

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 93
3023995

BETWEEN VICTOR CARPENA
 Applicant

AND CROSS COUNTRY
 RECRUITMENT LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Warwick Ryan for Respondent

Investigation Meeting: 12 March 2018

Additional Information
Received: 13 March 2018

Determination: 22 March 2018

DETERMINATION OF THE AUTHORITY

- A. Cross Country Recruitment Limited is ordered to pay to Mr Carpena \$4,585.46 for arrears of wages including holiday pay under section 131 of the Employment Relations Act within 14 days of the date of this determination.**
- B. Mr Carpena has not established a personal grievance and his application for compensation is declined.**
- C. Cross Country Recruitment Limited is order to reimburse Mr Carpena the sum of \$71.56 being the filing fee for his application.**

Procedural history

[1] Mr Victor Carpena lodged his statement of problem with the Authority on 18 January 2018. The statement of problem was served on Cross Country Recruitment Limited on 22 January 2018 at 10.38 am. No statement in reply was received.

[2] On 23 February, in order to advance the matter, I proposed to the parties that this matter be progressed to an investigation meeting and made directions accordingly. A Notice of Direction to that effect was served on CCR at 11.07 on 28 February and a Notice of Investigation Meeting was served on CCR at 10.35 am on 6 March 2018.

[3] At the start time of the investigation meeting CCR attended and made an oral application for leave to respond or reply to Mr Carpena's application. As it is always preferable to hear from both sides of a problem CCR was granted leave to respond.

Employment relationship problem

[4] CCR provides employee solutions for farming operations which includes the recruitment and placement of migrant labour. CCR was set up in September 2012 by Mr Warwick Ryan and Mr Benjamin De'ath. Mr Ryan and Mr De'ath parted ways in September 2017. Mr Ryan remained a shareholder and director of CCR while Mr De'ath resigned as a director and his share allocation was removed from the companies register.

[5] Mr Victor Carpena worked in a Pastoral Care role for CCR looking after mainly Filipino migrants who were placed in work by CCR. He worked part time while on a student visa from April 2014. On or about 2 March 2015 Mr Carpena was offered and accepted full time employment. At that time the parties signed a written employment agreement. Neither party has been able to provide me with a copy of the signed agreement however, CCR has provided me with a copy of an unsigned document which Mr Carpena has acknowledged sets out the terms of the agreement he signed in 2015.

[6] It was common ground that in 2016 Mr Carpena's role changed and by agreement his rate of pay was changed from an hourly rate with a travelling allowance, to an all-encompassing annual salary. While Mr Carpena is convinced he

signed a new employment agreement at that time neither he nor CCR was able to provide a copy of the agreement.

[7] Mr Carpena continued to work until he resigned and left his employment in October 2017. Mr Carpena resigned on 28 September to work for Mr De'ath in his new business.

[8] Mr Carpena provided one month's notice. On about 3 October Mr Ryan acknowledged Mr Carpena's resignation. CCR invoked clause 8.1(ii) of the employment agreement which provides the discretion for CCR to pay Mr Carpena in lieu of him working the notice period and requiring Mr Carpena not to work for a competitor during that period.

[9] CCR calculated Mr Carpena's final pay at the time his employment ended but withheld payment. Accordingly, Mr Carpena claims he is owed arrears of wages including holiday pay not paid at the end of his employment. He also claims compensation for stress. In the Notice of Direction dated 23 February Mr Carpena was advised that to be successful in a claim for compensation he must first establish he has a personal grievance and he was directed to provide evidence of his personal grievance.

Issue

[10] In order to resolve Mr Carpena's employment relationship problems I must determine the following questions:

- a) Is Mr Carpena owed arrears of wages including holiday pay and if so how much?
- b) Does Mr Carpena have a valid personal grievance and if so what if any remedies should be awarded?

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence received from Mr Carpena and CCR but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Arrears of wages

[12] Mr Carpena says he is owed arrears of wages and holiday pay. While Mr Carpena's last day of work was 3 October his employment ended on 27 October which was the end of his notice period.

[13] There is no dispute Mr Carpena was not paid his final pay. At the investigation meeting Mr Ryan told me Mr Carpena's final pay had been calculated but not paid due to CCR discovering he had been overpaid commission payments and had failed to return a company cell phone at the end of his employment. For the reasons that follow I have concluded that withholding Mr Carpena's final pay was unlawful.

Recovery of overpayment of commissions

[14] The Wages Protection Act 1983 requires wages to be paid without deduction.¹ The recovery of an overpayment of wages is governed by the rules set out in the WPA at s 6.

[15] The commission payments made by CCR were not provided for in the employment agreement. Mr Ryan acknowledged there was no formal documentation around the way commission payments were calculated or paid or how commission payments would be reconciled to take into account any overpayments from one period to the next. Withholding payment of Mr Carpena's final pay in these circumstances was unlawful.

Mobile phone

[16] Mr Carpena denied he had received a company phone. He told me he had received a sim card which he used in his own personal device. Mr Carpena told me he returned the sim card when he left his employment.

[17] At clause 24.1 the employment agreement requires Mr Carpena to maintain a cell phone with available credit at all times. It is not clear whether he had to maintain available credit on his own device or a device provided to him by CCR.

¹ Wages Protection Act 1983, s 4.

[18] The Fourth Schedule of the employment agreement provides for provision of a laptop, an iphone and a sim card.

[19] I have accepted Mr Carpena's evidence that he received a sim card which he used in his own device and that he returned the sim card at the end of his employment. Withholding his final pay in these circumstances was unlawful.

Calculation of arrears of wages

[20] Mr Carpena was unable to calculate his claim for arrears of wages in any detail. Instead he has provided an "estimate". At the investigation meeting Mr Ryan provided me with a copy of a record setting out CCR's calculations of Mr Carpena's final pay. The record is dated as being made for the pay period ending 13 October. The final pay calculations include payment of the one month notice period and outstanding holiday pay.

[21] Mr Carpena accepts that the total net pay amount calculated by CCR is likely to be correct. On that basis I have accepted CCR's evidence as to the amount outstanding for unpaid salary and holiday pay. The record provided by Mr Ryan shows a total net amount of \$6,124.14 owing to Mr Carpena which has then been reduced by \$970 which Mr Ryan says was paid to Mr Carpena.

[22] Mr Carpena denies receiving a payment of \$970 and no evidence has been produced by CCR to show when or how that payment was made. I have concluded the \$970 was incorrectly deducted from Mr Carpena's final pay calculation.

[23] After reviewing the record setting out the final pay calculation and the documents and evidence provided by both CCR and Mr Carpena I am not satisfied the total net payment owing is correct. The record provided by Mr Ryan provides for a deduction of \$800 gross being the balance of a loan owed by Mr Carpena to CCR.

[24] At the investigation meeting Mr Ryan told me he had also paid Mr Carpena \$500 on 18 November as a part payment of his final pay. Post the investigation meeting Mr Ryan provided documents to show that he made two further payments to Mr Carpena of \$1,440.68 (5 and 17 October). Mr Carpena accepts he has received all three of these payments.

[25] Mr Carpena agrees he had received a loan of \$1,000 from CCR and that he was required to pay it back by way of deductions from his wages. The first repayment was made in September, before Mr Carpena resigned. That reduced the loan to \$800 and it was this amount that was deducted from the calculations of Mr Carpena's final pay. For the reasons that follow I have concluded CCR has erred in reducing Mr Carpena's final pay by \$800.

[26] Mr Carpena was paid his fortnightly salary on 5 October. This salary payment was reduced by \$200 to account for a second loan repayment. This reduced the loan to \$600.

[27] A further salary payment was made on 17 October. CCR has again reduced the salary payment by \$200 to account for a third repayment of the loan leaving a balance of \$400.

[28] CCR has made deductions for the repayment of the loan twice. Once in its final calculations where it deducted \$800 and then again when CCR has paid Mr Carpena during his notice period on 5 and 17 October. CCR has recovered \$400 more than it was entitled to recover in loan repayments.

[29] It is not clear on the documents or evidence I received whether the 13 October calculations of Mr Carpena's final pay took into account the payment made to him on 5 October. I have concluded it is more likely than not that the payment made to Mr Carpena was not a factor in the calculation of his final pay as it was paid prior to CCR's calculations.

[30] The starting point for calculating Mr Carpena's outstanding wages and holiday pay is \$6,126.14. Following the date of this calculation Mr Carpena received payments totalling \$1,940.68 (\$1,440.68 on 17 October and \$500 on 18 November). Taking into account the payments received by Mr Carpena the total outstanding wages and holiday pay amounts to \$4,185.46.

[31] To this should be added \$400 being to take into account the over recovery of the loan repayments. The total arrears of wages including holiday pay outstanding is \$4,585.46.

[32] Cross Country Recruitment Limited is ordered to pay to Mr Carpena an amount of \$4,585.46 for unpaid wages and holiday pay under section 131 of the Act within 14 days of the date of this determination.

Personal grievance

[33] In his statement of problem Mr Carpena claims remedies including compensation for stress. In the Notice of Direction dated 23 February 2018 I directed Mr Carpena to provide evidence of his personal grievance. In response Mr Carpena provided a copy of a text message he sent to Mr Ryan. The text message is not evidence of a personal grievance but is to do with Mr Carpena's final pay.

[34] In a short statement provided by Mr Carpena prior to the investigation meeting he refers to a text message he received from Mr Ryan in conjunction with a partial payment of his final pay of \$500 on 18 November. Mr Carpena's employment relationship ended on 27 October. The text he received from Mr Ryan is after the employment relationship ended and the Authority has no jurisdiction to investigate that actions of CCR in relation to that text message.

[35] Mr Carpena has not established a personal grievance and his claim for compensation is declined.

Costs

[36] Mr Carpena is entitled to be reimbursed his filing fee in this matter. Cross Country Recruitment Limited is ordered to pay to Mr Carpena the sum of \$71.56 within 14 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority