

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 14
5574786

BETWEEN LEONARDO MENDOZA
 GARCIA
 Applicant

AND FRONTLINE SECURITY &
 CONSULTING LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Jessica Sebastian, Counsel for Applicant
 No appearance for or on behalf of Respondent

Investigation Meeting: 28 January 2016 at Wellington

Oral Determination: 28 January 2016

ORAL DETERMINATION OF THE AUTHORITY

[1] This determination is a written record of an oral determination delivered on 28 January 2016.

Employment relationship problem

[2] Mr Leonardo Garcia seeks orders against Frontline Security and Consulting Limited (FSCL) for payment of wages and holiday pay and monies deducted from wages without his consent. He asks also that FSCL reimburse the cost of disbursements required to progress his application with the Authority.

The Authority's investigation

[3] The Authority encountered difficulties ensuring FSCL was served with Mr Garcia's statement of problem.¹ Attempts made by Mr Garcia's counsel to effect

¹ The Authority had Mr Garcia's statement of problem couriered to FSCL's address for service on 12 August 2015. It was returned unclaimed.

service were equally thwarted.² FSCL did not furnish a statement in reply, however I am satisfied that FSCL was aware as to the existence of Mr Garcia's claim, and of the Authority's investigation. A sworn affidavit from a process server affirms that service of the Authority's 'Notice of an Investigation Meeting' was effected on 16 December 2015 with the director of FSCL.

[4] FSCL was not present at the time the investigation meeting was scheduled to commence. The meeting was deferred for 20 minutes whilst the Authority placed a call with the director of FSCL. A request to urgently contact the Authority went unanswered. No good cause has been shown as to why FSCL did not appear at the Authority's investigation meeting. Pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act), I proceeded with an investigation as if FSCL or a representative of it attended the meeting.

Determination

The law

[5] Section 130 of the Act requires all employers to keep wage and time records. Section 132 of the Act states that where any claim is brought before the Authority for the recovery of wages (or other money payable to the employee), in the absence of clear records the Authority may, unless the employer proves the claims are incorrect, accept the claims as proved.

[6] Section 4 of the Wages Protection Act 1983 provides the following:

No deductions from wages except in accordance with Act

Subject to sections 5(1) and 6(2) of this Act, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[7] Section 5 states:

Deductions with worker's consent

(1) *An employer may, for any lawful purpose, -*

(a) *With the written consent of a worker; or*

² On 11 September 2015 Mr Garcia's counsel sought to personally serve the statement of problem on FSCL by attaching the papers to the front door of FSCL's address for service. The documentation was returned unopened. Counsel also emailed the documents to FSCL's email address on 14 September 2015.

(b) *On the written request of a worker –
make deductions from wages payable to that worker.*

Are wages owed?

[8] Mr Garcia worked as a Security Guard for FSCL on a casual basis for approximately 15 months. His claim focusses on 8 January 2015 and 8 February inclusive. Mr Garcia says he worked 118 hours over this time frame but was not paid.

[9] Mr Garcia produced a bank account statement which reveals \$1,473.78 (nett) was inserted into his bank account on Thursday 5 February 2015 but that the payment was removed by way of bank reversal the next working day, 9 February 2015.³ Following that event there is evidence of an exchange on Facebook between Mr Garcia and the director of FSCL whereby Mr Garcia was advised that the matter would be sorted out.

[10] Mr Garcia stopped attending work but he continued to write to FSCL and ask for his wages. In mid-February 2015 the director of FSCL informed Mr Garcia that he would be paid when clients paid for services. No payments were forthcoming and Mr Garcia says the director of FSCL ceased responding to his requests.

[11] In March 2015 Mr Garcia obtained assistance from Whitireia Community Law Centre.

[12] In the absence of any engagement by FSCL with Mr Garcia⁴ (or with the Authority) prior to or at the investigation meeting I have no information to prove Mr Garcia's claims are incorrect. Mr Garcia provided cogent documentation about wages received prior to 5 February 2015, and evidence of his roster as directed by FSCL over the material period of time. I have no reason to not accept Mr Garcia's claims.

[13] I am satisfied that the deposit of wages into Mr Garcia's account on 5 February did not satisfy FSCL's obligation to pay Mr Garcia his wages where that sum of money was quickly removed. Mr Garcia's evidence is that his account went into overdraft when he sought to remove a portion of those funds. He was not able to access or utilise his wages and in these circumstances I do not consider he received

³ Taking into account Waitangi day on Friday 6 February 2015

⁴ Letters and/or email requests were sent were sent to FSCL's address for service on 17 March 2015 and 15 July 2015 seeking FSCL's response to Mr Garcia's claims and requesting wage and time records be provided.

his wages. There is no evidence that Mr Garcia was later paid wages owed including for the hours he worked on 7-8 February 2015. FSCL has breached its obligation pursuant to s 4 of the Wages Protection Act Mr Garcia his wages when due and is required to reimburse him the sum of \$1,770.⁵

Were wages deducted from Mr Garcia without written consent?

[14] Mr Garcia produced 4 separate ‘pay advice’ slips each of which records a deduction from wages of \$5.00 for “*social club*” fees. Mr Garcia says he did not consent to the deduction and I have no information from FSCL to establish that Mr Garcia gave written consent to the deduction. FSCL has breached s 5 of the Wages Protection Act by making unlawful deductions from Mr Garcia’s wages and is required to reimburse him \$20.00

Disbursements

[15] Mr Garcia is entitled to be reimbursed the filing fee associated with this application and for the sum associated with effecting service on FSCL.

Orders

[16] Frontline Security and Consulting Limited is ordered to pay Mr Leonardo Garcia the following:

- (a) \$1,770 in wage arrears; and
- (b) \$20.00 as reimbursement for unlawful deductions made from Mr Garcia’s wages; and
- (c) \$143.20 in holiday entitlements calculated as 8% as per s.23(2) of the Holidays Act 2003; and
- (d) 5% interest⁶ per annum beginning 9 February 2015 on the total sum set out at (a), (b) and (c) above until paid in full; and
- (e) \$71.56 as reimbursement of the filing fee associated with this matter; and

⁵ 118 hours at \$15.00 per hour

⁶ Clause 11 of Schedule 2 of the Act; s [87\(3\)](#) of the [Judicature Act 1908](#) and clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177)

- (f) \$100.00 as reimbursement of the sum required to effect service on the respondent.

Michele Ryan
Member of the Employment Relations Authority