

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 78 /08  
5116379

BETWEEN                      ARRAN STEWART  
   Applicant  
  
AND                                ALPHA DIGGERS LIMITED  
   Respondent

Member of Authority:     James Crichton  
  
Representatives:           Arran Stewart in Person  
                                     William Stowers, Advocate for Respondent  
  
Investigation Meeting:    21 May 2008 at Christchurch  
  
Determination:             9 June 2008

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     The applicant (Mr Stewart) alleges that he is owed wages by the respondent (Alpha) while Alpha contends that Mr Stewart has, in effect, been overpaid and that Mr Stewart owes Alpha money, partly because of overpayment of wages but also because of a counterclaim brought by Alpha against Mr Stewart which, amongst other things, alleges that Mr Stewart owes Alpha hireage for tools belonging to Alpha which Mr Stewart has retained, repayment of loan moneys paid by Alpha on Mr Stewart's behalf and various other sundry sums, the total counterclaim by Alpha against Mr Stewart being in the order of \$20,000.

[2]     Mr Stewart is an able drainlayer and was employed by Alpha in that capacity. Although an employment agreement was filed in the documents that were made available to the Authority, it was not ever signed by Mr Stewart but there is no dispute that there was always an employment relationship between the parties.

[3]     Alpha had a contractual relationship with an entity described to the Authority as Champagne Homes. In essence, Alpha provided all of the digging and drainlaying services for Champagne Homes' various projects. Mr Stewart was deployed at these

various projects and was effectively placed in charge of the site operations. Indeed, Mr Stewart showed me a business card for himself from Alpha which described him as *managing director*.

[4] The relationship between Mr Stewart and the proprietors of Alpha (Mr Stowers and his partner, Ms Edlin), clearly began very well and for much of the employment there was a strong fraternal bond between these three individuals. Indeed Mr Stewart's persistent financial problems were openly discussed with his employer and his employer generously agreed to personally meet some of Mr Stewart's financial obligations.

[5] Accordingly, during the course of the employment relationship, I am satisfied the evidence discloses that Alpha made significant and, for a small employer, quite extraordinary efforts to assist Mr Stewart in his financial predicament. By way of example only, Alpha paid off in full a debt which Mr Stewart had incurred with his former employer in the sum of \$2,798.19. That repayment was paid personally by Mr Stowers and Ms Edlin on 21 May 2007 and to date I am satisfied, on the evidence I heard, that Mr Stewart has still not repaid the total amount paid on his behalf by Mr Stowers and Ms Edlin.

[6] Towards the end of the employment relationship, with Mr Stewart apparently increasingly concerned about his income position, there were discussions between Mr Stewart and Ms Shirley Gollan who, at the relevant time, did accounting work both for Champagne Homes and for Alpha. Ms Gollan did not give evidence at the investigation meeting but I was able to speak with her after the meeting with the agreement of both the parties.

[7] The focus of my discussion with Ms Gollan was a document which she had prepared and which Mr Stewart relied upon to prove his entitlement to unpaid wages.

[8] The document in question is undated and it appears to show a variety of scenarios pertaining to Mr Stewart and his income position. When I spoke with Ms Gollan, she indicated to me that the principal purpose of the document was not to demonstrate that Mr Stewart was in fact owed money by Alpha but rather to demonstrate to Mr Stewart that he was being well treated by Alpha which was consistently contributing to his income by not just paying his take home pay but also meeting other obligations such as his child support payments and a variety of different

loan payments. The net result of this situation, Ms Gollan told me, was that Mr Stewart's earnings were significantly ahead of market rates for a tradesman of his kind when all the other miscellaneous amounts were added to his take home pay.

[9] Because Ms Gollan discerned that Mr Stewart was still concerned about his take home pay situation, she explored with him two different options for payment, the first of which was that Mr Stewart would become an independent contractor while continuing to work primarily for Alpha. Ms Gollan thought this would assist Mr Stewart's income position. The other alternative explored by Ms Gollan with Mr Stewart was that he be paid just a salary without any additional payments made by Alpha by way of loan reductions, but he also receive a quarterly cash bonus of \$2,500.

[10] By the commencement of the Christmas holiday break for 2007, Mr Stewart told Ms Gollan that he wished to become an independent contractor and he was keen for her to assist him in that regard. Accordingly, Ms Gollan arranged for Alpha to pay Mr Stewart a one-off bonus of \$2,500 in what she described as *a sign of good faith* by Alpha. Of that \$2,500, Ms Gollan retained \$500 in order that she could attend to the costs associated with the registration of Mr Stewart's new company. She undertook to do that on his behalf over the holiday period, or at least to commence work in that regard.

[11] The arrangement Ms Gollan says was reached between her and Mr Stewart was that on his return from annual leave in mid-January, Mr Stewart was to contact her and give her details about matters such as how he wanted the shareholding to be taken so that she could complete the incorporation details for the new company and conclude matters appropriately. She says Mr Stewart never contacted her and indeed never returned to provide services for Alpha after the Christmas holidays in 2007/2008, although Mr Stewart disputes this.

[12] Mr Stewart then filed his statement of problem in the Authority on 21 February 2008 having reached the conclusion that, as a consequence of the document which Ms Gollan had prepared for him, and for other associated reasons, he was owed money in the way of unpaid wages by Alpha.

[13] In responding to his claim, Alpha indicated that in its opinion, Mr Stewart had actually been overpaid and that there were various other loan payments and payments of that kind which Alpha had made on Mr Stewart's behalf for which he had not

completed reimbursed it. Accordingly, a formal counterclaim was eventually filed with the Authority on 19 May 2008, two days before the investigation meeting.

[14] By agreement with the parties, both matters were dealt with in the same investigation meeting and both matters are disposed of in this determination.

### **Issues**

[15] There are three issues that the Authority must determine:

- (a) Is Mr Stewart owed wages by Alpha;
- (b) Does Mr Stewart owe Alpha money;
- (c) Does Mr Stewart have property belonging to Alpha?

### **Are wages owed?**

[16] Mr Stewart relies for his claim of unpaid wages on the document prepared by Ms Gollan which I have already referred to, and his realisation that money was deducted from his final pay without authority. In addition, Mr Stewart alleges that there are other moneys owed amounting to \$760.05 which he says relate to work done in mid-January 2008.

[17] Dealing with the last of these issues first, Alpha's evidence is that it lost contact with Mr Stewart on and from the Christmas break 2007 and, to use Ms Gollan's phrase, Mr Stewart *just wandered off*. Of course, the expectation was that Mr Stewart would commence work on his own account from January 2008. Alpha appears never to have received Mr Stewart's claim for this \$760.05 and would not have regarded Mr Stewart as being in its employment by this time. In those circumstances, I decline to order payment of that sum.

[18] Next, the Authority needs to consider the document prepared by Ms Gollan. I am satisfied that the purpose of the document was not, in fact, to justify payments to Mr Stewart, although I accept that it does show that an amount of \$753.36 is owing to Mr Stewart. I am equally satisfied, on the basis of the evidence that I heard, that that sum was in fact paid to Mr Stewart on 10 January 2008. The document Mr Stewart produces as evidence for money being owed to him (the Gollan document) records that that money was paid to him on that date by direct credit, as does the

documentation supplied to the Authority by Alpha. It follows that I am not persuaded that Mr Stewart is owed anything as a consequence of the Gollan document.

[19] The final issue is the question Mr Stewart raised about the propriety of deductions being made from his final pay. I am satisfied, on the basis of the documentation before the Authority, that Alpha incorrectly deducted from Mr Stewart's pay moneys which it felt it was entitled to recoup from Mr Stewart to repay it for some of the loan payments that it had made on his behalf.

[20] Mr Stowers of Alpha rang the Labour Department in January 2008 and established that it was improper to deduct those kinds of costs from wages, but, Mr Stowers indicated in his evidence that he was reassured by the Labour Department officer that if he had overpaid Mr Stewart his wages, then provided that overpayment was greater than the deduction improperly made, there would be no difficulty.

[21] For reasons which I will discuss shortly in this determination, I am satisfied that there was no prejudice to Mr Stewart because of these improper deductions.

[22] The major reason I reach this conclusion is the payment of \$2,500 made by Alpha to Mr Stewart in a gesture which Ms Gollan referred to as a *sign of good faith* by Alpha, notwithstanding the fact that it plainly was not in any sense a term of Mr Stewart's employment agreement that he receive such a sum. Given that the amount of money improperly deducted by Alpha from Mr Stewart's wages is greatly exceeded by the \$2,500 paid by Alpha to Mr Stewart, in effect on what amounts to an *ex gratia* basis so that Mr Stewart would have money for the Christmas holidays, no finding against Alpha is appropriate.

[23] I am satisfied on the evidence that I heard that Mr Stewart had decided, after discussion with Ms Gollan, that from the beginning of the New Year and commencing 1 January, he would begin operations as an independent contractor trading as a limited liability company but with a special contractual relationship with Alpha. Ms Gollan had undertaken to attend to the necessary paperwork, subject to further instructions from Mr Stewart and, to that end, she had retained \$500 of his \$2,500 bonus for the purpose of registering his new company. However, it seems that there was a breakdown in communication between Mr Stewart and Ms Gollan and so the necessary decisions that needed to be made in relation to matters such as shareholders of the new company were never made and so the process of incorporation stalled.

[24] In any event, I am satisfied, on the evidence I heard, that the \$2,500 was simply paid by Alpha, literally out of the goodness of the hearts of the proprietors, to assist Mr Stewart over the Christmas holiday period. There was no contractual basis for the payment and indeed by the time the payment was made, I am clear that Mr Stewart had in fact chosen the alternative option Ms Gollan had suggested, namely of establishing his own company. As these two options (continuing in employment on a different basis but with the performance bonus payments, and trading on Mr Stewart's own account) were clearly mutually contradictory, the only basis for this payment of \$2,500 in December 2007 was ex gratia.

[25] I am satisfied that, by the time that payment was made by Alpha, Mr Stewart had indicated to Ms Gollan that he was going to set up his own company because it was agreed that Ms Gollan would retain \$500 of the bonus payment to enable her to commence setting up the company; Mr Stewart's own statement of problem confirms that that \$500 was retained by Ms Gollan.

[26] It follows, then, that I am not satisfied that any consequences should be visited on Alpha for its failure to comply with the law prohibiting deductions from wage payments.

### **Is Alpha owed money by Mr Stewart?**

[27] The evidence, in my opinion, is unequivocal that Mr Stewart owes money to Alpha. Mr Stewart himself confirmed during the course of the investigation meeting, while giving his evidence, that there were a number of sums outstanding.

[28] These outstanding sums, which Mr Stewart acknowledged he owed Alpha, are as follows:

- (a) \$1,405.19 being the balance of the sum paid by Mr Stowers and Ms Edlin personally to clear a debt owed by Mr Stewart to his former employer, Telpower;
- (b) \$100 being the balance still owing from a Burbank Finance loan paid by Alpha on Mr Stewart's behalf;
- (c) \$110.83 being registration for Plumbers' Gasfitters' and Drainlayers' Board for Mr Stewart's ticket.

[29] The sum of those outstanding amounts is \$1,616.02 and I am satisfied that Mr Stewart owes that sum to Alpha.

[30] The issue of more difficulty is Alpha's contention that, because Mr Stewart never worked the hours that he was paid for, or rarely worked the hours that he was paid for, he ought to repay some of the wages that he has already received. The first question to be disposed of is whether the evidence suggests that Mr Stewart did actually work a full span of hours or not. It is common ground that Mr Stewart was supposed to work 47 hours per week; the evidence presented by Alpha was that he was often late starting and invariably finished early, often as early as 3pm. Further, it was suggested that he rarely worked on Saturdays, although he was paid to work on Saturdays.

[31] Mr Stewart gave evidence before the Authority that he would occasionally leave work early but that he would go home to do drainage plans. Alpha's evidence tended to doubt that explanation. Frankly, so do I. I found Mr Stewart an unconvincing witness and I did not believe him when he claimed that he had worked the hours that he was paid for. That view of matters was reinforced by Ms Gollan who told me that Mr Stewart had admitted to her that he did not work the hours he was paid for.

[32] Having reached the conclusion then that Mr Stewart was paid for more hours than he actually worked, the next question for the Authority is whether he can be asked to pay back overpaid wages. The answer to that question is simple. Section 6 of the Wages Protection Act 1983 allows recovery of overpayments in certain circumstances. Those circumstances do not apply here so there can be no order to repay.

[33] In any event, a further difficulty of the present case is that for some of the period that Mr Stewart was working for Alpha, he was paid a salary. If that is the position, then Mr Stewart is entitled to argue that he did the work that was required and managed to complete it within the span of hours that he was paid for so there was nothing improper in that.

[34] Accordingly, I cannot direct that some of the apparent overpayment of wages to Mr Stewart be repaid to Alpha, although I accept the evidence that is given that Mr Stewart habitually worked less than the hours he was paid.

**Has Mr Stewart retained property belonging to Alpha?**

[35] During the course of the investigation meeting, Mr Stewart confirmed his earlier intimation in the papers filed in the Authority that he did in fact retain property which was not his. He acknowledged on oath that he had property which did not belong to him. His rather unsatisfactory explanation for this state of affairs was that there was an argument between Alpha and Champagne Homes as to who owned this property and he therefore thought it best to retain it. He claimed to gain comfort in this position by the intervention of the New Zealand Police who had been consulted by Mr Stowers of Alpha in an attempt to get Alpha's property back from Mr Stewart.

[36] During the course of the investigation meeting, I directed Mr Stewart to return the property that he held to Alpha and I then directed Alpha to engage with Champagne Homes to resolve the question of ownership between them. I indicated in making those orders that I had no jurisdiction to deal with Champagne Homes which was not in an employment relationship with Mr Stewart, and thus not involved in his claim, or for that matter in Alpha's counterclaim and that, in consequence, as Mr Stewart plainly did not own the property concerned, he should return the property to Alpha and it should resolve issues of ownership as between itself and Champagne.

[37] In fact what happened on the afternoon of the investigation meeting, after I had adjourned was that I received a phone call from the principal of Champagne Homes, Ms Yvonne Parker, who indicated to me that she was ringing me to tell me that she had been contacted by Mr Stewart after the investigation meeting had concluded and been told by Mr Stewart about my direction that Mr Stewart should return the property to Alpha. Ms Parker told me that the property belonged to Champagne and not to Alpha and that she, Ms Parker, was ringing me to ensure that Mr Stewart *did not get in trouble* because he had given the tools to her and not to Alpha as I had directed.

[38] Clearly there is nothing further that the Authority can do in relation to the tools issue. The Authority does, however, note that no credit can be given to Mr Stewart for ignoring the Authority's order and seeking to continue to embroil himself in an argument which has nothing whatever to do with him.

[39] Alpha seeks an order for the hire of their tools improperly retained by Mr Stewart. The evidence is clear Mr Stewart retained Alpha's tools without right or

authority. He admitted as much himself. However I am satisfied the Authority has no power to order the payment of hireage in these circumstances.

[40] The Authority does have the power to order compliance with its own directions. It is clear in the present case, that Mr Stewart has chosen not to abide by the direction I made that the tools were to be returned to Alpha. It is also plain that in retaining property which he acknowledged did not belong to him, Mr Stewart did not behave in good faith as the law requires him to.

[41] There is little point in the Authority issuing a compliance order directing Mr Stewart to return the property to Alpha; the evidence suggests that the property is no longer in Mr Stewart's possession. However, it is in the Authority's view entirely appropriate that Mr Stewart pay a penalty for his breach of good faith in seeking to undermine the employment relationship: Section 4A(1) (b) (iii) of the Employment Relations Act 2000 applied. I direct that a penalty of \$1000.00 is to be paid by Mr Stewart: Section 136(2) applied.

### **Determination**

[42] I am satisfied on the balance of probabilities that Mr Stewart is not owed wages by Alpha; indeed, I am satisfied that Mr Stewart has been significantly overpaid for his work and that he has been treated more than generously by Alpha during the period of his employment.

[43] Conversely, I am satisfied that Alpha has a viable counterclaim against Mr Stewart for the sum of \$1,616.02 and I now direct that Mr Stewart is to pay that sum to Alpha care of William John Stowers. On the assumption that Mr Stewart's financial difficulties continue, Mr Stowers and Alpha may need to accept payment on a time basis.

[44] In addition, Mr Stewart is to pay a penalty of \$1000.00 for his breach of good faith, and that sum is to be paid to Alpha direct.

### **Costs**

[45] Costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority