

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 157
5455745

BETWEEN DANNY JAMES SMITH
 Applicant

A N D SONTER SEAFOODS LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Danny Smith on his own behalf
 Bruce Leslie on behalf of the Respondent

Investigation Meeting: 7 October 2014 at Christchurch

Submissions Received: At the investigation

Date of Determination: 7 October 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Smith seeks money he claims is due but has not been paid by his ex-employer, Sonter Seafoods Limited (Sonter). The claim covers unpaid wages and annual leave due upon cessation.

[2] Sonter's response comes in two parts. It wants Mr Smith to repay a loan (\$150) before it will consider paying the outstanding wages and says Mr Smith agreed to waive the requirement he be paid outstanding leave in return for having given insufficient notice of resignation.

[3] Before continuing I note that Mr Leslie has failed to address this claim in good faith. His initial reaction, reduced to writing, was *I haven't got time to attend to your individual wants + needs and neither will my staff be*. He then told Mr Smith to get on with whatever course of action he intended and to stop *bothering myself*.

[4] Mr Leslie was tardy in furnishing a statement in reply and uncooperative when the Authority tried to arrange the telephone conference which normally precedes an investigation meeting and at which its conduct and administrative details are discussed. When called at the scheduled time he refused to participate.

[5] Mr Leslie then sent an e-mail on 3 October which advised he found the investigations timing inconvenient as he would *most likely* be attending to other matters. He advised he would be available *say 11:00ish*. Despite being told the meeting would proceed as scheduled he was late anyway.

Citation of the Respondent

[6] The Statement of Problem identified Mr Leslie as the respondent. Documents attached to both the Statement of Problem and Statement in Reply, along with the content of the latter, clearly show the employer was Sonter Seafoods Limited (Sonter). Mr Leslie is Sonter's sole director and one of two shareholders.

[7] I raised this with Mr Smith and he agreed Sonter was his employer. Mr Leslie concurred but when asked about a change to the citation replied he was unwilling to either agree or not. He considered the issue nothing more than a technicality as he is the persona of the company.

[8] Given the responses I choose to amend the citation so as to correctly identify the employer. I do so for the following reasons:

- a. The employer was clearly Sonter and the parties agree;
- b. Mr Leslie did not take issue with the citation and while he failed to agree to a change, he did not object;
- c. Sonter, through the *persona* of Mr Leslie, is well aware of the claim;
and
- d. Given this is an arrears claim Mr Smith could easily rectify the error and proceed. He has nearly six years in which to do so.

Background

[9] Mr Smith says he is due his final week's wages (\$689.75 gross) and holiday pay due as at his date of resignation (\$573.50 gross).

[10] Sonter accepts neither sum has been paid. It reasons for the failure to pay are outlined in [2] above.

[11] The debt relates to what Sonter contends was a loan advanced to Mr Smith. It appears he had money stolen while at work. He says he raised this with Mr Leslie as Sonter had earlier ignored his request to provide a secure locker as it appeared to do for other employees. It appeared as he says he now knows every locker has an identical key and they are not therefore secure. Mr Smith says he understood Mr Leslie gave the money as a reimbursement and he did not understand he was expected to repay the amount till some weeks later. He says the demand for repayment was made during a disciplinary meeting to discuss his attendance record.

[12] Mr Leslie did not say when he sought repayment. He simply says *he feels he is getting sand kicked in his face and has dug his toes in over the issue*. He says he will pay the wages when Ms Smith agrees to repay the loan.

[13] As already said Sonter claims Mr Smith agreed to waive his right to be paid his leave in return for having given insufficient notice of resignation.

[14] The resignation occurred as Mr Smith received a payslip for the week ending 30 March 2014 but no pay. When he approached Mr Leslie to discuss it on 2 April he was told to come back at the end of the day. Mr Leslie agrees and says that occurred as he was in a meeting with senior staff and did not see Mr Smith and his concerns as a priority given the latter's tardy attendance. He says he felt no need to stretch himself for Mr Smith.

[15] Mr Smith considered the response and decided he did not wish to work for someone who did not pay him and was then unwilling to discuss the issue. He wrote out a resignation, effective immediately, and left it on Mr Leslie's desk.

[16] Mr Leslie took issue with this on the grounds the employment agreement requires two weeks' notice. He says he raised this with Mr Smith who agreed to waive the leave payment. Mr Smith denies that. He says Mr Leslie definitely sought such a response during negotiations which occurred after his cessation and in an attempt to resolve the dispute but he rejected the approaches.

Determination

[17] There can be no doubt the amounts sought by Mr Smith have not been paid. That is conceded by Sonter. There can also be no doubt about the amounts involved given confirmation provided by the payslip of 30 March 2014. Finally there can be no doubt that in the normal course of events the monies would be payable.

[18] The question is whether or not the reasons tendered by Sonter excuse payment. For the following reasons the answer is no.

[19] Section 5 of the Wages Protection Act 1983 provides money can only be deducted from an employees pay with that employees written consent or on their request. There is absolutely no evidence, and Sonter does not suggest, Mr Smith made a request he not be paid.

[20] Similarly there is no written consent with Mr Leslie conceding both arrangements upon which he relies (the alleged loan and the concession outstanding leave need not be paid) were oral and neither party can produce the employment agreement Mr Smith accepts he signed. The generic document which Sonter says was used does not contain a general deductions clause upon which Sonter might be able to rely and while it has a clause requiring two weeks' notice of resignation there is no forfeiture clause that might arguably be used in the event of inadequate notice. Similarly, and if it could be argued the lack of notice means the resignation could be construed as abandonment, there is no forfeiture provision which may then be applied either.

[21] The absence of written confirmation or authority to deduct totally nullifies Sonter's approach in respect to the annual leave. Putting aside Mr Smith's denials and if there was consent it would not be enforceable as I cannot hold someone to the waiver of a statutory right.

[22] Turning to the alleged loan. Again the lack of written acknowledgment or consent for a deduction nullifies the approach taken by Sonter and there is also the fact the outstanding amount far exceeds the alleged debt. Even if that were not the case I would not order payment or offset. While Mr Smith accepts he received the money he disputes it was envisaged he be required to pay it back. He says repayment was only raised as a vindictive response to another concern of Sonter's. In the

absence of a counterclaim I need not, indeed cannot, conduct the investigation necessary to resolve the dispute.

[23] For the above reasons I conclude the amounts sought by Mr Smith should be paid. In addition, and given Mr Smith is a Kiwisaver contributor, Sonter must also pay the applicable employer contribution on these amounts.

Costs

[24] Mr Smith also seeks reimbursement of the filing fee he paid to the Authority. Given costs (or at least a contribution toward those incurred) follow the event and as recoverable costs are limited to the filing fee of \$71.56, I conclude that is also payable.

Orders

[25] For reasons outlined above I order the respondent, Sonter Seafoods Limited, pay the applicant, Mr Danny Smith, the following sums:

- a. \$1,263.25 (one thousand, two hundred and sixty three dollars and twenty five cents) gross in respect of outstanding wages and holiday pay; and
- b. The employers contribution toward Kiwisaver payable on the above amount; and
- c. A further \$71.56 (seventy one dollars and fifty six cents) as a reimbursement of Mr Smith's costs.

[26] The above payments are to be made within 14 days of this determination.

M B Loftus
Member of the Employment Relations Authority