

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 248  
5310307

BETWEEN            SCOTT JAMES WINTER  
                                 Applicant  
  
A N D                BRICKWORX LIMITED  
                                 Respondent

Member of Authority:    M J Loftus  
  
Representatives:        Scott Winter, on his own behalf  
                                 Branden Gunst, on behalf of the respondent  
  
Investigation Meeting:    7 November 2012 at Queenstown  
  
Submissions Received:    At the investigation  
  
Date of Determination:    12 November 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This is a wage arrears claim. The applicant, Scott Winter, claims the respondent, Brickworx Limited, owes the sum of \$2,815.37 (being unpaid holiday pay due on cessation).

[2] Brickworx denies the claim. It has two reasons for doing so. It contends Mr Winter's agreed rate of pay was an all inclusive one and therefore he has already received his holiday pay. In the event that is not accepted, Brickworx claims it was entitled to retain any monies owing as an offset for damage caused by Mr Winter operating a competing business on Brickworx's time, servicing Brickworx clients and using Brickworx's equipment.

**Citation of respondent**

[3] The application as originally filed cited Mr Branden Gunst as the respondent. The citation also noted Brickworx via a bracketed annotation. This was raised with the parties at the commencement of the investigation meeting. Both say the employer was Brickworx Limited and respondent's identity was altered by agreement.

**Background**

[4] Mr Winter's employment with Brickworx commenced on 2 July 2009. The arrangement, as originally entered into, saw him paid an amount that Brickworx describes as a *retainer*. It was essentially a salary and Mr Winter received \$875.95 gross per week (\$700.00 net) irrespective of the number of hours worked. In February 2010 the amount increased to \$1,025.14 gross (\$800.00 net) though other amounts were occasionally paid over the following weeks. On 2 May 2010 there was another change with Mr Winter then being paid \$28.00 for each hour actually worked.

[5] Brickworx claims the retainer was an all inclusive payment and catered for any obligations it may have in respect of holiday pay, sick leave or public holidays. Mr Winter is equally adamant that was not the situation and he is still to receive his holiday pay.

[6] On 2 June 2010 Mr Winter advised Mr Gunst he was resigning. He gave a month's notice. He did so with a view to establishing his own business and acquired premises from which to run it the same day.

[7] Mr Winter says that on 15 June he told Mr Gunst he would not be at work the following day. Mr Gunst denies he was forewarned but both agree Mr Winter was absent on the 16<sup>th</sup>. He was working on a building site for a client who had, until that time, used Brickworx services. He was utilising Brickworx's truck and equipment to perform the work. Mr Gunst became aware of this and visited the site.

[8] There is some disagreement as to what then occurred though that need not be resolved for the purposes of this determination. Mr Winter claims he was dismissed forthwith. Mr Gunst denies dismissing Mr Winter but accepts he took the truck and equipment and the two did not speak again until after this claim arose.

[9] On 1 July 2010 Brickworx solicitor wrote to Mr Winter. The letter advises Brickworx had expected Mr Winter would remain in its employ until 30 June 2010 as advised when he gave notice. It then raises allegations regarding work Mr Winter was alleged to have performed for three of Brickworx's clients during the notice period, along with some other allegations regarding misuse of Brickworx property.

[10] The letter then alleges Mr Winter abandoned his employment on 16 June 2010 before advising:

*By abandoning your employment without providing proper notice of leave, and working in your own capacity as a direct competitor during working hours, you have undermined and breached the obligation of trust and confidence towards Brickworx and breached your implied duty of fidelity and good faith.*

[11] The letter goes on to advise that Brickworx was seeking penalties and damages *in respect of*:

- a. *The value of the invoices for which the business has not been paid.*
- b. *General damages for inconvenience, loss of Mr Gunst's time and interruption of business.*
- c. *Loss of company property if you do not return all items.*
- d. *Loss to the company if you have taken confidential information.*

[12] A second letter followed on 10 July 2010. It responds to a claim for holiday pay Mr Winter had, by that time, made and opens by advising:

*We write this letter to you inform you that Brickworx paid the sum of \$200 for holiday pay to your account on 8 July 2010 as full and final settlement of all employment law matters between you and Brickworx.*

[13] The letter concedes the claimed amount. It goes on to discuss Mr Winter's alleged activities before quantifying an amount Brickworx contends he pocketed as a result of working for its clients on its time. The letter then advises:

*Brickworx must deduct the amount you have made from the above jobs (after costs).*

[14] The amount is said to be \$3,181.50. That exceeds the amount sought for holiday pay. Notwithstanding that, Brickworx made the payment of \$200 as a sign of goodwill.

[15] Brickworx maintains its position. It owes nothing but made a small payment as a sign of goodwill. It also claims to have uncovered additional wrongdoing on Mr Winter's part but concedes it never commenced the damages action threatened on 1 July.

[16] Mr Winter accepts he received the \$200. He also concedes a number of Brickworx's allegations but claims he was entitled to work on his own account.

### **Determination**

[17] Mr Winter seeks \$2,815.37. A perusal of the timesheets provided by Brickworx would indicate the amount is understated. It would appear to have been calculated from net earnings, not gross and even then there is a small discrepancy. Mr Winter did however confirm \$2,815.37 as the amount sought. The claim is the claim and I take the matter no further.

[18] Notwithstanding Brickworx's position, the claim has already been conceded on Brickworx's behalf. Even if it had not, the arguments proffered by Brickworx could not justify non payment.

[19] Section 28(1) of the Holidays Act 2003 specifies when an employer may pay holiday pay along with regular pay. It says an employer may do so if the employee is engaged on fixed term agreement of less than 12 months duration or works on a basis so intermittent or irregular it is impracticable to provide annual holidays in accordance with section 16 of the Holidays Act.

[20] Neither apply to Mr Winter. He was not on a fixed term arrangement and the salaried arrangement means there can be no suggestion it is impractical to provide holidays in accordance with the Holidays Act.

[21] Section 28(1) goes on to require the employee agree to *pay as you go* in his or her employment agreement and the holiday pay is an identifiable component of the employee's pay.

[22] Section 65(1)(a) of the Employment Relations Act 2000 requires an employment agreement be in writing. There is no written agreement to support the disputed claim Mr Winter agreed to the arrangement and the wage records fail to identify a leave component in the amount paid. I conclude the disagreement over

whether or not the parties agreed a pay as you go arrangement becomes irrelevant as you can not contract out of the law and the arrangement would, in this case, be precluded by non compliance with other requirements of s.28(1) of the Holidays Act.

[23] The alternate argument is Brickworx should be able to retain any monies owing as a counter to damage incurred from Mr Winter performing work for its clients and for which it was not remunerated. Again, the approach is unsustainable.

[24] Holiday pay is wages (section 86 of the Holidays Act). The Wages Protection Act 1983 provides an employer may only make a deduction from wages with the authority of the employee (s.5) or by operation of law (examples being s.6 of the Wages Protection Act or attachment orders (sections 87(1)(b), 88(3)(a) and 103 of the Summary Proceedings Act 1957)).

[25] With one possible exception, there is no suggestion Mr Winter agreed to the deduction and no evidence to support such a claim had it been made. In saying a possible exception I refer to the words *full and final settlement* in the letter of 10 July. This might be taken to allude to some form of settlement but that is not the case. The parties agree both letter and payment were unsolicited and they never discussed the claim, let alone reached any form of settlement.

[26] That leaves the assertion Brickworx is entitled to retain the money to recompense it for damage inflicted by Mr Winter. I can not agree. A damages claim must be commenced with an affirmative claim (see *Bourne v Real Journeys Ltd* [2011] NZEmpC 120 at 153). Whilst it was threatened and may yet be lodged, the damages claim was never pursued and there can not, therefore, be a resulting award which might possibly be used to counter Mr Winter's claim.

[27] For the above reasons I conclude Mr Winter's claim has validity and Brickworx owes the money sought.

### **Costs**

[28] It is normal that costs follow the event and the successful party is entitled to a contribution toward costs incurred. That said, Mr Winter was unrepresented at the investigation meeting which means his recoverable costs are most likely limited to the \$71.56 filing fee. In order to avoid additional effort or expense, and given a costs

award can be reviewed, I choose to dispose of the issue and order Brickworx pay Mr Winter a further \$71.56 as reimbursement of costs.

**Orders**

[29] The respondent, Brickworx Limited, is to pay the applicant, Mr Scott Winter, the following sums:

- a. \$2,815.37 (two thousand, eight hundred and fifteen dollars and thirty seven cents) being recompense of unpaid holiday pay; and
- b. A further \$71.56 being a contribution toward costs incurred.

M B Loftus  
Member of the Employment Relations Authority