

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 496
3048193

BETWEEN

GARETH HUTTON
Applicant

AND

WINIPAC LOGISTICS LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person
Paul Mathews, advocate for the Respondent

Investigation Meeting: 18 June 2019

Submissions Received: At the Investigation Meeting

Date of Determination: 22 August 2019

DETERMINATION OF THE AUTHORITY

- A. Winipac Logistics Limited is ordered to pay Gareth Hutton the following sums within 21 days of the date of this determination:**
- (a) \$969.47 gross for deductions made from his pay; and**
 - (b) \$2692.31 gross for the unpaid notice period.**
- B. The parties are encouraged to resolve the matter of costs. If they are unable to do so, a timetable is set for the filing of costs submissions.**

Employment Relationship Problem

[1] Gareth Hutton worked for Winipac Logistics Limited (Winipac or the company), a newly established logistics business owned by Michael Pick. Mr Hutton and Mr Pick had previously worked together and were friends.

[2] Mr Hutton claims that his employment started on 2 October 2017 but he was not paid for his work in October and November 2017. Winipac says that the business was started by Mr Pick and Mr Hutton together and that they agreed not to pay directors' fees or salaries at the start until business picked up. Mr Hutton was paid as an employee from December 2017.

[3] I held an investigation meeting on 18 June 2019 and heard evidence from Mr Hutton, Mr Pick and his wife, Annalena Pick. Mr Hutton also provided letters from two people, whose offices were in the same building as the Winipac offices, confirming that Mr Hutton was regularly in the office. There was no objection to the filing of those letters.

[4] This determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result, as permitted by s 174E of the Employment Relations Act 2000 (the Act).

Issues

[5] The issues for determination are whether:

- (a) Mr Hutton was an employee of Winipac in October and November 2017 and is therefore owed wages for that period;
- (b) Winipac was entitled to make deductions from Mr Hutton's pay and if not, owes him wages; and
- (c) Winipac owes Mr Hutton wages in lieu of notice on his resignation.

[6] Mr Hutton makes no claim for a penalty regarding non-payment of wages or unauthorised deductions.

[7] Winipac conceded in its closing submissions that it was not entitled to make the deductions.

Mr Hutton and Mr Pick's relationship

[8] Mr Hutton and Mr Pick worked together for a freight forwarding company in 2015. Mr Hutton then spent some time overseas and while away, stored property at Mr and Mrs Pick's home. Later Mr Hutton lived in a guest room at the home for some months.

[9] Mr Pick was appointed as general manager for a logistics company and he then appointed Mr Hutton to work there. They were both made redundant, paid two months' pay as redundancy compensation and finished work in September 2017.

Development of Winipac

[10] In about mid-2017 Mr Pick and Mr Hutton began discussions about developing a new logistics business. Mr Pick was aware of some opportunities which he thought could be used. One in particular was a substantial prospect.

[11] In late September or early October 2017 Mr Hutton moved back into the Picks' home. He was going to work on the new business from Mr Pick's home and wanted to avoid a daily commute. The parties agreed on payment of \$180 a week. The Picks considered this a contribution to costs rather than a market rental.

Mr Hutton's version of events

[12] Mr Hutton and Mr Pick have different versions of events regarding Winipac's establishment. Mr Hutton says that Mr Pick told him that he intended to start his own company and invited Mr Hutton to work for him. Mr Pick said he would look after him and offered to teach him the ropes. Mention was made of it being on the same basis as his then current operations manager role. Mr Hutton says that he understood this discussion meant the same salary of \$80,000, although he accepts the figure was not discussed. Mr Pick was confident in developing his own company and mentioned that he intended to get funding from overseas. Mr Hutton did not have capital to contribute.

[13] Mr Hutton denies that Mr Pick asked him to be a partner of the business and have a share in the company but acknowledges that Mr Pick promised that the two of them would be the highest earning Winipac employees. He acknowledged that in the distant future it was possible that he would become a partner in the business.

Mr Pick's version of events

[14] Mr Pick says that he asked Mr Hutton about the idea of leaving their current employer and creating something of their own. Mr Hutton was excited and wanted to be part of it. They discussed showing their commitments by using their redundancy compensation to fund their time developing the business.

[15] Mr Pick refers to WhatsApp communications showing them both deciding on a name for the new venture. I accept Mr Hutton's comment that these conversations have been copied and pasted which means that some of the communications in between could have been removed. They were originally in German and were translated by Ms Pick, with no objection from Mr Hutton to the translation nor other conversations filed.

[16] Ms Pick gave evidence of discussions she heard at home indicating that the two men would grow something together. Her husband also mentioned to her that Mr Hutton was not to be paid initially as they had received the redundancy compensation.

[17] Mr Pick drafted a business plan with Mr Hutton as a company director and COO¹ and sent it to Mr Hutton. Mr Hutton indicated that he was happy, although some modifications were needed. He preferred to be called operations manager.

[18] Mr Pick says that just prior to incorporating the Winipac company, he discussed with Mr Hutton about being a director and shareholder but Mr Hutton decided that he wanted to wait until the company was fully operating and making money. Mr Hutton does not accept that this conversation occurred. Mr Pick became the sole director and shareholder.

Winipac's operation

[19] Winipac was initially run from Mr Pick's home but later moved to commercial premises.

[20] There is no dispute that Mr Hutton was undertaking tasks for Winipac from 2 October. The question is whether he was an employee in October and November 2017. Mr Hutton was not offered an employment agreement. Winipac does question the quantum of work being undertaken by Mr Hutton in this early period as its October bank statements do not show much activity.

Payment question

[21] At the end of October Mr Hutton was not paid anything and asked Mr Pick about payment, which Mr Hutton found uncomfortable. Mr Pick says that Mr Hutton asked when he would start being paid, rather than why he had not been paid (for work already done). Mr

¹ Chief Operating Officer

Pick said that he would not be paid for October and November while the business got up and running.

[22] At this point Mr Hutton did nothing more to pursue the issue of salary payment. This is in marked contrast to later when he vigorously pursued, by email, deductions made from his pay for rather smaller amounts than a month's pay. Mr Hutton says he knew Mr Pick was not going to change his mind however, the same could be said regarding the deduction issue.

[23] Mr Hutton subsequently asked Mr Pick whether he could later get a performance bonus for the two months he was not going to be paid. Mr Pick did not agree, saying that Mr Hutton was an asset to the company. Mr Pick mentioned that Mr Hutton had received the redundancy compensation and that there was the prospect of making money once projects came in.

Meeting with accountants and employment agreement

[24] Mr Pick arranged a meeting with an accountancy firm and invited Mr Hutton along. The accountant asked about salaries and employment. Mr Pick says that he told the accountant that both he and Mr Hutton were not to be employees initially until the company started to make money. Mr Hutton's version of events is that he arrived at the meeting to find that Mr Pick and the accountant had already discussed his salary. He saw the calculations of PAYE on \$80,000 lying on the table.

[25] The accountant mentioned the need for an employment agreement. As none was forthcoming from Mr Pick, Mr Hutton drafted an agreement and sent it to Mr Pick. The draft agreement specified a start date of 2 October 2017 although was clearly drafted later. The salary was \$80,000.

[26] Mr Hutton reports Mr Pick saying he would look at it but nothing further was said until an issue about the pay rate was raised in the New Year. Mr Pick says he told Mr Hutton to re-look at the agreement as it was drafted too much in his favour. The employment agreement was never signed. I find that the draft agreement was never agreed to by Winipac.

[27] In late December 2017 Mr Pick paid Mr Hutton a month's salary based on a yearly salary of \$80,000.

Conclusion on the arrangement

[28] Mr Pick had the idea and some opportunities for the business. Mr Hutton was less experienced in terms of running a business and seemed more cautious by nature. However, before Winipac was incorporated he was involved in discussing the name of the business and its email address, commenting on a business plan and arranging a customer for the business. The initial business plan referred to Mr Hutton as the chief operating officer/director.

[29] Mr Hutton's WhatsApp message refers to having two months redundancy pay to "carry me over ...hope all kicks off with the next step by then". This is in keeping with Mr Pick's evidence of the two discussing using their redundancy compensation to keep themselves going when Winipac opened. It is not uncommon for redundant employees to put their compensation towards starting a new business of their own.

[30] Two days later Mr Hutton, referring to his current workplace, messages Mr Pick; "they know I will join you as I said I would".

[31] Mr Hutton later emailed the customer enclosing the certificate of incorporation and referring to Winipac as the company "I mentioned we would be setting up". Another email from the same period refers to "what is happening for myself and Michael on a new venture". Although Mr Pick in one email refers to setting up his own company, in another he says that he and Mr Hutton will put together some business opportunities for a client.

[32] These actions and references suggest that more than an employee role was envisaged. On his own evidence, Mr Hutton was not told before October 2017 that he was going to be an employee. He was told that he would be looked after.

[33] When Mr Hutton raised the issue of pay at the end of October and was told that pay would not start until December, he did not challenge that in the way he challenged later issues. This suggests that he was not certain of having an entitlement to pay. He also did not stop working for Winipac.

[34] There may have been a misunderstanding between Mr Pick and Mr Hutton regarding the arrangement. However, I consider that an objective observer would conclude that Mr Hutton and Mr Pick had discussed establishing the business together and agreed that they would use their redundancy payments to tide them over until the new business developed.

[35] Mr Hutton's employment would not commence until later. I am reinforced in this view by the absence of protests by Mr Hutton when not paid salary for October and November 2017. Mr Hutton is not entitled to payment for those months.

Deductions

[36] The business did not pick up as quickly as had been hoped. Also, Mr Pick became concerned that Mr Hutton was undertaking personal activities in his work time, although this was not canvassed in a formal way. In late January 2018 Mr Hutton and Mr Pick talked about Mr Hutton's salary with Mr Pick proposing a reduction due to the personal activities and the unaffordability of the salary for a newly established business. Mr Hutton felt that he had no choice but to agree to a reduction to \$70,000 per annum.

[37] Winipac decided to deduct from Mr Hutton's January 2018 salary, the amount by which the December salary payment was above the new rate. This was \$609.47 gross. The deduction was not raised beforehand with Mr Hutton and he did not agree.

[38] In February 2018 Mr Pick arranged for a \$360.00 deduction from Mr Hutton's salary for a month's rent. This deduction was also not agreed to by Mr Hutton.

[39] Under the Wages Protection Act 1983 deductions may be made from wages or salary with the employee's written agreement or on their written request.² Winipac conceded that that had not occurred here and thus the deductions totalling \$969.47 should not have been made.

[40] I order Winipac to pay Mr Hutton, within 21 days of the date of this determination, the sum of \$969.47 gross for the deductions made.

Notice period

[41] On 9 March 2018 Mr Hutton told Mr Pick he was resigning. He was operating on the basis of one month's notice being appropriate, as that was in the draft agreement. Mr Hutton claims he was not paid for the final two weeks of his notice period.

[42] Mr Hutton filed the letter of appointment for his new position which initially recorded his commencement date as 2 April 2018. This was amended to 9 April by hand and initialled

² Section 5 of the Wages Protection Act 1983

by the new employer's representative. Mr Pick suggests Mr Hutton wanted a shorter notice period there was insufficient time between 9 March and 2 April to give a month's notice. However, I am satisfied that Mr Hutton arranged for his new position to start on 9 April 2018.

[43] At a meeting on 14 March 2018, Mr Pick and Mr Hutton discussed the latter's notice period. Mr Hutton offered two options, either working and being paid his full salary for four weeks or, being paid the full salary but leaving after two weeks. Mr Pick said he would think about it.

[44] Mr Pick later told Mr Hutton that he could leave after two weeks, but deducted the two weeks' pay from his final salary. Mr Hutton appears to have been locked out of the company's server so there was little work for him. Mr Pick says as they had no contract, he considered two weeks' notice was more appropriate and that Mr Hutton agreed.

[45] I find that four weeks was a reasonable notice period for an operations manager on \$70,000. I do not accept that Mr Hutton agreed to reduce the notice period. Therefore he is owed for a further two weeks' notice.

[46] I have calculated two weeks' notice on the basis of 80 hours at the hourly rate of \$33.65385 from the March 2018 payslip. I order Winipac Logistics Ltd to pay Gareth Hutton the sum of \$2692.31 gross for the unpaid notice period, within 21 days of the date of this determination.

Costs

[47] Costs are reserved and the parties encouraged to resolve the matter. If they are unable to do so Mr Hutton shall have 28 days from the date of this determination to file a memorandum on costs. Winipac shall have a further 14 days in which to file a memorandum in reply. Submissions claiming costs must include a breakdown of the costs and be accompanied by supporting evidence. Although Mr Hutton was not represented at the investigation meeting, he had representation at one point and assistance with his preparation for the investigation meeting and is able to claim a contribution towards those costs.

[48] The notional daily tariff for a one day investigation meeting is \$4,500. However, Mr Hutton has only been partially successful with his claims and that will be considered as part of any costs determination.

Nicola Craig
Member of the Employment Relations Authority