

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kerry Finnigan (Applicant)
AND Hanover Group Limited (Respondent)
REPRESENTATIVES David France, Counsel for Applicant
Caitlin Wright, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INFORMATION RECEIVED 21 July 2006
24 July 2006
DATE OF DETERMINATION 6 September 2006

DETERMINATION OF THE AUTHORITY (No 2)

The problem

[1] By Determination dated 7 July 2006 the Authority ordered: -

"A(iv) Hanover Group Limited is ordered to pay to Kerry Finnigan any outstanding salary, holiday pay (including long service leave) and reimbursable expenses. The payment for holiday pay shall take into account the payment of \$50,000.00 ordered at (i) above."

[2] The Authority further directed that in the event that the parties were unable to agree on the sums due to Mr Finnigan, either party could make application in writing for further investigation by the Authority.

[3] The parties have not been able to agree and the Authority now determines the matter, having considered the matter on the papers.

Holiday pay

[4] Mr Finnigan claims he is owed outstanding holiday pay as follows: -

- a. *Holiday pay on \$50,000.00 (gross) (clause 2.1 of Deed of Settlement) - \$6,250.00 (gross)*
- b. *Holiday pay on \$590,000.00 (gross) (clause 3.1 (B) of Deed of Settlement) - \$73,750.00 (gross);*
- c. *Holiday pay outstanding on payment of \$500,000.00 (gross) paid to the applicant on the date of the Deed of Settlement pursuant to clause 3.1 - \$62,500.00 (gross).*

[5] These amounts are calculated at 12% of Mr Finnigan's gross earnings because his entitlement at the material time was to six weeks annual leave per annum.

[6] Hanover Group Limited ("Hanover") argues Mr Finnigan has no entitlement to the sums now sought. It says the disputed sums under the Deed of Settlement are not subject to holiday pay because: -

- 3.1 *being one-off, exceptional payments, they are excluded from the definition of "average weekly earnings" for the purposes of the Holidays Act 2003 ("the Act");*
- 3.2 *not being an amount payable under an employment agreement, they are excluded from the definition of "gross earnings" and therefore average weekly earnings; and*
- 3.3 *being essentially compensatory payments, they do not fall within the purposes of the Act, being to ensure remuneration paid to an employee is taken into account for the purposes of calculating holiday pay under the Act.*

[7] Hanover further refers the Authority to the principles set out *Probst -v- Hawkes Bay Network Ltd*¹ and *Re NZ Seafarers' Union Retirement and Welfare Plans*².

Determination

Clause 2.1 Bonus

[8] The holiday pay due at Clause 2.1 of the Settlement Deed is the subject of the second part of the Authority's order A.(iv) in the Determination of 7 July 2006. If there is any doubt I make it now explicitly clear.

[9] Clause 2.1 of the Settlement Deed provides, in part: -

In addition, the Employee will be eligible for a bonus in respect of his performance during the period ending on the termination date, at an amount to be set by the Employer at its complete discretion subject to a minimum aggregate bonus of \$50,000.

[10] I conclude this bonus of \$50,000 is correctly regarded as gross earnings and is not discretionary. It is payable under an employment agreement in the same way Mr Finnigan's fortnightly salary was. Mr Finnigan is entitled to holiday pay on this sum in the amount of \$6,250.00. **I order Hanover Group Limited to pay to Kerry Finnigan the sum of \$6,250.00 as holiday pay.**

¹ unreported, Employment Court, Wellington, Judge Shaw, 4 December 2001.

Clause 3.1 Payments

[11] Clause 3.1 of the Settlement Deed provides, in part: -

The Employer will on the date of this deed pay the Employee the sum of \$500,000 gross ...

and at Clause 3.1(b) Mr Finnigan is entitled to a payment of: -

(b) \$590,000 gross (i.e. PAYE to be deducted); and

[12] In the earlier Determination, I said at paragraph [49]: -

It is the recital C that demonstrates the benefit to Hanover of the terms of the Deed. Hanover purchased the resolution of Mr Finnigan's alleged personal grievance. That is what it gained out of the Deed. It did not primarily purchase his faithful service – it already had that because of its continuing employment relationship with him and all the attendant obligations of that relationship. The Deed secured the resolution of Mr Finnigan's alleged personal grievance and that was the essential quality of the Deed for Hanover.

[13] I conclude that the sums due to Mr Finnigan of \$500,000.00 and \$590,000.00 respectively are not remunerative elements or gross earnings as payment for service. I tend to the view that those payments are consideration for the collateral contract, being the deed of settlement, which secured the agreement for his forbearance to sue in relation to his contended personal grievance, together with his amicable departure. For this reason, I do not regard the said payments as subject to holiday pay.

Leon Robinson
Member of Employment Relations Authority