IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 1
5433857

	BETWEEN	SOUTH OTAGO HIGH SCHOOL BOARD OF TRUSTEES Applicant
	A N D	JOHN NICOL First Respondent
	A N D	STEVEN NICOL Second Respondent

Member of Authority:	David Appleton
Representatives:	Rachel Brazil, Counsel for Applicant John Nicol for himself and for Steven Nicol
Investigation Meeting:	20 October 2014 at Dunedin; 12 November 2014 by telephone
Submissions Received:	24 November 2014 from Applicant 11 December 2014 from Respondent
Date of Determination:	7 January 2015

DETERMINATION OF THE AUTHORITY

A. **John Nicol received an overpayment of final salary and holiday pay from the applicant which is to be quantified separately.**

B. **Steven Nicol received an overpayment from the applicant in the gross sum of $2,138.21. The sum of the net overpayment is to be calculated by the applicant and is to repaid by Steven Nicol to the applicant in accordance with the orders in this determination.**

C. **Costs are reserved.**

Employment relationship problem

[1] South Otago High School Board of Trustees (the Board) seek repayment of holiday pay from the first and second respondents (John Nicol and Steven Nicol respectively) following errors made by Novopay, which operated the payroll system of South Otago High School on behalf of the Board at the material time.

[2] John and Steven Nicol deny that they have been overpaid holiday pay and counterclaim stating that they are, in turn, owed sums of money by the Board.

[3] This determination addresses a number of matters raised by John Nicol which need to be settled before it is possible to determine whether he is owed money by the applicant, or whether he owes money to the applicant. A second investigation (possibly done on the papers) will then need to be effected in order to quantify the amount of the sum owed. This matter is being determined in two stages because of the complexities involved in reconciling what should have been paid to John Nicol with what was actually paid to him, due to the numerous difficulties encountered since Novopay took over the applicant's payroll.

[4] As far as Steven Nicol is concerned, his situation is considerably simpler and this determination addresses his situation in its entirety.

Brief account of the events leading to the dispute

[5] John Nicol was employed as a school caretaker, starting his employment on 10 November 1997 and leaving by mutual agreement on 27 October 2012. John Nicol was employed pursuant to the School Caretakers' and Cleaners' (Including Canteen Workers) Collective Agreement. John Nicol supervised a number of staff, including his son, Steven Nicol, who was employed as a grounds labourer. Steven was not a member of the applicable union and so his employment was governed by the terms of the Secondary and Area School Ground Staff Collective Agreement as at May 2005, which became the terms of his individual employment agreement after the first 30 days of his employment.

[6] In 2009, after what I understand was a long running dispute between John Nicol and the Board about his obligations and entitlements, the parties entered into a binding record of settlement pursuant to s.149 of the Employment Relations Act 2000 (the Act) which had the objective of agreeing what John Nicol's duties were, what

elements made up his wage package and how to deal with 70 days of annual leave holiday that John Nicol claimed had accrued but had not been taken. The 2009 Record of Settlement is a reasonably lengthy document but the following are material clauses:

> *1) These terms of settlement and all matters discussed at Mediation shall remain confidential to the parties.*
>
> *2) This is a full and final settlement of all matters relating to Mr Nicol's annual leave, and matters negotiated as part of Mr Nicol's job description, provided that nothing in this settlement shall remove either parties entitlement to seek to review the job description provisions at a future time.*
>
> *…*
>
> *3) (i) Mr Nicol's wage package comprises of the following:*
>
> *(a) Collective agreement base rate for a fulltime Grade 2 caretaker in charge of 10 + workers;*
> *(b) 16 hours of overtime per fortnight;*
> *(c) Applicable service allowance;*
> *(d) Boiler allowance of 10 days per fortnight;*
> *(e) Dirty work allowance of 3 days per week;*
> *(f) Alarm callout payment 8 hours per fortnight T1½;*
> *(g) Sunday boiler payment 2 hours per fortnight T2;*
> *(h) Caretaker's housing payment;*
> *(i) Clothing allowance;*
> *(j) CLP allowance of $590.25 per term;*
> *(k) Travel allowance of $236 per term.*
>
> *…*
>
> ***Annual Leave and off-duty conditions***
>
> *…*
>
> *o) All of Mr Nicol's annual leave shall be applied for in writing, and approved by the Principal in advance. All leave must be taken unless a variation is applied for in writing and granted. During approved leave no callbacks will be accepted.*
>
> *4) It is agreed that 70 days of accumulated leave is owing to Mr Nicol. This will be taken as follows –*
>
> *35 days of leave shall be taken immediately as annual leave, with Mr Nicol returning to work on Tuesday 3 March 2009.*
>
> *5) A compensatory payment of $10,100 will be made to Mr Nicol via his solicitors trust account within 7 days of the date hereof. This payment shall be made in accordance with s.123(1)(c)(i) of the Employment relations Act 2000* [sic].

[7] One of the areas of dispute between the parties arises out of the 2009 settlement agreement. It is the position of the Board that the payment of $10,100 was intended to extinguish John Nicol's right to the balance of 35 days of accumulated annual leave that would be outstanding after he had taken 35 days of leave pursuant to clause 4 of the settlement agreement. On the other hand, it is John Nicol's contention that the sum of $10,100 was intended to compensate him for stress and that he was entitled to retain the remaining balance of 35 days' accumulated leave to use as he wished. He argues that 35 days leave should be added to the amount of holiday pay owed to him at the end of his employment.

[8] The Board was willing to waive privilege on the content of the negotiations that took place leading to the signing of the 2009 settlement agreement so that the duty of confidentiality provided for in s.148 of the Act would no longer apply. However, as was his right, John Nicol declined to waive privilege, and so the Authority was unable to hear evidence in relation to those negotiations. On this particular issue, therefore, it must seek to resolve the purpose of the payment of $10,100 solely by construing the 2009 settlement agreement in accordance with the accepted principles of contractual interpretation.

[9] The 2009 settlement agreement was signed by the Principal, Mr Simpson, and by John Nicol's solicitor, Ms Tait, on his behalf on 23 February 2009. However, the Authority also saw an eight page document headed up *POSITION DESCRIPTION – Resident School Caretaker*. This document contained an attachment headed up *Remuneration.* It contained the same list of elements of John Nicol's wage package as was set out in clause 3(i) of the 2009 settlement agreement at (a) to (k) save that the alarm callout payment at clause 3(i)(f) was stated in the remuneration attachment to be payable at time and a half for 8 hours per week, rather than per fortnight.

[10] This job position description document had been signed by Mr Simpson on 16 February 2009, prior to the signing of the settlement agreement, but not signed by John Nicol until 27 February 2009, four days after the signing of the settlement agreement. It is the Board's position that John Nicol was only entitled to an alarm callout payment of 8 hours per fortnight in accordance with the 2009 settlement agreement, whereas John Nicol contends that he was entitled to have been paid that callout payment every week, in accordance with the position description. This comprises a second area of dispute for determination by the Authority.

[11] After the signing of the 2009 settlement agreement, the employment of John Nicol and Steven Nicol continued and, it seems, further areas of dispute arose between John Nicol and the Board so that it was eventually agreed that John Nicol would leave the employment of the Board by way of an agreed record of settlement dated 27 September 2012 (the 2012 settlement agreement).

[12] Material parts of this record of settlement stated as follows:

> 1. *These terms of settlement shall remain, so far as the law allows, confidential to the parties.*
>
> 2. *The applicant hereby resigns on one month's notice for which he shall be paid but not required to work.*
>
> ...
>
> 7. *This is the full and final settlement of all matters between the applicant and respondent arising out of their employment relationship other than any legitimate issues that may relate to payroll records of wages or holiday pay.*

[13] John Nicol's final day of employment was Friday 26 October 2012.

[14] Steven Nicol's employment ended on 28 September 2012 by way of redundancy. The Board acknowledges that it owes Steven Nicol the sum of $2,193 gross by way of redundancy pay but it is withholding this sum due to what it says was an overpayment to Steven Nicol by Novopay of his holiday pay.

[15] During the course of the parties' preparation for the Authority's investigation meeting, and during the investigation meeting itself, the parties came to the conclusion that several errors had occurred with respect to John Nicol's pay which have considerably complicated the process of reconciliation and resolution of the outstanding matters between the parties. The majority of these errors appear to have stemmed from Novopay. However, the parties themselves appear to have taken an antagonistic rather than conciliatory approach to one another historically, which has not assisted matters.

[16] I am pleased to note, however, that there was a more cooperative and conciliatory approach between the parties during the investigation meeting which resulted in a resolution of some of the areas of dispute. As a result of this process, the Board's position on the amount of the overpayments changed over time. It is the Board's current position that Novopay paid to John Nicol as a final salary payment the sum of $15,821.72, but should have paid him, instead, the total sum of $4,597.67,

of which $2,172.19 comprised outstanding holiday pay. Therefore, the Board states that John Nicol needs to repay to the school the gross sum of $11,224.05. It is John Nicol's position, however, that he is in fact owed the sum of $34,896.21 by the Board[1].

[17] With respect to Steven Nicol, the Board says that he was paid the final sum of $5,411.55 by Novopay whereas he was actually only due the sum of $403.51 (of which $184.21 comprised holiday pay). This means that Novopay overpaid Mr Steven Nicol by $5,008.04 according to the Board. Taking into account the fact that the Board owes Steven Nicol the sum of $2,193 by way of redundancy pay, the Board seeks repayment of the gross sum of $2,815.04 from Steven Nicol. Steven Nicol, on the other hand, claims that he is actually owed the sum of $3,953.64.[2]

[18] These significant discrepancies between the parties' positions are due to the combination of a number of issues which the Authority must determine.

The issues

John Nicol

[19] The following issues need to be determined with respect to John Nicol:

(a) Is John Nicol entitled to payment for 35 days' holiday pay or was that right extinguished by the payment to him of $10,100 under the 2009 settlement agreement?

(b) Was John Nicol entitled to be paid an alarm callout payment of eight hours at time and a half per week or per fortnight?

(c) Should the Caretaking Housing Benefit Allowance of $162.75 per week received by John Nicol be taken into account when calculating his ordinary weekly pay under s.8 of the Holidays Act 2003?

[1] John Nicol has counterclaimed different amounts over time, as has the applicant, but this figure derives from John Nicol's brief of evidence, which was drafted with the assistance of counsel, and it is this sum that I am taking as constituting John Nicol's claim. I am also using the brief of evidence from which to derive the basis of John Nicol's counterclaims.
[2] Derived from John Nicol's brief of evidence.

(d) Should John Nicol's travel allowance of $18.16 per week be taken into account when calculating his ordinary weekly pay under s.8 of the Holidays Act 2003?

(e) Did the Board fail to pay John Nicol a final salary payment of $2,761.48, comprising 10 days' pay, as asserted by John Nicol or is he only owed one day's pay, as asserted by the Board?

(f) Is John Nicol owed a further 25 days' leave as asserted by John Nicol, who relies on a letter to him dated 29 November 2011, signed by the payroll/financial manager, John Fenby and the Assistant Principal, Glen Ward? In this letter it is stated that:

> *I note in your leave record that you have 25 days outstanding in your leave balance.*

[20] During the course of the investigation meeting the parties resolved what had, up to that point, been a further area of dispute; namely, the amount of leave taken by John Nicol, and the amount of leave he was entitled to take for the holiday periods 2009/2010 and 2010/2011. The outcome of the discussion was that both parties agreed that, putting aside the issue of whether John Nicol was owed 35 days' leave, plus a further 25 days' leave as referred to above, at the date when he left the employment of the Board, John Nicol was owed a total of 8.7 days' leave. This differs from the positions that had been held respectively by the Board and John Nicol up to the investigation meeting.

[21] It also emerged during the investigation meeting that John Nicol had been overpaid for several years by reference to his pay grade. John Nicol had been employed as a G2 caretaker in charge of 10-14 workers and, from 18 July 2012, should have been paid a weekly gross rate of $738.84. Instead, he was erroneously treated as a G2 caretaker in charge of 20 plus workers and so received weekly gross wages in the sum of $762.75.

[22] The Board stated at the investigation meeting that it was going to consider whether it would seek to recover the cumulative overpayment and would advise the Authority accordingly. I directed that, if it were to do this, it would have to lodge a new Statement of Problem to enable John Nicol to take appropriate advice and lodge a considered Statement in Reply. In its submissions dated 24 November 2014 the

applicant confirmed that it did not intend to claim back wage payments made to John Nicol in error, but wished the correct pay rate to be used for the purposes of the reconciliation exercise that will need to be carried out after this determination is issued.

[23] John Nicol also included in his statement of problem a claim for compensation for stress that he says that he suffered when the Board sued him through the Disputes Tribunal for recovery of the overpayment that it says was made to him by Novopay. The Disputes Tribunal decided that it did not have the jurisdiction to consider the matter, which led to the Board reissuing proceedings in the Authority. However, John Nicol was not an employee at the time when the action was launched against him in the Disputes Tribunal and, accordingly, the Authority has no jurisdiction to consider any claim for compensation arising out of those actions by the Board.

Steven Nicol

[24] The following issues need to be determined with respect to Steven Nicol:

(a) Was Steven Nicol only paid 25 days' holiday pay out of a total of 151 days, as asserted on his behalf by John Nicol?

(b) Did the Board fail to pay Steven Nicol 77 days' statutory holiday?

(c) Was Steven Nicol paid at the correct wage rate?

(d) Did the Board fail to pay Steven Nicol final pay in the sum of $233.85?

Is John Nicol due pay in respect of 35 days' holiday?

[25] The principles of contractual interpretation are now well established and have been explored in a number of cases. His Honour Judge Ford set out the applicable principles in the Employment Court case of *Progressive Meats Ltd v Pohio & Ors* [2012] NZEmpC 103 at paragraph [29]. He stated the following:

> *[29] There was no dispute between counsel as to the applicable legal principles in the interpretation of collective agreements. Mr Cleary referred to the well-known five principles of contractual interpretation articulated by Lord Hoffmann in Investors Compensation Scheme Limited v West Bromwich Building Society*[3] *which were adopted in New Zealand in Boat Park Ltd v*

[3] [1997] UKHL 28: 1 WLR 896 at 912-913.

Hutchinson[4] *and recently reaffirmed in Vector Gas Ltd v Bay of Plenty Energy Limited.*[5] *As both counsel relied on the stated principles, I set them out in full:*

> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.*
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945)*
> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191,201: "... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*

[30] In Dwyer v Air New Zealand Ltd No 2,[6] *the full Court of this Court stated:*

> *We accept that our task in this part of the case is objectively to ascertain the mutual intentions of the parties and that by doing so we not only have regard to the particular words in the particular clause at issue but also to the nature and purpose of the employment contract. Reasonableness of result is a relevant consideration also in choosing between rival constructions and the contextual matrix is also to be taken into account.*

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[4] [1999] 2 NZLR 74.
[5] [2012] NZSC 5.
[6] [1996] 2 ERNZ 435 at 474.

[26] One may summarise the principles as follows:

(a) the plain words of the whole of the agreement need to be reviewed objectively in order to establish the meaning the parties intended the words to bear at the time;

(b) the factual matrix needs to be taken into account, including absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man; and

(c) the natural meaning of the words should be cross-checked with the relevant surrounding circumstances.

[27] On their face, the actual words of the 2009 settlement agreement at clause 4 deal only with half of the 70 days of accumulated leave that the parties had agreed was owing to John Nicol as at the date of that settlement agreement. It appears that the remaining 35 days has not been accounted for. On its face, the payment of $10,100 referred to in clause 5 is a completely separate payment, payable under s.123(1)(c)(i) of the Act which refers to compensation for *humiliation, loss of dignity, and injury to the feelings of the employee*. John Nicol confirmed that, to his knowledge, the payment of $10,100 was received by him free of tax.

[28] However, when one looks at the plain words of the 2009 settlement agreement as a whole, one must take into account clause 2, which states that the agreement is *a full and final settlement of all matters relating to Mr Nicol's annual leave ….* This implies that the purpose of the 2009 settlement agreement was, inter alia, to ensure that there remained no uncertainty about John Nicol's annual leave rights up to the date of the agreement being signed. This would not have been achieved had the remaining 35 days leave not been accounted for in the scope of the settlement between the parties.

[29] I also note that clause 4 contemplates that the whole of the 70 days' accumulated annual leave would be dealt with in the 2009 settlement agreement when it states *this will be taken as follows*, the word *this* referring back to the *70 days of accumulated leave*.

[30] I also take into account the fact that the so-called *compensatory payment* is the sum of $10,100, this is a rather odd sum to pay someone as compensation for

humiliation, loss of dignity and injury to their feelings. I note that $10,100, when divided by 35 days, gives a rate of $288.57 per day. This is, I believe, close to the daily rate of pay that John Nicol was receiving around that time, and indicates a rounding up has occurred.

[31] Therefore, although at first reading the payment of $10,100 appears to be a payment wholly unconnected with the balance of 35 days' leave, when the entire 2009 settlement agreement is taken into account, and especially its stated purpose of fully and finally settling all matters relating to John Nicol's annual leave, I find that the sum of $10,100 was paid to John Nicol as a way of compensating him for his sacrificing the right to take the remaining 35 days of leave.

[32] It is most regrettable that those advising the parties at the relevant time sought to dress up this payment as a compensatory payment under s.123(1)(c)(i) of the Act. It is my view that this was probably done in order to enable the payment to be made to John Nicol free of tax. If that is the case, it is an abuse of the income tax legislation, as holiday pay is clearly taxable in the hands of the recipient. It is John Nicol's evidence that he was away on leave when the 2009 settlement agreement was signed on his behalf, and so my comments should not be taken as being critical of him as it is possible that he did not realise the potential ramifications of dressing up the payment in this way. It is also not a criticism of Ms Brazil, as there is no evidence that she was advising the applicant at the material time.

[33] In conclusion, I find that John Nicol's right to 35 days' leave was extinguished when he received and accepted the payment of $10,100 pursuant to the 2009 settlement agreement.

Was John Nicol entitled to an alarm call out payment of eight hours at time and a half per week or per fortnight?

[34] This is an interesting issue given that the 2009 settlement agreement was entered into after Mr Simpson had signed the position description but before John Nicol had signed it. The question for the Authority, therefore, is which document prevails in relation to the alarm call out payment?

[35] Mr Simpson gave his evidence to the Authority by telephone on 12 November 2014. He stated that the position description had been prepared as part of the negotiations going on between the school and John Nicol and that he had signed it

once he believed agreement had been reached. Mr Simpson explained that the alarm call out payment had been negotiated with John Nicol outside of the collective agreement to recognise that there was a custom and practice of making payment for being called out to deal with the alarm.

[36] Mr Simpson said that a couple of errors had been spotted in the position description (including one about the alarm payment being payable weekly) and so these had been corrected by the settlement agreement. He was not sure why John Nicol had not signed the position description until 27 February 2009, although clause 4 of the 2009 settlement agreement required John Nicol to be on holiday until 3 March 2009 so that, presumably, accounted for the delay in John Nicol signing the position description.

[37] I note that the 2009 settlement agreement does not state that it records a full and final settlement of all matters relating to John Nicol's remuneration package, although it does state that it is a full and final settlement of all matters relating to *matters negotiated as part of Mr Nicol's job description*. Clause 2 of the 2009 settlement agreement goes on, however, to state:

> *… provided that nothing in this settlement shall remove either party's entitlement to seek to review the job description provisions at a future time.*

[38] Either way, it appears that the 2009 settlement agreement did not preclude the parties from agreeing changes to John Nicol's remuneration. This would make sense, as it is unlikely that the parties would have intended the job description and remuneration package to have been set in stone for ever more. Rather, it seems that the purpose of the 2009 settlement agreement was to establish the components of John Nicol's job and remuneration as they stood at the time of agreement.

[39] If the job description document had been signed by both parties after the 2009 settlement agreement had been signed, then it would be relatively simple for the Authority to find that it superseded the terms of the 2009 settlement agreement, as was contemplated could happen by the final words of clause 2 of that document. However, it appears that it was prepared and entered into by the Principal, on behalf of the Board, prior to the settlement agreement being signed but not signed by John Nicol until afterwards. It is the Board's case that the Principal made an error when he presented the position description to John Nicol for signature in respect of the alarm

call allowance. This error may have originated in the offices of John Nicol's legal representative at the time, although this is not clear.

[40] I believe that it is likely that the wrong copy of the position description was presented to John Nicol for signature. It is necessary to pause here and consider whether the Contractual Mistakes Act 1977 (the 1977 Act) is of assistance in resolving the issue.

[41] Section 6 of the 1977 Act sets out the criteria which need to be satisfied for relief to be granted under it. This provides as follows:

> ***6 Relief may be granted where mistake by one party is known to opposing party or is common or mutual***
> *(1) A court may in the course of any proceedings or on application made for the purpose grant relief under section 7 to any party to a contract—*
> *(a) if in entering into that contract—*
> *(i) that party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or 1 or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or*
> *(ii) all the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or*
> *(iii) that party and at least 1 other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and*
> *(b) the mistake or mistakes, as the case may be, resulted at the time of the contract—*
> *(i) in a substantially unequal exchange of values; or*
> *(ii) in the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; and*
> *(c) where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken.*
> *(2) For the purposes of an application for relief under section 7 in respect of any contract,—*
> *(a) a mistake, in relation to that contract, does not include a mistake in its interpretation:*
> *(b) the decision of a party to that contract to enter into it is not made under the influence of a mistake if, before he enters into it and at a time when he can elect not to enter into it, he becomes aware of the mistake but elects to enter into the contract notwithstanding the mistake.*

[42] First, it is debatable that the job description itself was a *contract*. To be a *contract* the arrangement reflected in the document must satisfy the basic requirements of contractual formation; namely, offer, acceptance and consideration. Whilst there was clearly consideration moving between the parties in respect of the 2009 settlement agreement, the intention of the job description document appears to do no more than to record the duties of the job and the pay attached to the job.

[43] Even if it does satisfy the definition of a contract, it is not clear that John Nicol was influenced to *enter into* the job description by a mistake, the existence of which was known to the school. First, there was no cogent evidence that the provision of a weekly alarm call out allowance had any influence over John Nicol in him signing the job description. Second, the mistake appears to have gone unnoticed by the school until these proceedings when it was first raised by John Nicol. *Knowledge* in this context means actual knowledge, not constructive knowledge; *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33.

[44] It is also not clear that the mistake resulted in a *substantially unequal exchange of values or in the conferment of a benefit or the imposition or inclusion of an obligation, which was disproportionate to the consideration therefor*. This is because the mistake resulted in an obligation to pay a weekly payment in return for an obligation to attend to alarm call outs. This is not a substantially disproportionate benefit in my view. However, if I am wrong, I am still not satisfied that the first required element relating to inducement and knowledge has been satisfied.

[45] All in all, I am not satisfied that the 1977 Act assists the parties.

[46] The wording in Clause 2 of the 2009 settlement agreement refers to either party's entitlement to seek to review the job description provisions at a future time. Whilst the relevant wording of the job description arguably effects a change to the remuneration provisions as set out in the 2009 settlement agreement in respect of the alarm call out payment, no review had taken place first. There is no evidence that there had been any discussion between the parties regarding the frequency of the alarm call out payment after the 2009 settlement agreement had been signed but before John Nicol signed the position description. Therefore, I cannot be satisfied that the job description document containing the reference to a weekly alarm call out payment actually reflects a meeting of minds between the parties about the frequency of the payment.

[47] Furthermore, whilst John Nicol signed the job description document after the 2009 settlement, it was prepared before it, and so is arguably overridden by the 2009 settlement agreement.

[48] Finally, it does not appear to be the case that John Nicol ever complained about the alarm call out payment being paid fortnightly instead of weekly until after he was pursued by the applicant in these proceedings.

[49] All in all, I cannot accept John Nicol's argument that he should have been paid this alarm call out payment at the rate of 8 hours per week instead of 8 hours per fortnight. It is my finding that the intention of the parties was always for the payment to have been made fortnightly, and that the job description signed by John Nicol on 27 February 2009 contained an error which does not bind the parties. Its terms are overridden by the terms of the 2009 settlement agreement.

Should the caretaker housing benefit allowance payment be taken into account when calculating ordinary weekly pay under the Holidays Act 2003?

[50] Section 21 of the Holidays Act provides as follows:

> ***21 Calculation of annual holiday pay***
> *(1) If an employee takes an annual holiday after the employee's entitlement to the holiday has arisen, the employer must calculate the employee's annual holiday pay in accordance with subsection (2).*
> *(2) Annual holiday pay must be—*
> *(a) for the agreed portion of the annual holidays entitlement; and*
> *(b) at a rate that is based on the greater of—*
> *(i) the employee's ordinary weekly pay as at the beginning of the annual holiday; or*
> *(ii) the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.*

[51] Section 5 of the Holidays Act defines average weekly earnings as 1/52 of an employee's gross earnings.

[52] The meaning of gross earnings is defined in s.14 of the Holidays Act, which provides as follows:

> ***14 Meaning of gross earnings***
> *In this Act, unless the context otherwise requires,* ***gross earnings****, in relation to an employee for the period during which the earnings are being assessed,—*

(a) means all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example—

(i) salary or wages:

(ii) allowances (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment):

(iii) payment for an annual holiday, a public holiday, an alternative holiday, sick leave, or bereavement leave taken by the employee during the period:

(iv) productivity or incentive-based payments (including commission):

(v) payments for overtime:

(vi) the cash value of any board or lodgings provided by the employer as agreed or determined under section 10:

(vii) first week compensation payable by the employer under section 97 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 or former Act; but

(b) excludes any payments that the employer is not bound, by the terms of the employee's employment agreement, to pay the employee, for example—

(i) any discretionary payments:

(ii) any weekly compensation payable under the Injury Prevention, Rehabilitation, and Compensation Act 2001 or former Act:

(iii) any payment for absence from work while the employee is on volunteers leave within the meaning of the Volunteers Employment Protection Act 1973; and

(c) also excludes—

(i) any payment to reimburse the employee for any actual costs incurred by the employee related to his or her employment:

(ii) any payment of a reasonably assessed amount to reimburse the employee for any costs incurred by the employee related to his or her employment:

(iii) any payment of any employer contribution to a superannuation scheme for the benefit of the employee:

(iv) any payment made in accordance with section 28B.

[53] Section 8(1) of the Holidays Act provides as follows:

8 Meaning of ordinary weekly pay

(1) In this Act, unless the context otherwise requires, ***ordinary weekly pay****, for the purposes of calculating annual holiday pay,—*

(a) means the amount of pay that the employee receives under his or her employment agreement for an ordinary working week; and

(b) includes—

(i) productivity or incentive-based payments (including commission) if those payments are a regular part of the employee's pay:

(ii) payments for overtime if those payments are a regular part of the employee's pay:

(iii) the cash value of any board or lodgings provided by the employer to the employee; but

> *(c) excludes—*
>
> > *(i) productivity or incentive-based payments that are not a regular part of the employee's pay:*
> > *(ii) payments for overtime that are not a regular part of the employee's pay:*
> > *(iii) any one-off or exceptional payments:*
> > *(iv) any discretionary payments that the employer is not bound, under the terms of the employee's employment agreement, to pay the employee:*
> > *(v) any payment of any employer contribution to a superannuation scheme for the benefit of the employee.*

[54] It is the position of the Board that the caretaker housing allowance payment does not come out of the school's budget but is paid for by the Ministry of Education. I accept this evidence. The relevant collective agreement between the Board and John Nicol provided for the parties to negotiate what rent should be deducted from the wages of a caretaker, but does not make any reference to the caretaker housing allowance.

[55] On the face of it, therefore, this housing allowance is not pay that John Nicol received *under his employment agreement*, as is required by ss. 8 and 14 of the Holidays Act. I therefore find that this payment cannot be taken into account when calculating John Nicol's entitlement to holiday pay.

Should John Nicol's weekly travel allowance of $18.16 be taken into account when calculating ordinary weekly pay under the Holidays Act 2003?

[56] Mr Fenby, on behalf of the Board, explained that it had been agreed as part of the 2009 settlement agreement that a travel allowance of $236 per term would be paid to save John Nicol from having to make numerous claims for undertaking small amounts of travel in his own car. It is the position of the Board that this allowance was a reimbursing payment, akin to the payment of expenses. Therefore, the Board submits, it should not be taken into account when calculating annual holiday pay.

[57] Section 14 of the Holidays Act recognises that allowances are included in the definition of gross earnings, save for *non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment*.

[58] Section 4.4 of the applicable collective agreement states as follows:

> *4.4 Transport Allowance*
>
> > *4.4.1 Where a worker is directed by his/her employer to use his/her own car, and providing such worker is*

> *willing, he/she shall be paid at the rate specified below.*
>
> .....
>
> - *Transport allowance – 59 cents per kilometre.*

[59] I find that the travel allowance was a payment, the intention of which was to reimburse John Nicol for travel costs related to his employment. Furthermore, it was a *reasonably assessed amount* to reimburse John Nicol for travel costs incurred by him in relation to his employment. This brings the payment into the scope of s.14(c)(ii), which is one of the exclusions when calculating gross earnings.

[60] In conclusion, I agree with the applicant that the travel allowance should not be included in calculating John Nicol's holiday entitlement.

Did the Board fail to pay John Nicol a final salary payment of 10 days' pay?

[61] John Nicol states that he believes this to be the case because he has perused the net payments he received between 4 September 2012 and 13 November 2012 and cannot reconcile them with the payment that he believes was due to him. However, this question is one of a number of factors that need to be determined as part of the reconciliation process that will have to follow on from this determination, and so I leave this question to the second stage of the investigation.

Is John Nicol owed a further 25 days' leave pursuant to the letter from the Board dated 29 November 2011?

[62] In his evidence, John Nicol did not know what prompted the school to send him the letter which stated that his leave record referred to 25 days outstanding. Mr Fenby could not recall why the letter had been sent either.

[63] However, John Nicol agrees how much leave had accrued to him during the final four years of his employment pursuant to the collective agreement, and how much leave he had taken. This is, of course, setting aside the issues of the 35 days already considered above. John Nicol accepts that the only reason he believes that he is entitled to a further 25 days leave is on the basis of the letter of 29 November 2011.

[64] It is clear that, as at that date, John Nicol had not accrued the right to a further 25 days' leave under the terms of the applicable collective agreement, nor under the Holidays Act. The letter appears, therefore, to contain an error. There appears to have been no consideration passing from John Nicol to the Board in return for which

it would have granted him a further 25 days' leave in addition to his contractual and statutory rights.

[65] Furthermore, the Authority saw a letter dated 13 December 2011 written by Galloway Cook Allan, which firm was acting for the Nicols at that point, which was written in reply to the respondent's letter of 29 November 2011. In this letter, Galloway Cook Allan state the following:

> *Please can you provide us with records to establish that Mr Nicol does have 25 days outstanding of Annual Leave?*
>
> *For his part, Mr Nicol instructs that:*
>
> 1. *He had no annual leave owing to him for the employment year ending 9 November 2011.*
>
> 2. *He has 25 days available to him for the current year, that is 10 November 2011 to 10 November 2012.*

[66] Taking all the above into account, I am satisfied that the letter of 29 November 2011 referred to by John Nicol does not give him the right to a further 25 days' annual leave.

Conclusion

[67] I conclude the following

a. John Nicol is not entitled to an additional 35 days leave;

b. John Nicol was entitled to be paid the alarm call out payment on a fortnightly, rather than a weekly basis;

c. The Caretaking Housing Benefit Allowance is not to be taken into account when calculating John Nicol's ordinary weekly pay for the purposes of the Holidays Act;

d. The travel allowance is not to be taken into account when calculating John Nicol's ordinary weekly pay for the purposes of the Holidays Act; and

e. John Nicol is not entitled to an additional 25 days' leave.

[68] These conclusions mean that John Nicol was overpaid by Novopay on behalf of the Board, and that he owes to the Board a net sum that now needs to be quantified.

That quantification will occur by way of a further investigation process, the details of which will be arranged by way of a case management telephone conference call to be arranged by the Authority.

Steven Nicol

Did the Board only pay Steven Nicol 25 days' holiday pay?

[69] This claim appears to be based on records of holiday leave requests made by Steven Nicol. John Nicol states that there were times when Steven Nicol worked when John Nicol was on leave. However, there appears to be no timesheets to support this statement.

[70] Steven Nicol worked part time, working 7.5 hours a week. Given that it appears that Steven Nicol took time off when his father did, who was employed full time, it is highly unlikely that Steven Nicol is owed 116 days leave as claimed. Pursuant to s.16 of the Holidays Act 2003 Steven Nicol was entitled to four weeks paid annual holidays. This does not mean that Steven Nicol was entitled to 20 days holiday a year, and parties generally agree what four weeks' holiday means in the case of part time employees. I heard no evidence of such an agreement but, in the absence of evidence of an express agreement as to what Steven Nicol's four weeks entitlement meant, I find that the fairest way of deciding the matter is to express Steven Nicol's minimum annual entitlement as 3.75 days a year (7.5 hours a week /40 hours per week = 18.75%; 18.75% x 20 days a year = 3.75 days a year).

[71] The Board points out that Steven Nicol received regular payments every fortnight which did not vary, save where the hourly rate increased to ensure compliance with the Minimum Wage Act 1983. It appears, therefore, that Steven Nicol received holiday pay on days when he took annual leave. John Nicol was responsible for supervising Steven Nicol and, for reasons that are not necessary to elaborate on in this determination, I infer that it is unlikely that Steven Nicol would have been in a position to apply for annual leave on his own account, without reference to his father. I also infer from evidence given by John Nicol that Steven Nicol would not have worked when his father was not working. Therefore, if John Nicol was on holiday, Steven Nicol would have been too.

[72] John Nicol also submits that Steven Nicol's leave was *zeroed off* at Christmas, without discussion with them. By this term, I understand that John Nicol is saying

that Steven Nicol's leave balance was extinguished each year. However, there is no evidence of that.

[73] On balance, I do not accept that Steven Nicol was not paid for annual leave taken by him in accordance with his contractual and statutory rights.

Was Steven Nicol paid for statutory holidays?

[74] John Nicol gave evidence that Steven Nicol never worked on a statutory holiday. Therefore, in view of the fact that he received the same pay every fortnight as explained above, and so would have been paid in accordance with s.49 of the Holidays Act whenever the public holiday would otherwise have been a working day for him, I do not believe that Steven Nicol was underpaid with respect to statutory holidays.

Was Steven Nicol paid at the incorrect pay rate?

[75] In support of this allegation, John Nicol pointed out that Steven Nicol's pay rate in his final year of employment was not that to which he was entitled in the relevant collective agreement. However, it emerged during evidence that Steven Nicol had never been a member of the applicable union and so had never been entitled to receive increases in his pay in accordance with the successive collective agreements. Accordingly, as he commenced employment on 17 May 2005, Steven Nicol's terms of employment were those contained in the 1 January 2004-31 October 2005 collective agreement and increases in Steven Nicol's pay rate reflected the requirement to ensure that his hourly rate did not fall below the minimum wage.

[76] Therefore, whilst there was a discrepancy as between Steven Nicol's pay rate after 2009 and the rates set out in the applicable collective agreements for his grade, this was because Steven Nicol was not entitled to have the benefit of those rate increases. However, it appears that Steven Nicol was paid at a rate higher than that set out in the applicable collective agreement, adjusted in accordance with minimum wage requirements. How this occurred is not clear, but it cannot be safely inferred that this was as a result of an error.

Did the Board fail to pay Steven Nicol a final payment of $233.85?

[77] It is clear that the final payment to Steven Nicol was significantly more than he should have received as a final payment. The most effective way of resolving whether Steve Nicol was overpaid, and by how much, is to work out what his total entitlement was for the 12 months going back from his last day of employment and then comparing that figure with what he was actually paid during the same period.

[78] One of the difficulties with determining this issue is that the applicant submits that the correct pay rate for Steven Nicol was $14.62 an hour. It derives this rate from the rate attributable to Steven in the 2007 – 2009 Groundstaff Collective Employment Agreement. However, at the time of his dismissal, Steven Nicol appears to have been paid at the rate of $14.88 an hour, and I believe that this is the rate that should be applied, as this rate was paid from August 2010 without demurrer from the applicant until these proceedings.

[79] Steven Nicol worked 7.5 hours per week. Applying the rate of $14.88 an hour means that Steven Nicol was entitled to an annual gross income of $5,803.20. Steven Nicol was also entitled to holiday pay at 8%[7] pursuant to s.25 of the Holidays Act. This amounts to $187.49 ($14.88 x 7.5 x 21 weeks). Finally, Steven Nicol was entitled to a redundancy payment in the gross sum of $2,193, which the applicant has withheld. This amounts to a total gross entitlement of $8,183.69.

[80] In the 12 months from his last day of employment, Steven Nicol was paid a gross income of $10,321.90. I note from IRD records that Steven Nicol received extra payments in November 2011 and May 2012, but as the applicant does not seek to recover any purported overpayments that may have occurred prior to October 2012, these additional receipts are ignored in case they do not derive from Steve Nicol's employment.

[81] Deducting $8,183.69 from $10,321.90 leaves the gross sum of $2,138.21, which is the overpayment that was made to Steven Nicol. However, this is not the sum to be repaid to the applicant, as Steven Nicol should only repay the net figure to the applicant. The applicant is directed to calculate this net sum and seek to agree it with Steven Nicol, or John Nicol on Steven Nicol's behalf.

[7] It is understood that Steven Nicol argues that he was entitled to be paid holiday pay at 9.2% of gross earnings pursuant to clause 5.2.4(b) of the 2011-2013 Groundstaff Collective Agreement, but this version did not apply to Steven Nicol's employment, as explained in paragraph [76] above.

Orders

[82] The applicant is to calculate the net sum that is payable to it by Steven Nicol, by reference to my finding that Steven Nicol was overpaid by the gross sum of $2,138.21. Once it has done so, it is to advise Steven Nicol of this net sum in writing, showing its calculation as clearly as it can. Steven Nicol will then have 14 days from notification of this net sum to either agree with the applicant's calculation or to challenge it. In the latter case, Steven Nicol is to set out the basis of the disagreement in writing and send it to the applicant. This disagreement is only to relate to the calculation of the net sum, and no other matter.

[83] If the parties are unable to agree the net sum to be repaid within a further 14 days of disagreement having been communicated to the applicant, then the applicant may make an application to the Authority for the matter to be determined. If the parties agree on the calculation, then Steven Nicol is to repay the agreed net sum to the applicant by no later than 4pm on Friday 27 February 2015.

Costs

[84] As the investigation meeting held on 20 October 2014 related to the claims against both John and Steven Nicol, I reserve the matter of costs until after the overpayment to John Nicol has been quantified.

David Appleton
Member of the Employment Relations Authority