

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 299
5572947

BETWEEN

APELAMO NICHOLAS
Applicant

A N D

POINT TO POINT HOLDINGS
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Steve Foley CEO and shareholder of Respondent

Investigation Meeting: 29 September 2015 at Auckland

Written Record of Oral
Determination: 29 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Nicholas was employed by Point to Point Holdings Limited (Point to Point) as a Construction Team Member/Leading Hand. Mr Nicholas attended an induction on 07 November 2014 and started work immediately. The parties signed an employment agreement on 10 November 2014 after Mr Nicholas had already started work.

[2] Mr Nicholas was paid weekly in arrears and he received his first pay on 20 November 2014. Mr Nicholas says he did not know if his pay was correct because he did not receive remittances however his understanding was that he was paid his wages net of PAYE and KiwiSaver deductions in accordance with clause 9.1 of his employment agreement.

[3] In January 2015 Mr Nicholas' wages became irregular. He raised this with Mr Steve Foley the Chief Executive Officer of Point to Point and 50% shareholder in Point to Point.

[4] Mr Foley explained to Mr Nicholas that there were some issues transitioning to a new payroll system and that all wages would be paid to him. Mr Foley subsequently told Mr Nicholas that his wages would not be paid weekly but would be paid fortnightly. Mr Nicholas says that when this did not occur Mr Foley again blamed the failure to pay Mr Nicholas on the new accounting system.

[5] Mr Nicholas requested remittances for his wages and when they were eventually given to him on 05 February 2015 he discovered that he had not been paid for statutory holidays. Mr Nicholas was also concerned that he had not been paid properly for any mileage done because the remittances provided to him were not accurate and the payments actually paid into his bank account could not be reconciled against the remittances which Mr Foley had provided.

[6] Mr Nicholas raised a query about this with Mr Foley who promised to make the relevant information available to him, but that has still not occurred.

[7] In or around mid-February 2015 Mr Nicholas stopped receiving his full wages. Mr Foley continued to promise that payment would be made but Mr Nicholas would only receive a few hundred dollars at a time. Mr Nicholas has provided the Authority with a spreadsheet showing all the moneys received as wages. This notes that some of the payments did not come from the account of Point to Point or from Mr Foley's account.

[8] Mr Nicholas says he was not the only employee who was not being paid on time and this was causing severe hardship for people. It got to the point where Mr Nicholas was unable to pay for repairs to his vehicle so it could pass its warrant of fitness so that he could attend work.

[9] Mr Nicholas says he was forced to leave his employment with Point to Point to seek other means of income to support his family. His last day of work was 03 March 2015 and although Mr Foley made a few more payments to him after that date, Mr Nicholas says he has still not received his full wages.

[10] On 08 March 2015 after numerous attempts by Mr Nicholas to obtain his wages, Mr Foley emailed him to acknowledge underpaying Mr Nicholas and he apologised for it and said he would make payment if the amount was agreed.

[11] Mr Nicholas responded to that proposal by identifying a number of errors in Mr Foley's calculations and he has not had any response to that to date.

[12] Mr Nicholas has provided the Authority with snapshots of text messages exchanged between him and Mr Foley over the period 01 April-mid-July 2015 in which Mr Nicholas is asking for payment and Mr Foley is confirming that payment will be made. In one of these text messages Mr Foley admits that there was no issue and that he just has to "*get the money.*" These acknowledged wage arrears have still not yet been paid.

[13] When Mr Nicholas' wife filed his tax return for the 2015 tax year she noticed PAYE had not been paid to IRD despite that having been deducted from Mr Nicholas' wages. Mr Nicholas raised that with Mr Foley on 13 July 2015 and Mr Foley promised to make that payment but that has not occurred. Mr Nicholas says his PAYE remains outstanding.

[14] Furthermore Mr Nicholas discovered that Point to Point had never enrolled him into KiwiSaver as per the terms of his employment agreement. This meant that Mr Nicholas missed out on the \$1,000 KiwiSaver kick-start payment which should have been credited to his account from November 2014, when he started work with Point to Point.

[15] Mr Nicholas also discovered that none of his contributions to his KiwiSaver account had been paid into his KiwiSaver account and that Point to Point had not made any of the compulsory employer KiwiSaver contributions into his account either.

[16] Point to Point did not produce Mr Nicholas' wage and time records or holiday and leave records as directed.

[17] Point to Point did not dispute any of Mr Nicholas' calculations and blamed its deficiencies on it being a new company which started on 07 November 2014. Mr Foley says he has taken steps to resolved the Inland Revenue Department issues and that full payment of all outstanding PAYE and KiwiSaver contributions will be made by the end of this month (i.e. tomorrow).

[18] Mr Nicholas seeks:

- (a) \$3,675.76 wage arrears;
- (b) Unpaid mileage at the agreed rate of 0.41c per kilometre;
- (c) Unpaid statutory holidays;
- (d) Unpaid holiday pay;
- (e) An order that the PAYE Point to Point deducted from his earnings be paid to the Inland Revenue Department (IRD);
- (f) An order that Point to Point pay his employee and employer KiwiSaver contributions to IRD so they can be credited to his KiwiSaver account;
- (g) An order that Point to Point reimburse him for the \$1,000 KiwiSaver kick-start he would have received if Point to Point had complied with clause 9.1 of his employment agreement.
- (h) Costs and interest.

Issues

[19] The following issues are to be determined:

- (a) Is Mr Nicholas owed wage arrears?
- (b) Is Mr Nicholas owed unpaid mileage?
- (c) Is Mr Nicholas owed for unpaid statutory holidays?
- (d) Is Mr Nicholas owed unpaid holiday pay?
- (e) Did Point to Point remit all of Mr Nicholas' PAYE to the Inland Revenue Department?
- (f) Is Mr Nicholas owed a KiwiSaver kick-start and contributions arrears?
- (g) Should interest be awarded to Mr Nicholas?
- (h) What if any costs should be awarded?

Is Mr Nicholas owed wage arrears?

[20] Point to Point has not produced Mr Nicholas' wage and time records or holiday and leave records. Under s.132(2) of the Employment Relations Act 2000 (the Act) the Authority may accept as proved all of Mr Nicholas' claims regarding the wages paid and the hours, days and times he worked in the absence of Point to Point proving such claims are incorrect.

[21] It is clear from the evidence before the Authority that Mr Nicholas was not paid on time and was not paid in full. Mr Nicholas has calculated his wage arrears as \$3,675.76. There are no wage and time records to contradict that evidence.

[22] I therefore find that Point to Point owes Mr Nicholas \$3,675.76 wage arrears.

Is Mr Nicholas owed unpaid mileage?

[23] Under clause 7.4 of his employment agreement Mr Nicholas is to be reimbursed for work related travel. Mr Nicholas says he is owed unpaid mileage for 2,723km he travelled for work while employed at the agreed rate of 0.41c per kilometre.

[24] Point to Point is ordered to pay Mr Nicholas \$1,116.43 unpaid mileage (2,723km x 0.41c).

Is Mr Nicholas owed unpaid statutory holidays?

[25] Mr Nicholas says he was not paid for 25 and 26 December 2014, 01, 02, 26 January 2015 and 06 February 2015. Mr Nicholas claims \$1,244.26 for these days. There was no evidence he was paid on these dates.

[26] Point to Point is ordered to pay Mr Nicholas \$1,244.26 for unpaid statutory holidays.

Is Mr Nicholas owed unpaid holiday pay?

[27] Mr Nicholas says he did not take any paid leave whilst employed. There are no holiday and leave records to contradict that evidence. Mr Nicholas is therefore entitled to be paid 8% of his total gross earnings as holiday pay upon termination. That has not occurred.

[28] I find that Point to Point owes Mr Nicholas \$1,049.06 unpaid holiday pay (8% x \$13,113.32).

Did Point to Point remit Mr Nicholas' PAYE deductions to IRD?

[29] I am satisfied that Point to Point did not remit the PAYE deductions it made from Mr Nicholas' wages to the Inland Revenue Department (IRD). This is a matter which IRD may wish to pursue directly with Point to Point and/or with its director, Diane Foley (Mr Foley's wife).

[30] Point to Point is ordered to remit the PAYE deductions it has made from Mr Nicholas' pay to IRD within seven days of the date of this determination.

Is Mr Nicholas owed KiwiSaver arrears?

[31] Point to Point did not enrol Mr Nicholas in KiwiSaver as it was required to do under clause 9.1 of his employment agreement. That contractual breach meant Mr Nicholas has not been credited with the \$1,000 government kick-start payment that he would have received if Point to Point had met its legal obligation to enrol him in KiwiSaver.

[32] The KiwiSaver government kick-start was only paid to those who had joined KiwiSaver by 2pm on 21 May 2015. Point to Point is therefore ordered to reimburse Mr Nicholas \$1,000 into his KiwiSaver account to account for the loss he has suffered.

[33] Point to Point is ordered to pay \$786.80 to Inland Revenue Department (IRD) as the combined compulsory employer (being \$13,113.32 total gross earnings x 3% = \$393.40) and employee (3% being \$393.40) KiwiSaver contributions.

Should interest be awarded?

[34] Point to Point has had the benefit of using money which should have been paid to Mr Nicholas. Mr Nicholas has been deprived of the use of his wages. It is therefore appropriate to award interest under the Judicature Act 1908 at the current prescribed rate of 7.5% per annum.

[35] Interest is to be paid by Point to Point from 03 March 2015 (the date employment ended) on the amounts awarded under this determination (excluding the \$71.56 filing fee reimbursement referred to below) have been paid in full.

Costs

[36] Mr Nicholas represented himself so there is no issue as legal costs but he is entitled to be reimbursed for his filing fee. Point to Point is therefore ordered to pay Mr Nicholas \$71.56 to reimburse his filing fee.

Orders

[37] Within 28 days of the date of the determination Point to Point is ordered to pay Mr Nicholas:

- (a) \$3,675.76 wage arrears;
- (b) \$1,116.43 unpaid mileage;
- (c) \$1,244.26 unpaid statutory holidays;
- (d) \$1,049.06 unpaid holiday pay;
- (e) Interest at the rate of 7.5% on all amounts (excluding the \$71.56 filing fee reimbursement and the PAYE component referred to below) from 03 March 2015 until these amounts have been paid in full;
- (f) \$71.56 to reimburse Mr Nicholas' filing fee.

[38] Within 7 days of the date of this determination Point to Point is ordered to pay to IRD;

- a. \$786.80 KiwiSaver contributions to be paid to IRD;
- b. \$1,000 to reimburse the KiwiSaver government kick-start payment Mr Nicholas missed out on;
- c. Correct PAYE for the total gross wages Mr Nicholas earned while employed by it.

Rachel Larmer
Member of the Employment Relations Authority

