

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 9

3030791

BETWEEN

KAYLA BEVERLEY
CONWELL-GRANT
Applicant

A N D

DKH CONTRACTING LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: E Sutherland, Advocate for the Applicant
E Miles, Counsel for Respondent

Investigation Meeting: Upon the papers

Submissions Received: 17 September and 17 December 2018 from Applicant
24 September and 12 December 2018 from Respondent

Date of Determination: 10 January 2019

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. I order DKH Contracting Limited to pay Kayla Conwell-Grant \$521.43 being her lost member tax credit due to the employer's failure to make employee KiwiSaver deductions.

B. Costs are reserved.

Employment Relationship Problem

[1] Kayla Conwell-Grant was employed by DKH Contracting Limited (DKH) in June 2016 on a casual basis. She became a permanent employee on 24 September

2016. The applicant changed roles and signed an employment agreement on 6 November 2017.

[2] Around October 2017 Ms Conwell-Grant became concerned about suspected errors in payments to IRD of her PAYE, student loans and KiwiSaver. The PAYE had been credited to an IRD holding account and the student loans and KiwiSaver had not been deducted from her pay at all. She then raised these issues with the DKH.

[3] DKH then contacted IRD and arranged for the PAYE to be paid from the holding account to the credit of the applicant. DKH refused to pay her student loans or employee KiwiSaver contribution because she had received the funds. It paid the employer's KiwiSaver contribution to Ms Conwell-Grant's KiwiSaver provider account.

[4] Ms Conwell-Grant filed a statement of problem on 26 June 2018 seeking payment of her KiwiSaver and her student loan contributions. DKH submits it is not required to make these payments.

Issues

[5] The issues that require determination are as follows:

- (a) Is the employer liable to recompense Ms Conwell-Grant for non-payment of her:
 - (i) KiwiSaver contribution; and/or
 - (ii) student loan payments?

Is the employer liable for payment of Ms Conwell-Grant's KiwiSaver contributions?

[6] Section 66 KiwiSaver Act 2006 requires an employer make deductions of KiwiSaver contributions from an employee's salary or wages:

66 Obligation to make deductions: general rule

The employer must make deductions of contributions from each payment of the employee's gross salary or wages of an amount equal to the contribution rate

[7] There is no legal basis within the KiwiSaver Act 2000 to recompense an employee for the failure to deduct an employee's contribution. Failures to make deductions are subject to penalties under the Income Tax Act 2007.¹

[8] The Court has also ruled where an employee has received the employee KiwiSaver contribution in their pay, it is inappropriate to reimburse the same.² I decline to order DKH Contracting to pay Ms Conwell-Grant's KiwiSaver employee deductions.

[9] However if the respondent had deducted the employee KiwiSaver contributions as agreed, Ms Conwell-Grant would have been eligible for the member tax credit for the relevant year of \$521.43. She lost the benefit of the member tax credit due to the failure to make employee deductions.

[10] This was not a matter Ms Conwell-Grant expressly sought a wage arrears remedy for. However I have the power to resolve the employment relationship problem "however described".³ Ms Conwell-Grant has sought recovery of losses incurred by the employer's failures to deduct her employee KiwiSaver contributions from her salary. This is a matter she ought to recover even if it is not expressly sought by her application.

[11] I order DKH Contracting Limited to pay Kayla Conwell-Grant \$521.43 being her lost member tax credit due to the employer's failure to make employee KiwiSaver deductions.

Is the employer liable for payment of Ms Conwell-Grant's student loan payments?

[12] Section 30 Student Loan Scheme Act 2011 provides that each borrower must repay his or her consolidated loan balance in accordance with this Act and the loan contract. There is no onus upon employers to repay the loan amounts.

¹ Section 67 Kiwisaver Act 2006 and RD21 Income Tax Act 2007.

² *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [72].

³ Section 160(3) Employment Relations Act 2000.

[13] If the employee has notified the employer of the correct tax code for deduction of the student loan from their salary or wages then the employer must make the required deductions under the Student Loan Scheme Act 2011.⁴ While it may be an offence or the employer may be subject to a penalty for failing to deduct the student loan amounts, there is no requirement it recompense the employee for the defaulted loan payments.

[14] While the applicant employee may feel aggrieved by the respondent's failure, there is merit in the submission that she has received the money and it would be inappropriate to require reimbursement.

[15] There is no other identifiable harm caused by the Respondent's failure to deduct the student loan. In the circumstances I decline to order DKH Contracting to pay Ms Conwell-Grant's student loan repayments.

Costs

[16] Costs are reserved. Given this matter was determined without a hearing and the relative success by both parties there is merit in letting costs lie where they fall. Parties are encouraged to try to reach an agreement regarding costs.

[17] If they are unable to do so file any applications for costs are to be filed within 14 days of the date of this determination. The other party shall have 7 days to reply.

T G Tetitaha
Member of the Employment Relations Authority

⁴ Section 36 Student Loan Scheme Act 2011.