

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 190/10  
5292910

BETWEEN                      BRAKE AND  
   TRANSMISSION NZ LTD  
   Applicant

AND                                JARRED STEELE  
   Respondent

Member of Authority:        G J Wood

Representatives:             Justine O'Connell for the Applicant  
   Steve Emslie for the Respondent

Investigation Meeting:      12 October 2010 at Wanganui

Costs Submissions:         Due by 28 October 2010

Determination:                18 November 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant BNT, is, as its full name implies, a supplier of automotive and commercial parts, accessories and engineering supplies. The respondent, Mr Jarred Steele, is a current employee of BNT as a parts person in its Wanganui Branch.

[2]     The issue for determination is whether Mr Steele should be required to pay BNT the sum of \$686.25, being the cost of repairs to a BNT vehicle as a result of an accident at work for which Mr Steele was responsible.

**Factual Discussion**

[3]     Mr Steele started work with BNT on 22 January 2008. On 18 January 2008 he had signed an individual employment agreement accepting that the BNT general

terms of employment would apply. BNT's general terms of employment include its code of conduct and its vehicle policy. The vehicle policy states:

*Note: Should an employee be involved in a motor vehicle accident in a company vehicle and be found to be at fault in such accident that employee shall be given a written warning to the effect that any further incident of a similar nature may result in that employee's dismissal without notice. The employee may also be liable to reimburse the company for any insurance excess payable in relation to any such at fault accident.*

[4] On 22 July 2009 Mr Steele backed into another vehicle while driving a work car, resulting in \$686.25 in panel beating costs to repair. BNT at first elected to lodge an insurance claim, given the damage to the other vehicle. However, under the two insurance companies' *knock for knock* agreement BNT was only required to pay the panel beating cost for its vehicle. Therefore, rather than claim from its insurance company, given that it has an excess under its policy of \$2,000, it chose to pay the costs directly. Mr Steele was asked to pay that sum but has declined to do so, despite admitting responsibility for the accident. The parties have attended mediation and considered settlement in other ways, but have been unable to reach agreement. It therefore falls to the Authority to make a determination.

### **Determination**

[5] Mr Steele could arguably be held accountable to pay the sum of \$686.25 either directly pursuant to the specific terms of the employment agreement, or indirectly as special damages for breach of the implied term that an employee will exercise due care and diligence in his work (see for example *F v. Attorney General* [1994] 2 ERNZ 62 and *Masonry Design Solutions Ltd v. Bettany* unreported Colgan CJ AC30/09 21 August 2009).

[6] The parties specifically agreed (pursuant to BNT's vehicle policy) what could occur in the case of a motor vehicle accident where an employee such as Mr Steele was at fault. The relevant part of the agreement states:

*The employee may also be liable to reimburse the company for any insurance excess payable in relation to any such at fault accident.*

[7] First, the clause gives BNT discretion in terms of liability for reimbursement. BNT is seeking to exercise that discretion. However, it also provides that

reimbursement is to be for any insurance excess payable. In the particular facts of this case there was no insurance excess payable, because for reasons of convenience BNT chose to pay the sum directly without claiming from its insurance company.

[8] It was submitted that the intention of this clause was to allow recovery of lesser sums to be made in lieu of a greater insurance excess. Unfortunately for BNT the clause states no such thing. This is a document prepared by BNT and had it wished to directly impose a different form of arrangement on employees such as Mr Steele it could have used different wording. Instead it chose to set the conditions in the parties' employment agreement under which they agreed the cost for a company vehicle accident for which the employee was at fault, that cost being *any insurance excess payable*. I can only conclude that because there was no excess payable, BNT is unable to rely on the wording of its own agreement from seeking to recover the (admittedly lesser) costs from Mr Steele.

[9] It is, however, quite clear that Mr Steele would be liable to pay for the costs of the accident as special damages for breach of contract (as claimed by BNT in the alternative), under the implied term noted above, unless the implied term was contradicted or inconsistent with an express term (see for example *Air New Zealand Ltd v. Raddock* [1999] 1 ERNZ 30 (CA)). This is because it was his negligence that caused the accident, as he clearly accepts.

[10] I conclude that the employment agreement does not modify the position at common law over the implied term relied on, and thus no exception in *Raddock* has been made out. Rather than the implied term being inconsistent or in contraction with it, I conclude that the contractually binding vehicle policy instead clearly sets out only that employees at fault in vehicle accidents may be liable for the insurance company excess, an amount payable by BNT to its insurer. In the ordinary course of events an employee owes no obligation to an employer's insurer. Furthermore, the clause is not expressed as a code, or in any other way as limiting an employer's rights otherwise implied at law. It follows that BNT may rely on the implied term to found a claim for damages for breach of contract.

[11] I therefore order the respondent, Mr Jarred Steele, to pay to the applicant, Brake and Transmission NZ Limited, the sum of \$686.25.

## Costs

[12] Mr Steele has incurred no costs in defending this matter with the assistance of Community Legal Advice Whanganui. BNT claims a contribution of two thirds of its costs of \$15,293.64 from its representative Teesdale Loof, plus \$4,096.47 from a law firm that assisted it. It also seeks reimbursement for travel costs of \$864 and a filing fee of \$70. Ms O'Connell referred to an open letter written weeks before the investigation meeting, whereby it agreed to resolve the matter provided Mr Steele agreed to pay the sum of \$686.25 in full within twelve months, but without any interest to be paid. Later Ms O'Connell also sought interest from the date of demand of August 2009.

[13] On behalf of Mr Steele, Mr Emslie submitted that any delays were not Mr Steele's responsibility and that it would be unfair to him to have to pay interest. It was also submitted that Mr Steele should not pay for two sets of legal advice. It was further submitted that costs should be at the lower end, but if awarded should only be by instalments. Mr Emslie noted that after budgeting for his regular outgoings, Mr Steele has only a surplus of \$270 per month.

[14] This case was heard extremely expeditiously, but I accept that a great deal of preparation was required, because the situation was somewhat novel. I do not accept that it is appropriate to award interest, as this was not claimed until well after the investigation meeting had concluded. BNT is, however, entitled to a contribution towards its costs of representation. Given the size and nature of the claim, however, the costs sought are disproportionate. In all the circumstances I consider that an appropriate contribution for Mr Steele to make to BNT's costs is the sum of \$1,200.

[15] BNT operates as a national company and it was its choice to engage a representative from Auckland and for Ms O'Connell to travel on its behalf. Similarly, I conclude that the travel expenses incurred by its Auckland based senior manager should be absorbed by BNT as part of its nationwide operations. BNT is entitled to payment of the filing fee of \$70.

[16] I therefore also order the respondent, Mr Jarred Steele, to pay to the applicant, Brake & Transmission NZ Limited, the sum of \$1,200 in costs and \$70 in expenses. Given that the parties are engaged in an ongoing employment relationship, I would expect them to agree on some form of prompt repayment, albeit by instalment.

**G J Wood**  
**Member of the Employment Relations Authority**