

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 62  
5448315

BETWEEN                      PATRICK MURRAY  
   Applicant  
  
AND                                JS PLASTERING LIMITED  
   Respondent

Member of Authority:        M B Loftus  
  
Representatives:              Patrick Murray, on his own behalf  
   No appearance for the Respondent  
  
Date:                                17 April 2014

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**ERRATUM - [2014] NZERA Christchurch 62**

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- [1]     On 15 April 2014 I issued a determination in respect of this matter.
- [2]     The orders specified in paragraphs 23 and 24 contain errors in that they do not reflect the decision to order the payment of outstanding wages as recorded in paragraphs 17 and 18 of the determination.
- [3]     As a result the orders in paragraphs 23 and 24 of the original determination are to be replaced with the following:
- [23]   *For reasons outlined above I order the respondent, JS Plastering Limited, to pay the applicant, Mr Patrick Murray, the following sums:*
- a.   *\$1,444.00 (one thousand, four hundred and forty four dollars) gross in respect of outstanding wages and holiday pay; and*
  - b.   *A further \$2,332.80 (two thousand, three hundred and thirty two dollars and eighty cents) gross in lieu of unpaid notice; and*
  - c.   *A further \$71.56 (seventy one dollars and fifty six cents) as a*

*reimbursement of Mr Murray's costs.*

*[24] The total, \$3,848.36 (three thousand, eight hundred and forty eight dollars and thirty six cents) minus PAYE, is to be paid, in full, within 14 days of this determination.*

M B Loftus  
Member of the Employment Relations Authority

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[2014] NZERA Christchurch 62  
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|         |                                     |
|---------|-------------------------------------|
| BETWEEN | PATRICK MURRAY<br>Applicant         |
| AND     | JS PLASTERING LIMITED<br>Respondent |

|                        |   |
|------------------------|---|
| Member of Authority:   | M B Loftus  |
| Representatives:       | Patrick Murray, on his own behalf<br>No appearance for the Respondent |
| Investigation Meeting: | 15 April 2014 at Christchurch   |
| Submissions Received:  | At the investigation meeting  |
| Determination:         | 15 April 2014   |

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[4] Mr Murray seeks money he claims is due but has not been paid by the respondent, JS Plastering Limited ('JSP'). The claim covers unpaid wages, annual leave and statutory holidays.

[5] JSP's position is unknown given its failure to either furnish a statement in reply or attend the investigation meeting.

**Non-appearance of the Respondent**

[6] JSP's absence was not a surprise. With one exception it has failed to participate in the Authority's process. The exception was one telephone conversation between Mr Jeremy Spears, the respondent's sole Director and Shareholder, and one of the Authority's staff during which Mr Spears undertook to furnish a Statement in Reply. He failed to do so.

[7] The absence does, however, raise the question of whether or not it is appropriate to proceed.

[8] I am satisfied all reasonable attempts have been made to advise JSP of the investigation. Notice of the investigation meeting was delivered, by Courier, to the company's registered office. A second was couriered to an alternate address advised by Mr Spears during the telephone conversation referred to in paragraph 3. The notice of meeting cautions a respondent that should it fail to appear, I might proceed and issue a determination in the applicant's favour.

[9] I conclude JSP is, or at least should be, aware of the investigation and the consequence of non-attendance. In the absence of an explanation, I consider it appropriate I continue. Mr Murray is entitled to have his claim heard.

### **Background**

[10] Mr Murray was employed as a plasterer. 21 December was his last day of work for 2013. He says he and Mr Spears had a conversation that day during which he was told to return to work on 6 January 2014. He was also told he would receive any wages due for the intervening period, along with his last weeks' pay which remained outstanding, forthwith.

[11] On 23 December 2013 Mr Spears sent Mr Murray a text advising:

*Hey paddy mate, just letting you know that I've decided not to continue your employment with me next year, surplus to requirements.*

[12] The text goes on to say:

*As you are on trial I am obliged to give you one week's notice from today. Which means you will be paid for 2 stat days this week plus last weeks pay and any holiday pay owing. This is your official written notice at 23/12/13.*

*All the best for the new year.*

*Regards... Jeremy.*

[13] Mr Murray was, by then, away and did not receive the text till 29 December. He replied asking JSP pay his wages till 6 January as agreed on 21 December. There was no response.

[14] The request for payment was repeated on 3 January along with one JSP return Mr Murray's tools which he had left, given the understanding he was returning in the new year.

[15] Mr Murray says Mr Spears responded that day advising his accountant was away till 6 January and payment could be made then. Mr Murray sent a terse response along the lines of *that's not my problem - we had an agreement - please honour it*. Mr Murray also advised he would be seeking legal redress and reiterated the request his tools be returned.

[16] Mr Murray says Mr Spears responded with a request he (Murray) return some equipment he allegedly had. Mr Murray denies he had it and says he told Mr Spears so. That led to an acrimonious telephone conversation which was the last direct contact between the two.

[17] The tools were returned on 28 January which allowed Mr Spears to commence with another employer.

### **Determination**

[18] Mr Murray seeks:

- a. Outstanding wages for the period 16 to 21 December 2013;
- b. Outstanding holiday pay;
- c. Two weeks' notice as specified in his employment agreement;
- d. Payment for the statutory holidays which fell over the Christmas / New Year period; and
- e. Payment for the period he was unable to work by reason of not having his tools.

[19] Mr Murray offered various documents in support of his claim. He also responded to questions and I accept his answers.

[20] Turning to the claim for outstanding wages and holiday pay. Section 132 of the Employment Relations Act 2000 provides that where there is a failure to keep or produce wage records I may accept a claim unless the respondent can prove it is

incorrect. There are no time and wage records and the respondent's failure to participate in the process means there is no evidence to challenge Mr Murray's claim these monies remain outstanding.

[21] The outstanding wages total \$972 gross. The holiday pay is hard to calculate accurately given the lack of records. Mr Murray estimates he earned some \$5,900.00 gross. It is an estimate, but an educated one based on bank statements. I accept it. That would suggest holiday pay in the order of \$472.00 gross. In the absence of anything better, I conclude that amount is owing.

[22] There is then the question of notice. Mr Murray was dismissed. Mr Spears' text cites *surplus to requirements* as the reason. That suggests redundancy. The employment agreement Mr Murray supplied states that if the employment ends by reason of redundancy he is entitled to two weeks' notice. Holiday's will also be payable for that period. Applying a forty hour week the payment would be in the order of \$2,332.80. That amount is payable.

[23] Mr Murray seeks payment for the statutory holidays which fell over the Christmas / New Year period. Those would have fallen during the notice period and have, therefore, already been paid.

[24] Finally Mr Murray seeks payment for the time he was unable to work due to a lack of tools. His problem with this claim is it lacks a statutory or contractual base. Any remedy that may go some way toward providing this (lost wages) would have to be accessed through the personal grievance process. Unfortunately Mr Murray has not raised a personal grievance so the remedy is unobtainable.

[25] Mr Murray has been successful with his claim. He is therefore entitled to a contribution towards the costs he incurred in pursuing it. There is no legal representation and recoverable costs are limited to the Authority's filing fee of \$71.56. Mr Murray should be recompensed that amount.

### **Orders**

[26] For reasons outlined above I order the respondent, JS Plastering Limited, to pay the applicant, Mr Patrick Murray, the following sums:

- a. \$472.00 (four hundred and seventy two dollars) gross in respect of outstanding wages and holiday pay; and
- b. A further \$2,332.80 (two thousand, three hundred and thirty two dollars and eighty cents) gross in lieu of unpaid notice; and
- c. A further \$71.56 (seventy one dollars and fifty six cents) as a reimbursement of Mr Murray's costs.

[27] The total, \$2,876.36 (two thousand, eight hundred and seventy six dollars and thirty six cents) minus PAYE, is to be paid, in full, within 14 days of this determination.

M B Loftus  
Member of the Employment Relations Authority