

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 148
5525591

BETWEEN NATHAN CHARLES BERG
Applicant

A N D EMERGENCY.CO.NZ
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
 G Mackley, Respondent Director

Investigation Meeting: 14 April 2015 at Auckland

Submissions Received: 14 April 2015 from the Applicant
 14 April 2015 from the Respondent

Date of Determination 20 May 2015

DETERMINATION OF THE AUTHORITY

- A. Emergency.co.nz Limited is to pay Nathan Charles Berg the sum of \$5,578.96 less PAYE being holiday pay owed pursuant to s.131 of the Employment Relations Act 2000.**

Employment relationship problem

[1] The Authority in its substantive determination dated 15 April 2015¹ held that the applicant was an employee of the respondent and directed the parties to confer about the amount of holiday pay owing. If there was no agreement, submissions on remedies regarding holiday pay from both parties were to be filed and served by 12 May 2015 at 3pm. A determination was to be issued on the papers thereafter.

¹ *Nathan Charles Berg v. Emergency.co.nz Ltd* [2015] NZERA Auckland 110

Parties Submissions

[2] On 15 April 2015 an email was received from Geoff Mackley, the respondent's director, stating:

Thank you, please give me the forms for an appeal, I will appeal. I have no intention of paying holiday pay, ever, Berg was taken on as an independent contractor, end of story.

[3] On 15 April 2015 the Authority was copied in to an email from the applicant to the respondent director, Mr Mackley, seeking 8% of his recorded gross earnings since November 2013 (\$39,286). The gross amount payable sought was \$3,142.88.

[4] Thereafter, correspondence between the parties copied to the Authority indicated no agreement was able to be reached about the amount of holiday pay owed.

[5] The Support Officer on 11 May 2015 reminded both parties that submissions about the holiday pay were due by 3pm the following day.

[6] On 11 May 2015 Mr Mackley emailed stating he was instructing an accountant go through the amounts paid to Mr Berg and estimate an appropriate hourly rate he should have been paid. Mr Mackley asserts Mr Berg would have earned a lot less and in fact owes him money.

[7] No further submissions have been received.

Determination

[8] I have already determined the applicant is an employee of the respondent for the reasons set out in my substantive determination. I do not intend re-litigating the merits of that determination here. The respondent has been advised by the Registry of his rights of appeal.

[9] Mr Berg has filed evidence from the Inland Revenue Department showing his gross earnings for the period November 2013 to October 2014 were \$39,286.

[10] I have already determined Mr Berg's start date for employment was in March/April 2013. He would have completed 12 months of continuous employment on or about 31 March 2014. Accordingly, pursuant to s.16 of the Holidays Act 2003 he is entitled to four weeks paid annual holidays. Given his weekly pay appears to

have fluctuated, his average weekly earnings during the 12 months immediately before the end of the last pay period for the end of the employee's employment shall be used to calculate the amounts owed.²

[11] In the 12 months prior to termination of his employment, Mr Berg earned \$39,286. His average weekly earnings during those 12 months would have been \$755.50 per week which is to be multiplied by four weeks. Accordingly, he is entitled to \$3,022 less PAYE for the period 1 April 2013 to 31 March 2014.

[12] In the period 1 April 2014 to 31 October 2014 Mr Berg earned \$31,962. Given his employment ended before the 12 month anniversary of his accrued annual leave, the value of his annual leave entitlement must be determined by 8% of his gross earnings for the period since he last became entitled to the annual holidays less the anticipated annual leave and annual leave paid with his usual pay³. Eight percent of \$31,962 is \$2,556.96 less PAYE for the period 1 April 2014 to 31 October 2014.

[13] Mr Berg is therefore owed \$5,578.96 less PAYE for holiday pay.

[14] Emergency.co.nz Limited is to pay Nathan Charles Berg the sum of \$5,578.96 less PAYE being holiday pay owed pursuant to s.131 of the Employment Relations Act 2000.

[15] Given both parties were self-represented there shall be no order for costs.

[16] The applicant has now filed an application for personal grievance. This shall be dealt with separately.

T G Tetitaha
Member of the Employment Relations Authority

² Section 24 Holidays Act 2003

³ Sections 25 and 28 Holidays Act 2003