IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 10
5374627

	BETWEEN	PAUL MAHONY Applicant
	A N D	INDUSTRY TRADE & TRAINING OPTIONS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Alan Taylor, Advocate for Applicant No appearance for the Respondent
Investigation Meeting:	15 January 2013 at Christchurch
Submissions Received:	At the investigation
Date of Determination:	16 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Paul Mahony, has a multiplicity of claims. The primary claim is that he is owed money due to unpaid wages, outstanding holiday pay, and a failure to reimburse expenses. He also seeks interest on these amounts.

[2] Mr Mahony also claims the failure to pay monies owing constitutes a personal grievance for unjustified disadvantage. Finally he seeks penalties regarding the payment failure which, he contends, constitutes a breach of his employment agreement and the manner in which the respondent replied (or, more correctly, failed to reply) to his claims.

[3] The response is confused but it appears the respondent, Industry Trade & Training Options Limited (ITTOL), contends it did not employ Mr Mahony and, if it did, he never performed the work payment is being claimed for.

Non appearance on behalf of the respondent

[4] ITTOL was not represented at the investigation meeting. Its absence was neither notified nor explained.

[5] I am satisfied it was aware of the investigation meeting. The sole director and shareholder, Ms Grace Ginnane, participated in two telephone conferences where administrative issues were discussed. The investigation meeting was scheduled during the second. Ms Ginnane also accepted receipt of the notice of hearing and she e-mailed information she wished me to consider the day before (14 January 2013).

[6] Given she neither advised nor explained the absence I know of no reason why I should not proceed. I chose to do so.

Background

[7] ITTOL provided a range of hydroponic products to, and conducted training courses for, the agricultural sector. It was jointly owned and directed by two individuals; Mesdames Grace Ginnane and Heather Morine. Their particular interest was the provision of training programmes, while Mr Mahony was engaged to sell the hydroponic supplies.

[8] Mr Mahony came to ITTOL's notice as he and Ms Morine had worked together for a couple of previous employers.

[9] It would appear Mesdames Ginnane and Morine had a 'falling out' and, on 28 October 2011, Ms Morine resigned her directorship. Mr Mahony, who had become disillusioned with the obvious tension between the two, was seeking alternate employment. Having found it, he resigned a week later (4 November 2011).

[10] He says he was not paid for his last week of work, nor did he receive his holiday pay or a final reimbursement of expenses. He raised his claim and sought time and wage records so as to quantify it but the records were never provided and settlement was not achieved.

[11] Ms Ginnane ceased trading under the ITTOL brand. ITTOL was struck from the Companies Register but reinstated after an application Mr Mahony made to enable his pursuit of this claim. In the interim, and soon after the departure of both Ms Morine and Mr Mahony, Ms Ginnane registered a new company whose purpose was the provision of training programmes to the agricultural industry. That occurred on 16 November 2011.

Determination

The wage claim

[12] The claim comprises the following elements:

a. The final week's salary ($1,250 gross);

b. Outstanding holiday pay ($980 gross); and

c. $62.50, being the outstanding amount from an expense claim of $962.50.

[13] The claims quantification was explained in some detail and was not questioned. When I add ITTOL's failure to provide time and wage records as requested, along with the provisions of s.132 of the Employment Relations Act 2000, I accept Mr Mahony's calculations are accurate.

[14] The defence, which does not query the amount claimed, is ITTOL did not employ Mr Mahony and, if it did, he never performed the work for which payment is being claimed.

[15] Mr Mahony was engaged by Ms Morine. That is confirmed in writing. She was, at the time, both a director and shareholder in ITTOL - 50% in both cases. To suggest she did not have authority to employ, or Mr Mahony could not consider she had ostensible authority to do so, is, given the evidence, nonsense.

[16] Even if that were not the case, and considering Ms Ginnane's protestations to the contrary (enunciated through both documentation and comments made during the telephone conferences), the uncontested evidence, which I accept, is Ms Morine had concerns about a restraint she had with her and Mr Mahony's previous employer. This, despite her signing Mr Mahony's letter of offer, led to Mr Mahony and

Ms Ginnane discussing, and ultimately agreeing, the terms of employment. I conclude Ms Ginnane knew what was occurring and was a willing participant.

[17] I also reject the suggestion Mr Mahony did not work in his last week of employ. His uncontested evidence is he did. He says he continued in ITTOL's employ after discussing Ms Morine's resignation as a director with Ms Ginnane, and being instructed to *carry on*. I accept that.

[18] There is no denial in respect to the claim for holiday pay or expenses. In these circumstances I accept this claim in its entirety.

[19] Mr Mahony seeks interest on the outstanding amount. Interest is to reimburse someone for use, by others, of money that is theirs. There can also be no doubt ITTOL has, by failing to make payments properly due, continued to have use of money rightfully belonging to Mr Mahony. This is, I conclude, a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[20] The rate to be applied is prescribed in the Judicature (Prescribed Rate of Interest) Order 2011 (2011/177). It is currently 5%. Payment was owing with effect from Mr Mahony's cessation on 4 November 2011. The interest payable as of the date of this determination is therefore $137.86. That amount is payable and will increase by $0.31 with each calendar day that passes between the date of this determination and payment.

The grievance claim

[21] The grievance claim seeks compensation for hurt resulting from the failure to pay monies owing. I do not consider it sustainable.

[22] Section 103(3) of the Act states:

> *... unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.*

[23] The payment of wages is, I conclude, an issue about the application and operation of an employment agreement. Section 103(3) precludes this claim.

The penalty claim

[24] Mr Mahony seeks penalties given the payment failure which, he contends, constitutes a breach of his employment agreement and the manner in which the respondent replied (or, more correctly, failed to reply) to his claims.

[25] There was also a suggestion Mr Mahony would seek a penalty against Ms Ginnane personally but this was not pursued and will be considered no further.

[26] I accept ITTOL failed to pay monies owing and there is no explanation or justification for the failure. ITTOL must therefore be in breach of the employment agreement.

[27] There is also no dispute ITTOL did not provide time and wage records despite those being requested. This means it must be in breach of s.130(3) of the Act and that compromised Mr Mahony's ability to quantify his claim. The breach is clear and, given ITTOL's responses and behaviour during the telephone conferences, I have no doubt deliberate. Ms Ginnane went so far as to claim, allegedly on professional advice from her accountant, there was no requirement to answer or address the claim. That is garbage and if it accurately reflects the advice received, I can only suggest the Institute of Chartered Accountants develop a training programme with alacrity.

[28] A clear and unexplained breach does, in my view, warrant a penalty. Having considered the evidence I conclude $1,500 to be appropriate. Normally a penalty is payable to the Crown but section 136(2) allows payment to an injured party. Having considered the circumstances, and the fact the penalty is not for a technical breach but one which directly affected the applicant, I consider that appropriate and order the penalty be paid to Mr Mahony.

Costs

[29] Mr Mahony has been successful. He is therefore entitled to a contribution towards the costs he incurred in pursuing it. On his behalf Mr Taylor seeks recompense for a day at the normally applied daily tariff (see 30 below), along with reimbursement of the filing fee and the cost of his travel from Hamilton to Christchurch.

[30] When assessing an appropriate contribution toward costs the Authority will normally use a daily tariff approach (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is $3,500 a day and from there adjustment may be made depending on the circumstances.

[31] I conclude Mr Taylor's claim for a day is excessive as the hearing only took half an hour. That said, its brevity can be attributed to ITTOL's absence. Mr Taylor had to prepare for a defended hearing and had that happened the investigation would have taken longer. I also note both conference calls were relatively long and the documentation provided on Mr Mahony's behalf is extensive. In the circumstances I consider a half day appropriate, which sees an award of $1,750.

[32] Mr Taylor also sought the Authority's filing fee of $71.56 and his travel costs. The filing fee is a given. Travel costs are not necessarily so as it is unusual for a Christchurch based employee to instruct a Waikato advocate. That said, I find the rationale it was easier to engage an advocate near to the company, which was Hamilton based, acceptable and will order the payment sought. It is $220.

Conclusion and Orders

[33] For the above reasons I make the following orders.

[34] The respondent, Industry Trade & Training Options Limited is to pay the applicant, Mr Paul Mahony:

a. $2,292.50 gross (Two thousand, two hundred and ninety two dollars and fifty cents) as recompense for unpaid wages, holiday pay and expenses; and

b. a further $137.86 (One hundred and thirty seven dollars and eighty six cents). This will increase by $0.31 (thirty one cents) with each calendar day that passes between 16 January 2013 and the date of payment; and

c. a further $2,041.56 (Two thousand and forty one dollars and fifty six cents) as a contribution toward the costs Mr Mahony incurred in pursing his claim.

d. A penalty of $1,500 (One thousand, five hundred dollars) with payment to be made no later than 4pm on Friday, 1 February 2013.

M B Loftus
Member of the Employment Relations Authority