

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 151  
5328895

BETWEEN KELLY BASIL MCLEAN  
Applicant

AND OVERDIMENSIONAL  
HAULAGE LIMITED  
Respondent

Member of Authority: R A Monaghan

Representatives: K McLean, in person  
V Pilbrow, advocate for respondent

Investigation meeting: 16 March 2011 at Tauranga

Additional information provided: 28 March 2011

Determination: 13 April 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Kelly McLean says his former employer, Overdimensional Haulage Limited (ODH) owes him unpaid wages.

[2] ODH denies that wages are owed.

**Background**

[3] ODH has a contract with Transpacific Waste Management Ltd (TWML) to carry out kerbside collections of recyclable rubbish. It owns and operates a single truck of which one of its directors, Shane Henry, is the usual driver.

[4] In January 2010 ODH advertised in the local paper for a driver to work on Mondays, Fridays and public holidays as required. Mr McLean responded to the advertisement. He required training, but Mr Henry was prepared to train him.

[5] Indeed Mr Henry had been attempting unsuccessfully to obtain a driver through a training provider contracted to WINZ to provide on-the-job training for beneficiaries. Through that avenue, and in association with appropriate monitoring, Mr Henry could have engaged a beneficiary whose services would have been unpaid in return for training received. Once the person was sufficiently trained benefit payments would cease and ordinary payments would commence.

[6] Mr McLean was in receipt of a sickness benefit at the time, and was not cleared for work pending surgery which was scheduled. He was referred to the training provider regarding the possibility of an arrangement through WINZ, but because he was not cleared for work the provider was not able to assist him into the position with ODH.

[7] Mr McLean and Mr Henry went ahead and reached their own arrangement. The arrangement was that Mr Henry would train Mr McLean, and when Mr McLean was ready he would become a permanent employee. Until then Mr McLean would continue to receive his benefit, and Mr Henry would make cash payments to him of \$100 per week to assist with expenses.

[8] From a diary note prepared by someone else, and on the basis of unknown source material, it appears Mr McLean commenced work on or about Wednesday 24 March 2010. In general he worked from Monday-Friday inclusive until Friday 29 October 2010, accompanying Mr Henry in the truck for most of this time.

[9] The hours recorded in the diary note do not coincide exactly with the hours recorded in route worksheets forwarded to TWML, and both parties say the hours recorded in those worksheets are not necessarily hours actually worked. However I rely on those records because no other suitable record is available. By my count Mr McLean worked for a total of 553.8 hours in the period 12 May – 29 October 2010.

[10] As for the rate of payment in the event he became a permanent employee, Mr McLean said \$16.50 per hour was discussed but he told Mr Henry \$15.50 per hour would suit him. A document filed with the statement of problem, and prepared by a person who assisted Mr McLean, indicated that Mr McLean seeks payment for 1,000 hours of work, at \$16.00 per hour.

[11] For his part Mr McLean has treated the first 6 weeks of his engagement as an unpaid training period, so that his claim for payment commences on 12 May 2010. He said that is when he became a permanent employee, although he also said that the parties agreed he would be on a three-month training course. He understood payment would commence at the end of that period, provided he was good enough.

[12] Mr Henry says Mr McLean's performance meant he could not leave him to drive the truck on his own, except that Mr McLean did drive on his own on a few occasions when Mr Henry was on holiday. Mr Henry believes Mr McLean's performance never reached a level at which training could be considered completed, and noted that complaints about the conduct of the run escalated when he was absent. Accordingly Mr Henry continued to implement the training arrangement and did not acknowledge or pay Mr McLean as a permanent employee.

### **Whether wages are owed**

[13] I am not satisfied the parties reached agreement about any particular rate of pay, and the Employment Relations Authority has no power to fix new terms and conditions of employment. Nor am I satisfied that ODH was entitled to continue the 'training' arrangement with Mr McLean indefinitely, as in effect it sought to do.

[14] Mr McLean is entitled to be paid at least at the minimum wage for the hours he worked during the period of his claim. The minimum wage applicable at the relevant time was \$12.75 per hour.

[15] I have found Mr McLean worked for a total of 553.8 hours over the period claimed. Accordingly he should have been paid  $\$12.75 \times 553.8 = \$7,060.95$  (gross) during the relevant period. The period spans 27 weeks, but records for two weeks in June were missing so I count the relevant number of weeks as 25. Mr McLean's

account of the number of weeks for which he received payment of \$100 in cash varied from very few to most. Mr Henry said that sometimes more than \$100 was paid. I assess the payment received as  $25 \times \$100 = \$2,500$  (nett)

[16] Further, it was common ground that Mr McLean was given access to a company fuel card, and he used it to make personal purchases of petrol and food items. From the records provided, Mr McLean's personal purchases totalled \$3,367.81 (nett). Mr McLean accepted that figure was likely.

[17] Mr McLean has in effect been paid  $\$2,500 + \$3,367.81 = \$5,867.81$  (nett). He is owed \$7,060.95 (gross). Since the Authority cannot make orders regarding the amount of tax to be deducted from a payment I order payment calculated as follows:

- a. ODH is to assess the tax payable by Mr McLean on \$7,060.95, and retains its obligation to remit that amount to the IRD;
- b. From the amount remaining after tax has been deducted, ODH may further deduct the sum of \$5,867.81;
- c. The balance, if any, is to be paid to Mr McLean.

[18] I observe that, although Mr McLean has not sought holiday pay, holiday pay is payable. I suggest the parties address that matter.

### **Additional payments**

[19] ODH assisted Mr McLean further in that it paid:

\$680.00 for repairs to his van's radiator

\$394.55 for other repairs to his van

\$420.00 for tyres for his van

[20] ODH also says it made other payments on behalf of Mr McLean, but that invoices are not available.

[21] Finally there are some insurance matters outstanding. They concern damage Mr McLean caused to other vehicles while driving the ODH truck. One such incident

led to ODH advancing the amount of the insurance excess to the driver of another vehicle.

[22] However no formal counterclaim has been made for the repayment of any of these monies. Moreover it appeared that the payments made in respect of Mr McLean's own van were made in order to assist him, and there was no suggestion that the payments were advanced as loans to be repaid.

[23] Accordingly I do not take these matters any further.

### **Costs**

[24] ODH is further ordered to reimburse Mr McLean for the filing fee of \$71.56

R A Monaghan

Member of the Employment Relations Authority