

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 94  
5634054

BETWEEN SIMON MICKELSON  
Applicant

A N D BOLD, O'NEILL AND ASSOCIATES  
LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person  
Christopher Bold, representative for Respondent

Investigation Meeting: 14 March 2017 at Auckland

Submissions Received: 16, and 27 March 2017 from Applicant  
16 March 2017 from Respondent

Date of Determination: 03 April 2017

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] The Applicant Mr Simon Mickelson, claims that he is owed outstanding wages, outstanding statutory holiday entitlement and unpaid monthly bonuses.

[2] The Respondent Bold, O'Neill and Associates Limited (Bold O'Neill) denies that it owes any money to Mr Mickelson and claims that with effect from 25 January 2016 Mr Mickelson ceased to be an employee of Bold O'Neill and became an independent contractor.

**Issues**

[3] The issues for determination are whether or not Mr Mickelson:

- (a) Ceased to be an employee and became an independent contractor with effect from 25 January 2016;

If Mr Mickelson did not become an independent contractor with effect from 25 January 2016, whether or not he is owed:

- (b) unpaid wages;
- (c) unpaid holiday entitlement and/or statutory holiday entitlement;
- (d) unpaid monthly bonuses.

### **Background Facts**

[4] Bold O'Neill, a company offering an insurance brokerage service, is a small business with three directors, Mr Chris Bold, Mr Eddie O'Neill and Mr Syd Jackson (the Directors).

[5] Mr Mickelson was employed by Bold O'Neill in the position of Telephone Outbound Sales on 14 September 2015. His duties involved contacting potential clients with a view to arranging interviews for the Directors to attend, and other jobs of an administrative nature as required. He initially reported to Mr Bold, and he received training from Mr O'Neill.

[6] Mr Mickelson was provided with an individual employment agreement (the Employment Agreement) which was signed by the parties and included the following clauses:

#### **2.1. Position**

*The employee is being employed as Telephone Outbound Sales.*

#### **3.2 Trial Periods**

*A trial period will apply for a period **NOT EXCEEDING 90 CALENDAR DAYS** employment to assess and confirm suitability for the position. ...*

#### **5.1 Flexible location.**

*The parties agree that the Employee shall perform their duties at **Ellerslie Business Centre, Level 1, 101 Main Highway, Ellerslie Town Centre, Auckland** and at any other reasonable location to which they may be directed from time to time by the employer.*

#### **6.1 Rostered hours with no minimum hours of work to be provided.**

*The parties agree that the Employee's hours of work shall be set by the Employer in advance in accordance with a roster. Unless there are exceptional circumstances, the Employee shall be given at least seven days' notice of a new roster. In setting the roster the Employer shall provide the Employee **two (2)** consecutive days off within a reasonable period.*

**7.1 Hourly rate.**

*The Employee shall be paid according to an hourly rate which shall be \$19.00 per hour. The employees pay should be paid **fortnightly on Friday into a bank account nominated by the Employee.***

**7.2 Bonus at the employers discretion.**

*The parties agree that the employee may, at the employer's sole discretion be paid a bonus **at the end of each calendar month.***

**8.9 Annual Closedown**

*The Employer may closedown all or part of its operation regularly once a year and require the Employee to take leave during the period of the close down, even where this requires the Employee to take leave for which they are not fully reimbursed. The Employer shall provide the Employee with at least 14 days advance notice of the closedown.*

**9.1 Kiwisaver**

...

*From 1 April 2009, employers will contribute a minimum of 3% of the employees' gross salary or wage. Employees are expected to contribute a minimum of 3% of their gross salary or wage. The Employee contribution will be deducted from the Employee's pay. ...*

**12.6 Notice of Termination due to redundancy**

*In the event the Employee's employment is to be terminated by reason of redundancy, the Employee shall be provided with **Seven (7) Days** notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.*

**13.2 General Termination.**

*The Employer may terminate this agreement for cause by providing **Seven (7) days'** notice in writing to the Employee. Likewise the Employee is required to give **Seven (7) days'** notice of resignation. The Employer may at its discretion, pay remuneration in lieu of some or all of this notice period.*

**15.1 Variation of Agreement**

*The parties may vary this agreement, provided that no variation shall be effective or binding on either party unless it is in writing and signed by both parties.*

[7] Mr Mickelson was eligible for a subsidy from WINZ. This was provided to an employer who employed him on the basis of a minimum of 30 hours per week. This subsidy of \$250.00 per week was paid to Bold O'Neill.

[8] Mr Mickelson worked Monday to Friday and was paid for the hours he worked, not for the number of calls or appointments he made with clients for the directors. He was supplied with a database which he used to generate the customer calls, there was no job description or roster provided, the relationship proceeding on a basis of trust.

[9] Mr Mickelson said he worked predominantly from the Bold O'Neill office but was permitted to make some calls from his home. He had a set of keys to the offices. He had contact during the working day with the Directors as they worked at the office, but their attendance was variable due to client interviews which were often conducted away from the office. As the last person in the office, Mr Mickelson said he was responsible for locking it up at the end of the day.

[10] Mr Mickelson's calls were part recorded on the computer system used by Bold O'Neill. However, this had not been in use when he made calls from his home and he kept a manual log of all the calls which he had made.

[11] He sent an email fortnightly to Mr Bold setting out the hours he had worked and received payment by direct bank transfer into his bank account within a few days.

[12] Mr Mickelson confirmed that during the first three months of his employment he had not received a bonus in accordance with clause 7.2 of the Employment Agreement.

[13] Mr Mickelson said no performance concerns had been raised with him during his employment with Bold O'Neill. However Bold O'Neill stated that issues of a performance nature had been raised with Mr Mickelson. In particular there had been discussions regarding the required KPIs of the position not being met, with this matter being discussed with Mr Mickelson over a period of several weeks.

#### *Proposal*

[14] In early December 2015 Mr Bold said the Directors had met and discussed the company's financial position and the future requirements. During that meeting it had been decided that it would not be financially viable to have Mr Mickelson employed on his current basis and therefore it was decided to put a proposal to him regarding future arrangements.

[15] The Agenda for the meeting which is dated 7 December 2015 records the options concerning Mr Mickelson to be considered by the Directors as being: *"Making him a contractor. If he is agreeable we consider Putting him just on commission? Say 10% of API. Give small retainer (\$200pw) and reduce commission to 3.5%."*

[16] The Directors met with Mr Mickelson on 5 January 2016 and proposed that he ceased employment and became a self-employed contractor engaged on a commission only basis. They stated that Mr Mickelson would be paid a commission rate of 3.5% on all applications that went to completion and for which he had achieved the first appointment.

[17] Mr Mickelson said that he understood that the proposal made to him concerned only a change to the bonus scheme, being that he would receive a weekly payment of \$250.00 and an increase in his bonus payment.

*6 January 2016 email*

[18] Following the meeting on 5 January 2016, Mr Mickelson sent an email dated 6 January 2016 to Mr Bold stating:

*Chris, as to the meeting yesterday on how things are proposed to change.*

*The short answer is YES! I will give it a go.*

*To tidy up before amended system starts:*

- 1. At present we are all square for all hours worked (just need to know holidays owing, it can only be a few days),*
- 2. I will work 5th to 15th Jan (9 days) and the present agreement to be paid Monday 18th Jan*
- 3. I will work the week of 18th Jan under present arrangement (may take a day or two to be with boys but will let you know, that is to be paid Monday 25th Jan and all holidays owing etc to be paid also and cleared up.*
- 4. How will holidays be calculated under the proposed new system?*
- 5. How do we account for the 4% of wage you are paying into Kiwisaver as I expect you will want to stop doing this? It is only about \$42 per fortnight but how do we account for it as it is less than I am getting even though it is going straight to Kiwisaver???*
- 6. Due to cashflow issues (as you know I have no cashflow to speak of) I will need to be paid the \$250 weekly on the Saturday following the end of the week, there are no hours etc to calculate anymore so it is just a payment each week. I still have weekly bills to pay.*

*Amended system could then start 25th Jan 2016 (a week prior to your suggestion).*

*We need to have a chat as to whether I form a company and invoice you weekly for the \$250 (would have to add GST if this option). The benefit for you would be no more tax issues as I would be seen as a contractor. Have a good look at this as it totally changes the situation. Any GST in invoices from me is tax neutral to you, ie. it is added to the invoice paid to me and you claim all GST back.*

*I need to talk to a mate of mine how he works things and can't do that until Thursday night so can we talk Friday and get the broad brush strokes of how this will work sorted?*

*Also, can you do a summary of my pay, YTD? Hours, pay, KiwiSaver paid to me and by you, holidays owing etc just so I can get a handle on what I'm giving up and how I will survive before first commission cheque comes through.*

[19] Mr Mickelson said there was no response to his email, nor any meetings between him and Bold O'Neill subsequently, and the proposal discussed on 5 January 2016 was never finalised.

[20] Mr Bold confirmed that the proposed changes to Mr Mickelson's employment arrangements had not been confirmed in writing as Bold O'Neill had considered that the discussions held on 5 January 2016 were sufficient, and therefore with effect from 25 January 2016 Bold O'Neill considered that Mr Mickelson had been working in the capacity of an independent contractor. He confirmed that Bold O'Neill had made no written response to Mr Mickelson's email dated 6 January 2016, nor had he met with Mr Mickelson as had been requested in the email.

*Mr Mickelson's work arrangements after 25 January 2016*

[21] After 25 January 2016 Mr Mickelson had worked the majority of his time at home, recording the calls he had made in a manual log, and coming into the Bold O'Neill office from time to time. He had continued to send Mr Bold emails setting out his hours, submitting these fortnightly during January, February and March 2016.

[22] Bold O'Neill had paid Mr Mickelson \$250.00 per week, although these payments were made at various time intervals rather than on a weekly basis.

[23] The Directors had regarded the emails sent by Mr Mickelson outlining his hours as being for information purposes only. No commission payments had been made to Mr Mickelson as he did not generate sufficient sales income to trigger a bonus.

[24] Mr Mickelson said issues had commenced in February 2016 and the only payment received in respect of the hours he submitted was for the two week period to 25 January 2016 when a total of \$887.42 had been deposited into his bank account on 5 February 2016. Six

weeks following the 5 January 2016 meeting, 38.50 hours of this payment was deducted with only a spreadsheet as the explanation and verbal promises to sort things out.

[25] The only payments Mr Mickelson said he received after 25 January 2016 were \$500 on 26 February 2016, \$250 on 18 March 2016, \$500 on 8 March 2016, \$812.71 on 18 March 2016, \$500 on 21 March 2016, \$500 on 1 April 2016 and a final payment of \$500 on 15 April 2016.

[26] Mr Mickelson said all of these payments were clearly annotated on his bank statement as *Bold, O'Neill and As ref: Wages*, but the payments did not relate to the hours he had submitted. Nor did he receive any PAYE statements that related to the deposits made by Bold O'Neill into his bank account.

[27] Mr Mickelson said because he had become concerned about the situation he checked his KiwiSaver account in early February 2016 and found a shortfall in the employer payment contributions. The KiwiSaver issue was subsequently resolved.

*Email 15 April 2016*

[28] Mr Mickelson sent Bold O'Neill an email dated 15 April 2016 in which he referred to issues with KiwiSaver, PAYE statements and with "*wages/bonus commission*". In the email he stated:

*No wages payment went into my account today? – its been 12 weeks since our meeting on 5th January 2016 – no-one has come back to me since then regarding the bonus commission scheme – what income has Bold Insurance generated from 25 January 2016 to 15th April 2016, paid or owing? This is the period (so far) that relates to the bonus commission payable to me.*

[29] Mr O'Neill replied on 15 April 2016 stating that he, Mr Jackson and Mr Bold were currently reviewing the points raised in his email.

[30] On 12 May 2016 Mr Mickelson again emailed Bold O'Neill stating:

*It will be 4 weeks tomorrow since I've had any communication regarding the email I sent on 15th April 2016. Eddie replied to me saying you were "extremely concerned" and that you were "looking into those issues" but there's been no communication since and certainly no action has been taken by any of you to resolve these outstanding matters. To move things forward, I have contacted the Employment Court ...*

[31] Mr Mickelson says that by 15 April 2016 he had become frustrated with the situation, and because he had no further response after the email from Mr O'Neill dated the same day, 15 April 2016, he had decided to finish the relationship with Bold O'Neill and file a claim with the Employment Relations Authority.

[32] Mr Bold said Mr Mickelson had been expected to attend a meeting with Mr O'Neill during April 2016. However, he had said he was unable to attend and after April 2016 Mr Mickelson had simply ceased to be engaged with Bold O'Neill. As Bold O'Neill considered him to be an independent contractor, they accepted it was his right to terminate his engagement with Bold O'Neill.

### **Determination**

*Was Mr Mickelson an employee or an independent contractor after 25 January 2016?*

[33] Mr Mickelson had been employed by Bold O'Neill in September 2015 and provided with the Employment Agreement.

[34] Whilst I accept that there may have been some concern on the part of Bold O'Neill that Mr Mickelson's performance was not at a satisfactory standard, there was no formal performance management process followed and the employment had been continued following the conclusion of the trial period at the end of 2015.

[35] I also accept that Bold O'Neill had considered its financial position and determined to put a proposal to Mr Mickelson regarding his future employment situation. The outline detail of the proposal was recorded in an Agenda dated 7 December 2015, which clearly states: *"Making him a contractor"* and specifically: *"If he is agreeable"*.

[36] The Directors said that they accordingly met with Mr Mickelson on 5 January 2016 and proposed he ceased being an employee and became a self-employed contractor engaged on a commission-only basis, plus a retainer of \$250.00 per week.

[37] It is also clear from Mr Mickelson's email dated 6 January 2016 addressed to Mr Bold that it had been proposed by Bold O'Neill that the terms under which he was employed by Bold O'Neill were to change during January 2016, and that he (Mr Mickelson) was amenable to the proposal, as evidenced by his statement: *"Chris, as to the meeting yesterday on how things are proposed to change. The short answer is YES! I will give it a go"*.

[38] Notwithstanding Mr Mickelson's acceptance that things were to change, he raised a number of matters requiring Bold O'Neill's response and it is not clear what the terms of the proposal were, and there is a difference in the evidence of the parties on that issue.

[39] There is no dispute between the parties that there was no subsequent confirmation that the Employment Agreement had come to an end in accordance with the requirements set out in either of clauses 12.6, 13.2, or 15.1, nor was there a meeting between Mr Bold and Mr Mickelson as requested by Mr Mickelson in the email dated 6 January 2016 to confirm the details of any subsequent arrangement.

[40] Bold O'Neill's evidence is that after 25 January 2016 it considered Mr Mickelson had accepted the proposed arrangement under which he became an independent contractor and that their relationship thereafter was in accordance with that arrangement. Mr Mickelson's evidence is that with minor changes, e.g. that he worked longer periods from his home, the employment relationship continued as previously.

[41] I accept that Bold O'Neill is a small employer without the resources normally available to a larger employer, however that does not explain why it had not responded to Mr Mickelson's email dated 6 January 2016, met with him as requested in the email, or confirmed any new arrangements in writing.

[42] However in proceeding to determine whether Mr Mickelson was employed by Bold O'Neill as an employee or an independent contractor after 25 January 2016, I apply s.6 of the Employment Relations Act 2000 (the Act) which provides:

*“s.6 Meaning of employee:*

*1. In deciding ... whether a person is employed by another person under a contract of service, the .... Authority-... must determine the real nature of the relationship between them.*

*(3) For the purposes of subsection (2)... or the Authority-*

*(a) must consider any relevant matters, including any matters that indicate the intention of the parties*

*(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[43] In *Bryson v Three Foot Six Limited (No2)*<sup>1</sup> the Supreme Court stated the following:

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<sup>1</sup> [2005] 1 ERNZ 372

*“‘All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.*

#### *Contractual basis*

[44] In *Cunningham v TNT Express Worldwide (NZ) Ltd*<sup>2</sup> the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship.

[45] There was a written and signed Employment Agreement between Bold O’Neill and Mr Mickelson. In order for Mr Mickelson’s employment status to change from employee to an independent contractor, the Employment Agreement dated 14 September 2015 would first need to be terminated in accordance with the terms of that agreement:

- clause 12.6 of the Employment Agreement deals with termination due to redundancy, which Bold O’Neill did not consider;
- clause 13.2 deals with termination for cause, which Bold O’Neill did not suggest, nor did it provide any cause for termination;
- clause 15.1 provides for any variation to the Employment Agreement to be in writing and agreed by the parties, but this did not occur.

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<sup>2</sup> [1993] 1 ERNZ 695

[46] Further following the meeting held with Mr Mickelson on 5 January 2016, there was no confirmation by Bold O'Neill that the employment relationship had ceased and the Employment Agreement was at an end.

[47] I find that as at 25 January 2016 the written Employment Agreement between the parties had not been formally terminated by either party pursuant to either clauses 12.6, 13.2 or 15.1 as required, and there is no final payslip to record the final payment marking the end of the employment relationship.

[48] I therefore need to consider how the relationship between the parties operated in practice after 25 January 2016 examining all relevant matters.

#### *Control and Integration*

[49] During his employment Mr Mickelson was paid based on the hours he worked which were advised to Mr Bold via an email. Following 25 January 2016 Mr Mickelson continued to send the emails, marking these "*For your information*". This indicates that information was their sole purpose which supports Bold O'Neill's contention that the intention of the parties was that Mr Mickelson would cease to be an employee after 25 January 2016 and become an independent contractor.

[50] However, Bold O'Neill had not queried with Mr Mickelson the reason why he was continuing to send it the emails outlining his hours. If it had done so, it is possible that any misunderstanding between them might have been identified and rectified.

[51] Moreover in his email dated 15 April 2016 Mr Mickelson queried the fact that he had received no PAYE statements apart from the two dated 5 February and 18 March 2016. PAYE is only payable by an employer in respect of employees.

[52] Mr Mickelson also queried the fact that he had received no wages payment that day. Employees receive wages, and this also supports Mr Mickelson's contention that he was still in an employment relationship with Bold O'Neill after 25 January 2016.

[53] In that same email Mr Mickelson referred to there having been no confirmation of the proposed bonus commission scheme. Bold O'Neill submit that this is a reference to the proposal that Mr Mickelson become an independent contractor subject to commission rather than a salary, but Mr Mickelson's evidence was that this was a reference to the increased bonus element. As previously observed, there is no written confirmation of the proposal details or a clear offer and acceptance.

[54] Rather than Bold O'Neill acting swiftly to clarify the position, the response email from Mr O'Neill states that the points raised by Mr Mickelson are being reviewed, and by 12 May 2016 when Mr Mickelson emails a second time it is clear that he had received no response to his queries.

[55] Mr Mickelson worked from his home for a greater period of time after 25 January 2016, but he was permitted to, and did, work from home prior to 25 January 2016. Whilst some calls were logged on the Bold O'Neill computer system when he was in the office, he kept a manual record of the calls he had made when working from home. He retained the office keys and occasionally worked from the office. This situation did not appear to alter after 25 January 2016.

[56] Mr Mickelson was provided with a database by Bold O'Neill. Whilst there was training at the outset of the employment, there was little in the way of formal direction on how he performed his duties. This situation did not change after 25 January 2016.

[57] I find that these circumstances are not of themselves determinative of the true nature of the relationship after 25 January 2016 and have to be balanced against considerations of contractual intention between the parties and examination of the question of whether Mr Mickelson was in business on his own account, the fundamental test.

#### *The Fundamental Test*

[58] Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*<sup>3</sup> that: "*Taxation arrangements, both generally and in particular are a relevant consideration.*"

[59] Initially Bold O'Neill deducted PAYE and remitted this to IRD on behalf of Mr Mickelson who received a copy of the PAYE record in lieu of a payslip. After 25 January 2016 Bold O'Neill did not calculate, deduct or pay PAYE on behalf of Mr Mickelson which is consistent with its understanding that with effect from that date Mr Mickelson was a self-employed contractor.

[60] While the actions of Bold O'Neill are consistent with its understanding that Mr Mickelson was a self-employed contractor, the email dated 15 April 2016 from Mr Mickelson to Mr Bold is at variance with that understanding. In the email Mr Mickelson refers to two PAYE statements received on 5 February and 18 March 2016, but states: "*I am still waiting on a further five PAYE statements*".

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<sup>3</sup> [2010] NZEMPC 1

[61] The PAYE statements dated 5 February and 18 March 2016 reference a fortnightly payment and correlate to entries in Mr Mickelson's bank statements as provided referenced: "*BOLD, O'NEILL AND A Ref: Wages*". The fortnightly amounts paid and appear as separate payments to the payments of \$250.00 agreed in essence as a subsistence payment to Mr Mickelson, but which are also identified in Mr Mickelson's bank statement as "*BOLD, O'NEILL AND A Ref: Wages*".

[62] These payments of \$250.00 are themselves inconclusive in nature. They were not agreed as payment to an independent contractor for services rendered, nor do they appear to relate to the actual hours worked. However I consider that a company would not make a payment in the nature of a 'subsistence allowance' payment to an independent contractor, rather such a payment appears to arise as a result of an employment relationship.

[63] Moreover these payments indicate that Mr Mickelson did not accept a degree of financial risk, and the email dated 15 April 2016 indicates that he expected there to be an ongoing entitlement to the employer's contribution to KiwiSaver and wages.

[64] Whilst there are no GST invoices rendered to Bold O'Neill by Mr Michelson, it is not disputed that none were provided and none expected on the basis that his income was below the income level at which payment of GST becomes mandatory.

[65] I accept this to be the case, however I note that there were no invoices for services rendered, and the emails outlining the hours he had worked by Mr Mickelson are consistent with the arrangements during the period prior to 25 January 2016 when Mr Mickelson and Bold O'Neill were clearly in an employment situation. On that basis, I do not find the taxation situation to be determinative.

[66] Significantly, as stated, I find there is no evidence that Mr Mickelson accepted a large degree of financial risk, and after 25 January 2016 he appeared to have an expectation that Bold O'Neill would be paying his PAYE and Kiwisaver contributions.

[67] In summary, I find that there is insufficient evidence to indicate that Mr Mickelson was in business on his own account.

[68] I determine that Mr Mickelson continued to be an employee of Bold O'Neill after 25 January 2016.

*When and how was the Employment Agreement terminated?*

[69] Having determined that Mr Mickelson continued to be an employee of Bold O’Neill after 25 January 2016, I must now consider when and how the employment ended.

[70] As stated, Bold O’Neill did not terminate the Employment Agreement pursuant to clauses 12.6, 13.2 or 15.1. Mr Mickelson summarised the hours worked from 25 January 2016 and submitted time sheets until 17 March 2016. It is clear from his evidence that due to the fact that he was not being paid by Bold O’Neill, he ceased working on or about 15 April 2016. He did not formally inform Bold O’Neill of his decision, but it is in accord with Bold O’Neill’s closing submission dated 16 March 2017: “*So in April 2016 he simply walked away from the situation and left the office on a Friday and we did not see or hear from him again.*”.

[71] I find it was Mr Mickelson who brought his employment to an end on or about 15 April 2016.

*Is Mr Mickelson owed unpaid monies by Bold?**(i) Unpaid wages*

[72] Whilst I have determined that the employment ended on or about 15 April 2016, there are no details of any hours worked by Mr Mickelson after the last email outlining his hours worked provided to Bold O’Neill which itemises the hours worked to Friday 24 March 2016. No time sheets or details have been supplied by Mr Mickelson to substantiate any other claim for hours worked.

[73] Mr Mickelson is entitled to the remuneration as set out in clause 7.1 of the Employment Agreement, namely at the rate of \$19.00 per hour. Mr Mickelson worked Monday to Friday and was paid for the hours he claimed he worked, not for the number of calls or appointments he made with clients for the Directors. Bold O’Neill has not produced any evidence that Mr Mickelson did not work the hours claimed, and in the absence of such evidence for the period 25 January to 24 March 2016, I accept Mr Mickelson’s claim that he worked 265.25 hours made up as follows:

<b>Period</b>	<b>Hours claimed</b>
2.02.16 – 12.02.16	59.50
15.02.16– 26.02.16	69.25

29.02.16– 11.03.16	75.25
14.03.16– 24.03.16	61.25

[74] Mr Mickelson is to be paid unpaid wages for the period 25 January 2016 to 24 March 2016 at the rate of \$19.00 per hour in respect of the hours claimed as worked in the emails provided by Mr Mickelson to Bold O’Neill, a total of \$5,039.75 gross.

[75] From that sum is to be deducted monies received by Mr Mickelson from Bold O’Neill relating only to the period 25 January to 15 April 2016, as evidenced by Mr Mickelson’s bank account submissions, to the total of \$2,750.00. Also to be deducted is the amount of \$151.20 in respect of the employee contribution to KiwiSaver.

*(ii) Holiday pay and unpaid statutory holiday entitlement*

[76] I am satisfied from the evidence provided that Mr Mickelson received his holiday entitlement until the end of 25 January 2016.

[77] Mr Mickelson is entitled to holiday pay in respect of the period 25 January to 15 April 2016.

[78] I order Bold O’Neill to pay Mr Mickelson the sum of \$403.18 gross (calculated as 8% of \$5,039.75).

[79] During the period 25 January to 24 March 2016 there were two statutory holidays: 1 February 2016, Auckland Anniversary Day, and 8 February 2016, Waitangi Day.

[80] I order Bold O’Neill to pay Mr Mickelson the sum of \$281.20 gross (calculated as 7.4 hours per day x \$19.00 per hour) in respect of unpaid statutory holiday entitlement.

*(iii) KiwiSaver*

[81] Mr Mickelson is entitled to KiwiSaver benefit pursuant to clause 9.1 of the employment Agreement.

[82] I order Bold O’Neill to make the employer contribution of \$151.20 (being 3% of \$5,039.75 gross) and the employee contribution of \$151.20 to the appropriate authority.

*(iv) Bonus payment*

[83] In the absence of any agreement superseding that set out in the Employment Agreement, clause 7.2 applies. That clause states that any bonus is payable at: “*the Employer’s sole discretion*”. As no discretion has been exercised, there is no bonus payable.

*Summary of orders*

[84] It is for Mr Mickelson to resolve any amount due from or payable to the IRD in respect of these orders.

[85] I order that:

- *Unpaid wages* - In respect of paragraphs [74] and [75] Bold O’Neill is to pay to Mr Mickelson the sum of \$2,138.55 gross.
- *Holiday Pay and unpaid statutory holiday entitlement* - In respect of paragraph [77] and [79] Bold O’Neill is to pay to Mr Mickelson the sum of \$684.38 gross.
- *Kiwisaver* - In respect of paragraph [79] Bold O’Neill is to pay to the appropriate authorities \$302.40.

[86] Mr Mickelson is also to be reimbursed the filing fee of \$71.56.

**Costs**

[87] While costs are reserved, I note here that, subject to his submissions, Mr Mickelson represented himself and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**