

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 251
3031659

BETWEEN SEBASTIAN JENKINS
 Applicant

AND BF7 TRADING LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Greg Bennett for Applicant
 No appearance by Respondent

Investigation Meeting: 14 August 2018

Oral Determination: 14 August 2018

Record of Oral
Determination: 14 August 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. BF7 Trading Limited is ordered to pay to Mr Jenkins the amount of \$2,132.48 gross under s 131 of the Act within 14 days of the date of this determination.**
- B. BF7 Trading Limited is ordered to pay to Mr Jenkins the amount of \$821.56 as a contribution to his costs within 14 days of the date of this determination.**

Employment relationship problem

[1] Mr Jenkins worked for BF7 Trading Limited for the period 21 January to 6 April 2018. BF7 Trading Limited is an online recruitment agency trading under the

name Filled Roles. It specialises in labour hire within the building and construction industry. Mr Jenkins was engaged as a Carpenter to work for BF7 in Auckland.

[2] Mr Jenkins claims he was not paid for the hours he worked for BF7 for the period 2 – 6 April inclusive. He claims arrears of wages for unpaid wages including holiday pay.

[3] Mr Jenkins lodged his statement of problem in the Authority on 26 June 2018. The statement of problem was served on the registered address for service at 12.17pm on 3 July 2018. Because no statement in reply was received a further copy of the statement of problem was served on the registered address for service at 1.46pm on 23 July 2018.

[4] BF7 is not unknown to the Authority and as I had a further matter already set down for hearing on 14 August on 1 August, I proposed to the parties that this matter be progressed to an investigation meeting and made directions accordingly.

[5] Included in the Notice of Direction was a direction to BF7 that if it failed to lodge a statement in reply by 6 August 2018 any correspondence to the Authority must include an application for leave to respond to the matter.¹

[6] The Notice of Direction and Notice of Investigation Meeting were served on BF7 at 11.50am on 2 August 2018. To date no statement in reply has been received and BF7 has not engaged in the Authority's process.

[7] The investigation meeting was delayed 15 minutes to allow BF7 time to attend at the Authority in case its representative had become caught up in traffic or had difficulty finding a carpark. No representative from BF7 attended.

[8] As provided in clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act fully in the matter as if BF7 had engaged in the process or was represented.

[9] As permitted by s 174E of the Act this determination has not recorded all the evidence received from Mr Jenkins but has stated findings of fact, expressed

¹ See Employment Relations Regulations 2000, Regulation 8(3).

conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Arrears of wages

[10] Mr Jenkins claims arrears of wages being unpaid wages and holiday pay. Mr Jenkins has also requested the Authority make a direction regarding the payment of tax deducted from his pay and held by BF7 but not yet paid to the Inland Revenue Department. The wage slips provided to the Authority show that during the period 21 January to 1 April 2017 BF7 deducted PAYE amounting to \$2,425.22. The Authority has no jurisdiction to make the order sought by Mr Jenkins however I have directed that a copy of this determination be sent to the Inland Revenue for its records.

Unpaid wages

[11] Mr Jenkins has provided me with a list of times and dates he worked from 2 – 6 April 2018. This records that Mr Jenkins worked a total of 37.5 hours during that week. Mr Jenkins' rate of pay was \$28.00 per hour.

[12] I am satisfied Mr Jenkins has not been paid for his week's work and is entitled to be paid \$1,050.00 gross for the work.

Holiday pay

[13] Mr Jenkins says he was not paid his holiday pay at the end of the employment relationship and seeks 8% of his gross earnings. Mr Jenkins says when he asked about holiday pay he was told it was included in his hourly rate.

[14] Section 28 of the Holidays Act 2003 allows the payment of holiday pay with an employees pay if the employee is employed on a fixed term agreement or the work is so intermittent or irregular that it is impracticable for the employer to provide the employee with annual holidays on pay. In addition, the employee must agree to the payment of holiday pay with their wages in the employment agreement, the holiday pay must be an identifiable component of the employee's pay and the holiday pay is to be paid at a rate not less than 8% of the employee's gross earnings.

[15] Mr Jenkins has provided the Authority with a copy of his employment agreement which he says he signed on 18 or 19 January 2017. The employment

agreement at clause 6B f. states that holiday pay will be paid at the same time as the fortnightly pay at the rate of 8%.

[16] Mr Jenkins has also provided the Authority with copies of his pay slips for the period of his employment. The pay slips do not specify as a separate identifiable component that 8% in addition to the hourly rate has been calculated and paid. The pay slips show that Mr Jenkins' wages have been calculated on the basis of the number of hours he worked in each pay period at his ordinary rate of pay. There is no record that payment of holiday pay at 8% in addition to his ordinary pay has been made.

[17] I have concluded Mr Jenkins has not been paid his holiday pay and is entitled to payment of 8% of his gross earnings.

[18] Mr Jenkins earned \$12,481.00 gross during the period 21 January to 1 April inclusive. His arrears of wages for the period 2-6 April inclusive amounts to \$1,050.00 gross. This makes a total of \$13,531.00 gross earnings. 8% of the gross equates to \$1,082.48.

Conclusion

[19] BF7 Trading Limited is ordered to pay to Mr Jenkins the amount of \$2,132.48 gross under s 131 of the Act within 14 days of the date of this determination which has been calculated as follows:

- a) \$1,050 gross for unpaid wages; and
- b) \$1,082.48 gross in holiday pay.

Costs

[20] Mr Jenkins is entitled to a consideration of costs. The discretion to award costs, while broad is to be exercised in a principled way. The primary principle is that costs follow the event. The principles applying to costs are well settled and do not require repeating.²

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[21] The Authority applies a starting point of a notional daily tariff for quantifying costs which is \$4,500 for a one day investigation meeting. The investigation meeting took less than an hour including the issue of this oral determination. The starting point for calculating the daily tariff is \$750.00.

[22] Until the morning of the investigation meeting Mr Jenkins was acting on his own behalf. There are not factors leading me to the view that the daily tariff should be reduced or uplifted.

[23] In addition to his legal costs Mr Jenkins is entitled to reimbursement of his filing fee of \$71.56.

[24] Taking all of the circumstances into account I consider it appropriate that BF7 Trading Limited pay to Mr Jenkins the amount of \$821.56 as a contribution to his costs and that this payment be made within 14 days of the date of this determination.

Certificate of determination

[25] Pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 Mr Jenkins is to be provided with a certificate of determination, sealed with the seal of the Authority recording that within 14 days of the date of this determination, BF7 Trading Limited is to pay Mr Jenkins:

- Unpaid wages and holiday pay of \$2,132.48 gross under s 131 of the Employment Relations Act;
- Costs of \$821.56.

Vicki Campbell
Member of the Employment Relations Authority