

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 349  
5515982

BETWEEN                      DION RODERIC WILSON  
Applicant

A N D                              MODULAR CONVEYORS  
LIMITED  
Respondent

Member of Authority:      T G Tetitaha

Representatives:              Applicant in person  
D Organ, Advocate for Respondent

Investigation Meeting:      On the papers

Submissions received:      22 June 2015 from Applicant  
23 June 2015 from Respondent

Date of Determination:      10 November 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.      Modular Conveyors Limited is ordered to pay Dion Roderic Wilson wage arrears pursuant to s.131 of the Employment Relations Act 2000 being all deductions of the employer's contribution to Kiwi Saver from his gross wage during employment including \$964.59 deducted from his bonus payment.**
- B.      There is an order pursuant to ss.135 and 136 of the Employment Relations Act 2000 that Modular Conveyors Limited pay a penalty of \$250.00 into the Authority's Crown Bank Account.**
- C.      There is no order for payment of legal costs.**

## **Employment Relationship Problem**

[1] Dion Roderic Wilson seeks recovery of wage arrears for non-payment of a wage increase, deductions for Modular Conveyors Limited employer's contribution to Kiwi Saver and bonus. He also seeks payment of a penalty for the unlawful deductions.

### **Facts leading to the dispute**

[2] Mr Wilson was employed as a production fitter on or about 20 May 2013. The parties signed an employment agreement. Schedule 1 of the agreement set out his gross wage and Kiwi Saver deductions:

***Wages:***

*Your gross hourly rate will be \$24 gross per hour. Any hours worked in excess of 40 hrs per week will be paid @ one & a half times the stated hourly rate. Payment will be made weekly by direct credit to your nominated bank account. Employer contributions of 3% will be deducted from the above amount & Employee deductions of 3% will be paid to a Kiwi Saver programme of your choice.*

[3] Clause 8 of the agreement noted Mr Wilson's obligations upon termination including *if you owe us any money, we may deduct the amount you owe us from your final pay.*

[4] From the start of his employment until 21 July 2014 the respondent company paid its 3 % employer Kiwi Saver contribution on top of Mr Wilson's gross hourly wages.

[5] In May 2014 Phillip Cooper, respondent director, raised concerns with Mr Wilson and other employee's that it should have paid the gross hourly wage less 3% for the employer's Kiwi Saver contribution. Two meetings on 4 and 8 July 2014 sought to clarify the alleged overpayment. Mr Wilson disputed the deduction being made at all.

[6] On 14 July 2014 the respondent also proposed removing the bonus and replacing it with a 5% increase in wages. It sought agreement by way of a written variation to the employment agreement. Mr Wilson refused to sign the variation agreement.

[7] The respondent company subsequently adjusted Mr Wilson's wages to the rate of \$24 gross less 3% effective 21 July 2014 but did not adjust his hourly wage rate by 5%.

[8] On 15 July 2014 Mr Wilson was paid his bonus less \$964.59 for the alleged Kiwi Saver employer contribution overpayments prior to 21 July 2014.

[9] On 28 August 2014 the applicant filed a statement of problem with the Authority seeking recovery of the employers Kiwi Saver contribution deductions.

[10] On 1 September 2014 Phillip Gordon Cooper, General Manager of the respondent company, met with the applicant. The applicant raised the issue of why his hourly rate had not increased and was told this had not occurred because there was no agreement for replacement of the bonus with an increase to the hourly wage of 5%.

[11] On 20 April 2015 the applicant gave notice of his resignation effective 15 May 2015.

[12] The matter was unable to be resolved at mediation. It is now before me for determination.

### **Issues**

[13] On 10 June 2015 I issued a Minute identifying the issues for hearing, indicating this appeared capable of determination on the papers pursuant to s174D of the Employment Relations Act 2000 and directing the filing of evidence and submissions.

[14] The issues are:

- (a) What wage arrears (if any) are owed to the applicant?
- (b) Whether a penalty pursuant to s.13 of the Wages Protection Act 1983 and s.135 of the Employment Relations Act 2000 should issue for the deductions made from the applicant's wages?

***What wage arrears (if any) are owed to the applicant?***

***Increased hourly rate by 5%***

[15] The respondent required a written agreement to be executed providing for a 5% wage increase in lieu of the bonus.<sup>1</sup> The applicant refused to sign it. Therefore the terms of his employment and wages remained the same. He is not entitled to the increased hourly rate of 5%.

***Deduction from wages of employers Kiwisaver contribution***

[16] The parties accept deductions were made from July 2014 of \$964.59 and a 3% reduction to his gross hourly wage for the respondent's Kiwi Saver contribution. The respondent submits it made a mistake and clause 8 and Schedule 1 of the employment agreement allows these deductions to be made.

[17] The Wage Protection Act 1983 prohibits any deductions from employee wages that have not been requested or authorised in writing, whether the deductions appear justifiable or not.<sup>2</sup>

[18] Clause 8 of the agreement does not allow the respondent to make any deduction at any time from wages. The clause provides for deductions to be made upon termination from Mr Wilson's final pay. The deduction from his bonus of \$964.59 occurred before termination and during his regular pay cycle.

[19] Section 101B of the Kiwi Saver Act 2006 (the Act) requires Kiwi Saver employer compulsory contributions to be *paid on top of gross salary or wages except to the extent that the parties otherwise agree*. Schedule 1 of the employment agreement does allow for the employers Kiwi Saver contribution to be deducted from gross wages and overtime.

[20] However in this case, the respondent omitted to deduct the 3% employer contribution from the gross wage and paid the Kiwi Saver employers contribution on top of Mr Wilson's hourly rate for a period of 13 months.

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<sup>1</sup> Statement of Problem Annexure MCL document dated 03/07/14.

<sup>2</sup> *Amaltal Fishing Company Limited v Morunga* [2002] 1 ERNZ 692; Sections 4,5 and 12 Wage Protection Act 1983.

[21] There is evidence Mr Wilson raised concerns about the payment of Kiwi Saver with his manager following receipt of his first payslip. He was told *my concerns were groundless as this was how it had been done over at least the last eight years.*<sup>3</sup> On the basis of that representation and the respondent's subsequent conduct Mr Wilson expected the employers Kiwi Saver contribution would continue to be paid on top of his gross hourly wage.

[22] There is evidence the respondent also believed its conduct may have varied its agreement about the payment of Kiwi Saver resulting in a draft proposed variation agreement. The agreement sought a variation *that from the date of signing this variation the MCL Kiwisaver contributions will be paid in accordance with the scheme i.e. 3% contribution will be deducted from the gross amount of your earnings.*<sup>4</sup> Unsurprisingly Mr Wilson refused to sign.

[23] Under the Employment Relations Act 2000 the Authority has exclusive jurisdiction to determine disputes about the application and operation of an employment agreement and any other action arising from or related to the employment relationship excluding those other than those directly within the Court's jurisdiction or in tort.<sup>5</sup> There is no express exclusion of actions in equity including estoppel.<sup>6</sup> The only requirement is the dispute arise from or be related to the employment relationship.<sup>7</sup> This is the case here.

[24] These facts give rise to estoppel. Mr Wilson could have opted out of Kiwi Saver within 55 days from the start of his employment.<sup>8</sup> His option to opt out had well and truly expired by the time the employer raised the incorrect deduction some 13 months later. Mr Wilson had relied upon the respondent's assurances and conduct. He did not turn his mind to considering opting out of the Kiwi Saver scheme. It would be unconscionable to allow the respondent to resile from the payment of the employers Kiwi Saver contribution after 13 months given the detriment to Mr Wilson.

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<sup>3</sup> Statement of Problem Annexure Statement for Shane Henderson sent 23/07/14.

<sup>4</sup> Statement of Problem Annexure MCL document dated 03/07/14.

<sup>5</sup> Sections 161(a) and (r) Employment Relations Act 2000.

<sup>6</sup> *Newick v Working In Ltd* [2012] NZEmpC 156 at [46].

<sup>7</sup> See above at [52].

<sup>8</sup> Section 16 Kiwi Saver Act 2006.

[25] In these circumstances it would be inequitable to allow the respondent to enforce the contractual right to deduct the past and future employer's contribution to Kiwi Saver from Mr Wilson's gross wage. Mr Wilson has acted to his detriment in reliance upon the assurances the employer contributions were being made correctly. Accordingly Mr Wilson is entitled to be recompensed for all deductions of the employer's contribution to Kiwi Saver from his gross wage.

[26] Modular Conveyors Limited is ordered to pay Dion Roderic Wilson wage arrears pursuant to s.131 of the Employment Relations Act 2000 being all deductions of the employer's contribution to Kiwi Saver from his gross wage during employment including \$964.59 deducted from his bonus payment.

### ***Bonus April 2015***

[27] Mr Wilson raised for the first time in his submission non-payment of his bonus in April 2015. I have no evidence to show he met the criteria for payment of a bonus in April 2015. Given it was raised late and the lack of evidence, I decline to make any order.

### ***Whether a penalty pursuant to s.13 of the Wages Protection Act 1983 and s.135 of the Employment Relations Act 2000 should issue for the deductions made from the applicant's wages?***

[28] Given my above determination Mr Wilson seeks a penalty under s 13 of the Wages Protection Act 1983 in respect of all of the deductions.

[29] The Authority has discretion to either award a penalty claimed or dismiss the action under s 135 (4) of the Act. The factors when considering whether it is an appropriate case to award a penalty and if so the quantum of the penalty are:<sup>9</sup>

- The seriousness of the breach;
- Whether the breach is one-off or repeated;
- The impact, if any, on the employee/respective employees;
- The vulnerability of the employee/respective employees;
- The need for deterrence;
- Remorse shown by the party in breach; and
- The range of penalties imposed in other comparable cases.

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<sup>9</sup> *Tan v Yang & Zhang* [2014] NZEmpC 65 at para.[32]

[30] Deductions in breach of the Wages Protection Act are serious. Employees are entitled to receive their wages without deduction unless there is an agreement otherwise.

[31] The behaviour that warrants any penalty is the deduction of \$964.59 from Mr Wilson's bonus. This was undertaken without any agreement for deduction. Gross wages had been paid. This deduction sought to recover an alleged debt under clause 8 of the agreement prior to termination when the respondent was not entitled to do so. The later deductions from his gross hourly wage proceeded on the basis of a genuine dispute about the enforceability of the wages clause in the employment agreement so no penalty is warranted for those.

[32] The impact upon Mr Wilson would have been severe given the large amount of the deduction from his bonus. He is vulnerable to an employer whom controls payment of his wages. There is a need for deterrence of these types of unilateral deductions.

[33] Although the respondent has shown little remorse that may have been due to a mistaken belief about its legal rights as opposed to evidence of any malicious intent or other bad behaviour.

[34] A penalty is warranted but given this was a one off breach a nominal penalty only is appropriate of \$250. Given the breach arose solely from a breach of a statutory obligation under the Wages Protection Act payment of the penalty to the Crown is warranted.

[35] There is an order pursuant to ss.135 and 136 of the Employment Relations Act 2000 that Modular Conveyors Limited pay a penalty of \$250.00 into the Authority's Crown Bank Account.

[36] The applicant was self-represented. There is no order for payment of legal costs.

**T G Tetitaha**  
**Member of the Employment Relations Authority**