

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

Determination Number: AA 180/07  
File Number: 5033080

BETWEEN                      Mark Anthony Horn (Labour Inspector)  
   Applicant  
  
AND                                B W Murdoch Limited  
   Respondent

Member of Authority:        Janet Scott  
  
Representatives:              Casey Hurren, Counsel for Applicant  
   Mark Ryan, Counsel for Respondent  
  
Investigation Meeting:        12 March 2007 at Hamilton  
  
Submissions received:        23 February from Applicant  
   12 March from Respondent  
  
Determination:                18 June 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant Labour Inspector seeks orders from the Authority that the respondent pay to its former employee Mr Honkoop public holiday pay in the sum of \$826.80 gross. The Labour Inspector also seeks interest on this sum from 27 July 2005 until date of payment

[2] The applicant also seeks costs in the matter.

[3] The respondent denies that Mr Honkoop was entitled to payment for the public holidays that fell during his employment with the company.

## Background

[4] Mr Honkoop saw the following advertisement in the Waikato Times on 5 March 2005.

***“Temporary Storeperson  
Mechanical/Dairy Industry***

***We require a store person for a  
Construction site at Te Awamutu***

***The contract would be for 3-4 months  
starting immediately.***

***The position would suit  
(but not necessarily)  
-semi/retired person  
- person with mechanical knowledge  
-dairy industry experienced person***

***Please send an application letter to:  
BW Murdoch Ltd etc”***

[5] Mr Honkoop applied for the position and was interviewed within days by the company’s engineering manager, David Spurway. As I understand the evidence the discussions between the parties resulted in agreement that Mr Honkoop would work about 40 hours per week setting up and managing the stores operation for the company’s construction project at the Fonterra site in Te Awamutu. It was understood and accepted by Mr Honkoop that the position was to be one of limited duration for the period of the construction project and it was eventually agreed that he would be paid \$20 per hour plus 6% holiday pay.

[6] The parties entered into a written employment agreement (IEA) dated 14 March 2005. The IEA provided among other things for the following provisions that are relevant to my determination in this matter:

***Clause 3 Term***

*Please note that it is for casual project work. The hours and days to be worked are not fixed and are to be agreed between the Engineering Manager and yourself.*

***Clause 6 Termination***

*Either party giving one week’s written notice may terminate this contract. No redundancy applies.*

***Clause 9 Special Conditions***

1. ....
2. Three week trial period

[7] Mr Honkoop commenced employment on 14 March 2005. He worked for the respondent for 20 weeks. His pattern of working hours is set out below. The total hours claimed by Mr Honkoop for the week are also set out<sup>1</sup>. Public holidays are noted with an asterisk\*. Mr Honkoop was told not to come to work on those days.

	<i>Week Dates</i>		<i>Mon</i>	<i>Tues</i>	<i>Wed</i>	<i>Thurs</i>	<i>Fri</i>	<i>Total Hours</i>
1	14-18 March	7	8	9	9	8.5		41.5
2	21-25 March	10	10	10	8	8*		46
3	28 Mar-1 Apr	8*	10	10	10	9		47
4	4 –8 Apr	10	10	10	10	8.5		48.5
5	11-15 Apr	10	10	10	-	-		30
6	18-22 Apr	10	10	10	10	-		40
7	25-29 April	10*	10	10	10	9		49
8	2-6 May	10	10	-	10	9		39
9	9-13 May	10	10	10	10	-		40
10	16-20 May	10	7.5	7	10	9		43.5
11	23-27 May	10	10	10	10	-		40
12	30 May-3 Jun		10	10	10.25	10	-	40.25
13	6-10 June	-*	10	10	10	9		39
14	13-17 June	10	10	10	10	-		40
15	20-24 June	10.5	10.5	9.5	10.25	-		40.25
16	27 Jun-1 July		10	10	10	10.25	-	40.25
17	4-8 July	10.5	10.5	10.5	11.75	-		43.25
18	11-15 July	10.75	10.75	10.25	10.25	-		42
19	18-22 July	10.25	10.25	10.25	10	10		50.75
20	25-29 July	10	10	10.25	-	-		30.25

[8] Mr Honkoop's evidence was that after the 4<sup>th</sup> week of his employment he was reminded he was expected to work about 40 hours per week and was asked to bring his average hours into line with this expectation. As a result he worked 30 hours in his fifth week of employment to bring his average hours within the expected 40 per week range. He says he was also advised by David Spurway that it was alright for him to work those 40 hours over 4 days if he wished. Thereafter Mr Honkoop usually worked 10 hour days between Monday and Thursday. The only exceptions to this pattern were:

- Wk 8 where Mr Honkoop had to attend a dentist on Wednesday 4 May and he worked his hours on the other four days of that week.
- Wk 9 when Mr Honkoop undertook forklift training and worked his hours around that training.

<sup>1</sup> Mr Honkoop did not claim payment for Monday 6 June because he had advised he would not be paid for public holidays.

- Wk 13 when he did not work on the public holiday (Monday 6 June) and worked his 40 hours (approx) on the other four days.
- Wk 18 when Mr Honkoop worked on Friday at the request of the respondent.
- Wk 20 where he worked 3 ten hour days and finished his employment with Murdoch's in accordance with notice he had been given to finish on 27 July.

[9] There were four public holidays that occurred over the period of Mr Honkoop's employment with BW Murdoch. They were Good Friday and Easter Monday (25 & 28 March 2005), Anzac Day (Monday 25 April 2005) and Queen's Birthday (Monday 6 June 2005). It is Mr Honkoop's position that he was entitled to public holiday pay for those days and he claimed payment for those days when he submitted his time sheets. Mr Honkoop was not paid public holiday pay for those days and he was advised orally and in writing that he would not be paid for the days in question.

[10] On 4 May the Angela Murdoch (HR Manager) wrote to Mr Honkoop.

*"Dear Mr Honkoop*

*We confirm that you have casual employment with B W Murdoch Ltd working on the current Te Awamutu project. As a casual worker there are no set hours and no set days. You have not been rostered to work on any statutory days.*

*Much of the company's business consists of short-term projects consequently we employ contract and casual labour. Neither contractors or casual workers are paid statutory days. Your annual leave entitlement of 6% is paid each week, as stated on your contract, which reflects the casual short-term nature of your work. Pay as you go holiday pay is allowable under the Holidays Act 2003 in these circumstances.*

*Yours faithfully, Angela Murdoch"*

[11] After he received this letter Mr Honkoop decided not to pursue his claim for public holiday pay with the company any further and that he would sort it out for himself. After he left his employment he laid a complaint with the Department of Labour.

[12] The Labour Inspector investigated Mr Honkoop's claim and in doing so considered the relevant provisions of the Holidays Act 2003, the IEA, Mr Honkoop's work patterns and other relevant factors and concluded that Mr Honkoop was entitled to be paid for the public holidays that fell during his period of employment. The company was asked to make payment.

[13] The company disagrees with the Labour Inspector's conclusions and declined to make payment. The company's position is essentially that:

- Mr Honkoop was employed as a casual worker with no set days or hours of work. There were discussions on a regular basis between management personnel and Mr Honkoop on the hours/days to be offered to Mr Honkoop that he was free to accept or reject.
- The company did not offer Mr Honkoop employment on the public holidays in question and the store was not open.
- His employment contract (IEA) describes the work as casual.
- The hourly rate paid was consistent with the work being casual.

- Mr Honkoop is knowledgeable in relation to casual work and frequently undertakes casual and relief work.
- Mr Honkoop's work pattern was irregular and unpredictable with his weekly hours varying between 30 and 50 over the 20 week period of his employment.
- When Mr Honkoop was advised the company did not pay its casual/contract employees public holiday pay he continued his employment thus accepting the position.

[14] As no agreement could be reached with the company in the matter the Labour Inspector filed with the Authority to have the matter determined.

[15] The parties attended mediation but the matter was not resolved between them.

### **Issues to be Determined**

- What is the real nature of the employment in question?
- Is Mr Honkoop entitled to payment for the public holidays that fell during his employment with the respondent?

### **Holidays Act 2003**

[16] The relevant provisions of the Act are:

#### ***S.3 Purpose***

*The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to-*

- (a) annual holidays to provide the opportunity for rest and recreation:*
- (b) public holidays for the observance of days of national, religious, or cultural significance:*
- (c) sick leave to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on the employee for care is sick or injured:*
- (d) bereavement leave to assist employees who are unable to attend work because they have suffered a bereavement.*

#### *S. 6 Relationship be Act and employment Agreements*

- (1) Each entitlement provided to an employee by this Act is a minimum entitlement.*
- (2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.*
- (3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act—*

*(a) has no effect to the extent that it does so; but*

*(b) is not an illegal contract under the Illegal Contracts Act 1970.*

***Subpart 3 –Public Holidays***

***S. 43 Purpose of this subpart***

*The purpose of this subpart is –*

*(a) to provide employees with an entitlement to 11 public holidays if the holidays fall on days that would otherwise be working days for the employee;*

*(b) to enable employees to agree to work on a public holiday in exchange for another day's paid leave.*

S. 44 of the Act sets out the days that are public holidays. There are 11 days. They include Good Friday, Easter Monday, Anzac Day and Queen's Birthday.

***S.46 Entitlement to public holidays***

*(1) An employee is entitled to public holidays, and payment for those holidays, in accordance with this subpart.*

*(2) Public holidays are in addition to annual holidays that an employee is entitled to under this Act or otherwise.*

***S 48 Compliance with section 46***

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*(2) If a public holiday falls on a day that would otherwise be a working day for an employee, section 46 is complied with if –*

*(a) the employee does not work on that day; and*

*(b) the employer pays the employee in accordance with section 49; or*

***S. 49 Payment if employee does not work on public holiday***

*If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay for that day.*

And critically:

***S. 12 Determination of what would otherwise be working day***

*(1) This section applies for the purpose of determining an employee's entitlements to a public holiday, an alternative holiday, to sick leave, or to bereavement leave.*

*(2) If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed in subsection (3), with a view to reaching agreement on the matter.*

(3) *The factors are –*

(a) *the employee's employment agreement:*

(b) *the employee's work patterns:*

(c) *any other relevant factors, including-*

(i) *whether the employee works for the employer only when work is available:*

(ii) *the employer's rosters or other similar systems:*

(iii) *the reasonable expectations of the employer and the employee that the employee would work on the day concerned.*

(4) *For the purposes of public holidays, if an employee would otherwise work any amount of time on a public holiday, that day must be treated as a day that would otherwise be a working day for the employee.*

## Discussion

### Credibility

To the extent there are disputes in the evidence between the respondent and its former employee as to the agreements between them, it is Mr Honkoop's evidence that I prefer. This is because his evidence very closely matches the reality of the relationship as it evolved on the ground. I do not accept Mr Honkoop's evidence on one point, however. I do not accept that Mr Honkoop was entitled to accept or reject work as he saw fit. This evidence was not consistent with the remainder of his evidence. Nor was it consistent with the agreement reached between the parties that Mr Honkoop would work 40 hours per week for the period of the construction project. I accept, however, there was a degree of flexibility overall regarding the days that would be worked by Mr Honkoop as long as 40 hours were worked. The parties did agree that Mr Honkoop would not work on 4 May because he had to go to the dentist. This does not warrant a conclusion – taking all the evidence into account – that Mr Honkoop could choose to work or not work as he saw fit.

### What was the real nature of the relationship?

[17] The Holidays Act provisions apply to all employees be they casual employees, part timers, full time employees and/or workers engaged on a fixed term agreements. In respect to public holidays the Act states at s. 49 that *if an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay for that day.* (Emphasis mine).

[18] Critical to my determination as to whether or not Mr Honkoop is entitled to payment for the public holidays that fell during his employment with the respondent are findings as to the real nature of the relationship.

[19] The respondent submits that Mr Honkoop was a casual worker. The real nature of the employment needs to be determined because the features of true casual employment include a genuine freedom between employer and employee to offer and accept employment. This gives parties considerable flexibility in the arrangements arrived at. While there is no legal definition of casual employment, generally speaking it involves an employer offering work if and when it is available. The employee has the right to accept or reject that employment and each period of work is usually treated as a separate engagement. Notice provisions and trial periods are not consistent with casual employment and unjustified dismissal provisions are rarely accessed because the ending of the engagement does not involve the termination of the employment *by the employer*. The

employment starts and ends *in accordance with the agreement between the parties* as determined by the offer and acceptance. It is not inconceivable that a casual worker would not work for an employer on a day “that would otherwise be a working day for that worker” but it is less likely that a casual worker would qualify for payment of public holiday pay in accordance with the provisions of the Holidays Act than workers who work full time or regular part time hours or workers engaged on fixed term agreements.

[20] The respondent in this matter argues strongly that Mr Honkoop was a casual worker and that he does not qualify for payment of the public holidays in question because he worked irregular hours as agreed on a regular basis with his managers and he was not offered work on the public holidays in question.

[21] Having regard to a number of factors including the terms of the job advertisement, oral agreements reached between the parties, the terms of the IEA and the pattern of work worked by Mr Honkoop and the duration of his employment I am satisfied he was not a casual employee as claimed by the respondent. Viewing the employment in its entirety it would be more appropriately categorised as full time work of a fixed duration.

[22] The evidence is clear, and I so find, that the respondent required someone to work regular hours for a fixed period coinciding with the duration of the Fonterra construction project. The parties agreed Mr Honkoop would work approximately 40 hours per week. The evidence discloses there were more hours called for in the early part of the employment because the store needed to be set up. In the initial stages of his employment Mr Honkoop devoted the hours necessary to complete the job. After the fourth week of his employment he was reminded that that the agreement was he would work about 40 hours. I accept his evidence too that he was told he could work the 40 hours over four days if he wished. Having reduced his hours in the fifth week of his employment to bring his average closer to 40 overall Mr Honkoop thereafter usually worked 10 hours per day for four days over Monday to Thursday in accordance with the advice he had received that he could work his 40 hours over four days if he wished.

[23] I note too the fact that Mr Honkoop was given written notice of the termination of his employment in accordance with the IEA and that he worked out that notice, concluding his employment on 27 July 2005.

[24] The picture that emerges on the evidence is that this employment was consistent with that contemplated under s.66 of the Employment Relations Act 2000 which provides that the parties can agree that a worker’s employment will end on a specified date or on the occurrence of a specified event where the employer has genuine reasons based on reasonable grounds for specifying that the employment will end that way and advises the employee of that. Mr Honkoop’s employment for the period of the respondent’s Fonterra contract fits this scenario.

[25] The Act requires such agreements<sup>2</sup> to be recorded in writing and they are to specify the way the employment will end and the reasons for it s.66 (4). Mr Honkoop’s contract did not conform to this sub-section of the Act and the respondent could not therefore have relied on the agreement as a valid s.66 agreement if a dispute had arisen about the termination of the employment at the end of the Fonterra project.

[26] Nevertheless this provides the best description of Mr Honkoop’s employment and I find specifically there was no routine offer/acceptance of specific hours/days of employment during the

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<sup>2</sup> Pay as you go holiday pay is permitted (subject to conditions) where employees are employed pursuant to s.66 of the Employment Relations Act.

course of the employment. The main terms were the subject of oral/written offers and acceptance at the commencement of the employment and some flexibility re hours and days of work to suit both parties – albeit it was the respondent that dictated there would be no work for Mr Honkoop on public holidays. It was entitled to make that call but it does not follow that having made that call it was relieved of paying Mr Honkoop for the public holiday if it fell on a day that would otherwise have been a working day for him.

[27] This brings me to the second issue that must be determined.

**Is Mr Honkoop entitled to payment for the public holidays that fell during his employment with the respondent?**

[28] In determining what would otherwise be a working day the Court of Appeal in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* (Unreported CA 21 December 2006 CA 270/05) stated at para 12:

“Whether a day would otherwise be a working day is an intensely practical question. In the first instance, employers and employees have to try and agree on the answers: s 12(2). And the factors they are bound to take into account are very open ended and flexible: s.12 (3). If they cannot agree, then a Labour Inspector can determine the matter for them s 13. His or her decision is binding (s.79), except to the extent, that in any proceedings before the Employment Relations Authority, the authority” makes its own determination on the matter”.

[29] I find that Mr Honkoop’s entitlement to payment for the public holidays that fell during his employment with the respondent does not rely solely on the nature of the employment. The terms of the employment agreement allow the nature of the employment to be described. It is, however, only one factor in the mix that goes to deciding the critical question as to whether the day in question would otherwise be a working day for the employee.

[30] Relying on the tests set out in s.12 (3) I must concur with the Labour Inspector that the public holidays in question would otherwise have been working days for Mr Honkoop.

[31] I have found Mr Honkoop was not a casual employee. Through a combination of verbal and written terms and terms arrived at by the conduct of the parties, Mr Honkoop worked an average of 40 hours per week for the duration of the Fonterra construction project. Initially he worked 5 days per week to complete his hours and then after he was advised he could work his hours over four days he adopted a pattern of working 4 x 10 days over four days of the week Monday to Thursday. The only variations after that related to the week of his dentist visit; the week when Queen’s Birthday fell and he was directed not to work by the respondent; the week when he did forklift training and made up his hours over five days; a week he worked additional hours at the respondent’s request and the last week of his employment when he worked 3 x 10 hour days and finished his employment in accordance with the notice he was given. This pattern of 4 x 10 hour days worked over four days being Monday to Thursday is a dominant pattern in Mr Honkoop’s work history with the respondent. I note, further, that Mr Honkoop worked 16 Mondays over the 20

weeks of his employment and the only Mondays that Mr Honkoop did not work were the public holidays when he was directed not to work.

[32] Before concluding this matter I note that a number of factors raised by the respondent to support its position (e.g. the rate of pay was consistent with casual work) are not relevant to the determination of this problem. Neither is it correct for the employer to rely on a claim that Mr Honkoop accepted the position when he continued working after he was told he would not be paid for public holidays. The fact that Mr Honkoop continued working cannot be taken as agreement in the matter and in any event the Act is specific at s.6 (3) that any agreement that excludes, restricts or reduces an employee's entitlements under the Act has no effect.

[33] Lastly, I do not accept that the findings in *Labour Inspector v Elder Stock Ltd* AA 324/05 have application in this matter. That was decided on its own facts. This matter is decided on its own facts with reference to the purpose and provisions of the Holidays Act 2003.

## **Conclusion**

[34] There is no question in my mind that taking into account the employment in its totality including the oral and written terms, the history of the employment including the patterns of work and the purpose and provisions of the Holidays Act 2003, that the public holidays in question would, but for them having been public holidays were days that would otherwise have been working days for Mr Honkoop. This brings him squarely within the entitlement to paid public holidays as described in s. 49 of the Act.

[35] It needs to be noted, however, that had the employment continued with its dominant pattern of work between Monday and Thursday and had another public holiday fallen on a Friday, it is unlikely that Mr Hankoop would have qualified for payment for that public holiday because it would not otherwise have been a working day for him. Mr Honkoop is entitled to payment for Good Friday 2005 because it fell in the initial period of his employment when the work spread over five rather than four days of the week.

[36] On the evidence it seems to me the employer in this case has misconstrued its obligations. Firstly it has misconstrued the nature of the relationship (to be casual in nature when the employment clearly did not have the essential characteristics of casual employment). Then based on a reference to a single test in s.12 (3) (i) it then gave itself permission to offer work only on days that were not public holidays. In not paying Mr Honkoop for public holidays that he did not work which were otherwise days that would have been working days for him the respondent has breached

Holidays Act and Mr Honkoop must be paid his entitlements in accordance with the Act.

### **Determination**

[37] Relying on the reasoning set out above it is my determination that Mr Honkoop is entitled to payment for the public holidays which fell during his employment with BW Murdoch Ltd.

[38] The respondent is therefore directed to pay to the Labour Inspector the sum of \$826.20 gross for the use of Mr Honkoop. The respondent is also directed to pay to the Labour Inspector (for the use of Mr Honkoop) interest on the above sum at the rate of 9% to be calculated and applied from 27 July 2005 until the Authority's order is paid.

### **Costs**

[39] The parties are to attempt to resolve the issue of costs between them. If they cannot agree then submissions are invited and the Authority will determine the matter.

Janet Scott  
Member of the Employment Relations Authority