IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 345
5466300

	BETWEEN	ROBERT DENIS WILLIAMS Applicant
	AND	INTERCIVIL LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Kerry Mulholland for the Respondent
Investigation:	On the papers
Determination:	25 August 2014

DETERMINATION OF THE AUTHORITY

A. By no later than 14 days from the date of this determination Intercivil Limited must pay Robert Williams the following sums:

(i) $2000 for wages wrongfully deducted from his final pay; and

(ii) $50.96 as interest on those wages for the period from 21 February to 25 August 2014; and

(iii) 27 cents a day as further interest from 26 August 2014 until the sums due are paid; and

(iv) $71.56 in reimbursement of the Authority fee to lodge his application in the Authority.

Employment relationship problem

[1] On 20 February 2014 Intercivil Limited (Intercivil) deducted $2000 from a payment of final wages and holiday pay to Robert Williams. The deduction was labelled "*Cash Advance*" on Intercivil's records for his final pay.

[2] In response to a query from Mr Williams, Intercivil human resources manager Kerry Mulholland told him she understood the deduction was for a cash advance of $2000 given to him by cheque. She said his employment agreement allowed for money owed to be deducted from his final pay.

[3] Mr Williams disputed that he was paid the $2000 as a cash advance on his wages. He said Intercivil's managing director Alan Hill had arranged for him to be paid that amount in November 2013 as the first part of a bonus they had agreed verbally. Mr Williams said the bonus was agreed to 'match' or partly match a salary package offered to him by a rival firm, Hydrotech Drainage.

[4] Mr Williams worked for Intercivil from July 2013 until he resigned in January 2014. He had previously worked for Hydrotech and, after 20 February 2014, returned to work for that business.

[5] The issue of wages due to Mr Williams on his departure from Intercivil was the subject of an earlier Authority determination on 18 February 2014.[1] It found he should be paid wages for a period of garden leave and directed the parties to further mediation on other matters. On 20 February the parties met in mediation and resolved those other matters. Their agreement was recorded in a settlement agreement certified that day under s149 of the Employment Relations Act 2000 (the Act). One term stated their agreement was in full and final settlement of all matters between Mr Williams and Intercivil arising out of their employment agreement.

Issues

[6] The issues for resolution in this matter were:

(i) Was Intercivil entitled to make deductions from Mr Williams' pay for any debts owed by him to it?

(ii) Did Mr Williams owe Intercivil $2000?

(iii) If Mr Williams did not owe Intercivil $2000, did the 20 February settlement agreement nevertheless prevent him seeking an order for payment of the money deducted from his final pay?

(iv) Were any orders required for payment of money, interest, costs and reimbursement of the Authority fee?

[1] [2014] NZERA Auckland 58.

[7] I have determined this matter 'on the papers' after the parties had timetabled opportunities to lodge additional documents and information in addition to their statement of problem and the statement in reply.

Authorisation for deductions from final pay

[8] Mr Williams said Intercivil was not entitled to make any deductions from his final pay because he had not provided written authority for it to do so. He was incorrect. Clause 16 of the employment agreement he signed with Intercivil in June 2013 provided this authorisation to Intercivil:

> ***Deductions from pay***
>
> *You agree in the event of the termination of your employment to the deduction from your final pay of any money owing to Intercivil whatsoever it may be. ...*

[9] The provision was consistent with s5 of the Wages Protection Act 1983 (the WPA) allowing an employer to make deductions for any lawful purpose where the worker has given written consent and has not given the employer written notice withdrawing that consent. Clause 16 in Mr Williams' employment agreement was the written consent for the deduction and he had not given notice withdrawing it.

Did Mr Williams owe Intercivil any money?

[10] By email on 28 February 2014 Ms Mulholland asked Mr Williams to provide "*paperwork*" to support his belief that the $2000 was not a cash advance that he had to pay back to Intercivil.

[11] Her request placed the burden on the wrong party. To displace the statutory obligation at s4 of the WPA for an employer to pay "*the entire amount*" of wages due, Intercivil needed to establish that the amount of $2000 paid to Mr Williams earlier was, in some way or other, "*money owing*". If it did so, the deduction was lawful under clause 16 of the employment agreement and s5 of the WPA.

[12] In the Authority's investigation, carried out 'on the papers', Intercivil had at least three opportunities to meet that its of proof – in its statement of reply and by

responding to two Authority Minutes identifying the sort of information and documents required.

[13] By letter to the Authority on 31 July 2014 Ms Mulholland said Mr Hill had asked a payroll officer on 11 November 2013 for a cheque for $2000. She said the cheque was for "*Mr Williams' loan*". However there was no direct evidence from Mr Hill on whether he gave Mr Williams the cheque as a loan or any other basis that would require the $2000 to be paid back to Intercivil. Mr Hill was the person that Mr Williams claimed had made the verbal agreement with him about the basis on which the money was paid. Intercivil had the opportunity to provide an affidavit from Mr Hill, its managing director, rebutting Mr Williams' account but did not do so.

[14] Intercivil offered two other relevant items of evidence. One was a copy of a "*Payment Voucher*" dated 11 November 2013. It recorded a payment of a cheque for $2000 to "*Robbie Williams*". Under the heading of "*Particulars*" on the voucher was one word: "*Advance*".

[15] Ms Mulholland said the word 'advance' showed the amount was a loan. However I considered, in the context of the limited other evidence provided, that the word was ambiguous. It could have meant an advance on wages, being effectively a cash loan. Alternatively it could have meant an advance of part of the total bonus payment that Mr Williams alleged he had agreed with Mr Hill.

[16] The other relevant item was an email to Mr Williams from Intercivil's payroll administrator, Annette Harris, dated 8 November 2013. The text asked him to fill out an attached cash loan application form for $1800 and said it was said "*per Alan Hill instructions*". By letter to the Authority on 11 August 2014 Ms Mulholland confirmed Intercivil had "*no filled-in loan form*" for the amount of $1800 or $2000. Mr Williams said Mr Hill had thrown what might have been a loan form into a rubbish bin and had told Mr Williams not to worry about it.

[17] On the basis of the documentary evidence, and in the absence of any direct evidence from Mr Hill contradicting Mr Williams' account of the agreement to pay him the amount as a bonus, Intercivil failed to establish that the $2000 was "*money owing*". Intercivil was not entitled to make the deduction of $2000 from Mr Williams' final wages.

Was the 20 February settlement agreement a bar to recovering the $2000?

[18] There was nothing to suggest or confirm Mr Williams knew during the mediation with Intercivil on 20 February that $2000 was or would be deducted from the final wages paid to him by bank transfer that day. The mediation was about other employment matters to do with him leaving Intercivil and returning to work for Hydrotech. The terms agreed and certified that day were final and binding under s149 of the Act. As a matter of interpretation the term referring to a full and final settlement cannot be taken as a waiver or authorisation for a deduction from Mr Williams' final pay that he did not know, at the time, Intercivil had made or would make.

Orders for payment

[19] On the basis of those findings I concluded Intercivil must resolve Mr Williams' employment relationship problem by paying him the sums set out in the order labelled "A" at the head of this determination.

[20] The interest payments were calculated at the rate of 5 per cent a year under clause 11 of Schedule 2 of the Employment Relations Act 2000 and clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177).

Costs

[21] Other than reimbursement of the Authority fee I have not ordered any payment of costs or expenses to Mr Williams. In a memorandum to the Authority dated 12 August 2014 Mr Williams referred to a fee of $800 for his advocate, a man who was a former Hydrotech manager. There was no evidence any such amount was charged, paid or reasonably incurred.

Robin Arthur
Member of the Employment Relations Authority