

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 443/10
5290415

BETWEEN FOREST AND GENERAL
 SECURITY LIMITED
 Applicant

AND ALAN REID, LABOUR
 INSPECTOR
 Respondent

Member of Authority: Robin Arthur

Representatives: Ken Badcock, counsel for Applicant
 Respondent in person

Investigation Meeting: 8 October 2010

Determination: 14 October 2010

DETERMINATION OF THE AUTHORITY

[1] This determination deals with an objection made by Forest and General Security Limited (FGSL) under s225 of the Employment Relations Act (the ER Act) to a demand notice issued by Labour Inspector Alan Reid for the payment of \$4127.85 as holiday pay to former FGSL employee Mike Moore (the demand notice).

[2] At issue between the parties is whether FGSL was entitled to pay Mr Moore for annual holidays on a 'pay-as-you-go-basis' as permitted in certain circumstances under s28 of the Holidays Act 2003. This, in turn, raises the issue of the basis and nature of Mr Moore's employment.

[3] Section 28 of the Holidays Act allows pay-as-you-go payments for annual holidays (rather than allowing the leave) where the following four conditions are met:

- (i) the employee is employed on a fixed term agreement compliant with s66 of the ER Act for a period of less than 12 months *or* works so

intermittently or irregularly for the employer that it is impracticable to provide annual leave; and

- (ii) the employee has agreed in her or his employment agreement; and
- (iii) the annual holiday pay is identified clearly in the employee's pay; and
- (iv) the annual holiday pay is paid at the prescribed statutory rate.

[4] A central issue in determining this matter is whether Mr Moore was a casual employee, as FGSL director Brett George told Mr Reid, or was, as Mr Moore claimed, really employed on an ongoing basis. In terms of the requirements of s28 of the Holidays Act, the specific questions for answer are:

- (i) Was Mr Moore employed on a fixed-term agreement for less than a year?
- (ii) If not, was he working so intermittently or irregularly that it would be impracticable to provide holidays?
- (iii) Had he agreed to pay-as-you-go holiday pay in his employment agreement?
- (iv) If so, was annual holiday pay identified in his pay?
- (v) Was annual holiday pay paid at the correct statutory rate of eight per cent of his gross earnings?

[5] I have also considered whether interest should be awarded on the amount of holiday pay sought in the demand notice served on FGSL on 12 April 2010.

The Authority's investigation

[6] I declined to direct this matter to mediation under s159 of the ER Act. On the basis of information from a representative of FGSL and Mr Reid I understood a previous objection to demand in similar circumstances was settled by the company and the inspector in mediation in 2009. However the present application demonstrated there had been no real resolution of the problem between the parties as to when employment was truly casual and apt for pay-as-you-go. In those circumstances I considered the public interest required determination rather than mediation of the matters at issue.

[7] Mr Reid and Mr Moore then lodged written witness statements under timetable directions from the Authority. Those directions also called for a witness statement from Mr George but none was provided. Neither did Mr George attend the

notified investigation meetings. Instead FGSL was represented by counsel alone, with no evidence given for the company. Mr Reid and Mr Moore, under oath, confirmed their written statements and answered questions from the Authority and Mr Badcock. Mr Badcock and Mr Reid provided closing submissions.

[8] In the absence of any direct evidence from FGSL, this determination relies on the evidence of Mr Reid and Mr Moore, available documents regarding working hours and arrangements, and the parties' submissions.

The nature of Mr Moore's employment

[9] Mr Moore worked as a security guard for FGSL in the period from 21 July 2008 to 19 November 2009.

[10] He had contacted FGSL seeking work and was interviewed by Mr George on 17 July 2008.

[11] At an initial interview Mr George told Mr Moore there was a "casual" position working on a Contact Energy site. FGSL had gained a contract to provide security services there for 90 days with prospects of extension for a year. Mr Moore's evidence described his employment as "*linked*" to the Contact Energy contract but noted that Mr George referred to FGSL having just signed three contracts and that the two men had discussed the possibility of a supervisory position as a result of that new work.

[12] A letter of offer from FGSL headed "Casual Position – Static" stated the work related to three contracts with Mighty River Power (MRP) and Contact Energy (CE). Other terms stated:

- (i) Shifts were to consist of 12 hour day and night shifts allocated on a roster system; and
- (ii) Hourly pay of \$17.50 including \$1.40 as a "*holiday pay allowance*"; and
- (iii) In the event that the three contracts for MRP and CE sites ended, Mr Moore would be given one month's notice.

[13] Mr Moore accepted the offer by email on 20 July 2008. He says Mr George also had him sign an “*employment contract*” that day. He did not have a copy of that document but says it was the same as an unsigned document later provided by FGSL to Mr Reid (Document K5 attached to Mr Reid’s statement).

[14] That agreement is headed “*Individual ‘Casual’ Employment Agreement for Mike Moore*”. A schedule described the job as “*Static Guard – Taupo*” and the place of employment as “*MRP & Contact Energy sites*”. It stated a “*period of redundancy notice*” as one week and a “*period of termination notice*” as “*one month (except for casual employees 24 hours)*”. At clause 3.4.1 it stated: “*This is a casual contract and no holiday pay shall accrue*”. Clause 3.10.1 required each party to give one week’s notice of termination of employment.

[15] Mr Moore began work at a CE site on 21 July and worked there until 26 October 2008. He was then assigned to an MRP site until 5 December 2008. On 16 December 2008 he was assigned to the CE site until 19 February 2009. He then worked at two MRP sites until 4 September 2009. After a week’s leave in early September he was assigned to work at a bank in Taupo until 2 October 2009. Throughout the remainder of October 2009 he was not rostered on for any work. Mr George, and a local manager Craig Hiha, told him no work was available. In early November he was contacted by Mr Hiha to work at a farm owned by a company placed in receivership.

[16] Mr Moore worked at the farm for 15 days in November but stopped working there after an argument with Mr George over whether he would be paid petrol money for travel to and from the farm. Mr Hiha agreed to find a replacement to work at the farm and from 20 November Mr Moore did no more work for FGSL.

[17] On 2 December Mr Moore submitted a written resignation giving two weeks’ notice. He did no work and got no pay during the notice period.

[18] Apart from some leave taken in May and September 2009, and the weeks in October 2009 when he was provided with no work, Mr Moore worked an average of 45 hours a week for FGSL between July 2008 and November 2009.

[19] For the work at most sites his hours were set by a printed roster provided to him and other staff a fortnight in advance. He typically worked 12 hour shifts for three or four days in each week. For two sites – the bank and the farm – he was told his working hours at the start of the assignment and told he would work there until further notice.

[20] These facts confirm the “*regularity of work and continuity of the employment relationship*” identified in New Zealand case law as indicative of ongoing rather than casual employment.¹

[21] While the explicit agreement made by FGSL and Mr Moore at the beginning of the relationship described the employment as casual, I find their day-to-day conduct justifies a conclusion that they implicitly agreed to vary that arrangement to become regular ongoing employment.

[22] Three instances of that conduct warrant further comments:

- (i) In late October 2008 Mr George told Mr Moore he was now considered a full time employee although Mr Moore was subsequently still referred to as “*casual*” on his pay slip. Neither point changed the reality of what I find, on the facts, to have already become an ongoing employment relationship.
- (ii) In late February 2009 Mr George and Mr Moore discussed the draft of a further employment agreement. As the result of that discussion Mr George gave Mr Moore a proposed written agreement which did not include the references to “*casual*” found in the earlier agreement he had signed. The draft agreement provided for annual leave rather than a holiday allowance. Mr Moore sought further changes regarding notice, the hourly rate and redundancy compensation but no agreement was subsequently signed. I find those negotiations for a variation of his terms and employment – which were not concluded and resulted in no actual changes for Mr Moore – did not alter the already ongoing nature of the employment relationship.

¹ *Jinkinson v Oceana Gold (NZ) Ltd* EC, CC 9/09, 13 August 2009 at [48].

- (iii) In October 2009 Mr Moore was not allocated any work. I do not accept FGSL's submission that his conduct, in effectively accepting that situation without significant protest, confirmed Mr Moore understood that his employment was on a casual basis only. Rather, I find his silence was not acceptance of anything other than being in a relatively powerless situation and the commercial reality that FGSL did not have work to give him.

Failure to comply with s28 of the Holidays Act

[23] Whether if FGSL complied with the requirements of s28 of the Holidays Act must now be determined in light of the finding on the nature of Mr Moore's employment.

Fixed term agreement

[24] FGSL's closing submissions suggested Mr Moore's evidence accepted that his employment was initially on a fixed term basis because he understood it was "*linked*" to the CE contract. I do not accept that submission for three reasons.

[25] Firstly, the letter of offer of 20 July 2008 and the employment agreement said to have been signed that day refer to contracts with CE *and* MRP.

[26] Secondly, Mr George repeatedly told Mr Reid only that Mr Moore's employment was "*casual*", without any reference to an asserted fixed term. That stance was reiterated in a letter from FGSL's solicitors, Lance Lawson, as late as 9 April 2010 which stated that the company "*maintains its position that Mr Moore was employed as a casual employee*".

[27] Thirdly, neither the letter of offer nor the employment agreement meet the requirements of s66(4) of the ER Act to state in writing how and why the employment will end.

[28] Accordingly there was no fixed term agreement between Mr Moore and FGSL for the purposes of s28 of the Holidays Act.

Intermittent or irregular work

[29] Time sheets and pay records confirm Mr Moore worked regular, rostered hours for most of the period of his employment. He was able – with prior approval of his manager – to take leave, albeit unpaid, in May and September 2009.

[30] Accordingly – even if I were wrong in concluding Mr Moore’s employment was not casual – the circumstances were such that his work was sufficiently continuous and regular that he could practicably be provided with leave and was not within the terms of the exception provided at s28(a)(ii) of the Holidays Act.

Agreement

[31] While the parties’ initial arrangement demonstrated agreement by Mr Moore of pay-as-you-go holiday pay, that is not decisive in light of the finding that the circumstances of his employment did not meet the conditions of s28(1)(a)(i) and (ii).

[32] His pay slip did meet the requirement of s28(1)(c) for the holiday pay to be identified. It was also calculated at the correct statutory rate (s28(1)(d)).

Determination

[33] For the reasons given I find FGSL did not meet the requirements of s28 of the Holidays Act to pay Mr Moore’s leave entitlements on a pay-as-you-go basis. Accordingly, under s226 of the ER Act I decline to uphold FGSL’s objection to the demand notice and I find the whole of the holiday pay specified in the demand notice is due to Mr Moore from FGSL. The amount due is \$4,127.85.

Interest

[34] The Authority has the discretionary power to award interest on the amount due. When arrangements for the investigation meeting were being made, the parties were put on notice that this would be considered.

[35] While FGSL was entitled to pursue its statutory right to object to a demand notice, its action has also put Mr Moore out of the use of money now confirmed as due to him. FGSL must put that right by paying interest at a rate of 5 per cent from 13

April 2010 until the date the amount due is paid – that is a daily rate of around 56c per day.

Orders

[36] Both the amount due under the demand notice and the interest ordered on that amount are to be paid by FGSL to the Labour Inspector (for the benefit of Mr Moore) within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority