IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2019] NZERA 460
3043554

	BETWEEN	RAYCHEL IOATA Applicant
	AND	HUTT VALLEY BASKETBALL ASSOCIATION INCORPORATED Respondent

Member of Authority:	Michael Loftus
Representatives:	Richard Birkhead, for Applicant Brett Ross, for respondent
Investigation Meeting:	6 August 2019 at Wellington
Date of Determination:	6 August 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Ioata, claims she is yet to receive the holiday pay due upon cessation of her employment with HVBA.

[2] The respondent, Hutt Valley Basketball Association Incorporated (HVBA), is resisting the claim being of a view Ms Ioata's employment was fixed term and it could therefore address her leave entitlements on a pay as you go basis. It also suggests Ms Ioata may in fact have been overpaid as the job was seasonal and while not required to work for about six weeks each year she continued to be paid. While not seeking a recovery it is being argued fairness requires this be taken into account.

Background

[3] Ms Ioata was engaged by HVBA toward the end of 2013. The parties are unsure of the exact date but accept mid-December for present purposes.

[4] She was employed to perform a range of tasks including administration and work aimed at obtaining funding from various charitable sources. Primarily, however, the goal was to ensure the Association had a contact point who could field initial queries. This meant Ms Ioata need not necessarily be at work but had to be contactable. It also meant her hours were intended to be flexible.

[5] There was not, initially, a written employment agreement but the arrangement saw her regularly paid twelve hours each week along with additional sums for work organising playing leagues. The evidence suggests there is some seasonality involved as some of the leagues, but not all, involve school children and do not run all year.

[6] In April 2015 and after prompting from Ms Ioata's partner, Mr Birkhead, the parties signed an employment agreement. It purports to be fixed term though no expiry date is specified with cessation being said to occur *When the Grant Funding from NZ Community Trust finishes (subject to HVBA receiving such funding) or if HVBA decides to appoint a full time Senior Sports Administrator*.[1]

[7] The agreement also says the reason for a fixed term *... is because the role is funded by a Charitable Trust, therefore ongoing support is not guaranteed*.[2]

[8] The agreement provides the hours shall be variable with any in excess of 20 a week only being paid if the President agrees before work is undertaken.[3] Finally, at least for the purposes of this dispute, the agreement provides:

> 11.1 Holiday pay for Employees who are on genuine fixed term agreement of less than 12 months duration – where the holiday pay is paid on an "pay as you go" basis.
>
> 11.2 The parties agree that the Employer shall instead of paying the employee during any period of annual leave, pay the Employee's holiday pay at the same time that the Employee is paid their salary payment.

[9] Ms Ioata resigned with effect 18 December 2017. There was no holiday payment on cessation and while HVBA now agrees some is due it thinks four weeks fair.

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[1] Individual Employment Agreement dated 20 April 2015 at 3.1
[2] n 1 above at 3.2
[3] n 1 above at 8.1 and 8.2

[10] Wage records, such as they are, commence with signature of the employment agreement and record payment for 12 hours each and every week till cessation. There is nothing for the first sixteen or so months and no time records.

Discussion

[11] With respect to holiday pay the claims are as follows. $3,993.60 gross being holiday pay (8%) on the regular 12 hour payment from mid-December 2013 to cessation on 18 December 2017. There is a claim for a further $1792 being holiday pay on an amount Ms Ioata estimates she received for work relating to the leagues. This has been estimated on the basis she did 10 hours a week for a twenty eight week season each year. The evidence is this work was recognised via cash payments and there are no wage records.

[12] HVBA accepts holidays have never been paid as such and primarily relies on a defence that Ms Ioata had already benefited by reason of the pay as you go provisions. I cannot accept that. Clause 11.1 assumes a valid fixed term agreement of less than 12 months duration. Aside from the fact the employment continued for four years I do not accept there was a valid fixed term agreement. I do so for a number of reasons.

[13] First there is no evidence from either Ms Ioata or David Clyma, the then President of HVBA with whom Ms Ioata agreed the employment, that it was ever intended it be fixed term when first arranged. Indeed both strongly suggested the opposite and that the employment was intended to be ongoing.

[14] Second the evidence is the written agreement was obtained from the template of another employer – an employer which, I note, is known for some unique employment practices enabled for it alone by statute.[4] There is also no evidence the issue of pay as you go was discussed prior to signing.

[15] Third the rationale for a fixed term is contradictory and the idea one of the reasons the agreement might end is the job becomes full time tends to undermine the argument it is legitimately of a finite nature. Indeed the reasons used mean the employment could, effectively, be ongoing and as events transpired the fixed term was never invoked.

[4] Parliamentary Services

[16] Similarly clause 8.2 cannot apply. Once again it was never discussed but more importantly the contract cannot override statute and s 28 of the Holidays Act 2003 applies. In this instance that would preclude pay as you go as:

a. For reasons already explained there is no valid fixed term agreement;

b. The work is not so intermittent it is impractical for holidays to be allowed. Quite the contrary given Ms Ioata was consistently paid 12 hours a week plus some additional payments which could then be the subject of an average earnings calculation; and

c. There is no separate identification of the holiday component on the records that do exist.

[17] The second defence is the work was seasonal and while not said it is implied payment has therefore been made by continuing to pay during the Christmas off-season. Again I cannot accept this. I do so given the evidence of Ms Ioata and Mr Clyma who both said Christmas/January was in fact intended to be a busy period preparing funding applications for the upcoming year and arranging for the attendance of teams at various competitions. To this I add the fact Mr Ross accepts the concept of a seasonal break was never discussed with Ms Ioata and therefore her employment agreement was never altered to reflect such an arrangement.

[18] Finally there is the issue of the league work and here I record two points.

[19] The first is Mr Ross concedes such work was performed saying it continued for about a year after he came to the Association's committee in December 2016 and ceased when Ms Ioata *disassociated herself*. When asked what that meant he agreed it coincided with her departure. He also accepts payments were made for such work though he does say the league work is normally undertaken by volunteers and the payment is a form of enticement/recognition. That cannot be so in Ms Ioata's case given the evidence of David Clyma that such work was always intended to be undertaken as part of the employment and Mr Ross' concession there was never any discussion that might have altered that.

[20] The second is s 132 of the Employment Relations Act 2000 allows me to accept Ms Ioata's estimate of the amount owing where there are no records but the evidence shows they were requested and their absence impeded quantification of the

sum owing. In this case both preconditions have been evidenced and there is no suggestion from HVBA the estimate is flawed.

[21] For the above reason I accept Ms Ioata's claim and her estimate of what is owing.

[22] Finally there is a claim for costs but as Ms Ioata is represented by her partner and there is no evidence legal costs have been incurred these are limited to reimbursement of the Authority's filing fee. That is payable.

Conclusion

[23] For the above reasons I conclude Ms Ioata has succeeded with her claim and as a result I order the Hutt Valley Basketball Association Incorporated pay Raychel Ioata $5,785.60 (five thousand, seven hundred and eighty five dollars and sixty cents) gross being outstanding holiday pay plus a further $71.56 (seventy one dollars and fifty six cents) being reimbursement of the Authority's filing fee

[24] The payments specified in paragraph [23] above are to be made no later than 4.00pm Friday 6 September 2019.

Michael Loftus
Member of the Employment Relations Authority