

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 25
5433506

BETWEEN CRAIG PAUL CARDWELL
Applicant

A N D ROB GOLD BUILDERS LIMITED
trading as GOLD
CONSTRUCTION
Respondent

Member of Authority: T G Tetitaha

Representatives: A E M Reid/C T Patterson, Counsel for Applicant
G Bennett, Advocate for Respondent

Investigation Meeting: 21 January 2014 at Auckland

Submissions Received: 17 and 21 January 2014 from Applicant
14 and 21 January 2014 from Respondent

Date of Determination: 23 January 2014

DETERMINATION OF THE AUTHORITY

- A. The respondent is ordered to pay Mr Cardwell wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$4,436.88 comprising \$2,893.88 wages excluding PAYE and \$1,543 gross holiday pay.**
- B. Interest is awarded at the rate of 5% on the above wage arrears from 20 April 2012 to the date of payment (clause 11, Schedule 2 Employment Relations Act 2000).**
- C. Mr Cardwell raised the personal grievance of unjustified disadvantage by non-payment of wages within the 90 day period pursuant to s114 Employment Relations Act 2000. The Authority has jurisdiction to consider the claim of unjustified disadvantage.**

- D. Mr Cardwell was unjustifiably disadvantaged by the respondent's non-payment of wages.**
- E. The Authority declines to impose any penalties because those proceedings are statute barred by s135(5) Employment Relations Act 2000.**
- F. The Authority declines to award any remedy under s123(b) because Mr Cardwell's lost remuneration has been met by the above order for recovery of wages and interest.**
- G. There is an order that the respondent pay to Mr Cardwell compensation of \$1,000 pursuant to ss.123(c)(i) Employment Relations Act 2000.**

Employment relationship problem

[1] Craig Cardwell was employed initially as an labourer, and subsequently as a qualified builder, by Rob Gold Builders Limited trading as Gold Construction (the respondent), from 2003 until April 2012. Mr Cardwell seeks leave to extend the period he can file proceedings in the authority to recover wages owed for this period. He alleges he is owed \$10,601.82 net wages and \$1,543.15 gross holiday pay. Alternatively, he seeks to recover wages from 2007 to April 2012 totalling \$3,210.56 net wages and \$1,543.15 gross holiday pay. He also seeks leave to raise a personal grievance of unjustified disadvantage for non-payment of wages and an award of interest and penalties on the sums owed.

[2] The respondent denies there are any wage arrears. It submits Mr Cardwell's analysis of wage arrears is wrong and does not account for cash payments he made. It denies any unjustified disadvantage.

Facts leading to dispute

[3] Mr Caldwell was employed by the respondent in 2003 aged 17 years. He was not provided with a written employment agreement. The practice was for Mr Caldwell's wages to be paid one week in arrears, although this varied at times. Mr Caldwell resigned from his employment in April 2012.

[4] After resigning, Mr Caldwell became concerned that his final pay was incorrect, and that he had not received his full holiday pay. He raised this with the respondent by telephone and was given wage and time records for 2003 to 2011.

[5] In May 2012 Mr Caldwell engaged an accountant (Causeway) to analyse his time and wage records. They compared the wage and time records against Mr Caldwell's bank statements. Several variances between these sets of records were noted in a report dated 21 May 2012.

[6] During this period Mr Caldwell spoke to Robert William Gold, sole director and shareholder of the respondent company, about the discrepancies seeking payment. Mr Gold maintained that he had been paid all that was owed.

[7] In March/April and May 2013 the parties attended mediation. Mr Gold provided Mr Caldwell with a list of payments that had allegedly been made to Mr Caldwell either in cash or by cheque.

[8] Mr Caldwell then engaged another accountant (John Heaslip of Gilligan Rowe & Associates) to provide advice and analysis on the list of payments, his bank accounts, wage and time records and the IRD records.

[9] Mr Caldwell went overseas for three months. Upon his return he consulted a lawyer. On 24 September 2013 Mr Caldwell filed an application with the Authority.

Issues

[10] Two oral interim determinations were given at the start of hearing. These allowed the recovery of holiday pay claim to proceed, and disallowed the recovery of wages for the period 2003 to September 2007.¹ The following issues remain:

- a) Should leave be granted to raise a personal grievance out of time for unjustified disadvantage arising from the respondent's failure to pay wages?
- b) What wages were due and owing to the applicant (if any)?
- c) What remedies should be granted?
 - Should interest be awarded?
 - Should penalties be imposed?

¹ [2014] NZERA 21 and 22

Issue one: Is leave required to raise a personal grievance out of time for unjustified disadvantage arising from the respondent's failure to pay wages?

[11] Mr Cardwell submits he raised the personal grievance about unjustified disadvantage by non-payment of wages within 90 days. This was raised with Mr Gold in direct telephone conversations. Alternatively he submits there was implied consent to the raising of the grievance outside of the 90 days by the respondent's conduct in engaging in mediation and ongoing discussions. The respondent denies the grievance was raised. It denies any conversation between the parties raised the grievance with the specificity required. It also denies it consented to the raising of the grievance by its conduct or otherwise.

[12] Time starts running for raising a personal grievance from the date which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period (s114). The cause of action accrued when the wages fell due one week after the work had been done.

[13] There was evidence the wage and time record was in a state of disarray. The respondent accepted there were over and under payments of wages. Mr Gold gave evidence he regularly added or deducted wages to 'correct' these payment errors on a weekly and monthly basis. Some of these corrections were recorded in a wages book. Some were not. Sometimes the wages book did not record any date of payment. Wages were not always paid into Mr Cardwell's account on the same date recorded in the wages book. Sometimes the wages were reversed. Mr Gold alleged in this case he paid them by cash or cheque. There was no agreement about this changed method of payment. Payment had primarily occurred by direct debit.

[14] Very few payslips (if any) were given to Mr Cardwell showing these discrepancies. The wage and time record did not reconcile with the IRD records produced. Mr Gold alleged there was some dispute with IRD about wages, but did not produce any information supporting this. Mr Cardwell says given his youth and inexperience, he trusted he was being correctly paid over the course of his longstanding employment relationship with the respondent.

[15] Given the above, it is unlikely Mr Cardwell would have been aware of the cause of action on the date it accrued. The likely date this personal grievance would have come to the notice of Mr Cardwell was 21 May 2012, when he was made aware

by his accountants (Causeway) there was a shortfall in wages recorded and his bank account statements.² The time for raising a personal grievance ran from 21 May 2012. The last date for raising the grievance was 29 August 2012.

[16] To raise a personal grievance, it should be specified sufficiently to enable the employer to address it.³ Both parties gave evidence of telephone conversations where the wages shortfall was raised and payment sought.⁴ These conversations appeared to have occurred around May/June 2012.

[17] The evidence supported the conclusion the respondent knew about the shortfall in wages and Mr Cardwell sought payment to remedy this prior to 29 August 2012. In the circumstances, the Authority determines Mr Cardwell raised his personal grievance within the 90 day period.

Issue Two: What wages were due and owing to the applicant (if any)?

[18] Mr Cardwell submits he is owed \$3,210.56 net wages and \$1,543 gross holiday pay for the period 2007 to April 2012 based upon his accountant's analysis. He accepts he received \$1,106.19 and \$236.09 around 19 and 25 January 2012 for holiday pay but otherwise asserts there are wages owed.

[19] The respondent submits no wages are owed because they were paid in cash or cheque and Mr Cardwell has several bank accounts in which they could have been deposited. It also disputed the accountant's analysis because it does not provide for these cash and cheque payments and was not a 'recognised forensic method of accounting'.⁵

[20] Mr Gold conceded under examination he had no bank statements or other source documents to support the list of alleged cash and cheque payments. There was no clear evidence of how he compiled the list other than his own memory. Mr Gold simply believed he had made all of the payments listed.

[21] The respondent's wage and time record do not meet the requirements of s130(1)(a) to (h) Employment Relations Act 2000. There were wage records missing

² Statement of Problem para 2.15 to 2.16

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]

⁴ Brief of evidence (BoE) R Gold at para 46; BOE C Cardwell paras. 15 and 22.

⁵ BOE R Gold paras. 32 and 33

or unclear for the periods August and October 2003, June to November 2009, and January to April 2012.

[22] The respondent had no holiday and leave record. This is a statutory requirement under s81 Holidays Act 2003. Mr Gold proposed the holiday and leave records could be gleaned from various notations about holiday pay in the wage records.

[23] John Mark Heaslip, a qualified accountant and client services manager for Gilligan Rowe & Associates, gave expert evidence about the wages and holiday pay owed to Mr Cardwell which the Authority accepts. He checked the original analysis by Causeway and confirmed it was correct. He then compared the respondent's wages books with IRD records. These showed an underpayment of \$3,106.70 net wages for the period 31 March 2008 to 31 December 2011.⁶ This figure needs to be reduced to account for the recovery of wages claims that were struck out pre-24 September 2007. Mr Heaslip's workings show wage variances of \$212.82 for the period 1 April to 27 September 2007.⁷ Accordingly this can be deducted from the underpayment of \$3,106.70 net wages for the period 31 March 2008 to 31 December 2011.

[24] In absence of a statutory compliant wage and time record, the Authority accepts Mr Heaslip's evidence and subject to the above adjustment determines the net wages owed are \$2,893.88 for the period 24 September 2007 to 31 December 2011.

[25] In the absence of any statutory compliant holiday and leave record, the Authority accepts Mr Heaslip's calculation of holiday pay owed being \$1,543. No further adjustment is to be made for the money Mr Cardwell received in January 2012 given the absence of holiday and leave record. Accordingly the total wages due and owing are \$4,436.88.

Issue three: Was Mr Cardwell unjustifiably disadvantaged by the non-payment of wages?

[26] It is common ground Mr Cardwell was due to be paid wages one week in arrears and this did not always occur. The extrinsic evidence in the wage records and

⁶ Applicants Bundle of Documents (ABD) p127 adding figures for year ended 31 March 2008 to 31 March 2011 wages book and deducting IRD figures for same period.

⁷ ABD p 111 variances column shows two payments of \$106.41 on 03/05/07 and 07/06/07.

bank statements supported this practice primarily occurring from 2003 to 2011. To give business efficacy to his employment agreement, it must be an implied term his wages are paid one week in arrears.

[27] Mr Cardwell was disadvantaged by the non-payment of wages. He lost the use of money owed to him under his employment agreement. There was no reason for withholding payment. The disarray of the wage and time record and absence of holiday and leave record does not justify breaching the implied term for payment.

[28] The Authority determines Mr Cardwell was unjustifiably disadvantaged by the non-payment of wages.

Issue four: What remedies should be granted? Should interest and penalties be awarded?

[29] Both parties agree an order for payment of wage arrears and interest is appropriate in the event the Authority should determine they are owed. The date from which interest shall accrue is 20 April 2012.

[30] Given the Authority's findings Mr Cardwell had knowledge of his personal grievance following his accountant's advice in May 2012 the same timeframe shall be applied to penalty proceedings. The time for commencing penalty proceedings is limited to 12 months or May 2013 (s135(5) Employment Relations Act 2000). His proceedings were filed on 24 September 2013. The Authority declines to impose any penalties because those proceedings are statute barred by s135(5) Employment Relations Act 2000.

[31] Given the Authority's determination Mr Cardwell was unjustifiably disadvantaged the remedies of lost remuneration and damages for hurt and humiliation are available.

[32] Mr Cardwell accepts the order for payment of wages and interest shall remedy his lost remuneration claim and no further order under s123(b) is required. He seeks damages for hurt and humiliation of \$5,000 for the shock and devastating effect upon his relationship with Rob Gold. There was little if any evidence supporting more than a minimal award for hurt and humiliation. An award of \$1,000 is appropriate.

[33] There is no contributing behaviour requiring reduction of remedies under s124 Employment Relations Act 2000.

[34] Accordingly the Authority makes the following orders:

- a) The respondent is ordered to pay Mr Cardwell wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$4,436.88 comprising \$2,893.88 wages excluding PAYE and \$1,543 gross holiday pay.
- b) Interest is awarded at the rate of 5% on the above wage arrears from 20 April 2012 to the date of payment (clause 11, Schedule 2 Employment Relations Act 2000).
- c) Mr Cardwell raised the personal grievance of unjustified disadvantage by non-payment of wages within the 90 day period pursuant to s114 Employment Relations Act 2000. The Authority has jurisdiction to consider the claim of unjustified disadvantage.
- d) Mr Cardwell was unjustifiably disadvantaged by the respondent's non-payment of wages.
- e) The Authority declines to impose any penalties because those proceedings are statute barred by s135(5) Employment Relations Act 2000.
- f) The Authority declines to award any remedy under s123(b) because Mr Cardwell's lost remuneration has been met by the above order for recovery of wages and interest.
- g) There is an order that the respondent pay to Mr Cardwell compensation of \$1,000 pursuant to ss.123(c)(i) Employment Relations Act 2000.

Costs

[35] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.



T G Tetitaha
Member of the Employment Relations Authority