

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 319
3134018

BETWEEN	SHANNAN WAYNE NICHOLS Applicant
AND	TITAN CONSTRUCTION LTD First Respondent
AND	LEON WILLIAM TRACEY Second Respondent

Member of Authority: Rowan Anderson

Representatives: Applicant in person
Leon William Tracey for the First Respondent
Second Respondent in person

Investigation Meeting: 19 April 2022 at Auckland

Submissions received: 19 April 2022 and 25 April 2022 from Applicant
19 April 2022 and 4 May 2022 from the First and
Second Respondents

Determination: 13 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Shannan Wayne Nichols claims that Titan Construction Ltd (Titan) failed to make payment for annual holidays not taken by him during his employment.

[2] Titan does not deny that annual holidays were not paid when Mr Nichols's employment ended. Titan instead claims that it should not be required to make payment

because tools went missing during Mr Nichols's employment and because he subsequently went to work for a former client of Titan.

[3] Mr Nichols also seeks leave to recover any outstanding sum from Leon William Tracey, the sole director and shareholder of Titan, as a person involved in a breach under s 142Y of the Employment Relations Act 2000 (the Act).

Background

[4] Mr Nichols was employed by Titan as an apprentice builder and carpenter and commenced working as an employee of Titan on or about 30 January 2017. Mr Nichols provided a copy of an unsigned individual employment agreement to the Authority referencing that date. Mr Tracey, when giving evidence, said that there were other versions of the employment contract, but that he didn't think there was any difference between them that was relevant.

[5] Titan carried on business as a construction contractor, with a focus on carpentry, and would subcontract to other construction firms. Titan was founded by Mr Tracey in 2011. Mr Tracey gave evidence that Titan stopped trading in approximately July 2020, approximately one month after Mr Nichols left his employment. The business at various times employed or engaged other workers, although Mr Tracey said that the only employee during approximately the last six months Titan was trading was Mr Nichols.

[6] Mr Nichols's hours of work were subject to some change. However, he usually worked from 7.00am to 5.00pm Monday to Thursday, and from 7.00am to 2.30pm on Fridays. The process of recording hours of work depended on the job/site that Titan was contracted to, but often Mr Nichols would simply advise Mr Tracey what his hours of work were by text message.

[7] Mr Nichols gave notice of his resignation to Mr Tracey on 15 June 2020, and his final day of work for the Titan was on 26 June 2020. The fact that he was not paid any amount for any untaken annual holidays at the time of his employment ending is not itself disputed by Titan.

The issues

[8] The issues requiring investigation and determination are:

- (a) Is Mr Nichols owed unpaid holiday pay?

- (b) Is Mr Tracey a person involved in a breach of minimum standards by Titan, and if so, should he be liable default in the payment of wages?
- (c) Should either party contribute to any costs of representation incurred by the other party?

The Authority's Investigation

[9] A case management conference was held on 2 November 2021 and an investigation meeting was scheduled for 19 April 2022.

[10] A written witness statement was lodged from Mr Nichols in advance of the investigation meeting. The lodgement of that witness statement was in accordance with directions issued at the case management conference. Titan were provided an opportunity to lodge any witness statements prior to the investigation meeting. However, Titan did not do so.

[11] The Authority held an investigation meeting on 19 April 2022 in Auckland. Neither Mr Tracey, nor any other representative of Titan, was present at the scheduled start time of the investigation meeting. At my direction, an Authority Officer attempted to telephone Mr Tracey approximately fifteen minutes after the scheduled start time. Initial attempts to contact Mr Tracey were unsuccessful. However, Mr Tracey returned the call a short time later and then subsequently confirmed that he was able to fully participate in the investigation meeting by telephone.

[12] The investigation meeting ultimately commenced at approximately 10.34am with Mr Nichols present, and with Mr Tracey in attendance by telephone. The Authority heard evidence, under affirmation, from both Mr Nichols and Mr Tracey. The parties were also given the opportunity to make oral submissions.

[13] At the investigation meeting, the Authority issued directions seeking further information as to the calculation of the claimed outstanding sum, and additionally providing Mr Tracey a further opportunity to provide any response as to whether he should personally be joined to the proceedings and whether he should be liable for any payment under s 142Y of the Act.

[14] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Relevant Law

[15] Sections 24 and 25 of the Holidays Act 2003 set out the basis on which annual holiday pay calculations are to be made where employment ends. In circumstances where an employee's employment has come to an end, the employer must pay the annual holiday pay in the pay that relates to the employee's final period of employment.¹

Discussion

[16] The documents and evidence before the Authority show that Mr Nichols was not paid the annual holiday pay that he was entitled to.

[17] Mr Nichols gave evidence that at the time his employment with Titan ended, he was being paid \$28.00 gross per hour. When asked as to the calculation of the claimed total of \$7,487.48 gross, Mr Nichols stated that he had arrived at that sum by multiplying the hours of annual holiday pay owed, as listed on a final payslip², by his hourly rate of \$28.00 gross. Mr Nichols later clarified in submissions that the amount claimed was actually \$7,047.04 gross.

[18] In questioning by the Authority, Mr Tracey gave evidence that the payslips issued to the applicant throughout his employment were accurate. Mr Tracey could not confirm the precise hourly rate that Mr Nichols was being paid at the relevant time, but he agreed that it was either \$28.00 per hour or close to that amount.

[19] At the conclusion of the investigation meeting, I directed that a copy of the final payslip be provided to the Authority.

[20] On 27 April 2022 Mr Nichols emailed a copy of his final payslip to the Authority. Titan and Mr Tracey were provided the payslip and given an opportunity to respond to the calculations provided by Mr Nichols. The payslip of 3 July 2020 records that as of that date, Mr Nichols had 23.85 days of annual leave available. Further, the

¹ Holidays Act 2003, ss27(1)(b) and (2).

² Payslip dated 3 July 2020.

payslip confirms, when a calculation is performed by taking the total recorded gross pay and dividing it by the recorded hours of work for the relevant period, that Mr Nichols's rate of pay was \$28.00 gross per hour.

[21] On 4 May 2022 Mr Tracey provided submissions by email to the Authority. Mr Tracey stated in those submissions that the amount claimed by Mr Nichols was disputed. However, neither Titan nor Mr Tracey have provided any alternative evidence or calculation as to Mr Nichols's annual holiday entitlements, despite Titan being obligated to keep a holiday and leave record for Mr Nichols in accordance with s 81 of the Holidays Act 2003.

[22] I accept the evidence of Mr Nichols as to the relevant rate of pay, and the amount of annual holiday leave as evidenced by the payslip of 3 July 2020. That payslip was provided to Mr Nichols by Titan, and I have no reason to doubt its accuracy. I calculate that the amount of annual holiday pay that Mr Nichols is owed is \$7,047.04 gross.

TCL's Counterclaims

[23] Mr Tracey gave evidence to the effect he considered Titan should not have to make payment to Mr Nichols because of behaviour he considered to be 'unethical'.

[24] Mr Tracey disputed the need to make the payment on two grounds. Firstly, he considered that Mr Nichols bore responsibility for tools belonging to Titan that had gone missing. Secondly, Mr Tracey asserted that Mr Nichols went to work for a competing company and that in doing so breached a non-solicitation clause in the individual employment agreement.

[25] Titan's evidence in relation to the responsibility for tools was, at best, extremely vague. Mr Nichols gave evidence that no specific allegations were raised in relation to missing tools during his employment and that neither Titan or Mr Tracey sought to recover the cost of missing tools during his employment.

[26] The alleged loss by Titan has not been quantified in any meaningful way³, nor has Titan provided sufficient evidence to establish that Mr Nichols was responsible for

³ Mr Tracey, in his email submission of 4 May 2022, submitted that "...at least \$4,500 dollars worth of equipment has been misplaced...". However, no reasonable or reliable basis for that assertion has been disclosed.

any such loss, let alone that Mr Nichols should as a result be deprived of payment for annual holidays. Mr Tracey confirmed that his concerns about tools related to alleged carelessness by Mr Nichols rather than dishonesty. The claims made by Titan as to missing tools have not been made out.

[27] Titan also claims that Mr Nichols acted in breach of non-solicitation obligations contained in his individual employment agreement. The relevant clause in the individual employment agreement is as follows:⁴

35. Non-Solicitation

The Employee shall not at any time during the period of employment or for a period of three years after termination of employment, for whatever reason, either on the Employee's own account or for any other person, firm, organisation or company, solicit, endeavour to entice away from or discourage from being employed by the Employer, any other employee or actual client / customer or prospective client / customer of the Employer.

[28] There is no evidence to support a breach of clause 35. Mr Nichols's evidence was that he was employed, after his employment with Titan ended, by a contractor that Titan had subcontracted to. There is no evidence to establish that Mr Nichols solicited the contractor in any way, nor is there evidence that he enticed the contractor/client away from Titan. In that context, the non-solicitation clause has no application. The mere fact that Mr Nichols performed work for the contractor does not establish a breach of clause 35.

[29] So far as Titan might consider Mr Nichols's performance of work for the contractor as an issue, it is significant to note that the non-solicitation clause does not purport to operate such as to place a restraint on all work performed for a client of Titan. Even if the clause did purport to restrain such work in the relevant circumstances, a covenant in restraint of trade is prima facie unlawful. To overcome that, Titan would have needed to establish a legitimate proprietary interest requiring protection, and if successful in that, would have had to have shown the restraint to be no wider than necessary.⁵ Titan did not lodge any witness statements, nor did it offer any evidence sufficient to establish a relevant proprietary interest that might justify such a restrictive covenant.

⁴ Individual Employment Agreement, dated 30 January 2017, clause 35.

⁵ *Air New Zealand v Kerr* [2013] NZEmpC 153 at [23].

[30] Mr Tracey no doubt felt aggrieved by Mr Nichols leaving his employment and then working for the contractor, and also by what he perceived as dishonesty in terms of Mr Nichols intentions in relation to alternative work. However, that in no way justifies the withholding of minimum employment standards in the form of payment for annual holidays.

[31] The counterclaims made by Titan have not been made out, nor would they in my view otherwise have justified the withholding of a minimum employment standard in the form of payment for annual holidays.

Section 142W of the Act – liability for breach of employment standards

[32] At the investigation meeting leave was sought by Mr Nichols to have Mr Tracey joined as a respondent. That application was made on the basis that Mr Tracey was a person involved in a breach of employment standards and that he should be liable for any default in payment pursuant to s 142Y of the Act.

[33] The level of knowledge required to establish liability for a “person involved in a breach” of employment standards under s 142W(1) of the Act is “...knowledge of the essential facts that establish the contravention by the employer”.⁶

[34] Mr Tracey is the sole director and shareholder of Titan. Mr Nichols gave evidence that he dealt directly with Mr Tracey when engaging with Titan, including in relation to payroll and administrative matters.

[35] The Authority was provided a series of screenshots of text messages between Mr Nichols and Mr Tracey from between 6 July 2020 and 28 September 2020. The text messages include enquiries from Mr Nichols as to his holiday pay made on 7 July 2020, 14 July 2020, 18 July 2020, 20 August 2020, 30 August 2020, and 28 September 2020. The responses from Mr Tracey were varied. However, they clearly exhibit an understanding on the part of Mr Tracey that holiday pay had not been paid. This included responses seeking meetings to “...sort it out...”, references to being “...skint as...”, and references to the possibility of going bankrupt.

⁶ *A Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 at [58] and [59].

[36] Whilst Mr Tracey gave evidence that, at times, he was assisted in matters such as payroll systems, he acknowledged that he was responsible for the day-to-day operations and would input and run the payroll system. Mr Tracey also agreed that Mr Nichols would, from time to time during his employment, make annual holiday requests directly to Mr Tracey and that he would process them and ensure payment was made.

[37] Mr Tracey was provided an opportunity to respond to the issue at the investigation meeting and stated that neither Titan nor he as an individual had the funds to make payment of the claimed sum. As recorded elsewhere in this determination, the Authority provided a further opportunity to Mr Tracey to respond in writing following the investigation meeting. Mr Tracey provided a response by email on 4 May 2022. The issues raised in that response are not in my view relevant to any finding of personal liability.

[38] I am satisfied that Mr Tracey had actual knowledge of the essential facts establishing the contravention by Titan. Mr Tracey knew that Mr Nichols was entitled to payment for outstanding annual holidays and that Titan did not make the relevant payment. I find that Mr Tracey is a person involved in Titan's contravention of minimum employment standards in terms of s 142W(1)(c) and that, to the extent that Titan is unable to pay the arrears ordered, leave is granted and Mr Nichols is entitled to recover that sum from Mr Tracey personally.

[39] Mr Tracey made submissions to the effect that any order requiring payment would be unfair as it may result in bankruptcy and otherwise impact him personally. However, I find that in the circumstances, including that default in payment of the annual holidays has been a known issue for approximately two years and that there is no evidence that the financial position of Titan will improve, that payment by instalments is not appropriate.

Orders

[40] The following orders are made:

- (a) Titan Construction Ltd is ordered to pay Mr Nichols, on or by 1 August 2022, unpaid annual holiday pay in the amount of \$7,047.04 gross.
- (b) To the extent Titan Construction Limited does not pay the sum above because it is not able to, Mr Tracey is ordered to pay Mr Nichols, on or by 15 August 2022, unpaid annual holiday pay in the amount of \$7,047.04 gross.

Costs

[41] Neither party was represented and there is no issue as to costs.

Rowan Anderson
Member of the Employment Relations Authority