

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 58
5447625

BETWEEN ROBERT DENIS WILLIAMS
Applicant

AND INTERCIVIL LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Kerry Mulholland for the Respondent

Investigation Meeting: 18 February 2014

Determination: 18 February 2014

DETERMINATION OF THE AUTHORITY

- A. By no later than 48 hours from the date of this determination Intercivil Limited must pay wages that were due to Robert Williams since 22 January 2014.**
- B. The parties are directed to mediation to address other issues between them regarding allegations each has made about breaches of their employment agreement.**

Employment relationship problem

[1] Robert Williams sought orders requiring Intercivil Limited to pay wages due to him under the terms of a “*garden leave*” agreement signed by the parties on 22 January 2014. He was to serve a notice period “*on full pay*” after he advised that he was resigning to take up a role with Hydrotech, a competitor business referred to in a restraint of trade provision in his employment agreement with Intercivil.

[2] Intercivil, by a statement in reply lodged on 17 February 2014, confirmed it had not paid wages due because it believed Mr Williams had breached obligations of good faith and duty still owed to it. It said Mr Williams had used a Hydrotech vehicle during the garden leave period “*which has led to the repudiation of his employment*”.

[3] Mr Williams admitted he was using a car with Hydrotech signage but denied he was working for Hydrotech. He said Hydrotech loaned a car to him (for which he paid the expenses) because Intercivil took his work car off him for the garden leave period but it should have let him keep using that car as his employment agreement allowed for “*limited private use*”.

[4] In addition to the orders sought Mr Williams had lodged a personal grievance application for what he said were breaches of his employment agreement by Intercivil. In reply Intercivil said it believed Mr Williams was already working for Hydrotech or intended to do so in breach of his restraint of trade and it would take steps to enforce the restraint against him.

[5] I granted Mr Williams’ application to have the wages issue dealt with urgently and held an investigation meeting, notified on a time-abridged basis, because I considered Intercivil had not responded sufficiently promptly to arrangements for mediation on an urgent basis.

[6] Under oath or affirmation Intercivil human resources manager Kerry Mulholland, Intercivil national business development manager Adam Baines and Mr Williams answered questions and explained relevant documents about the wages issue and their views or understanding of the context in which the matter arose.

Non-payment of wages

[7] Ms Mulholland’s evidence confirmed that Mr Williams’ weekly pay was withheld on three occasions from 22 January as the result of a deliberate decision by the company’s management. It was not an administrative error or oversight.

[8] Intercivil’s decision was *prima facie* a breach of the Wages Protection Act 1983 provision at section 4:

Subject to sections 5(1) and 6(2) of this Act, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction

[9] Sections 5(1) and 6(2) of that Act did not apply to this situation and the issue is not about a deduction from wages but a total default in payment of them. The effect of s4 was that Intercivil was obliged to pay Mr Williams' wages.

[10] The legitimacy of Intercivil's decision not to do so needed to be considered in light of the two reasons it gave:

- (i) That Mr Williams had "*repudiated*" his employment agreement by his actions so Intercivil was no longer liable to continue paying him; and
- (ii) That Intercivil's conclusions were those that "*any reasonable employer would make*".

Had Intercivil legitimately cancelled the contract?

[11] The first reason was effectively an argument that Intercivil was entitled to cancel its obligation to pay Mr Williams' wages because his actions in driving a Hydrotech car showed he had repudiated his employment agreement with Intercivil. This cancellation of their contract – that is his employment agreement and the terms agreed for his service of garden leave – needed to be considered under the rules applying to cancellation at section 8 of the Contractual Remedies Act 1979.

[12] Intercivil failed to meet the requirements of those rules because it did not notify Mr Williams of its intention to cancel the contract (or that part of it requiring it to pay him). Ms Mulholland confirmed Intercivil had not made any attempt to advise Mr Williams of its decision not to pay him. There was no phone call, no email and no letter. He found out after noticing that his usual wages were not in his bank account and he rang a pay roll officer who told him that Ms Mulholland had said not to pay him. He then left messages for Mr Hill, Ms Mulholland and Mr Baines but did not receive any response to those various emails, texts and voice messages. Ms Mulholland said she was busy at the time with work to do with a business acquisition and there was also a problem with the company's computer and telephone system on those days. That explanation does not explain the lack of response to text and voice messages left on mobile phones. The result was that Intercivil failed, I have found, to establish, as required by s8(1)(b) of the Contractual Remedies Act, that it was not

reasonably practical to communicate with him in some way. The consequence of that failure is the cancellation Intercivil purported to make has not taken effect.

Were Intercivil's actions what a fair and reasonable employer could do?

[13] The second reason given by Intercivil for its actions had to be assessed against the standard set by section 103A of the Employment Relations Act 2000 (the Act). Intercivil failed to meet the test of justification because it did not put its concerns to Mr Williams for his explanation before taking action against him.

[14] At a meeting with Ms Mulholland and Mr Baines on 22 January Mr Williams signed an agreement about the terms of garden leave that included a reminder about his restraint of trade and confidentiality obligations along with a requirement to return company property, including the company vehicle provided to him for business purposes and "*limited private use*". Although Ms Mulholland and Mr Williams differed in their evidence over whether use of the car was debated before he signed the agreement, they do not disagree that Mr Williams openly made arrangements to borrow a vehicle from Hydrotech. Mr Baines offered to drive Mr Williams home after the meeting and on that journey Mr Williams telephoned a Hydrotech employee and made arrangements to collect a car. He then asked Mr Baines to drop him off at Hydrotech's offices and Mr Baines saw Mr Williams collect the car. Mr Baines informed Intercivil's managing director Alan Hill later that day about those events and the company's decision not to pay Mr Williams was made in the following days.

[15] Intercivil's defence on this point is that Mr Williams' actions showed he was breaching obligations of good faith and fidelity owed to it and he was either working for Hydrotech, or looked like he was, because he was driving one of its vehicles and was seen doing so by Intercivil's staff and customers. However at no point did Intercivil exercise its right (and obligation) as Mr Williams' employer during this period to require him to attend an investigation or disciplinary meeting to explain his actions. Under the terms of the 20 business days required in his notice period he remained Intercivil's employee until 19 February 2014 and it was able to 'call him in' from garden leave to respond to its concerns.

[16] Mr Williams did have an explanation for what he did that was based on his view that Intercivil breached its contractual obligation to allow him private use of the

work car during the garden leave (that he needed to be able to transport his children) and that he was not intending to breach the restraint provisions of his employment agreement. Those explanations may or may not be correct but the point for Intercivil is that it was required, I have found, to put its concerns to Mr Williams, give him a reasonable opportunity to respond and to genuinely consider his explanation. It took no steps to do so and consequently did not meet the statutory standard for what a fair and reasonable employer could do. Its decision to stop Mr Williams' wages was consequently unjustified.

Orders

[17] Accordingly, as advised orally to the parties at the conclusion of the investigation meeting, I have decided that I was obliged to make orders for Intercivil to pay the wages due to Mr Williams. The order is made under s137 and s138 of the Act. Within 48 hours of the time and date of electronic despatch of this determination to the parties, Intercivil must pay the wages due to Mr Williams for the period from 22 January to 18 February 2014.

[18] Mr Williams asked about holiday pay due to him. As the last day of his employment, which I believed to be 19 February 2014, has not occurred Intercivil cannot be said to have defaulted on any final payment due, so no order could yet be made on those amounts. Intercivil could be expected to make any such payments due without delay and without unauthorised deduction or default.

[19] A direction to mediation is already in place for the parties to discuss wider issues regarding the end of Mr Williams' employment, his plans for future work with Hydrotech, and the nature of his confidentiality and restraint of trade obligations.

[20] At the end of the investigation meeting I urged the parties to make every effort to resolve those issues between them without resort to further litigation as the time, expense and effort put into such disputes often left parties feeling the outcome was "lose, lose" rather than "win, lose". There is a history to the present dispute involving Hydrotech and Intercivil as Mr Williams had previously worked for Hydrotech and that company issued proceedings to enforce a restraint when he moved to a job with Intercivil in 2013.

[21] If the matter is not resolved in mediation the Authority will continue its investigation of Mr Williams' personal grievance and Intercivil's claim or counterclaim that Mr Williams has breached restraint of trade obligations.

Robin Arthur
Member of the Employment Relations Authority