

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 494
3092452

BETWEEN HILAL IBRAHIM
 Applicant

AND CLOUD BRIDGE LIMITED
 Respondent

Member of Authority: Michele Ryan

Applicant: Applicant in person
 Aaron Graham, for the Respondent

Investigation Meeting: 30 October 2020

Submissions Received: None from either party

Date of Determination: 1 December 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Hilal Ibrahim worked for Cloud Bridge Ltd trading as Hataitai Family Barbers whom I have referred to as HFB. He seeks an order from the Authority that HFB pay him his final holiday pay and interest on this sum.¹

[2] HFB accepts that Mr Ibrahim's accrued holiday pay has not been paid, but its director, Mr Aaron Graham, says Mr Ibrahim has engaged in fraud and/or misappropriated monies from it.

¹ Mr Ibrahim's statement of problem also sought compensation for events which occurred after his employment ended. This claim was subsequently withdrawn.

[3] Mr Graham says it is reasonable for HFB to withhold Mr Ibrahim's holiday pay in the circumstances for the following reasons.

- (i) First, he points to a provision in employment agreement between the parties which allows holiday pay to be deducted from pay where the employee owes money to the employer.
- (ii) Next, he says a complaint with the New Zealand Police has been laid regarding Mr Ibrahim's conduct and he hopes the matter will be determined in the Criminal Courts. He says if monies are owed to Mr Ibrahim following a District Court judgment that sum will be paid.

[4] Mr Ibrahim denies the allegations against him by HFB and reports he is keen to be interviewed by the police on the matter. It appears the dispute centres around how Mr Ibrahim operated HFB's eftpos machine.

Issues

[5] It is important to note this determination does not decide whether Mr Ibrahim stole from HFB, and is concerned only with Mr Ibrahim's claim for payment of holiday pay.

[6] In the circumstances of this matter the Authority must determine:

- whether the employment agreement allows HFB to deduct holiday pay, or
- whether the possibility of a criminal sanction provides reasonable cause to withhold holiday pay.

Is HFB able to rely on the employment agreement to lawfully deduct holiday pay?

[7] Relevant to this case, cl 8.4 of the employment agreement between the parties provides a general deductions provision which is said to allow the employer, with the employee's consent, to deduct from pay (including holiday pay) any: "*Outstanding debts or monies to the employer*". The employment agreement also records "*The employee's signature to this agreement will satisfy the written consent requirement of s 5 of the Wages Protection Act 1983*".

[8] I am not satisfied HFB is able to rely on the above deductions provision. HFB has not established that Mr Ibrahim owes any monies to it, and it cannot anticipate that at some later point that matter will be proven to justify a prior deduction.

[9] Further, while the Wages Protection Act 1983 does allow an employer to make deductions from wages where there is written consent in a general deductions clause contained in the employee's employment agreement, the employer is not able to rely on a general deductions clause to make a specific deduction without first consulting the employee.²

[10] Mr Graham acknowledges no consultation with Mr Ibrahim occurred before the deduction was made.

Does the potential for a criminal sanction allow HFB to withhold holiday pay?

[11] I note that it is now over a year since Mr Ibrahim's employment with HFB finished but no criminal charges have been laid against Mr Ibrahim, and he reports he is keen to be interviewed by the police and says he has done nothing wrong.

[12] Section 7 of the Holidays Act 2003 (HA) provided that the HA applies to all employees and employers including the Crown and its employees.

[13] Section 27 of the HA sets out when payment for annual holidays must be paid. The effect of ss 27(1)(b) and (2) of the HA is that if the employee's employment comes to an end, the employer must pay the annual holiday pay in the pay that relates to the employee's final period of employment.

[14] Holiday pay is a minimum entitlement.³ Excepting the limited circumstances I have already referred to in the Wages Protection Act 1983, there is no general ability under the HA which allows an employer to off-set its obligation to pay holiday pay in anticipation that separate financial obligation may arise in the future between the parties which favours the respondent.

² Section 5(1A) Wages Protection Act 1983

³ Section 5, see definition of "employment standards"

[15] It follows that any proceedings that may occur in another jurisdiction (including the criminal courts) is not a matter I can take into consideration when determining Mr Ibrahim's claim.

Summary

[16] HFB has not established any lawful ground on which it is able to withhold payment of Mr Ibrahim's holiday pay entitlement.

Orders

[17] Within 21 days of the date of this determination Cloud Bridge Limited trading as Hataitai Family Barbers must pay Mr Hilal Ibrahim:

- (a) \$4,444.15 minus PAYE, as holiday pay;⁴
- (b) \$321.61 in interest⁵ for the period between the date Mr Ibrahim's employment ended and the date he lodged his claim in the Authority;⁶
- (c) \$71.56 as a disbursement equal to the cost of the filing fee paid for Mr Ibrahim to progress his claim.

Costs

[18] No order for costs is necessary where both parties were self-represented.

Michele Ryan
Member of the Employment Relations Authority

⁴ Section 27(2) Holidays Act 2003

⁵ Pursuant to Schedule 2, Interest on Money Claims Act 2016

⁶ Mr Ibrahim lodged his claim on 20 February 2020; 91 days after his dismissal on 21 November 2019.