

Police and brought into account when assessing who is due what as between employer and employee with regard to their former relationship.

[5] Mr Robertson-Welsh advised that he had laid with the Police a complaint of theft against Mr Sucich which he wished to have investigated and resolved before the Authority considered making any orders requiring his company to pay the holiday pay admitted to be due. A copy of the complaint presumably made in writing, has not been supplied by Mr Robertson-Welsh.

[6] There was and is no indication to the Authority of the stage at which the Police may have reached with any inquiries. On 25 February 2010 at 10am there was no appearance at the investigation meeting on behalf of the employer for any information about this to be obtained from that source. Mr Sucich who was present advised that he has had no contact whatsoever with the Police about the allegations. He says he has not been charged with any offence or even interviewed about any possible offending.

[7] No counterclaim alleging an employment relationship problem of any kind has been brought by his former employer against Mr Sucich in any respect.

[8] Another aspect of this matter, as I explained to Mr Robertson-Welsh during the telephone conference on 27 January with the Authority, is that Mr Sucich himself is not the applicant in this case and any counterclaim could not be brought effectively against a Labour Inspector carrying out statutory functions under the Holidays Act.

[9] I must find that the claim is established. It has not been disputed that Mr Sucich was employed at material times and was paid the amount of wages and took holidays, as recorded by the company. Upon resignation he was entitled to outstanding holiday pay. The company itself calculated the amount being claimed and advised Mr Sucich of it in a pay slip for the period ending 15 February 2009. The amount of holiday pay is shown as \$5,646.33 gross.

[10] The company may believe it is entitled to withhold that amount from Mr Sucich under an express provision of his employment agreement which appears to allow deductions from final pay of any money owing to the company "*whatsoever.*" That provision, of course, is not effective against the Labour Inspector to whom I am sure Mr Robertson-Welsh explained the situation as he sees it but who has nevertheless exercised her discretion to proceed with this recovery action.

Determination

[11] Effective Fencing NZ Limited is ordered to pay to the Labour Inspector, Ms Tasneem Begum, for the use of Mr Sucich, \$5,646.33 gross as unpaid holiday pay.

[12] The company is also ordered to pay to the Labour Inspector \$70 in reimbursement of the fee for bringing this application.

Postscript

[13] After the above determination had been given orally by me at about 10.30am on 25 February, at around 1.30pm in the afternoon Mr Robertson-Welsh arrived at the Authority. He claimed the meeting time had been set for that time and not 10am.

[14] I have no doubt that Mr Robertson-Welsh is wrong. I am quite satisfied from the usual notes made by the Support Officer during the telephone conference on the log sheet that, in conjunction with Mr Robertson-Welsh and Ms Begum, the time for the investigation meeting was fixed at 10am. Also, my diary which I habitually fill in during such calls has written in it "*I/M 10am.*" Further, Ms Begum has confirmed that I made it clear the meeting was at 10am. I expect the practice of Labour Inspectors is to note fixtures in their diaries as soon as they are made.

[15] The formal notice of the meeting showing it was to be at 10am was served at the registered address of Effective Fencing NZ Ltd on 28 January 2010, nearly a month before the fixture. The service address is also the business address of the company apparently. The Authority cannot be responsible for checking what is in the company's mailbox.

[16] More recently Mr Robertson-Welsh has advised that he took the conference call of 27 January at 9.30 "*on a mobile phone whilst driving down State Highway 1.*" The blame for what has happened most likely lies then with Mr Robertson-Welsh being distracted by his activity at the time of the call.

[17] Notwithstanding that it was his mistake, the Authority of its own initiative explored the possibility of informally reopening the investigation to allow the employer a second opportunity to attend and be heard. The Authority sought the advice of the Labour Inspector as to whether she was opposed to that course. Mr

Begum is; she notes that the determination has already been given and in the presence of the employee Mr Sucich who had taken time off from work to attend.

[18] The determination given orally and now in writing must therefore stand.

[19] Effective Fencing NZ Ltd may if it wishes lodge a formal application to have the investigation re-opened. The Employment Relations Authority Regulations 2000 provide for this. There must be grounds before an investigation can be re-opened.

[20] The above determination is enforceable until any further order of the Authority may be made.

A Dumbleton
Member of the Employment Relations Authority