

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5050905
AA 271/07

BETWEEN KEVIN PELLOW-JARMAN
 Applicant

AND CMI FASTNERS LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: In person
 Paul Adlam, for Respondent

Investigation Meeting: On the papers

Submissions and further 10 August 2007 from Applicant
information received: 10 August 2007 from Respondent

Determination: 3 September 2007

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 20 December 2006 (AA 384/06) I upheld Mr Pellow-Jarman's claim for his bonus payment to be included in the calculation of holiday pay. The parties were referred to the Labour Inspectorate to calculate the amount of holiday pay. On 22 May 2007, having completed its investigation, the Labour Inspectorate calculated Mr Pellow-Jarman's annual holiday pay entitlement as \$2,563.51.

[2] CMI says that it is not obliged to pay the outstanding holiday pay because Mr Pellow-Jarman was overpaid when he received earnings related compensation for a non-work injury during April/May 2004.

[3] Mr Pellow-Jarman says there was no overpayment and that he is entitled to his holiday pay as calculated by the Labour Inspectorate.

[4] I have received further information and submissions from the parties in support of their respective positions.

[5] This determination concerns whether Mr Pellow-Jarman owes a debt to CMI for wages paid during the period of recuperation from his injury.

Debt owing?

[5] CMI paid Mr Pellow-Jarman full wages from the time of his accident until his return to work. It says these wages were overpaid to Mr Pellow-Jarman and that he should refund the amount owed in full which totals \$4933.00. CMI says that under the terms of the employment agreement it was not required to pay Mr Pellow-Jarman for periods off work due to non-work related accident (clause 9 iea), that he was absent from work during this period due to a non-work related accident and the payments made to him remain a debt owing to the company (clause 6.4 iea).

[6] Following are the provisions of the employment agreement on which CMI seeks to rely:

6. Termination of employment

...

6.4 *Upon termination of employment, the Employee shall return to the Company all property and equipment belonging to the Company and the parties agree that the Company may deduct the value of any such property not returned as well as any debt owing to the Company by the Employee (whatsoever it may be) from the final pay.[my emphasis]*

9. Remuneration

The Company shall pay the Employee the remuneration and method as specified in the Job Description set out in SCHEDULE C. The Employee agrees that the Company is not required to pay for times of unauthorised absence, sickness (except for paid sick leave provisions) absenteeism caused by accident outside of work hours (subject to workplace injury provisions) or absenteeism that has been agreed with the Company to be allowed without pay.

[7] Mr Pellow-Jarman says that he has paid CMI \$906.15 which is the difference between what he received from ACC and what he was paid by CMI for the same

period. He says there was no issue about repaying this amount because it is unlawful to receive wages while receiving earnings related accident compensation. He says there is no other outstanding amount owed to CMI.

[8] Information received from ACC by the Authority, and copied to the parties, shows that Mr Pellow-Jarman received earnings related accident compensation totalling \$906.15 (gross) and that this compensation was paid as follows:

3/5/04 – 4/5/04 received \$258.90 (gross)

5/5/04 – 9/5/04 received \$647.25 (gross)

[9] The information from ACC also provides that CMI paid him from 26/4/05 – 2/5/04, that he had nil entitlement for that period and the period 10/5/04 – 16/5/04 and had no medical cover from 16/5/04.

[10] It is unclear why Mr Pellow-Jarman did not receive earnings related accident from the period beginning 26 April 2004. The accident occurred on 18 April 2004 and CMI was obliged to pay Mr Pellow-Jarman for the first week of his injury ie, the week beginning 19 April 2004. The week beginning 26 April 2004 was the second week of his injury.

[11] Mr Pellow-Jarman says he returned to work on 10 May 2004. He relies on a workplace assessment completed for ACC on 18 May which records that he returned to work the week before (ie, the week beginning 10 May 2004) and that he worked near full time hours Monday – Thursday of that week. CMI says Mr Pellow-Jarman returned to work on 25 May 2004. It relies on computer logons and says Mr Pellow-Jarman failed in his obligations as the manager of the factory to complete records of his absence from work. This is a significant area of dispute between the parties. However, it is not relevant to the issue I need to determine.

[12] Mr Pellow-Jarman's employment with CMI ended in September 2005.

[13] On 12 September 2005 Mr Pellow-Jarman lodged a claim for recovery of holiday pay due on termination of employment.

[14] In its statement of reply dated 28 September 2006 Mr Adlam wrote:

I wrote to Mr Jarman on 11 November 2005 advising him that he had not completed some outstanding matters regarding a claim form for ACC. I went to some length to assure him that there was no liability against him however the company had voluntarily paid him his full salary during the period he was absent from work which was the result of an accident he had been involved in outside of work hours. I also explained to him that had the company not voluntarily done this he would have only received 80% of his monthly entitlement from ACC during the time he was absent from work and that he was required to complete the ACC form before CMI could claim back the 20% differential the company was entitled to.

[15] There is no evidence that the payment of wages as a debt owing was discussed with Mr Pellow-Jarman prior to or at his employment ending or that any arrangement to repay those wages was entered between the parties. What was raised with Mr Pellow-Jarman was the recovery by CMI of any double payment between it and ACC. Based on the information I have received from the parties and ACC the double payment has been addressed.

[16] As stated above the statement of nil entitlement by ACC for the week beginning 26 May seems odd given Mr Pellow-Jarman had medical cover at this point and this was the second week following his injury. However, this is not a matter the Authority has jurisdiction to deal with and will have to be resolved between the parties and ACC.

Determination

[17] There is insufficient evidence to support CMI's claim that Mr Pellow-Jarman owes it \$4933.00. The statement of reply states that the payments were made without agreement that the money would be paid back. There is no evidence that would indicate that that is not the true position. The payments made to Mr Pellow-Jarman during the period of his injury are not a debt owing to CMI.

[18] The holiday pay calculation made by the Labour Inspectorate has not been challenged by either party. I am satisfied that it is correct. It must be paid forthwith.

[19] **CMI is ordered to pay Kevin Pellow-Jarman \$2,563.51, as outstanding holiday pay entitlement with interest calculated from 22 May 2007 until date of payment to be calculated at the rate of 9% per annum.**

Costs

[20] An order has already been made in relation to the original filing fee incurred by Mr Pellow-Jarman¹. That order stands. In addition, CMI is ordered to reimburse Mr Pellow-Jarman the \$70 filing fee incurred in lodging this compliance application.

Marija Urlich

Member of the Employment Relations Authority

¹ Paragraph 11 AA 384/06