

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 46
5614410

BETWEEN RAYMOND BADE
 Applicant

A N D MAIN STREET AUTO LIMITED
 First Respondent

 ALAN MONAHAN
 Second Respondent

 MICHELLE MONAHAN
 Third Respondent

Member of Authority: Peter van Keulen

Representatives: Applicant in person
 Alan and Michelle Monahan for Respondents

Investigation Meeting: 27 March 2017 at Westport

Submissions Received: Oral submissions for both parties on 27 March 2017

Date of Determination: 28 March 2017

DETERMINATION OF THE AUTHORITY

- A. Main Street Auto Limited is to pay Mr Bade \$9,619.80 (net) for wage arrears within 14 days of this determination.**
- B. Main Street Auto Limited is to pay Mr Bade \$518.21 (net) for holiday pay within 14 days of this determination.**
- C. Within 14 days of this determination Main Street Auto Limited is to calculate and pay to Mr Bade the employer KiwiSaver contributions due for the whole period of his employment.**

D. Main Street Auto Limited is to pay Mr Bade the sum of \$71.56 within 14 days of this determination.

E. I have no jurisdiction to make the orders sought against Mr Monahan and Ms Monahan.

Employment relationship problem

[1] The applicant, Raymond Bade, claims he is owed wage arrears and holiday pay due to him at the termination of his employment. He also claims he is owed employer KiwiSaver contributions for the period of his employment.

[2] Mr Bade's claim is made against the first respondent, Main Street Auto Limited (MSA) as his employer and against the second and third respondents, Mr Monahan and Ms Monahan, pursuant to s 142Y of the Employment Relations Act 2000.

[3] In the statement in reply MSA says Mr Bade was employed until March 2015 when he was then retained as a contractor on a piecemeal rate, therefore Mr Bade's calculations are incorrect. Mr Bade was paid this contract rate until 31 October 2015 when MSA closed its business due to debts owed. MSA has outstanding debts and no assets or income to pay any further money to Mr Bade.

[4] Mr Monahan and Ms Monahan say they have no ability to pay any further sums to Mr Bade as they have personally paid creditors of MSA and as a result they have no money or assets left.

Facts

[5] Mr Bade worked for MSA from 14 November 2014. He claims to have worked for MSA until 20 November 2015 but MSA says it ceased trading on 14 October 2015 and Mr Bade must have stopped working for it then. When asked about his finish date Mr Bade was equivocal and unsure of why he says the end date was 20 November 2015. So, on balance I accept MSA's evidence and find that Mr Bade ceased working for MSA on 14 October 2015.

[6] Mr Bade was employed to carry out warrant of fitness inspections on vehicles and trailers. He worked 40 hours per week and was paid a net weekly payment of \$635.25.

[7] MSA says this changed in March 2015. It was unable to continue to pay Mr Bade as an employee and it says he agreed to switch to a contractor receiving a piecemeal rate of \$20.00 per warrant of fitness completed by him on cars and \$10.00 per warrant of fitness for trailers.

[8] Mr Bade accepts that his status changed to a contractor and he was paid the piecemeal rates but he says this change only occurred in October 2015 just prior to the business closing.

[9] I was unable to determine the date Mr Bade changed from being an employee to a contractor from the oral evidence. Neither Mr Bade nor Mr Monahan could provide precise information about when the conversation about changing to a contractor occurred.

[10] However, Mr Bade's records of payments he received from MSA are helpful on this point. Mr Bade's records show that he continued to be paid wages until August 2015. On this basis I will take the start of September as the date when Mr Bade changed from an employee to a contractor.

[11] Overall, I am satisfied that Mr Bade was employed from 14 November 2014 until 31 August 2015.

[12] Mr Bade has provided information of times worked and the wages he was paid. In the absence of any wage and time records produced by MSA I accept Mr Bade's records pursuant to s 132 of the Employment Relations Act 2000 and will calculate his wage arrears claim and holiday pay claim based on these records.

[13] I calculate Mr Bade's wage arrears and holiday pay claim as follows:

- a. He worked a total of 45 weeks and should have received total net payments of \$28,586.25 (53 weeks x \$635.25).
- b. Mr Bade was paid erratically and only received total net payments of \$17,594.45
- c. Mr Bade is owed a total net sum of \$11,011.80 (\$28,586.25 - \$17,574.45).

- d. Mr Bade was entitled to 8% of his earnings as holiday pay being \$1,407.56. Mr Bade did take some holidays which I take to be seven days¹ with a total net value of \$889.35. So the amount of holiday pay owing to Mr Bade at the end of his employment is a total net sum of \$518.21

[14] Mr Bade accepts that he was able to purchase some tools from MSA and had some servicing and repair work done to his vehicles during his employment. The parties agreed the value for the various tools and parts is \$1,392.00. Mr Bade agreed that this amount can be taken by deduction from any wage arrears owed to him. Therefore, the wage arrears owed to Mr Bade is reduced to \$9,619.80 (\$11,011.80 - \$1,392).

[15] The parties also accepted that Mr Bade was enrolled in KiwiSaver and MSA should have made payments for him, both employee deductions and employer contributions. MSA did not make all of these deductions/contributions and it only made limited KiwiSaver contributions to the Inland Revenue Department for Mr Bade's KiwiSaver account. On this basis Mr Bade is entitled to receive, as compensation, the amount of employer KiwiSaver contributions that should have been made.

[16] The wage arrears, holiday pay and KiwiSaver amounts are owed by MSA and I will order payment less the agreed deduction. The outstanding issue is whether Mr Monahan and Ms Monahan are liable for these payments pursuant to s 142Y of the Employment Relations Act 2000.

[17] Section 142Y was inserted into the Employment Relations Act 2000 by s 19 of the Employment Relations Amendment Act 2016, which came into force on 1 April 2016. Clause 3(1) of Schedule 1AA of the Employment Relations Act 2000 provides that the amendments made by the 2016 Act do not apply to conduct that occurred before the commencement of that Act.

¹ The witnesses agreed that Mr Bade took seven days off work for holidays and specialist appointments. Mr Bade suggested some of this may have been sick leave entitlement but without evidence of when these days were taken and why, I cannot accept that he should be credited with sick leave payments for any of the seven days.

[18] Therefore as the wage arrears, holiday pay and KiwiSaver claims relate to acts that occurred before 1 April 2016 I have no jurisdiction to make the orders sought against Mr Monahan and Ms Monahan.

Determination

[19] Main Street Auto Limited is to pay Mr Bade \$9,619.80 (net) for wage arrears within 14 days of this determination.

[20] Main Street Auto Limited is to pay Mr Bade \$518.21 (net) for holiday pay within 14 days of this determination.

[21] Within 14 days of this determination Main Street Auto Limited is to calculate and pay to Mr Bade the employer KiwiSaver contributions due for the whole period of his employment.

[22] I have no jurisdiction to make the orders sought against Mr Monahan and Ms Monahan.

Costs

[1] Mr Bade is entitled to the filing fee on the statement of problem that he has lodged with the Authority. I order that MSA pay Mr Bade the sum of \$71.56 within 14 days of this determination.

Peter van Keulen
Member of the Employment Relations Authority