

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 156
5625503

BETWEEN MARK MACAULAY
 Applicant

AND CBC 2013 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Kelly Coley, Advocate for Applicant
 Craig Bertram, for Respondent

Investigation Meeting: 15 December 2016 at Palmerston North

Submissions Received: At the investigation meeting

Written confirmation of
Determination: 16 December 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mark Macaulay, seeks payment of wages and holiday pay he says he is yet to receive.

[2] Mr Macaulay also lodged a personal grievance claiming he had been constructively dismissed. During the investigation meeting he advised he was withdrawing the claim and therefore it will be discussed no further.

[3] The respondent, CBC 2013 Limited (CBC), denies the claim on three grounds. It disputes he worked some of the time for which he seeks payment; says he has already received pay he was not due and relies on various sums it says Mr Macaulay owes.

Background

[4] Mr Macaulay worked for CBC from January 2015 on various tasks related to its forestry and firewood supply business. CBC is owned and managed by Mr Bertram.

[5] There is some debate about whether or not the terms of employment were stipulated in a written employment agreement. Mr Macaulay says he signed one on commencement but it was later misplaced. He says he was given a second copy which he never signed or returned. Mr Bertram denies the agreement was ever signed. He says he only gave Mr Macaulay one copy which was never returned. He also accepts he never pursued the issue.

[6] The importance of this is the agreement contains a clause which permits CBC to cease paying Mr Macaulay should it be forced to close by reason of *material safety, climatic, operational or economic considerations*.¹ The clause also provides the parties may agree alternate duties or other arrangements including the taking of annual leave in order to ensure the employee continues to be paid during a closure or part there-of.

[7] On 20 April Mr Macaulay advised Mr Bertram of his resignation though he worked the two week notice period. It would be fair to say he departed on less than amicable terms and his claims were commenced soon after cessation.

Determination

[8] As already said Mr Macaulay seeks payment of outstanding wages and holiday pay. In particular he wants:

- a. His final weeks' wages which, he says, was not paid;
- b. Recompense for one weeks holiday accrued but yet to be taken;
- c. Holiday pay for the incomplete year of service; and
- d. Payment for the Christmas / New Year statutory holidays.

[9] The claim totals \$4,428.31 gross.

¹ Clause 17 of the form employment agreement used by CBC

[10] CBC says nothing should be payable. It says no leave owes as Mr Macaulay used it all by virtue of being paid for time off when the business could not function² due, mainly, to equipment malfunctions he was responsible for. CBC also claims Mr Macaulay failed to attend work at various times toward the end of the employment and once this is taken into account he has received more holidays than he is entitled to. Finally CBC refers to the fact Mr Macaulay received a tax free tool allowance of \$36 a day when he was on leave. It is argued that as tools are not used when Mr Macaulay did not work the reimbursement allowance should not have been paid and that should be offset against the statutory holiday claim.

[11] Even if the above were incorrect CBC maintains it should still pay nothing as Mr Macaulay is in debt to the company. It refers to two sums in particular though one of \$2,000 relates to a residual amount owing on a vehicle Mr Macaulay bought from Mr Bertram some time before the employment commenced. The second relates to damage to a company vehicle which, according to CBC, was sustained when Mr Macaulay used it inappropriately and for private purposes. Mr Macaulay denies the claim and says the damage was due to wear and poor maintenance.

[12] CBC's position faces significant problems. First there is s 132(2) of the Employment Relations Act 2000. Essentially it provides where there is evidence the employer failed to maintain a wages and time record as required by s 130 I may accept the claim as valid. Mr Bertram admits there is no such record.

[13] The second issue is its arguments as to why the money is not due fail to persuade me.

[14] The idea Mr Macaulay not be paid as a result of time off due to CBC's inability to offer work faces a couple of problems. The parties agree Mr Macaulay was a full time employee and paid accordingly. The idea he not be paid when work was not available therefore relies on what is essentially a deduction clause which allows money to be taken from his wages by agreement.³ First the evidence is the clause has never been used but more importantly, and accepting Mr Bertram's evidence the employment agreement was never signed, there is no written authority for the deduction as required by the Wages Protection Act 1983.

² Above n 1

³ Section 5(1) of the Wages Protection Act 1983

[15] The lack of a time and wage record means CBC cannot support its claims regarding Mr Macaulay's use of leave and the suggestion the tool allowance be offset against the money owing is untenable as the evidence is Mr Macaulay was paid what was essentially a salary. The allowance is an integral part thereof and not separately identified. In other words it would, pursuant to section 21(2)(b) of the Holidays Act 2003, have been payable when Mr Macaulay was on leave. It is not therefore available to be used at a later date to offset another debt.

[16] Turning to the money Mr Macaulay is said to owe CBC. The vehicle he purchased cannot be considered such a debt. The sale was a private arrangement between Messrs Macaulay and Bertram. CBC has no claim on that money and if Mr Macaulay was responsible for the damage to the company vehicle CBC could not take that money without written authorisation from Mr Macaulay.⁴ None exists.

Conclusion

[17] For the above reasons I conclude Mr Macaulay is owed the sums claimed. As a result CBC 2013 Limited is ordered to pay Mr Macaulay the sum of \$4,428.31 (four thousand and four hundred and twenty two dollars and thirty one cents) gross for unpaid wages and holiday pay. PAYE should be deducted prior to the balance being paid to Mr Macaulay and that should occur no later than Thursday 12 January 2017.

M B Loftus
Member of the Employment Relations Authority

⁴ Above n 3