

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 114
3355643

BETWEEN ANDRIES GOUWS
 Applicant

AND OPTIMAL FIRE LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Beth Smith, counsel for the Applicant
 Andrew Swan, counsel for the Respondent

Investigation: By telephone conference on 10 February and
 by audio-visual link on 24 February 2025

Determination: 25 February 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By determination issued on 26 August 2024 the Authority ordered Optimal Fire Limited (OFL) to reinstate Andries Gouws to its employment until the Authority has investigated and determined whether he was unjustifiably dismissed.¹

[2] This interim reinstatement order included a requirement that “OFL must restore Mr Gouws to its payroll from the date of this determination”.

[3] On 3 February 2025 Mr Gouws applied for a further order requiring OFL to comply with that part of the interim reinstatement order. He said OFL had not paid the full amount owed to him when it made its first payment under the payroll restoration order, on 11 September 2024, and in subsequent payments.

[4] His claim about the shortfall comprised four elements:

¹ *Andries Gouws v Optimal Fire Limited* [2024] NZERA 509.

- (i) Restoration of a deduction of \$2,789.34 labelled as being for a “capital loan repayment” in the record of the salary payment made to him on 11 September 2024 through OFL’s payroll system (“the payroll salary payment”).
- (ii) Failure to pay him for days, other than public holidays, during the December-January holiday period (“the holiday period payments”). On 17 December OFL had sought an Authority direction relieving it from paying Mr Gouws’ salary during that period. OFL’s request was declined for reasons set out in a Minute to the parties on 18 December 2024. The Minute advised that “OFL should continue to pay Mr Gouws his regular salary payments for the period from 7 December 2024 to 20 January 2025”. Despite this direction, payslips provided for that period showed OFL paid Mr Gouws for public holidays but recorded other days as “unpaid leave”.
- (iii) A further fortnightly payment of \$8,107.78 which he said should be made to JAG Consult Limited, a company in which Mr Gouws and his wife Estene are both shareholders and directors (“the JAG Consult payments”). Mr Gouws’s statement of problem for his substantive claim said this amount was part of a salary “split” that was “standard OFL practice” for its directors and shareholders, which included him. He was removed as a director of OFL on 12 August 2024 but remained a shareholder.
- (iv) Payment of employment benefits comprising a vehicle allowance and insurance, a fuel car, health insurance and a mobile phone and plan (“employment benefits”).

[5] OFL, replying to the compliance order application, said:

- (i) It was entitled, under a clause in its employment agreement with Mr Gouws, to deduct “outstanding advances” from its payroll salary payments.
- (ii) Pay entitlements for the holiday period ought to be addressed as part of the arrears issue in the substantive investigation because the Authority’s direction on that issue was wrong.
- (iii) Nothing about Mr Gouws claim that his salary included the JAG Consult payments.

- (iv) The interim payroll restoration order did not relate to the employment benefits which Mr Gouws said were part of his remuneration.

Authority investigation

[6] In a case management conference on 10 February with the parties' counsel Mr Gouws' compliance application was granted urgency, with time then abridged for OFL lodging its statement in reply. Arrangements were also made for counsel to be heard on the issue before a determination was made. On 24 February counsel for both parties attended by audio-visual link and assisted in clarifying factual details relating to the compliance order sought and deductions and payments made to date under the interim reinstatement order.

Assessment

[7] The application for a compliance order in relation to the JAG Consult payments and the employment benefits is declined, at this interim stage of the proceedings. The status of the JAG payments, and whatever arrangements were made for them, is in dispute in the substantive investigation. The employment benefits were not referred to in the interim reinstatement application. It is also not clear whether both those categories of payment related to Mr Gouws' employment or to his role as a shareholder and a director. Those are matters that may be resolved by the evidence considered in the substantive investigation.

[8] Prior to his dismissal Mr Gouws was clearly paid a fortnightly salary of \$3,961.54 (gross) through the OFL payroll system as an employee. Payroll records showed this payment was for 80 hours work at the rate of \$49.519231. The interim reinstatement order referred to OFL restoring Mr Gouws to its payroll. OFL clearly understood that reference was to those fortnightly payroll salary payments because it used that as the starting point for preparing its first payment under the order.

[9] Deductions for repayment of a supposed capital loan were not apparent on the pay slips for salary payments made to Mr Gouws prior to his dismissal. There was no legitimate basis established, during this interim stage, for unilaterally imposing such a deduction in the payment made on 11 September 2024. Even if this was arguably permitted by a term in Mr Gouws' employment agreement, his counsel had quickly notified OFL after the 11 September payment that any authorisation for deductions was withdrawn.

[10] The direction given on 19 December 2024 regarding December-January payments was clear that deductions for unilaterally imposed leave could not be made under the interim reinstatement order. OFL chose to ignore that direction for reasons of its own. As a result, its failure to pay Mr Gouws for some days during that period, labelling them as “unpaid leave”, was in breach of the order made about payments to Mr Gouws in the interim reinstatement period.

Compliance order

[11] To comply with the terms of the interim reinstatement orders made on 26 August 2024, OFL must pay Mr Gouws his full payroll salary payment at the gross rate of \$3,961.54 for each fortnight period from 26 August 2024 until the interim reinstatement order is discharged by the Authority’s determination on the substantive issues or by some earlier order.

[12] The only deductions permitted from the gross are those made for PAYE tax and KiwiSaver (including a salary sacrifice element), in the same way as was done in his payroll salary payment prior to his dismissal.

[13] Any arrears due in light of this compliance order must be paid within 14 days of the date of this determination.

Costs

[14] Mr Gouws is entitled to an order for costs for this compliance order application. If not otherwise agreed between the parties, those costs are reserved for assessment following determination of the substantive application.

Robin Arthur
Member of the Employment Relations Authority