

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 61  
3003131

BETWEEN                      PAUL BAINES  
   Applicant  
  
AND                              THORN COMMERCIAL  
   GROUP LIMITED  
   Respondent

Member of Authority:      Andrew Dallas  
  
Representatives:            Applicant in person  
   Andrew Thorn, Director of the Respondent  
  
Investigation Meeting:      On the papers  
  
Determination:              27 April 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.      Thorn Commercial Group Limited (Thorn) must pay Paul Baines the following amounts within 28 days of the date of this determination:**
- (a) \$600.00 gross as unpaid wages;**
  - (b) \$5704.07 gross as unpaid holiday pay; and**
  - (c) \$1818.00 as KiwiSaver employer contributions.**
- B.      Thorn must also pay within 28 days of the date of this determination \$71.56 as reimbursement of the Authority's filing fee.**

## **Employment relationship problem**

[1] Paul Baines was employed by Thorn Commercial Group Limited (Thorn) as a crane operator until he resigned with effect from 23 September 2016. Mr Baines' employment was governed by an individual employment agreement.

[2] Mr Baines claims he is owed unpaid wages, holiday pay and KiwiSaver employer contributions by Thorn.

[3] Mr Baines sought to recover these outstanding amounts directly from Thorn. His efforts proving fruitless, he engaged solicitors who requested payment and also wage and time records for Mr Baines. Neither payment nor wage and time records were forthcoming.

## **Issues**

[4] The following are the issues for determination by the Authority:

- (i) Is Mr Baines owed unpaid wages by Thorn?;
- (ii) Is Mr Baines owed unpaid holiday pay by Thorn?; and
- (iii) Is Mr Baines owed KiwiSaver employer contributions by Thorn?

## **The Authority's investigation**

[5] Mr Baines lodged a statement of problem in the Authority. As remedies for his employment relationship problem with Thorn, Mr Baines claimed unpaid wages, unpaid holiday pay and unpaid expenses. Mr Baines did not claim interest on outstanding monies or penalties in the statement of problem he lodged with the Authority.

[6] Thorn did not lodge a statement in reply or seek leave to lodge one out of time. Director of Thorn, Andrew Thorn did, however, communicate to the Authority that he denied Mr Baines' claims. It was not entirely clear, beyond blanket denial, what the basis for this was. Mr Thorn did appear to suggest that Mr Baines was a "contractor" but this contention was directly contradicted by the individual employment agreement and payslips prepared by Thorn.

[7] Having taken into account the surrounding circumstances outlined above, I decided to investigate Mr Baines's employment relationship problem on the papers under s 174D of the Employment Relations Act 2000 (the Act).

[8] As Mr Baines had sought wage and time records and these were not forthcoming, Mr Baines was asked by the Authority to quantify his claims for unpaid wages, holiday pay and KiwiSaver employer contributions based on his own best endeavours.

[9] Mr Baines subsequently provided these calculations to the Authority. He said he was owed \$600.00 as unpaid wages, \$5704.07 as unpaid holiday pay and KiwiSaver contributions of \$1818.00.

[10] In response to the above information, I formed the view, in reliance on s 132(2) of the Employment Relations Act 2000, the orders for payment of \$600.00 as unpaid wages, \$5704.07 as unpaid holiday pay and \$1818.00 as KiwiSaver employer contributions should be made.

[11] On 18 April 2017, a Member's Minute was issued to the parties setting out the nature of Mr Baines' employment relationship problem. Mr Thorn was asked to provide written comment on Mr Baines' claim for unpaid wages, holiday pay and KiwiSaver employer contributions by 26 April 2017.

[12] On 18 April 2017, Mr Thorn provided a response to the Member's Minute. Various claims were made but none directly addressed Mr Baines claims for wages, holiday pay or KiwiSaver contributions or provide other information directed at defeating the operation of 132(2) of the Act

[13] The ultimate position adopted by Thorn was "any funds claimed are setoff to damages and other funds are setoff to contractor claim" (sic). No evidence or other information was provided to support these contentions.

[14] However, there is no live “damages” claim against Mr Baines before the Authority as Thorn did not lodge a statement in reply or seek leave to lodge one out of time. In any event, off-setting claims, however described, even if properly pleaded, cannot be used as a device to reduce minimum statutory entitlements.<sup>1</sup> It is also not clear what “other funds” relate or do not relate to the “contractor claim”, or what this even is. The claim Mr Baines was a “contractor” is not supported by the information Mr Baines provided, as outlined in paragraph [6] above, nor contradicted by any information provided by Thorn, as none was provided.

### **Is Baines owed unpaid wages?**

[15] Mr Baines claimed Thorn owed him wages. He claimed the amount owed in unpaid wages was \$600.00 gross. Mr Baines provided calculations and other information to justify this claim.

[16] Thorn failed to produce wage and time records to assist Mr Baines in the calculation of the claim for lost wages. In the absence of any information from Thorn disproving the claim and in reliance on s 132(2) of the Act, I accept Mr Baines’s claim for unpaid wages.

[17] Thorn must pay Mr Baines \$600.00 gross as unpaid wages within 28 days of the date of this determination.

### **Claim for unpaid holiday pay**

[18] Mr Baines claimed that he was owed outstanding holiday pay. He claimed the amount owed in unpaid holiday pay was \$5704.07 gross. Mr Baines provided calculations and other information to justify this claim.

[19] Thorn failed to produce wage and time records to assist Mr Baines in the calculation of the claim for unpaid holiday. In the absence of any information from Thorn disproving the claim and in reliance on s 132(2) of the Act, I accept Mr Baines’s claim for unpaid holiday pay.

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<sup>1</sup> See, *Edwards (Labour Inspector) v Topo Gigio Restaurants Ltd*, AEC109/05, 16 October 1995, at 5

[20] Thorn must pay Mr Baines \$5704.07 gross as unpaid holiday pay within 28 days of the date of this determination.

**KiwiSaver employer contributions**

[21] Mr Baines said he was owed \$1818.00 as deducted but unremitted KiwiSaver employer contributions. He provided calculations and other information in support of this claim. Mr Baines claimed was not disproved or otherwise contradicted by Thorn. On the above bases, I am prepared to accept Mr Baines claim is made out.

[22] Thorn must pay Mr Baines \$1818.00 as deducted but unremitted KiwiSaver employer contributions within 28 days of the date of this determination.

**Costs**

[23] It is fair and reasonable in all the circumstances to require Thorn to reimburse Mr Baines for the Authority's filing fee of \$71.56. This amount must also be paid to Mr Baines within 28 days of the date of this determination.

Andrew Dallas  
Member of the Employment Relations Authority