

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 232
5448480

BETWEEN

CHRISTOPHER DAVID
GOLD
Applicant

A N D

MODERN ELECTRICAL
SOLUTIONS LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Vimlesh Sharma, Advocate for the Respondent

Investigation Meeting: 28 May 2014 at Auckland

Date of Determination: 16 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Gold) alleges that he was dismissed by text message, that that message acknowledged that there were wages owing to him and that subsequently payment of those sums has not been effected by the respondent employer (MES).

[2] MES acknowledges the dismissal took place as Mr Gold contends, although there is some dispute about the rationale for the dismissal. That is not an issue the Authority needs to investigate because there is no claim the dismissal is unjustified. The issue before the Authority is exclusively about the payment of wages still owing to Mr Gold. In that regard, MES acknowledges that some wages are owed but pleads cashflow difficulties which preclude it from dealing appropriately with Mr Gold's entitlements until some point in the future.

[3] Mr Gold claims holiday pay which he calculates at \$13,500 remains owing to him, unpaid overtime which he estimates at \$8,000 and payment of notice.

[4] As I have already noted, MES acknowledges that Mr Gold is owed some wages and the Authority has before it affirmed evidence from Mr Sharma for MES which responds to Mr Gold's claim. In essence, MES acknowledges Mr Gold is owed holiday pay but denies the balance of the claim for unpaid wages.

Issues

[5] It will be convenient if the Authority considers the following issues:

- (a) What holiday pay is Mr Gold owed;
- (b) Is Mr Gold owed any overtime pay; and
- (c) Is Mr Gold owed any notice payment?

What holiday pay is owed to Mr Gold?

[6] Both parties are in agreement about the start and finish dates of the employment and there is a difference of just one day in the computation of how much leave Mr Gold took during the employment. I am satisfied on the evidence before me that I can safely do the calculation on the basis of MES' record of how many days' leave Mr Gold took.

[7] That, however, is where the common ground ends. MES, while acknowledging that a significant amount of holiday pay is owed to Mr Gold, seeks to deduct from that sum a variety of amounts which it wishes to claim back against Mr Gold because, it is said, those sums are owed to MES by Mr Gold.

[8] The amounts alleged to be owed by Mr Gold to MES are variously for product purchased by Mr Gold from MES, the recovery of the costs to repair an MES vehicle which was damaged when Mr Gold was in charge of it, and the cost of putting right examples of allegedly faulty workmanship by Mr Gold while working for MES.

[9] I have no hesitation in deciding that the proposed deductions from the holiday pay due and owing to Mr Gold by MES are improper and not in accordance with New Zealand law. There is nothing in the employment agreement between the parties

which entitles MES to deduct any of those sums from wages due and owing to Mr Gold and no other legal basis on which those deductions can be made.

[10] If MES wishes to pursue those matters against Mr Gold, this is not the forum in which to do it.

[11] Accordingly, I conclude that MES owes Mr Gold the sum of \$11,040 gross in unpaid holiday pay for the wages already earned and paid, but that amount will need to be increased if Mr Gold is entitled to additional wages in terms of the following section of this determination.

Is Mr Gold owed overtime?

[12] Mr Gold's evidence is that he worked on call as an electrician for MES and that meant that effectively he was bound to his employer for 12 hours in a working day because he was on call from 9am to 9pm five days a week.

[13] Mr Gold was paid for 40 hours a week for each week during the employment but Mr Gold says he is owed overtime payments for periods when he worked in excess of 40 hours.

[14] Conversely, MES maintains that Mr Gold's entitlement was to 40 hours payment per week simpliciter and that that sum compensated Mr Gold for what MES says were the extended periods when he would not have been working at all.

[15] It is common ground that Mr Gold was "*on call*" but that he would not actually have been working on his tools for all of that period. In effect, he was summoned by MES' office to attend to work on an as-and-when-required basis.

[16] While the wage records supplied to the Authority by MES disclose that 40 hours wages have been paid to Mr Gold for each and every week worked, the employment agreement between the parties clearly refers to the 40 hours payment as "*a minimum*". Moreover, the wage records before me are clearly defective as it is common ground that Mr Gold was on call for a longer period than the wages record show he was on pay.

[17] Accordingly, I must conclude that if Mr Gold was required to work for most of the employment on an "*on call*" basis for 12 hours a day five days a week (latterly on call for 10 hours a day for six days a week), Mr Gold is entitled to some payment

for the hours that he was required to be available to work even where he was not actually working on his tools.

[18] In Mazengarb's Employment Law at para.18.26, the following passage sets out the legal principles:

At common law, the consideration for the payment of wages may be either the actual performance of work by the employee or the employee's readiness and willingness to perform work, if able to do so. ... If the latter is the proper construction, the Employment Relations Authority ... must ask itself whether the employee remained ready and willing to work, in which case there will be an entitlement to wages for the period in question; Re Rutter v. JJ Craig Ltd [1944] NZLR 430

[19] Mr Gold was, I am satisfied, an employee ready and willing to work over the 12 hour period and he is therefore entitled to receive some payment for the time that he is ready and willing to work, even if he is not actually required to do anything. Mr Gold claims the sum of \$8000 gross which is his estimate of the amount he is owed for work done by him after normal working hours, that is after eight ordinary hours of work in a day.

[20] Mr Gold thinks that MES has the records to support this computation, presumably in job sheets for work performed by Mr Gold after normal working hours. If that information is available, it has certainly not been made available to the Authority and, based on s. 132 of the Employment Relations Act 2000, I am entitled to prefer Mr Gold's evidence to that of the employer, when the employer ought to have produced the wage and time records, did not do so and thus prejudiced the employee's ability to accurately calculate what he is owed.

[21] Quite clearly, the employment agreement between these parties is defective in that it does not provide for an on call payment or a standby allowance or any of the other usual devices which parties use where there is a mixture of chargeable time and standby time. In the present case, in the absence of any of those provisions, I must apply the law as I understand it and require that Mr Gold be paid for the hours that he claims, unless MES can prove to my satisfaction that it has records to disprove Mr Gold's claim.

[22] That being the case, I am satisfied that the only proper conclusion I can reach is that, unless MES can provide wage and time or other records to disturb Mr Gold's

claim for what he calls overtime, Mr Gold is entitled to be paid for the amount he is claiming.

[23] I give MES fourteen days from the date of this determination to provide to my support officer any material it wishes me to consider that will disturb my provisional conclusion that Mr Gold is entitled to be paid the claimed amount of overtime of \$8000 gross.

Is Mr Gold entitled to paid notice?

[24] I am satisfied Mr Gold is entitled to two weeks' notice of the termination of his employment. He was paid fortnightly and he was not given any notice of the termination of his employment. He is entitled to that notice.

[25] Accordingly, Mr Gold is to be paid \$3,000 gross by way of notice for the termination of the employment.

Determination

[26] For reasons already made clear, this is an interim determination only. If MES take the opportunity to provide further material to me as I suggest in para. [23] above, I will consider that information and issue a further determination as soon as I am able. If nothing further is received from MES within the time I have stipulated, I shall confirm the provisional conclusion I have signalled in this determination.

[27] For the reasons already advanced, I direct that Modern Electrical Solutions Limited is to pay to Mr Gold the following sums:

- (a) Unpaid holiday pay in the sum of \$11,040 gross; and
- (b) Unpaid notice in the sum of \$3,000 gross.

Costs

[28] As both parties acted for themselves in effect, there is no issue of costs arising.

James Crichton
Member of the Employment Relations Authority