

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 44
5357729

BETWEEN PETER OWEN JAMES
 MUCKLE
 Applicant

A N D AB TRANSMISSIONS
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Peter Muckle on his own behalf
 Alan Broad for the Respondent

Investigation Meeting: 28 February 2012 at Nelson

Submissions Received: At the investigation

Date of Determination: 12 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This a wage arrears claim brought by the applicant, Mr Peter Muckle, against the respondent, AB Transmissions Limited (ABT). The amount sought is expressed in holistic terms but includes claims of unpaid wages, holiday pay, sick pay, bereavement leave and long service leave.

[2] ABT concedes it owes Mr Muckle a substantial sum but not as much as sought.

Background

[3] As its name suggests ABT is, or more correctly was, in the business of maintaining and repairing automotive transmissions. It was represented at the hearing by Mr Broad, the husband of its sole director and shareholder.

[4] Mr Muckle commenced with ABT as the Workshop Foreman in May 2002 and the parties agree their intention was that he would, one day, be in a position to acquire the business. This goal resulted in a lack of formality, which included a failure to ever conclude a written employment agreement. Indeed, there is no evidence the parties discussed any terms and conditions other than a rate of pay which was, in effect, a salary. Mr Muckle would be paid what he described as a fair weekly wage irrespective of the hours worked. While initially lower, it had risen to \$800 nett per week by the time this cause of action arose.

[5] The intention that Mr Muckle eventually own the business led to practices which may be considered unusual but this did not concern Mr Muckle as he states he could address any issues when he eventually took ownership. For example, Mr Muckle (and for that matter, Mr Broad) would lend money to ABT to address short term liquidity issues. There was also a blasé attitude to the manner and timeliness of wage payments. Mr Muckle could receive pay in cash, by bank deposit or in kind with ABT sometimes taking care of various bills. Examples include Mr Muckle's SKY TV subscription, rent and payment for tyres.

[6] Unfortunately Mr Muckle later had cause to rethink his attitude to payment as the viability of the business deteriorated. Indeed, it is now dire. Mr Broad advises that ABT ceased operating in November 2011 as a finance company had repossessed its assets; that absolutely nothing remains and the Inland Revenue has applied to have ABT placed in liquidation. That application will be heard in the High Court at Nelson this month (March) and Mr Broad's evidence suggests liquidation is an inevitable consequence of the application.

[7] From Mr Muckle's perspective, things came to a head around the middle of 2011 when ABT failed to pay him and, this time, the failure was not addressed. This initially led to a period of sick leave which Mr Muckle attributes to stress caused by the financial situation in which he found himself and ended with his resignation which took effect 19 August 2011. Mr Muckle is not alleging he was constructively

dismissed or otherwise challenging his cessation, but the situation led to his attempting to reconcile payments received against those he considers he should have received.

[8] He did this by assessing various records (mainly bank records) and compiled a document comparing what he claims he should have received against what he says he did. He did not use, or even seek, the wage records that Mr Broad states ABT has in its possession.

[9] Mr Muckle's calculations suggest a claim totalling \$37,559.91 for the period 29 Dec 2007 to cessation. To this he adds a further \$2650 for unpaid sick leave, along with \$160 (being 1/5th of a week's wage) for a days bereavement leave. There has been no attempt to quantify any prior shortfall.

[10] The document was then forwarded to ABT who performed its own reconciliation and noted where and why it disagreed with Mr Muckle's calculations. ABT concluded that the shortfall totalled \$26,195.29.

[11] As said earlier, this is not a case of determining whether or not monies owe. They do – that is conceded. The issue is how much.

Determination

[12] Notwithstanding the situation in which ABT finds itself, I note the fact the Inland Revenue has not applied for a stay of other proceedings under s.247 of the Companies Act 1993. Mr Muckle is therefore entitled to have his claim considered and the extent of the shortfall recorded, if only for the purposes of informing the liquidator.

[13] With one amendment which is minor when compared to the amounts involved, I accept ABT's calculation. I do so for the following reasons.

[14] First, and perhaps most importantly, the onus is on Mr Muckle to quantify, at least as far as is possible, the amount owing. I must conclude he has fallen short in this respect and do so for the following reasons:

1. Mr Muckle openly states that his calculations are a guess and that they are muddled by various references to monies he lent ABT and the

following repayments, with considerable confusion as to what was salary and what was a loan repayment; and

2. According to Mr Broad's unchallenged testimony the wage records do exist. Those have never been sought, let alone considered, in the preparation of Mr Muckle's claim.

[15] Second, there are Mr Muckle's own admissions/concessions which undermine elements of his claim. For example there is his claim for unpaid sick leave. This relates to the period of leave immediately prior to cessation. ABT paid this as annual leave on the belief that Mr Muckle had, due to earlier usage, insufficient sick leave remaining to cover payment under that guise. They listed, in their response, the days they understood Mr Muckle had earlier used and which led them to this belief. He accepted he had been absent on each of the days listed and while I note the contrary views of his partner, who was present at the hearing, I disregard them as this is Mr Muckle's claim. Here note must also be made of section 39(2)(b) of the Holidays Act 2003 and the provision that payment of sick leave as annuals holidays be approved by the employee. Given the evidence, I consider that requirement to have been complied with.

[16] Similarly Mr Muckle's claim records some of the payments in kind being recompense for additional hours, yet this is contradicted by his acceptance that he was paid a weekly rate designed to cover all hours worked (ie: a salary).

[17] Third, there is the fact that there is simply no contractual base for one of his claims and here I note that for recompense of unused long service leave. This claim is based on nothing other than an assertion that Mr Muckle thought he would be entitled to such leave as a result of having been with ABT a while but the claim has no statutory or contractual foundation.

[18] Against these shortfalls I must balance ABT's response, which is informed by the wage records and explained by various notes. Whilst not all of those explanatory notes were put to Mr Muckle, he accepted the validity of each of those that was. In such circumstance, I must conclude that ABT's reconciliation as preferable.

[19] Having said that, the one additional element of the claim that does have validity is, in my view, the claim for bereavement leave. ABT's records show that one days pay was deducted for attendance at the funeral of an acquaintance on the

basis that bereavement leave is limited to relatives. This assertion is not correct (see section 69(2)(b) of the Holidays Act) as the evidence shows Mr Muckle's attendance was approved in advance by ABT. That day's pay is owing.

[20] For the reasons expressed above, I conclude Mr Muckle has a legitimate claim but the amount owing is essentially that calculated by ABT. He is therefore owed the sum of \$26,355.29 (being the \$26,195.29 conceded, along with the day's bereavement leave) and ABT should pay that amount to him.

Costs

[21] It is normal that costs follow the event but Mr Muckle was unrepresented and lives locally. That means his recoverable costs are limited to the \$71.56 filing fee. Given the time imperative imposed by the upcoming High Court hearing and in order to avoid further effort or expense for the parties, I choose to dispose of the issue and order ABT pay Mr Muckle a further \$71.56 as reimbursement of costs.

Orders

[22] The total owing is \$26,426.85 gross (twenty six thousand, four hundred and twenty six dollars and eighty five cents) and AB Transmissions Limited is ordered to pay Mr Muckle that amount.

M B Loftus
Member of the Employment Relations Authority