

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN Jacob Schwalger (Applicant)
AND Tapa Services Ltd (Respondent)
REPRESENTATIVES Moana Schwalger for the applicant
No appearance for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 2 February 2005
FURTHER INFORMATION 20 April 2005
RECEIVED
DATE OF DETERMINATION 21 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. This is a claim for arrears of wages and holiday pay. Mr Schwalger was Facilitator/Manager for the respondent from May 2002 and worked from the Henderson, Avondale and New Lynn branches at different times. On 20 May 2004 Mr Schwalger gave two weeks notice in writing of his resignation. On his last day, Friday 4 June 2004, he met with the managing director, Mr Maka, to collect his final pay. Mr Schwalger says Mr Maka told him that leave he had taken in advance exceeded his final fortnight's salary and mileage. As a result he said that it was Mr Schwalger who owed the respondent money and he would not be getting any further payment whatsoever.
2. Mr Schwalger disputes all this. He says that he had not taken all the holidays that were due to him and was in fact short paid during a period in 2003. Mr Schwalger is now seeking:
 - Balance of arrears of wages and mileage for a five week period of underpayment in 2003;
 - Arrears of wages for the final fortnight of work made up of retainer plus an estimate of the bonus he believes he would have received during that period, plus mileage for that period;
 - Holiday pay.
3. Mr Maka provided a statement in reply and participated in a telephone conference with the Authority during which he agreed to provide the Authority with witness statements and wage and time records. However, even after a reminder he failed to meet this obligation or to attend the investigation meeting. It was confirmed to me that notice of the investigation

meeting was served at the respondent's registered office on 16 November 2003. On that basis, I proceeded to complete my investigation in the absence of representation from the respondent. Mr Schwalger established his claims to my satisfaction and I now make orders in his favour for arrears of wages. All are expressed in gross terms.

Arrears of wages arising March-April 2003

2. When he was first employed, Mr Schwalger's wage rate was agreed at \$1,153.85 gross per fortnight (\$920.00 per fortnight net.) In addition he was to receive a mileage allowance in recognition of the use of his private vehicle on the respondent's business.
3. Between May and August 2002 Mr Schwalger experienced problems relating to failures to pay his wages into his bank account on time or at all and failures to pay agreed mileage for use of his own car on the respondent's business.
4. A draft employment agreement was prepared by the respondent in August 2002. The essential terms of the document accorded with the parties' oral agreement about employment conditions. However, Mr Schwalger suggested amendments designed to rectify his concerns about such matters as late payment, for example by requiring that the employer pay personal bank charges he had incurred as a result of the late payments. The employer did not respond to these suggestions and the document was never executed.
5. Mr Schwalger worked the first two weeks of March 2003 as usual. However he did not receive his fortnightly pay. He telephoned the respondent's head office and heard that Mr Maka was overseas. Mr Schwalger continued to work without pay for a further three weeks before he stopped.
6. He repeatedly left messages with Mr Maka's receptionist without response until finally, in late April or early May Mr Maka called at Mr Schwalger's home with a \$500.00 cash part-payment of the arrears owed and asked Mr Schwalger to return to work for him. Mr Schwalger agreed on the basis that he would receive the balance of the arrears upon his return. In the event, he received a further \$300.00 which he says leaves an outstanding balance owed to him of \$1,500.00 net that was never paid to him, plus mileage allowance of \$375.00.
7. In the absence of any appearance from the respondent or provision of wage and time records, I am satisfied that I must accept the applicant's evidence that there remains a shortfall in his wages for this period. As indicated the amount claimed was expressed in net terms and has therefore been "grossed up" here.
8. **The respondent is therefore ordered to pay to the applicant the sum of \$2,084.62 gross arrears of wages and \$375.00 mileage allowance.**

Arrears of wages arising June 2004

9. In about August 2003 Mr Schwalger was presented with a further written employment agreement. It provided for a change to the method of payment whereby his previous set fortnightly salary would be replaced by a retainer (\$400.00 per fortnight) plus bonuses for placements achieved and for the overall performance of the centre. The method of reimbursement for use of his car also changed. Instead of receiving a mileage rate, he was now to receive a flat \$150.00 per month.

10. Mr Schwalger did not consent to this change and did not sign the new agreement. The respondent proceeded with the change anyway and from this point until the employment was terminated, Mr Schwalger's fortnightly payment was made up of two components, the fixed retainer and a fluctuating bonus.
11. Mr Schwalger says he is owed wages for the final fortnight of work. Again, in the absence of wage and time records for this period I accept his evidence that he did not receive the wages to which he was entitled.
12. The retainer is straightforward; the respondent is obliged to pay \$400.00 per fortnight in respect of this.
13. Calculation of the bonus is more complicated however. Although I do have the details of the bonus scheme I have no evidence of placements for that period and cannot therefore calculate the bonus accurately. I was given some of the payslips for 2004 (Mr Schwalger told me he did not retain all of them.) I also have a schedule prepared by the respondent which was presented to Mr Schwalger on 4 June and later attached to the statement in reply. That notes a figure for "salary (net) week ended 4 June" of \$636.55. I consider this a somewhat mysterious figure seeming as it does rather too high to be weekly pay and too low to be the fortnightly pay.
14. The payslips show fortnightly bonuses ranging from \$390.00 (for the week ending 21/05/04) to \$750.00 (for the week ending 30/01/04). All of the intervening weeks are however for \$650.00 per fortnight. I conclude that the bonus to be paid for the final fortnight of work is \$650.00 gross.
- 15. In total, therefore the respondent is ordered to pay, in respect of the final fortnight worked: \$400.00 gross retainer; \$650.00 gross bonus and \$150.00 mileage allowance.**

Holiday pay

16. Mr Schwalger says he took two weeks leave over each Christmas period that he was employed, inclusive of statutory holidays. In addition he says he took five more days in the six months prior to the ending of his employment. He says he is owed the balance of his holiday pay.
17. Attached to the statement in reply was a schedule which appears to indicate that during his employment Mr Schwalger had received holiday pay of \$3,600.00 gross. This would seem to be the basis of the respondent's assertion that Mr Schwalger had been overpaid. I have scrutinised this schedule very carefully but I have to say that it is not self explanatory and I can make no sense of it. Had the respondent come to the investigation meeting it may have been able to establish that holiday pay obligations had been met or even exceeded. However, in the absence of further evidence of this, I cannot make any conclusions about this. I note also, for the benefit of the respondent, that if this were the case it would affect only the claim for holiday pay. Overpaid holiday pay cannot be offset against the arrears of wages.
18. I have decided that the fairest way to establish what holiday pay Mr Schwalger is owed is to calculate 6% of his total earnings over the period of his employment and deduct the value of the holidays he says he took during his employment.
19. I asked Ms Schwalger to provide me with information which would establish the total amount Mr Schwalger had earned at Tapa Services Ltd. In due course she supplied me with

a letter from Inland Revenue which stated that in the period from 1 June 2002 until 31 March 2004 he earned a total of \$41,903.00 gross. In respect of the period after 31 March 2004 I was provided with payslips for the pay periods ending 23 April 2004 (showing gross earnings of \$1050.00 inclusive of retainer) 7 May 2004 (showing gross earnings of \$1050.00 inclusive of retainer) and 21 May 2004 (showing gross earnings of \$790.00 inclusive of retainer).

20. His total earnings were therefore \$41,903.00, plus whatever he was paid during April, May and June 2004, plus what he is awarded in retainer and commission in this determination. The evidence for the earnings after 31 March 2004 is that he earned \$2,890.00 over six of the ten weeks in that period. Taking an average from this I calculate his earnings for the remaining four weeks as \$1,927.00. Adding these two figures together gives us wages paid for the period 1 April 2004 until 4 June 2004: \$4,817.00.

21. The total earnings (excluding the travel allowance) throughout the employment are therefore:

	\$41,903.00 (wages paid 1 June 2003-31 March 2004)
	\$4,817.00 (wages paid 1 April 2004 until 4 June 2004.)
	\$2,084.62 (balance of wages owed March-April 2003)
	<u>\$1,050.00 (wages owed for the period 20 May-4 June 2004)</u>
Total	<u>\$49,854.62</u>

22. Mr Schwalger's total holiday pay for the entire period of his employment would be six percent of this figure, or \$2,991.28 gross.

23. Set against this is the annual leave that Mr Schwalger says he took. After accounting for statutory holidays this is six days over each of the two Christmas periods of his employment plus a further five days, giving 17 days in total. We have already seen that the retainer plus bonus for a typical fortnight amounted to \$1,050.0 or an average daily payment of \$105.00. I therefore use a multiplier of \$105.00 applied to the 17 days already taken to arrive at the holiday pay already received. This gives a figure of \$1,785.00 gross.

24. The gross holiday pay outstanding is therefore the difference between \$2,991.28 and \$1,785.00, that is, \$1,206.28. **The respondent is therefore ordered to pay to the applicant holiday pay of \$1,206.28.**

Summary of orders

25. The respondent is ordered to pay to Mr Schwalger the following:

- **\$2,084.62** gross arrears of wages and **\$375.00** mileage allowance in respect of the underpayment in March-April 2003;
- **\$400.00** gross retainer, **\$650.00** gross bonus and **\$150.00** mileage allowance in respect of the period 20 May 2005 until 4 June 2005;
- holiday pay of **\$1,206.28**.