

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 47
5637393

BETWEEN BRUCE JOHN BULMER
Applicant

A N D DHIRAJ MAHAL
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
No appearance for the Respondent

Investigation Meeting: 23 March 2017 at Nelson

Date of Determination: 31 March 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A Dhiraj Mahal is ordered to pay to Bruce John Bulmer the following:

- (i) Holiday pay in the sum of \$3,120 gross.**
- (ii) Employer contribution to KiwiSaver assessed at 4% in the sum of \$2,080.**
- (iii) Reimbursement of filing fee in the sum of \$71.56**

Employment relationship problem

[1] Bruce Bulmer in his statement of problem said he was employed by Dhiraj Mahal until in or about mid-2016 and that his PAYE, ACC, KiwiSaver, and KiwiSaver tax credits remain unpaid. He wanted two weeks' pay for a period he says

he was not paid wages for and four weeks holiday pay. He noted in the statement of problem that he did not have an employment agreement and was not provided with payslips when employed from August 2015 to July 2016.

[2] Mr Mahal lodged a statement in reply in which he stated that payment had already been made for time worked and for two weeks of holiday pay. There was reference to Mr Bulmer resigning without notice. Mr Mahal noted that the PAYE paper work had been filed.

[3] This matter has progressed slowly over a number of months. The Authority wrote to Mr Bulmer and Mr Mahal in October 2016. Mr Mahal was asked for details of total payments made to Mr Bulmer and details of his hourly rate. The Authority also asked for any bank statements showing payments made or received together with clarification around the KiwiSaver contributions.

[4] There was no response from Mr Mahal. Mr Bulmer advised the cost of getting bank statements was expensive. Mr Bulmer further advised that he could not get a summary of earnings from Inland Revenue Department because they had no figures from Mr Mahal. Mr Bulmer checked again with the Inland Revenue Department in January 2017 and found that there had been income paid to Mr Bulmer declared by Mr Mahal in the sum of \$13,358.00 gross.

[5] Mr Bulmer advised the Authority that he was now seeking \$3,335.21, representing the employer's KiwiSaver contribution as well as a week's holiday pay.

[6] Attempts to set the matter down for a telephone conference with the Authority were unsuccessful. Mr Bulmer worked long hours and there was no response at all from Mr Mahal. The Authority was undertaking another investigation meeting in Nelson and advised that it would hold an investigation meeting on 23 March 2017 in Nelson later in the day to accommodate Mr Bulmer who is a truck driver. The Authority was happy for Mr Mahal to take part by telephone as he resides in Wellington.

[7] I am satisfied that Mr Mahal was served with a copy of the investigation meeting notice and notice of direction which included a direction for both parties to provide any relevant documentation to the Authority and each other by 20 March 2017. It also invited Mr Mahal to advise how he could be contacted by telephone if that was his preferred method of participation in the investigation meeting.

[8] Mr Mahal did not attend at the investigation meeting and did not, prior to the investigation meeting, make any arrangement to be contacted by telephone or advise a telephone number on which he could be contacted. No information was provided. There was no telephone number therefore available to contact Mr Mahal on, and with no good reason for his absence, I proceeded to hear evidence from Mr Bulmer.

Background to the employment and monetary claims

[9] Mr Bulmer said in his evidence that he commenced employment with Mr Mahal in or about May 2015 and was employed in that role for about a year. The dates differ somewhat from the dates in the statement of problem but what, I find, is consistent, is the period of employment Mr Bulmer says he worked for of approximately a year. Mr Bulmer explained that he drove a truck for Mr Mahal making various deliveries. It was his understanding that Mr Mahal owned the truck. Mr Bulmer said that he was paid an hourly rate of \$25 per hour and worked a variety of hours. He said that the lowest number of hours he would work each week was 35 and he would sometimes work 55 hours per week. He said that he normally received about eight to nine hundred dollars in the hand each week and thought that 40 hours a week on average to calculate any holiday and KiwiSaver entitlements would be fair.

[10] Mr Bulmer was unsure of his statutory entitlements to holiday pay. Section 16 of the Holidays Act 2003 provides that at the end of 12 months employment an employee is entitled to not less than four weeks paid annual holidays. Mr Bulmer said that he had not taken any holidays during his period of employment with Mr Mahal.

[11] Clause 23 of the Holidays Act 2003 provides for calculation of holiday pay for periods of less than 12 months employment on the basis of 8 % of gross earnings. I find that is the appropriate calculation in the circumstances where there is some uncertainty about the exact period of employment. Mr Bulmer said he had received payment for one week's holiday from Mr Mahal and had claimed a further week simply as a matter of dealing with the issue quickly so as to resolve the matter.

[12] Mr Bulmer said that his earnings must have been under reported to IRD because of the period he had worked for Mr Mahal and the payments made to him for hours he worked. Mr Bulmer confirmed that he did not receive pay slips. He also wanted to claim the employer's contribution to KiwiSaver at 4%.

Determination

[13] After meeting and hearing evidence from Mr Bulmer on 23 March 2017 I wrote again to Mr Mahal because I was concerned at the complete lack of any records and paperwork and the changing nature of the claims. I wanted to give him one final opportunity to provide information in the form of records and any other information he wished to in light of the evidence I heard from Mr Bulmer. I set out in my letter to Mr Mahal the evidence I had heard about the period of employment, hours worked and whether the report to IRD was reflective of actual gross earnings. I also confirmed the monetary claims, how they were calculated and on what basis. Mr Mahal did not respond within the time frame to do so and so I have proceeded to determine the matter.

[14] In the absence of any records it seemed more likely than not that the total gross earnings by Mr Bulmer during his employment with Mr Mahal have been significantly under reported to the Inland Revenue Department. I accept as likely that Mr Bulmer worked for Mr Mahal for about a one year period and that it would be fair in the absence of any records to calculate gross earnings for the period of employment on the basis of an average work week of 40 hour per week at \$25 per hour. That is a sum of \$1,000 gross per week and a total gross sum for one year of \$52,000.

[15] Mr Bulmer wishes to claim his statutory entitlement for holiday pay. There is no evidence to satisfy me leave was taken during Mr Bulmer's employment with Mr Mahal. Mr Bulmer is entitled to 8% of gross earnings which is the sum of \$4,160. Mr Bulmer acknowledges that he has received one week's holiday pay so the sum of \$1,040 should be deducted from the sum of \$4,160, leaving a balance of \$3,120 gross. Mr Bulmer is unclear in the absence of any records whether deductions were made for KiwiSaver and if so whether they were simply withheld by Mr Mahal or paid onto Inland Revenue Department. Mr Bulmer does seek the employer's contribution to KiwiSaver of 4% which is the sum of \$2,080. He also seeks reimbursement of his filing fee of \$71.56.

[16] I find that Mr Bulmer is entitled to holiday pay less one week's payment in the sum of \$3,120 gross together with a 4% employer contribution to KiwiSaver in the sum of \$2,080. He is also entitled to reimbursement of the filing fee of \$71.56.

[17] I order Dhiraj Mahal to pay to Bruce John Bulmer holiday pay in the sum of \$3,120 gross.

[18] I order Dhiraj Mahal to pay to Bruce John Bulmer his employer contribution to Kiwisaver at 4% in the sum \$2080.

[19] I order Dhiraj Mahal to reimburse Bruce John Bulmer his filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority