

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 21
5599696

BETWEEN PETER GILBERT EDWARDS
 Applicant

A N D MODULAR BUILDING
 SYSTEMS LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Geoff Brodie, Counsel for Applicant
 No appearance by or for Respondent

Investigation Meeting: 29 February 2016 at Christchurch

Oral Determination
delivered: 29 February 2016

Written Determination
issued: 3 March 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Edwards, was employed by the respondent, Modular Building Systems Limited (Modular), from February 2014 until 5 June 2015. During the course of his employment, Mr Edwards was not paid fully for his salary and holiday pay and he has made an application for payment of arrears of salary and holiday pay pursuant to s 131 of the Employment Relations Act 2000 (the Act).

Preliminary matter

[2] Modular did not appear at today's investigation meeting. Modular had instructed counsel, Steven Rollo, to act on its behalf in this matter. Unfortunately Mr Rollo was never able to obtain full instructions and as a result he did not lodge a

statement in reply for Modular nor was he able to participate in the case management conference which was conducted on 29 January 2016.

[3] As was recorded in the notice of direction from that case management conference, the conference proceeded without either Mr Rollo appearing or Modular participating. The Authority was satisfied, however, that Modular, through Mr Rollo and separately, had been served with the statement of problem and was aware that the case management conference was going to proceed without it if it did not make itself available on the day.

[4] Modular was then advised of the notice of direction and the pending investigation meeting both directly and through Mr Rollo who confirmed that he passed on to Modular the notice of direction and the notice of investigation meeting.

[5] In the case management conference I made directions requiring Modular to lodge and serve a copy of wage and time records and to lodge and serve a statement in reply if it intended to participate in the investigation meeting.

[6] Modular has not done either of these things and this morning Mr Rollo appeared at the Authority to advise that he had no instructions in terms of opposing the application being made and sought leave to withdraw. I granted that leave.

[7] In all of the circumstances, it is safe for the Authority to proceed without Modular being present at the investigation meeting as I am satisfied it is on notice of the claim being made against it and that this matter was proceeding whether it appeared or not.

Events giving rise to the employment relationship problem

[8] Mr Edwards was employed by Modular from February 2014 until June 2015. He was paid an annual salary of \$96,000 and a car allowance. This equated to a monthly net payment of \$6,008.

[9] Due to financial difficulties and lack of funding it became clear that Modular could not pay Mr Edwards's salary. Mr Edwards put a proposition to Modular in July 2014 suggesting that his monthly salary be reduced on an interim basis to a net payment of \$3,500. His proposal was that the difference, being \$2,508 net per month,

just accumulate until Modular was in a position to make that payment. Modular accepted this proposition.

[10] Since this time, however, Modular failed to pay Mr Edwards even the agreed amount of \$3,500 per month. Some amounts have been paid and I have received a table setting out the amounts due each month, the amounts paid each month and the balance due.

[11] There were ongoing discussions since July 2014 between Mr Edwards and Modular regarding payment of his salary including some emails which I have seen as evidence and an oral account of the follow-up that Mr Edwards made with Modular. I am satisfied that Mr Edwards continued to pursue payment and never conceded that the full amount of his salary was not owed, rather, it would simply be paid at a date when Modular had the finances generated from sales in order to pay him. I am also satisfied that Modular never disputed that this money was owed during this time.

[12] I also note that Modular has failed to produce wage and time records as requested by Mr Edwards and directed by the Authority. As a result I can treat Mr Edwards's evidence as his wage and time records for the purposes of calculating arrears, pursuant to s132 of the Act. I am satisfied that that is appropriate given the evidence I heard in the investigation meeting.

[13] As a result, I conclude that Mr Edwards is owed the sum of \$10,292 as arrears on the agreed \$3,500 monthly payments due to him from July 2014 until June 2015. He is also entitled to 10 months' deferred payments of \$2,508 being \$25,080. There is a total of salary due and owing to Mr Edwards of \$35,372 net.

[14] Mr Edwards has not been paid any holiday pay other than for some holidays that he took during the 18 months in which he was employed. In an email of 24 July 2015, Modular advised Mr Edwards that he was owed \$4,516.12 of holiday pay. Based on the calculations undertaken by Mr Edwards I am satisfied that this is a net amount owed to Mr Edwards.

[15] On this basis, Mr Edwards is owed a total for arrears of holiday pay and salary of \$39,888.12 net.

Determination

[16] I make an order that Modular is to pay arrears of salary and wages to Mr Edwards of \$39,888.12 net.

[17] I also award interest at the current rate of 5.5% under the Judicature Act on each monthly salary payment due (less any amount paid in that month) until the investigation meeting and this oral determination. Mr Edwards has calculated this amount to be \$2,551.42.

Costs

[18] Costs are reserved on the basis that Mr Edwards has not made an application for costs and as Modular did not attend the investigation meeting it cannot be aware of any subsequent application that might be made in the investigation meeting that costs be paid. Mr Edwards can consider whether he wishes to make an application for costs. If so, he is to lodge and serve written submissions within 14 days of the date of this determination. Modular can then respond within 14 days of service if it wishes to oppose any application for costs.

[19] Mr Edwards is, however, entitled to the filing fee on the statement of problem which he has lodged with the Authority. I order that Modular pay to Mr Edwards the sum of \$71.56.

Peter van Keulen
Member of the Employment Relations Authority