

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 321/07
5046429**

BETWEEN JEREMY O'NEILL
 Applicant

AND KAMO LABOUR LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Andrew Holgate for Respondent

Investigation Meeting: 1 October 2007

Determination: 15 October 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Jeremy O'Neill ("Mr O'Neill") seeks to recover arrears of wages from his former employer Kamo Labour Limited ("Kamo"). He claims he is owed one weeks salary and holiday pay.

[2] The parties were unable to resolve the problem between them by the use of mediation.

[3] I had granted an adjournment of investigation meeting at Kamo's request to 1 October 2007. On that day Mr Holgate appeared on instructions from Mr Wayne Peters. Mr Holgate advised the Authority his instructions were to seek a further adjournment because Kamo's director Mr Michael Daly's was that very same morning attending at the Whangarei District Court for jury service. There had been no prior notice to the Authority of Mr Daly's jury service. I stood the matter down briefly and asked Mr Holgate to obtain written verification of Mr Daly's jury service. Counsel was unable to provide the same to the Authority.

[4] It seemed to me wholly inappropriate to proceed if Mr Daly was actually performing his civic duty, notwithstanding the apparent discourtesy. As a compromise, I proceeded to take Mr O'Neill's evidence and advised Mr Holgate that Mr Daly, if he wished to be heard, could have either 7 days to lodge his evidence in reply by affidavit, or within 14 days attend an interview by me and by telephone. Mr Daly did not comply with either but instead, Mr Peters by facsimile of 9 October 2007 provides a memorandum of counsel and attaches an employment pack for new employees. I have considered that memorandum and the attached documentation.

[5] Kamo does not dispute that it owes Mr O'Neill holiday pay and one half weeks wages. Mr Peters asks for a direction from the Authority as to whether it will permit deductions from the sums owing to Mr O'Neill. The only substantive matter raised by way of affirmative defence in the statement in reply is an allegation that Mr O'Neill did not give the requisite notice of termination. There is no counter-problem raised and so I decline to permit the matters raised in Mr Peters' memorandum to be raised and they will not be investigated. Mr Daly has also had his opportunity to be heard.

The facts

[6] Mr O'Neill commenced employment with Kamo in March 2006 initially as a foreman. He was paid a salary of \$1,000.00 per week. The terms of the employment were recorded in an individual employment agreement signed on 16 March 2006 ("the IEA").

[7] The IEA contains these provisions:-

7.1 Annual holidays are allowed in accordance with the Holidays Act 2003, which provides for three weeks holiday at the end of each year of service. This will increase to four weeks for the year commencing on 1/4/07.

10.1 Employment may be terminated in accordance with the following provisions:

At least two weeks advance notice shall be given by either party. Where employment is terminated without the required notice, two weeks wages shall be paid (by the employer) or forfeited (by the employee) as the case may be.

[8] On Thursday 13 July 2006 Mr O'Neill gave one weeks' notice in writing of his resignation. He wrote:-

*I hereby give one weeks notice to end my employment with Kamo Labour Ltd as from Thursday 13th 2006.
J O'Neill (signed)*

[9] On Thursday 20 July 2006 Mr O'Neill learned that his salary had not been deposited into his account. He resolved to then leave the employment immediately and did so. He telephoned the person responsible for the payroll one "Debra" and arranged to meet with Debra the following day on Friday 21 July 2006. Debra promised to have Mr O'Neill's severance pay made up for him to collect.

[10] The following morning Mr O'Neill took his mother with him as his support person when he met with Debra. He says that Debra was yelling and screaming and refused to answer questions. She presented a statement to Mr O'Neill of an amount of \$6,628.21 she said he owed Kamo and that she would "contra" that amount against his severance pay. Mr O'Neill was not paid anything.

The merits

[11] Mr O'Neill produces to the Authority a final payslip with what he says his Debra's handwriting noting that "*Total hols & pay to date owed \$2,393.93*". Mr O'Neill's own calculation of the amount owed to him is \$2,086.05.

[12] I accept that the IEA obliged Mr O'Neill to give two weeks notice. He gave one week. There is no evidence of any objection by Kamo at the time. But there is no evidence on the pay advice slips or the statement of deductions that Mr O'Neill has forfeited two weeks salary. The notations show that respective sums will be direct credited to Mr O'Neill's account. Because there is no evidence that at the time Kamo would rely on the IEA and Mr O'Neill would forfeit two weeks salary, I find that Kamo had no such intention. Instead, I find that it sought to entirely discharge all amounts owed to Mr O'Neill by the deductions in the form of his alleged indebtedness to Kamo. Accordingly I find that Kamo admits it owes Mr O'Neill arrears of salary.

[13] Finally, Kamo admits it owes holiday pay. I consider the correct amount owed to Mr O'Neill is the amount confirmed by Debra on the pay advice slip printed on 21 July 2006.

The determination

[14] I am satisfied that Jeremy O'Neill is owed arrears of wages by Kamo Labour Limited in the gross sum of \$2,393.93 (being both salary and holiday pay). **I order Kamo Labour Limited to pay to Jeremy O'Neill the gross sum of \$2,393.93 as arrears of wages.**

Costs

[15] Mr O'Neill is entitled to have his lodgement fee on this application reimbursed to him. **I order Kamo Labour Limited to pay to Jeremy O'Neill the sum of \$70.00 being the lodgement fee on this application.**

Leon Robinson
Member of Employment Relations Authority