

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 111/10
5276857

BETWEEN WALTER JAMES DELANY
 Applicant

A N D GARRY ALLAN DERRICK
 (CAITHNESS FARMING CO
 LIMITED)
 Respondent

Member of Authority: James Crichton

Representatives: David Clark, Counsel for Applicant
 Respondent in person

Investigation Meeting: On the papers

Determination: 6 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Delany) filed his statement of problem in the Authority on 30 August 2009 and at the first telephone conference with the parties, I directed that all relevant documents held by each side were to be filed and served and that in particular, the respondent (Mr Derrick) was to send copies of source documents on which the time and wages record was based. In essence, Mr Delany claims to have been short-paid wages and holiday pay arising out of his individual employment agreement with Mr Derrick.

[2] Mr Derrick's position is that all wages due and owing have been paid.

[3] There was a delay in Mr Derrick providing some of the source material required by the Authority and on investigation, it appeared that Mr Derrick had lost some electronic records as a consequence of the changeover from one computer to

another. Then the investigation meeting scheduled for early December had to be adjourned because of Mr Derrick's ill health and was rescheduled for 3 February 2010.

[4] Then Mr Derrick protested, by email dated 19 January 2010, that the matter had been *escalated unnecessarily* by Mr Delany and that the parties had not been allowed to go to mediation. As counsel for Mr Delany was quick to assert in a responding email, Mr Derrick's observations on that matter were well astray of the mark. It was a consequence of Mr Derrick's insistence at the initial telephone conference that mediation would not avail, that I decided that the matter should proceed directly to a hearing. I am satisfied that I carefully explained in the initial telephone conference that the nature of the proceeding was an investigation meeting and not a mediation. That view of matters is also supported by counsel for Mr Delany.

[5] In any event, with Mr Derrick's new found enthusiasm for mediation and some further payments on account by Mr Derrick in relation to Mr Delany's claim, counsel for Mr Delany sensibly proposed that there be further mediation on the matter rather than the rescheduled investigation meeting. Mediation took place on 3 February 2010 and although some matters were resolved, there are still outstanding points of difference. I issued a notice of direction to the parties on 16 February 2010 in which I confirmed their agreement to deal with the remaining issues by way of written submissions and I provided a timetable to the parties for the receipt of those submissions.

[6] The submissions having now come to hand, the Authority is in a position to complete the resolution of this matter.

Issues

[7] Mr Delany seeks orders requiring Mr Derrick to pay the following items:

- (a) One week's pay;
- (b) A penalty for breach of the employment agreement by withholding pay;
- (c) Interest;
- (d) Costs.

[8] Mr Derrick resists all those claims and seeks to advance a counterclaim alleging he is owed money by Mr Delany in respect to the following items:

- (a) Stains on the carpet of the house property provided;
- (b) Missing tools from the farm;
- (c) Charging goods to Mr Derrick's account inappropriately.

The extra week's pay

[9] The evidence before the Authority discloses a disagreement about the finish date of Mr Delany's employment with Mr Derrick. Mr Delany says that he gave Mr Derrick verbal notice and that in the course of that conversation (which he claims was the only occasion the matter was addressed) Mr Delany asked him to stay as long as he could. Accordingly, Mr Delany worked on until 7 June 2009. Mr Delany accepts that that final week was a week outside his four week notice period, but he said he worked that extra week to accommodate the request of the employer.

[10] Mr Derrick says that there was no such agreement for an extra week to be worked and that his understanding was that Mr Delany would cease employment at the end of May. Mr Derrick calls in aid evidence of his advertising for Mr Delany's replacement. That evidence discloses that Mr Derrick was advertising for Mr Delany's replacement during May 2009. That does not assist the Authority because that is consistent with both men's evidence. Mr Delany does not deny that he gave his notice at the end of April and in the normal course would have finished his duties at the end of May (after working out his four weeks notice), but he says he worked the extra week because Mr Derrick asked him to stay as long as possible.

[11] In the result, I am left to conclude that both parties accept that Mr Delany worked the first week of June 2009 and he is entitled to be paid for that work, even if there were a misunderstanding between the two men about when his period of service was to end.

[12] Accordingly, I order that Mr Derrick make payment to Mr Delany for that final week's work.

Should there be a penalty?

[13] Mr Delany seeks a penalty from Mr Derrick because of the quite unreasonable delay in payment of wages and holiday pay due and owing. While it might be argued that in relation to the final week's work (which I have just dealt with) there was a genuine misunderstanding, that cannot be the position in relation to holiday pay where there has been a long standing and wilful refusal to address the issue going back over many months. Mr Derrick protests that his records disclose that Mr Delany did not have any entitlement to holiday leave while Mr Delany says that he can prove that he was working at the farm on those occasions.

[14] Of course, holiday pay as a substantive issue has been resolved by the parties. They are to be commended for that, but the resolution of the matter at a very late stage without any agreement on the other outstanding matters, and particularly without agreement about whether there should be interest payable on the late amount and a penalty, still leave those matters up for determination.

[15] I am satisfied that the delay in the payment of holiday pay was unreasonable. It was not until the Authority's investigative process was well advanced that Mr Derrick felt inclined to address the issue, and his enthusiasm for blaming the Authority for a failure to send the matter to mediation in the first place, when he himself refused mediation at the first telephone conference, does little for his credibility.

[16] I award a penalty against Mr Derrick for his unreasonable delay in the payment of holiday pay alone (reflecting my instinct that there was a reasonable prospect of misunderstanding about the one week's pay) in the sum of \$500 and direct that that penalty is to be paid by Mr Derrick to Mr Delany.

Should interest be payable?

[17] The awarding of interest in this kind of situation attracts much the same range of arguments as considerations around penalties attract. Mr Delany argues that there was an unreasonable delay in payment of money that was legitimately his, that he was denied the use of that money, which money was wages that he had earned and which he had an absolute entitlement to.

[18] All those arguments seem to me to be made out and I award the sum claimed of \$250 in interest. Mr Derrick is to pay Mr Delany that amount.

Should Mr Delany pay Mr Derrick for the carpet?

[19] Mr Derrick's argument about the state of the carpet in the farmhouse provided for Mr Delany to live in was, as counsel for Mr Delany correctly points out, an argument raised at the last minute once the proceedings were on foot and with the sense about it that it was a kind of set-off to Mr Delany's own claims against Mr Derrick.

[20] Whatever its genesis, the short point is that if there is a legitimate grievance between Mr Derrick and Mr Delany in relation to the carpet in the farmhouse in which Mr Delany lived during the employment, then the Employment Relations Authority is not the forum to resolve it.

The missing tools

[21] Mr Derrick complains that there are a number of tools and some consumables missing from the farm and he seeks to call Mr Delany to account for those missing items. The difficulty with this claim is that there is not a shred of evidence that Mr Delany is responsible for removing any of the items in question and like any workplace where there are a number of employees, there are all sorts of explanations for items going missing. I am not persuaded there is any evidence to link Mr Delany to the missing items and I am not prepared to take matters any further.

The unauthorised account charging

[22] Mr Derrick complains that Mr Delany charged up items to Mr Derrick's CRT account after he left the employment and he produces evidence to this effect. That evidence is fine as far as it goes. The difficulty with it is that Mr Delany accepts immediately and without reservation that an error was made (he himself having his own account as well) and that as soon as the error was discovered it was immediately rectified. Mr Delany provides evidence to the Authority that the very month after the debts were incurred the error was found and corrected. It follows that the evidence that Mr Derrick provides to the Authority is plainly misleading. It does not give a full and true picture. Mr Derrick would know perfectly well in preparing his submission for the Authority that the matter of the CRT account had been resolved and was

capable of a perfectly innocent explanation, yet he chose to portray Mr Delany as a dishonest person who had deliberately debited Mr Derrick's account.

Costs

[23] As the successful party, Mr Delany seeks costs against Mr Derrick. Mr Delany's position is that had he been able to resolve matters by agreement with Mr Derrick, then he would have incurred no legal costs at all, but because that was not possible Mr Delany was forced to engage counsel and then meet counsel's reasonable costs.

[24] Mr Delany's counsel has provided a statement of the total fees charged and I am satisfied that those fees are in the circumstances of this case perfectly reasonable. What is more, Mr Delany seeks a reasonable contribution to his fees in the sum of \$1,500. That represents around a third of the total costs incurred. Such a figure is reasonable in all the circumstances and I award it.

Summary

[25] Mr Derrick is to pay to Mr Delany the following sums to conclude this matter:

- (a) One week's wages in the sum of \$1,538.46;
- (b) A penalty in the sum of \$500;
- (c) Interest in the sum of \$250;
- (d) Costs of \$1,500.

James Crichton
Member of the Employment Relations Authority