IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2013] NZERA Wellington 161
5415690

	BETWEEN	AARON JAMES FORDE Applicant
	AND	CENTRAL COMMERCIAL VEHICLES LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Aaron Forde in person Richard Wharton for the Respondent
Investigation Meeting:	17 September 2013
Further documents received	From Respondent 20 and 30 September 2013
Determination:	17 December 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Aaron Forde was employed as a heavy truck sales person by Phil Wheelans Fuso Limited from 16 May 2011 until he resigned effective from 5 September 2012. The company changed its name to Central Commercial Vehicles Limited from 1 August 2012.

[2] Mr Forde claims that his former employer has breached the Holidays Act 2003 by not paying him the full value of accrued holiday pay owing at the termination of his employment. He also says his employer breached his employment agreement by not paying commission on all the vehicles he sold. Additionally, Mr Forde seeks reimbursement of money he claims was unlawfully deducted from his final pay.

[3] Mr Forde sought access to full wage and time records for the period of his employment, through his legal representative. Central Commercial Vehicles Limited provided only summary information. Mr Forde asks the Authority to impose a

penalty on his former employer for breach of s.130 of the Employment Relations Act 2000 (the Act) for this failure. He seeks a further penalty for a breach of his employment agreement, as well as interest and costs.

[4] A director of Central Commercial Vehicles Limited (CCVL), Richard Wharton, filed a short statement in reply. This stated that Mr Wharton understood Mr Forde's application should have been lodged within 90 days of his resignation. It also stated that Mr Wharton understood the matter to have been resolved.

[5] Mr Wharton's understanding was incorrect on both counts. This was explained to him in the course of a telephone conference with the Authority and Mr Forde on 31 July 2013. An investigation meeting was scheduled and a timetable put in place for the parties to provide witness statements in the weeks leading up to it. While Mr Forde provided a witness statement, none was forthcoming from CCVL.

[6] Mr Wharton and Phil Wheelans attended the investigation meeting for CCVL and subsequently provided some documents to the Authority.

Background

[7] Mr Forde was employed on an individual employment agreement. His remuneration consisted of a retainer of $70,000 per annum and commission on each truck he sold.

[8] There were no incidents of note in the employment relationship until Mr Forde's employer lost the franchise for Freightliner and Mercedes Benz Heavy Vehicles on six months' notice. Mr Forde continued to sell those products, along with another brand of vehicle, until the contract finished on 1 August 2012. This was the date his employer changed its name to Central Commercial Vehicles Limited.

[9] Mr Forde submitted his resignation on 21 August 2012, following an offer of employment from another company to continue selling Freightliner and Mercedes Benz products. CCVL offered him a $30,000 increase in his annual retainer to stay with the company, which he considered but refused.

[10] Mr Forde says that when he left CCVL he was under the impression he had left on relatively good terms. He had been told that outstanding commissions, holiday pay and salary would be paid to him. In the following weeks he was paid for only

some of the holidays owing to him and deductions were made from his final salary payment.

[11] After querying the discrepancies, Mr Forde received a letter signed by Mr Wharton stating that money had been deducted from his salary for damages to a company vehicle and for credit card expenses that were not authorised. A further deduction had been made for an airfare incurred in transporting an employee back to Wellington after he had delivered a truck to a client in Auckland.

[12] Mr Forde disagrees with all three deductions, but has chosen not to pursue the deduction for credit card expenditure, which he says was for legitimate client entertainment and did not require prior authorisation. In the past he had not been required to obtain advance authorisation for such expenditure.

Issues

[13] The issues for the Authority to determine are whether CCVL:

a. paid Mr Forde's holiday entitlement in full;

b. paid all commissions to which he was entitled;

c. deducted monies unlawfully from his final payment;

d. should have a penalty awarded against it for a breach of s. 130 of the Act; and

e. should have a penalty awarded against it for a breach of Mr Forde's employment agreement.

First Issue – did Mr Forde receive all the holiday pay to which he was entitled?

[14] Section 24 of the Holidays Act 2003 provides that when an employee leaves his/her employment and an entitlement to annual leave has arisen the following shall apply:

> (1) Subsection (2) applies if—
>
> (a) the employment of an employee comes to an end; and
>
> (b) the employee is entitled to annual holidays; and
>
> (c) the employee has not taken annual holidays or has taken only some of them.

> (2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of—
>
> (a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or
>
> (b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

[15] CCVL's leave record for Mr Forde shows that he took 10 days annual holidays in the first 12 months of his employment. There was no record of his taking holiday leave in his second year. By my calculation he accrued a further 6.2 days between 16 May 2012 and 5 September 2012. He should, therefore, have been paid out 16.2 days of annual holidays at the termination of his employment. He was paid for 10 days. CCVL therefore owes Mr Forde 6.2 days annual holidays to be calculated in accordance with s. 24(2)(b) of the Holidays Act.

Second issue – did Mr Forde receive all commissions to which he was entitled?

[16] The relevant part of the remuneration clause in Mr Forde's employment agreement provides that :

> *6.1 The employee shall receive a retainer of $70,000 p/a. Thereafter $100.00 per truck sold and a commission payable of 10% of retained gross profit per truck sold.*
>
> *6.2 Remuneration will be paid based on information recorded by the employee on the timesheet/diary provided for that purpose.*

[17] Mr Forde claims he is entitled to commission in respect of 13 trucks he sold before his employment terminated. In his statement of problem he estimated the commission due to him to be $17,877.34.

[18] CCVL's initial response to his claim, by way of a letter dated 13 September 2012 signed by Mr Wharton, referred to losses incurred by the company through Mr Forde's action in not cancelling an order of 2 trucks after the customer had asked for cancellation. CCVL also referred to parts from one of those trucks being used, on Mr Forde's unauthorised initiative, on a vehicle for another customer, resulting in further loss to the company.

[19] Following the investigation meeting the employer accepted that some commission was owing to Mr Forde. Mr Wheelans provided a Salesperson

Commission Report for Mr Forde, and a calculation showing that CCVL owed Mr Forde $2,430.37.

[20] This was based on 10% of the retained gross profit from the sale of 4 trucks. Mr Wheelans subsequently accepted that Mr Forde was also entitled to receive $100 in respect of each of those 4 trucks in accordance with clause 6.1 of his employment agreement. This raises the total amount of commission owing, by his calculations, to $2,830.37.

[21] Mr Wheelans claims that no commission is payable in respect of the other 9 vehicles claimed by Mr Forde. In some instances he says vehicles were delivered after Mr Forde's departure from CCVL, and that no commission was payable in those instances.

[22] Mr Forde disagrees with CCVL's position on vehicles delivered after his employment had ended. He put forward evidence that industry practice in such situations is that the employee is entitled to 50% of the commission. I am not persuaded by that evidence, which consisted of letters from four executives in the motor truck industry. The evidence was unsworn, and none of the four executives attended the investigation meeting, so their evidence was unable to be tested. CCVL denied that the executives' letters reflected industry practice.

[23] I note also that, when Mr Forde claimed commissions that were owing to him, by letter to CCVL dated 10 September 2012, he did not include commission for trucks he had sold, which had not been completed or delivered by the date of his departure from CCVL. While his employment agreement does not specify that commission will only be paid after a truck has been delivered, Mr Forde's initial claim appeared to tacitly acknowledge that to be a reasonable inference.

[24] Mr Wheelans also claims that in some instances CCVL incurred costs that affected the retained gross profit and therefore the commission owing to Mr Forde. These costs were due to promises Mr Forde had made to purchasers; travel costs incurred in delivering a vehicle; or, in one instance, a rebate being given to a customer for a poor paint job on a vehicle. Mr Forde disagreed over the date of delivery of one vehicle, and rejected the company's assertions on two others.

[25] CCVL did not provide any documentary evidence to support its claims. However, I am satisfied from Mr Forde's acknowledgement in respect of the paint job on one vehicle, that it is more likely than not the company provided the $2000 rebate

to the customer that it claimed. I have accordingly reduced by that amount the sum on which Mr Forde's commission should be calculated.

[26] I find that Mr Forde is owed commission on 5 of the 13 vehicles for which he is claiming. No commission is payable on the 8 vehicles that were completed and delivered after he left his employment with CCVL. I accept Mr Forde's evidence over the delivery date of one vehicle disputed by CCVL. In doing so, I note that his employer provided no evidence in support of its assertion of a later delivery date. The Salesperson Commission Report that CCVL supplied after the investigation meeting supports the date claimed by Mr Forde.

[27] I find the following commissions payable to Mr Forde:

Client (as described by CCVL)	Commission Payable (including $100 per truck as per IEA) $
Macaulay Metals	2,682.45
Super Freight	636.98
Super Freight	467.60
B Dougherty	3,789.81
Westview Aluminium	339.65
Total commission payable	**7,916.49**

Third Issue – were monies unlawfully deducted from Mr Forde's final pay?

[28] The sum of $1,207 was deducted from Mr Forde's final payment, for damage to his company vehicle. He discovered this when he received a letter from Mr Wharton with his final salary payment. The letter informed him that this was the cost of repairing damage to his vehicle "*which was not covered by our company insurance*". In an email sent to Mr Forde's legal representatives on 29 October 2012, Mr Wharton justified the amount as:

> "*$1207 for vehicle damage – rear tailgate and rear quarter panel $1,000 excess per claim. Aaron had been advised to have this repaired prior to his resignation."*

[29] Mr Forde said his vehicle was dented off-site during working hours when he reversed into a car park, not seeing a branch that was sticking out into the space. It was a minor accident and there was no reason it would not be covered by insurance. He had discussed the matter with his employer and had been told to give the vehicle to the company's in-house paint and panel shop for repair. The shop was too busy to do the repair at the time and Mr Forde was still waiting for it to be done when his employment with CCVL ended. Mr Forde says the issue of his liability for the damage was never raised with him during his employment.

[30] CCVL relies on clause 6.6 of Mr Forde's employment agreement, together with its motor vehicle policy, for its authorisation to deduct the $1,207 from Mr Forde's final salary. Clause 6.6 provides:

> *The employee agrees that upon termination of employment for any reason the employer may make deductions from the employee's remuneration in respect of any money owed to the employer whatsoever. This includes any such sums of money that may be equivalent to amounts of money or property of the employer for which the employee is unable to satisfactorily account.*

[31] In the course of the investigation meeting CCVL referred to a motor vehicle policy which, in its view, justified the deduction from Mr Forde's final pay. It did not produce the policy at the time but subsequently emailed it to Mr Forde and the Authority at my request. The "*Accidents*" clause relied upon by CCVL is reproduced below:

> *If you are involved in an accident or cause damage to a company vehicle and you are wholly or partly at fault, you may be liable to pay Companies insurance excess. (being $1,000) Further, in such circumstances, The Company reserves the right to withdraw the company vehicle.*

[32] I do not agree with CCVL that clause 6.6 of Mr Forde's IEA and the above clause of the company's motor vehicle policy authorise the deduction of $1,207 from his final remuneration. Firstly, there is no evidence that CCVL had, in any discussion with Mr Forde, attributed blame for the accident to him, or raised the issue of his liability for payment of the company's insurance excess. That being so, I am not satisfied that this was a sum "*owed to the employer*". It is neither fair nor reasonable for an employer to invoke a discretionary provision that will financially penalise an employee without first discussing the matter with that employee.

[33] Mr Forde should have been informed of his employer's view of his liability during his employment, not after it had terminated. He should also have been given the opportunity to provide his viewpoint before any decision was made. Mr Wheelans acknowledged in the investigation meeting that it was his practice to make employees aware when he intended that they should contribute to the cost of repairs.

[34] Secondly, the *Accidents* clause provides that the liability that may be imposed on the employee is the amount of the company's insurance excess of $1,000. Mr Forde had $1,207 deducted from his final pay for the repair, which the company says was the full cost of the repair. Its policy does not provide for an employee to be charged the full cost. Mr Wheelans acknowledged in an email to the Authority after the investigation meeting that Mr Forde was "*entitled to a refund of $200*".

[35] Thirdly, a reasonable implication to take from the *Accidents* clause is that the company has made a claim on its insurance policy. It emerged that, despite the inconsistent information provided to Mr Forde before the investigation meeting, CCVL did not claim insurance for the vehicle repair. It is therefore questionable whether it could rely on its *Accidents* policy to recover the insurance excess of $1,000.

[36] Fourthly, s. 4 of the Wages Protection Act 1983 obliges an employer to pay wages due to a worker, in full without deduction. Section 5 of that Act provides an exception to that obligation where a worker has given written authorisation for the deduction. I find that clause 6.6 of the employment agreement signed by Mr Forde, in conjunction with the *Accidents* clause of the Motor Vehicle policy, does not provide the requisite written authority for a deduction of this nature that was not made known to the employee in advance.

[37] CCVL also deducted $100 from Mr Forde's final salary payment for the airfare of an employee who had delivered a truck Mr Forde had sold to an Auckland client. The employer maintains that responsibility for payment of the airfare should rest with Mr Forde, not CCVL. Mr Forde's position is that his employer was responsible for the delivery of the vehicle being delayed by two and a half weeks. It was reasonable to use an employee to deliver the truck and to fly back to Wellington.

[38] Mr Forde's use of his initiative to ameliorate a difficult situation with a client may not have been strictly in accordance with his employer's normal procedure. That may have been good cause to initiate a conversation with him over the amount of commission to which he was entitled for the sale. CCVL did not engage in such a

conversation, but simply deducted the sum of $100 from Mr Forde's final pay to cover the driver's airfare.

[39] Mr Forde had not given written authorisation for the deduction and, accordingly, I find it to be in breach of s. 4 of the Wages Protection Act. CCVL is to reimburse Mr Forde the $100 it unlawfully deducted from his final payment.

Should a penalty be awarded against CCVL for breach of s. 130 of the Act?

[40] Section 130 of the Act provides that:

> (1) Every employer must at all times keep a record (called the wages and time record) showing, in the case of each employee employed by that employer,—
>
> (a) the name of the employee:
> (b) the employee's age, if under 20 years of age:
> (c) the employee's postal address:
> (d) the kind of work on which the employee is usually employed:
> (e) whether the employee is employed under an individual employment agreement or a collective agreement:
> (f) in the case of an employee employed under a collective agreement, the title and expiry date of the agreement, and the employee's classification under it:
> (g) where necessary for the purpose of calculating the employee's pay, the hours between which the employee is employed on each day, and the days of the employee's employment during each pay period:
> (h) the wages paid to the employee each pay period and the method of calculation:
> (i) details of any employment relations education leave taken under Part 7:
> (j) such other particulars as may be prescribed.
>
> (2) Every employer must, upon request by an employee or by a person authorised under section 236 to represent an employee, provide that employee or person immediately with access to or a copy of or an extract from any part or all of the wages and time record relating to the employment of the employee by the employer at any time in the preceding 6 years at which the employer was obliged to keep such a record.
>
> (3) Where an employer keeps a wages and time record in accordance with any other Act, that employer is not required to keep a wages and time record under this Act in respect of the same matters.
>
> (4) Every employer who fails to comply with any requirement of this section is liable to a penalty imposed by the Authority.

[41] Mr Forde's legal representatives requested by letter dated "*a copy of Aaron's full holiday and leave record, and his wages and time record for 2012*" reminding CCVL that it was "*required by law to provide these records upon request*." This was by letter dated 24 October 2012. Two documents were provided by CCVL on 29 October 2012, comprising a summary of remuneration paid in the financial year

beginning 1 April 2012, and a summary of annual holidays earned and taken from the commencement of Mr Forde's employment to 11 September 2009.

[42] The Notice of Direction issued to parties by the Authority on 5 August 2013 directed CCVL to file its witness statements and "*all documents including wage, time and holiday records for Aaron Forde*" by 5 pm on Friday 6 September 2013. No documents were filed by CCVL within that time frame.

[43] It is appropriate to impose a modest penalty on CCVL for not complying with its statutory duty to provide the full wage and time records for 2012 sought by Mr Forde. I am mindful that it did provide some information, albeit insufficient, and in summary form. CCVL is ordered to pay a penalty of $250, which is to be paid to the Crown.

Should a penalty be awarded against CCVL for breaching Mr Forde's employment agreement?

[44] Section 134 of the Act provides that:

> (1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.
>
> (2) Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[45] Mr Forde's employment agreement provided for 2 payments in respect of each truck he sold. One payment was a flat $100, and the other was a commission of 10% of the retained gross profit from the sale.

[46] CCVL acknowledged after the investigation meeting that Mr Forde was owed commission, although its estimate of the due amount differed from his estimate and from mine. It should have come to that conclusion at the time of Mr Forde's departure from its employment. It should then have engaged with him over the amount of the commission rather than simply denying that he had any entitlement. CCVL offered no reasonable explanation for its failure to do so.

[47] I find CCVL breached Mr Forde's employment agreement by withholding commission due to him. I award a penalty of $1,000 against CCVL, of which half is to be paid to the Crown and half to Mr Forde.

Determination

[48] Central Commercial Vehicles Limited is ordered to pay:

a. Outstanding annual holiday pay of 6.2 days to Mr Forde, to be calculated in accordance with s. 24(2)(b) of the Holidays Act;

b. Outstanding commission to Mr Forde in the sum of $7,916.49 gross;

c. The sum of $1,307 nett to Mr Forde, being monies unlawfully deducted from his final payment;

d. Interest on the sums at (a) to (c) above at the rate of 5% per annum from 11 September 2012 to the date of payment;

e. A penalty of $250 for a breach of s. 130 of the Act, to be paid to the Crown; and

f. A penalty of $1,000 for breaching the remuneration provisions of Mr Forde's employment agreement, with $500 to be paid to Mr Forde and $500 to the Crown.

Costs

[49] The issue of costs is reserved.

[50] I note that Mr Forde has been largely successful in his claims, although he has been awarded a lower amount of commission than he sought. Costs generally follow the event. While both parties were self-represented at the investigation meeting, Mr Forde incurred legal costs after his own efforts to obtain the monies owing to him proved to be unsuccessful. If the parties are unable to reach agreement on costs, they may make submissions to the Authority on the matter.

Trish MacKinnon
Member of the Employment Relations Authority