

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 460
3079955

BETWEEN KIRSTY BAXTER
 Applicant

AND DAMERELL GROUP
 PROPERTY MANAGEMENT
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Tasha Ioelu, counsel for the Applicant
 Andrew Schirnack and Tanya Preston, counsel for the
 Respondent

Submissions: From the Applicant on 15 and 27 July 2021 and from
 the Respondent on 26 July 2021

Determination: 18 October 2021

FURTHER DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination Damerell Group Property Management Ltd must pay the following amounts to Kirsty Baxter:**
- (a) \$11,515.89 (gross) for annual holiday pay;**
 - (b) \$562.15 (gross) for public holiday pay; and**
 - (c) interest on those sums for the period from 30 August 2019 to the date of payment.**

Employment Relationship Problem

[1] This determination was required to resolve some points of difference between Kirsty Baxter and Damerell Group Property Management Ltd (DGPM) about the extent and value of her public holiday and annual leave entitlements. An earlier determination of the Authority found Ms Baxter's work for DGPM in the period from 17 August 2015

to 31 March 2018 was really carried out as its employee rather than as an independent contractor.¹ Because the existence of an employment relationship had not been properly recognised at that earlier time, entitlements due under it had not been provided.

[2] The parties were given an opportunity to work out between themselves what was due to satisfy those obligations now. Leave was reserved to seek a further determination if they and their lawyers could not complete that exercise. When they could not reach full agreement, they lodged memoranda about their differences and asked for this remaining matter to be determined on the papers. They also advised that they had resolved any question of costs for the proceedings so no Authority determination was needed on that issue.

[3] The earlier determination made the following findings on the arrears issue:

[53] An arrears order in this case needed a broad assessment of the outstanding entitlements, from which the parties could then practically calculate the amount DGPM must pay. For that purpose the period for which entitlements are due is to be taken as comprising two full years and eight months. For each whole year Ms Baxter was entitled to be paid annual leave of 20 days (that is four weeks) and 11 public holidays, that is 31 days' pay. For the part-year, the total is to be taken as a further 14 days of annual leave and seven paid public holidays. The result is an entitlement to 54 days of paid annual leave and 29 days of paid public holidays, totalling 83 days, for the two year and eight month period. The parties must apply the provisions of s 24 and s 49 of the Holidays Act 2003 to calculate the amount due, based on the relevant records regarding Ms Baxter's salary and actual earnings.

[54] Any paid leave Ms Baxter actually took during the relevant period should be excluded from the calculation. In her oral evidence Ms Baxter said she "took a day off here or there to have a long weekend, but not more than two or three days at a time."

[55] ...

[56] DGPM is [also] liable to pay Ms Baxter interest on the amount calculated as due to her for the annual leave and public holiday entitlements. Interest on the amount due for those entitlements must be calculated using the Ministry of Justice civil debt calculator for the period from 30 August 2019 to the date of payment.

What was agreed and what remained to determine

[4] DGPM and Ms Baxter, through their respective counsel, advised they had agreed she was owed 32 hours and 18 alternative days for having carried out some work

¹ *Baxter v Damerell Group Property Management Ltd* [2021] NZERA 154.

on 18 public holidays that fell during the relevant period. No finding or order was needed for payment of what was due for that element of the outstanding entitlements.

[5] They had also agreed Ms Baxter was owed payment for 11 public holidays on which she did not work. However the parties differed on a key factor in calculating the amount of pay due for those days. DGPM described the payment arrangement Ms Baxter worked under at the time of those public holidays as a “retainer”. The difference of opinion concerned whether that payment should be counted in or excluded from the annual gross earnings figure to be used in calculating whatever still needed to be paid for those 11 public holidays.

[6] The parties also disagreed over how many days could properly be deducted from the tally of 54 days that the earlier determination had found were due to Ms Baxter as annual leave. DGPM said the equivalent of 23.5 days had been taken as paid leave during the relevant period, leaving 30.5 days due for payment. Ms Baxter did not accept any days could validly be deducted as annual leave taken. At issue was whether she could or should be deemed to have received any pay for those days at the time and whether the days DGPM closed its office during an annual Christmas and New Year closedown could legitimately be described as providing paid annual leave.

The counterfactual scenario

[7] Resolving those issues required, in part, a counterfactual analysis. This considered what should have been done at the time, which may differ from the facts of what the parties actually did or thought at the time. The assessment was necessarily broad rather than precise.

[8] In Ms Baxter’s case a key factor concerned the nature of the income paid to her by DGPM in this period. She had signed an agreement labelled as a contract for services and in which she was defined as an independent contractor. Payment for her services was to be based on an annual “guaranteed minimum of \$45,000 income”, paid in monthly instalments. She was also to be paid commission on the various fees that DGPM could charge clients and tenants for her work.

[9] In the counterfactual analysis, where she is now deemed to be an employee rather than a contractor, the \$45,000 guaranteed income is to be treated as her salary. It was not a “retainer” for a period where an unspecified amount of work could be

sought from her. Rather, she received a monthly payment for her ordinary work carried out during her normal business hours. In the absence of any agreement otherwise, such a salary payment would not typically include more pay for additional hours worked outside those normal business hours. That conclusion would, of course, not to be adjusted if so many additional hours were worked that the salary payment fell below the requirements of the Minimum Wage Act 1983.

[10] Ms Baxter's evidence during the Authority investigation was that the normal business hours she was required to work in this period ran from 8.30am to 5pm on Monday to Friday and 10am to 2pm on Saturdays. It was a five-and-a-half day working week. The same hours were specified in an employment agreement she had later signed and worked under from 1 April 2018. That later agreement expressly provided for a "base salary".

Calculating the amount due for public holiday pay

[11] DGPM proposed calculating Ms Baxter's pay on the basis of her average daily pay for the 11 public holidays she and DGPM agreed she had not worked. This method is allowed under s 9A of the Holidays Act 2003. It applies a formula which divides the employee's gross earnings for 52 calendar weeks by the number of whole or part days on which the employee earned those gross earnings.

[12] Ms Baxter agreed with using the average daily pay formula but disagreed with the next step of DGPM's calculation. The company said the "guaranteed minimum income", paid in monthly instalments, should be treated as if it were a salary. On that analysis the monthly payments made to her covered the ordinary working days that fell on those public holidays that she had not been required to do any work. As a result DGPM submitted Ms Baxter had already received her ordinary salary for those days and, once the average daily pay was calculated, the payments for those days should be deducted from that amount.

[13] The remainder of the gross earnings comprised commission payments Ms Baxter earned on fees she generated in the relevant period. Once the "guaranteed minimum income" or salary amount was deducted, the remainder due for the average daily pay calculation applicable to those 11 public holidays totalled only \$562.15.

[14] Ms Baxter submitted the “retainer” did not compensate her for paid holidays and leave so a reduction as proposed by DGPM should not be made. However that submission was inconsistent with the finding already made in this determination that the guaranteed income was really a salary and not a retainer. It did include payment for ordinary working days that fell on a public holiday and, as such, DGPM was entitled to deduct the amounts already paid.

[15] The result on this point was that DGPM had to pay Ms Baxter an additional \$562.15 (gross) to satisfy the remainder of its obligation to pay average daily pay for those 11 public holidays.

Annual holidays

[16] The parties had been asked to resolve a factual issue of how many days of paid leave Ms Baxter had actually taken of the 54 days found to be due to her as annual leave in the relevant period.

[17] The memoranda they lodged, appending correspondence on the issue between their respective counsel, show Ms Baxter had not provided information consistent with her evidence at the Authority investigation meeting. She had referred there to having taken a number of days off through the period of more than two-and-a-half years. However the information subsequently provided identified only one day – on 30 December 2015.

[18] In addition to that one day DGPM said Ms Baxter had been on paid annual leave for 22.5 days. Those days comprised the two summer closedowns of its office that occurred during the relevant period. Ms Baxter submitted there was no evidence she had not carried out work during some of those days because she recalled “often working” on days through the closedown. Equally, there was no evidence confirmed in any reliable way that she had actually worked on one of those days.

[19] Ms Baxter submitted that the Authority could apply its discretion under s 132 of the Employment Relations Act 2000 to prefer her account of events relating to those days, and arrears due for them, because DGPM failed to keep wage time and wage records relating to her work in that period. This failure was because, at the time, DGPM wrongly regarded her as a contractor and did not keep leave records of the type required for employees.

[20] However, as is clear from s 132(2), there is a discretion for the Authority to make a finding of that kind, not a requirement to do so. In this case the evidence from Ms Baxter was insufficient to prefer her account and to exercise that discretion in her favour.

[21] Rather, the only significant question was whether the annual closedowns were a legitimate basis for making deductions from her entitlement. The answer required a counterfactual analysis.

[22] If Ms Baxter had been treated as an employee, as she should have been, she could have been required to take annual holidays during the closedown period. Such an arrangement is permitted under s 32 of the Holidays Act 2003. It is more likely than not that DGPM would have required her to take leave at that time if she had been recognised as an employee but had not agreed to take those holidays.

[23] Accordingly, those days could properly be regarded as holidays taken as part of a required closedown. Because the guaranteed minimum income has been deemed to be salary, those days were also paid for as part of that payment. As a result those 22.5 days were legitimately deducted from Ms Baxter's annual holiday entitlement.

[24] The total days of annual leave for which DGPM must still pay Ms Baxter is 30.5 days.

[25] There is however one point of difference which should be resolved in Ms Baxter's favour. She submitted, correctly, that her entitlement to annual leave set in the earlier determination was implicitly calculated on the basis of a five day week, not running into a sixth day as described in her evidence.² As a result the divisor for the 30.5 days still owed to her should be 5, not 6 as DPGM had used in its calculation of the amount due.

[26] Making that correction, as part of the broad assessment, the following calculation sets the amount due for those 30.5 days of annual leave.

[27] Ms Baxter's gross earnings for the 12 months immediately before the end of her last pay period were \$98,167.99. As such, her average weekly earnings for the year

² *Baxter*, above n 1, at [53].

were \$1,887.85. As that amount was slightly higher than her ordinary weekly pay in her last week of work, her average weekly pay was the appropriate rate to use in calculating the value of the annual holiday pay.³

[28] The 30.5 days for which holiday pay was due are deemed to comprise 6.1 weeks for the purpose of this calculation. Applying the average weekly earnings of \$1,887.85 to 6.1 weeks results in \$11,515.89 (gross) as the annual holiday pay due to Ms Baxter.

Orders

[29] Within 28 days of the date of this determination, DPGM must pay Ms Baxter the following sums:

- (a) \$562.15 (gross) for public holiday pay;
- (b) \$11,515.89 (gross) for annual holiday pay; and
- (c) Interest on those amounts for the period from 30 August 2019 to the date of payment.

[30] Interest is to be calculated using the Ministry of Justice civil debt calculator.⁴

[31] There is no issue as to costs in relation to this determination.

Robin Arthur
Member of the Employment Relations Authority

³ Holidays Act 2003, s 24(2).

⁴ www.justice.govt.nz/fines/civil-debt-interest-calculator.