IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 116
3031104

	BETWEEN	ADS BUILDING SERVICES LIMITED Applicant
	AND	MATTHEW DAVID McLEAN Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Sue Smith, for Applicant No appearance by Respondent
Investigation Meeting:	13 December 2018
Determination:	19 December 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] ADS Building Services Limited ("ADS") asks the Authority to order its former employee, Matthew McLean, to repay monies it advanced to him when he had insufficient annual holiday leave accrued to cover the company's annual closedown. Mr McLean, who notified ADS of his resignation with immediate effect on 25 February 2018, had agreed to repay the money at $50 per week, by deduction from his pay.

[2] Mr McLean provided a statement in reply but did not attend the Authority's investigation. He acknowledged he had received a cash advance from ADS. He said he could not afford travel costs to get to work in Lower Hutt from his Wellington home. This was due to the payments being deducted for the cash advance on top of court fines which were also being deducted from his pay. Mr McLean said he was unemployed and was not in a position to repay the full amount as sought by his former employer.

[3] I am satisfied Mr McLean was properly notified of the date and time of the Authority's investigation meeting. I delayed the commencement of the meeting for 10 minutes and asked an Authority Officer to contact him on his mobile phone. After she informed me her calls were not being answered, I commenced the investigation meeting in Mr McLean's absence, in accordance with clause 12, Schedule 2 of the Employment Relations Act 2000 (the Act).

Issue

[4] The issue for determination is whether Mr McLean should be ordered to pay the outstanding amount of the cash advance on wages he received from ADS in January 2018.

Relevant background and discussion

[5] Mr McLean commenced employment with ADS, in its Skylight Specialists division, on 4 September 2017. He signed an individual employment agreement (IEA) on 13 September. According to Ms Suzanne (Sue) Smith, a working co-owner of ADS, he was a very good worker.

[6] The IEA included, in its Holidays and Leave clause, notification that ADS closed down between Christmas and New Year and operated a close down period in January of each year, during which the employee would be required to take leave. In 2017 the company closed on Friday 22 December.

[7] Ms Smith was uncertain when it reopened but believed it was after Wellington Anniversary Day which fell on 22 January 2018. Pay records provided by Ms Smith suggest it may have been one week later as Mr McLean recommenced work on 29 January 2018. I note at this point that the closedown period was, in total, for a period of five weeks although five of those days were statutory holidays.

[8] The pay records show that Mr McLean was paid for the statutory holidays over Christmas and New Year. Additionally he was paid 24 hours of annual leave in the pay period ending 29 December 2017 and a further 24 hours of annual leave in the pay period ending 5 January 2018.

[9] Mr McLean contacted Ms Smith by telephone in early January 2018 while she was on holiday. She said he told her he was having financial difficulties during the closedown period and he asked for assistance.

[10] Ms Smith agreed ADS would advance him money to tide him over until the business reopened, and she arranged payment to him of $600 per week for three weeks. Those amounts were paid on 8, 17, and 23 January 2018. An additional amount of $50 was advanced to Mr McLean during that time, taking the total amount to $1,850.

[11] There was a verbal agreement between Ms Smith and Mr McLean that he would repay the money at the rate of $50 per weekly pay shortly after the business re-opened at the end of the closedown. Mr McLean started repayments on 9 February 2018 when $100 was deducted, with a further $50 being deducted from his pay of 16 February. At this stage the amount outstanding was $1,700.

[12] Mr McLean texted Ms Smith on Thursday 22 February 2018 to notify her he would not be in that day as he had "a few interviews to go to". He then informed her by text on Sunday 25 February that he would not be working for ADS any longer and asked to be paid any leave owing to him in the pay run that Tuesday.

[13] As events turned out, Mr McLean received no wages or payment of any outstanding leave in the pay run of Tuesday 27 February. The payslip for the period ending Friday 23 February shows that Mr McLean had worked 20.75 hours for which his wage entitlement was $373.50 gross. His "termination pay", which Ms Smith confirmed was his accrued holiday pay entitlement, was $293.90.

[14] After deducting PAYE, KiwiSaver, and Court fines of $50 ADS took the remaining wages and accrued annual leave owing as "repayment to company". This amount was $490.17, leaving a zero nett pay balance. The outstanding amount of the loan reduced to $1,209.83 as a result of this deduction.

[15] Ms Smith, who gave evidence on behalf of ADS, added her administration and "court costs" to that amount, explaining that this was a means of persuading Mr McLean to pay the amount he owed. She acknowledged, under questioning, that she did not expect to recoup the cost of her time in the Authority.

[16] The loan, or cash advance, was not documented in an agreement at the time, but was the subject of bank account reconciliations by ADS on 2 February 2018 when each of the three payments of $600 was recorded on payslips as non-taxable allowances.

[17] Among documents Ms Smith provided to me during the investigation meeting was one dated 12 February 2018, the contents of which were as follows:

> Matt McLean employee of Skylight Specialists, on agreement between both parties was issued $1,800 in loans (3x$600 each week) over Christmas due to having no leave when joining us.
>
> Agreement of a minimum of $50 per week is to be repaid. As per working contract, it is agreed that if employment is ending all holiday pay or the like is to be put towards this debt. And the $50 per week is to continue until fully settled.

[18] The document was unsigned and there is no evidence that Mr McLean ever signed it. Ms Smith did not draw my attention to the document or assert that a copy signed by Mr McLean existed. I find it unlikely that Mr McLean did sign the 12 February 2018 document.

[19] Mr McLean's IEA included the following provisions:

> **7 Wages/Salary/Allowances**
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> 7.1 The Employee shall be reimbursed at the rate of $18 (before tax) per hour worked. The Employee shall be paid on Wednesday into a bank account nominated by the Employee. Holiday pay on termination will be withheld for a maximum of one month after the termination date. The employee authorises Skylight Specialists to deduct any moneys owed to Skylight Specialists from their final pay or holiday leave owed on termination of employment. (underlining added)
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> **21 Acknowledgement of the Agreement**
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> 21.5 **Deductions from Salary/Wages**: Where requested by the Employee, the Employer shall deduct from their salary/wages any agreed amount for matters such as superannuation, a staff social club or union fees and pay the amount to the organisation specified by the Employee. The Employer shall also be entitled to deduct from any salary/holiday payment payable upon termination of employment any overpayment made to the Employee for leave taken in advance, tabs for tools etc, uniform, keys etc not handed in. (underlining added).

[20] ADS relied on these provisions of the IEA to deduct $490.17 from his final pay for the week ending 23 February 2018, leaving him with no wages or holiday pay. I note that it was not entitled to do so without first consulting Mr McLean which, it did not do.[1] Nor was it entitled to make a deduction from wages payable to Mr McLean if the deduction was unreasonable.[2] Ms Smith did not dissent when I suggested to her that leaving Mr McLean with no wages or holiday pay was unreasonable.

[21] However, there is no dispute that a cash advance totalling $1,850 was made to Mr McLean on the verbal agreement between the parties that he would repay it at $50 per week to be deducted from his wages. Of that amount, $1,209.83 currently remains outstanding and Mr McLean must, as he agreed to do, repay that sum to ADS.

[22] Although I had no evidence from Mr McLean, I have no reason to believe his employment status has changed since he lodged a statement in reply professing himself to be unemployed. Accordingly there is little point in my ordering him to pay the full amount immediately and the order will be for repayment by instalments.

Orders

[23] Mr McLean is ordered to repay $1,209.83 to ADS Building Services Limited by 40 instalments of $30 per week and a final instalment of $9.83. Payments are to commence one month from the date of this determination.

Costs

[24] As ADS Building Services Limited was represented by an owner of the business, no issue as to legal costs arise. Mr McLean is, however, ordered to reimburse his former employer the cost of the Authority filing fee of $71.56.

Trish MacKinnon
Member of the Employment Relations Authority

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1 Section 5(1A) the Wages Protection Act 1983
2 Section 5A Wages Protection Act.