

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 303
3011211

BETWEEN GLENN HAMPSHIRE
 Applicant

A N D BUILDING SERVICES
 NORTHLAND LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: A. Harvey, Counsel for Applicant
 R. Poole for Respondent

Investigation Meeting: 28 September 2017 at Whangarei

Submissions Received: 28 September 2017 from both parties

Date of Oral
Determination: 28 September 2017

Date of Written
Determination: 2 October 2017

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Building Services Northland Limited is ordered to pay Glenn Hampshire the sum of \$13,898.82 less tax and deducting the \$1,974.14 net payment made in November 2016.**
- B. I order Building Services Northland Limited to pay \$2,250 to Glenn Hampshire as a contribution towards his legal costs.**
- C. Both parties have the leave to seek further directions about payment by instalments if required. Otherwise payment is to occur within 28 days.**

Employment relationship problem

[1] Glenn Hampshire alleges he is owed wages from his time employed as a builder by Building Services Northland Limited (Building Services Northland).

[2] Mr Hampshire was employed as a builder on 29 April 2014. He reported to Rowan Vendt, the director of Building Services Northland, whom he had previously worked for as a contractor. Mr Hampshire ended the employment on 28 November 2016.

[3] Mr Hampshire disputes the amounts he was paid for the last month's work and his annual leave accrued. I directed Building Services Northland to file a wage, time and leave record. As a result of viewing that record Mr Hampshire now says that he is owed further money for under payments in his weekly wage of \$1,200.

[4] Building Services Northland says that it has correctly calculated his final pay, including any leave accrued. It also says that any under payments has been the result of Mr Hampshire not working his contracted hours of 44 hours per week. It believes it has legally made deductions from his pay where he has failed to meet that minimum hourly requirement.

Issue

[5] The issue for determination is relatively simple. It is whether there are any wage arrears owed to Mr Hampshire under the employment contract between the parties.

Employment Agreement

[6] There is an employment agreement that was signed by both parties on 29 April 2014. Mr Hampshire was required to work 44 hours per week. The agreement set out his remuneration and Building Services Northland's right to make deductions in clauses 5(a) and (b):

5. Remuneration

(a) Wages

The employee shall be remunerated at a weekly rate of \$1,200 gross payable monthly to a bank account nominated by the employee.

...

(b) Deductions

The employer shall be entitled to make a rateable deduction from the employee's remuneration for lost time, through default, accident, sickness except where clause 9(c) applies.

Deductions from wages

[7] At the hearing evidence was given by Mr Vendt that deductions had been made from Mr Hampshire's wages pursuant to clause 5(b) of the agreement. Those deductions were made for lost time through default.

[8] I have some concerns about the enforceability of clause 5(b). It refers to making deductions for time lost through accident or sickness. The law already provides for when payment if an employee suffers an accident or sickness during employment in the Holiday Act 2003 and the Accident Compensation Act 2003. An employer is not entitled to make any deduction from wages where an employee is eligible for sick leave or accident compensation.

[9] Even if the clause was enforceable there are concerns about the way it has been exercised. In ordinary language default occurs where there is a failure to fulfil an obligation. The default alleged here is the failure to work 44 hours per week by Mr Hampshire. Building Northland Services undertook an audit of Mr Hampshires time recording.

[10] This default is disputed by Mr Hampshire. He states he did work all the hours contracted. He has given evidence today of his breaks and having pick up supplies either on the way to work, or during work time, which he says were not included within the time records.

[11] Mr Hampshire also had a different view of what the time records were to be used for. He says they were used to prove hours worked on projects for the head contractors to ensure project management of the build site as opposed to managing his employment, Mr Vendt had a different view. He understood the time records were to be used to manage Mr Hampshire's time spent on the job.

[12] It is accepted by both parties that they did not discuss any failures by Mr Hampshire to work 44 hours per week during his employment. They also did not discuss that this would result in a unilateral deduction from his weekly wage of \$1,200.

[13] Section 5(1) of the Wages Protection Act 1983 requires the written consent of a worker before an employer makes deductions from wages. Even if clause 5(b) of the employment agreement was enforceable and provided written consent, from 1 April 2016 section 5(1A) of the Wages Protection Act 1983 provided:

(1A) An employer must not make a specific deduction in accordance with a general deductions clause in a worker's employment agreement without first consulting the worker.

[14] What that means for these parties is in the absence of any evidence of consultation prior to deductions being made means those deductions should not have occurred. Both parties seem to agree that there was no consultation about the deductions that were made here. There certainly is no evidence to that effect.

[15] Further s5A of the Wages Protection Act 1983 forbids unreasonable deductions from wages. Failure to consult or provide relevant information before the deductions are made would be unreasonable. Unilateral deductions from wages also undermines the duty of good faith in s4(1A) of the Employment Relations Act 2000. Employers must be active and constructive and provide access to all information before making an adverse decision to the continuation of employment such as reduction in wages.

[16] It would have been more appropriate in these circumstances if Building Services Northland had a concern about the hours worked for it to have raised those concerns with Mr Hampshire to answer. This allows Mr Hampshire an opportunity to remedy it. Failure to remedy it would have given Building Services Northland the right to consider disciplinary action.

[17] Given the concerns about enforceability and exercise of clause 5(b) in the agreement, I have determined Building Northland Services was not entitled to make the wage deductions from Mr Hampshire's wages over the course of his employment. From discussions with the parties it has been agreed that the deductions total \$8,402.82.

Holiday Pay

[18] There was also an issue about holiday pay Mr Hampshire is owed. It is agreed he took 27.5 days leave. This equates to 5.5 weeks. From discussions with the parties he is still owed the sum of \$5,496 gross. It is also accepted Mr Hampshire was paid

\$1,974.14 net. I intend making orders which provide for him to be paid the net figures still owed, less the amounts he has received in November 2016.

Orders

[19] Accordingly, the following orders are now made:

[20] Building Services Northland Limited is ordered to pay Glenn Hampshire the sum of \$13,898.82 less tax and deducting the \$1,974.14 net payment made in November 2016.

Costs

[21] After hearing from both parties, I have determined it is appropriate to follow the usual approach in the Authority to costs. The Authority uses a daily notional tariff approach to costs. The tariff that is applicable in this case is \$4,500 for one hearing day. This matter has taken a little over half a hearing day. There are no reasons to increase or decrease costs. Therefore the costs payable shall be \$2,250.

[22] I order Building Services Northland Limited to pay costs of \$2,250 to Glenn Hampshire as a contribution towards his legal costs.

[23] Both parties have the leave to seek further directions about payment by instalments if required. Otherwise payment is to occur within 28 days.

T G Tetitaha
Member of the Employment Relations Authority