

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 140/08  
5101259

BETWEEN                      JOHN ANDREW LAWRENCE  
Applicant

AND                              JON BEGG  
First Respondent

AND                              HABITAT CARPENTRY  
LIMITED  
Second Respondent

Member of Authority:      Robin Arthur

Representatives:            Applicant in person  
                                      No appearance for Respondents

Investigation Meeting:    14 April 2008 at Auckland

Determination:              15 April 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant seeks an order to recover wages of \$2911.55, interest on the amount claimed, and reimbursement of the \$70 fee for lodging his application in the Authority.

[2]     The First Respondent (“Mr Begg”), in a statement in reply, alleges that the Applicant has failed to honour a “verbal agreement” to pay for the cost of a car damaged in an accident while being driven by the Applicant. Although not expressly stated, the inference is that any wages owed to the Applicant have not been paid because Mr Begg considers that the sum should be kept to offset those costs.

[3] The matter was referred to mediation in October 2007. Mediation occurred in February 2008 but the problem was not resolved. The Applicant asked the Authority to proceed to investigate his claim.

[4] On its own motion the Authority joined the Second Respondent, a limited liability company of which Mr Begg is the sole director, as a party. Both respondents were advised of the joinder by Minute of 12 March 2008 which was sent to the parties with a Notice of Investigation Meeting issued that day.

### **The investigation meeting**

[5] Mr Begg did not attend the investigation meeting at the notified time. No other representative appeared for the Second Respondent (“the Company”).

[6] A Support Officer of the Authority contacted Mr Begg by telephone. He denied receiving notice of the investigation meeting. He said he was working on Waiheke Island and could not attend the meeting but wanted to come another day.

[7] Courier post records on the Authority’s file confirm that the Notice of Investigation Meeting and the Authority’s Minute of 12 March were delivered to a post office box given as the address for service by Mr Begg in his statement in reply and to a street address given as the registered office and address for service of the Company on the Companies Office register.

[8] The Employment Relations Act 2000 (“the Act”) Schedule 2 clause 12 allows the Authority to proceed where a party fails, without good cause shown, to attend or be represented. The Notice of Investigation Meeting states that, where a respondent does not attend an investigation meeting, the Authority may issue a determination in favour of the Applicant.

[9] I am satisfied that Mr Begg and the Company were sent notice of the Authority’s investigation. Both parties had the opportunity to participate. No good cause for having failed to do so has been shown.

[10] I have proceeded to investigate and determine this matter. In doing so I have relied on the Applicant's statement of problem, a witness statement he lodged in compliance with a timetable order, Mr Begg's statement in reply, the Applicant's sworn and unchallenged evidence at the investigation meeting, and copies of invoices and bank statements provided by the Applicant.

[11] The issues for investigation were:

- (i) who was the employer; and
- (ii) were wages owed to the Applicant; and
- (iii) was the employer entitled to withhold those wages from the Applicant to offset costs of damage to a vehicle; and
- (iv) was there any enforceable agreement for the Applicant to pay the Respondent some or all of the cost of the vehicle damage?

### **The employment relationship**

[12] The Applicant began work in April 2007. He had earlier met with Mr Begg. They agreed he would start on an hourly rate of \$25 which had increased to \$28 an hour by August 2007.

[13] There was no written employment agreement. The Applicant and Mr Begg agreed that the Applicant would be paid on submission of a fortnightly invoice. Withholding tax would be deducted.

[14] The Applicant says that he regarded himself as working for Mr Begg but recalls Mr Begg talking about owning a business with "three or four other guys working for him".

[15] The Applicant produced a copy of Mr Begg's business card that he was given on first meeting Mr Begg. The card includes the words "Habitat Carpentry" without referring to the limited liability company.

[16] However the Applicant was provided with a template for submitting invoices some time after he started work. This identifies "Habitat Carpentry Limited" as the entity to which invoices for hours worked was addressed.

[17] It is not appropriate to fix Mr Begg with personal liability for any wages owed as an ‘undisclosed principal’ because the Applicant was aware of the existence of the Company. I am satisfied on the basis of the information available to me that it is more likely than not that the Company was intended and understood to be the party that was employing the Applicant.

[18] I am also satisfied that the Applicant was an employee rather than an independent contractor. His work was solely for and directed by the Company in the period of employment. Although the Applicant nominally “invoiced” for his hours, this was an arrangement instigated by the employer. The term “invoice” is, in this case, a misnomer as the document submitted was really a timesheet.

**Were wages owed?**

[19] On 22 August 2008 the Applicant gave notice of resignation and agreed with Mr Begg that he would finish work on 31 August 2008. On 2 September 2008 he submitted an “invoice” for wages and expenses totalling \$2911.55. The invoice set out details of 99.5 hours worked in the fortnight between 20 and 31 August 2008. The invoice included amounts to reimburse ferry tickets to and from Waiheke Island where the building work on which the Applicant was employed was being done. The Company has not paid the invoice.

[20] Mr Begg’s statement in reply did not dispute wages were owed.

[21] I am satisfied that the Company owes the Applicant the sum of \$2911.55 in wages and expenses.

**Is the Company entitled to withhold wages for the accident costs?**

[22] While working on Waiheke Island the Applicant and other employees of the Company used the car of a co-worker for tasks such as collecting materials from a local hardware supplier.

[23] While driving this car on a trip to the hardware store on 23 August 2008 the Applicant collided with another car. He pulled out from a stop sign without noticing an approaching car. He was subsequently charged with careless driving and fined.

[24] The Applicant understands that the car he was driving had a value of around \$5000 and its owner had only third party insurance for the vehicle.

[25] Mr Begg, by his statement in reply, suggests that the Applicant had not sought permission to use the car and is liable to pay the worker whose car was damaged.

[26] I do not accept that argument. The vehicle was clearly used for work purposes. The Applicant was driving it during working hours on a work task.

[27] If the Applicant were directly liable to the owner of the car, that would be a civil matter between the two workers and not involve the employer. It is not a matter on which Mr Begg or the Company is entitled intervene by withholding wages owed to the Applicant.

[28] If the Company had an arrangement with the car owner for the vehicle to be used for work purposes, then it may be vicariously liable to the car owner (also, in this case, an employee) for the damage caused by another employee (here the Applicant). If as a result of that vicarious liability, the Company had paid for the damage or replacement of the vehicle, there is a theoretical right to sue the Applicant for the costs to the Company of his negligent act: *Lister v Romford Ice & Cold Storage Co Ltd* [1957] 1 All ER 123 (HL) and *Davidson v Christchurch City Council* [1995] 1 ERNZ 172 at 206 (EC, Goddard CJ).

[29] However the practical application in New Zealand of the common law principle of employee indemnification of his or her employer for negligent or unlawful acts has for some long time been in doubt, both because of (i) the longstanding practice of the insurance industry not to exercise of subrogation rights under cover provided to an employer to pursue recovery from an employee<sup>1</sup> and (ii) for the reasons discussed by the courts in *Miller v Smith Crane & Construction*

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<sup>1</sup> See *The Law of Torts in New Zealand* (Todd, 4<sup>th</sup> edition, 2005) at 23.1 fn 8.

*Limited* (unreported, EC Christchurch, C36/95, 7 February 1996, Palmer J) at and *Everist v McEvedy* [1996] 3 NZLR 348 (HC, Tipping J) at 359-362.

[30] In the present case to allow the Company to require the Applicant to pay for costs of damage to the vehicle – which it appears to have neither owned nor had insured – would effectively turn the Applicant into the Company’s insurer.

[31] Whatever policy reasons there may be against such an approach, there is a more immediate barrier. The action of the Company in withholding the Applicant’s wages is in breach of section 4 of the Wages Protection Act 1983. The position may have been different if the Applicant has a written employment agreement with a clause allowing for deduction of sums from his wages to compensate for the effects of carelessness on his part: see *Mazengarb’s Employment Law* page 2,405,101 at para 1026A. No such written agreement or consent exists.

[32] The Company is not entitled to keep the Applicant’s wages to offset its alleged costs for damage to the vehicle. The wages owed are to be paid without delay and by no later than 14 days from the date of this determination.

[33] Whether the Company might have succeeded in a separate action against the Applicant to recover costs incurred for damage or replacement of the vehicle of another worker cannot be determined on the basis of the information available. Such a claim would face a number of hurdles.

[34] Firstly, evidence would be required of the Company having paid for that damage and whether there was any liability beyond the cost of the excess paid for the third party cover, assuming that the insurer of the vehicle used by the Applicant paid for damage to the other car involved in the collision.

[35] Secondly, there is the long-standing doubt referred to above that the principle in the *Lister* case would apply to the circumstances of the present case in the absence of an express contractual term.

[36] Because Mr Begg and the Company did not attend the investigation meeting, what amounted to a counterclaim or argument for set off of the Applicant's wage claim could not be investigated and determined. Rather it is dismissed.

**Any agreement to pay for damage?**

[37] I do however find that there was no enforceable verbal agreement that the Applicant would pay at least \$1300 towards the costs of the damage to the co-worker's vehicle.

[38] The Applicant accepts that he did offer to pay \$1300 towards those costs on 31 August 2007. However Mr Begg did not accept that was adequate and insisted that the Applicant also "pay the rest". Having failed to accept that offer, it lapsed and the Applicant is not presently liable for that or any greater amount by virtue of the alleged verbal agreement.

[39] The Applicant says he did offer to pay some money at the time because he felt some responsibility to the other worker whose car was damaged in the accident. However he disputes that his former employer should now be entitled to get him to pay for what the Applicant admits was his error. He says that if he mistakenly cut a piece of wood too short and it was wasted, he would not be required to pay his employer for the cost of that error. Neither, he says, should he have to pay for the cost of his error made while driving on a work task.

[40] While such inadvertent or careless acts might bring into question the continuation of such a worker's employment, I accept the Applicant's argument on that point as being correct in the present circumstances.

**Interest and lodgement fee**

[41] The Applicant seeks interest on the wages owed to him. Exercising the discretion under clause 11 of Schedule 2 of the Act to award interest, I think it fit to order interest at today's 90-day bill rate plus two per cent, being 10.91 per cent, because the Company – in breach of the Wages Protection Act 1983 – has wrongfully denied to the Applicant the use and benefit of the remuneration properly owed to him.

[42] On the sum of \$2911.55, interest of \$195.81 is awarded for the period of 225 days from 2 September 2007 to 14 April 2008.

[43] The Applicant is also entitled to reimbursement of the \$70 Authority lodgement fee.

### **Summary of orders**

[44] Within 14 days of the date of this determination, the Company is to pay to the Applicant the sum of \$3177.36 comprising the following amounts:

- (i) \$2911.55 in outstanding remuneration; and
- (ii) \$195.81 in interest on this amount; and
- (iii) \$70.00 in reimbursement of his lodgement fee.

Robin Arthur  
Member of the Employment Relations Authority