

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 130
3243219

BETWEEN	DANIEL WHITE Applicant
AND	CUNNINGHAM CONSTRUCTION CC LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Hayley Johnson, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	16 January 2024 in Masterton and by AVL
Submissions:	At the Investigation Meeting
Determination:	5 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Daniel (Red) White was employed by Cunningham Construction CC Limited (CCL) from 26 April 2022 until 25 April 2023, when he resigned due to alleged lack of payment by CCL. Mr White raises claims with CCL related to non-payment, including of annual holiday pay, interest on unpaid amounts, and failure to provide records.

[2] There has been no engagement by CCL with the Authority's investigation of this employment problem and as a result, Mr White's claims against it have gone unchallenged.

The Authority's investigation

[3] A case management conference for this matter was held on 14 September 2023 with Ms Johnson for Mr White. There was no appearance for CCL. An Authority Officer attempted to contact Mr Cunningham, who is the sole shareholder and director of CCL, on a mobile phone number that had been provided for him and were on emails from him. Two calls to Mr Cunningham were not answered and there was no facility to leave a message. I am satisfied that CCL had been advised of the time of the conference by way of registered courier accepted for delivery at its registered address and address for service, so the conference proceeded in CCL's absence, as it had been advised it would.

[4] Directions were issued which included a timetable for CCL to engage with the Authority's investigation, including lodging a statement in reply. Those directions and other documents for this matter were couriered to the registered address of CCL and proof of delivery by courier for each document was obtained. Regulation 17(1)(b) of the Employment Relations Authority Regulations 2000 provides for effective service on a New Zealand corporation if the notice, order, or document is left at its registered office. I am satisfied that CCL has been served with all necessary documents for this matter, however, CCL has not taken any steps to engage with the Authority's investigation.

[5] No representative for CCL was present at the directed venue on the morning of the investigation meeting. After a 10-minute adjournment, an Authority Officer made two attempts by to contact Mr Cunningham by phone, one of which was not answered and the other of which the call was terminated without answer. The Authority Officer left a message for Mr Cunningham advising that the investigation meeting would commence in CCL's absence pursuant to cl 12 schedule 2 of the Employment Relations Act 2000 (the Act) which enables the Authority to act fully in the matter before it as if CCL had duly attended or been represented. The investigation proceeded on that basis with Mr White in person and his advocate appearing by AVL.

[6] For the Authority's investigation a written witness statement was lodged for Mr White. Mr White answered questions, under affirmation, from me and from his advocate. Mr White's advocate also provided oral submissions at the investigation meeting.

[7] As permitted by s 174E of 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

[8] The issues requiring investigation and determination were:

- (a) Whether CCL has failed to pay Mr White wages or other money payable (including reimbursement of claimed expenses, and Kiwisaver and PAYE deductions), which may be recovered under s 131 of the Act or s 4 of the Wages Protection Act 1983?
- (b) Whether CCL has failed to pay Mr White annual holiday pay in accordance with either s 23 or ss 24 and 25 of the Holidays Act 2003 (HA2003)?
- (c) If CCL owes Mr White any amounts under (a) or (b), should it also be required to pay interest on those amounts (to be calculated in accordance with the Interest on Money Claims Act 2016) or a penalty under s 13 of the Wages Protection Act 1983?
- (d) Whether CCL has failed to provide when requested copies of:
 - (i) Mr White's individual employment agreement, as required under s 64(3) of the Act?
 - (ii) Wages and time records, as required under s 130(2) of the Act?
 - (iii) Holidays and leave records, as required under s 82(2) of the HA2003?
- (e) If so, should penalties be imposed under s 130 of the Act and s 75 of the HA2003, and should any part of those penalties be paid to Mr White?
- (f) Should either party contribute to the costs of the other party?

[9] At the investigation meeting Mr White's advocate advised that the portion of Mr White's claim related to PAYE deductions was no longer being pursued and this part of his claim is not addressed further in this determination.

Relevant law

[10] Under s 132 of the Act and s 83 of the HA2003 where:

- (a) claims are brought before the Authority for arrears under s 131 of the Act or holidays entitlements under the HA2003; and
- (b) an employer has failed the keep or produce wage and time records under the Act or a holiday and leave record; and

(c) the employer's failure prejudices an employee's ability to bring an accurate claim;

then the Authority may accept as proved, in the absence of evidence to the contrary, an employee's claims about wages paid, hours, days and time worked, and payments made under the HA2003 and leave taken.

[11] In this matter there is evidence in the form of an email from Mr Cunningham which appears to acknowledge in general terms that money is owed to Mr White, saying:

... in regards to funds i will finish off what i do have left and pay what is owed, the only catch is i dont have a date set for this payment to you but i will work on getting it to you as soon as i can,

im not in a position to even do payments as now there isnt enough coming in to going out so the best i can do is get you what is owed as soon as i have it..
[sic: grammatical errors in original email]

[12] Mr White also provided copies of a number of payslips generated through PayHero, which showed payments which were made to him and some details of annual holidays which he says were due. These included payslips including those from the pay periods for 18 April to 1 May 2022 and 3 to 16 April 2023, which he says were for the first and last payments he received from CCL, and corroborating bank payment records.

[13] In combination I have therefore relied on Mr White's evidence which supports amounts that he says are due, as described in paragraphs [14] to [21] below, and Mr Cunningham's general acknowledgement on behalf of CCL in paragraph [11] above that payments were due to Mr White.

How much is Mr White owed?

[14] Under affirmation Mr White stated that there were first payment issues at Christmas 2022 and over that holiday period, although these were remedied shortly thereafter. Mr White said he also was not paid on the Thursday prior to Anzac Day 2023, although there was a promise that would be rectified. He then continued to work and when he had not been paid on the Monday prior to Anzac Day that was when he decided he needed to resign due to non-payment, as he could not afford to work without being paid. Mr White says he resigned on Anzac Day, Tuesday 25 April 2023, and while he was eventually paid for the fortnight that had precipitated his concerns about non-payment, he says that he was not paid for the last six days he worked, being Monday 17 April 2023 to Monday 24 April 2023.

[15] I accept based on Mr White's uncontested evidence that he is due six days wages which amounted to 53 hours gross pay at \$35 per hour, totalling \$1,855 gross. I also accept his claim for an employer Kiwisaver contribution at 3% on this amount, which I calculate as \$55.65 gross.

[16] Mr White also says that he took no annual holidays and claimed based on payslips that he provided that he had accrued 6.9 weeks of annual holidays.

[17] While this amount of annual holiday entitlement was shown on the payslips Mr White provided, he was unable to explain why he would have been entitled to this amount of annual holidays as based on his uncontested evidence he was employed from 26 April 2022 until 25 April 2023. The payslips show that he would have become eligible for annual holidays on 26 April 2023 (recorded as his "Next Anniversary"). In these circumstances I do not consider Mr White has established he was entitled to the amount of annual holiday entitlement show on those payslips.

[18] Rather, based on Mr White's evidence and the payslips I consider the correct approach to his annual holiday pay is to apply s 23 of the HA2003, which provides for the calculation of annual holiday pay if employment ends within 12 months. This is appropriate as Mr White is one day short of having worked for CCL for 12 months, meaning he is entitled to annual holiday pay of 8% of his gross earnings under s23(2) of the HA2003.

[19] Mr White provided IRD records which show that between 26 April 2022 and 1 June 2023 he was paid \$52,316.04 by CCL.¹ To calculate his annual holiday pay, I add the gross amount of unpaid wages of \$1,855 awarded at paragraph [15] above. 8% of this combined amount equates to \$4,333.68 gross. The employer Kiwisaver contribution of 3% on this amount equates to an additional \$130.01 gross, which is also ordered to be paid.

[20] Mr White also provided a copy of an invoice for \$746.82 which he says he paid on behalf of CCL, for repairs to a work van. Mr White said that Mr Cunningham verbally agreed to the work being done on the van and that Mr White would be reimbursed, and that the van was returned to Mr Cunningham when Mr White resigned. Mr White provided an email showing he sought reimbursement for the invoice and says

¹ While these IRD records were for more than one year, they appeared to show the full amount of payments Mr White received from CCL, as well as payments from a subsequent employer.

that he has not been repaid that amount. Payslips and emails show that Mr White was provided reimbursement for other, smaller amounts, such as for petrol purchased for the van. I have no reason to doubt Mr White's evidence that the invoice provided was for work for CCL's benefit on CCL's van and order that this amount be reimbursed.

[21] I also consider that an order for payment of interest in accordance with the Interest on Money Claims Act 2016 is appropriate. Mr White has been without the benefit of money that was due to him since 4 May 2023 (being the Thursday after his employment ended). Mr White is entitled to interest on the full amount due to him of \$7,121.16 gross² from 4 May 2023 until that amount has been paid in full, to be calculated using the civil debt calculator on the Ministry of Justice website.³

Penalties

[22] Mr White sought penalties under s 13 of the Wages Protection Act 1983, s 130 of the Act and s 75 of the HA2003, with submissions on his behalf that half of any penalty should be paid to him due to the impact of non-payments to him, and the frustration and distress that this caused him.

[23] In considering what the right amount of penalty is, I have regard to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*⁴, *A Labour Inspector v Prabh*⁵ and *A Labour Inspector v Daleson Investment*.⁶ Section 133A requires that I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach, any vulnerability, and finally previous conduct.

[24] While penalties were sought for three statutory breaches, I regard the breaches as sufficiently interrelated to warrant a globalisation of breaches into one breach for record-keeping purposes, including the non-provision of Mr White's employment

² Made up of unpaid wages and an employer Kiwisaver contribution of \$1,910.65 gross (as ordered at paragraph [15]), unpaid annual holiday pay and an employer Kiwisaver contribution of \$4,463.69 gross (as ordered at paragraph [19]) and the reimbursement of an unpaid invoice of \$746.82 (as ordered at paragraph [20]).

³ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>. As at 5 March 2024, the amount of interest payable was \$332. The parties will need to determine the amount payable at the date any payments are made.

⁴ [2016] NZEmpC 143.

⁵ [2018] NZEmpC 110.

⁶ [2019] NZEmpC 12.

agreement when requested, and one breach for non-payment of wages, annual holiday pay and reimbursement of expenses that Mr White incurred on CCL's behalf. The maximum penalty against a company is \$20,000. For two breaches that gives a total of \$40,000.

[25] In terms of seriousness of the breaches, the actions involve a mix of employment standards provisions and record-keeping. Mr White and Mr Cunningham engaged in discussions where Mr Cunningham acknowledged CCL owed Mr White money, although demands by Mr White and his representative for payment which did not result in any payments being made.

[26] CCL was non-responsive to requests for records to be provided, although this was at and after the end of the employment relationship. The evidence that Mr White provided suggested that CCL had maintained records, although there had been some issues with timeliness of payments and supporting payslips. This does not however excuse CCL's failure to provide full records, including a copy of Mr White's individual employment agreement when requested to do so. The judgement of the Court in *Preet* suggests that starting points for failures to pay proper minimum entitlements should be assessed at 70% to 80%, and record keeping breaches at 50%.⁷ This would suggest an adjustment downwards to a combined penalty of between \$24,000 and \$26,000.

[27] The breaches by CCL were intentional and have not been rectified. There is no indication of CCL having been involved in similar actions with other employees. The amounts involved are relatively small, though important to Mr White. The record keeping breaches appeared to be relatively minor, which would warrant some reduction in the penalty for this breach.

[28] There is some indication of CCL having financial difficulties from Mr Cunningham's email acknowledging that money was owed to Mr White, however, CCL did not engage in the investigation process and is still on the Companies Register, so I have no evidence that would enable me to make a deduction for inability to pay.

[29] Standing back, looking at that figure, including in comparison to other cases and the total arrears, I conclude that a fair penalty is \$4,000. Payment of half the penalties is sought to Mr White. I heard evidence that he was placed under financial pressure by the lack of payments to him, although he remediated that by promptly obtaining other

⁷ Note 4 above at [161] to [171] and [173].

employment. I consider that payment of half the penalties to Mr White is appropriate in the circumstances. CCL are ordered to pay a penalty of \$4,000, with \$2,000 to be paid to Mr White and \$2,000 to be paid to the Crown account.

Summary of orders

[30] For the above reasons I order Cunningham Construction CC Limited to pay Daniel White within 28 days:

- a. Unpaid wages of \$1,855 gross and employer Kiwisaver contributions on this amount of \$55.65 gross;
- b. Annual holiday pay of \$4,333.68 gross and employer Kiwisaver contributions on this amount of \$130.01 gross;
- c. Reimbursement of \$746.82 for an invoice that Mr White paid on CCL's behalf;
- d. Interest on the above amounts calculated in accordance with the Interest on Money Claims Act 2016 from 4 May 2023 until that amount has been paid in full, to be calculated using the civil debt calculator on the Ministry of Justice website;⁸ and
- e. A penalty of \$2,000, with a further penalty of \$2,000 to be paid to the Crown account.

Costs

[31] I was asked by Mr White's advocate to award costs as part of this determination, rather than reserving costs for the parties to resolve between themselves.

[32] The Authority usually determines costs, when asked to do so, on the basis of a notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹ Submissions for Mr White were that CCL's actions and lack of engagement warranted payment of the daily rate for a full day.

[33] In this case, the investigation meeting was relatively brief, being concluded within just over an hour and a half, including time attempting to contact Mr Cunningham, hearing Mr White's evidence and submissions on his behalf. I consider, given this matter was relatively straight-forward, that a costs award of \$1,500 is

⁸ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>. As at 5 March 2024, the amount of interest payable was \$332. The parties will need to determine the amount payable at the date any payments are made.

⁹ See: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>.

appropriate. I also order that CCL reimburse Mr White for the filing fee, being \$71.56.
The amounts are also to be paid by CCL to Mr White within 28 days.

Shane Kinley
Member of the Employment Relations Authority