IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 117
EMPC 310/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SHANE HATCHER Plaintiff
AND	BURGESS CROWLEY CIVIL LIMITED Defendant

Hearing:	23 July 2019 (Heard at New Plymouth)
Appearances:	L E Hansen, counsel for plaintiff T Wano, counsel for defendant
Judgment:	4 September 2019

JUDGMENT OF JUDGE J C HOLDEN
(Preliminary issues: Holidays Act 2003, s 81(4) and s 83)

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[1] The plaintiff, Mr Hatcher, was employed by the defendant, Burgess Crowley Civil Ltd (Burgess Crowley) between 28 March 2004 and 9 November 2016. Mr Hatcher considers that the amount he was paid by way of holiday pay (including for public holidays, and alternative days off) when his employment with Burgess Crowley ceased was less than it ought to have been.

[2] Burgess Crowley provided Mr Hatcher with his holiday and leave information for the period January 2010 to November 2016. Holiday and leave information for his employment prior to January 2010 was not retained by Burgess Crowley. In that

context, the parties requested a preliminary hearing to determine the following questions:

(a) Does s 81(4) of the Holidays Act 2003 (Holidays Act) require an employer to keep and retain an employee's holiday and leave record for the entire employment period of the employee?

(b) In the event the Court determines that the employer has not complied with s 81(4) of the Holidays Act, what, if anything, are the consequences for the employer as regards s 83 of the Holidays Act?

[3] This judgment resolves those questions.

Section 81(4) limits employers' record-keeping obligations

[4] Section 81(2) of the Holidays Act requires employers to keep a holiday and leave record showing certain employment and leave information for each employee employed by them.

[5] Section 81(4) provides:

> Information entered in the holiday and leave record must be kept for not less than 6 years after the date on which the information is entered.

[6] Burgess Crowley argues that s 81(4) recognises that businesses should not be required to keep records indefinitely and provides a specified timeframe for the retention of the holiday and leave record. It says, as its holiday and leave record for Mr Hatcher goes back six years, it has complied with s 81(4).

[7] Mr Hatcher says that the correct interpretation of s 81(4) is that the employer must keep an employee's holiday and leave record for the entire employment period, and for an additional six years after the ending of the employment relationship.

[8] In making this submission, Mr Hatcher starts with the requirement in s 5 of the Interpretation Act 1999 to consider the text of s 81, as well as surrounding sections and legislation.

[9] He points to s 27 of the Holidays Act, which requires an employer to pay an employee outstanding holiday pay when the employee's employment comes to an end. He says, for employees whose employment is longer than six years, compliance with s 27 could not properly be tested unless the employer has kept a holiday and leave record for the duration of the employee's employment.

[10] Mr Hatcher then points to the opening words of s 81(2) "An employer must *at all times* keep a holiday and leave record…" (emphasis added).

[11] He says that the obligations in s 27 and the inclusion of the words "at all times" in s 81(2) together mean that s 81(4) must refer to the entire employment period. He also points to the reference in s 142 of the Employment Relations Act 2000 to actions having to be commenced not more than "6 years after the date on which the cause of action arose". As a claim for holiday pay crystallises on termination of employment, the cause of action arises at that time. This, Mr Hatcher says, supports his interpretation of s 81(4).

[12] The rationale behind Mr Hatcher's argument is understandable. An employee's entitlement to paid holidays exists until those holidays are taken or until the employment ceases, at which time payment is due in respect of outstanding holiday entitlements. There potentially is a difficulty if an employee has worked for longer than six years and his or her holiday and leave record is only for the previous six years.[1] The issue, though is whether, notwithstanding that potential difficulty, s 81(4) limits the employer's s 81 record-keeping obligations.

[13] Mr Hatcher appears to accept that s 81(4) provides the timeframe for which the employer must keep the information in its holiday and leave record, so that, if the employer complies with s 81(4), it has met its legal obligation as to how long it needs to retain the information in the holiday and leave record. That must be right; otherwise, s 81(4) has no purpose.

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[1] From 1 April 2016, s 4B of the Employment Relations Act 2000 requires an employer to keep records in sufficient detail to demonstrate compliance with minimum entitlements, including under the Holidays Act 2003. This applies in addition to other record-keeping requirements.

[14] Mr Hatcher's argument is that the words "not less than six years after the date on which the information is entered" in s 81(4) must be read as "not less than six years after the date on which the employee's employment terminates". Essentially, Mr Hatcher is arguing that the specific reference point from which the six years is calculated, included in s 81(4), must be substituted with a quite different reference point to overcome the practical difficulty that otherwise may arise.

[15] Not only does that go against the plain words of s 81(4), it is contrary to other indicators of Parliamentary intent.

[16] Section 81 replaced s 31 of the Holidays Act 1981. Section 31 required employers to keep a "holiday book" containing information about each employee and their holiday entitlements. Section 31(3) provided "The holiday book in use for the time being, and any such book used within the preceding 6 years, shall at all times be open to the inspection of an Inspector of Factories". That clause limited employers' obligations to keep their holiday books for six years.

[17] There was no suggestion at the time that the Holidays Act 2003 was enacted that the intention behind the provision was to change.

[18] The point is reinforced by s 81(5), which allows employers to keep its holiday and leave record so as to form part of the wage and time record required to be kept under s 130 of the Employment Relations Act. Section 130(2) requires employers to provide employees with the information in the wage and time record relating to their employment for the preceding six years. If the employer was obliged to provide holiday and leave information for more than six years, this would be inconsistent with the employer keeping its holiday and leave record as part of the wage and time record. That too points to the time periods in s 81(4) and in s 130(2) of the Employment Relations Act being the same.

[19] In conclusion, s 81(4) of the Holidays Act provides a limit on the requirement for employers to keep information in its holiday and leave record. A specific reference point is used – the date on which the information is entered. Notwithstanding the potential difficulty that could arise, that specific reference point cannot be read as

Mr Hatcher submits. Section 81(4) thereby provides a rolling time frame of not less than six years per entry, so that an employer who keeps the information required by s 81(2) in its holiday and leave record for six years from the date on which the information is entered into the holiday and leave record has complied with s 81(4).

[20] That answers the first question. It also means that s 83 would not come into play. Nevertheless, I address the second question.

Section 83(4), where applicable, shifts the onus of proof

[21] If an employer fails to keep a holiday and leave record, as required by s 81, or fails to provide access to the holiday and leave record, as required by s 82, and that failure prevents an employee from bringing an accurate claim, the Authority (or the Court on a challenge) may make a finding to that effect.[2] If such a finding is made, s 83(4) allows the Authority or Court to accept as proved, in the absence of evidence to the contrary, statements made by the employee about the extent to which holidays or other leave have been taken and/or paid. It remains open to the employer to submit evidence that would counter the statements made by the employee.

[22] The use of "may" in s 83(4) means too that it remains open for the Authority or Court not to accept the employee's statements.[3] However, in view of s 83(3), something more than a mere concern about some imperfections would be required. An example would be where the Authority or Court finds that the employee's statements are simply not credible.

[23] If the employer has complied with s 81 (and s 82), it is still open to the employee to claim that he or she has not received his or her full entitlement to holiday pay, but the onus would rest on the employee to prove his or her claim on the balance

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2 Holidays Act 2003, s 83(3).

3 *Glenmavis Farm Partnership (2007) v Todd* [2012] NZEmpC 137, (2012) 10 NZELR 338 at [45]; *Rainbow Falls Organic Farm v Rockell* [2014] NZEmpC 136, [2014] ERNZ 275 at [29].

of probabilities. This may include where an employee makes a claim in respect of service dating back more than six years.[4]

[24] In summary, therefore, the answers to the questions posed by the parties are:

(a) It is not a breach of s 81(4) if an employer does not keep the information required to be entered into the holiday and leave record beyond six years from the date on which the information is entered into the record.

(b) Where an employer fails to keep this information in the holiday and leave record for the period required, and that prevents the employee from bringing an accurate claim, then, in the absence of evidence to the contrary, the Authority (or the Court on a challenge) may accept as proved statements made by the employee about holiday and leave pay actually paid to the employee.

[25] The Registrar should now arrange a further telephone directions conference with counsel to progress the substantive challenge to trial.

[26] Costs are reserved.

J C Holden
Judge

Judgment signed at 10.45 am on 4 September 2019

[4] But subject to the limitation in s 142 of the Employment Relations Act 2000.