

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 268
5548024

BETWEEN

NEEL SINGH
Applicant

AND

LIFE TECHNOLOGIES NEW
ZEALAND LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person
Matthew Dearing for Respondent

Investigation Meeting: On the papers

Submissions Received: 4 June 2015 from Applicant
12 June 2015 from Respondent

Additional Information Received: 10, 12, 13, 16, 24 July and 27, 31 August and 1
September 2015

Determination: 4 September 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Singh's application for a compliance order with respect to the payment of salary and holiday pay is declined.**
- B. Life Technologies New Zealand Limited is ordered to comply with the Record of Settlement dated 17 January 2014 and issue Mr Singh the correct Certificate of Service on its letterhead and signed by Mr Airey within 7 days of the date of this determination.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Singh seeks an order for compliance in relation to the terms of settlement set out in a Record of Settlement (the Agreement) made in mediation with his former employer, Life Technologies New Zealand Limited (Life Technologies) on 17 January 2014.

[2] Mr Singh claims Life Technologies breached the Agreement when it failed to pay him all annual leave owed to him within the timeframe set out in the Agreement. Mr Singh claims the sum of \$2,732.99 net remains outstanding plus Kiwisaver payments of \$74.98.

[3] Further, Mr Singh claims Life Technologies breached the Agreement when it failed to provide him with the agreed Certificate of Service on or before 24 January 2014.

[4] The statement in reply was to be lodged and served on 2 April 2015 but was not lodged and served until 8 April 2015. Life Technologies apologised for the lateness and sought leave to respond to the application. As it is always preferable that an application be dealt with on its merits and because I did not perceive any prejudice to Mr Singh in granting leave, Life Technologies was granted leave to respond.

[5] The parties consented to this matter being determined on the papers based on the information lodged in the Authority and the submissions made by the parties.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Singh and Life Technologies but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[7] On 17 January 2014, Mr Singh and Life Technologies reached an agreed settlement of their employment relationship problems. The settlement was recorded in a Record of Settlement and signed by a Ministry of Business Innovation and Employment mediator pursuant to section 149 of the Act.

[8] The Agreement provided for the following relevant terms:

2. The parties agree to end their employment relationship effective of today's date. All salary and annual leave will be paid to Neel Singh by way of direct credit within 7 days of the date hereof.
3. Life Technologies New Zealand Limited agrees to provide Neel Singh with a Certificate of Service in terms of the attached appendix "A". This certificate will be available to him within 7 days of the date hereof.

[9] The agreed Certificate of Service was attached to the Agreement. The document records that the Certificate of Service was to be on letterhead and the signatory was to be Mr Peter Airey.

Issues

[10] The issue for determination is whether Life Technologies has met its obligations set out in the Agreement and if not what, if any remedies are available to Mr Singh.

Payment of Annual Leave

[11] The Agreement required the payment of "all salary and holiday pay" to Mr Singh within seven days. Mr Singh says the payment of holiday pay due to him at the end of his employment has been incorrectly calculated by Life Technologies and therefore it is in breach of the Agreement as he has not received "all" of his holiday pay.

[12] In response, Life Technologies says Mr Singh has been paid all amounts due to him and in fact, he was overpaid for the month of January 2014.

[13] Mr Singh's employment ended on 17 January 2014. On that date Mr Singh had an outstanding annual holiday entitlement of 682.56 hours which he had not taken. Mr Singh's anniversary date for annual holidays was 30 August.

[14] In addition to payment of annual holidays to which Mr Singh had become entitled but not taken Life Technologies was required to calculate and pay an amount equivalent to 10% of his gross earnings (Mr Singh received 5 weeks annual leave each year) from 31 August 2013 to 17 January 2014.

[15] When calculating the payment for the annual leave entitlement Life Technologies says it relied on section 24(2)(b) of the Holidays Act 2003 ("Holidays Act"). Section 24 (2) of the Holidays Act states:

- (2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of –
- (a) the employee's ordinary pay as at the date of the end of the employee's employment; or
 - (b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

[16] The employment agreement between the parties at clause 5 states:

- 5.1 Salary payments shall be paid monthly, and normally, not later than the fifteenth of each month by direct credit to a bank account in the employee's name.
- 5.2 Salary is paid two weeks in advance and two weeks in arrears, thus constituting payment for the calendar month.

[17] Mr Singh's ordinary pay on 17 January 2014 was a salary of \$72,000 per annum. To ascertain the greater of Mr Singh's ordinary pay or his average weekly earnings, Life Technologies compared Mr Singh's ordinary pay on 17 January 2014 to his average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment. Life Technologies used the date of 31 December 2013 as being end of the last pay period before the end of Mr Singh's employment on the basis that Mr Singh's last pay period was the calendar month of 1-31 December 2013.

[18] Mr Singh says Life Technologies used the wrong date and this affected its calculation of his average weekly earnings. Mr Singh says the pay period is as defined in his employment agreement which is the month of January which accords with the employment agreement.

[19] Life Technologies pays its employees on the 15th of each month. The pay is for the period commencing on the first of each month and ending on the last day of the month. In accordance with the employment agreement employees are paid for two weeks in arrears and two weeks in advance for that calendar month.

[20] In order to arrive at the correct answer the Authority must identify what Mr Singh's last pay period was before the end of his employment. "Pay period" is not defined in the Holidays Act.

[21] Mr Singh was paid on 15th of January 2014, for two weeks in arrears and two weeks in advance. Because Mr Singh's employment ended on 17 January 2014 he

was not entitled to receive payment for the full calendar month of January 2014. The purpose of section 24(2)(b) is to ascertain correctly, the average earnings of an employee whose employment is terminating. Mr Singh's submissions that 17 January 2014 was the date of the last pay period immediately before his termination date cannot be correct given that he was not paid his salary for the full calendar month. If this date was used it would lead to an incorrect assessment of his average earnings.

[22] I find that for the purposes of calculating Mr Singh's average earnings the last full pay period immediately before the end of Mr Singh's employment with Life Technologies was the pay period 1-31 December 2013.

[23] I find Life Technologies New Zealand Limited has complied with its obligations under the Record of Settlement to pay all of Mr Singh's salary and annual leave and his application for a compliance order is declined.

Certificate of Service

[24] A copy of the agreed Certificate of Service was appended to the Agreement. Mr Singh says he has never received a correctly signed copy of the Certificate of Service on company letterhead as required by the Agreement.

[25] On 10 July 2015 Life Technologies emailed to Mr Singh, with a copy to the Authority, a Certificate of Service on letterhead. This document was signed by a person other than Mr Airey.

[26] On 13 August 2015 Mr Singh notified the Authority that he still had not received a clean copy of the Certificate of Service on Life Technologies letterhead.

[27] I find the failure of Life Technologies to provide Mr Singh with an original copy of the agreed Certificate of Service, which includes that it be on company letterhead constitutes a breach of the Agreement.

[28] Life Technologies New Zealand Limited is ordered to comply with the Record of Settlement dated 17 January 2014 and issue Mr Singh the correct Certificate of Service on its letterhead and signed by Mr Airey within 7 days of the date of this determination.

Penalty

[29] The Employment Relations Act 2000 expressly provides for a person who breaches an agreed term of settlement to be subject to penalties.¹

[30] Penalties are designed to punish and deter others from engaging in similar conduct.² I have found Life Technologies has breached the Agreement by its failure to provide Mr Singh with a correct copy of the Certificate of Service.

[31] Before awarding a penalty I must be satisfied that Life Technologies' conduct was deliberate, serious and sustained.³ I find that on balance the breaches were inadvertent.

[32] Life Technologies New Zealand Limited's conduct in breaching the terms of the Agreement is not sufficiently serious to warrant the imposition of a penalty.

Costs

[33] Costs are reserved. The parties should know that I am of a mind to let costs lie where they fall. The parties are invited to resolve the matter and if they are unable to do so Mr Singh shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Life Technologies shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell

Member of the Employment Relations Authority

¹ Employment Relations Act 2000, section 149(4).

² *Tan v Yang & Zhang* [2014] NZEmpC 65.

³ Employment Relations Act 2000, section 4A(e).