

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 32
5630530

BETWEEN COREY VINCENT SINCLAIR
 Applicant

AND ACCESS SOLUTIONS LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person
 Respondent in person

Investigation Meeting: On the papers

Determination: 2 May 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Corey Sinclair seeks an order from the Authority that Access Solutions Ltd (Access Solutions) pay him his final holiday pay of \$3,712.28 (gross) minus PAYE and KiwiSaver deductions.¹

[2] In its statement of reply Access Solutions says it has withheld payment of holiday pay because after Mr Sinclair left his employment it discovered he had used its courier account for personal use to the value of \$872.46.²

[3] In a case management call held on 7 December 2016 and reiterated in later correspondence Access Solutions further alleged that Mr Sinclair sold company scrap metal to a third party and kept the proceeds from those sales.

¹ Contained in a Statement of Problem dated 23 June 2016

² Statement in Reply received by the Authority on 14 July 2016

[4] Access Solutions' position in its final correspondence to the Authority is that it would pay Mr Sinclair the difference between what it owes to Mr Sinclair (\$2,323.30 (nett)) and the sum it says Mr Sinclair owes it (\$2,117.46). That sum is estimated to be \$146.84.

[5] Mr Sinclair accepts he utilised Access Solutions courier account to send personal items but denies he used the facility to the extent alleged. He says the amount is \$117.74. On receipt of his entitlement to holiday pay he undertakes to pay those expenses. He says he has "*no idea*" about the matters concerning the scrap metal.

Preliminary matters

[6] Access Solutions reports that it has lodged a complaint with the New Zealand Police alleging that Mr Sinclair's actions as they concern the courier account and sale proceeds amount to theft as a servant. The question as to whether Mr Sinclair is guilty of an offence under the Crimes Act is not within the Authority's jurisdiction and is a matter for the courts of ordinary jurisdiction to determine.

[7] Neither party was legally represented. In documents sent to the Authority Access Solutions made reference to a 'without prejudice' offer made by Mr Sinclair to it prior to lodging his claim. Noting that in any event the offer was not accepted, it is clear that it made to Access Solutions in confidence. That information has no bearing on the findings of fact and application of law in this determination.

The issue

[8] The issue for the Authority to decide in this determination is whether Mr Sinclair is owed holiday pay and if so, the quantum of his entitlement.

The law

[9] Section 86(a) of the Holidays Act 2003 provides that holiday pay payable by an employer to an employee is to be treated as salary or wages earned by the employee. The effect of the Wages Protection Act 1983 is that an employer cannot make deductions from an employee's wages unless in accordance with that Act or other statutory enactments.³

³ Sections 4 and 15 Wages Protection Act.

[10] There are only very limited circumstances in which an employer entitled to deduct wages from an employee. Section 5 of the Wages Protection Act states:

Deductions with worker's consent

- (1) An employer may, for any lawful purpose, make deductions from wages payable to a worker-
 - (a) with the written consent of a worker (including consent in a general deductions clause in the workers employment); or
 - (b) on the written request of a worker –

...

Determination

[11] There is no dispute that Mr Sinclair has not provided Access Solutions with written consent to allow it to deduct holiday pay from his wages. Nor is Access Solutions entitled to set off the sum it considers Mr Sinclair owes, in anticipation that it may receive a reparation order, should Mr Sinclair be convicted of the matters it alleges.

[12] Access Solutions has not established a lawful justification to withhold Mr Sinclair's holiday pay entitlement and is in breach of the Wages Protection Act.

Orders

[13] As at 1 April 2016 Access Solutions Limited was obliged to pay Mr Sinclair \$3,712.28 (gross). Following payment of PAYE and KiwiSaver that sum is \$2,324.30 (nett).

[14] Mr Sinclair accepts he owes Access Solutions Ltd \$117.74. I have deducted that sum from my calculations as to quantum.

[15] There is a further question as to whether Access Solutions Ltd has paid Mr Sinclair \$146.84 (nett) as purported in correspondence to the Authority. If Access Solutions has paid the sum \$146.84 it is now ordered to pay Corey Sinclair a total sum of \$2,059.72.

[16] If Access Solutions Ltd has not paid the sum of \$146.84 between its correspondence of 23 January 2017 and the date of this determination it must now pay Corey Sinclair a total sum of \$2,206.56.

Costs

[17] Access Solutions Ltd must also pay Mr Sinclair \$71.56; the cost of the filing fee paid by him to progress his claim at the Authority.

Michele Ryan
Member of the Employment Relations Authority