

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 142
5373236

BETWEEN LESLIE LEWIS
 Applicant

AND HARBOUR CITY TOW &
 SALVAGE (2003) LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Ross Jamieson, for the Applicant
 No attendance by or for the Respondent

Investigation Meeting: 15 November 2012 at Wellington

Determination: 19 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Lewis claims that he was not paid for several months and not paid his holiday pay once it became clear his job with the respondent (Harbour City Tow) was over. He seeks payment of the sums owing together with interest. He also claims that he was constructively dismissed and seeks compensation for that. He has also sought, through his representative, a copy of his employment agreement and a copy of the wages and time records, neither of which have ever been provided by Harbour City Tow. A penalty is sought in the sum of \$2,500 for the failure to produce the wage and time records, half to be paid to the Crown and half to Mr Lewis. Mr Lewis also claims to have a personal grievance for constructive dismissal because he had to leave Harbour City Tow as he was not being paid. Compensation in the sum of \$7,500 is sought. He also seeks costs of \$1,500.

[2] Harbour City Tow failed to provide a statement in reply. At a conference call on 6 August 2012, Mr Okeby (the principal of Harbour City Tow) was given until

13 August to file a statement in reply, and to pursue any counterclaim he believed he had by way of a separate application. The agreed timetable also provided for the exchange of witness statements for the investigation meeting on 15 November 2012. Mr Okeby also noted that there were no cash payments as Mr Lewis claimed recorded with the IRD. Mr Okeby confirmed that he would attend the investigation meeting after it was raised with him that he had failed to attend on behalf of Harbour City Tow in a case involving another former employee. Mr Okeby acknowledged receipt of the notice of directions, which set in place these agreed requirements.

[3] Mr Okeby, on behalf of Harbour City Tow, failed to meet any of the requirements agreed to on the conference call. Given Harbour City Tow's failure to follow any of the agreed directions Mr Lewis did not have the advantage of a statement in reply nor any evidence to respond to at the investigation meeting.

[4] Harbour City Tow was not represented at the investigation meeting held on 15 November 2012. An Authority support officer attempted to contact Mr Okeby, but he could not be contacted before the delayed investigation meeting commenced at 10.15am. At 10.23am Mr Okeby rang to say that he was in hospital receiving medical treatment, but would otherwise have been at the investigation meeting. On my instructions, the support officer asked Mr Okeby if he agreed that he owed Mr Lewis unpaid wages. Mr Okeby did agree but said it was only around \$10,000, and not the sum Mr Lewis was claiming. Mr Okeby was then informed that the investigation would continue to proceed in his absence.

[5] My reasons for continuing with the investigation meeting in the absence of any representative from Harbour City Tow were that Harbour City Tow had failed to be represented without good cause shown, pursuant to clause 12 of Schedule 2 of the Employment Relations Act. While I accepted that Mr Okeby was in hospital receiving treatment, he had made no application for an adjournment and he had given the Authority no forewarning at all that he did not intend to attend to represent Harbour City Tow. Such an application would have been particularly important given all the difficulties with it not responding to requests for information, either from Mr Lewis or the Authority. In particular, Harbour City Tow had not followed any of the directions Mr Okeby had agreed to in the conference call, including the failure to comply with its undertaking to have representation at the investigation meeting. I

therefore had no confidence that, regardless of his illness, Mr Okeby, on behalf of Harbour City Tow, would have followed any agreed process in the future.

[6] The issues for determination are:

- a. How much money is Mr Lewis owed in unpaid wages?
- b. How much money is Mr Lewis owed in holiday pay?
- c. Is Mr Lewis entitled to interest?
- d. Does Mr Lewis have a claim for constrictive dismissal?
- e. Should Harbour City Tow pay a penalty for failure to supply wages and time records, and to whom should any penalty be awarded?
- f. What costs should be awarded?

Factual Discussion

[7] The applicant, Mr Lewis, was employed as a tow truck driver by the respondent, Harbour City Tow. Its principal is Mr Steve Okeby. Mr Lewis was employed for almost exactly eight years, between 2003 and 2011. I accept that he was paid an annual salary of \$65,000 for working six days a week driving tow trucks. This is in accordance with a mortgage reference given to Mr Lewis by Mr Okeby in 2005, which stated that his salary was \$65,000 per annum, plus a company vehicle.

[8] I accept Mr Lewis's evidence, who I questioned closely, that he was paid \$519.53 per week net by automatic payment and \$600 net in cash. I also note that this sort of arrangement is one likely to raise a red flag with the Inland Revenue Department.

[9] Mr Lewis' evidence was that he had taken only four weeks' holiday during the course of his eight years employment. That would be an average of 2.5 days per year. However, Mr Lewis accepted that he had a two week holiday in Australia one year and also, under questioning from me, that he would take a long weekend involving two days annual leave two or three times a year to visit family. In the absence of wage and time records, the Authority may accept as proved all claims made by the employee about such matters. However, I conclude that an appropriate allowance for leave taken must take into account all the leave that Mr Lewis or his partner believed

was taken. In this regard, allowing for the odd day off here and there, an appropriate deduction to make is 58 days, not 20 days as claimed by Mr Lewis. A deduction of 58 days rather than the 20 claimed is appropriate, equating to just over seven days leave per year, given that in one year at least 10 days was taken.

[10] On 2 December 2010, Mr Lewis discovered that he had not been paid for that week. He did not get paid the next week either. The week after that, he approached Mr Okeby and told him that if he was not going to be paid he would not do any more towing work for Harbour City Tow. Mr Okeby told him that he was trying to organise payment. Mr Lewis went home and left the tow truck in the yard.

[11] Around the middle of January 2011, Mr Lewis and another employee decided to approach Mr Okeby again. Mr Okeby told them that they both still had jobs, that they were both still “*on the books*” and that things would be sorted out by the end of the week.

[12] On 20 January Mr Lewis discovered, despite a promise from Mr Okeby that he would be paid that week, that he was again not paid. After that, the direct credit arrangement, which had continued throughout December and January (although no funds were released to Mr Lewis), was stopped. After that, Mr Lewis was pretty clear that he did not have a job at Harbour City Tow, but he still held out hope that his position could be retrieved because of his long working relationship with Mr Okeby and his personal friendship with him.

[13] Mr Lewis had no further contact with Mr Okeby after mid-January 2011, apart from sending him messages which were not responded to, apart from one email where he sought the moneys owing to him or he would have to take the matter further, i.e. to mediation. There Mr Okeby responded, in October, stating: *can you let me know what you **think** you are owed and we will go from there.*

[14] Mr Okeby did not otherwise respond to messages and Mr Lewis then instructed Mr Jamieson, who wrote to Mr Okeby on 24 February 2012 seeking a copy of his employment agreement and wage and time records, together with a claim for wage arrears and a personal grievance claim on the grounds of unjustified constructive dismissal.

[15] Mr Okeby never responded to this letter, or subsequent attempts by Mr Jamieson to contact him. Mr Lewis filed his statement of problem on 7 March 2012 and the subsequent history of the matter is set out above.

Determination

Unpaid wages

[16] Mr Lewis was not paid for eight weeks when he should have been, as claimed. Even though Mr Lewis did not physically work at Harbour City Tow after 13 December, he was told that he was still an employee and that he would be paid accordingly. It was not until 20 January, some eight weeks later, that it was clear that Mr Okeby no longer intended to continue his employment. Mr Lewis, a long term employee, is entitled to be paid for that period. The sum owing is \$8956.24 net.

Holiday pay

[17] Over the eight years of his employment, Mr Lewis had become entitled to 28 weeks paid leave. I have concluded that he has taken 11.6 weeks and is therefore entitled to 16.4 weeks pay. This sum equates to \$18,360.29, given his weekly rate of pay of \$1119.53 net.

Interest

[18] Mr Lewis has lost the use of money to which he has been entitled for the best part of two years. Interest on the above sums is therefore owed for the period of 1.75 years, at the annual rate of 5%, which equates to \$2390.20.

Constructive dismissal

[19] This claim must be dismissed. Mr Lewis never raised a personal grievance, as he accepted in his own evidence, until Mr Jamieson did so on his behalf over a year after his employment ended. Harbour City Tow has never responded to the grievance and certainly has never consented to it being raised out of time, explicitly or impliedly.

[20] No application for exceptional circumstances was made, but in any event that would have been unlikely to have been successful because if there were any

exceptional circumstances they would not have occasioned the full length of delay, of around a year, rather than the 90 days set out in the Act.

Penalty

[21] There has been a clear breach of s.130 of the Act, which requires every employer to supply an authorised representative immediately with access to or a copy of or an extract of any part or all of the wages and time records relating to an employee. The maximum penalty for an employer is \$20,000.

[22] The penalty claimed of \$2,500 is entirely appropriate for a clear breach of this nature. Employees are entitled to copies of their wages and time records.

[23] Despite Mr Lewis' claim to half of the penalty, for public policy reasons penalties are normally paid to the Crown and I conclude that there is nothing in this case to grant any of that sum to Mr Lewis personally. He has been recompensed by awards for unpaid wages and holiday pay, together with interest.

Costs

[24] Mr Jamieson sought a contribution towards costs at \$1,500. He highlighted in submissions the lengths to which he had sought to get responses from Harbour City Tow. I accept those submissions given the Authority's involvement in this file and the failure of Mr Okeby, on its behalf, to facilitate the Authority's investigation or to act in good faith towards Mr Lewis by way of providing information and responses properly sought. A claim of \$1,500 is commensurate with the tariff that might be expected in a case like this.

[25] I therefore order that the sum of \$1,500 in costs be paid to Mr Lewis by Harbour City Tow.

Summary of Orders

[26] I order the respondent, Harbour City Tow & Salvage (2003) Limited, to pay to the applicant, Mr Leslie Lewis, the following sums:

- \$8596.24 net in unpaid wages;
- \$18,360.29 net in unpaid holiday pay;

- \$2390.20 gross in interest; and
- Costs in the sum of \$1,500.

[27] I also order the respondent to pay to the Crown a penalty of \$2,500.

G J Wood
Member of the Employment Relations Authority