

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 159  
5355309**

BETWEEN VITALI REZNIK  
Applicant  
AND BAVARIAN MOTORS LIMITED  
Respondent

Member of Authority: Eleanor Robinson  
Representatives: Tina Buchanan, Advocate for Applicant  
Respondent in person  
Investigation Meeting: 27 April 2012  
Determination: 11 May 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Vitali Reznik, claims that the Respondent, Bavarian Motors Limited (“BML”), owes him \$1,292.00 gross in respect of 8.5 days of unpaid statutory annual leave entitlement, in addition to payment in respect of unpaid wages for 3 working days, these being 6, 7, and 8 September 2006.

[2] BML accepts that the amount claimed by Mr Reznik in respect of 8.5 days of unpaid statutory annual leave entitlement is due and owed. However BML argues that Mr Reznik is not owed unpaid wages for the 3 days claimed on the basis that he had been paid in cash for the first 3 days of his employment.

[3] Mr Fischboeck, owner of BML, claims that Mr Reznik had the use of BML motor vehicles from 12 January 2010 until he resigned and his employment terminated on 6 May 2011. Mr Fischboeck is claiming from Mr Reznik the sum of \$40 per week throughout that period in respect of a hire charge for the use of the vehicles.

[4] Mr Fischboeck further claims that Mr Reznik who resigned on 5 May 2011 failed to work out 3 days of his contractual notice period of 1 week.

## **Issues**

[5] The issues for determination are whether:

- Mr Reznik is owed the sum of \$1,292.00 gross in respect of unpaid statutory annual leave entitlement.
- Mr Reznik is owed a sum in respect of 3 days unpaid wages for 6, 7, and 8 September 2006.
- Mr Fischboeck is entitled to a hire charge payment for use of the BML motor vehicles by Mr Reznik from 12 January 2010 until his employment terminated on 6 May 2011.
- Mr Fischboeck is entitled to claim a sum equivalent to 3 days payment from Mr Reznik in respect of 3 days of the 1 week contractual notice period which he failed to work.

## **Background Facts**

[6] Mr Reznik commenced employment with BML servicing and repairing motor vehicles on 6 September 2006 which continued until he resigned his employment on 5 May 2011, leaving his employment with BML on 6 May 2011.

[7] Mr Reznik had been provided with an offer letter dated 7 August 2006 which outlined his commencement date of employment as 10 August 2006, and his remuneration as being at an hourly rate of \$16.50 for a 40 hour working week. A written employment agreement was also provided to Mr Reznik which was signed by Mr Reznik and Mr Fischboeck on 7 August and 8 August 2006 respectively.

[8] Mr Reznik said that he had been provided with a cheque in the amount of \$1,202.23 in respect of his final wages payment, however Mr Reznik, who had never been provided with a payslip during the course of his employment, said he had been confused as he had not understood how the final amount had been calculated.

[9] Mr Reznik stated that he had requested an explanation from BML who had sent him a calculation sheet showing a final payment of \$1,202.23. Mr Reznik said he had asked Ms

Tina Buchanan, a friend who worked as an Administration/Accounts Manager, to assist him in the matter.

[10] Ms Buchanan said the calculation sheet supplied by BML was not readable, had no name on it, no Director's or Account's person signature, no date, and had nothing on it indicating that it related to Mr Reznik.

[11] Ms Buchanan said she had telephoned Mr Fischboeck on 17 June 2011 and he had allowed her, as Mr Reznik's representative, to visit BML's office and to examine the BML Wages Book.

[12] Ms Buchanan said her examination revealed that BML had made a serious mistake in calculating the final payment, and that it owed Mr Reznik 8.5 days statutory annual leave entitlement.

[13] Ms Buchanan said that BML's Accounts Assistant insisted that the BML calculation was correct and advised Ms Buchanan to contact the Department of Labour.

[14] Ms Buchanan stated that she had contacted the Department of Labour, who had confirmed that her calculation was correct, and had advised her to write a grievance letter to Mr Fischboeck.

[15] Ms Buchanan said she had sent a letter on behalf of Mr Reznik and dated 12 July 2011, to Mr Fischboeck, together with a statement showing the amount owed to Mr Reznik in respect of statutory annual leave entitlement. The letter requested:

*Also I would like to ask you to check my first payment I received on 14<sup>th</sup> of September 2006, but not on 7<sup>th</sup> of September 2006 as per wages book. I commenced working on the 6<sup>th</sup> of September 2006 as per your records, but was paid on 14<sup>th</sup> of September 2006 only for 5 days (I have a copy of my bank statement, showing date of payment receipt and amount for \$523.00).*

[16] Ms Buchanan said that she and Mr Reznik did not receive a reply from Mr Fischboeck despite Ms Buchanan having made many telephone calls to Mr Fischboeck and having left messages on his mobile telephone.

[17] Mr Fischboeck stated that he accepted that the 8.5 days statutory annual leave entitlement was outstanding and owed, but that no monies were owed to Mr Reznik in respect of the first 3 days of his employment worked in September 2006.

[18] Mr Fischboeck explained that Mr Reznik had been paid in cash for the first 3 days of his employment, and had been subsequently paid for the same 3 days by direct credit transfer to his bank account, consequently rather than being owed unpaid wages, Mr Reznik in fact had been overpaid by an amount of \$523.00.

[19] Mr Fischboeck produced in evidence a copy of a cheque butt which was dated 14 September 2006. Written on the cheque butt was:

*To: Wages*

*For: Vitaly \$523.-  
Ernst \$150.-*

*This cheque: \$673.00*

[20] Mr Fischboeck claimed that because a regular direct credit transfer had not been set up until 14 September 2006, Mr Reznik had been paid in cash for the first 3 days of his employment, and by payment direct into his bank account thereafter.

[21] Mr Reznik provided in evidence his bank statements from August 2006 until the end of December 2006. These showed that there had been a payment received during August from BML, noted as being in respect of 3 days payment. From 14 September 2006 there had been a regular weekly payment of \$523.00

[22] Mr Reznik said that he had not raised the issue of non-payment for the 3 days in question with Mr Fischboeck as he had not realised that he had not been paid for the first 3 days of his employment in 2006 until Ms Buchanan had carried out the investigation into the BML wage book and had raised the issue.

#### *Motor Vehicle*

[23] Mr Fischboeck said that on 12 January 2010 Mr Reznik had borrowed BML motor vehicles which he had used until he left his employment with BML. Mr Fischboeck stated that he believed that a reasonable hire charge for the use of the cars would have been \$40.00 per week

[24] Mr Fischboeck said that he had spoken to Mr Reznik on several occasions requesting that he stopped using the BML vehicles but that Mr Reznik had not done so.

[25] Mr Reznik said that he had asked for, and obtained, Mr Fischboeck permission before using a BML car. Mr Reznik said he had used a car if one was available, and if one was not available he had caught the bus to and from his home.

[26] Mr Reznik stated that it had been agreed with Mr Fischboeck that a condition of his being allowed to use a motor vehicle was that he had to provide and pay for his petrol usage and maintain the motor vehicle in a clean condition. Mr Reznik denied that Mr Fischboeck had spoken to him about ceasing the use of the BML cars.

#### *Contractual Notice Period*

[27] Mr Fischboeck said that on Thursday 5 May 2011 Mr Reznik had informed him that he was going to start a new job on Monday 9 May 2011. Mr Fischboeck said he had not considered insisting that Mr Reznik work his contractual notice period as he had not believed that Mr Reznik would work fully and satisfactorily in that situation.

[28] On 30 August 2011 Mr Reznik filed a statement of problem in the Authority.

#### **Determination**

**Is Mr Reznik owed the sum of \$1,292.00 gross in respect of unpaid annual leave entitlement?**

[29] At the Investigation Meeting, Mr Fischboeck said that he accepted that Mr Reznik was owed the 8.5 days annual leave entitlement.

**Is Mr Reznik owed a sum in respect of 3 days unpaid wages for 6, 7, and 8 September 2006?**

[30] Mr Fischboeck stated that Mr Reznik had been paid in cash for 6, 7 and 8 September 2006.

[31] I do not find Mr Reznik's claim that he was unaware he had not been paid for these 3 days to be credible given that he had been provided with an offer letter and written employment agreement which set out his rate of pay and that he was employed for a 40 hour working week. Mr Reznik would consequently have been fully aware of his wages entitlement.

[32] Even if I were to accept that, despite Mr Reznik knowing his hourly rate and the weekly working hours he worked, he was not aware he had not been paid for the initial 3 days, the bank statements he provided show a consistent pattern of payment, being a weekly payment of \$523.00 per week. On this basis it would have been apparent to Mr Reznik that he had not been paid sufficient monies in respect of the 6, 7 and 8 September 2006 and for him to have raised this matter with Mr Fischboeck in a timely manner.

[33] The sum identified on the cheque butt is a greater amount than what would have been represented by 3 days of employment, but Mr Fischboeck, who explained that he had been ill at this time, was unable to explain why Mr Reznik would have been paid a sum greater than that which would have been due to him.

[34] BML's claim that Mr Reznik had been paid for the 3 day period is supported by evidence of IRD PAYE tax deductions having been made of \$548.00 in relation to a gross payment of \$2,640.00 during the month of September 2006 which represented the gross payment for the 4 weeks Mr Reznik worked during that period.

[35] I find that Mr Reznik had been paid for working on the 6, 7 and 8 September 2006, and that having been paid was the reason he had not raised the question of non-payment with Mr Fischboeck until Ms Buchanan raised it as an issue following her investigation in June 2011.

**Is Mr Fischboeck entitled to a hire charge payment for use of the BML motor vehicles by Mr Reznik from 12 January 2010 until his employment terminated on 6 May 2011?**

[36] The employment agreement provided to Mr Reznik in 2006 provided at clause 7 that:

*7.1 A motor vehicle may be provided to the employee as part of the employee's position.*

*7.2 The employer shall pay the costs of registration, insurance, warrants of fitness and routine maintenance.*

[37] The remainder of the clause outlines the responsibilities of the employee, but these do not state that a hire charge was payable or that any other type of payment was payable in relation to the use of a motor vehicle, other than in relation to any damage to the vehicle whilst in the employee's charge.

[38] I do not find that Mr Fischboeck is entitled to a hire charge payment from Mr Reznik in respect of the private use of the BML motor vehicles.

**Is Mr Fischboeck entitled to claim 3 days payment from Mr Reznik in respect of the 3 days of his contractual notice period which he failed to work?**

[39] Clause 16 of Mr Reznik's employment agreement with BML provided that: "*Either party may terminate this agreement by one week's notice in writing to the other party*".

[40] As Mr Fischboeck had verbally agreed to allow Mr Reznik to conclude his employment earlier than at the conclusion of the contractual notice period, I find that he is not entitled to any recompense for the 3 days of the contractual notice period not worked by Mr Reznik.

[41] However I observe that parties who enter into contractual agreements should abide by them. In this case BML had provided Mr Reznik with many years of employment; Mr Fischboeck had assisted Mr Reznik with his immigration applications, and had allowed him the use of a BML motor vehicle to assist him getting to and from his place of employment.

[42] I find that BML acted in good faith towards Mr Reznik and that he failed to act accordingly in breach of the good faith requirement set out in clause 4 (1)(a) of the Employment Relations Act 2000, which might have incurred a penalty had BML applied for one in a timely manner. Fortunately for Mr Reznik, BML have not done so.

**Remedies**

[43] BML is to pay Mr Reznik the sum of \$1,292.00 gross in respect of 8.5 days unpaid annual leave entitlement.

**Costs**

[44] While costs are reserved, I note here that, subject to his submissions, Mr Reznik was not legally represented and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**