

Note: an order for the payment
of a penalty appears at p 6

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 302/07
5081426

BETWEEN JAMES GREEN
 Applicant

AND NOUVEAU HOLDINGS
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: James Green in person
 No appearance for respondent

Investigation Meeting: 19 September 2007 at Auckland

Determination: 2 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] James Green says his former employer, Nouveau Holdings Limited (“Nouveau Holdings”), owes him various sums of money in respect of:

- (a) unpaid wages;
- (b) reimbursement of money deducted unlawfully from wages;
- (c) overtime;
- (d) use of vehicle and personal tools, and reimbursement for purchase of materials used; and
- (e) unpaid holiday pay.

[2] Mr Green also seeks penalties for unspecified breaches of the Employment Relations Act and of the employment agreement.

[3] Nouveau Holdings filed a statement in reply but did not attend and was not represented at the investigation meeting. I am satisfied it received the notice of investigation meeting. It has not provided any reason for its failure to attend. Nor did it respond to the telephone messages the Authority left for it on the day of the meeting advising of the meeting and enquiring as to its representatives' whereabouts.

[4] I have therefore heard and determined the matter in the absence of Nouveau Holdings, pursuant to clause 12, Schedule 2 of the Employment Relations Act 2000.

The facts

[5] Nouveau Holdings employed Mr Green as a carpet and vinyl layer and salesperson, commencing 9 October 2006.

[6] Mr Green was presented with a written employment agreement, but sought to amend some of its terms. He returned his amended document to Nouveau Holdings, but said the document was never finalised. Nouveau Holdings filed a document purporting to be the parties' individual employment agreement, signed by a company director and shareholder and dated 9 October 2006. Mr Green said that is not the document he was given and believed it was prepared some time after his employment commenced. For present purposes I will say that this information is not sufficient to support a finding that Nouveau Holdings should be penalised for failing to provide a written employment agreement. Further, because of certain acknowledgements of Mr Green's nothing turns on the genuineness of the document when it comes to identifying relevant terms and conditions of his employment.

1. Unpaid wages

[7] Nouveau Holdings denied that Mr Green was owed any unpaid wages and said he was always paid the amount due and owed to him. It filed a schedule of payments made, but the source documents were not provided. Mr Green said the schedule did not correctly set out payments actually made to him.

[8] Mr Green worked for Nouveau Holdings from Monday 9 October 2006 to Friday 9 February 2007. He handed in his notice on 12 February 2007, and said he

then entered immediately into a contractual arrangement to carry out further work. He had received a payment of wages on 7 February 2007, but says he was not paid for 8 and 9 February.

[9] In the period to 9 February 2007 he worked a total of 16 weeks. He should have been paid $16 \times [40 \times \$22] = \$14,080$ (gross). The payments he received were nett of tax and his calculations reflect that. The payslips he produced indicate that his nett fortnightly pay was \$1,355.40 so the total nett amount he should have received was $8 \times \$1,355.40 = \$10,843.20$. He said he was frequently not paid on time and was sometimes paid in cash, with only a few payments being made by direct credit to his bank account. The records he provided indicated he was actually paid a total of \$7,353.17. Notes made by Nouveau Holdings on the payslips he provided support his statement that his wage payments were not made in the regular fortnightly amounts suggested by the company's schedule.

[10] Accordingly the total amount of wages underpaid, expressed as a nett figure, is $\$10,843.20 - \$7,353.17 = \$3,490.03$. Nouveau Holdings remains responsible for forwarding any tax payable on that amount.

2. Unlawful deduction from wages

[11] A deduction of \$1,154.15 was made from the payment made to Mr Green on 7 February 2007. Mr Green said the deduction was not authorised. No-one provided the written consent for such deductions required under s 5 of the Wages Protection Act 1983. I therefore accept the deduction was made without authority.

[12] The effect of the deduction - namely that Mr Green did not receive payment to which he was entitled - has been taken into account in my assessment of the total amount of wages Mr Green should have received, less the amount he did receive. Hence there is no need to make a further order regarding repayment of the deduction.

[13] However if Mr Green did owe Nouveau Holdings the sums deducted, the company is entitled to seek repayment. The deductions concerned carpet which Mr Green said he was told he could take, and underlay which he says he did not take. In the absence of evidence to the contrary, I accept that. The deductions also concerned

some vinyl which Mr Green had taken, a charge which Mr Green accepted. Finally they concerned personal phone calls said to have been made on the company account. However no supporting accounts were provided to Mr Green or to the Authority. Mr Green said the arrangement was that he could make personal calls on the phone, provided he did not 'overdo it'.

[14] Since Mr Green acknowledged the vinyl was to be paid for, I offset the amount of \$75 from the monies he is owed. The company's schedule indicates that Mr Green's personal calls were high and that reimbursement could have been considered. However it is not possible to accept the schedule is accurate because of the lack of supporting accounts. I take that matter no further.

[15] In conclusion, \$75 is to be deducted from the amount of unpaid wages set out at [10] above.

3. Overtime

[16] Mr Green sought payments for hours worked in excess of 40 per week. However he acknowledged that the parties had agreed overtime should be recognised by way of time off in lieu of overtime. When he resigned he had not taken the accumulated time off. Without more, that does not entitle him to payment instead.

[17] For that reason I decline the claim for payment for overtime.

4. Use of vehicle and tools and reimbursement

[18] Mr Green claimed a sum that amounted to a rental for the use of his van. He acknowledged there was no agreement between the parties to that effect, so I disallow that claim.

[19] He also said there was an agreement that he would be reimbursed for diesel he used, and for the use of his tools and materials. Whether or not there was such an agreement, the claim was not supported by any invoices or other supporting material. I reject it on the ground that the evidence in support is not sufficient.

5. Holiday pay

[20] Mr Green said he did not take any paid annual leave during his employment. Accordingly on the termination of employment he was entitled to holiday pay calculated at 6% of his total gross earnings (as they should have been). That calculation is $6\% \times \$14,080 = \844.80 (gross).

[21] Nouveau Holdings is ordered to pay Mr Green the sum of \$844.80 (gross) as holiday pay.

Penalties

[22] Penalties may be payable to the crown when, for example, there has been a breach of a provision in the Employment Relations Act which also makes provision for a penalty, or for breach of an employment agreement.

[23] I was not expressly directed to any of the breaches said to attract a penalty. Regarding any breach of the Employment Relations Act I have made an assumption in respect of the obligation to provide a written employment agreement, and declined to award a penalty. Breaches in respect of holiday pay are subject to penalties in the terms set out in s 75 of the Holidays Act 2003. I was not asked to consider a penalty under that Act.

[24] The apparently unreliable payments of wages are capable of amounting to breaches of the employment agreement in respect of the obligation to pay wages. Mr Green said that, in the early days of his employment, he was told the company was awaiting payment of a significant sum from an offshore client so it could meet its obligations. That is why payments were sporadic.

[25] On the other hand, Mr Green indicated that from time to time he received cash payments as advances against wages owed to him.

[26] With evidence of that kind, it is difficult to identify the true extent of the breaches of the obligation to pay wages to Mr Green when they fell due. I therefore address the matter in a global way as a notional single failure to pay wages. In the circumstances indicated by Mr Green's evidence, I order Nouveau Holdings to pay the sum of \$500 as a penalty.

Summary of orders

[27] Nouveau Holdings is ordered to pay to Mr Green:

(a) \$3,490.03 (nett) - \$75 = \$3,415.03 as unpaid wages; plus

(b) \$844.80 (gross) as holiday pay

[28] Nouveau Holdings is ordered to pay to the crown, through the Authority, a penalty of \$500.

Costs

[29] Mr Green is entitled to reimbursement of the Authority's filing fee of \$70. Nouveau Holdings is ordered to pay him that amount in addition to the amounts set out above.

R A Monaghan

Member of the Employment Relations Authority