

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 228  
3081575

BETWEEN MALCOLM FULLER  
Applicant

AND LITTLE CREEK LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Dave Cain, advocate for the Applicant  
Shane Kilian, counsel for the Respondent

Investigation Meeting: 4 May 2021 at Auckland

Submissions and/or further evidence 12 May 2021 from the Applicant

Determination: 27 May 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Malcolm Fuller, claims that he is owed wages by the Respondent, Little Creek Limited (LCL), for the period from 30 January 2018 until May 2019.

[2] LCL claims that when LCL was sold to Mr James Hogg in May 2018, he was unaware that it had any employees, including Mr Fuller with whom he has had no contact.

[3] Since being made aware of the claim for unpaid wages made by Mr Fuller, LCL claims that Mr Fuller ceased to do any productive work for it during his period of employment, being until April 2018.

**The Authority's investigation**

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **Issues**

[5] The issue requiring investigation are whether or not Mr Fuller is owed wages by LCL.

### **Failure of Respondent to attend or be represented**

[6] LCL did not attend, and was not represented, at the Investigation Meeting despite having been consulted about the proposed date. Notice of Investigation on a day confirmed by LCL as being suitable was served by email on Mr Kilian, counsel for LCL, at his personal email address and also at the administration email address for Mr Kilian's law firm

[7] I delayed the commencement of the investigation meeting for some 10 minutes; however neither Mr Kilian nor his client attended. No other representative of LCL attended. The Investigation Meeting was delayed for a short time while the Authority Officer attempted to contact LCL in connection with its non-attendance prior to the Authority Investigation

[8] For the reasons set out above I am satisfied that LCL had notice of the application and the date of the Investigation Meeting and that it chose not to attend or to be represented.

[9] LCL has not shown good cause for its failure to attend or to be represented. I have therefore proceeded pursuant to clause 12 Schedule 2 of the Employment Relations Act 2000 (the Act) to act as fully as if LCL had attended or been represented.

### **Background**

[10] LCL is a company registered on the New Zealand Companies register. Mr Fuller said that he met Mr Steve Foley prior to commencing employment in February 2018. He was aware from some research that Mr Foley had previously been a bankrupt but accepted his explanation for that situation having arisen.

[11] Mr Fuller said that LCL was a start-up company and he was the sole employee.

[12] At the commencement of Mr Fuller's employment with LCL Mr Foley was a shareholder but not a director of LCL. However Mr Fuller understood him to be acting on behalf of LCL when they entered into an individual employment agreement signed by them both on 30 January 2018 (the Employment Agreement).

[13] The terms of the Employment Agreement included a trial period provision for the first 90 days of employment. Other terms and conditions of employment included:

- Position: Business Development Manager

- Salary: \$75,000.00
- Hours of work: 40 per week
- Vehicle Allowance of \$750.00 per month
- Notice period: Four weeks in writing

[14] Mr Fuller said his position as Business Development Manager involved him making contact with, and visiting, farmers throughout the upper North Island identifying opportunities to sell hydro plants and effluent systems to them. He had flexibility to decide on the structure of his working day.

[15] Mr Fuller said he purchased a Ute vehicle in order to carry out his job of visiting farmers throughout LCL's operating region which he did frequently during the initial part of his employment.

[16] He said he liaised with Mr Foley by telephone and had occasional meetings with him at cafés in order to update him on sales leads.

[17] Mr Fuller said he was not paid at the end of his first month of employment with LCL. This situation continued throughout the ensuing months during which time Mr Fuller repeatedly sent Mr Foley text messages requesting payment.

[18] The text messages became increasingly emotive in nature with Mr Foley outlining the adverse impact of non-payment upon his finance situation and commitments.

[19] Mr Foley responded initially with an assurance that monies would be paid. On 28 April 2018 he responded: "...I need to catch up with you on Monday morning to give you your pay for last two months and discuss the go forward for the business".

[20] However no monies eventuated and on 24 May 2018 Mr Fuller sent Mr Foley a text message stating: "Steve I need my money now by Friday in my account as I now have to put my ute on the block as we need the money to pay our bills." The following day he advised Mr Foley that he had no money for food and to pay bills.

[21] On 28 May 2018 Mr Fuller sent a text message to Mr Foley stating: "Steve need to (sic) what is happening with Little Creek am I still working for you or do I need to start looking for a new job just need to know."

[22] Mr Foley's responses to the text messages had initially made assurances that payment might be forthcoming, but by May he was referring to his personal financial situation: "...I'm

in mtg, which is all about sorting my marriage and finances”, and on 13 June 2018 he sent Mr Fuller a text message which read:

This has been a shit year and we haven't banked one deal thru Little Creek and that isn't going to change any time soon. I thought you had secured teaching work? The stock settlement apparently is waiting for money from their bank . Meantime I've let stock go and no money in yet.

[23] Mrs Fuller text messaged Mr Foley on 2 June 2018 stating: “ ... we have no money, all our bank accounts are in overdraft, we are actually in a desperate situation right now ...”

[24] Mr Fuller said he obtained a part-time teaching role with Valley Education & Training Enterprises Limited in late May 2018 This was for 20 hours a week, and lasted for approximately two and a half months.

[25] Mrs Dianne Fuller said that she had decided to undertake some research on LCL and Mr Foley on or about the end of July 2018. As a result she realised that Mr Foley had again entered into bankruptcy.

[26] Mr Fuller said that he continued to carry on telephoning potential client farmers after July 2018.

#### **Is Mr Fuller owed monies in respect of wage arrears?**

[27] Mr Fuller claims that he is owed wages for the period he was employed by LCL for the period from his date of commencement in February 2018 until he obtained alternative employment in 2019.

[28] LCL did not participate in the Investigation Meeting and failed to supply wages and time records. Section 132 of the Employment Relations Act 2000 (the Act) states that if an employer failed to keep such records in the required format and that the failure prejudiced the employee's ability to bring an accurate claim for arrears of wages, the Authority may accept the employee's claims in respect of the wages actually paid and hours, days, and time worked.

[29] The Authority therefore has a discretion to accept the employee's claims in such a situation. However in exercising that discretion the Authority may have regard to the basis of evidence presented by the applicant and the credibility of the basis of the claim.

[30] In this case Mr Fuller was employed subject to the terms set out in the Employment Agreement. There was no requirement for him to complete timesheets. His evidence is that he continued to carry out duties on behalf of LCL until May 2019 because he was not informed that his employment had been terminated.

[31] There is no evidence that Mr Fuller tried to contact the sole director of LCL, Mr James Hogg, about the non-payment of his salary and the continuing nature of an employment relationship given the non-payment of any salary.

[32] I do not find it reasonable that he failed to do so. However persuasive Mr Foley may have been in his assurances of payment being forthcoming, the fact was that no payments were received in the first few months of employment, and the obvious step in that situation would have been for Mr Fuller to contact the director of LCL.

[33] It would not have been difficult for Mr Fuller to have made contact with Mr Hogg. I note the following points as relevant:

- a) Mr Fuller was aware at the outset of employment that Mr Foley was previous bankrupt and that LCL was a start-up company;
- b) Mr Fuller's evidence that he was aware that Mr Hogg was the director of LCL;
- c) LCL is listed on the New Zealand Companies Office register, the website of which is freely accessible by members of the public;
- d) Mr James Hogg is the sole director of LCL, his personal address and LCL's registered office address are listed on the Companies office website; and
- e) Mrs Fuller is an accountant and in that capacity she would be aware of the availability of information on companies including the identity of the directors and shareholders, and the registered addresses from the NZ Companies Office website.

[34] I find that by late May 2018 Mr Fuller was no longer working full-time for LCL in a full-time capacity. He had obtained part-time alternative employment for 20 hours a week.

[35] At that point LCL had not made any sales, Mr Fuller had not received any vehicle allowance and although his evidence was that the text message sent on 24 May 2018 stating that the Ute: "was on the block" was not correct, I consider it extremely unlikely that Mr Fuller would have been travelling extensively to visit farmers on behalf of LCL at that point.

[36] I am not persuaded that it is appropriate to award wage arrears for the full period claimed. I accept that Mr Fuller worked full-time for the initial three to four months of his employment with LCL, but by late May 2018 when he had been unpaid since the commencement of work in LCL he had sought and obtained alternative part-time employment.

[37] I consider the fact that Mr Fuller accepted and commenced employment in an alternative part-time role evidences or signals his having accepted the fact that the employment with LCL was neither sustainable nor financially viable. Significantly despite this he made no attempt to contact Mr Hogg as would have been the logical step had he believed that the employment was ongoing.

[38] Whilst there may have been some telephone contact calls being made after that time, Mr Fuller's evidence was that he carried out some advisory work and kept in contact with farmers in regard to the possibility of agricultural training jobs. There is a suggestion from his evidence that this was work performed on his own behalf rather than for the benefit of LCL but in any event his evidence was that his work on behalf of LCL was for no more than 10 hours per week.

[39] I note as highly significant that at the outset of the employment relationship Mr Fuller was aware that Mr Foley was a bankrupt, and by late July 2018 Mr and Mrs Fuller were both aware that Mr Foley was unable to be, and in fact had not been, a director of LCL since May 2017. He was therefore unable to act in an executive capacity on behalf of LCL in relation to Mr Fuller's employment.

[40] I consider that this renders it more inexplicable that Mr Fuller failed to contact Mr Hogg if he understood there to have been an ongoing employment relationship.

[41] I find that after the end of July 2018 there is no evidence that Mr Fuller performed any duties for the benefit of LCL, although he remained in contact with Mr Foley seeking payment of wages, and I find therefore that there is no entitlement to wages after that date.

[42] I determine that Mr Fuller is entitled to wage arrears for the period from 30 January 2018 until 31 July 2018.

### **Remedies**

[43] **LCL is to pay Mr Fuller the sum of \$25,410.96 gross in respect of unpaid wages for the period 30 January 2018 until 31 May 2018 (calculated as 4 months at \$6,250.00 per month and 2 days at \$205.47 per day).**

[44] **LCL is to pay Mr Fuller the sum of \$2,311.54 gross in respect of unpaid wages for the period 1 June to 31 July 2018 (calculated on the basis of 10 hours per day for 9 weeks).**

[45] Mr Fuller is also entitled to statutory annual leave entitlement for the period.

[46] **LCL is to pay Mr Fuller the sum of \$2217.80, calculated at the rate of 8% for the period from 30 January to 31 July 2018.**

[47] **LCL is to pay Mr Fuller the sum of \$5,769.23 gross in respect of four weeks contractual notice period.**

#### *Vehicle Allowance*

[48] Mr Fuller did not receive the vehicle allowance of \$750.00 per month to which he was entitled under the Employment Agreement.

[49] While the text message dated 24 May 2018 indicated that Mr Fuller was no longer using the Ute, his evidence at the Investigation Meeting was that this was not correct but was used as a means of encouraging Mr Foley to make the salary payments.

[50] **LCL is to pay Mr Fuller the sum of \$4,500.00 gross in respect of the vehicle allowance.**

#### *Interest*

[51] **I order that LCL pays interest on the outstanding sums from the date of this determination until payment is made in full in accordance with the Interest on Money Claims Act 2016.**

#### **Penalties**

[52] Mr Fuller is claiming penalties in respect of a breach of s 130 of the Act and of a4 of the Wages Protection Act 1983 by LCL.

[53] Not all breaches will result in a penalty being imposed and for that reason it is relevant to assess how much harm the breach has occasioned, to impress upon the party in default the fact that such behaviour is not acceptable, and to act as a deterrent to others.

[54] Factors the Authority and court are to take into account when considering penalties are set out in s 133A of the Act, as summarised below:

- (a) The object stated in s.3 of the Act;
- (b) The nature and extent of the breach or involvement in breach;

- (c) Whether the breach was intentional, inadvertent or negligent;
- (d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach;
- (e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, and has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;
- (g) Whether the person in breach or the person involved in the breach has previously been found by the Authority or the Court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct;

[55] Guidance over the application and weighting to be attributed to the factors has been provided by a Full Court of the Employment Court in *Borsboom (labour Inspector) v Preet PVT Limited* and as refined *Nicholson v Ford*.<sup>1</sup>

[56] It is submitted on behalf of Mr Fuller that although the non-payment of salary and the vehicle allowance to which he was entitled in the Employment Agreement, caused him great distress and anxiety.

[57] I accept the evidence of the text messages that Mr Fuller was very anxious about the non-payment which continued over some months, and that he persevered in the position with LCL because he hoped that the situation could be resolved.

[58] However I also take into consideration that Mr Fuller did not make the sole director of LCL, Mr Hogg, aware of his employment and the non-payment of his wages which may have resolved the issue at an early stage. In failing to contact Mr Hogg in circumstances where it was reasonable for Mr Fuller to have done so, I find that Mr Fuller has failed to minimise his losses.

[59] There is no evidence that Mr Hogg was aware that Mr Foley had engaged Mr Fuller in employment or provided him with the Employment Agreement.

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<sup>1</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143 ; *Nickolson v Ford* [2018] NZEmpC

[60] While Mr Fuller was aware at the time he accepted the Employment Agreement that Mr Foley had been declared a bankrupt, he believed that Mr Fuller had the ostensible authority to make such an appointment. This has been acknowledged in the remedies awarded, but I find it does have relevance to the culpability of LCL, which was ignorant of the fact that the employment of Mr Fuller had occurred, in respect of the penalties.

[61] I find that the breaches of the Act were not committed knowingly by a director of LCL, and LCL did not knowingly commit the breaches.

[62] Having considered the circumstances of this case and the principles which should govern the imposition of a penalty, I determine that a penalty of \$2,500.00 is appropriate.

**[63] I order that LCL is to pay a penalty of \$2,500.00, to be paid to the Authority. On recovery of the penalty the Authority will transfer 50% (\$1,250.00) of that amount to Mr Fuller, and 50% (\$1,250.00) and 50% (\$1,250.00) to the Crown.**

#### **Costs**

[64] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[65] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**