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Waterhouse v All Stars Property Services Limited (Wellington) [2018] NZERA 2099; [2018] NZERA Wellington 99 (5 November 2018)

Last Updated: 11 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON		
		[2018] NZERA Wellington 99 3026031
	BETWEEN	JORDAN WATERHOUSE Applicant
	AND	ALL STARS PROPERTY SERVICES LIMITED Respondent
Member of Authority:	Michele Ryan	
Representatives:	Tania Allan, advocate for the Applicant Chris Roche, on behalf of the Respondent	
Investigation Meeting:	31 July 2018 at Wellington	
Subsequent Information:	Nothing further from the Applicant 15 and 21 August 2018 from the Respondent	
Determination:	5 November 2018	
DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY		

Employment relationship problem

[1] Jordan Waterhouse seeks payment of public holidays (25 & 26 December 2015, and 1 & 2 January 2016) and payment of the remainder of his contractual notice period from his former employer, All Stars Property Services Ltd (“All Stars”). Claims alleging an unjustified disadvantage and unlawful discrimination were withdrawn during a case management conference on 5 July 2018.

Summary of relevant background information

[2] Chris Roche is the sole director of All Stars. The company is based in Wellington.

[3] Mr Waterhouse was employed by All Stars for just over 5 months when he informed Mr Roche that he was leaving All Stars to take up an apprenticeship elsewhere.

[4] Mr Waterhouse says he advised Mr Roche of the matter on 14 December 2015. Mr Roche says this occurred on 10 December 2015.

[5] Clause 10.2 of the parties' employment agreement set out what was required by either party when providing notice to end the employment relationship, as follows:

“One month's notice of termination of employment shall be given by either party, provided that a lesser period of notice has not already been agreed between you and the Employer.”

[6] The parties also disagree about the date by which they agreed Mr Waterhouse's employment would end. Mr Waterhouse's written brief of evidence says he gave notice “*with an end date of 10 January 2016*”. In contrast, Mr Roche says Mr Waterhouse told him he would finish on 23 December 2015.

[7] The date of 23 December 2015 has additional relevance in this case. It was the last day of operations that year before All Stars' customary closedown over the Christmas/New Year period began. The business was scheduled to reopen on Monday 11 January 2016.

[8] Formal notice of the closedown had been provided to all employees, including Mr Waterhouse, in November 2015.¹ Prior to that announcement Mr Waterhouse had made arrangements to holiday with his family at their Hawkes Bay home over the Christmas break period.

[9] Mr Waterhouse's resignation generated some tension between the parties. Mr Roche says the agreement to allow Mr Waterhouse to attend a training course on 8-9 December had been subject to his remaining an employee for at least another six months. He accepts the condition was not recorded in writing. I shall return to this matter.

[10] Over the weekend of 17-18 December 2015 Mr Waterhouse sent a text message to All Stars indicating he was keen to head home early. He asked if he was

1. The closedown was initially scheduled to begin at the close of business on 24 December 2015 but was amended to begin one day earlier.

needed over the following week. The request was not accepted in its entirety, but with his manager's agreement, Mr Waterhouse finished work at the end of the day on Tuesday 22 December 2015.

[11] On 2 January 2016 Mr Waterhouse sent an email to Mr Roche as follows: “*Hey Chris, just confirming that my employment with you has ended as of 10th January.*”

[12] Mr Roche responded on 4 January 2016. He rejected Mr Waterhouse's assertion and advised his resignation had been accepted as effective on 23 December 2015 but had been varied with agreement so as to end on 22 December 2015.

[13] Mr Waterhouse received his final wages on 5 January 2016. He was paid all outstanding wages and 8% of gross annual earnings as holiday pay, less sums paid for annual leave taken in advance.

Mr Waterhouse's claims

[14] In a letter dated 7 March 2016 Mr Waterhouse raised various claims against All Stars concerning the end of his employment.

[15] Amongst other things, he claimed that the decision by All Stars to assign payment for the training days as paid annual leave (as opposed to wages) was an unlawful deduction. The matter was resolved prior to the Authority's investigation and All Stars paid Mr Waterhouse an amount equal to two days wages.

[16] A concern was raised during the Authority's investigation meeting as to whether holiday pay was included in the payment. That issue is dispelled by the contents of the relevant corresponding payslip which demonstrates the holiday payment component was paid.²

[17] Regarding the remainder of Mr Waterhouse's claims, his position is that his notice period concluded on 10 January 2016 and he is entitled to be paid for any public holidays that occurred over that time frame, and the remainder of his notice. He says the agreement to leave work on 22 December 2015 was an agreement to take

annual leave in advance.

2. Payslip for the period end 18/12/2016 records Mr Waterhouse was paid a \$345.60 (gross) comprising \$320 (16 hours x \$20 per hour) plus \$25.60 (8% of wages as holiday pay).

The issues

[18] To determine whether Mr Waterhouse is entitled to the payments he seeks I need to determine when his employment ended and whether that date was a consequence of an agreement to a lesser period of notice, or not.

When did Mr Waterhouse's employment end?

[19] For the following reasons I do not accept Mr Waterhouse's written account (set out in his brief of evidence) that he gave his notice with "*an end date of 10 January 2016*".

(i) First, there is an email dated 14 December 2015 sent by Mr Roche to all staff advising "*Jordan is leaving us when we close for the year*". The email included detailed instructions to the office administrator regarding Mr Waterhouse's final pay. Mr Waterhouse says he cannot recall seeing the document but the correspondence reflects it was sent to him and I am satisfied he would have received it. He was unable to explain why he did not take the matter up with Mr Roche if the email misrepresented the arrangement between them.

(ii) Nor am I satisfied that the email sent by Mr Waterhouse to Mr Roche on 2 January 2016 reflected the parties' agreement regarding notice. When asked what prompted him to send the email Mr Waterhouse said when he received the payslip for the period over which the training course occurred he was concerned that the training was treated as annual leave. But there is no mention of that matter in the email. Mr Waterhouse was unable to provide a credible explanation as to why, on 2 January 2016, he sought to confirm the duration of his notice period when, by his account, it had already been agreed he would finish on 10 January 2016. .

[20] Mr Waterhouse modified his evidence during the investigation meeting. He accepts he did not say 10 January 2016 would be his last day of employment. He now says he told Mr Roche that he would not be coming back to work after Christmas. As a matter of credibility I prefer Mr Roche's account, and am satisfied Mr Waterhouse simply told Mr Roche he would finish work when the closedown began on 23 December 2016.

[21] At issue is whether the parties' agreement; that 23 December 2015 would be Mr Waterhouse's last day, was a practical consequence of the closedown, but that the contractual notice period remained operative, or whether it was a lessening of the contractual notice period by mutual consent.

[22] Mr Waterhouse says there was no discussion or agreement by him to forgo his notice period and any benefits he may have been entitled to over the period. He acknowledged under questioning however, that at the time he furnished his resignation he was unaware of the notice provision. It follows he cannot have raised with Mr Roche that he wished to remain in employment until his notice period concluded despite the intervening closedown period.

[23] I find it was reasonable of All Stars to assume Mr Waterhouse was aware of the notice provisions within his employment agreement when he tendered his resignation. All Stars was entitled to view his nomination of a date earlier than one month's notice to end his employment as activating the proviso at cl 10.2 of the employment agreement whereby the parties may agree to a lesser notice period. The notice provisions did not require All Stars to do anything more than either accept or reject the date proposed by Mr Waterhouse. There was no legal obligation on All Stars to question or dissuade Mr Waterhouse from his decision to finish work on 23 December 2015.

[24] I further satisfied All Star's acceptance of Mr Waterhouse's request to leave at the end of the day on 22 December 2015 was, in effect, an additional agreement to vary the notice provision. There was no indication that Mr Waterhouse's absence from work on 23 December was requested or approved by either party on the basis that it would be treated as anticipated annual leave. There is no evidence of that arrangement.

[25] I view Mr Waterhouse's email of 2 January 2016 as likely a belated attempt to revive the contractual notice period so as to obtain payment for the public holidays occurring over that time. However the parties had already agreed his employment would end on 22 December 2015. Mr Waterhouse was not able to alter that arrangement without All Stars' consent.

[26] Mr Waterhouse's employment finished by agreement between the parties on 22 December 2015.

Further comment on claim for payment of notice period.

[27] Even if the parties had not agreed to a shorter notice period and Mr Waterhouse's employment had continued in accordance the employment agreement, he was not entitled to payment of wages between 24 December 2015 and 10 January 2016 (inclusive). This is because the closedown required him to discontinue work for the duration of that period.³ He was also not entitled to paid annual leave over the same time frame because he had not employed by All Stars for 12 continuous months.⁴ He would however been entitled at 8% of his gross annual earning (less any amount of annual leave taken in advance) up to the point the closedown began.⁵ Mr Waterhouse was, in any event, paid that sum in his final wages.

[28] Mr Waterhouse's claims are dismissed.

Costs

[29] Costs are reserved.

Michele Ryan

Member of the Employment Relations Authority

3 Section 32(2) [Holidays Act 2003](#)

4 Section 16 [Holidays Act 2003](#)

5 Section 34(2) [Holidays Act 2003](#).