

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 92  
5593025

BETWEEN            ANDREW SAWLEY  
Applicant

A N D                BRIX PROJECT  
MANAGEMENTS LIMITED  
Respondent

Member of Authority:     David Appleton

Representatives:         Applicant in person  
                                      No appearance for Respondent

Investigation Meeting:    21 June 2016 at Christchurch

Date of Determination:    21 June 2016

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Sawley was employed by the respondent at the time of his employment ending.**
- B.     The respondent is to pay to Mr Sawley arrears of pay in the gross sum of \$6,386.82, together with the sum of \$71.56, being the Authority's lodgement fee incurred by Mr Sawley.**
- C.     There is no further order as to costs.**

**Employment relationship problem**

[1]     No one from the respondent appeared at the Authority's investigation meeting. I am, however, satisfied that sufficient efforts were made by the Authority to ensure that its director, Shane Beecham, was made aware of the date, time and venue of the meeting. The meeting therefore proceeded in the respondent's absence.

[2] Mr Andrew Sawley claims arrears of pay against the respondent in the sum of \$6,761.52 before deductions, being wages and final holiday owing after his dismissal by way of redundancy. Mr Sawley's application to the Authority was originally against his original employer, Brix Frames Limited, a different legal entity to the current respondent. However, this company was struck off the register of companies with effect from 30 January 2016. Upon being advised of this, Mr Sawley then provided to the Authority a copy of a letter from Mr Beecham, written on the headed notepaper of Brix Frames Limited, dated 13 March 2015, which informed Mr Sawley that his employment with Brix Frames Limited was being terminated but that Mr Sawley would *see [his] notice period out in Brix Project Managements Limited*.

[3] On the basis that the original respondent (Brix Frames Limited) no longer existed as an entity, but there appeared to have been a transfer of Mr Sawley's employment to Brix Project Managements Limited prior to his dismissal, the Authority substituted that latter company for Brix Frames Limited in order to investigate, inter alia, whether that company was now liable for the arrears of wages that Mr Sawley claims are due.

[4] In its statement in reply, lodged prior to being struck off the Companies Office register, Brix Frames Limited acknowledged that Mr Sawley was owed arrears of wages but claimed a set-off against those wages in respect of a number of matters. Essentially, the statement in reply lodged by Brix Frames Limited contained a counterclaim that the arrears of pay were extinguished and that Mr Sawley owed it the sum of \$1,550.52.

### **Complicating factors**

[5] The complicating factors are as follows. First, Mr Sawley retained his company car as security over the arrears of wages that were owed to him. It is Mr Sawley's case that he agreed with a former director of Brix Frames Limited, Ms Carole Aburn, that he could keep the company car as security over it, until he was paid the arrears of wages. Mr Beecham, however, asserts that Mr Sawley took possession of the company car unlawfully, without agreement.

[6] In the statement of reply that had been lodged on behalf of Brix Frames Limited, the sum of \$3,862.96 had been deducted from the arrears of pay, being

allegedly the costs of finance and insurance incurred by Brix Frames Limited after Mr Sawley had retained the car.

[7] This matter is further complicated by the fact that the company car was subject to a perfected security in favour of a finance company. In addition, Ms Aburn had personally guaranteed the finance company's loan over the car and had subsequently obtained legal ownership of the car (even though it was in the possession of Mr Sawley at the time). Mr Sawley said that separate proceedings are ongoing in the District Court in an attempt by Ms Aburn to recover the car from Mr Sawley, along with damages.

[8] Secondly, Mr Sawley says that Brix Frames Limited tried to get him to retain equipment for him to sell and to use the proceeds (estimated by the respondent to be worth \$2,500) from the amount owed to him. This appears to be correct, as the Authority saw an email from Mr Beecham to Mr Sawley dated 26 May 2015 which stated that Mr Beecham was happy for Mr Sawley to take title of the stock, and for him to sell it and retain the moneys as part of the settlement of his outstanding wages. Mr Beecham asked Mr Sawley to provide a list of the items prior to selling them. Mr Sawley says he has not sold the tools as they are not worth more than around \$900, and some of them were taken back by Mr Beecham in any event (namely, some second hand Milwaukee power tools). The statement in reply lodged on behalf of Brix Frames Limited deducted \$2,500 from the arrears of pay owed to Mr Sawley.

[9] There was also a deduction of \$374.70 from Mr Sawley's final salary shown on his payslip which had the annotation *Sony Xperia Phone* against it. Mr Sawley confirms that he had agreed to retain this phone in return for a deduction of \$374.70 being deducted from his salary.

### **The issues**

[10] The Authority must determine the following issues:

- (a) Did Brix Project Managements Limited become Mr Sawley's employer prior to the termination of his employment taking effect; and
- (b) If so, is that company entitled to make deductions from the wages and holiday pay owed to Mr Sawley in respect of his retention of the company car, the tools and the phone?

**Did Brix Project Managements Limited become Mr Sawley's employer prior to the termination of his employment taking effect?**

[11] The letter from Mr Beecham to Mr Sawley dated 13 March 2015, written on the headed notepaper of Brix Frames Limited, strongly implies that Brix Frames Limited intended to transfer Mr Sawley's employment from it to Brix Project Managements Limited. Brix Frames Limited was not able to do this unilaterally, but could do so if Mr Sawley agreed. Mr Sawley's evidence was that he did agree, or at least, did not object.

[12] I therefore find that Brix Project Managements Limited became the employer of Mr Sawley prior to his dismissal taking effect, and that that company thereby took on liability for arrears of pay owed to Mr Sawley at the end of his employment.

**Is Brix Project Managements Limited entitled to deduct sums from Mr Sawley's arrears of wages and holiday pay?**

[13] This question needs to be determined under the different subheadings of the retention of the car, the retention of the tools and retention of the phone.

*Mr Sawley's retention of the car*

[14] For the avoidance of doubt, the Authority has no jurisdiction to investigate the status of Mr Sawley's continued retention of the car, after legal title in it was transferred to Ms Aburn. That issue is currently in the hands of the District Court. In addition, the Authority does not have jurisdiction to consider the counter-claim for the costs of finance and insurance apparently incurred by Brix Frames Limited prior to the transfer to Ms Aburn of title over the car, as that entity is no longer in existence.

[15] Furthermore, no evidence was adduced by either Brix Frames Limited, or Brix Project Managements Limited to show that the latter company took over the assets of the former company, including monies allegedly owed to it by creditors, including Mr Sawley.

[16] For these reasons, I am unable to conclude that Brix Project Managements Limited is entitled to deduct from his final pay the sum of \$3,862.96, purportedly in respect of costs of finance and insurance incurred by Brix Frames Limited prior to the transfer to Ms Aburn of title over the car.

[17] However, I would note that there does appear to have been a binding agreement between Mr Sawley and the presumed then owner of the car, Brix Frames Limited, for Mr Sawley to retain it as security for the unpaid wages and holiday pay. If there was such an agreement, then Mr Sawley could argue that he has a contractual lien over the car and that, arguably, the later transfer by Brix Frames Limited of the car to Ms Aburn without his consent was a breach of that contract.

[18] I reach this conclusion on the basis of a copy of an email from Ms Aburn to Mr Sawley dated 14 April 2015 that Mr Sawley produced at the investigation meeting. Although Ms Aburn had ceased to be a director of Brix Frames Limited on 1 January 2015, the email concluded with Ms Aburn's name and the title, *Payroll Administrator for Brix Frames Ltd*. I therefore accept that the email was written on behalf of that company.

[19] The email attached Mr Sawley's final payslip, and contained the following passages:

*Hi Andrew*

*I have been asked to email you.*

*I do apologise for no-one being in contact sooner. We fully intended to get you paid before now, but as you know, the financial situation of Brix Frames is not good, and so we have to find the funds to pay you from elsewhere. This is taking some time, but **we have no intention of not paying you.** [Emphasis in the original]*

*You have use of the Hilux in the meantime. We have not asked for this back.*

[20] The statement in reply that had been lodged on behalf of Brix Frames Limited included a copy of the loan agreement with the finance company and Brix Frames Limited in respect of the company car, which showed that the loan amount was \$31,750, with total interest charges of \$9,127, making a total balance payable to the finance company of \$40,877. The statement in reply made the point that, given that the purchase price of the vehicle was \$31,500 and that the loan was perfected, so that it has priority over an unperfected security interest in the same collateral<sup>1</sup>, Brix Frames Limited would not have agreed that Mr Sawley could take physical possession of a car which was subject to a perfected security and which was worth significantly more than the arrears of pay it owed Mr Sawley.

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<sup>1</sup> Section 66 Personal Property Securities Act 1999

[21] However, the wording of Ms Aburn's email appears to create a binding contract, allowing Mr Sawley to keep the vehicle pending the payment of his arrears of pay. The connection between the acknowledgement of the debt, and the retention of the car, is made by the use of the words *in the meantime*. I therefore find that there was an agreement between Mr Sawley and Brix Frames Limited for him to keep the car as security.

[22] Interestingly, Ms Aburn was also the personal guarantor for the loan over the car, and so any argument that Brix Frames Limited may have had that it had no standing to agree that Mr Sawley kept the car as security might be defeated by that fact.

[23] In any event, as the agreement was made between Mr Sawley and Brix Frames Limited, which does not exist anymore, the finding of a binding agreement in relation to the retention of the car does not add anything to the Authority's principal finding that the current respondent is not able to withhold \$3,862.96 from Mr Sawley's arrears of pay.

[24] Therefore, the counterclaim against Mr Sawley in relation to the retention of the car must fail.

#### *The tools*

[25] Mr Sawley was clearly allowed to keep the tools, and to sell them, as was evidenced by an email from Mr Beecham to Mr Sawley dated 26 May 2015. This email was sent by Mr Beecham in his capacity as *Director/Project Manager, Brix Project Managements*. This suggests that Brix Project Managements Limited may have had title over the tools by then. Mr Sawley's evidence was that he did not want to have the tools in lieu of \$2,500 of his arrears of pay as he did not believe the tools were worth that much. He said that he offered to keep them for a reduction of \$1,000 off the arrears, but that Mr Beecham never replied to that offer.

[26] Given that Mr Sawley did not agree to keep the tools in lieu of \$2,500 of his arrears of pay, I find that the respondent is not entitled to withhold that sum from Mr Sawley's arrears of pay (or any other sum in the absence of an acceptance of Mr Sawley's counter proposal). Once the arrears have been paid to Mr Sawley in accordance with the orders of the Authority set out below, Mr Sawley is to return the tools to the respondent company, save for tools already taken back by Mr Beecham.

*The phone*

[27] Mr Sawley clearly agreed to keep the phone in return for the deduction of \$374.70 from his arrears of pay, and this sum should be deducted from the arrears owed by the respondent.

**Orders**

[28] I order the respondent to pay to Mr Sawley arrears of pay and holiday pay in the gross sum of \$6,386.82. I further order the respondent to pay Mr Sawley the sum of \$71.56 in respect of the lodgement fee that he will have incurred.

[29] I order Mr Sawley to return to the respondent all tools in his possession or under his control belonging to Brix Project Managements Limited, or formerly belonging to Brix Frames Limited, within seven days of him receiving in full the arrears of pay and reimbursement of the Authority's lodgement fee referred to above.

**Costs**

[30] Mr Sawley was not represented during any part of the Authority's proceedings, and so is not entitled to recover any costs of representation.

David Appleton  
Member of the Employment Relations Authority