

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 80  
5431810

BETWEEN RORY KIRKWOOD  
Applicant  
AND MAT TRIX PAVING LIMITED  
Respondent

Member of Authority: Helen Doyle  
Representatives: Applicant in person  
Ronald Williams, Advocate for Respondent  
Investigation Meeting: 13 May 2014 At Christchurch  
Determination: 15 May 2014

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**DETERMINATION OF THE AUTHORITY**

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- **Mat Trix Paving Limited is ordered to pay to Rory Kirkwood as below:**
  - (i) **\$350 gross deducted from his final pay in breach of the Wages Protections Act 1983;**
  - (ii) **\$297.95 gross being holiday pay; and**
  - (iii) **\$71.56 being reimbursement of the filing fee.**

**Employment relationship problem**

[1] Rory Kirkwood came from Scotland to New Zealand on 21 May 2013 to obtain employment in the rebuild of the city. He was employed by a Christchurch recruiting company and placed with Mat Trix Paving Limited on 27 May 2013.

[2] Mat Trix Paving Limited (Mat Trix) carries on the business of driveways and pavements. Mr Kirkwood's main contact within Mat Trix was one of its directors,

Ronald Williams. Mr Williams gave evidence at the Authority's investigation meeting on behalf of Mat Trix.

[3] For reasons I do not need to set out as they are not the focus of this determination, Mr Kirkwood came to work directly for Mat Trix from 28 June 2013. He continued to work for Mat Trix until he ended his relationship with the company from 2 August 2013.

[4] Whilst working for Mat Trix Mr Kirkwood had an accident in the company Ute. Mr Williams relied on a discussion he had with Mr Kirkwood in which he said Mr Kirkwood had stated he would pay for the damage to the Ute. There was some dispute about that although it is common ground that neither Mr Williams nor Mr Kirkwood knew before the employment ended what the cost of any repair would amount to.

[5] Mr Williams said that in reliance on his discussion with Mr Kirkwood he deducted \$350 gross from Mr Kirkwood's final pay which was deposited into Mr Kirkwood's bank account on 23 August 2013. That was half of the amount of tax invoice 22897 from Elite Collision (GST not included). Mr Williams said he felt that was a fair amount and there was no account taken of the cost for a new bumper bar. Holiday pay was not paid to Mr Kirkwood on the basis that he was an independent contractor.

[6] Mr Kirkwood claims the followings:

- (a) Reimbursement of \$350 gross being full payment of final pay; and
- (b) Holiday pay.

[7] I record that earlier investigation meeting dates were adjourned because Mr Kirkwood was out of the country for two of the dates and Mr Williams had difficulties with a third date.

### **Issues**

[8] The Authority has identified for Mr Kirkwood and Mr Williams the following issues for determination:

- (a) Who is the correct respondent?

- (b) Was Mr Kirkwood an employee or an independent contractor?
- (c) If Mr Kirkwood was an employee, was Mat Trix entitled to deduct the sum of \$350 gross from his final pay?
- (d) Finally, if Mr Kirkwood is an employee, is he entitled to holiday pay?

**Who is the correct respondent?**

[9] The statement of problem identified Mr Williams as the respondent. Mat Trix was added as a second respondent after a telephone conference with the Authority and parties. At the start of the investigation meeting it was agreed by Mr Kirkwood and Mr Williams that the name of the respondent could be amended to Mat Trix. There is no claim therefore against Mr Williams.

**Was Mr Kirkwood an employee or an independent contractor?**

[10] Mr Kirkwood worked for Mat Trix for a period of five weeks. There was no written agreement governing the relationship.

[11] When the Authority considers whether an individual is an employee or an independent contractor it is required to determine the real nature of the relationship rather than what one party or both parties decide the relationship is. This requires that it consider all relevant matters in the relationship. I will proceed to do that.

[12] The evidence did not satisfy me that there was any discussion about the basis on which Mr Kirkwood would work for Mat Trix before he commenced in that relationship on 28 June 2013. Mr Kirkwood had been an employee of the recruiting company immediately prior to working for Mat Trix and I am not satisfied that there was any discussion that that would change.

[13] I find that there was a degree of control and supervision exercised by Mat Trix over Mr Kirkwood's daily work.

[14] Mr Williams would pick Mr Kirkwood up for work each morning and drop him back to where he was living after work had finished. Mr Williams would indicate to Mr Kirkwood the type of work he wanted him to undertake each day and I am satisfied there was a measure of supervision of the work Mr Kirkwood undertook.

The work that Mr Kirkwood performed was an integral part I find of the business that Mat Trix carried out.

[15] The one feature that may indicate a contract for service rather than employment is the way Mr Kirkwood was paid. Withholding tax was paid. Mr Kirkwood confirmed that he was not provided with a pay slip and was not aware how his income was taxed. Even if he had been provided with a pay slip I do not consider he would necessarily have understood the meaning of withholding tax. Mr Kirkwood explained he was unfamiliar with the New Zealand tax system. I asked Mr Kirkwood if he was registered for GST. He was not registered and was unfamiliar with GST.

[16] In some cases the payment of withholding tax may indicate that the relationship weighed with other factors is not that of employment. I do not find that the method of taxation is a persuasive factor in this case that the relationship was not one of employment.

[17] Finally, the Authority has considered whether or not Mr Kirkwood in performing services for Mat Trix was so doing as a person in business on his own account. Mr Kirkwood was paid an hourly rate. His hours of work were of a regular nature and there was no real ability for him to increase his financial return from the job. He did not provide any tools and for transport relied on Mr Williams. I am not satisfied that Mr Kirkwood performed services for Mat Trix as a person in business on his own account.

[18] I find that the above factors when weighed and considered support that the relationship between Mr Kirkwood and Mat Trix was that of employment. Mr Kirkwood was an employee.

**Was Mat Trix entitled to deduct from his final pay the sum of \$350.00?**

[19] Mr Williams felt aggrieved at what he saw as Mr Kirkwood damaging the Ute and then reneging on a promise to pay. Mr Kirkwood is quite adamant though that he never in writing or verbally authorised money to be deducted from his final pay for damage. That is the important issue for my purposes. I do not find that Mr Kirkwood agreed verbally or in writing to any deduction of money from his final pay.

[20] The law in respect of deductions is quite clear and that is what the Authority must apply. The Wages Protection Act 1983 provides in ss.4 and 5 that there is to be no deduction from wages except in accordance with the Act. When wages become payable to a worker the entire amount must be paid without deduction. If deductions are to be made they have to be made with the written consent of a worker, or on the workers written request.

[21] It is clear in this case that there was no written consent to the deduction that was made from Mr Kirkwood's final pay. There have been some cases where an employer has attempted to argue, as Mat Trix does, an entitlement to set off money claimed to be owed by an employee against wages. The Court has held in such cases that s.4 precludes the application of any set-off and such deductions are in breach of the Wages Protection Act 1983.

[22] Mr Kirkwood is entitled to be reimbursed for the amount deducted from his final pay in the sum of \$350.00 gross.

[23] I order Mat Trix Paving Limited to pay to Rory Kirkwood the sum of \$350.00 gross being an amount deducted from his final pay in breach of the Wages Protection Act 1983.

#### *Holiday pay*

[24] Mr Kirkwood accepted that the accountant's figures provided to the Authority and to Mr Kirkwood on 8 November 2013 correctly set out the gross payments made to him and the amount of holiday pay calculated as 8% of gross payments. I find that Mr Kirkwood is entitled to holiday pay in the sum of \$297.95 gross.

[25] I order Mat Trix Paving Limited to pay to Rory Kirkwood the sum of \$297.95 gross being holiday pay.

#### **Costs**

[26] I advised Mr Kirkwood and Mr Williams there may be an issue depending on my findings as to Mr Kirkwood's entitlement to reimbursement of his filing fee. As Mr Kirkwood has been successful I find that he is entitled to that reimbursement.

[27] I order Mat Trix Paving Limited to pay to Rory Kirkwood the sum of \$71.56 being reimbursement of his filing fee.

Helen Doyle

Member of the Employment Relations Authority