

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 232  
3071992

BETWEEN                      TONY MCKENZIE  
   Applicant  
  
A N D                              BNT CONTRACTING LIMITED  
   Respondent

Member of Authority:              Peter van Keulen  
  
Representatives:                      Jacqueline Pearse, counsel for the Applicant  
   No appearance for the Respondent  
  
Investigation Meeting:              16 June 2020  
  
Submissions Received:              16 June 2020 from the Applicant  
  
Date of Determination:              17 June 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Tony McKenzie was employed by BNT Contracting Limited as an excavator operator and truck driver from 22 March 2018.

[2]      Mr McKenzie worked long hours and found the work stressful. On 27 May 2019, Mr McKenzie was signed off work on sick leave for an indefinite period. It appears this was the last straw for Mr McKenzie; he had been considering leaving and on 27 May he told BNT he was resigning.

[3]      BNT insisted that he put his resignation in writing and that he give it one month's notice. So, Mr McKenzie gave written notice of his resignation on 27 May 2019 with one month notice, recording that his final day of work would be 27 June 2019. However, Mr McKenzie did not work his notice period as he was on sick leave.

[4] Mr McKenzie says he was not paid any further wages or holiday pay by BNT after he handed in his notice. As a result he says he is owed wage arrears comprising work he completed until he went on sick leave, sick leave for 5 days being his accrued entitlement as at 27 May 2019 and holiday pay. This is the basis for Mr McKenzie's claim against BNT.

[5] BNT says it does not owe Mr McKenzie any money as it deducted money owed to it from Mr McKenzie's final pay leaving nothing payable to him; it claims Mr McKenzie owed it money for tax it had underpaid on his behalf during his employment.

### **Progress of this matter**

[6] Initially BNT responded to Mr McKenzie's statement of problem through counsel, lodging a statement in reply setting out its position in respect of the claimed set off against wages owed to Mr McKenzie.

[7] BNT's counsel also participated in a case management conference on 17 February 2020. Arising out of the case management conference, recorded in a notice of direction dated 17 February 2020, I directed BNT to lodge and serve relevant wage and time records by 2 March 2020. The notice of direction also recorded that I would hold an investigation meeting on 16 June 2020 and it set out directions for the exchange of written evidence.

[8] Counsel for BNT then lodged a summary of hours worked by Mr McKenzie, in response to the direction regarding wage and time records. Whilst the summary is helpful it does not constitute wage and time records.

[9] BNT then failed to lodge and serve its witness evidence in line with my directions. When contacted about this, counsel for BNT advised that he had forwarded all of the information regarding the investigation meeting and the directions to BNT but he had no further instructions from it regarding lodging evidence and acting for it in respect of the investigation meeting.

[10] On 12 June 2020 counsel advised that he was no longer acting for BNT. In response to this the Authority emailed BNT directly reminding it of the investigation meeting on 16 June 2020 and advising it that if it chose not to participate then I would proceed in its absence and orders could be made against it.

[11] BNT did not respond to the Authority's email and was therefore unable to be contacted to participate in the investigation meeting.

[12] Considering all of the above, there was no apparent reason why the investigation meeting could not continue without BNT. I therefore proceeded with the investigation meeting (by telephone conference) pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000.

### **Wage arrears**

[13] During his employment Mr McKenzie was paid monthly for the period from the 16<sup>th</sup> of each month until the 15<sup>th</sup> of the next month. So from the date of his resignation on 27 May 2019, Mr McKenzie should have been paid at least twice by BNT:

(a) for the period covering 16 May 2019 until 15 June 2019; and

(b) for the period from 16 June 2019 until 29 June 2019, being Mr McKenzie's last day of work, including payment for any accrued but untaken annual leave at the end of his employment.

[14] By 30 June 2019, Mr McKenzie had not been paid either of these two payments, so he asked BNT to give him his final pay slip and pay him what he was owed.

[15] On 3 July 2019, Mr McKenzie received a pay slip for the pay period ending 15 June 2019. This pay slip recorded that Mr McKenzie had worked 48 hours and calculated the gross payment owed to him as \$1,494.24. The payslip also recorded a "termination" payment of \$2,889.76, giving Mr McKenzie a gross total payment for the pay period of \$4,384.00. However, from this gross total three deductions are recorded as being made, KiwiSaver of \$131.52, a "paid in cash" sum of \$4,196.72 and PAYE of \$746.41 leaving a net sum payable to Mr McKenzie of -\$690.65.

[16] As BNT did not participate in the investigation meeting I was unable to ask it about the "paid in cash" deduction. However, in its statement in reply BNT set out that it had previously had to account to the Inland Revenue for unpaid PAYE on Mr McKenzie's payments as it had incorrectly treated Mr McKenzie as a contractor and had not deducted PAYE in the initial period of his employment. The paid in cash amount of \$4,196.72 matches

the amount recorded in the statement in reply as being the amount of unpaid PAYE that BNT had to account for to the Inland Revenue.

[17] Reflecting on Mr McKenzie's claim and the statement in reply there are two issues for me to resolve:

(a) How much does BNT owe Mr McKenzie for his final pay?

(b) Does BNT have a right to deduct \$4,196.72 for PAYE it claims it had to subsequently pay to the Inland Revenue for payments made to Mr McKenzie?

#### *Final pay*

[18] First, there is no dispute that in the period from 16 May 2019, Mr McKenzie worked 48 hours. For this work he is owed \$1,494.24.

[19] Second, Mr McKenzie was then on sick leave and did not attend work during his notice period. However Mr McKenzie had five days accrued sick leave<sup>1</sup> and is therefore entitled to a further payment for 40 hours work – this is \$1,245.20.

[20] Third, Mr McKenzie had accrued but untaken annual holiday pay which was to be paid to him at the end of his employment. Based on the calculation of holiday pay in Mr McKenzie's final pay slip plus the holiday pay on the additional payments he is entitled to, I calculate the holiday pay owing to Mr McKenzie to be \$3,108.91.

[21] Therefore the total amount of wages and holiday pay owed to Mr McKenzie at the end of his employment is \$5,848.35 (gross).

#### *Deduction from final pay*

[22] The issue of whether BNT can deduct money from Mr McKenzie's final pay turns on two parts – did Mr McKenzie owe BNT money and if so, was there a valid provision in Mr McKenzie's employment agreement allowing it to make deductions from Mr McKenzie's pay that BNT used appropriately.

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<sup>1</sup> As BNT has failed to provide wage and time records as directed I can rely on Mr McKenzie's records pursuant to section 132 of the Employment Relations Act 2000 and I am satisfied on his evidence that he had 5 days of accrued sick leave.

[23] As BNT did not participate in my investigation there is no evidence available to me that explains what BNT says is the debt Mr McKenzie owes it.

[24] When I asked Mr McKenzie about the possibility of him owing BNT a sum for unpaid PAYE that BNT suggests (in its statement in reply) it had to account to the Inland Revenue for in respect of Mr McKenzie's initial wage payments, he made the following comments:

- (a) He accepted he was initially retained by BNT as a contractor for a job he did for it in Kaikoura. This job was for about three weeks and after that he commenced regular work with BNT as an employee.
- (b) At the time that Mr McKenzie switched to being an employee he says BNT assured him there would be no tax implications for him, which he took to mean BNT would sort out any prior tax that needed to be paid – although there was no discussion at the time around whether there actually was any additional tax to pay or not.
- (c) BNT never discussed any money owed to it by Mr McKenzie for additional tax paid or otherwise.
- (d) When Mr McKenzie contacted the Inland Revenue about BNT's suggestion that there may have been some additional tax to pay, the Inland Revenue told Mr McKenzie his tax was up to date and no additional payments had been made – this is reflected in Mr McKenzie's tax summaries which were provided in evidence.

[25] So there is no evidence of any alleged debt owed by Mr McKenzie to BNT for unpaid tax or PAYE and, the evidence I do have suggests there is no basis for the alleged debt. Therefore on the first part of this issue BNT fails and the deduction is not lawful.

[26] For completeness on the second part, even if there was a debt owed to BNT, BNT cannot withhold wages due to Mr McKenzie or deduct any amount from any final pay due to Mr McKenzie<sup>2</sup> except for an authorised deduction from wages or holiday pay due pursuant to s 5 of the Wages Protection Act 1983.<sup>3</sup> The requirements of the Wages Protection Act mean

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<sup>2</sup> *Edwards (Labour Inspector) v Topo Gigio Restaurant Ltd* AEC 109/95

<sup>3</sup> *Drake Personnel (New Zealand) Ltd v Taylor* [1996] 2 NZLR 644 (CA)

BNT might have been able to deduct money owed to it if there was a suitable deductions clause in Mr McKenzie's employment agreement, if BNT consulted over the possible deduction and the deduction was not unreasonable.<sup>4</sup>

[27] Applying those requirements in this case, BNT also fails. There was not a suitable general deduction clause in Mr McKenzie's employment agreement, BNT did not consult with Mr McKenzie before making the deduction and because there is no evidence about the deduction I cannot say if it is unreasonable or not.

[28] In conclusion, this means BNT's deduction from Mr McKenzie's final pay is not lawful<sup>5</sup>. And therefore, BNT must pay Mr McKenzie his wages and the accrued but untaken holiday pay without deduction.

### **Orders**

[29] BNT owes Mr McKenzie \$5,848.35 (gross) in wage arrears and this is to be paid to him within 14 days of this determination.

[30] Mr McKenzie is also entitled to be paid the filing fee on this application of \$71.56, which must also be paid to him within 14 days of this determination.

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>4</sup> Section 5(1)(a) of the Wages Protection Act 1983, enacted in April 2016 enables a deduction to be made on the basis of a general deductions clause. Section 5(1A) of the Wages Protection Act 1983, also enacted in April 2016, codifies the common law position and it requires an employer to consult with an employee before making a deduction under a general deduction clause. Section 5A of the Wages Protection Act 1983 provides that a deduction made under a general deduction clause (in reliance on s 5) must not be unreasonable.

<sup>5</sup> *Online Contractors Ltd v Wetere* [2017] NZERA Auckland 17