

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 55/10

File Number: 5295322

BETWEEN Elite Cabling Services Limited  
Applicant

AND Taiaroa McMillan-Parata  
Respondent

Member of Authority: Denis Asher

Representatives: Lauren Beecroft for the Company  
Mr McMillan-Parata represented himself with the  
assistance of his father, Mr Tony McMillan

Investigation Meeting Wellington, 19 February 2010

Submissions Received 10 March 2010

Determination: 30 March 2010

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1] By way of urgency, the applicant (the Company) claimed Mr McMillan-Parata had breached his employment agreement, including a failure to work out his notice period and sought various particularised damages.

[2] Mediation followed the filing of the statement of problem on 10 February 2010 but it did not resolve the parties' employment relationship problem.

## **The Investigation**

[3] During a telephone conference on 12 February the parties agreed to an investigation in Wellington on 19 February and a timetable for the respondent filing his statement in reply.

## **Background**

[4] The Company is a small business providing both domestic and commercial electrical work, heating and ventilation, home automation and renovations, as well as maintenance and servicing, in the Wellington area.

[5] Mr Kelvin Jones is the owner and manager of the Company: he is assisted by another electrician employee, an apprentice and, formerly, by the respondent. Mr Jones' partner does the applicant's administrative work on a part-time basis.

[6] Mr McMillan-Parata began his employment with the Company on 26 January 2009. A written employment agreement set out his terms and conditions of employment.

[7] At 6.34 p.m. on Friday 15 January 2010 Mr McMillan-Parata sent the Company an email attaching to it a letter of resignation. In it he stated,

*This is the two weeks required notice of resignation (as per employment contract). However, an earlier release from this contract would be greatly appreciated if it proves to be of no harm to the ongoing daily running of the company.*

(attachment to statement of problem)

[8] On 18 January, the Monday following notice of his resignation, Mr McMillan-Parate attended work as normal. The next day he met with Company representatives who expressed various concerns to the applicant, including a belief he had taken leave in advance for which he now owed the Company, that he had damaged a vehicle belonging to it and was liable for a parking ticket. Mr McMillan-Parata disputed those claims.

[9] Relations between the parties quickly deteriorated from that point. Mr McMillan-Parata expressed an intention not to turn up for work if he was not going to be paid (because of forecast deductions from his pay for leave the Company claimed he owed it and other claims).

[10] Mr McMillan-Parata set out his views in an email sent to the Company on 19 January; he advised that because of the unresolved disputes he would not be returning to work on the following day (doc 1, attachment to Mr Jones' witness statement). The Company responded by advising, amongst other things, that he would be in breach of his requirement to work out his notice.

[11] As a result of the respondent's failure to attend work, the Company was obliged at short notice to bring in an electrical contractor to undertake Mr McMillan-Parata work. Its efforts to make contact with the respondent via email and his portable phone from 20 January were unsuccessful.

[12] The Company said other costs were incurred as a result of Mr McMillan-Parata's actions, including recovering his work vehicle, grooming and repairing the same vehicle and replacing tools and telephone cards not accounted for by the respondent. The Company said the losses it sustained as a result of Mr McMillan-Parata's behaviour amounted to \$10,528.08.

[13] The respondent does not accept those claims.

## **Discussion**

[14] The applicant brings its claim under breach of contract. The contract in question is the parties' written employment agreement (attached to statement of problem) and its relevant, express provisions.

[15] Jurisdiction for the Authority to determine this claim rests in s. 161 of the Employment Relations Act 2000 (the Act); and power to award damages rests in s. 162 of the Act.

[16] As the applicant properly makes clear in its submissions dated 25 February 2010, the essential principle is that the Company is entitled to be put into a position it would have been in had there been no breach (*Doherty Trading Ltd v Ferris* [1999] 2 ERNZ 776, 785).

[17] During the Authority's substantive investigation on 19 February, and after reviewing the relevant evidence and listening to the other's arguments, the differences between the parties in respect of their competing issues narrowed significantly: Mr McMillan-Parata accepted he was liable for the parking ticket he had previously disputed, a total of \$40. Similarly, after reviewing the evidence, Mr Jones made substantial adjustments to the Company's claims. Unfortunately, the parties' concessions did not result in them reaching an agreement on their own terms.

[18] The Company's amended claim is set out in a supplementary witness statement from Mr Jones and a particularised claim for damages dated 25 February 2010. The latter are:

- a. Overpaid leave (clause 15.3) less wages owed: \$239.17; and
- b. Damage to Company van and grooming (miscellaneous clauses company vehicle) , less 50 %: \$380.63; and
- c. Replacement car seat covers (miscellaneous clauses, company vehicle) , less 50%: \$50; and
- d. Tools not returned (clause 13.5), less 50%: \$559.42; and
- e. Portable telephone cards (clause 13.5): \$70; and
- f. Parking ticket (miscellaneous clauses, parking and infringement): \$40; and
- g. Labour costs for respondent's absence (clause 13.1, general termination), as amended at hearing: \$2,100; and
- h. Profit margin lost (clause 13.1, general termination): \$1,800; and

- i. Labour costs (clause 13.1, general termination), less 50% \$296.66, i.e. a total of \$5,555.88.

## **Findings**

### **Overpaid Leave**

[19] Mr McMillan-Parata does not dispute the amount claimed by the Company as anticipated leave, but says it was leave taken and sanctioned by the applicant, as study leave, etc and “*other understandings were in place with regards to the disputed leave*” (5<sup>th</sup> par, response to amended statement of problem), including a Company-initiated Xmas closure.

[20] The Company says the leave taken by the respondent (other than unpaid leave) was clearly recorded on his payslips (as exemplified to the Authority) as annual leave. Until the Authority’s investigation, Mr McMillan-Parata never queried those records. While it is now a small amount, the annual leave issue is at the heart of the applicant’s case.

[21] Because of the payslip record, and Mr McMillan-Parata’s failure until now to challenge the same, I accept the Company’s claim. I find that, after allowing for deduction of wages owed the respondent, the Company is entitled to seek to recover \$239.17 in respect of anticipated annual leave.

### **Damage to Company van and grooming**

[22] Because the Company did not actively pursue the claim of damage to the vehicle allocated Mr McMillan-Parata during his employment, and because the evidence disclosed during the Authority’s investigation made clear that other employees had access to, and made use of, the same vehicle during his employment, and in the absence of an agreed description of the vehicle at the time of allocation, I am not prepared to grant the discounted damages sought by the applicant.

**Replacement car seat covers**

[23] In the absence of any agreed description of the vehicle's condition at the time it was allocated to Mr McMillan-Parata and whether or not it had car seat covers (disputed by the respondent), and because other employees could and did make use of the vehicle and could also have been responsible if the covers were in place but went missing, I am not satisfied from the Company's evidence that – on a balance of probabilities basis – the vehicle was equipped with car covers and/or that the respondent was responsible for their removal and should therefore compensate the applicant for their replacement costs.

**Tools not returned**

[24] Mr McMillan-Parata disputes the claim of tools not returned on the ground they were never supplied to him. Again, there is no list signed off by both parties, detailing what tools were provided the respondent at the start, and during the term of, his employment.

[25] In light of the disputed claims and the absence of compelling evidence, and on a balance of probabilities basis, I am not prepared to grant the damages claimed by the Company in this category.

**Sim cards**

[26] The Company did not pursue the issue of Mr McMillan-Parata misplacing the original telephone card during the time of his employment; it took the step of disconnecting the second so as to avoid the risk of the respondent charging to it unrelated expenses. I am therefore satisfied that, on both counts, the applicant should bear the cost of these items.

**Parking ticket**

[27] Mr McMillan-Parata agrees he is responsible for this item and the Company is therefore entitled to recover damages of \$40.

**Labour costs for absence**

[28] The Company has clearly made out its case to recover amended damages sought of \$2,100, arising out of Mr McMillan-Parata's failure to work out his notice period and the need to engage contractors less what the respondent would have been paid. Two wrongs do not make a right: it was for Mr McMillan-Parata to raise a dispute about the Company's intended deductions from his wages rather than (as it turns out) worsen matters by withdrawing his services in breach of his contracted obligations.

**Profit margin lost**

[29] The Company seeks to recover the difference between what it would have earned if Mr McMillan-Parata had been working and what it earned from the contractors engaged to replace him, when he failed to work out his notice. Because a significant reshuffle of other staff was required, and based on Mr Jones' knowledge of the business and accounts, lost profitability of \$1,800 is sought.

[30] This claim is necessarily speculative because it relates to what the Company **might** have earned **had** the respondent been present. I accept Mr McMillan-Parata's absence resulted in some lost profit but am conscious of a 'double-dip' risk in that I have already found the respondent to be liable for the cost of contracting in replacement labour.

[31] In all the circumstances, but because of the speculative measure require to assess this loss, I am not prepared to award damages greater than \$500 to the Company in respect of this claim.

**Other Labour costs**

[32] I accept the Company's claim that, because of Mr McMillan-Parata's failures to return its telephone calls and the vehicle he had responsibility for, it was necessary for the respondent to incur costs in retrieving it. Two other employees were taken off normal (and profitable) activities to retrieve the vehicle. The calculation of the time

they took and their hourly rates has, I find, been reasonably and fairly halved, and I award the damages sought of \$296.66.

### **Summary**

[33] For the reasons set out and particularised above I award the Company damages against Mr McMillan-Parata totalling \$3,175.83.

### **Determination**

[34] Mr McMillan-Parata is to pay damages to the Company totalling \$3,175.83.

[35] Costs are reserved. Subject to the parties' submissions and any without prejudice except as to costs offers that Mr McMillan-Parata may have made the Company, I can indicate that – as costs follow the event – and in respect of time taken on this matter and other, relevant considerations, the respondent can anticipate a costs award of \$2,000 against him.

**Denis Asher**

**Member of the Employment Relations Authority**