

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 171
5443370**

BETWEEN KERRY GEENTY
 Applicant

AND GR & TL BURNETT LTD
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul Blair, Advocate for Applicant
 Graeme Burnett, Advocate for Respondent

Investigation Meeting: On the papers

Submissions received: 31 March 2014 from Applicant
 3 April 2014 from Respondent

Determination: 5 April 2014

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] The Applicant, Mr Kerry Geenty, is seeking payment of unpaid wages and holiday pay due to him by the Respondent, GR & TL Burnett Ltd.

[2] The Respondent confirms that it owes Mr Geenty the sum of \$1,263.36 for outstanding unpaid wages and holiday pay, but claims that it has the right to set off the amounts owed to Mr Geenty against the sum of \$23,682.00 ordered to be paid to it by way of reparation by the Rotorua District Court on 11 November 2013, pursuant to clause 13 of the Set Off Act 1729 and clause 5 of the Set Off Act 1735.

Issues

[3] The issue for determination is whether or not the amounts in respect of unpaid wages and holiday pay owed to Mr Geenty can be set off against the amount awarded to the Respondent by way of reparation.

Background Facts

[4] Mr Geenty commenced employment with the Respondent on or about June 2010.

[5] On 20 June 2013 Mr Geenty was summarily dismissed by the Respondent following his arrest by the New Zealand police. He was subsequently charged and convicted of theft as a servant, and on 11 November 2013 the Rotorua District Court imposed a Reparation Order on Mr Geenty, ordering that he pay the Respondent the sum of \$23,682.00 by way of reparation.

[6] For completeness, as confirmed by the Deputy Registrar of the Rotorua District Court in a letter addressed to Mr Burnett and dated 10 January 2014, Mr Geenty was convicted in the name of Kerry Damion Bendall, and the Reparation Order is made in that name. For the purposes of this determination I shall refer to the Applicant as Mr Geenty.

[7] On 3 December 2013 Mr Blair, on behalf of Mr Geenty, wrote to the Respondent requesting payment of Mr Geenty's outstanding unpaid wages and holiday pay entitlements.

[8] The Respondent accepts that the sum of \$1,263.36 for outstanding unpaid wages and holiday pay is owed to Mr Geenty, but claims that it has the right to set off the wages and holiday pay owed to Mr Geenty against the amount ordered by the Rotorua District Court as reparation pursuant clause 13 of the Set Off Act 1729 and clause 5 of the Set Off Act 1735.

The Law

[9] The Set Off Act 1729 allows for the setting off of mutual debts:

13 Mutual Debts to be set one against the other. This Clause amended and made perpetual by 8 Geo 2 c 24

And be it further enacted by the Authority aforesaid, that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as Executor or Administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other and such matter may be given in evidence upon the general issue, or pleading in Bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon

such general issue. (Emphasis mine)

[10] Clause 13 of the Set Off Act 1729 was made perpetual by s4 of the Set Off Act 1735 which also states at clause 5:

5 Exception

And be it further enacted and declared by the authority aforesaid, that by virtue of the said clause in the said first recited Act contained, and thereby made perpetual, mutual debts may be set against each other, either by being pleaded in Bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or speciality; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued, or shall accrue, by reason of such penalty, the debt intended to be set off, shall be pleaded in Bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid. (Emphasis mine)

[11] Section 4 of the Wages Protection Act 1983 precludes deductions being made by an employer from an employee's wages unless the employee has given their written consent for the employer to do so:

4 No deduction from wages except in accordance with Act

Subject to sections (5)(1) and 6(2) of this Act, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[12] . Section 15 of the Wages Protection Act 1983 states:

15 Act subject to other enactments

Subject to sections (6)(2) and 16 of this Act, this Act shall be read subject to the provisions of any other Act.

Determination

[13] In this case, there is no dispute on the part of the Respondent that it owes outstanding unpaid wages and holiday pay to Mr Geenty. There is equally no dispute that there is a Reparation Order in favour of the Respondent against Mr Geenty as a result of a judgment made by Rotorua District Court. There are therefore mutual agreed debts in existence between the parties.

[14] Section 4 of the Wages Protection Act 1983 is mandatory unless a claim falls within an established statutory exception or is subject to s15 of the Wages Protection Act 1983.

[15] The issue in this case is whether or not the Wages Protection Act 1983 should be read subject to the provisions of the Set Off Act of 1735 which make provision for the setting off of one debt against the other irrespective of the fact that the debts may be different in nature.

[16] Mr Blair on behalf of Mr Geenty submits that the words: “*any other Act*” contained at s 15 of the Wages Protection Act 1983 means any other enactment that specifically allows for or permits a deduction from wages, citing the Court of Appeal case *Attorney-General v Sears*¹ in which the ‘*any other Act*’ was the Government Superannuation Fund Act 1956 which made provision at s 61B (1) for the deduction of superannuation contribution from the employee’s salary.

[17] Mr Blair further submits that there is a substantial body of case law which establishes that claims on behalf of employers to set off claims against an employee from wages have been almost wholly unsuccessful, holding s4 of the Wages Protection Act 1983 to be unequivocal.

[18] Whilst this may be the case, I note that the Set Off Act 1735 is still good law in New Zealand. I accept that the meaning of s4 of the Wages Protection Act 1983 is unequivocal, and has been held to be so in several cases².

[19] However s15 of the Wages Protection Act 1983 states clearly that that Act is to be read subject to the provisions of any other Act. I consider that had Parliament intended the wording: “*the provisions of any other Act*” to mean only the specific provision for the deduction of wages of any other Act, it would have been open to Parliament to have made this clear in the wording of s 15 of the Wages Protection Act 1983.

[20] However it did not do so and s15 refers only to “*the provisions of any other Act*” rather than to only those provisions which specifically refer to deductions from salary or wages.

[21] The provision set out in in clause 5 of the Set Off Act 1735 is that where it can be shown: “*how much is truly and justly due on either side*” the judgment shall be determined for:

¹ [1995] 1 ERNZ 627 (CA)

²E.g. *Inspector of Awards v Perry* [1982] ACJ 51; *Gyles v Holmes Consulting Group EmpT* Wellington WT77/92, 23 October 1992

“no more than shall appear to be truly and justly owed to the plaintiff, after one debt being set against the other”.

[22] The legal position to set off has been defined in the Court of Appeal case *Grant v NZMC Ltd*³ in which the Court stated:

Set-off affords a defence to an action wholly or in part depending upon the amount and is by its very nature limited to money claims. When a set-off is established by judgment it will pro tanto extinguish the plaintiff's claim ...

[23] The Court of Appeal further held:⁴

The defendant may off-set a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing a cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot be fairly given without regard to the other; the defendant's claims calls into question or impeaches the plaintiff's demand. It is neither necessary nor decisive, that claim and cross-claim arise out of the same context.

[24] I find that in the current case there is no dispute about the debt owed to the Respondent, it has been judged to be an amount of \$23,682.00 by the Rotorua District Court, and I find it would be unjust to allow Mr Geenty's claim without bringing the Respondent's claim to account.

[25] I determine that the amount owed to Mr Geenty in respect of unpaid wages and holiday pay by the Respondent, GR & TL Burnett Ltd in the sum of \$1,263.36, can be off set against the sum of \$23,682.00 owed to it by Mr Geenty by way of the Reparation Order made by the Rotorua District Court on 11 November 2013.

[26] I determine that set-off has been established and Mr Geenty's claim for payment of unpaid wages and holiday pay by the Respondent is thereby extinguished

³ [1989] 1 NZLR 8

⁴ Ibid at pages 12-13

Costs

[27] This matter I regard as a genuine dispute about the interpretation, application or operation of the provisions of the Set Off Acts 1729 and 1735 and I am not persuaded that this is a matter in which costs should be awarded.

[28] However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, submissions may be filed by the parties within 28 days of the date of this determination

Eleanor Robinson
Member of the Employment Relations Authority