

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN David Hamilton trading as Hamilton and Co (Applicant)

AND Labour Inspector (Adrienne Lines) (Respondent)

REPRESENTATIVES David Hamilton In person
Adrienne Lines, Labour Inspector

MEMBER OF AUTHORITY James Crichton

INVESTIGATION MEETING 17 May 2005

DATE OF DETERMINATION 23 June 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This matter comes to the Authority because of an objection to a demand notice issued against the applicant, David Hamilton trading as Hamilton and Co (Mr Hamilton) by the labour inspector at Christchurch.

[2] The essence of the labour inspector's position is comprehensively set out in the statement in reply filed in respect to this matter. The labour inspector says that the minimum legal rights of the employee in respect to payments for sick leave, public holiday leave and annual leave have not been met in accordance with the requirements of the Holidays Act 1981 and the Holidays Act 2003.

[3] Mr Hamilton denies the claim in its entirety and says that, at least in respect to the annual holiday pay, there was an agreement between him and the employee to the effect that the annual holiday pay would be subsumed within the hourly rate paid to the employee concerned.

The demand notice

[4] The demand notice sets out three separate amounts which the labour inspector says are due and owing by Mr Hamilton which in total amount to \$4,879.63 gross.

[5] The three separate amounts which in aggregate amount to that sum are respectively:

Special or sick leave	\$305.59 gross
Public holidays	\$2,059.59 gross
Annual holiday pay	\$2,514.45 gross

[6] I am satisfied that the demand notice has been properly served and that the calculations of monies due and owing are correct.

[7] The evidence given by the labour inspector satisfied me that the requirements of Section 224 of the Act had been met and that the financial calculations made by the labour inspector were also accurate.

The employment relationship

[8] Mr Hamilton answered an advertisement from the employee, Kevin Graham (Mr Graham). Mr Hamilton's accountancy practice was very busy and needed additional staff resources. Mr Graham lived and worked in Ashburton (where Mr Hamilton's practice was) and Mr Graham had a part time job which he sought to augment with additional hours somewhere else.

[9] There was by all accounts a lengthy discussion between Mr Hamilton and Mr Graham after Mr Hamilton answered Mr Graham's advertisement.

[10] Mr Graham said that he was earning \$11.50 an hour at that stage with his other employment and that he did not wish to go backwards. The two men agreed on that figure as the figure that Mr Graham would work for in Mr Hamilton's practice but Mr Hamilton says that he intended that \$11.50 an hour to include holiday pay.

[11] Mr Hamilton said in his evidence:

I would be pretty sure I would have said we would give you that rate (\$11.50 per hour) as an all up casual rate (that is an hourly rate inclusive of public holiday and statutory holiday pay).

[12] Mr Graham, in his evidence, said that he did not agree in that initial discussion or at any other time, to holiday pay being subsumed within the hourly rate. Indeed, within a couple of months of his employment, which started on 16 October 2001, Mr Graham was asking the pay clerk why he was not getting holidays paid for. The pay clerk told him that that was because of the instructions that she had received from Mr Hamilton when he was employed.

[13] Mr Hamilton said that he had recorded in the wages system that Mr Graham was to receive \$11.50 per hour inclusive of holiday pay.

[14] In justification of his stance and in particular his understanding of those initial discussions with Mr Graham, Mr Hamilton produced evidence to show that the rate had been agreed with Mr Graham was out of step with the rate of pay paid to other equivalent staff. Mr Hamilton's evidence was that Mr Graham would have had to come up *as a cracker* in order for Mr Hamilton to justify paying him \$11.50 per hour plus holiday pay.

[15] The problem, for Mr Hamilton, was exacerbated by the fact that he had agreed with Mr Graham that Mr Graham would work the hours that suited him and the end result was that Mr Graham's hours built up significantly. Mr Hamilton felt he had no control over the hours that Mr Graham worked and certainly took no steps to limit those hours.

[16] In addition to Mr Hamilton's anxiety about the growth in Mr Graham's hours, Mr Hamilton also was anxious about Mr Graham's productivity but neither of these issues was ever put to Mr Graham and as I indicated to Mr Hamilton during the investigation meeting, neither are relevant to the question the Authority is required to determine.

Was there an agreement about holiday pay in the hourly rate?

[17] Neither Mr Hamilton nor Mr Graham alleges there was a definitive agreement between them that holiday pay would be included in the hourly rate.

[18] As close as one can get is Mr Hamilton's contention that he was *pretty sure* that he would have said the \$11.50 per hour rate was inclusive of holiday pay.

[19] But even Mr Hamilton does not allege that he remembers Mr Graham agreeing to this. Mr Graham's evidence is unequivocal that he made no such agreement.

[20] On that basis then, the only proper view that the Authority can reach is that no such agreement was ever struck.

Did Mr Graham condone the arrangement?

[21] Mr Hamilton alleges as the major point of contention for him that if Mr Graham had not agreed to the rate as being an all inclusive rate when he commenced his employment on 16 October 2001, he certainly condoned the all inclusive rate because, according to Mr Hamilton, he did not raise the issue with his employer for fully two years of a two and a half year period of employment.

[22] Mr Graham disputes this and in his evidence, he says that he approached the pay clerk he thinks about Christmas 2001 (perhaps two months after he commenced employment with Mr Hamilton) and established from her that he was not to be paid for public holidays and he says that he approached Mr Hamilton several times thereafter to try to resolve the matter.

[23] Mr Graham further contends that he wrote to Mr Hamilton in early 2004 and he says that he received an unhelpful response.

[24] Mr Graham instructed the labour inspectorate by letter on 2 February 2004 and certainly from that date onwards Mr Hamilton can have been in no doubt about the nature and extent of the issue.

[25] Mr Hamilton invites me to reach the conclusion that, because he says Mr Graham did not raise the matter of the all inclusive rate promptly, Mr Graham can be assumed to have accepted that all inclusive rate by condonation.

[26] I do not accept that submission. In my opinion the evidence is plain that Mr Graham did his best to resolve the matter and I accept his evidence that he did raise the matter with Mr Hamilton on more than one occasion. Without in any way wishing to allege bad faith on Mr Hamilton's behalf, I think I am entitled to observe that, given the difficulty that the labour inspector had in getting response from Mr Hamilton, it is perhaps not surprising that Mr Graham had difficulty in resolving the matter himself.

[27] It is also appropriate for me to observe that even if Mr Graham had condoned the all inclusive rate by not assertively taking steps, such condonation cannot in my opinion, abrogate the force of the law as it is provided in the various manifestations of the Holidays Act. That law has been enacted by Parliament for the purpose of protecting workers and the Authority is entitled to demand the strongest possible evidence of any arrangements between the parties which might seek to alter the usual statutory formulae.

Determination

[28] For reasons which I have outlined above, I do not accept that there was an agreement between Mr Hamilton and Mr Graham whereby the latter would be paid an all inclusive hourly rate and it follows from that finding that Mr Hamilton's claim, at least in respect to annual holiday pay, must fail. As I understand the position, Mr Hamilton has no argument at all in relation to public holiday leave or sick leave.

[29] It follows that, there being no proper formal agreement between the parties in respect to the payment of annual holiday leave, the usual rules in the Holidays Act apply and the calculations in that regard made by the labour inspector must stand.

[30] As I indicated above, I do not understand Mr Hamilton to be advancing any argument in defence of his non-payment of sick leave or public holiday leave (those categories of leave being unable to be subsumed under an hourly rate in any circumstances whether agreed by the worker or not) and accordingly those entitlements as calculated by the labour inspector must also stand.

[31] Accordingly, Mr Hamilton's objection to the demand notice served on him by the labour inspector fails and I now order Mr Hamilton to pay the following sums to the employee and to make that payment within 28 days of the date of this determination.

[32] The amount due by Mr Hamilton to Mr Graham is as follows:

Special or sick leave	\$305.59 gross
Public holidays	\$2,059.59 gross
Annual holiday pay	\$2,514.45 gross
Total	\$4,879.63 gross

[33] Mr Hamilton alleges that there are potential consequences for Mr Graham in terms of his entitlement or otherwise to compensation pursuant to the accident compensation system if I decide that Mr Graham is owed unpaid remuneration. Given that I have made that decision, I suggest that Mr Graham should advise the Accident Compensation Corporation of the result of these proceedings.

[34] Costs are reserved.

James Crichton
Member of Employment Relations Authority