

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 274
5379575

BETWEEN

KYLE McLACHLAN
Applicant

A N D

FRANCES CRABB trading as
Communication Gurus
First Respondent

A N D

COMMUNICATION GURUS
LIMITED
Second Respondent

Member of Authority: James Crichton
Representatives: Applicant in person
First Respondent in person
Investigation Meeting: 9 August 2012 at Auckland
Date of Determination: 10 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr McLachlan) alleges that he is owed wages by either the first or second respondent (Ms Crabb or the company). In addition, Mr McLachlan seeks recovery of the Authority's filing fee.

[2] Ms Crabb acknowledges that, due to an oversight when changing banks, money owed to Mr McLachlan for wages were inadvertently not paid but argues that, since then, she has researched Mr McLachlan's short employment with her firm and concluded that he has been guilty of various breaches of his obligations to the employer such as to entitle her to retain the unpaid wages.

[3] The employment was covered by a written employment agreement and it is common ground that the employment relationship commenced in late January 2012

and concluded on 20 April 2012. Both parties agree that Mr McLachlan was engaged by Ms Crabb and was employed by her for the bulk of the short engagement. It seems that Ms Crabb's business was incorporated on 3 April 2012 but the documentation relating to Mr McLachlan's employment continues to be with Ms Crabb personally. The one payment received by Mr McLachlan from the employer after the incorporation of the employer's business but before he ceased the employment was still received from Ms Crabb personally. The final pay on the other hand, which was received after the employment relationship came to an end, was paid by Communication Gurus Limited.

[4] In all the circumstances, the Authority thinks that the evidence discloses that Mr McLachlan was employed up until 3 April 2012 by Ms Crabb and from 3 April 2012 was employed by Communication Gurus Limited. This view of matters is supported first by the incorporation of the new company from 3 April, and second by the fact that the final pay to Mr McLachlan was paid by the company.

[5] However, because the only amount in contention is a single fortnightly pay for the fortnight ending 14 April 2012, if the Authority finds that wages are due and owing, it will be necessary to apportion the payments between the two employing entities.

[6] It is common ground that the fortnightly pay for the period ending 14 April 2012 was not received by Mr McLachlan. There was a change of banks, the Authority was told, and this resulted in an inadvertent failure to pay Mr McLachlan what he was entitled to. However, Ms Crabb was quite explicit in her evidence that what was originally a mistake became deliberate because Ms Crabb alleges that, after Mr McLachlan had departed from her business, she discovered various matters which in her opinion disclosed Mr McLachlan had failed to meet his obligations to his employer.

[7] However, she was unable to provide the Authority with any evidence on these allegations, apparently because computer records belonging to the employer had been inappropriately withheld by a former computer consultant to the business. Ms Crabb told the Authority that had she been able to obtain those records, she could have proved the detail of the general allegations which she made against Mr McLachlan.

[8] That notwithstanding, the Authority referred during the investigation meeting to the relevant provisions of the Wages Protection Act 1983 and read aloud section 4 of the Act which of course provides that:

... an employer, shall when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[9] The Authority noted that there were exemptions to that general rule namely deductions made with the worker's consent (section 5) and a limited basis for recovering over-payments (section 6).

[10] However, the Authority also drew the parties' attention to the following section of commentary on the Act from *Mazengarb's Employment Law* at paragraph 3104.3 as follows:

Unless the case falls within an established statutory exception, it cannot be emphasised too strongly that arguments based on set off or counterclaim cannot defeat the purpose of section 4. Thus where it was accepted the former managing director of a company was owed salary and holiday pay, but the employer argued that he was indebted to the company in a number of respects – including some items alleged to have been over claimed in breach of fiduciary duty – it was held that the mandatory nature of section 4 was clear and that the plaintiff was entitled to judgment: Deighton v Deighton Intergraphika (NZ) Limited, High Court Auckland, CP33/91, 30 May 1991, Master Hanson.

[11] This is precisely such a case. Ms Crabb seeks to set-off her (so far unspecified) claims against Mr McLachlan for the wages that she now fortuitously has charge of.

[12] As the Authority indicated to Ms Crabb, if she wishes to bring a claim against Mr McLachlan based on these generic but so far unspecified allegations, then she should do so but there is no basis on which the Authority can depart from its obligation to enforce the law by allowing her some latitude in respect to as yet unspecified allegations without the barest of evidence. As the Authority remarked during the investigation meeting, even if Ms Crabb were able to produce evidence of the alleged defaults by Mr McLachlan, unless they fell within the terms of one or other of the statutory exceptions, then even the production of the evidence would not avail her.

[13] Ms Crabb indicated that her claim was in part based on allegations that Mr McLachlan had falsified time sheets and in consequence was claiming payment for hours that he did not actually work. The Authority observed that if that evidence were available and if it was such as to fall within the terms of the rules in respect to overpayment as set out in section 6 of the Wages Protection Act 1983, then there might be a basis for recovery but the Authority also observed that the basis of the statutory exception in section 6 was very narrow indeed.

[14] It also became apparent during the investigation meeting that Mr McLachlan might raise a personal grievance in relation to alleged defaults by the employer during the employment and the Authority observed that if that were to be the position then Ms Crabb could certainly seek to raise a counterclaim in respect to that action if she preferred not to bring an action of her own.

[15] Finally, the Authority told the parties that there were rights of challenge to its determination with the Employment Court and that there was also a limited right to reopen an investigation and that one of the bases on which the Authority might contemplate taking that action was the existence of new evidence. This latter option would be particularly apposite if Ms Crabb was able to access the evidence she claims to have in relation to the matter and could bring that before the Authority to enable it to consider that new evidence.

Determination

[16] The Authority is satisfied on the evidence it heard that Mr McLachlan is entitled to payment of his withheld pay in the sum of \$1,085.81 net and in addition is entitled to reimbursement of the Authority's filing fee of \$71.56.

[17] The apportionment of those sums is to be as follows:

- a. The sum of \$853.14 net payable by Communication Gurus Limited to Mr McLachlan; and
- b. The sum of \$304.23 to be paid by Ms Crabb to Mr McLachlan.

[18] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority