

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 440
3166622

BETWEEN	CHRISTIAN WEBBY Applicant
AND	BOWMAN BUILDING SERVICES Respondent

Member of Authority:	Claire English
Representatives:	Applicant in person Robert Bowman for the Respondent
Investigation Meeting:	15 August 2022 at Wellington
Submissions received:	15 August 2022 from Applicant 5 September 2022 from Respondent
Determination:	6 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant was employed by the respondent as an apprentice builder. He says he was entitled to a pay increase of \$10 per hour on becoming fully qualified, and he has been underpaid for a total of 26 hours. He also claims that his annual leave payable on the ending of his employment has been underpaid.

[2] The respondent accepts that the applicant was not paid the pay increase of \$10/hour, with reservations, but denies that there is any annual leave outstanding.

The Authority's investigation

[3] For the Authority's investigation payroll documents were provided by both parties. The applicant and the director of the respondent attended the investigation meeting, and answered questions under affirmation from me.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- (a) Is the applicant owed \$260.00 in underpaid wages?
- (b) Is the applicant owed any annual leave as at the end of his employment, and if so, what amount might be owed?

Background

[6] The applicant, Mr Christian Webby, worked for the respondent, Bowman Building Services Limited, from November 2019, as an apprentice builder.

Payment of Wages

[7] Mr Webby states that, as of the week beginning Monday 28 February 2022, he became a qualified builder. The parties agreed that achieving his qualification entitled him to a pay rise of an additional \$10/hour. Mr Bowman texted Mr Webby to confirm his new payrate on Sunday 27 February, together with instructions for the upcoming week's work.

[8] In the event, Mr Webby resigned at the end of that week. The payslips show that during that week, he worked 26 hours, and was paid for those hours at his previous rate of \$30/hour, rather than the rate of \$40/hour stated by Mr Bowman in his text message.

[9] Mr Bowman states that he withheld the pay rise. Mr Webby did not consent to this, and now claims \$260 as an underpayment.

[10] Mr Bowman explained that Mr Webby never provided him with proof of his qualification. Mr Webby has now provided a photograph of his framed New Zealand Certificate in Carpentry, issued on 28 February 2022 by BCITO, and a text from his BCITO contact confirming that he had spoken with Mr Bowman, who had “confirmed capability” on that same date. Mr Bowman has now accepted this.

[11] The Wages Protection Act 1983 provides that:

- a. an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction (section 4 of that Act); and
- b. an employer can only make deductions from wages with the employee’s written consent (section 5 of that Act).

[12] There is no dispute that Mr Webby worked for 26 hours in the relevant week, or that he was paid for those 26 hours at the rate of \$30/hour, not \$40 per hour.

[13] Bowmans was then obliged, in accordance with section 4 of the Wages Protection Act 1983, to pay Mr Webby the entire amount of his wages at the agreed rate of \$40/hour when they became due at the end of the week.

[14] Any deduction from those wages would need to be confirmed by way of written consent from Mr Webby, in accordance with section 5 of that Act. No such written consent exists.

[15] Bowmans is therefore obliged to pay Mr Webby the sum of \$260.00, as underpaid wages.

Annual Leave

[16] Mr Webby originally raised a claim that he was not paid out the accruing portion of his annual leave for the current incomplete year of service. After having an opportunity to view the payslips in greater detail, he has withdrawn this claim. I have viewed the payslips and other pay records provided by Mr Bowman, and note that when making his original claim, Mr Webby was somewhat taken aback by the differing wording used on the final payslip, compared to the wording used on previous payslips.

He has now accepted, correctly in my view, that he was paid out the correct portion of his annual leave.

[17] Mr Webby's second claim relating to annual leave, which is still pursued, is that the annual leave he was paid was paid out at the rate of \$30/hour, when it should have been paid out at the rate of \$40/hour.

[18] The final payslip confirms that the 81.96 hours of entitled annual leave were calculated at the rate of \$30/hour. Section 24(2) of the Holidays Act 2003 provides that:

- (2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of—
 - (a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or
 - (b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

[19] At the time Mr Webby's employment came to an end, his ordinary weekly pay was higher than his average weekly earnings over the past 12 months, as his hourly rate had recently been increased. To put it another way, his annual leave should have been calculated with reference to an hourly rate of \$40/hour, not the previously applicable \$30/hour rate that was actually used.

[20] Accordingly, I award Mr Webby the additional sum of \$819.60 he claims, in accordance with section 24(2) of the Holidays Act 2003.

[21] I must also consider whether the amount of Mr Webby's annual leave that has already been paid out to him has been calculated at the correct rate. Section 25(2) of the Holidays Act requires that any annual leave payments that relate to leave that is accruing but to which the employee is not yet entitled are to be calculated at the rate of 8% of the employee's gross earnings. I am advised by Mr Bowman, who has provided a letter from his payroll provider to explain what calculations the payroll system uses, that this portion of Mr Webby's holiday pay has been properly calculated at the 8% rate.

[22] However, at the time this calculation was performed, Mr Webby had been underpaid in the sum of \$260.00. This \$260.00 properly forms part of Mr Webby's gross earnings. Therefore, Mr Webby is entitled to be paid a further 8% on the sum of \$260.00, in accordance with section 25(2) of the Holidays Act 2003, which amounts to \$20.80 gross.

Orders

[23] Bowman Building Services Limited is ordered to pay to Christian Webby within 28 days of the date of this determination:

- a. The sum of \$260.00 gross in respect of underpaid wages.
- b. The sum of \$819.60 gross in respect of underpaid holiday pay.
- c. The sum of \$20.80 gross in respect of further underpaid holiday pay.

Costs

[24] As both parties were self-represented, there is no issue as to costs.

Claire English
Member of the Employment Relations Authority