

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 113  
3005672

BETWEEN            LEONARDO DIAS FERREIRA  
                                 Applicant  
  
A N D                TOOLEY HOLDINGS LIMITED  
                                 First Respondent

Member of Authority:     Peter van Keulen  
  
Representatives:         Applicant in person  
                                 Dave Tooley for Respondent  
  
Investigation Meeting:    27 June 2017 at Christchurch  
  
Date of Determination:    4 July 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. Tooley Holdings Limited's deduction of \$436.77 from Mr Ferreira's final pay is not lawful.**
- B. Tooley Holdings Limited does not have a legal nor evidential basis for its counterclaim against Mr Ferreira and he does not owe it any money as alleged.**
- C. Tooley Holdings Limited owes Mr Ferreira \$436.77 (net) for holiday pay and it must pay this amount to him within 14 days of this determination.**
- D. Tooley Holdings Limited owes Mr Ferreira wage arrears of \$25.00 (gross) and it must pay this amount to him within 14 days of this determination.**

- E. I also award interest on these sums at the current rate of 5% (under the Judicature Act 1908) from 1 March 2017 until payment is made in full.**

**Employment relationship problem**

[1] The applicant, Leonardo Ferreira, claims he has not been paid holiday pay owing to him at the termination of his employment with Tooley Holdings Limited (Tooley Holdings).

**Progress of this matter**

[2] Mr Ferreira lodged a statement of problem seeking payment of \$436.77 (net) on 21 March 2017.

[3] Tooley Holdings failed to lodge and serve a statement in reply.

[4] In a case management conference on 10 May 2017, Dave Tooley, the sole Director and shareholder of Tooley Holdings, alleged that Mr Ferreira had stolen tools from Tooley Holdings and for this reason, any outstanding holiday pay had not been paid.

[5] In the case management conference I made the following directions:

- (a) Tooley Holdings was to lodge and serve a statement in reply, a copy of the complaint made to New Zealand Police and wage and time records for Mr Ferreira, by 17 May 2017.
- (b) Tooley Holdings was to lodge and serve any witness evidence to support its position by 31 May 2017.
- (c) Mr Ferreira was to lodge and serve any witness evidence by 14 June 2017.
- (d) This matter was set down for an investigation meeting on 27 June 2017.

[6] A notice of direction setting out my directions was sent to the parties on 11 May 2017. And a notice of investigation meeting setting out the date, time and venue of the investigation meeting was sent to the parties on 19 May 2017.

[7] The Authority did not receive a statement in reply from Tooley Holdings, nor has it received the relevant documents or any witness evidence as directed.

[8] Tooley Holdings did send a copy of a Trade Me listing to the Authority. It claims this listing shows the tools stolen from it and is evidence of Mr Ferreira selling those tools.

[9] Mr Tooley appeared on behalf of Tooley Holdings at the investigation meeting. He advised me that a statement in reply had been filed by email about four weeks ago. The other documents had not been filed due to his absence from work.

[10] I checked the Authority's email and was unable to find the statement in reply. I advised Mr Tooley that I would allow him to explain Tooley Holdings' position and would hear evidence from him and Mr Ferreira. I would then decide how to progress the matter, as, at the very least, I would require a copy of any statement in reply.

[11] At the conclusion of the investigation meeting I directed Tooley Holdings to lodge and serve its statement in reply by close of business on 27 June 2017. Tooley Holdings failed to do this and has not provided any explanation for not lodging this statement in reply as directed.

[12] After the investigation meeting Tooley Holdings did provide a copy of Mr Ferreira's final pay slip to him.

[13] I am satisfied that I can proceed to determine this matter notwithstanding that Tooley Holdings has not filed a statement in reply.

### **Tooley Holdings' response**

[14] Despite suggesting in the case management conference that it had withheld payment of the final amount of Mr Ferreira's last pay because he had stolen tools from it, Tooley Holdings conceded that the issue of stolen property was a matter to be

pursued in another forum and was not something that I have jurisdiction to investigate and determine<sup>1</sup>.

[15] Tooley Holdings' position is that Mr Ferreira owed it money for poor work by him, which it had to remedy at a cost to it.

### **Facts**

[16] Tooley Holdings employed Mr Ferreira from 18 March 2015. He was employed as a plasterer.

[17] Mr Ferreira resigned on 14 February 2017 and his last day of work was 28 February 2017.

[18] Tooley Holdings paid Mr Ferreira weekly and for his final week of work, he should have been paid on 1 March 2017. This final pay was for 35 hours worked in the week up to 28 February 2017 and accrued but untaken holiday pay in accordance with s 27 of the Holidays Act 2003.

[19] Mr Ferreira did not receive any payment on 1 March 2017 so he emailed Tooley Holdings. In reply he was advised that \$1,600.00 (net) would be paid immediately leaving a balance owing to him of \$436.77 (net).

[20] Mr Ferreira's final pay slip confirms that the final payment due to him is \$2,036.77 (net). Tooley Holdings paid Mr Ferreira \$1,600.00 so the balance owing is \$436.77 (net). This has not been paid to Mr Ferreira.

[21] Mr Ferreira now queries this amount. The final pay slip shows that Tooley Holdings calculated the accrued but untaken leave based on 7.99 days holiday. However, the payslip Mr Ferreira received for the previous week states he is owed 10 days holiday pay. On the face of it Tooley Holdings appears to have miscalculated the accrued but untaken holiday pay by 2.01 days.

[22] That pay slip for the second to last week of work for Mr Ferreira also includes payment to Mr Ferreira of one day of holiday pay at the rate of \$189.45. On this basis, his holiday pay accrued at that point was 10 days payment of \$189.45 being \$1,894.50. The calculation of holiday pay in Mr Ferreira's final pay (based on 7.99

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<sup>1</sup> See *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255

days of holiday) is \$1,936.27. So despite the change in the number of days used to calculate holiday pay I believe the final pay calculation is consistent with the summary of holiday pay owed in the pay slip for the previous week and I am satisfied that the holiday pay calculations set out in Mr Ferreira's final pay slip are correct.

[23] There is one other aspect of Mr Ferreira's payslip that he queries. The payment for hours worked in Mr Ferreira's final week is based on 34 hours of work yet Mr Ferreira's time sheet shows he worked 35 hours. I am satisfied that Mr Ferreira is also owed one hour of pay at the rate of \$25.00 per hour.

[24] In his final week of work Mr Ferreira worked on a fence as part of work done by Tooley Holdings on a job known as the Preston's job.

[25] In the course of working on the fence at the Preston's job, Mr Ferreira and his crew left the site with plaster on the ground. Mr Ferreira and one other employee were told to return to the site to clean up and Mr Ferreira did that the following day.

[26] Mr Ferreira says there was paint and poly glue on the concrete (on the ground) and he did what he could to remove it. He says he was not responsible for this mess, particularly the paint as he did not paint the fence.

[27] Mr Tooley says, Mr Ferreira did not clean up the site as directed, and regardless of whether he did, the clean-up that did occur was not effective. As a result, Mr Tooley had to attend the site, waterblast the materials off the concrete and then re-seal the concrete. This was done at a cost to Tooley Holdings for Mr Tooley's time and the necessary materials.

[28] Tooley Holdings believed Mr Ferreira and one other employee were responsible for the mess that Mr Tooley had to clean up so it deducted money from both employees' pay.

[29] There was no evidence of the actual cost but Mr Tooley says it was greater than the amount deducted from both employees.

### **Discussion**

[30] Tooley Holdings owes Mr Ferreira \$436.77 (net) for accrued but untaken holiday pay at the end of his employment.

[31] The issue to consider then is whether Tooley Holdings has a right to withhold payment of that amount on the basis it is deducting money it says is owed to it for the alleged faulty workmanship.

[32] The answer to that is no.

[33] Tooley Holdings has no right to withhold payment or deduct any amount from any final pay due to Mr Ferreira<sup>2</sup> except for an authorised deduction from wages or holiday pay due pursuant to s 5 of the Wages Protection Act 1983<sup>3</sup>.

[34] Clause 31.2 of the employment agreement between Tooley Holdings and Mr Ferreira (the IEA) provides:

Should you be indebted to us for any reason including by reason of advanced leave, any account, forfeiture for failing to provide notice at the end of employment or to return our property or equipment, you agree that any sum owing may be deducted from your Remuneration and/or holiday pay to be paid during or on termination of employment.

[35] The use of this general deductions clause is subject to ss 5 and 5A of the Wages Protection Act. Section 5(1)(a), enacted in April 2016 enables a deduction to be made on the basis of a general deductions clause. Section 5(1A), also enacted in April 2016, codifies the common law position and it requires an employer to consult with an employee before making a deduction under a general deduction clause. Section 5A provides that a deduction made under a general deduction clause (in reliance on s 5) must not be unreasonable.

[36] Whilst clause 31.2 of the IEA is a suitable general deduction clause, Tooley Holdings has not consulted with Mr Ferreira before making a deduction and I think, for the reasons set out below in paragraph 34, that the deduction is unreasonable.

[37] This means the deduction is not lawful<sup>4</sup>.

[38] I must however consider the possibility that Tooley Holdings has a valid counterclaim against Mr Ferreira and he owes it money. Strictly speaking Tooley Holdings cannot set off any amount owed to it against holiday pay it owes (as set out above) but the practical effect, if I find that Mr Ferreira owes money to Tooley

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<sup>2</sup> *Edwards (Labour Inspector) v Topo Gigio Restaurant Ltd* AEC 109/95

<sup>3</sup> *Drake Personnel (New Zealand) Ltd v Taylor* [1996] 2 NZLR 644 (CA)

<sup>4</sup> *Online Contractors Ltd v Wetere* [2017] NZERA Auckland 17

Holdings based on its counterclaim, is that there will be a set-off by an exchange of payments.

[39] Turning then to the counterclaim, I am not satisfied that Tooley Holdings has a valid counterclaim against Mr Ferreira:

- (a) The Employment Court has expressed concerns about counterclaims arising out of negligence by an employee in the performance of his/her tasks<sup>5</sup>. I am not satisfied that the actions complained of by Tooley Holdings can constitute a valid cause of action against Mr Ferreira.
- (b) In any event, the evidence from Tooley Holdings does not establish that only Mr Ferreira and the other employee were responsible for the mess or damage that Mr Tooley had to remove from the concrete. Mr Ferreira's evidence is that other employees were responsible for the mess; other employees had painted the fence, not him and other members of his crew had failed to clean up at the end of the relevant workday, suggesting he could not clean up properly when he tried because it had been left overnight.
- (c) And, finally, there is insufficient evidence of loss by Tooley Holdings; just mere assertions by Mr Tooley that the cost exceeded the amount deducted.

[40] I conclude that Tooley Holdings' counterclaim is not based on a valid cause of action and, if I am wrong on that, then the evidence does not establish a breach by Mr Ferreira and loss caused by such a breach.

[41] In all of the circumstances, Tooley Holdings must pay the accrued but untaken holiday pay without deduction or any further delay.

[42] I am also satisfied that it is appropriate to award interest to Mr Ferreira on the sum owed to him<sup>6</sup>.

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<sup>5</sup> *George v Auckland Council* [2013] NZEmpC 179 at [147].

<sup>6</sup> In any matter involving the recovery of any money, the Authority may, under clause 11(1) of Schedule 2 of the Act, if it thinks fit, order the payment of interest at the rate prescribed under section 87(3) of the Judicature Act 1908.

### **Determination**

[43] Tooley Holdings Limited's deduction of \$436.77 from Mr Ferreira's final pay is not lawful.

[44] Tooley Holdings Limited does not have a legal nor evidential basis for its counterclaim against Mr Ferreira and he does not owe it any money as alleged.

[45] Tooley Holdings Limited owes Mr Ferreira \$436.77 (net) for holiday pay and it must pay this amount to him within 14 days of this determination.

[46] Tooley Holdings Limited owes Mr Ferreira wage arrears of \$25.00 (gross) and it must pay this amount to him within 14 days of this determination.

[47] I also award interest on these sums at the current rate of 5% (under the Judicature Act 1908) from 1 March 2017 until payment is made in full.

### **Costs**

[48] Mr Ferreira is entitled to the filing fee on the statement of problem that he has lodged with the Authority. I order that Tooley Holdings Limited pay Mr Ferreira the sum of \$71.56 within 14 days of this determination.

Peter van Keulen  
Member of the Employment Relations Authority