

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 109
3035853

BETWEEN KAWALJIT SINGH
 Applicant

AND ESK COMMUNICATIONS
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Kawaljit Singh, on own behalf
 Nil for Respondent

Investigation Meeting: 5 December 2018 at Wellington

Oral Determination 5 December 2018

Record of Oral
Determination: 5 December 2018

ORAL DETERMINATION OF THE AUTHORITY

[1] Kawaljit Singh seeks the payment of money he says was due upon termination but is yet to receive from his employer, Esk Communications Limited (Esk). In particular he says he is still to be paid for his last two weeks work along with three weeks untaken annual leave. The total sought is \$3,800.00.

[2] There is also an issue concerning PAYE with Mr Singh claiming that while Esk deducted tax from his wages between December 2017 and May 2018 the Inland Revenue Department advises it never received the money.

[3] Esk's position is unknown given its failure to participate in the Authority's process. There is no statement in reply and nor has Esk otherwise responded to the papers I am satisfied have been served upon it. That failure, along with Esk's non-attendance today does, however, raise the question of whether or not the investigation should proceed.

[4] All companies are required to have an address for service.¹ On the day documents relevant to this investigation were served the Companies Office recorded Esk's address as Flat 2, 154 Boundary Road, Blockhouse Bay, Auckland. I am satisfied the documents were served there with delivery being confirmed by the courier and acknowledgement by signature. Further copies were also sent to three e-mail addresses known to be used by Esk and its principles.

[5] The documents include a notice of investigation meeting. The notice advises that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.² I also note regulation 8(3) of the Employment Relations Authority Regulations 2000 which provide that when a respondent fails to furnish a statement in reply the claim can only be defended with leave of the Authority. Leave has not been sought.

[6] Given the above and no notification of, or explanation for, Esk's absence I consider it appropriate to continue. Mr Singh is entitled to have his claim heard.

[7] Mr Singh was employed by Esk as a Technician installing fibre cables. He resigned, with effect 1 June 2018, having obtained employment with another company. His resignation was accepted in writing by Esk's sole director, Ethan Kasere.

[8] Mr Singh says he worked his notice period of two weeks but was not paid. He also claims he is yet to be paid unused holidays. He supports his claims with;

- a. a copy of the letter of offer he accepted on 8 May 2017 and his individual employment agreement dated 28 June 2017;
- b. a request for wage and time records which went unanswered;
- c. documents from Inland Revenue regarding the PAYE; and
- d. correspondence between himself and Mr Kasere, the content of which became increasingly terse and which suggest Esk believes Mr Singh has various debts which it might use to offset any money it may owe.

¹ Section 192(1) of the Companies Act 1993

² Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

[9] I have heard from Mr Singh and had a chance to question him. Having done so, and in the absence of any contrary evidence from Esk, I accept his claims though there are a couple of factors about which comment should be made.

[10] The first is the potential *offset* argument (paragraph [8(d)] above). That has two significant impediments. Esk's absence means there is no evidence the debt exists. Mr Singh denies it does and the correspondence between him and Mr Kasere would give some support. There is then the fact the Wages Protection Act 1983 prevents Esk from taking such sums without Mr Singh's written authorisation.³ It does not have that authorisation.

[11] The second issue is the employment agreement alleges the arrangement was casual and consistent with that assertion is a provision which states holidays would be recompensed on a "pay as you go" basis by loading 8% to the hourly rate.

[12] Aside from an observation the evidence indicates a relationship that was far from casual (refer [14] below) the statutory provisions preclude such an arrangement in this instance.

[13] Section 28 of the Holidays Act 2003 limits *pay as you go* to fixed terms of less than twelve months or situations in which the engagements are *...so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays under section 16.*⁴

[14] Here there is no suggestion of a fixed term arrangement, at least as envisaged by s 66 of the Employment Relations Act 2000, and in any event Mr Singh was engaged for more than 12 months. The evidence is Mr Singh regularly worked 40 hour or more a week. That is not the sort of irregular arrangement envisaged under s 28(1)(a)(ii) nor is it a casual arrangement as the employment agreement claims.

[15] The Holidays Act also requires the loading be an identifiable component of the pay.⁵ Given the lack of wage and time records it isn't and here I note s 132 of the Employment Relations Act. Section 132(2) essentially provides where there is evidence the wage records were sought but not produced and that failure affected the applicant's ability to quantify the claim I may accept it unless the respondent can

³ Sections 4 and 5(1) of the Wages Protection Act 1983

⁴ Sections 28(1)(a)(i) and (ii) of the Holidays Act 2003

⁵ Section 28(1)(c) of the Holidays Act 2003

prove otherwise. There is evidence the records were sought and their non-production has adversely affected Mr Singh's quantification of his claim. Esk's absence also means there is no 'otherwise'.

[16] I also accept, given both Mr Singh's evidence and the documents, money is owed to the Inland Revenue Department in respect to Mr Singh's PAYE and will order the appropriate amount be forwarded by Esk forthwith.

[17] Last is the issue of costs to which Mr Singh is entitled given he has been wholly successful. As he is self-represented these are, however, limited to reimbursement of the Authority's filing fee. That too is payable.

Orders

[18] For the above reasons I order the respondent, Esk Communications Limited, pay the applicant, Kawaljit Singh, the sum of \$3,800.00 (three thousand, eight hundred dollars) being unpaid wages along with a further \$71.56 (seventy one dollars and fifty six cents) being reimbursements of the Authority's filing fee which Mr Singh paid.

[19] I also order Esk Communications Limited pay the Inland Revenue Department all PAYE it has deducted from Mr Singh's wages but is yet to forward.

[20] The above payments are to be made no later than 4.00pm on Friday 21 December 2018.

[21] In closing I advise the respondent and its director, Ethan Kasere, of two further points. The first is that as this determination involves a failure to pay money due to an employee Mr Kasere may find himself personally liable should Esk fail to pay.⁶ The second is continued failure may result in further consequences which potentially include the imposition of fines, the sequestration of property and/or imprisonment.

M B Loftus
Member of the Employment Relations Authority

⁶ Sections 142W and 142Y of the Employment Relations Act 2000