

NOTE: An order for the payment of a penalty appears on p 3 of this determination

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Shane Michael Watson
AND Fibre Logistics Ltd
REPRESENTATIVES Jenny Watson, advocate for Shane Watson
Kim Stretton, advocate for Fibre Logistics Limited
MEMBER OF AUTHORITY R A Monaghan
DATE OF DETERMINATION 20/10/2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Shane Watson seeks payment of two weeks' salary plus holiday pay, being final payments Fibre Logistics Limited ("Fibre Logistics") owed to him at the termination of his employment.

[2] He also seeks what was described as a fine, but I have interpreted as a penalty, in respect of the failure to make those payments.

[3] Mr Watson's employment ended on 10 May 2006, in connection with his having been charged with offences involving the misappropriation of funds from the Godfrey Social Club. Fibre Logistics' employees were members of the club and, I was told, were very upset that their colleague had stolen from them. The letter of dismissal referred to their concerns, and also included the following passage:

"Our understanding is that a considerable sums of money seems to be misappropriated from the Godfrey Social Club and consequently the company has decided that all of your wage entitlements are to be frozen pending the outcome of this issue."

[4] Thus Mr Watson did not receive his final pay. His solicitors acted promptly by letter dated 12 May 2006 demanding payment, and pointing out the lack of any right to withhold the money as well as the liability to penalties if the money was withheld. Apparently the letter had no effect. Fibre Logistics says it is awaiting the outcome of Mr Watson's trial in the District Court before it will consider making payment. The charges are being defended and I have been told the trial is still some weeks away.

[5] Since Fibre Logistics has never been less than clear about its reasons for refusing to make payment, during a conference call with the parties I sought confirmation of whether the amounts were in dispute. I set a timetable for doing so, which Fibre Logistics did not meet. Its representative subsequently advised that the company says:

"two weeks wages are due and calculated at \$2115.38 nett as well as holiday pay calculated at \$3077.89 (nett)"

[6] These amounts are not disputed. During a subsequent conference call I set a further timetable to allow Fibre Logistics to address remaining aspects of Mr Watson's claim, and in particular the claim for a penalty and for costs.

[7] In the light of the overt delaying tactics to date, I warned the company's representative that, if the timetable was not met, I would issue a determination without hearing further from the company. The Authority received two blank pieces of paper by facsimile at or about the close of business on the designated date. The Authority's support staff contacted the representative that evening and the following morning, leaving messages to advise that only blank pieces of paper had been received. During a conversation with a member of the representative's staff later that morning a member of the Authority's support staff gave a further time limit on my instruction, and advised of the importance of the matter. The representative's staff member indicated the advocate was not available but the file would be checked for the possibly mis-faxed document.

[8] The Authority had heard nothing further by the close of business that day, or the next morning. That is unacceptable. As I warned, I have proceeded to issue this determination without hearing further from Fibre Logistics.

Unpaid wages

[9] Fibre Logistics is ordered to pay to Mr Watson forthwith the sums of \$2,115.38 nett as wages, and \$3,077.89 nett as holiday pay. The figures I was given are nett of tax, and Fibre Logistics retains its obligations regarding the forwarding of employee taxes to the IRD.

[10] Interest is to be paid on the above sums at the rate of 7.7% from 10 May 2006 to the date of payment.

Penalty

[11] The Wages Protection Act 1983 provides at s 4 that employers must, when any wages become payable to a worker, pay the entire amount of those wages to the worker without deduction. Exceptions not relevant here concern the making of deductions. Fibre Logistics has not paid the entire amount of the final wages owing to Mr Watson when they became due, thus failing to comply with that provision.

[12] Section 13 of the Act creates a liability to penalties when an employer contravenes or fails to comply with any of the provisions of the Act. Penalties are available at the suit of the worker or a Labour Inspector.

[13] I have not been addressed on whether Fibre Logistics has breached its obligations of good faith under s 4 of the Employment Relations Act, or whether a penalty should be awarded under s 4A, so I merely note the possibility of a breach of good faith.

[14] The failure to pay wages due is also a breach of the employment agreement, and liable to a penalty under s 134 of that Act.

[15] To the extent there is any breach of the Holidays Act 2003 in respect of the unpaid holiday pay, claims for penalties against an employer under the Holidays Act may be brought only by a Labour Inspector so there is no need to pursue that matter here.

[16] This could not be a plainer case of deliberate withholding of wages, and, I am afraid, flouting of the law. If Mr Watson is guilty of the charges against him, he will be called to account for his actions in the appropriate place. The Authority is concerned with Fibre Logistics' breaches of its obligations as an employer, and is the place where Fibre Logistics is called to account for those breaches.

[17] Since the same conduct on the part of Fibre Logistics breaches at least two of its legal obligations as an employer, I do not consider it appropriate to order penalties in respect of

each breach. Rather I treat the conduct as a single breach and order payment of a single penalty.

[18] The deliberate nature of the breach, aggravated by the subsequent delaying tactics, means I consider a more than nominal penalty is called for. I order it to pay a penalty of \$3,000.

Summary of orders

[19] Fibre Logistics is ordered to pay:

- (a) \$2,115.38 + \$3,077.89 = \$5,193.27 (nett) to Mr Watson forthwith; and
- (b) Interest on the above amounts at the rate of 7.7% from 10 May 2006 to the date of payment; and
- (c) \$3,000 by way of penalty, payable to the Crown bank account; and
- (d) costs as detailed below.

Costs

[20] Fibre Logistics is to reimburse Mr Watson for the filing fee of \$70.

[21] Mr Watson incurred some legal fees in respect of this employment relationship problem, although his wife represented him in the Authority. Some, but not all, of the fee bears directly on the proceedings in the Authority and Mr Watson is entitled to a contribution to a portion of it. For his further information, it is rare in any circumstances for the full reimbursement of legal fees to be awarded. The fee itself was modest, and Fibre Logistics is ordered to contribute to it in the sum of \$50.

R A Monaghan
Member of Employment Relations Authority