

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 364
5383491

BETWEEN TE APITI TRUST
 Applicant

A N D GRANT McLEOD
 Respondent

Member of Authority: James Crichton

Representatives: Kathy Gibbs for Applicant
 Respondent in person

Investigation Meeting: 1 August 2013 at Auckland

Date of Determination: 14 August 2013

SECOND DETERMINATION OF THE AUTHORITY

Introduction

[1] By determination dated 2 August 2013, the Authority dealt with Te Apiti Trust's application to reopen an investigation previously conducted by the Authority on the application of the present respondent (Mr McLeod).

[2] In its 2 August 2013 determination, issued as [2013] NZERA Auckland 335, the Authority determined to reopen its investigation to the original claim brought by Mr McLeod against Te Apiti Trust but deferred consideration of the substantive merits for subsequent consideration and determination.

[3] This determination then, considers the further evidence the Authority has heard as a consequence of its decision to reopen its investigation. The two issues between the parties are considered separately.

The daily pay issue

[4] The Authority's determination issued as [2013] NZERA Auckland 228 (the original determination) concerns the calculation of daily pay in respect of public holiday leave, sick pay and payments for alternative holidays for work performed on a public holiday.

[5] In that regard, the Authority concluded, in the original determination, that the calculations made by the former employer Te Apiti Trust were wrong and that Mr McLeod was entitled to an additional sum of \$2,971.94 gross.

[6] The Authority reached the conclusion that it did because it was satisfied on the evidence it heard from Mr McLeod that his daily pay varied such that it was neither possible nor practicable to determine his relevant daily pay pursuant to s.9 of the Holidays Act and the appropriate calculation should in fact have been made pursuant to s.9A of the Holidays Act 2003. That alternative calculation is referred to in the statute as "Average Daily Pay" instead of "Relevant Daily Pay" which is provided for in s.9.

[7] The essence of the Authority's conclusion is contained in clause 18 of the original determination which is in the following terms:

[18] In the Authority's opinion, if on examination it becomes clear to an employer embarking on a relevant calculation, that it is not possible to identify precisely what amount of pay the employee would have received if the employee had worked on that day, or the employee's daily pay varies, then the law requires that the calculation be done in terms of s.9A of the 2003 Act (the Holidays Act).

[8] Because the Authority concluded that Mr McLeod's daily pay did vary and it would therefore be impossible for Te Apiti Trust to calculate precisely what amount of pay Mr McLeod ought to have received if he had worked on a particular day then it followed that s.9A of the 2003 Act ought to be used for calculation purposes rather than s.9 of the 2003 Act.

[9] The essence of the evidence now heard for the first time by the Authority from Te Apiti Trust is that Mr McLeod's daily pay did not vary and therefore it was perfectly competent for Te Apiti Trust to do the requisite calculation based on the concept of relevant daily pay as that is defined in s.9 of the Holidays Act 2003.

[10] But of course that evidence is disputed by Mr McLeod who gave the Authority very clear evidence at the original investigation meeting about the fluctuations in his daily hours (for a variety of entirely proper reasons) and that evidence is backed up by the extensive calculations done by Mr McLeod's wife on his actual hours worked. Indeed, as the Authority made clear in the original determination, Mrs McLeod has produced significant documentary evidence relating to her husband's working hours which the Authority is satisfied it can rely upon. Those extensive spreadsheets presented by Mrs McLeod do seem to support Mr McLeod's oral evidence that his daily hours varied.

[11] What is more, Mrs McLeod told the Authority that she had sought assistance from a variety of sources in coming to grips with this quite technical calculation and had satisfied herself that her calculations were correct.

[12] But the essence of the matter is not the veracity of Mrs McLeod calculations but the evidentiary point about whether the mathematical calculation ought to be made under s.9 of the Holidays Act or s.9A of the same Act. In that regard, the Authority has not been persuaded by hearing the evidence of Te Apiti Trust.

[13] On this occasion, both parties were present and when Te Apiti Trust asserted that Mr McLeod had worked the same daily hours and thus the calculation could be done in terms of s.9 of the Act, Mr McLeod retorted with his original evidence that his hours varied day by day. Both parties agreed that Mr McLeod worked to a roster and that he signed for that roster, but what is in dispute is the number of hours that he worked on each day. His evidence is that his hours varied day by day although the actual days that he was rostered to work and did work were programmed in advance.

[14] In all the circumstances, the Authority has not been persuaded by the fresh evidence now heard for the first time from Te Apiti Trust preferring Mr McLeod's evidence that his actual worked hours varied day by day.

[15] It follows from the foregoing discussion that the Authority has not been persuaded that it ought to change the conclusion that it reached in relation to the calculation of average daily pay pursuant to s.9A of the Holidays Act 2003. In the Authority's view, Te Apiti Trust still owes Mr McLeod the sum of \$2,971.94 gross. That sum represents the calculation derived from the application of s.9A of the Holidays Act 2003 for the last six years of the employment.

The sleepover backpay issue

[16] In the original determination, the Authority concluded that Mr McLeod was not entitled to the sleepover backpay allowance because his claim was statute barred by the effect of s.10 of the Sleep-Over Wages (Settlement) Act 2011. The Authority's conclusion in that regard is set out in paras. [24] to [28] of the original determination. At rehearing, Te Apiti Trust indicated, unsurprisingly, that they supported that conclusion.

[17] Once the Authority reopened the investigation into Mr McLeod's original application, Mr McLeod told the opportunity, as he is entitled to do, to advance objections to the Authority's conclusion that he was unable to access the sleep-over back-pay allowance because of a statute bar.

[18] The essence of the new evidence provided to the Authority by Mr McLeod is his contention that *each of the staff of Te Apiti Trust have in fact been paid for this (the sleep-over back-pay)* and they were not required to seek this back-pay by the statutory date. The Authority accepts the evidence that has been given that Te Apiti Trust has been paid by the Crown for whatever its total entitlement is but the issue here is whether Mr McLeod is being treated differently from other staff. His evidence is that he is being treated differently.

[19] The Authority has obtained a response to this allegation from Te Apiti Trust. They simply deny Mr McLeod's evidence and say that the other staff did apply within the statutory time frame. In those circumstances, the Authority must rest on its original decision which is that Mr McLeod is statute barred from claiming the sleep-over back-pay allowance because he did not make a claim for it before the date specified in the statute.

Determination

[20] The Authority is not satisfied that the evidence it heard in the reopened investigation has caused it to change its view that Mr McLeod is entitled to the paid relevant daily pay in the respect to the calculations set out in s.9A of the Holidays Act 2003 and that as a consequence Te Apiti Trust must pay him the sum of \$2,971.94 gross to remedy its default in the original miscalculation of Mr McLeod's entitlement.

[21] The Authority however maintains its view that Mr McLeod is not entitled to be paid the sleep-over back-pay allowance he has claimed because he did not make application for that payment before the statutory cut off date.

Costs

[22] There is still an issue of costs outstanding. In the original determination, the Authority entertained a claim from Mr McLeod for costs. The Authority declined to order costs without giving Te Apiti Trust an opportunity to be heard. No submissions have been received from Te Apiti Trust and they are sought again. Te Apiti Trust is referred to clauses [29] to [31] inclusive of the original determination.

[23] In addition, Mr McLeod has again sought costs in respect to the reconvened investigation meeting. Essentially that request is that he recover the cost of having to drive from his home in the Bay of Plenty to attend on the Authority not once but twice, the latter through no fault of his own. Again, the Authority seeks submissions from Te Apiti Trust on that subject. Submissions on both points are to be filed in the Authority within 14 days of the date of this determination, failing which the Authority will make a determination in respect to costs without further advice of the parties.

James Crichton
Member of the Employment Relations Authority