New Zealand Employment Relations Authority Decisions

Mighty River Power Ltd v Paio AA 285/07 (Auckland) [2007] NZERA 678 (14 September 2007)

Last Updated: 19 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 285/07 5087418

BETWEEN	MIGHTY RIVER POWER LIMITED Applicant
AND	FILITOATASI LE PAIO Respondent

Member of Authority: Robin Arthur

Representatives: Beth Bundy for Applicant

No appearance for Respondent Investigation Meeting: 12 September 2007 at Auckland Determination: 14 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant seeks an order for recovery of money mistakenly paid to the Respondent as wages even though she did not ever start the job she was offered and accepted with the Applicant. The amount sought totals $3169.79 which was credited to the Respondent's bank account in two payments for wages over a six week period.

[2] The Respondent did not appear at the investigation meeting. I am satisfied from documents on the Authority file that she was properly sent a copy of the Applicant's claim and advised of the opportunity to reply. The Applicant was also directed to arrange personal service on the Respondent of both the notice of investigation meeting and the statement of problem. An affidavit of service of Bernard George Burton-Brown, a process server, dated 17 July 2007 and lodged in the Authority by the Applicant deposes that the Respondent was personally served with both the notice and the statement at an address in Papatoetoe on 11 July 2007.

Issues

[3] The issues for determination are whether the money sought were in fact paid to the Respondent and whether the Applicant is entitled to an order for return of the money.

The investigation

[4] The Applicant's Human Resources Services Manager Beth Bundy and Workforce Manager Saane Roa both gave sworn evidence on the circumstances giving rise to this matter. In the absence of any evidence to the contrary from the Respondent, I accept their evidence in full.

The facts

[5] The Respondent was formally offered a job in the Applicant's call centre by letter dated 27 February 2007. She had already informally accepted the job through a recruitment agent.

[6] She communicated formal acceptance of the job by signing and returning a copy of the letter of offer and standard terms and conditions attached to that letter. The copy provided to the Authority shows this was done on 2 March 2007.

[7] The letter of 27 February 2007 directed the Respondent to start work on 19 March 2007. She did not start work on that day as she had some days before then asked, through the recruitment agent, if a relative with whom she had some conflict and who already worked at the Applicant's call centre could be moved to another work area. The Applicant considered that possibility but decided it was not reasonable or feasible to move the employee already working. Through the recruitment agent, the Applicant advised that it could not accommodate the Respondent's request. Again through the agent, the Respondent advised that she would no longer accept the job.

[8] The Applicant pays wages monthly, on the 15th day of each month. If the Respondent had started work on 19 March, she would normally not have been paid until the 15th of April. However, to assist new staff starting after the middle of the month, the Applicant usually arranges an earlier wage payment at the end of that first month. For that purpose the Applicant's payroll office had already processed paperwork – assuming she would start as expected on 19 March 2007 – so the Respondent would be paid at the end of March for her first two weeks of work.

[9] Through administrative error the Applicant's payroll system did not identify that the Respondent had not started work on the anticipated date and had not worked since. This resulted in a payment of $999.36 to her bank account at the end of March. On 15 April her bank account was credited with a further $2170.43 as wages for the month of April. A check of actual staffing against payroll was not carried out until the mid-month pay day. (The Applicant has, I was told, since improved its system of cross-checking such matters.)

[10] On 23 April 2007 Ms Roa wrote to the Respondent advising of the error and seeking repayment of $3169.79 by cheque by the end of April. She also suggested the Respondent could contact her to discuss other repayment options.

[11] On 24 April 2007 Ms Roa spoke by telephone to the Respondent. She confirmed with her that the bank account number to which the payments were made was that of the Respondent. The Respondent told Ms Roa that she was not aware of the payments but would check with her bank, and, if the money was there, she would call and make arrangements to repay the money.

[12] Ms Roa did not hear from the Respondent again and subsequent attempts to contact her by telephone and letter were unsuccessful.

Discussion

[13] I am satisfied that the Respondent did not do any work for the Applicant but has received money as wages to which she is not entitled.

[14] I am also satisfied that the Applicant is entitled to an order for the Respondent to repay the money and the Authority has the jurisdiction to make such an order.

[15] This is not a matter that falls within the ambit of the provisions of the Wages Protection Act 1983 for recovery of wages from future payments of wages to an employee. In this case there is no ongoing employment relationship or expectation of further wages from which deductions could be made.

[16] Rather it falls within the Authority's exclusive jurisdiction under s161(1)(r) of the Employment Relations Act 2000 ("the Act") to determine actions arising from or related to the employment relationship. An employment

relationship under the Act includes those between an employer and an employee employed by the employer. An employee, in turn, includes "a person intending to work" which is defined as a person who has been offered and accepted work as an employee. This applies to the Respondent who was offered and accepted work, as evidenced by her employment agreement signed on 2 March 2007.

[17] Accordingly, as provided under s162 of the Act, this matter may be disposed of by the Authority making any order that the High Court or District Court could make under any enactment or rule of law relating to contracts.

[18] One avenue would be for an order under s9 of the Contractual Remedies Act 1979 for payment of such sum that the Authority thinks just. Application of this power to grant relief requires the Respondent in this case to have repudiated her employment agreement (the 'contract') which she has clearly done by not starting work as directed on the appointed date or earlier having advised that she no longer 'accepted' the job. That breach substantially reduced the benefit of the contract to the Applicant. The Applicant, subsequently, communicated cancellation of the contract by asking the Respondent to repay the wages advanced to her in error. That cancellation did not, however, as provided by s8(3)(b) of the Contractual Remedies Act, mean the Applicant divested the money it had paid under the contract. Rather it was entitled to seek an order for relief under s9. Under that section I am satisfied – having regard to the terms of the agreement and the failure of the Respondent to perform any part of her obligations under it, principally being to turn up and work for

the Applicant – that an order for the Respondent to pay to the Applicant the sum sought may be granted.

[19] Alternatively an order could be made on an action for money had and received. This action, historically founded in contract but now seen as a restitutionary remedy for unjust enrichment, may be broadly seen as within the rules of law relating to contract available to the Courts, and under s162 of the Act, to the Authority in cases of this type.1 Such actions are open when a plaintiff has made a mistake of fact, even though with more care such a mistake could have been avoided. In the present case the Applicant's payroll office mistakenly believed the Respondent had begun work.

[20] More broadly the Act requires the Authority to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities (s157(1)). Further the Authority is directed to act as it thinks fit in equity and good conscience, but not to do anything inconsistent with the Act or any relevant employment agreement. I am satisfied that the substantial merits of this case are with the Applicant, and it would not be equitable or in good faith for the Respondent to keep the money paid in error to her by the Applicant. Ordering the Respondent to repay the money is not inconsistent with this Act or her employment agreement.

[21] From the evidence of Ms Roa, and in the absence of any evidence to the contrary from the Respondent, I am satisfied that the Respondent does not assert any real right to have or keep that money. There is nothing to suggest that a defence is available to her under s94(A) of the Judicature Act 1908 that she received the payment in good faith and has relied on its validity to alter her position so that it would be inequitable to grant full or partial relief to the Applicant. As she resolved, for reasons of her own, not to keep her side of the bargain by starting work as previously agreed with the Applicant, allowing her to keep the money would be an unwarranted windfall. In short, because she did nothing to earn the money, she is not entitled to keep it and must pay it back.

1 *Restitution* Laws of New Zealand at paras 3 and 11-13 and *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1998] NZCA 755; [1999] 2 NZLR 211 (CA)

Determination

[22] For the reasons given, I am satisfied that the Applicant has paid to the bank account of the Respondent the sum of $3169.79, that the Applicant has since made demand for the return of that money but the Respondent has not done so, that the Respondent was not entitled to receive or keep that money, and the Applicant should have an order for its return.

[23] Accordingly, the Respondent is ordered to pay to the Applicant the sum of

$3169.79 by no later than 14 days from the date of this determination.

[24] The Respondent is also ordered to pay to the Applicant the additional sum of $70 in reimbursement of

its filing fee in this matter.

[25] I draw to the Respondent's attention that s141 of the Act provides that any order made under this Act by the Authority may be filed in any District Court and is enforceable in the same manner as an order made by the District Court.

[26] A copy of this determination is to be sent to the Respondent at the address at which she was located by the process server referred to earlier in this determination.

Robin Arthur

Member of the Employment Relations Authority
