

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 39
5535378

BETWEEN MICHAEL DANILEWICZ
Applicant

A N D SPRINGS ROAD QUARRY
LIMITED T/A CCL
CONSTRUCTION
CONTRACTING
Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
Hamish Wright, Director for Respondent

Investigation Meeting: 27 March 2015 at Christchurch

Submissions Received: 27 March 2015 from Applicant and
Respondent

Date of Determination: 30 March 2015

DETERMINATION OF THE AUTHORITY

- A. The respondent is to pay to Mr Danilewicz unpaid holiday pay and seven and a half days' unpaid wages.**
- B. It remains to be determined whether Mr Danilewicz is owed one week's pay in lieu of notice, for which further evidence is required.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Danilewicz, who worked for the respondent as a driver between 24 March 2014 and 16 September 2014, claims that he is owed final holiday pay¹ and arrears of wages for the period Monday 8 September 2014 to Tuesday 16 September 2014, on which date he claims he was dismissed by the respondent. He also claims one week's notice pay.

[2] The respondent had initially resisted payment to Mr Danilewicz of the wages, in reliance on an abandonment clause in the employment agreement between the parties which entitled the respondent to withhold one week's pay. It also resisted payment of the holiday pay on the grounds that Mr Danilewicz allegedly owed the respondent monies ordered to be paid by way of reparation. It resists payment of the one week's notice pay on the grounds that Mr Danilewicz abandoned his employment.

[3] However, during the investigation meeting, the respondent conceded that it had no lawful right to withhold payment of the holiday pay and also declared that, as the employment agreement between it and Mr Danilewicz had not been signed, it no longer sought to rely upon the right to withhold pay in reliance of the abandonment clause. The respondent made no concession regarding the notice pay, saying that Mr Danilewicz had abandoned his employment.

[4] The concession by the respondent in regard to the abandonment clause means that it clearly owed Mr Danilewicz pay for the five day period from Monday 8 September to Friday 12 September 2014.

[5] After some discussion with the parties I conclude that the respondent had sought to suspend Mr Danilewicz on pay on Friday 12 September 2014 until it had received the formal results of a drug test that had been taken on that day. Those results were received by the respondent on Tuesday 16 September 2014.

[6] Although there is a dispute between the parties as to whether Mr Danilewicz was dismissed on Tuesday 16 September, as he claims, or he had abandoned his employment by then, on the respondent's own evidence Mr Danilewicz is clearly owed pay for the two days of 15 and 16 September 2014.

¹ Owed pursuant to s23 of the Holidays Act 2003

[7] There was some debate as to whether Mr Danilewicz would have worked on Saturday 13 September 2014, but Mr Wright conceded at the investigation meeting that it was a possibility, so the respondent has agreed to pay Mr Danilewicz half a day's pay in respect of that day.

[8] There is one issue remaining to be determined; namely whether Mr Danilewicz was dismissed on Tuesday 16 September 2014 by Mr Wright by way of a telephone call, or whether he abandoned his employment, as asserted by Mr Wright, who denies that he spoke to Mr Danilewicz on or after 16 September 2014.

[9] If Mr Danilewicz was dismissed, he would be entitled to notice pay. Even if the employment agreement between the parties that was seen by the Authority did not bind them, one week's notice pay would be implied as a reasonable notice for termination in any event. If Mr Danilewicz abandoned his employment, he would not be entitled to any notice pay. This issue therefore needs to be determined.

[10] Mr Danilewicz did not raise a personal grievance for unjustified dismissal within the 90 day period stipulated by s114(1) of the Employment Relations Act 2000 (the Act) and has not made an application to the Authority under s.114(3) of the Act for leave do so after the expiration of the 90 day period. Therefore, the Authority does not have the jurisdiction to consider a personal grievance for unjustified dismissal.

[11] In order to assist the Authority to determine the notice pay issue, it will seek telephone records to be produced pursuant to s.160(1)(a) of the Employment Relations Act 2000 in order to determine whether a telephone call was made by Mr Wright to Mr Danilewicz on 16 September 2014 or not.

[12] In the meantime I make the following orders:

Orders

[13] The respondent is to pay to Mr Danilewicz the following:

- a. The gross sum of \$1,320, being seven and a half days' pay at \$22 an hour; and

- b. Unpaid holiday pay calculated in accordance with s.23 of the Holidays Act 2003.

Costs

[14] Although neither party was legally represented at the investigation meeting, Mr Danilewicz will have incurred the lodgement fee of \$71.56. However, I reserve costs at this stage, until the Authority has determined the remaining issue of the notice pay.

David Appleton
Member of the Employment Relations Authority