

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 203
5355797

BETWEEN

DARRELL HUGH ROSE
Applicant

A N D

HIBELL HOLDINGS LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Darrell Rose on his own behalf
John Benefield on behalf of the Respondent

Investigation Meeting 13 December 2011 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 15 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a wage arrears claim brought by the applicant, Mr Darrell Rose, against the respondent, Hibell Holdings Limited (HHL).

[2] It is claimed that upon Mr Rose's cessation HHL withheld his final pay (comprising both salary owing for time worked and holiday pay). The amount withheld totals \$4,694.08 gross (\$3,199.90 net) but this is not, for reasons which shall be explained later, the amount sought. Mr Rose is asking that the Authority order HHL to pay him the sum of \$949.90.

[3] HHL accepts that it retained Mr Rose's final pay but contends its actions were justified. It claims that Mr Rose owed HHL a greater sum and it was entitled to take this from his final pay by virtue of a provision in the employment agreement between the two.

Background

[4] HHL owns and runs a dairy farm. It employed Mr Rose as a herd manager and he commenced on 15 September 2010.

[5] The process by which he came to be employed was somewhat circuitous. A friend, Mr Geoff Harrison, had been employed by HHL in what is now known as the position of operations manager. Messrs Harrison and Rose had previously worked together in the Wairarapa and Mr Harrison was aware that Mr Rose was interested in a position in the Canterbury region. It appeared the two first discussed the possibility of Mr Rose working with HHL in March 2010 but, at the time, nothing came of it.

[6] Later in the year HHL was having staffing difficulties and sought new employees. It would appear from the evidence that this need was initially discussed between Mrs Rose and Mrs Harrison. That led to discussions between Mrs Rose and Mr Harrison before Mr Rose and Mr Harrison finally concluded an arrangement whereby Mr Rose would work for HHL. The two discussed terms and conditions and these are, with two exceptions, recorded in a detailed written employment agreement. The two exceptions are an agreement that Mr Rose would have free electricity while living in one of HHL's houses and, more importantly for this dispute, an agreement that HHL would pay Mr Rose's removal expenses between Pahiatua and Leeston provided he remained with the company until the end of the current season on 31 May 2011.

[7] Despite the fact the discussion about terms and conditions was between Messrs Rose and Harrison, the employment agreement was prepared by Mr John Benefield, HHL's manager. Mr Benefield and Mr Rose had one telephone discussion prior to confirmation of the employment arrangement but it was, in the words of Mr Rose, more of an interview and terms and conditions were not discussed. Mr Benefield agrees.

[8] Mr Harrison believes he advised Mr Benefield of his and Mr Rose's agreement regarding electricity and removal expenses and understood those arrangements would be recorded in the employment agreement. They were not.

[9] The agreement does, however, contain the provision (clause 12.5) upon which HHL relies in this dispute. It reads:

The Employee authorises the Employer to deduct any monies owed by the Employee to the Employer from any monies owed or accruing, to the Employer by the Employer.

These monies include, but are not limited to:

- *Monies owed under clauses 11.5, 11.9, 11.11, 12.6, 12.7, 22.2, 22.3 and/or 22.5. [none of which are applicable to the present dispute].*
- *Monies owing in respect of accounts paid by the Employer on behalf of the Employee including, but not limited to, private toll calls, power and charge accounts.*
- *Monies to repair or replace damage or loss to the Employer's equipment, caused by wilful or careless action or inaction, misuse, or abuse.*

[10] In accordance with their agreement and about a week before the shift, Mr Rose advised Mr Harrison of the estimated shifting cost - \$3,000. The day before the shift, and having had the removal firm pack and measure accurately, Mr Rose telephoned to advise that the cost had increased to \$4,000. It would appear from the evidence that Mr Harrison advised Mr Benefield of the change and whilst the latter was displeased, he felt that HHL had no choice but to proceed given the need for staff, the agreement entered into and the fact Mr Rose came highly recommended.

[11] As events transpired, even that latter advice was incorrect as it had neglected GST. When Mr Rose's effects were delivered to Leeston HHL (or more correctly Mr Harrison) was faced with an account for \$4,500 and a demand it be paid forthwith. Mr Harrison made a personal payment and was later reimbursed by HHL.

[12] Mr Rose's relationship with HHL was not as harmonious as the parties would have expected and within a short time he was seeking alternate employment. That he found, though the commencement date was negotiable.

[13] He advised Mr Benefield by email on 28 December 2010. It reads:

This email is to let you know what our intentions are for next year. I have been offered and accepted a position in Dorie, which is a step up from my current position.

My start date in the new position is flexible, however I would like to start by mid March. (So we can start the kids in the new school at the start of the year and Angela does not have to commute with them too much.)

Now we realise that there is the issue of furniture costs which the company paid for us when we shifted down here, I cannot find anything in the contract, but around the time we shifted Geoff did mention it was expected we remain until the end of season.

If I stay until mid March that would be six months I would have been here and I would be happy to repay half of the shifting costs. Obviously I would not be eligible for any of the bonuses written into my contract that I would be if I remain 6 weeks longer until the end of May.

This would also free up the house so it can be used by two staff members as originally was the case ... and it would also save the farm money in travel/rent expenses currently paid.

Please note this is not my official resignation as I would like to discuss the date of my leaving directly with you after I guess you have spoken with Geoff in regards to the farms needs...

Given the situation with the housing shortage should suitable staff be found before March, we could leave from anywhere mid February onwards if this would suit the company better.

I do not want to make things difficult for anyone and would like to leave on good terms so I will try to accommodate what suits the farm best in relation to my leave date.

Thanks,

Darrell Rose

[14] The requested discussion took place on the morning of 10 January 2011. Mr Rose says he and Mr Benefield had a good conversation which took an hour or so. It was conducted over a cup of tea and the first 45 minutes was spent discussing issues inconsequential to this dispute. The conversation then turned to the issue of Mr Rose's departure and, according to him, Mr Benefield said that perhaps it would be best if he simply gave the month's notice required by his agreement and left as early as possible. They agreed a cessation date of 18 February 2011 provided Mr Rose could confirm his new house was available by then. Mr Rose says he briefly mentioned the issue of repaying removal expenses but Mr Benefield said nothing. His understanding was that Mr Benefield had, by suggesting he leave at the earliest convenience and not commenting on the issue of repayment which he had raised, accepted his proposal of 28 December in its entirety. In his view, this acceptance included the suggestion he pay half the cost of the shift.

[15] Mr Benefield essentially agrees with Mr Rose's recollection of the conversation. He does not, however, accept that the failure to discuss the removal

expenses indicated acceptance of Mr Rose's proposal. To him it was, at the time, irrelevant as he was not aware of the issue's significance.

[16] Subsequently, and on an unascertainable date prior to 6 February, Mr Harrison raised the issue with Mr Benefield and said something to the effect of *what about the deal we had about removal expenses? He owes the lot.*

[17] After the discussion of 10 January and later that day, Mrs Rose sent the following advice on her husband's behalf:

We have had a chat with our new employer and the house will be available for us to move into from the 19th of Feb so we will make this our final day.

As discussed please take any holiday pay owing as part payment for the moving cost paid by you and then invoice us for the remaining amount.

I have attached a letter of resignation for your records.

[18] Mr Benefield, having been alerted to the issue of the outstanding removal expenses by Mr Harrison, sent an email to Mr Rose on 6 February 2011. It reads:

I have calculated pay owing to 18.2.11.

You will see that pay due is \$3,199.90.

You have agreed to pay back removal costs of \$4500.00 as you have not stayed to the 31.5.11.

You are yet to advise how and when you will pay the \$4500.00.

Please advise by Monday the 7th February 2011 by email as there will be no further payments made until this matter has been clarified.

Many thank,

John

[19] Mr Rose states that he was taken by surprise by this email, having understood that he had entered into an arrangement whereby he would reimburse half the removal cost. By way of response, he telephoned Mr Benefield and being unable to get a response, left a message on an answerphone. He stated:

Hi there, its Darrell Rose here from Main Rakaia Road Farm, Delhaven I think its called. Hey John just a message in regard to the final pay. Seems like there has been a bit of a misunderstanding but I

guess it seems like I'm going to crunch it. I was under the belief I was only paying half but never mind um if you can give me a ring at home tonight. I'm working today. I believe I'm due 2½ stat days and there's only one in there. My home phone number is ...

[20] That evening Mr Rose sent Mr Benefield an email. It reads:

I did leave a message on your answer phone but thought it is better if our conversations are documented as there seems to be a misunderstanding.

My understanding of the situation was that I was to pay back half of the moving cost which was stipulated in my previous correspondence to you, which would make it \$2000 owed after gst which the company would have claimed.

This was why I gave notice for when I did, as per my first email I was suggesting I stay until mid March and repay half the costs (instead of the end of season and not pay anything) however during our conversation you were happy for me to give one months notice (which I had written in my email if this suited the company better to free up the house I could do so) I did not realise this would mean I would have to repay the full amount.

I had expected that my holiday pay would have just about covered the \$2000 as I had told you it would during our meeting hence why I have not contacted you...

[21] Considerable correspondence then passed between the parties with Mr Rose maintaining that he entered into an arrangement whereby he would reimburse half the removal expenses, while HHL maintains an entitlement to the full amount. HHL even lodged a claim in the Disputes Tribunal but, quite correctly, was told that the matter had its origins in an employment agreement and is therefore within the jurisdiction of the Employment Relations Authority. Here it should be noted that a similar claim (for reimbursement of the residue of the full amount) has not been lodged in the Authority.

[22] Notwithstanding the considerable correspondence, the matter remains unresolved and that has led to this investigation meeting.

Determination

[23] This is an arrears claim, the determination of which will depend upon the contractual arrangements that existed between the parties.

[24] For HHL it is contended that the parties initially agreed that Mr Rose remain in its employ until at least 31 May 2011 and that in the event he not do so he repay the removal assistance provided when he commenced. He did not remain until 31 May.

It is therefore contended that the amount concerned is *monies owed by the Employee to the Employer* and therefore recoverable from the final pay by virtue of clause 12.5 of the employment agreement.

[25] Conceding that the original arrangement was as described by HHL, Mr Rose contends that it subsequently changed. His contention is that when faced with the possibility of a flexible commencement date with his new employer, he sought a discussion over an arrangement that would suit both he and HHL and, in the absence of an express provision in the employment agreement, he proposed that he repay half the removal expenses. He is also of the view that by vacating HHL's house and freeing it for the use of others, he was assisting the company and (not his words) that was a form of consideration for the reduced repayment. Mr Rose is of the view that by not commenting when he raised the issue of repayment and then accepting, indeed promoting, an earlier cessation date HHL accepted his package in full. That meant he was now to repay half the removal expenses and he then acted on what he considered a concluded agreement by contacting his new employer and facilitating an early departure.

[26] It is that belief, namely that the discussion between himself and Mr Benefield on 10 January effectively changed the terms of employment, that is behind Mr Rose's decision not to seek the amount deducted in full (namely \$3,199.90). He believes he entered into an arrangement whereby he would pay something to HHL and he only seeks the residue - \$949.90. This, it should be noted is a smaller sum than that originally claimed and the change recognises an acceptance he is also liable for GST on his half.

[27] In my view, Mr Rose's view fits with the way in which the doctrine of estoppel has developed in recent years. Estoppel refers to a situation where someone acts in reliance on a promise - either express or implied. It has long been available as a defence, but in recent times has been found capable of constituting a cause of action. For instance, in a recent Australian case, a party was held liable for inducing a belief that a contract would be entered into and allowing the other to act in reliance on that belief (*Broughtons Stores (Interstate) Ltd v. Maher* (1988) 76 ALR 513). In the current instance it is not a contract being entered into but a contract being varied, and that appears to be what occurred here.

[28] Mr Rose put up a complete proposal – early departure and the repayment of half of the removal expenses. Mr Benefield, on behalf of HHL, accepted the first part of the proposal but did nothing to suggest that he was rejecting the other. In such circumstances I believe it understandable that Mr Rose considered his proposal accepted in full. He then acted on that understanding and HHL is therefore, in my view, estopped from deducting the relocation expenses in full. The arrangement has now been altered to one under which only half is recoverable.

[29] Mr Rose is willing to honour the amended agreement and, as said earlier, seeks only the residue from his final pay. I consider that amount owing.

Orders

[30] For the reasons expressed above, I conclude Mr Rose has a valid claim. He is owed, as claimed, the sum of \$949.90 and, accordingly, HHL is ordered to pay that amount to him forthwith.

Costs

[31] It is normal that costs follow the event but both parties were unrepresented at the investigation meeting and both reside locally. That means that costs are limited to the filing fee incurred by Mr Rose. In order to avoid additional effort or expense for the parties, and given that a costs award can be reviewed, I choose to dispose of the issue and order HHL pay Mr Rose a further \$71.56 as reimbursement of costs.

M B Loftus
Member of the Employment Relations Authority