

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 156
5609408

BETWEEN DAMIAN WINDER
 Applicant

AND TAUPO FUN LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant
 Steve Punter, Advocate for the Respondent

Investigation Meeting: On the papers

Determination: 23 May 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Winder was not given notice by Taupo Fun of a closedown period in 2015, for the purposes of section 32(3) of the Holidays Act 2003. Taupo Fun is therefore not entitled to deduct money for that period from Mr Winder’s holiday payment due on his resignation of employment.**

Employment relationship problem

[1] Damian Winder (Mr Winder) was employed by Taupo Fun Limited (Taupo Fun or the company) from 19 May 2014 to 24 December 2015.

[2] Mr Winder claims that he was not paid his holiday pay correctly, including annual leave outstanding as at his resignation and payment regarding public holidays worked.

[3] At the case management conference held by telephone on 8 April 2016, the parties appeared to have already reached agreement over aspects of Mr Winder's claim, although payment may not have been made. The parties indicated that the only outstanding issue was whether Taupo Fun can lawfully deduct, from what would otherwise be Mr Winder's annual leave entitlement on termination, for a 2015 period when Taupo Fun says the business was in a closedown period. The parties agreed that this matter could be dealt with on the papers.

[4] After receiving affidavits and submissions, I am not certain that there is agreement between the parties on all the remaining issues. However, I am issuing this determination on the closedown issue and will then give the parties the opportunity to resolve matters between themselves if possible.

[5] As permitted by s 174E of the Employment Relations Act 2000 this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, and expressed conclusions on issues necessary to dispose of the closedown issue.

Issue

[6] The issue for determination is whether Taupo Fun satisfied the requirements of the Holidays Act 2003 (the Act) regarding a closedown period in 2015 and can thus deduct annual leave for that period. There appears to be no claim regarding any closedown in 2014.

Background

[7] Taupo Fun is a small business operating Tongariro Expeditions trips and also Got Wood, a firewood supplies service.

[8] Mr Winder was identified as the Taupo Fun's general manager in his employment agreement. However, his tasks were wider than would perhaps usually be included in a general manager's role. Mr Winder's job description included sales and marketing, administration, bus driving of Tongariro Expeditions' clients, and also wood processing and delivery for Got Wood.

[9] Taupo Fun acknowledged early on that it did not have holiday records as it should have had, at the time Mr Winder worked for it. It says that it has since remedied this situation.

Closedown

[10] Mr Winder's evidence is that the first time that he was informed by Taupo Fun of an "operational closedown period" from 25 July to 10 August 2015, was during his notice period after handing in his resignation on 27 November 2015. He accepts that the Tongariro Expeditions work was determined by weather conditions, but says that his other duties included tasks which were not weather dependent.

[11] During the period Taupo Fun is claiming they were closed down, Mr Winder says that he knows that he did Got Wood work on a particular day in that period. The evidence of Jared Thomas (one of Taupo Fun's directors) was that there was no stock at that time (to undertake that work with).

[12] Mr Winder also questions why the period deducted by Taupo Fun for the closedown is for seven days per week, a total of 17 days.

[13] Mr Winder's ability to check what work was being done on particular days was hampered by there being no holiday records, and the wage records not including information on particular days worked. Mr Winder was paid a salary and the wage records provided by Taupo Fun simply show the date of payment and the amount paid, which did not vary.

[14] Taupo Fun's position is that the business was subject to a 2015 closedown period during which Mr Winter was paid and that that must be taken off the annual leave owing to him on resignation. The evidence filed for Taupo Fun is outlined below.

[15] The closedown provisions of the Holidays Act¹ set up a regime allowing employers to close down their business once in any 12 month period². Employees with annual leave entitlements may be required to take annual leave during the

¹ Sections 29-35

² Under s 31 of the Act different closedown periods for each separate part of an employer's business are permitted.

closedown. Those without leave entitlements may be required by their employer to discontinue work.

[16] The meaning of closedown period is defined in s 29 of the Act:

In this section and sections ...30 to 35, **closedown period** means a period during which an employer customarily-

- (a) closes down the employer's operations or discontinues the work of 1 or more employees; and
- (b) requires the employer's employees to take all or some of their annual holidays.

[17] Under s 32(3) of the Act if due to the closedown, the employer is requiring an employee to take annual leave or is discontinuing their work, the employer:

...must give the employee not less than 14 days' notice of the requirement to take the annual holiday or discontinue the work (as the case may be).

[18] The questions which arise in this case are whether a closedown was customary for Taupo Fun and whether Mr Winder was given proper notice of this closedown.

[19] Taupo Fun relies on affidavit evidence from Jared and Mandy Thomas (Taupo Fun directors) and Jan Hayter. Ms Hayter was the only other employee (as distinct from contractors) working for Taupo Fun when Mr Winder did, and she has worked for the company for 16 years. All three affidavits refer to Taupo Fun having a close (or closed) down period. Mr Thomas said it happened usually every year. All three describe having discussions regarding when closedown is to happen. Reference is made to the impact of the weather on the business and the wider industry closedown due to weather and tourism factors.

[20] Both Jared and Mandy Thomas refer to the closedown being referred to in Mr Winder's employment agreement. Clause 9 (d) of that agreement states:

The employee agrees to take annual leave at a mutually agreeable time except that it will be expected that at least 3 weeks of the annual leave shall be taken between the months of September and October in each year (unless otherwise mutually agreed).

[21] Although this clause does signal that annual leave to likely to be required to be taken in a particular period, there is no specific reference to this being a "closedown" period. The other issue for Taupo Fun is that the clause specifies the months of September and October, whereas the period in 2015 claimed by the company as the closedown period is July to August.

[22] I consider that Taupo Fun may well be able to meet the test of closedowns customarily occurring in its business, however, the difficulty is the issue of notice.

[23] Section 32 of the Act requires notice to be given. There is no explicit requirement for that notice to be in writing. However, the closedown regime has significant effects. A closedown period means that an employee can be required to take annual leave when they potentially do not wish to, or an employee may have to discontinue their work and face a period of not being paid at all³. I find that the notice must be clearly given.

[24] Mr and Mrs Thomas, and Ms Hayter all refer to discussions about closedowns generally and why Mr Winder must or should have known about closedowns. However, none of them specify when any such discussions happened in 2015. None refer to a specific event or circumstance which they say amounted to notice.

[25] I am not satisfied that Mr Winder was given notice of a closedown in 2015 sufficient for the purposes of s 32(3) of the Holidays Act. Taupo Fun is therefore not entitled to deduct money for that period from Mr Winder's holiday payment due on resignation of employment.

[26] As stated above I now give the parties the opportunity to attempt to resolve the issues between them. In the event that they are unable to do so, either party may notify the Authority that they require its further involvement.

Costs

[27] Costs are reserved. If there is any issue regarding costs the party seeking costs may apply to the Authority. A timetable will then be set for response by the other party.

Nicola Craig

Member of the Employment Relations Authority

³ S 34(3) of the Holidays Act