

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 94/10
5294219

BETWEEN MARGARET MCLEOD of
Whanganui
Applicant

AND KALILANDS LIMITED
TRADING AS K & M
DINNERS
Respondent

Member of Authority: P R Stapp
Representatives: Steve Emslie for the Applicant
Mariann Guy for Respondent
Investigation Meeting: 3.15pm 11 May 2010 at Whanganui
Determination: 12 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A statement of problem was filed in the Authority on 15 March 2010 that claimed the respondent had failed to pay wages and holiday pay to Mrs McLeod. Mrs McLeod is seeking the payment of \$391.62 arrears, \$11.70 reimbursement of mileage, \$168 recovery of holiday pay and the \$70 filing fee.

[2] A statement in reply was filed on 29 March 2010 and claimed that there was no dispute, and a delay in payment. The respondent claimed that no holiday pay applied because holiday pay was included in the hourly rate of pay.

[3] During a case management conference on 3 May 2010 it became apparent that there is an issue about who the respondent has paid some of the claim to. Mariann Guy, a director for the respondent, told me that a payment has been made by cheque

in the sum of \$403.32 to another lawyer, previously representing the applicant and who requested outstanding payments to be made in the first place (March 2010) for Mrs McLeod. Mrs McLeod says that Ms Guy has no authority to make the payment to anybody else but to her and or her current representative.

Issues

[4] Has the applicant been paid and if so has she been paid the correct amount? Who should the payment be made to?

The facts

[5] Margaret McLeod was employed by Kalilands Limited trading as K and M Dinners from 18 June 2009 to 30 November 2009. She had set days and hours and did additional work as required. She was employed as a driver to deliver meals. There was no written employment agreement. She was paid \$14 per hour. She says it was agreed she would be reimbursed mileage costs at the agreed rate of .65cents per Km.

[6] Mrs McLeod has calculated with the assistance of her representative that she is owed outstanding wages for the period 22 October 2009 to 30 November 2009 in the sum of \$391.62.

[7] Also she claimed that there is an outstanding sum of \$11.70 mileage owing.

[8] Ms Guy has sent a cheque to Mrs McLeod's previous lawyer for \$403.32 covering the above sums. Mrs McLeod has instructed that lawyer not to cash the cheque because it is conditional as a full and final settlement that she does not agree with because it does not include holiday pay and the filing fee for the cost of the application in the Authority.

[9] Further, Mrs McLeod has claimed that the amount of \$168 accrued holiday pay calculated at 8% of her gross earnings has not been paid. She informed me that there was never any agreement on incorporating holiday pay in her rate. The

respondent denied that any holiday pay is owed because of the contractual arrangement.

[10] Requests have been made for the payments. I accept that. Mrs McLeod informed me that she checked with the respondent's accountant and received confirmation that the sums are owed as claimed in this application, except that there was no holiday pay calculated.

Determination

[11] Despite Ms Guy arranging for a payment to be made it is the company's responsibility, through its director and accountants to get it right: (1) in terms of whom to correctly make the payment to, and (2) to pay the correct amount.

[12] Firstly, the respondent should be making the payment to the applicant or her current representative in regard to this matter given the claims filed in a statement of problem in the Authority. The contact details are provided in the statement of problem and these supersede any earlier requests from Mrs McLeod's earlier lawyer for a payment. Ms Guy has no authority to assume payment is to be made to another lawyer having received the statement of problem. Therefore, the payment must be made to the applicant and/or Mr Emslie at the addresses provided in the statement of problem.

[13] Mrs McLeod was entirely within her rights not to accept the cheque for payment through another lawyer considering the respondent's unilateral decision that the payment (which was less than the sum claimed) was a full and final settlement.

[14] Secondly, I accept Mrs McLeod's claims for the arrears and reimbursement of mileage (not challenged and a cheque made out for the total sum).

[15] Under the Holidays Act 2003 payment of holiday pay with the rate of pay can only occur where the employment is intermittent, or under the terms of a fixed term employment agreement pursuant to s 66 of the Employment Relations Act for less than 12 months duration, and agreement is in an employment agreement, and the holiday pay is identifiable and at a rate not less than 8%. None of the criteria have

been met by the respondent. There is no employment agreement in writing and the components of the pay have not been identified (see s 28 of the Holidays Act 2003).

[16] The respondent's failure to provide Mrs McLeod with an employment agreement in writing is in breach of the requirements under the Employment Relations Act 2000. No good reason has been provided by Ms Guy for not providing Mrs McLeod with an employment agreement having regard to the details required under the Act:

- The names of the employee and employer.
- A description of the work to be performed by the employee.
- An indication of where the employee is to perform the work.
- An indication of the arrangements relating to the times the employee is to work.
- The wages or salary to the employee.
- A plain language explanation of the problem solving procedures.

[17] Also, it is not a defence to rely on someone else being relied upon to complete the requirements. I have preferred Mrs McLeod's evidence because the respondent failed to provide her with a written employment agreement, did not produce any wage and time records that should have been reasonably anticipated for the Authority's investigation. Also, Ms Guy says that she did not know that she could bring any other witnesses to support the existence of an oral agreement existing. The point is that the law requires a written employment agreement, and either a fixed term agreement and or intermittent employment, none of which have been met here.

[18] Therefore, the employer has the responsibility to pay holiday pay. I accept the applicant's calculation.

[19] The applicant has been put to unnecessary cost to pursue this matter. It is entirely of the respondent's making. It is entirely reasonable for the respondent to pay the filing fee to Mrs McLeod because it is a cost that Mrs McLeod has had to incur to get her employment relationship problem resolved. Mrs McLeod had a genuine claim.

Orders of the Authority

[20] I order Kalilands Limited trading as K & M Dinners to pay Margaret McLeod:

- (1) \$391.62 wage arrears; and
- (2) \$11.70 mileage owing; and
- (3) \$168 holiday pay; and
- (4) \$70 filing fee.

P R Stapp
Member of the Employment Relations Authority