

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 308
5624757

BETWEEN MICHAEL TUCKER
Applicant

AND BABOOM LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: David Spalter, Advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: On the papers

Determination: 12 September 2016

DETERMINATION OF THE AUTHORITY

- A. Baboom Limited (Baboom) must pay Michael Tucker the following amounts within 14 days of the date of this determination:**
- (a) \$11,537.76 gross as unpaid wages;**
 - (b) \$10,836.92 gross as unpaid holiday pay; and**
 - (c) \$3,170.91 as expenses reimbursement.**
- B. Baboom must pay Mr Tucker the following further amounts within 14 days of the date of this determination:**
- (a) \$3500.00 as a contribution to the costs of his representation before the Authority; and**
 - (b) \$71.56 as reimbursement of the Authority's filing fee.**

Employment relationship problem

[1] Baboom employed Michael Tucker as Head of Content from 1 May 2014 until 5 February 2015. Baboom was, or is, an online music platform.

[2] Mr Tucker's employment was governed by an individual employment agreement.

[3] On 5 November 2015, Mr Tucker was presented with a letter from Baboom's then directors, which sought to invoke the "no fault termination" clause in his employment agreement. The letter stated that Mr Tuckers' employment would end on 5 February 2015. The letter also stated:

We will pay you all your contractual entitlements up to and including 5 February 2015.

[4] In mid-January 2015, Mr Tucker, who was paid fortnightly via what appeared to be a company credit-card direct debit, did not receive his salary. He made inquiries of one of the then director's of Baboom, Grant Edmundson. Mr Edmundson advised Mr Tucker to provide his bank details to ensure he was paid his salary directly.

[5] Mr Tucker provided his bank details as requested. However, he received neither the outstanding January 2015 amount of salary nor any subsequent payments from Baboom. Mr Tucker also did not receive his holiday pay upon termination of his employment on 5 February 2015.

[6] As remedies for his employment relationship problem with Baboom, Mr Tucker claimed unpaid wages, unpaid holiday pay and unpaid expenses. Mr Tucker did not claim interest on outstanding monies, penalties or contest his dismissal in the Statement of Problem he lodged with the Authority. He did, however, seek a contribution to the cost of his representation before the Authority.

[7] The following are the issues for determination by the Authority:

- (i) Is Mr Tucker owed unpaid wages by Baboom?
- (ii) Is Mr Tucker owed unpaid holiday pay by Boboom?
- (iii) Is Mr Tucker owed unpaid expenses by Baboom?
- (iv) Should either party contribute to the costs of representation of the other?

The Authority's investigation

[8] Having reviewed the Authority's file, I am satisfied that Baboom Limited was properly served with Mr Tucker's Statement of Problem on 12 May 2016.

[9] Baboom did not formally engage in the Authority's processes. It failed to lodge a Statement of Reply or seek leave to lodge one out of time. In addition, Baboom did not provide the wage and time records to Mr Tucker to assist him with the calculation of his unpaid wages and unpaid holiday pay claim.

[10] Baboom did, however, comply with a direction of the Authority to attend mediation but this was unsuccessful.

[11] Having taken into account the surrounding circumstances outlined above, I decided to investigate Mr Tucker's employment relationship problem on the papers under s 174D of the Employment Relations Act 2000 (the Act).

[12] On 29 August 2016, a Member's Minute was issued to the parties setting out the nature of Mr Tucker's employment relationship problem and how the Authority intended to investigate it. A Director of Baboom or another authorised representative was asked to provide written comment on Mr Tucker's claim for unpaid wages, holiday pay and expenses by 4pm, 5 September 2016.

[13] The Minute also advised the parties that the Authority has the power to issue a determination in the absence of another party.¹ The parties were further advised that a determination of the Authority is enforceable by a compliance order or an enforcement order filed in the District Court for enforcement in the same manner as an order of the Court.²

[14] The Minute was communicated to Baboom via the same means that the direction to mediation was communicated.

[15] Baboom did not provide any response to the Minute by the time specified or at any other time prior to this determination being issued.

Is Mr Tucker owed unpaid wages?

[16] Mr Tucker claimed that Baboom owed him wages.

[17] Mr Tucker said he was not paid from mid-January 2015 until the date of his termination on 5 February 2015. Mr Tucker's annual salary was \$120,000. He claimed the amount owed in unpaid wages was \$11,537.76 gross. Mr Tucker provided calculations to justify this claim.

[18] Baboom failed to produce wage and time records to assist Mr Tucker in the calculation of the claim for lost wages. In the absence of any evidence or information to the contrary from Baboom and in reliance on s 132(2) of the Act, I accept Mr Tucker's claim for unpaid wages.

[19] Baboom must pay Mr Tucker \$11,537.76 gross as unpaid wages under s 131(1)(a) of the Act within 14 days of the date of this determination.

Claim for unpaid holiday pay

[20] Mr Tucker claimed that he was owed outstanding holiday pay. He said the default by Baboom occurred at the same time as non-payment of his unpaid wages upon termination of his employment.

¹Employment Relations Act, s 173 and Sch 2, cl 12.

²Employment Relation Act, s 141 of the Act

[21] The Holidays Act 2003 and cl 6 and Appendix B of his employment agreement governed Mr Tucker's right to four weeks annual leave with pay. Mr Tucker claimed the amount owed in unpaid holiday pay was \$10,836.92 gross. He provided calculations to justify this claim.

[22] Baboom failed to produce wage and time records to assist Mr Tucker in the calculation of the claim for unpaid holiday. In the absence of any evidence or information to the contrary from Baboom and in reliance on s 132(2) of the Act, I accept Mr Tucker's claim for unpaid holiday pay.

[23] Baboom must pay Mr Tucker \$10,836.92 gross as unpaid holiday pay within 14 days of the date of this determination.

Unpaid expenses

[24] Mr Tucker said he was owed \$3,170.91 as expenses reimbursement. He provided some evidence in support of this claim.

[25] A review of Mr Tucker's employment agreement disclosed at cl 5 he was entitled to claim reasonable expenses incurred in the course of his employment with Baboom. Baboom failed to provide any information to either assist the Authority in this regard or rebut Mr Tucker's claim for expenses.

[26] In the absence of such, Baboom must pay Mr Tucker \$3,170.91 as expenses reimbursement within 14 days of the date of this determination.

Costs

[27] Mr Tucker sought a contribution towards the cost of his representation.

[28] The notional daily tariff for such costs, conventionally applied, is \$3500.00.³ Baboom did not provide any comment on costs despite being afforded the opportunity to do so. In the absence of any comment from Baboom on the issue and any other factor that might suggest that costs should not follow the event, I find that \$3500.00 is an appropriate contribution to Mr Tucker's costs in the circumstances of the case.

³*PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[29] Baboom must pay Mr Tucker \$3500.00 as a contribution to his costs within 14 days of the date of this determination.

[30] It is also fair and reasonable in all the circumstances to require Baboom to reimburse Mr Tucker for the Authority's filing fee of \$71.56. This amount must also be paid to Mr Tucker within 14 days of the date of this determination.

Andrew Dallas
Member of the Employment Relations Authority