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Wade v Hume Pack N Cool Ltd AA 322/07 (Auckland) [2007] NZERA 738 (16 October 2007)

Last Updated: 22 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 322/07 5070417

BETWEEN ERROL WADE

Applicant

AND HUME PACK N COOL LTD

First Respondent

Member of Authority: Vicki Campbell Representatives: Bill Nabney for Applicant

Kim Stretton for Respondent

Investigation Meeting 28 August 2007 at Tauranga

Additional information 14 and 18 September 2007 from Applicant

16 September 2007 from Respondent

Submissions Received: 26 September from Applicant

No submissions from Respondent

Determination: 16 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Errol Wade seeks a compliance order from the Authority in respect of an agreement he says was entered into between him and Hume Pack N Cool Ltd ("Hume PNC") to resolve an issue that he had raised as to unpaid wages and other payments.

[2] Mr Wade was employed by the respondent at various times from 1989 until 2005 and in various capacities. The respondent is owned and operated by the Hume brothers, Mark, Gavin and Jim. Mr Wade was a brother-in-law to the Hume brothers.

Initial Claim – January 2004

[3] On 6 January 2004 Mr Wade raised a claim in respect of unpaid wages and reimbursements of expenses totalling \$1,080,960.00 against Hume PNC.

[4] The respondent says the claim came as a complete surprise as no issues had ever been raised by Mr Wade with regard to outstanding payments for wages or other monies owed. The respondent did not accept at that time, nor does it accept now, that any money is owed to Mr Wade.

[5] Mr Wade attended a meeting on 12 January 2004 with Mark, Jim, and Gavin Hume and during which the respondent says Mr Wade told the Hume brothers that he had put the claim together to get their attention.

[6] Mr Wade says that at that meeting, by agreement, his claim was settled by the Respondent undertaking to pay him an amount of \$70,000 nett of tax. He says he was paid \$40,000 on 9 March 2004 and that as far as he was concerned that payment was a part payment only.

[7] Mark Hume, the respondent's general manager, says that there was never an agreement to pay \$70,000. He says that during the meeting on 12 January 2004 Mr Wade reduced his claim and asked for \$70,000 but no figures were actually agreed.

[8] A copy of the letter dated 6 January 2004 and on which Mr Wade has handwritten some comments was produced at the investigation meeting. It was common ground that during the meeting on 12 January 2004, Mr Wade deleted out of all but two of his claims. The remaining claims were for "Savings of \$500 per week, for five years" and the other for "Supply of vehicle for ten years". However, the amounts originally sought of \$125,000 and \$130,000 was reduced to \$50,000 and \$20,000 respectively.

[9] Mr Wade has also hand written at the bottom of the letter:

I had a meeting with Mark and Gavin on 12.01.04 and I have elected to withdraw this letter and continue negotiation.

[10] I have concluded that on 12 January 2004 that the parties agreed that Mr Wade would withdraw his letter setting out his claims, and that the parties would continue to negotiate. I do not accept there was any agreement on 12 January 2004, for Mr Wade to be paid \$70,000.

[11] Mark Hume says that after meeting with Mr Wade on 12 January 2004, and even though he considered Mr Wade's claim to be a nonsense he re-evaluated Mr Wade's claim and determined that as he had been using his own vehicle for many years on business purposes it would not be unreasonable to pay to him a sum of

\$40,000 which seemed to him to be a fair reimbursement to reflect the use of his vehicle. He had concluded that Mr Wade had probably spent \$5,000 per year for eight years in running his own vehicle.

Payment of \$40,000 – March 2004

[12] It was common ground that on 9 March 2004 Mr Wade and Mark Hume met. The discussion during that meeting is disputed. What is common ground is that following the meeting Mr Wade was paid \$40,000 less tax. An amount of

\$31,120 was deposited into Mr Wade's bank account on 29 March 2004.

[13] Mr Wade says it was agreed at the meeting that he would be paid \$40,000 as a part payment. Mark Hume says that the \$40,000 was the settlement of Mr Wade's entire claim.

[14] A copy of an invoice dated 9 March 2004 was produced to the Authority. It was in reliance of this invoice that Hume PNC says it paid Mr Wade the \$40,000. The invoice is addressed to Hume Pack N Cool Ltd from Errol Wade. Under the description heading on the invoice it states "Crop Procurement fee as per negotiation" [my emphasis]. The invoiced amount is \$40,000.

[15] In his written statement Mr Wade states:

[Mark Hume] then presented me with an invoice book, said he was going to pay me the sum of \$40,000 gross and that he required me to sign for the money.

He told me that if I did not sign for it they wouldn't pay me the money then and I would have to wait another year due to,

what he described as “tax issues”.

I believe the invoice may have read something like “for procuring crop” but that is not what I recall was written on the invoice when I signed it. Apart from anything else, indicating that it was for procuring crop is a nonsense given the nature of the work that I had with Hume Pack-N-Cool. I did not sell them any crop.

[16] At the investigation meeting Mr Wade told me that he went into Mark Hume’s office where Mark Hume told him he would be given \$40,000 and asked him for a receipt. Mr Wade told me that Mark Hume then told Mr Wade what to write on the note (the invoice) and he then signed it.

[17] I have not relied on Mr Wade’s evidence about what was or was not written on the invoice at the time he says he signed it. I have preferred to rely on the actual words written on the document itself. I am satisfied the handwriting on the invoice is that of Mr Wade. I have compared the handwriting on both the invoice and the 6 January 2004 letter and have concluded that it is sufficiently similar to have been written by the same person.

[18] I have concluded that the invoice was to allow for the payment of a “fee” for Mr Wade’s services for crop procurement as if Mr Wade were a contractor, and that this payment would be reflected as a payment to a contractor through the business accounting system.

[19] Further, I have concluded on the balance of probabilities, that while the invoice does not specifically state that the payment is in full and final settlement of Mr Wade’s original claim, the payment of the \$40,000 was to be the end of the matter. I am supported in my conclusions by Mark Hume’s written evidence where he told me:

I discussed Errol’s claims and said that I recognised money was owed in regard to the use of Errol’s vehicle, and we believed \$40,000 was a generous payment.

Errol said that he still wanted \$70,000, however, I said that we were prepared to pay \$40,000 but would not agree to pay any more than that.

[20] Further, Mr Wade had withdrawn his original claim (the letter) and wanted to continue negotiating. The invoice shows that the \$40,000 was paid “as per” those “negotiations”.

[21] I find on the balance of probabilities that Mr Wade settled his claim with Hume Pack N Cool Ltd on 9 March 2004 when he accepted payment of \$40,000. I am satisfied that there was no expectation on 9 March 2004, on the part of either Mr Wade or Hume PNC that any further payments would be made.

Deduction of PAYE

[22] At the investigation meeting Mr Wade told me that the payment of the \$40,000 should have been made to him without any deduction as the original figures provided in his letter of 6 January 2004 were net figures. He also told me he was asked by Inland Revenue (“IRD”) to pay tax of about \$10,000 on the money.

[23] I do not accept that Mr Wade did not expect to pay tax on the \$40,000. At the investigation meeting Mr Wade conceded that some of the figures he had set out in his letter of 6 January were based on gross sums and not nett. Further, in his written evidence Mr Wade himself says, that Mark Hume told him on 9 March 2004, that the payment was gross.

[24] Mr Wade says he was required to pay to IRD a further \$10,000 as tax on the \$40,000. Mr Wade has been unable to produce a copy of that letter, however the IRD records he has produced show that Mr Wade paid IRD an additional sum of \$5,664.79 on 18 January 2005 and that this was credited to his tax debt for the year ended 31 March 2004.

[25] Jim Hume provided the Authority with extracts from its Contractor payments accounting system. The \$40,000 payment to Mr Wade is accounted for within that system, while his wages payments are accounted for in the wages system. Appropriate deductions from gross payments, for tax have been itemised on the extracts produced.

[26] Mr Wade provided me with a statement from IRD which shows two distinct payments of tax remitted by Hume PNC on behalf of Mr Wade. Both payments mirror the statements and documentation provided by Hume PNC that the appropriate tax was deducted and paid to IRD in respect of the \$40,000.

[27] A Statement of Account – Income Tax, produced by Mr Wade sets out tax assessments and provisional tax amounts attributable to Mr Wade, together with payments made for the period 1 April 1999 through to 2007.

[28] Mr Wade has previously been self employed as a contractor. The statement of account document produced to the Authority seems to be more relevant to a self employed person, as opposed to an employee. Employees do not generally receive statements from IRD setting out provisional tax and assessment advice. Mr Wade may wish to follow this up with IRD.

[29] I am satisfied that Hume PNC treated the payment to Mr Wade appropriately.

Determination

[30] I find that Mr Wade did not have an agreement with the respondent that he would receive \$70,000 as payment for his claim he had made against the company in January 2004.

[31] I have also found that the parties entered into negotiation and that there was an agreement for Mr Wade to be paid \$40,000 gross as a contractor for “crop procurement”.

[32] Further, the handling of the payment to Mr Wade, through the respondents accounting systems together with the deduction of tax at source, was appropriate.

Costs

[33] Costs relating to this determination are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell

Member of Employment Relations Authority

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