

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 88
3235599

BETWEEN ROSS LAMBOURN
 Applicant

AND TEVITA FIFITA
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Respondent in person

Investigation Meeting: 15 February 2024

Determination: 16 February 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ross Lambourn applied to the Authority for findings and orders in relation to the end of his employment in January 2023. He identified his employer as Tevita Fifita. He said Mr Fifita dismissed him after he pressed for payment of wages due to him. Mr Lambourn said late payment of wages was a problem he experienced during the previous 13 weeks he had worked for Mr Fifita.

[2] Mr Fifita did not lodge a statement in reply to Mr Lambourn's application to the Authority. He did participate in the Authority process by attending mediation held at the direction of the Authority, attending a subsequent case management conference and attending the Authority investigation meeting. Mr Fifita denied Mr Lambourn was dismissed for raising concerns about his pay. Mr Fifita said the job ended because the company on the site where Mr Lambourn was working on a labour-hire basis no longer needed him.

The Authority's investigation

[3] At the investigation meeting, Mr Lambourn, Mr Fifita and Mr Lambourn's wife Wendy Lambourn each took an affirmation and answered questions from me. Mr Fifita was assisted by an interpreter of Tongan provided by the Authority.

[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.

The issues

[5] The issues requiring determination were:

- (a) Who employed Mr Lambourn – was it Mr Fifita or some other entity?
- (b) Did the employer (whoever this was found to be) unjustifiably disadvantage Mr Lambourn by not paying wages due to him in full and on time?
- (c) Did the employer (whoever this was found to be) unjustifiably dismiss Ross Lambourn?
- (d) If the employer's actions were not justified (in disadvantaging and/or dismissing Mr Lambourn), what remedies should be awarded, considering:
 - Lost wages; and
 - Compensation under s123(1)(c)(i) of the Act?
- (e) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Lambourn that contributed to the situation giving rise to his grievance?
- (f) Is Mr Lambourn also owed arrears of wages and holiday pay?
- (g) Should either party contribute to the costs of representation of the other party?

The employment relationship and identity of the employer

[6] In a letter dated 9 February 2023 and raising a personal grievance on Mr Lambourn's behalf, an advocate acting for him at that time described Mr Lambourn as having been employed as a builder's labourer since 25 October 2022 by a company called Keep NZ Beautiful Construction Limited (KNZBCL). The company was

removed from the Companies Office register on 23 February 2023. Mr Fifita was a director and sole shareholder of the company at that time.

[7] The evidence in the Authority investigation meeting, from Mr Lambourn and Mr Fifita, revealed the employment relationship was not that straight forward.

[8] In October 2022 Mr Lambourn answered an advertisement Mr Fifita had posted on Facebook seeking labourers. Mr Fifita had a contract with a construction company to provide labour for a fit-out project at a South Auckland manufacturing plant. Mr Fifita and some carpenters employed by him finished their work on the site within a week but the construction company had an ongoing need for a labourer. Mr Lambourn stayed on in that role.

[9] Mr Fifita provided no written employment agreement for Mr Lambourn's work. He said he told Mr Lambourn that the work was "part-time" and not permanent. There was no documentation to show the basis on which ongoing work could be provided or how it might end.

[10] In the investigation meeting Mr Fifita said he had arranged the contract to provide labour through KNZBCL. There was, however, no evidence confirming Mr Lambourn was ever told at the beginning of his employment about the identity of the company or any intention that the employment relationship was to be with the company rather than with Mr Fifita. The only document bearing the company name were two "wage receipts" given to him in January 2023 when he asked for a payslip.

[11] Mr Lambourn's wages were paid by direct credit to his bank account. All but one of the 13 payments made were labelled as "MR TEVITA FIFITA wages Dave". Mr Fifita uses the name Dave. The other payment was labelled just "transfer wages".

[12] Mr Fifita said he made those payments from his personal bank account. He said he paid Mr Lambourn's wages from that account because the construction company made its payments for Mr Lambourn's work directly into that account. Mr Fifita said he had ceased using a bank account in the company's name sometime earlier when he changed banks.

[13] Against that background, Mr Lambourn understood his employment relationship was with Mr Fifita. Even if Mr Fifita had intended KNZBCL to be the

employer, the existence of that company was not adequately disclosed to Mr Lambourn at the outset of the employment. As a result, the company was an undisclosed principal and Mr Lambourn was able to elect to pursue Mr Fifita as the employer.¹

[14] The effect of this conclusion is that Mr Lambourn was entitled to name Mr Fifita as his employer and to seek remedies against him, if his personal grievance and wage claims were established.

Late payment of wages

[15] In the weeks after he began work from October 2022 Mr Lambourn became concerned at shortfalls in the amounts he received as wages. On 17 November 2022, for example, Mr Lambourn was paid \$850. Based on the 45 hours recorded on his timesheet with the construction company, after allowing for the PAYE tax deduction under the M code, he could have expected to receive \$905.31.

[16] On 18 January Mr Lambourn was paid \$420. Based on the 45 hours he had worked in the previous week he, again, should have been paid \$905.31.

[17] During the investigation meeting the value of the shortfalls over 13 weeks was calculated as totalling \$818.36. This total was reached through a line-by-line analysis of payments recorded in Mr Lambourn's bank statements, information in timesheets available for ten of the 13 weeks he worked and uncontested oral evidence from him about his hours of work in the other three weeks. It showed Mr Lambourn was short paid wages in eight weeks and overpaid in three.

[18] Mr Lambourn provided 'screen shots' of messages he said were exchanged by text with Mr Fifita around 19 and 21 January 2023 over the issue. Mr Fifita denied sending the text messages seen in the record provided by Mr Lambourn. A message dated 19 January and identified as being from Mr Fifita says: "I'm waiting for them to send me your another 2 weeks (sic), so I can pay straight away". In messages recorded as being exchanged on 21 January, Mr Lambourn complained: "I can't pay my rent as you won't pay me. I will need to get a loan for rent, food and gas for work". A reply, also identified as being from Mr Fifita says: "I told you, I can pay you next week, all your money".

¹ *Cuttance (t/a Olympus Fitness Centres) v Purkiss* [1994] 2 ERNZ 321 at 332-333 and 338.

The end of the employment – an unjustified dismissal

[19] Mr Lambourn said he made inquiries to an MBIE help line about what he could do about his pay problems. Mr Lambourn said he subsequently received a phone call from Mr Fifita who told him that his employment was ended because he had “rung MBIE on me” and he was no longer needed for work at the construction company’s work site.

[20] Mr Fifita denied Mr Lambourn’s account. He said the site manager had called him and said the job was finished. He said he thought he had then rung Mr Lambourn and told him. He denied making any reference to Mr Lambourn’s concerns about his wages.

[21] There was no other evidence to corroborate either man’s account of their discussion, which occurred either on Friday 20 January or Monday 23 January 2023.

[22] However, even if Mr Lambourn was not dismissed in the way he claimed, the evidence showed that his employment was terminated in an unjustified way.

[23] Mr Fifita had not met the legal requirement to provide a written employment agreement. The terms of his employment of Mr Lambourn had to be inferred from the evidence about how the employment worked in practice. The pattern of work established an ongoing employment relationship, subject to availability of work at the client workplace as notified on a week-by-week basis. The parties had also agreed that Mr Lambourn would be paid on a weekly basis, based on timesheets signed off by a supervisor of the construction company at the work site.

[24] While it was clear that, as Mr Fifita said he had explained to Mr Lambourn at the outset, the work was “not permanent”, no terms were agreed about how the employment would come to an end, even if it was on a casual or fixed term basis related to the length of the project. In those circumstances, Mr Lambourn was entitled to receive at least reasonable notice and to be consulted about that employment coming to an end and whether there might be alternative work elsewhere.

[25] Because no such notice or consultation was provided, Mr Lambourn had established a personal grievance for unjustified dismissal. A fair and reasonable employer could not have ended Mr Lambourn’s employment in the way that Mr Fifita did. Mr Lambourn had also established that he was unjustifiably disadvantaged by

being short paid during his employment for amounts about which there was no contest he was owed and entitled to be paid in full and on time.

Remedies

Lost wages

[26] The remedy of lost wages needs to take account of the prospect that Mr Lambourn's employment may not have continued for much longer, even if Mr Fifita had followed a fair process.

[27] Mr Lambourn said he had subsequently contacted the client's site supervisor who told him that there was ongoing work that he could have done. This was at odds with what Mr Fifita said he was told by the site supervisor about a labourer no longer being needed. There was no corroboration of either account.

[28] Mr Lambourn said he had begun looking for alternative work immediately after Mr Fifita dismissed him. It was around two months before he got a new job.

[29] In those circumstances, and allowing for the contingency that work at the site may have ended and the employment could have ended through a fair process, an appropriate award of lost wages was four weeks. This includes allowing for notice of one week, which was a reasonable period giving the weekly nature of the work and pay arrangement.

[30] Accordingly, Mr Fifita must pay Mr Lambourn the sum of \$4,500 gross as lost wages. This is based on the wages Mr Lambourn would have received, at \$25 an hour, for a 45-hour week at that time.

Compensation for humiliation, loss of dignity and injury to feelings

[31] Mr Lambourn's evidence, confirmed by the evidence of Wendy Lambourn, also established that he was distressed by the shortfall in his pay during his employment and the abrupt, unexpected termination of his employment. He experienced sleeplessness and anxiety over meeting commitments to rent and other household and living expenses, both during the employment and as a result of his dismissal.

[32] Considering that evidence, and the range of awards in similar cases, \$4,000 was an appropriate amount to order Mr Fifita to pay for the humiliation, loss of dignity and

injury to the feelings of Mr Lambourn resulting from the failures to treat him fairly during and at the end of his employment.

Any reduction for contribution

[33] No reduction of remedies was required for any blameworthy conduct by Mr Lambourn that might have contributed to the situation giving rise to his grievance. He was not responsible for Mr Fifita's failure to properly document the nature of the employment relationship or to pay him correctly throughout the employment. And, if the dismissal was triggered by making inquiries about how to deal with his pay problem, this was not inappropriate conduct by Mr Lambourn.²

Arrears of wages and holiday pay due

[34] As identified earlier in this determination, Mr Lambourn was short paid the sum of \$818.36 during the 13 weeks of his employment.

[35] In his evidence Mr Fifita also confirmed Mr Lambourn was not paid any holiday pay. Because there was no written employment agreement, there was no agreed term that Mr Lambourn's hourly rate incorporated an amount for his holiday pay entitlement.³ Mr Lambourn was, therefore, also entitled to an order for payment of holiday pay at the rate of 8 per cent on his gross earnings. This was an amount that should have been paid to him at the end of his employment.

[36] Calculated from the available timesheets (for 10 of the 13 weeks) and from Mr Lambourn's evidence about his work on the other three weeks, and based on his \$25 hourly rate, his gross earnings were as follows:

Dates	Total hours	Gross due
w/e 30 October 2022	26	\$650.00
w/e 6 November 2022	46	\$1,150.00
w/e 13 November 2022	45	\$1,125.00
w/e 20 November 2022	46	\$1,150.00
w/e 27 November 2022	45.25	\$1,131.25
w/e 4 December 2022	46	\$1,150.00
w/e 11 December 2022	41	\$1,025.00
w/e 18 December 2022	45	\$1,125.00
w/e 25 December 2022	45	\$1,125.00
w/e 1 January 2023	22.5	\$562.50

² Employment Relations Act 2000, s 124.

³ Holidays Act 2003, s 28.

w/e 6 January 2023	22.5	\$562.50
w/e 15 January 2023	45	\$1,125.00
w/e 22 January 2023	45	\$1,125.00
Total	520.25	\$13,006.25
x 8 per cent		\$1,040.50

Orders

[37] For the reasons given in this determination, Mr Fifita must pay the following sums to Mr Lambourn within 28 days of the date of this determination:

- (i) \$4,500 under s 123(1)(b) of the Act;
- (ii) \$4,000 as compensation under s 123(1)(c)(i) of the Act;
- (iii) \$818.36 as arrears of wages;
- (iv) \$1,040.50 as holiday pay; and
- (v) \$71.55 as reimbursement of the fee paid to lodge the application in the Authority.

Costs

[38] Mr Lambourn has confirmed he incurred no costs of representation so there is no award for costs. Reimbursement of the expense of the Authority fee has been ordered.

Robin Arthur
Member of the Employment Relations Authority