

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 65
3003602

BETWEEN RORY SHEEHAN
Applicant
AND JONES AND JONES GROUP
LIMITED
Respondent

Member of Authority: Peter van Keulen
Investigation Meeting: 27 April 2017 at Christchurch
Representatives: Rory Sheehan
Martin Hartley, Representative for Respondent
Date of Determination: 1 May 2017

DETERMINATION OF THE AUTHORITY

- A. Jones and Jones Group Limited must pay Mr Sheehan \$2,545.50 (gross) for holiday pay within 14 days of this determination.**
- B. Jones and Jones Group Limited must pay Mr Sheehan the sum of \$71.56 within 14 days of this determination.**

Employment relationship problem

[1] The applicant, Rory Sheehan, claims he has not been paid holiday pay owing to him at the termination of his employment with Jones and Jones Group Limited (Jones and Jones).

[2] In the statement in reply Jones and Jones acknowledged that it owed holiday pay to Mr Sheehan. However, it withheld payment because of the failure by Mr Sheehan to provide a correct timesheet for hours worked on 23 September 2016.

Discussion

[3] Jones and Jones employed Mr Sheehan as an apprentice builder from 8 October 2014 until 25 November 2016.

[4] Mr Sheehan's final pay slip indicated that Jones and Jones owed Mr Sheehan \$4,048.30 for accrued but untaken holiday pay at the end of his employment. However, this amount did not account for 57.8 hours of holiday that Mr Sheehan took prior to the termination of his employment. After deduction of these hours, the amount of holiday pay that Jones and Jones owed to Mr Sheehan is \$2,545.50.

[5] Jones and Jones has not paid Mr Sheehan this amount of accrued but untaken holiday pay owing at the termination of his employment. It says Mr Sheehan has failed to provide a correct timesheet for work he undertook on 23 September 2016.

[6] It appeared from the statement in reply and the submissions made in the case management conference that Jones and Jones withheld the holiday pay on the basis that Mr Sheehan had not met his contractual obligation to it, to provide an accurate and correct timesheet for work done. It was simply holding any payment pending receipt of what it viewed to be a correct timesheet.

[7] In the investigation meeting, Jones and Jones' position developed further. It suggested that it has a counterclaim against Mr Sheehan for lost revenue. It says that without a correct timesheet it cannot bill the client for work undertaken by Mr Sheehan on 23 September. As a result, there is approximately four hours of Mr Sheehan's time that it cannot bill to a job completed by Jones and Jones. As Mr Sheehan was working with another employee at the time, Jones and Jones says, it cannot verify that employee's time as well and therefore it cannot bill that employee's time.

[8] However, Jones and Jones did not plead that counterclaim in its statement in reply nor was it able to provide particulars of the loss claimed in the investigation meeting.

[9] Mr Sheehan accepts that he did submit an incorrect timesheet for 23 September 2016, which recorded him having worked on a job at Riccarton Road for

eight hours. He accepted that in fact he only worked at the Riccarton Road site for 2 hours and left around 9:30 am to return to the workshop to complete some maintenance work. His explanation for leaving was that there was insufficient work for him to do at the Riccarton Road site because he was waiting on various contractors to complete their work before he could do the tasks he was assigned.

[10] Helen Harris, a director of Jones and Jones, was sceptical of this explanation. In her view, Mr Sheehan had been instructed to attend the Riccarton Road site and he should have worked there filling in his time on other jobs or assisting where he could even if he could not do the tasks he was specifically instructed to do. There was sufficient work on site and Jones and Jones had instructed him to be there so there was no valid reason for Mr Sheehan to leave to complete maintenance that could have been completed some other time. And, it did not make sense that he would take it upon himself to do that.

[11] When he was at the workshop, Mr Sheehan said he was then instructed to attend a further site to assist with moving furniture. This was a house in Cam Road that, at that time, was owned by Callum Jones and Ian Jones, two other directors of Jones and Jones. Mr Sheehan says he went to Cam Road three times and in total, he spent about one hour there moving furniture for Messrs Jones and Jones.

[12] Martin Hartley, a fourth director of Jones and Jones became aware that Mr Sheehan had left the Riccarton Road site and he checked on Mr Sheehan. His evidence was that between himself and Ms Harris, they attended the workshop on three or four occasions during the day and Mr Sheehan was not there.

[13] Mr Hartley did not check the Cam Road house as this was not an authorised job for Jones and Jones. He now asserts that Messrs Jones and Jones were misappropriating company resources to work on the house and, it follows, that Mr Sheehan was part of that.

[14] When Mr Hartley processed the time sheets for the week of 23 September 2016 he discovered the incorrect time sheet and requested that Mr Sheehan file a correct timesheet. He had to send three email requests including a formal notice in the third email before Mr Sheehan complied with the request.

[15] The amended time sheet for 23 September 2016 recorded that Mr Sheehan had worked for two hours at the Riccarton Road site, one hour at the house at Cam Road and five hours at the workshop.

[16] Mr Hartley and Ms Harris do not accept this is correct based on the times they attended the workshop during the day on 23 September, finding on each visit that Mr Sheehan was not there.

[17] So, based upon:

- (a) Mr Sheehan's absence from the Riccarton Road site without proper explanation;
- (b) the fact that Mr Sheehan's purported time at the workshop cannot be verified and actually contrary to what Mr Hartley and Ms Harris observed;
- (c) the false time sheet;
- (d) Mr Sheehan's reluctance to file an amended time sheet;
- (e) the fact that the Cam Road work was not authorised by Jones and Jones; and
- (f) the close personal friendship between Mr Sheehan and Messrs Jones and Jones,

Mr Hartley and Ms Harris conclude that Mr Sheehan is likely to have spent a larger part of the day of 23 September 2016 at the Cam Road site on unauthorised work. Work that Jones and Jones should be able to bill to Messrs Jones and Jones.

[18] Whilst I can see there is a basis for Mr Hartley and Ms Harris's complaint and I have concerns about the credibility of Mr Sheehan's evidence of what he did on 23 September 2016, I am unable to determine the counterclaim. This is because it was not pleaded prior to the investigation meeting and neither party came prepared with appropriate evidence and submissions to address the issues.

[19] Jones and Jones can pursue this counterclaim if it wants to, however, the pursuit of this counterclaim does not mean I cannot resolve Mr Sheehan's claim for holiday pay; even if there is a valid counterclaim, this does not mean that Jones and Jones should not pay the holiday pay it owes to Mr Sheehan.

[20] Jones and Jones owes Mr Sheehan \$2,545.50 for accrued but untaken holiday pay. It has no right to withhold payment or deduct any amount from it¹ except for an authorised deduction that might be made from wages or holiday pay due pursuant to s 5 of the Wages Protection Act 1983². Mr Sheehan has not given Jones and Jones written authorisation to deduct any specified payments from his wages let alone some non-particularised amount arising out of a damages claim.

[21] In all of the circumstances, Jones and Jones must pay the accrued but untaken holiday pay without deduction or any further delay.

[22] In the course of the case management conference, I advised the parties that I would consider whether I should award interest on the outstanding holiday pay. I note that Mr Sheehan did not ask for interest and my ability to award interest is discretionary. I have decided that in this case it is not appropriate to award Mr Sheehan interest on the outstanding holiday pay. He is however, entitled to be reimbursed for the filing fee for lodging the statement of problem.

[23] If Jones and Jones wishes to advance its counterclaim against Mr Sheehan then it will need to lodge a statement of problem particularising this claim. That claim will follow the normal investigation process of the Authority.

Determination

[24] Jones and Jones Group Limited is to pay Mr Sheehan \$2,545.50 (gross) for holiday pay within 14 days of the date of this determination.

¹ *Edwards (Labour Inspector) v Topo Gigio Restaurant Ltd* AEC 109/95

² Section 5 of the Wages Protection Act refers to authorised deductions from wages and the definition of Wages in s 2 of the Wages Protection Act does not include holiday pay. However, in *Drake Personnel (New Zealand) Ltd v Taylor* [1996] 2 NZLR 644 (CA) the Court of Appeal stated at p332 that while s 2 of the Wages Protection Act does not expressly include holiday pay in the definition of wages, s 22 of the Holidays Act 1981 does (being similar to s 86 of the Holidays Act 2003) and there is no basis for reading down s 22 as not applying for the purposes of the Wages Protection Act.

Costs

[25] Jones and Jones Group Limited is to pay Mr Sheehan the sum of \$71.56 within 14 days of the date of this determination.

Peter van Keulen
Member of the Employment Relations Authority