

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 - s. 278 - power to recover unpaid wages and superannuation contribution etc.*

**John Hugh Power (for Rodney Alex Putna) AND  
Torres Strait Island Regional Council  
(B/2009/84)**

DEPUTY PRESIDENT BLOOMFIELD

9 March 2011

DECISION (No. 2)

**Background**

[1] On 5 November 2010 I released a Decision in relation to an application under s. 278 of the *Industrial Relations Act 1999* (the Act) by Mr John Hugh Power, a duly appointed Inspector under the provisions of the Act, where Mr Power had sought an order that Torres Strait Island Regional Council (the Council) pay certain monies alleged to still be owing to Mr Rodney Alex Putna.

[2] The total amount claimed was \$39,271.90, made up as follows:

- |   |             |
|---|-------------|
| • Wages payable for the period 7 April 2008 to 11 July 2008   | \$20,997.34 |
| • Five weeks' annual leave and loading accrued during the period 20 November 2006 to 19 November 2007   | \$8,811.38  |
| • <i>Pro rata</i> annual leave and loading, on the basis of five weeks' per annum, accrued in the period 20 November 2007 to 11 July 2008           | \$4,963.75  |
| • Balance of isolation leave accrued during the period 20 November 2006 to 19 March 2008 as per Clause 9.2 of the Employee's contract of employment | \$4,499.43  |

**TOTAL AMOUNT CLAIMED** \$39,271.90

[3] In the course of my Decision I wrote:

*"[37] In the end result, I have concluded that:*

...

- *In accordance with* (an agreement between he and the Saibai Island Council), *Mr Putna's employment was to continue until 28 March 2008, at which time it was to cease. In fact, he authorised for himself to be paid until (apparently) 6 April 2008.*
- *On the basis of the above findings Mr Putna has been paid all wages to which he was entitled. Accordingly, I reject Mr Power's claim on behalf of Mr Putna for unpaid wages between 7 April 2008 and 11 July 2008.*
- *Mr Putna has no entitlement to isolation leave for several reasons. Firstly, he worked for roughly two weeks on the Island (he claims he worked 14 days straight but Ms Menzies evidence suggests it was only 12 days) before he returned to Cairns for two weeks. This fly-in/fly-out arrangement, which the Council apparently agreed to, sits at complete odds with the notion of "isolation". The provision at Schedule C, concerning provision of an annual airfare, is more representative of that concept.*

*Secondly, it is noteworthy that no isolation leave was ever claimed before (in effect) his last working day on Saibai Island, most notably during the period when Ms Menzies was the Financial Controller. Even then, the one week's pay he received on or about 12 March 2008 was only obtained, in my view, by deceit on Mr Putna's part. When she found out about it, the payment was immediately challenged by Ms Menzies on the basis he was not entitled to it.*

*Thirdly, Mr Putna's working arrangements meant that he worked 17 days out of a possible 20 working days each 28 day period. Leaving aside public holidays, this meant he had three "working days" (not counting weekends) free from duty each four weeks, or 39 days over 12 months. This is far in excess of the 15 days provided for in the Contract.*

- *The Respondent has accepted (see paragraph [3] above) that Mr Putna is owed some annual leave and pro rata annual leave payments in relation to his period of employment with the Council. Given my*

*findings about Mr Putna's general credibility I have some difficulty accepting his evidence that no annual leave was taken during the whole of his period of employment. In those circumstances, it would be best for the Respondent to search the records of the Council to try to identify the amount of annual leave which might be still owing to Mr Putna. While this is ultimately a matter for the Respondent (which will be faced with the circumstance that Mr Putna - on his own admission - never completed any timesheets), I simply note that the records of flights taken by Mr Putna during the relevant period might assist in making the calculation. On the evidence presented it is generally accepted that he worked on Saibai Island for approximately two weeks out of each four.*

*In any event, I note that the provisions of the second paragraph of Clause 9.1 - Annual Leave, do not support Mr Power's claim for 17.5% loading on untaken annual leave and pro rata annual leave nor payment for pro rata leave on the basis of five weeks per annum. The Clause clearly provides that untaken annual leave standing to an employee's credit on their termination is to be paid on the basis of five weeks pay for each year of employment and one-twelfth of the employee's pay for a period of less than one year. There is no mention of annual leave loading being paid on either accrued leave or pro rata leave on termination of employment. The Clause provides that loading is to be paid for periods of annual leave, not on the cash equivalent.*

[38] *In the circumstances, I direct the Respondent to calculate, within a period of 28 days from the date of release of this Decision, the amount of annual leave and pro rata annual leave said to still be owing to Mr Putna. An affidavit, setting out how such amount was calculated is to be prepared and served on the Applicant, and filed in the Commission, within that 28 days. The affidavit is to have appended to it copies of **all** source data used to calculate the amount of annual leave said to still be owing (such as airline flight records, details of the days on which rent was charged for the house on Saibai Island, etc).*

[39] *In the event that the Applicant disputes the calculation made by the Respondent, the Applicant is write to the Respondent, as well as the Commission, within 42 days of the date of release of this Decision setting out the nature of the challenge.*

[40] *If there is any such challenge my Associate will contact the parties to arrange a telephone proceeding to discuss how the matters in dispute might be determined."*<sup>1</sup>.

[4] On 14 December 2010 Mr Paul Gwydir, who appeared for Mr Power, complained that the Council had failed to provide the calculations as directed in my 5 November 2010 Decision and sought an urgent re-listing of the matter. During a telephone hearing on 20 December 2010:

- the Council was given until 4 February 2011 to provide the requisite affidavit setting out the amount of annual leave it calculated as still owing to Mr Putna (this date was subsequently extended by a few days because of the approach of cyclone Yasi towards Cairns where the relevant Council Officer was based); and
- Mr Gwydir was requested to seek information from Mr Putna concerning dates he may have travelled between Cairns and Saibai Island. Knowledge of the time spent on Saibai Island would assist all participants in the proceedings to establish whether Mr Putna had taken any leave during the period of his employment (20 November 2006 until 28 March 2008) or not.

[5] As it transpired, Mr Putna was able to identify 27 flights between Cairns and Horne Island. Only a few of these involved a return trip. The others identified a trip in one direction only. However, Mr Putna also advised that during his employment with the Saibai Island Council he submitted a monthly report which included details of all travel he had undertaken in that month, as well as work he undertook while in Cairns.

[6] On 7 February 2011 Mr Noel Peters, Executive Manager Human Resources of the Council, filed an affidavit in purported compliance with the Commission's direction of 5 November 2010. Attached to the affidavit were three documents (the exact relevance of which was not explained):

- Attachment A: List of payments made to Mr Putna - including for airfares;
- Attachment B: Copy of email from Mr Gwydir showing details of flights by Mr Putna between Cairns and Horne Island; and
- Attachment C: Payroll records for Mr Putna.

[7] In the course of his affidavit Mr Peters stated that Mr Putna returned to Cairns on 24 December 2007 after only working for one week on Saibai Island, compared to the usual two weeks. He returned to Saibai on 8 January 2008. On the basis of this travel pattern Council believed a period of 10 working days (or two weeks) should be

<sup>1</sup> *John Hugh Power (for Rodney Alex Putna) AND Torres Strait Island Regional Council (B/2009/94) - Decision <http://www.qirc.qld.gov.au>.*

taken from Mr Putna's annual leave entitlement as all other employees, except for emergency services personnel, took leave at this time.

- [8] Mr Peters also stated that Mr Putna had arranged to be paid an additional weeks' pay, as isolation leave, prior to the cessation of his employment when he was not entitled to be paid that money.
- [9] Accordingly, Council calculated the amount owing to Mr Putna to be \$6,290.09 calculated as follows:

3 weeks' annual leave (balance of leave for the period 20 November 2006 until 19 November 2007)	3 x \$1442.31	\$4327.11
Annual leave loading 5 weeks at 17.5% (5 x \$1442.31 = \$7211.55)	\$7211.55 x 17.5%	\$1262.00*
1/12 of 17 weeks' pay (20 November 2007 until cessation of employment)	\$24,519 / 12	\$2043.27
		<b><u>\$7632.38</u></b>
<u>Less</u> 1 week paid on 13 March 2008 as isolation leave	\$1442.31	\$1442.31
	<b>TOTAL</b>	<b><u>\$6290.09</u></b>

\*It is unclear why Council has included this figure in its calculation. In my 5 November 2010 Decision (see above) I determined Mr Putna was not entitled to annual leave loading under his contract of employment because the relevant clause provides that loading is to be paid for periods of annual leave, not on the cash equivalent.

- [10] By letter dated 18 February 2011 Mr Gwydir challenged Mr Peters calculations (above). In doing so, Mr Gwydir submitted that the points made by Mr Peters were "*pure speculation*", unsupported by any documents.
- [11] Mr Gwydir also highlighted that Mr Putna had deposed that he submitted a monthly report to the Saibai Island Council which included details of the travel he had undertaken and the work he performed in Cairns. He said this statement had not been disputed by the Council, which appeared not to have accessed these reports as there was no reference to them in Mr Peters' affidavit. Mr Gwydir further noted that Mr Putna had deposed that he had not taken any annual leave during the period of his employment. This statement had not been disproved by the Council.
- [12] Finally, Mr Gwydir argued that Council had no right to offset moneys paid to Mr Putna on 13 March 2008 as isolation leave against the annual leave and pro rata annual leave to which he was entitled (per Asbury C in *DIR v Tick Tock Australia Pty Ltd*<sup>2</sup> citing Hall P in *Haggarty Group Pty Ltd v Justin Wallace*<sup>3</sup>). In her Decision on the issue of offset, Commissioner Asbury stated:

*"The law in relation to such payments and the ability of employers to offset those payments against award and other entitlements, is well established and most recently stated by the President in Haggarty Group Pty Ltd v Justin Wallace (Case No. C69 of 2000) and Justin Wallace v Haggarty Group Pty Ltd (Case No. C70 of 2000). The law is very clearly (sic), that amounts which are overpaid cannot be offset in the manner which the respondent claims. The only way in which any amount can be argued to be offset, is where it was paid for exactly the same purpose as the applicant claims."* (Mr Gwydir's emphasis).

- [13] Accordingly, Mr Power was seeking the following annual leave and pro rata annual leave payments on behalf of Mr Putna:

5 weeks' leave (5 x \$1499.81**)	\$7499.05
Pro rata annual leave (19.6 weeks' at \$1499.81 = \$29,396.28 ÷ 12)	\$2449.69
	<b>TOTAL</b>
	<b><u>\$9948.74</u></b>

\*\* It is unclear to me where this figure comes from. Mr Putna's agreed salary was \$75,000 per annum. This equates to \$1442.31 per week, which is half of the amount (\$2884.62) shown in Attachment C to Mr Peters' affidavit as having been paid to Mr Putna each fortnight.

<sup>2</sup> *Department of Industrial Relations v Tick Tock Australia Pty Ltd* [2001] 167 QGIG 203.

<sup>3</sup> *Haggarty Group Pty Ltd v Justin Wallace* [2001] 166 QGIG 417.

## Resolution of the conflict

- [14] At the outset, I reject the Council's contention that Mr Putna's travel pattern around the Christmas/New Year period in late 2007 established he had taken two weeks' (or 10 days') leave during that period. More than that brief period of time needs to be looked at to decide whether any leave was taken. In this respect, the Council does not seem to have examined the monthly reports Mr Putna deposes he submitted to the Saibai Island Council. An examination of those records would have established whether Mr Putna did report details of his travel and, if he did, the time he spent on Saibai Island as opposed to the time spent in Cairns.
- [15] However, as that exercise has not been undertaken by the Council, I am left with its sole submission (above) that I should conclude that Mr Putna took two weeks' annual leave over Christmas/New Year 2007 - a submission I have already rejected.
- [16] Accordingly, in the absence of any information to the contrary, I conclude that Mr Putna is still owed five weeks' annual leave in respect of the period 20 November 2006 until 19 November 2007.
- [17] That leaves the issue of the one weeks' "isolation leave" which Mr Putna arranged to be paid shortly prior to the cessation of his employment with the Saibai Island Council.
- [18] In the course of my 5 November 2010 Decision I found that Mr Putna's employment ceased on 28 March 2008 in accordance with an agreement negotiated between Mr Putna and the Saibai Island Council through Ms Janelle Menzies, an officer of the Department of Local Government at the relevant time. I also found that he authorised for himself to be paid an additional weeks' pay as "isolation leave" prior to the cessation of his employment. This payment was made on or around 13 March 2008. I also found that he was not entitled to isolation leave in accordance with the terms of his contract of employment.
- [19] Mr Gwydir argues that Council has no right to offset that payment, in the amount \$1442.31, on the basis of the decisions of President Hall in *Haggarty*<sup>4</sup> and Commissioner Asbury in *Tick Tock*<sup>5</sup>, respectively.
- [20] However, the facts in those two cases are markedly different to the facts in this matter. In the earlier cases the respective employers were attempting to offset a bonus, paid for an unspecified purpose or reason, against Award entitlements. President Hall and Commissioner Asbury each concluded that an amount paid for an unspecified purpose could not be offset against specific Award entitlements.
- [21] The situation in this case involves entirely different circumstances. Firstly, neither the Saibai Island Council or the Council authorised payment of the additional week of "isolation leave" to Mr Putna. He authorised that payment himself and arranged for it to be paid by deceit. Secondly, the payment was based on Mr Putna's interpretation of his entitlements under his contract of employment, which I subsequently found to be incorrect. Thirdly, payment of the additional one week involved a mistake of fact, in that it was paid in circumstances where it should not have been.
- [22] Finally, I note that decisions of the Commission, including in matters under s. 278 of the Act, are to be based upon equity, good conscience and the substantial merits of the case having regard to the interests of the persons immediately concerned and the community as a whole. In my view, it would be travesty of justice if Mr Putna was allowed to profit from his dishonesty, in deceiving another staff member to pay him amounts he was not entitled to, and the Council was not entitled to offset that overpayment against other monies it still owes to Mr Putna under his contract of employment.
- [23] All of those considerations, in my view, entitle the Council to recover the overpayment of one week's pay to Mr Putna.
- [24] In the end result, I have calculated the amount owing to Mr Putna to be \$8004.82 comprised as follows:

5 weeks' leave covering the period 20 November 2006 until 19 November 2007, inclusive (at \$1442.31 per week)	\$7211.55
Pro rata annual leave for period 20 November 2007 until 28 March 2008 (18.6 weeks' at \$1442.31 ÷ 12)	\$2235.58
	<b>TOTAL \$9447.13</b>
<u>Less</u> additional payment Mr Putna arranged to be paid as "isolation leave" in alleged reliance on the terms of his contract of employment	\$1442.31
	<b>TOTAL <u>\$8004.85</u></b>

<sup>4</sup> *Haggarty Group Pty Ltd v Justin Wallace* [2001] 166 QGIG 417.

<sup>5</sup> *DIR v Tick Tock Australia Pty Ltd* [2001] 167 QGIG 203.

[25] For the foregoing reasons I order the Torres Strait Island Regional Council to pay Mr John Hugh Power, on behalf of Mr Rodney Alex Putna, the amount of \$8004.82 within 22 days of the date of release of this Decision.

[26] I determine and order accordingly.

A.L. Bloomfield, Deputy President.

*Hearing Details:*

2010 26 and 27 August  
8 October (*Applicant and Respondent's written submissions filed*)  
15 October (*Applicant's written submissions in response filed*)  
20 December (*Telephone Mention*)  
2011 7 February (*Respondent's affidavit*)  
18 February (*Applicant's response*)

*Appearances:*

Mr D. Gwydir of the Department of Justice and Attorney-General, the Applicant.  
Mr N. Peters on behalf of the Torres Strait Island Regional Council.

Released: 9 March 2011