

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 46
5531824

BETWEEN STUART EDWARD
 TRUSTRUM
 Applicant

AND SHORE MARINER LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: The Applicant in person
 Justine Foden, Advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 26 February 2015 from the Applicant
 4 March 2015 from the Respondent

Determination: 14 April 2015

DETERMINATION OF THE AUTHORITY

A. The application is dismissed.

Employment relationship problem

[1] Stuart Trustrum's employment with Shore Mariner Limited (SML) ended in November 2013. He was paid an amount of holiday pay calculated by SML. Mr Trustrum believes that his holiday pay has been wrongly calculated because SML did not include vehicle allowances paid to him in his gross earnings on which his holiday pay was calculated.

[2] Mr Trustrum claims he is owed payment of a further \$2,340.35 in holiday pay plus interest and \$3,000 compensation for humiliation and injury to his feelings as well as the reimbursement of the filing fee of \$71.56.

[3] SML says that the vehicle allowance was excluded from Mr Trustrum's gross earnings because it was a *reasonably assessed amount to reimburse* [Mr Trustrum] *for any costs incurred by [him] related to his ... employment*, under section 114(c)(ii) of the Holidays Act 2003 (the Act) which excludes such payments from gross earnings.

Issues

[4] I need to determine whether the vehicle reimbursement should be included in a calculation of gross earnings under the Act 2003, or whether it is excluded because of s.114(c)(ii) of the Act.

[5] I am not able to award any payment by way of compensation for humiliation and injury to feelings as that remedy is only available when a personal grievance of unjustified disadvantage or unjustified dismissal has been proved. This is not a claim for a personal grievance.

Factual background

[6] Mr Trustrum's employment agreement did not include any provision for a vehicle allowance. Instead, under the heading of 'salary' it set out a monetary amount and listed a 'car' and a 'phone'. SML says that Mr Trustrum travelled between 15,000 and 18,000 kilometres per year on SML business.

[7] Initially, Mr Trustrum was provided with a vehicle that SML leased for him. The company also paid for fuel and insurance on the vehicle. However, in 2010 Mr Trustrum requested that he be permitted to use his own vehicle for SML business and be reimbursed for the costs of using his own vehicle. SML agreed and from 16 July 2010 until 15 November 2013 paid him a weekly amount expressed to be a *vehicle allowance* of \$336.45 gross. The vehicle allowance was included in Mr Trustrum's taxable pay.

Interpreting s.114 of the Act

[8] Section 114 of the Act provides:

*In this Act, unless the context otherwise requires, **gross earnings**, in relation to an employee for the period during which the earnings are being assessed,—*

*(a) means **all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example—***

(i) salary or wages:

*(ii) **allowances (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment):***

(iii) payment for an annual holiday, a public holiday, an alternative holiday, sick leave, or bereavement leave taken by the employee during the period:

(iv) productivity or incentive-based payments (including commission):

(v) payments for overtime:

(vi) the cash value of any board or lodgings provided by the employer as agreed or determined under section 10:

*(vii) first week compensation payable by the employer under section 97 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 or former Act; **but***

*(b) **excludes** any payments that the employer is not bound, by the terms of the employee's employment agreement, to pay the employee, for example—*

(i) any discretionary payments:

(ii) any weekly compensation payable under the Injury Prevention, Rehabilitation, and Compensation Act 2001 or former Act:

*(iii) any payment for absence from work while the employee is on volunteers leave within the meaning of the Volunteers Employment Protection Act 1973; **and***

*(c) **also excludes—***

(i) any payment to reimburse the employee for any actual costs incurred by the employee related to his or her employment:

*(ii) **any payment of a reasonably assessed amount to reimburse the employee for any costs incurred by the employee related to his or her employment:***

(iii) any payment of any employer contribution to a superannuation scheme for the benefit of the employee:

(iv) any payment made in accordance with section 28B.

[emphasis added]

[9] I need to ascertain the meaning of s.114(c)(ii) of the Act. The Interpretation Act 1999 includes the following in Part 2, 'Principles of interpretation':

5 Ascertaining meaning of legislation

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[10] The wording of s.114, and of s.114(c)(ii) in particular, is not ambiguous. Therefore, I need to understand the plain and ordinary meaning of the words in the context of the entire section and in light of the purpose of s.114.

[11] The purpose of s.114 as a whole, which is indicated by the heading to the section as well as the first sentence in s.114(a), is to define the meaning of *gross earnings* for employees under the Act, unless the context requires some other interpretation. In this case Mr Trustrum refers to the meaning of gross earnings for the purpose of calculating holiday pay so the s.114 meaning of gross earnings must be ascertained in that context.

[12] Both parties agree that the vehicle allowance was taxed. Mr Trustrum submits that because the vehicle allowance was taxed it should be included in his gross earnings for the sake of calculating his holiday pay as a taxable allowance under s.114(a)(ii), which includes allowances. The vehicle allowance paid to Mr Trustrum was an allowance and on the face of it could appear to be included in the meaning of gross earnings for the purpose of calculating holiday pay.

[13] Section 114(a)(ii) excludes allowances that are *non-taxable payments to reimburse the employee for any actual costs incurred by employee related to his or her employment*.

[14] The vehicle allowance was not intended by either party to reimburse Mr Trustrum for his actual costs incurred. Mr Trustrum was never asked to supply proof of the costs he incurred and he never claimed reimbursement for his actual costs. Therefore, the vehicle allowance was not a non-taxable allowance as defined in s.114(a)(ii). It is not excluded by s.114(a)(ii).

[15] Section 114(b) contains a further exclusion and excludes *any payments the employer is not bound, by the terms of the employee's employment agreement, to pay the employee*. Section 114(b) sets out examples of such payments, which are payments required under other legislation.

[16] The vehicle allowance is not excluded from the meaning of ‘gross earnings’ under s.114(b). Although it was not expressed in writing in Mr Trustrum’s employment agreement I am confident that it was a contractual term agreed between the parties and as such did form a part of his employment agreement.

[17] Section 114(c) contains further exclusions. It first¹ *excludes any payment to reimburse the employee for any actual costs incurred by the employee related to his or her employment*. I have already established that the vehicle allowance was not a payment to reimburse Mr Trustrum for his actual costs.

[18] The second exclusion in s.114(c)(ii) is what SML argues applies to take the vehicle allowance outside of Mr Trustrum’s gross earnings under the Act. That subsection excludes from the meaning of gross earnings any *payment of a reasonably assessed amount to reimburse the employee for any costs incurred ... in relation to his ... employment*.

[19] Mr Trustrum submits that the allowance was not based on the calculation of any costs he incurred but was based on the cost to the company of leasing the vehicle he was previously supplied with. By this I assume he submits that the payment was not a reasonably assessed amount to reimburse him for costs incurred by him for his vehicle use in relation to his employment.

[20] SML says that when it agreed that Mr Trustrum could use his own car it calculated a figure which it assessed would reimburse Mr Trustrum for costs he would incur in using his own car. It agrees its assessment of the costs Mr Trustrum would incur was based on the cost to the company for the car it had previously provided for Mr Trustrum. That car had a value of \$39,000.

[21] SML intended the vehicle allowance payments to Mr Trustrum to cover the costs of registration, warrants of fitness, servicing, regular maintenance, fuel, vehicle insurance, and depreciation of Mr Trustrum’s vehicle. All of those costs had been paid by SML when it provided Mr Trustrum’s work vehicle, although many were included in the lease costs. The calculation of the vehicle allowance included the possibility that Mr Trustrum would pay leasing costs for the vehicle as SML had done, or finance costs.

¹ Section 114(c)(i).

[22] Ms Foden submits that it was reasonable for SML to assume Mr Trustrum would face costs similar to those the company had faced. Therefore, by basing the amount of the vehicle allowance on what SML had paid the costs were reasonably assessed.

[23] I agree that SML reasonably assessed the amount required to reimburse Mr Trustrum for costs incurred by him by using his own vehicle for his employment. It was reasonable for SML to assume that costs incurred by Mr Trustrum would not be less than it had faced in providing a vehicle for him.

[24] Mr Trustrum considers it material that the vehicle allowance was paid to him during periods of annual leave he took while employed by SML. I assume Mr Trustrum considers that relevant because during annual leave he did not incur any work-related vehicle costs.

[25] SML spread the annual vehicle costs it had calculated Mr Trustrum would face out over 52 weeks and paid Mr Trustrum \$336.45 per week gross. That does not of itself mean the payments made during Mr Trustrum's annual leave bring the allowance into the category of not being reasonably assessed.

Conclusion

[26] The vehicle allowance paid by SML to Mr Trustrum was the payment of a reasonably assessed and taxable amount to reimburse Mr Trustrum for all costs he incurred using his own vehicle related to his employment. As such s.114(c)(ii) excludes the vehicle allowance from the meaning of gross earnings under the Act.

[27] Therefore Mr Trustrum's application is dismissed and SML do not have to pay him any further holiday pay, any interest or the cost of filing this application.

Costs

[28] Costs are reserved. Generally, the successful party may receive a reasonable contribution towards its costs from the unsuccessful party, at the Authority's discretion. If any costs were to be ordered in this case they would be modest because there was no investigation meeting held. The issue was an important one to both

parties; Mr Trustrum genuinely believed he was entitled to have the vehicle allowance included in his gross earnings for the purpose of calculating his holiday pay. Shore Mariner was reluctant to confidentially settle the matter with Mr Trustrum because it considered the determination of the matter by the Authority to be important in that it has a number of other employees who are paid similar allowances.

[29] It is my preliminary view that costs should lie where they fall. However, if either party wishes to claim costs they should make a written application for costs within 28 days of this determination being issued and the other party should make a written response within a further 14 days.

Christine Hickey
Member of the Employment Relations Authority