

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2019] NZERA 125
3041111

BETWEEN ALLIED ASPHALT
Applicant

AND JASON BOYLE
Respondent

Member of Authority: Rachel Larmer

Representatives: Russell Drake, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 04 March 2019 in Tauranga

Date of Determination: 06 March 2019

WRITTEN RECORD OF ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant seeks to recover an overpayment of \$8,000 from its former employee Jason Boyle. It withdrew its penalty claim for a breach of good faith at the investigation meeting.

No Mediation

[2] The parties were directed to mediation. The applicant attended but the respondent did not. Mr Boyle failed to engage with Mediation Services regarding this matter.

No Statement in Reply

[3] The applicant's Statement of Problem and a Statement in Reply Form were personally served on the respondent Mr Boyle on 7 November 2018 at 5.30pm by hand by Mr Coby

Gibbs. Mr Boyle identified himself to Mr Gibbs before Mr Gibbs served the above documents on Mr Boyle.

[4] Mr Gibbs filed an affidavit of service with the Authority.

[5] No Statement in Reply was filed. No leave application to file a Statement in reply out of time has been received. Mr Boyle has taken no steps regarding this matter. He has failed to engage with the Authority at all regarding this matter.

No Appearance by Respondent

[6] The first Notice of Hearing, recording a starting time of 10am, and the direction to mediation, were served on Mr Boyle by Mr Gibbs on 24 January 2018 at approximately 8.10am at Mr Boyle's home address. Mr Boyle identified himself to Mr Gibbs before Mr Gibbs served Mr Boyle with the above documents.

[7] Mr Gibbs filed an affidavit of service with the Authority.

[8] The start time for the investigation meeting was changed from 10am to 12.30pm so a new Notice of hearing was issued. The second Notice of Hearing was also personally served on Mr Boyle by Mr Gibbs.

[9] Service occurred on 4 February 2019 at approximately 2.55pm, at Mr Boyle's home address. Mr Boyle identified himself to Mr Gibbs before Mr Gibbs served him with the second Notice of Hearing. Mr Gibbs also filed an affidavit of service with the Authority.

[10] On the day of the investigation meeting the Authority delayed the start of its investigation meeting by 15 minutes to give Mr Boyle some extra time to appear. That did not happen, because even given this extra delay Mr Boyle still did not appear.

[11] The Authority is satisfied that Mr Boyle has been put on notice of the applicant's claim and about the investigation meeting on 4 March, but has elected to take no part in this investigation.

Circumstances of overpayment

[12] On 17 August 2018 the parties entered into a Settlement Agreement that was certified under s 149 of the Employment Relations Act 2000 by a mediator from Ministry of Business Innovation and Employment.

[13] Clause 1(c)(i) of the Settlement Agreement provided that the applicant would pay Mr Boyle a specified sum of money. That payment was made.

[14] After the Settlement Agreement payment had been paid in full, due to a payroll error the applicant accidentally/mistakenly made another payment to Mr Boyle, which he was not entitled to.

[15] This second payment that was made in error resulted in Mr Boyle receiving \$8,000 from the applicant that he was not entitled to. Uncontested evidence from the applicant's payroll was presented to the Authority to prove the overpayment error.

[16] The applicant also confirmed at the investigation meeting that no money had been received from Mr Boyle to repay any of the overpayment.

[17] Fulton Hogan Limited is the company that operates the payroll system on behalf of the Applicant. As soon as Fulton Hogan became aware that an overpayment had been made to Mr Boyle in error, they contacted him to recover it.

[18] The Applicant's representative made contact with Ken Usmar, Mr Boyle's then representative, in the hopes that he would be able to recover the overpayment from Mr Boyle.

[19] Mr Usmar apparently contacted his client on 24 August 2018 at 2:36pm, via phone, and left a voice message which instructed him to immediately repay the overpayment.

[20] On 31 August 2018, the Applicant had received no contact from Mr Boyle in respect of the overpayment so it followed up again with Mr Usmar, who emailed Mr Boyle on 31 August 2018 at 1:56pm requesting that he immediately repay the overpayment.

[21] Mr Usmar followed this email up with a text message to Mr Boyle's personal cell phone at 2:00pm on 31 August stating the same thing. Evidence of Mr Usmar's attempts to obtain repayment of the overpayment was produced to the Authority.

[22] On 4 September 2018 the Respondent contacted Fulton Hogan and requested the bank account details to enable him to repay the overpayment. Fulton Hogan then sent an email to Mr Boyle with the bank account details attached to enable him to repay the overpayment.

[23] However despite being provided with the bank account details, the Respondent still made no attempts to repay the overpayment.

[24] On 14 September 2018 the Applicant's representative wrote a letter to Mr Boyle requesting repayment of the overpayment to be made by no later than 5:00pm Tuesday 18 September 2018.

[25] Within this letter, it was made clear that should the Applicant not receive the total overpayment by this time, they would be commencing proceedings in the Employment Relations Authority.

Authority's Findings

[26] The Authority is satisfied that:

- (a) the Applicant did overpay Mr Boyle;
- (b) the overpayment occurred as a result of a payroll mistake/error;
- (c) the Applicant has taken all reasonable steps to resolve this matter with Mr Boyle directly;
- (d) Despite a number of demands Mr Boyle has still not repaid the overpayment;
- (e) Mr Boyle was not entitled to the \$8,000 of the Applicant's money that he has retained;
- (f) Mr Boyle has been unjustifiably enriched as a result of a genuine payroll error that he has still not repaid.

Costs

[27] The Applicant as the successful party is also entitled to be reimbursed for a proportion of its actual legal costs, which are in excess of \$4,000.

[28] It is appropriate to uplift the notional daily tariff to reflect that Mr Boyle's inaction has unnecessarily increased the Applicant's actual legal costs. It has attended mediation, it

has arranged for private personal service of these proceedings on Mr Boyle and it has attended this investigation meeting.

Orders

[29] The Authority orders Mr Boyle, within 28 days of the date of this determination, to pay the Applicant:

- (a) \$8,000 without deduction to repay the overpayment he has received;
- (b) \$2,500 towards its actual legal costs;
- (c) \$71.56 to reimburse its filing fee.

Rachel Larmer
Member of the Employment Relations Authority