



attend the mediation, however he should have advised Medication Services and Icarus of that before the day on which mediation was to occur, instead of just failing to attend.

### **Employment relationship problem**

[4] Mr Woodcock claims that he was unjustifiably dismissed by a text message on 21 June 2019. He claims wage arrears on the basis Icarus Construction Services Limited (Icarus) failed to pay him for his last five days that he worked or any holiday pay when his employment ended.

[5] Mr Woodcock seeks that a penalty be imposed on Icarus for its failure to pay him his wages.

[6] Mr Woodcock is a young worker who was on a benefit before he accepted an offer of employment from Icarus. Mr Woodcock said he had started work for Icarus before 6 June, which was the date of his offer letter and individual employment agreement.

[7] Mr Woodcock says he worked and was paid for the weeks ending 31 May and 7 June 2019.

[8] A review by Mr Woodcock of his bank statements shows that he was paid his wages for his first two weeks of employment by “E and R Engineering”. He does not know who or what that entity is or why its name appeared on his pay statements.

[9] Mr Woodcock says that the offer of employment was with Icarus, and the work he was doing was for Icarus. From 7 June 2019 onward Mr Woodcock’s bank statements show that his wages were paid by “*Icarus Construct*”.

### *No PAYE paid to IRD*

[10] Mr Woodcock’s Inland Revenue Department (IRD) earnings schedule shows that neither E and R Engineering or Icarus have paid any PAYE on his behalf to IRD. That is a matter that the IRD may want to follow up.

[11] Mr Woodcock said he assumed that PAYE had been deducted from his wages because he was paid less each pay period than the gross amount of wages he would have been paid if PAYE had not been deducted.

[12] The failure by Icarus and E and R Engineering to pay PAYE to the IRD is a matter that the IRD will have to investigate.

#### *Terms and conditions of employment*

[13] Under the terms of Mr Woodcock's employment agreement he was to be paid \$20 gross an hour into his nominated bank account each week. He was employed for 40 hours per week, to be worked between 7am – 5:30pm Monday to Friday. His hours of work were to be advised to him by way of a roster.

[14] Icarus could provide Mr Woodcock with more hours, and he could elect whether to accept its offer of extra hours or not.

[15] The employment agreement also specified that Mr Woodcock would receive at least one day off work within a period when the roster was set.

#### **No appearance by Icarus**

[16] In light of the failure of the parties to attend mediation, the Authority scheduled an investigation meeting for 12 November. The parties were also directed to attend the investigation meeting along with all of their witnesses (if any).

[17] On 21 October 2019 the Authority issued timetable directions to the parties. This required Mr Woodcock to file his statement by 25 October and Icarus had until 31 October 2019 to file its witness statements.

#### *Service details*

[18] The Notice of Hearing was also served on 21 October 2019 on Robbie Crawford, who filed Icarus' Statement in Reply, by email address at the email he had previously used to communicate with the Authority.

[19] The Statement of Problem and attachments, Statement in Reply, Notice of Hearing and Authority's timetable directions were served on Icarus' director, Eliza Szonert, by track and trace courier 21 October 2019. She responded to the Authority on 24 October so we know she received these service documents.

[20] Mr Woodcock's witness statement, an unsigned employment agreement Mr Woodcock said he had received from Icarus, a case he was relying on (*Ferrari v the Flying Bean Petone*) and a copy of the invoice his advocate had given him were all served by email on Ms Szonert on 31 October 2019.

[21] The Authority also had communications with Ms Szonert that confirmed that the matter was going to be investigated on 12 November 2019.

#### *Communications with Icarus*

[22] On 18 October 2019 Mr Robert Crawford emailed the Authority, in his capacity as Icarus' representative, asking "*can you please drop this vexatious time wasting claim.*" That application was declined.

[23] On 21 October 2019 Mr Crawford emailed the Authority advising that "*the company is going into liquidation and I no longer work for the company.*"

[24] On 24 October 2019 Ms Szonert emailed the Authority. Her email included a number of complaints and allegations against Mr Woodcock and advised that Icarus was "*in the process of being dissolved.*"

[25] Ms Szonert's email also raised reasons for Mr Woodcock's dismissal that he says had not been raised with him, and which were contrary to the text messaged dismissal he had received. These were not the same reasons that were recorded in Icarus' Statement in Reply, dated 23 August 2019.

[26] On 6 November 2019, after Icarus failed to file any statements or information, the Authority emailed Ms Szonert confirming that the Authority would be investigating Mr Woodcock's claims on 12 November 2019, as scheduled.

[27] The Authority also pointed out that:

- (a) Ms Szonert had not provided the information responding to Mr Woodcock's claims that Icarus had been asked to provide; and
- (b) Although Ms Szonert had made allegations against Mr Woodcock, she had not filed any evidence/information to support such allegations.

[28] The Authority then set out the evidence/information that it expected to see from Icarus and/or wanted it to provide to support Ms Szonert's allegations.

[29] Ms Szonert replied by sending an inappropriate email to the Authority that did not provide the evidence/information requested and did not respond to Mr Woodcock's claims. She also said she was having surgery so would not be attending the investigation meeting.

[30] The investigation meeting had been scheduled around the claim in her email of 24 October 2019 that she was having surgery "*in four weeks*" (i.e. on 24 November). She had never advised the Authority that her 24 November surgery date had unexpectedly changed to an earlier date. She also said that she was no longer a director of Icarus. However the Companies Office still recorded her as a director.

[31] Icarus' other director is William Ihinga Ihipa Crawford who, according to the Companies Office, resides at 1c Puriri St, Takapuna Auckland 0622. That is the same address for service that was recorded on the Companies Office for Eliza Szonert.

[32] Mr William Crawford is recorded by the Companies Office as having taken on a director role on 2 October 2019. He is also the 100% shareholder in Icarus. The Companies Office records Ms Szonert as having vacated her shareholder role on 21 October 2019. Mr Woodcock's Statement of Problem was filed on 7 August 2019.

[33] It is unclear whether the other director Mr William Crawford is the same person as Robert (Robbie) Crawford who is recorded in a document filed with the Authority as Ms Szonert's "*partner*" and who apparently resides at Icarus' registered address for service.

[34] Mr Robert Crawford attended mediation for Icarus and he is named as the person who filed Icarus' representative in its Statement in Reply. He is also the person who initially communicated with the Authority about this matter.

[35] No information was provided to the Authority about why Mr Crawford could not attend the investigation meeting on 12 November for Icarus, as he was the person who had dismissed Mr Woodcock via text message.

[36] The Authority's email dated 7 November 2019 to Ms Szonert informed her that if she wanted an adjournment of the investigation meeting (IM) that was scheduled for 12 November,

on the grounds of her ill health, then she would need to provide the Authority with the following information:

- (a) Medical certificate that she was unfit to attend the IM and identifying when she would be fit to do so;
- (b) Date of her surgery and expected recovery period;
- (c) Why none of Icarus' other directors could attend the IM if she was unable to;
- (d) Any other information that would assist the Authority to decide whether or not an adjournment should be granted.

The Authority further advised Ms Szonert that if the information it had requested, relevant to an adjournment request, was not provided the IM would proceed on 12 November, as scheduled. The Authority again set out the information/evidence it expected to see from Icarus if it wanted to defend Mr Woodcock's claims.

[37] Ms Szonert replied in another inappropriate email dated 7 November that said (among other things):

Any information regarding my health is a matter of medical privilege and if you like to confirm any of it you can apply through the justice system by way of discovery or through The Freedom of Information Act for anything public. I do not have to supply you with these documents.

[...]

I will focus on my health that my surgeon indicates will be 6-12 months from now. (sic)

[38] On 8 November 2019 Ms Szonert emailed the Authority a form that looked as it was intended to be a Work and Income New Zealand (WINZ) Capacity Medical Certificate but it was not from a registered medical practitioner or a District Health Board. However the document was not on WINZ letterhead, it did not identify who had created it and it was unsigned.

[39] The Authority emailed Ms Szonert on 11 November advising that the information she had provided was insufficient to warrant a late adjournment of the IM and that there was no explanation of why the other director William Crawford or Robbie Crawford (if they were not the same person) could not attend.

[40] There was also no explanation regarding the contradicting surgery dates she had given the Authority, or when she would be fit to attend an IM or why Robbie Crawford would not be

appearing for Icarus. The Authority confirmed that the IM would be proceeding, as scheduled, the next day.

[41] Later that same day (11 November 2019) Ms Szonert emailed the Authority a “*discharge letter*” from Mercy Hospital. It recorded her procedure on 4 November, her discharge on 6 November and that her next of kin was “*Robbie Crawford - Partner*”.

[42] The Authority emailed Ms Szonert back on 11 November, confirming the IM would be proceeding the next day because such a late adjournment would unreasonably prejudice Mr Woodcock, she had not provided all of the requested information and the Authority considered that the director and/or Robbie Crawford should have been able to attend the IM even if she could not.

### **Failure to provide employment documentation**

[43] Icarus was directed by the Authority to provide it with copies of Mr Woodcock’s wage and time records that it was legally required to keep under s 130 of the Employment Relations Act 2000 (the Act).

[44] Icarus was also directed to provide the Authority with a copy of Mr Woodcock’s holiday and leave records that it was legally required to keep under s 81 of the Holidays Act 2003 (HA03).

[45] These employment records were not provided.

[46] Section 132(2) of the Act applies, meaning the Authority can accept Mr Woodcock’s evidence about the hours, days and time worked by him and wages he was paid because Icarus has not proved that his evidence to the Authority about that was incorrect.

[47] The Authority also directed Icarus to provide copies of Mr Woodcock’s final pay advice, but that did not occur.

### **Issues**

[48] The following issues are to be determined:

- (a) Was the trial period provision in Mr Woodcock’s employment agreement valid?
- (b) Was Mr Woodcock’s dismissal justified?

- (c) If not, what if any remedies should be awarded?
- (d) Is Mr Woodcock owed wage arrears?
- (e) What if any penalties should be imposed for any breaches that may have occurred?
- (f) What, if any, costs should be awarded?

### **Was the trial period provision valid?**

[49] Mr Crawford's claim that Mr Woodcock was dismissed under a valid trial period provision does not succeed.

[50] The s 67A mandatory requirements for a valid trial period were not met, because Mr Woodcock had already worked for two or more weeks before he was given a written employment agreement.

[51] Because the trial period was invalid, the Authority has jurisdiction to investigate Mr Woodcock's dismissal grievance.

### **Was Mr Woodcock's dismissal justified?**

[52] Mr Woodcock took a sick day on 18 June 2019 and he provided a medical certificate to Mr Crawford for that absence.

[53] On Saturday, 22 June 2019 Mr Woodcock received a series of text messages from Mr Crawford. Mr Woodcock was accused of not turning up to work and Mr Crawford said he was "*sick of young fellas not turning up*".

[54] Mr Woodcock told Mr Crawford that he had not agreed to work on Saturday, 22 June 2019 because he had worked for 14 days in a row before that, and his employment agreement said he was entitled to at least one day off per roster.

[55] Mr Woodcock told Mr Crawford that no-one told him (Mr Woodcock) that he was required to work and even if he had been told, he still had the option to decline Saturday work.

[56] Mr Woodcock told the Authority that he thinks that because he had worked two weekends in a row that Mr Crawford must have assumed that Mr Woodcock would always work every Saturday, without actually discussing it with him.

[57] Mr Woodcock says that Mr Crawford told him he was going to get a written warning and that if he missed one more day of work he would be sacked.

[58] Mr Woodcock produced a text message from Mr Crawford that said that if Mr Woodcock was humble enough to apologise for missing two days of work that week, and if he promised to work every Saturday for the next eight weeks, then he would be given another chance.

[59] This was sent to Mr Woodcock by Mr Crawford in response to a text Mr Woodcock had sent Mr Crawford which said he had never been told that he had to work every Saturday and he had never been asked to work the Saturday in issue (22 June) which is why he had not attended.

[60] Mr Crawford's text to Mr Woodcock said "*This is the third and last time Joel if you miss another day of work you're gone*".

[61] Mr Woodcock responded saying he had never missed a day of work and that Saturday, 22 June was his day off so he did not know what Mr Crawford was talking about.

[62] Mr Crawford also sent another text to Mr Woodcock saying "*As of now your (sic) sacked*". This was clearly a dismissal.

[63] This dismissal occurred without any fair or proper process. Icarus is therefore unable to comply with the good faith obligations of s 4(1A) of the Act or with any of the four procedural fairness tests in s 103A(3) of the Act.

[64] The Authority was also not satisfied that Icarus had a good reason for dismissing Mr Woodcock.

[65] He was not under any contractual obligation to work on Saturdays. Nor had he been offered work on Saturday 22 June 2019. Even if he had, he was under no obligation to have accepted it. Mr Woodcock had not received an instruction requiring to work on Saturday, 22 June 2019.

[66] The fact that Mr Woodcock had already worked for 14 days in a row, meant it was very unlikely that he would have accepted any offer of working for a third Saturday in a row.

[67] It was not fair or reasonable for Icarus to dismiss Mr Woodcock for not being at work on a day he was not required to work, or which he did not know Icarus had wanted him to work.

[68] Icarus' dismissal of Mr Woodcock is substantively and procedurally unjustified.

**What, if any, remedies should Mr Woodcock be awarded?**

*Distress compensation*

[69] Mr Woodcock gave evidence to the Authority about the shock, stress, hurt and humiliation his unjustified dismissal had caused him.

[70] The situation was stressful and humiliating for Mr Woodcock and it undermined his confidence as a young worker who was new to the workforce. He said he felt the pressure of the risk of his mother losing a house because she was unable to make the mortgage payments as he couldn't pay her the board that he owed her because he wasn't getting any income.

[71] This financial pressure caused him to have to sell some tools that he had used for work which had been provided to him by Icarus to a friend on the understanding that they would be sold back to him as soon as he was paid his wages from Icarus.

[72] Mr Woodcock confirmed to the Authority that once he receives his wages from Icarus then his friend is still prepared to sell the tools that he had to sell, in order to pay money for board to his mother so she could cover his mortgage, back to him.

[73] Icarus is ordered to pay Mr Woodcock \$10,000 distress compensation under s 123(1)(c)(i) of the Act to compensate him for the hurt, humiliation and injury to feelings he has suffered as a result of his unjustified dismissal.

*Lost remuneration*

[74] Mr Woodcock has attempted to mitigate his loss so he is entitled to recover lost remuneration.

[75] Icarus is ordered to pay Mr Woodcock \$10,399 being three months' lost remuneration (40 hours per week x \$20 per hour, x 3 months).

**Is Mr Woodcock owed wage arrears?***Hours worked but not paid*

[76] Mr Woodcock's evidence that he was not paid for the last five days that he worked was uncontested. Icarus is ordered to pay Mr Woodcock \$810 gross, for hours he worked but was not paid (being 40.5 hours x \$20 per hour).

[77] This is calculated as follows:

- (a) 11 hours on Monday 17 June 2019, excluding a half-hour unpaid lunch break.
- (b) No pay for Tuesday 18 June 2019, because he was on certified sick leave.
- (c) 9.5 hours on Wednesday 19 June 2019, excluding a half-hour unpaid lunch break.
- (d) 10.5 hours on Thursday 20 June 2019, excluding a half-hour unpaid lunch break.
- (e) 9.5 hours on Friday 21 June 2019, excluding a half-hour unpaid lunch break.

*Public holiday pay arrears*

[78] Icarus failed to pay Mr Woodcock any wages for 3 June 2019. Mr Robert Crawford told Mr Woodcock that he was not entitled to be paid that day. That is incorrect.

[79] Mr Woodcock was a full time employee and the public holiday fell on a Monday that was an ordinary working day for him. He was therefore entitled to be paid the amount he would have received had it not been a public holiday.

[80] Icarus is therefore ordered to pay Mr Woodcock \$190, being 9.5 hours consisting of his normal day's work from 7am until 5:30pm, less a half-hour unpaid lunch break.

*Unlawful deduction from wages*

[81] Icarus deducted \$200 from Mr Woodcock's wages without the written authority to do so. Mr Woodcock did not consent to this amount being deducted from him, he had not authorised this deduction and he was not consulted about it before it was made.

[82] Icarus is ordered to repay Mr Woodcock \$200 to reimburse him for the unlawful deduction it made from his wages.

*Holiday pay arrears*

[83] Mr Woodcock has not been paid any holiday pay.

[84] Icarus is ordered to pay Mr Woodcock 8% of his total gross earnings as holiday pay. He earned \$3,650.01 while employed. He has been awarded \$1,200 wage arrears (\$810 hours worked but not paid + \$190 public holiday pay arrears + \$200 unlawful deduction from wages). He was awarded \$10,399 lost remuneration for his unjustified dismissal.

[85] Mr Woodcock's total gross earnings that attract holiday pay are \$15,249.01 (\$3,650.01 paid while employed + \$1,200 wage arrears + \$10,399 lost remuneration awarded).

[86]  $\$15,249.01 \times 8\% = \$1,219.92$ . Icarus is therefore ordered to pay Mr Woodcock \$1,219.01 holiday pay.

*PAYE arrears*

[87] The PAYE that Icarus deducted from Mr Woodcock's wages but failed to remit to IRD is owed to him as wage arrears.

[88] That now represents a debt that Icarus owes Mr Woodcock, but which instead of paying to him directly it is ordered to pay to IRD, on his behalf. Icarus is required to liaise with IRD to ensure that the correct amount of PAYE for Mr Woodcock has been paid on his behalf.

[89] A copy of this determination is to be sent to the Chief Executive of the IRD, so that IRD knows that it will need to pursue Icarus to recover Mr Woodcock's missing PAYE arrears, and not Mr Woodcock personally.

*Tool allowance*

[90] Under the terms of Mr Woodcock's employment agreement he was to be paid a tool allowance of \$12.50 per week. That did not occur.

[91] Icarus is therefore ordered to pay Mr Woodcock \$50 being the four weeks he worked x \$12.50 per week, as his tool allowance arrears.

**Should a penalty be imposed on Icarus for its breaches of the Wages Protection Act?**

[92] An employer is legally required to pay an employee their wages without deduction when the wages become due. Because Mr Woodcock was to be paid weekly, he was entitled to be paid for the work he had done each week. That did not occur.

[93] It is appropriate to impose a penalty on Icarus for its breach of the Wages Protection Act (WPA) under s 13 WPA.

[94] Mr Woodcock was a vulnerable employee. He was young and had been out of work before accepting employment with Icarus. He was living hand to mouth and he relied on his income to help his mother pay her mortgage. The failure to pay his wages as they became due created serious financial hardship for him and for his mother.

[95] Bearing in mind the factors identified in s 133A of the Act, the Authority imposes a penalty of \$3,000 for its breaches of the WPA.

*Should part of the penalty imposed be paid to Mr Woodcock?*

[96] Because Mr Woodcock has suffered as a result of these breaches, that have still not been remedied, it is appropriate that some of the penalty imposed on Icarus be paid to him directly and not to the Crown.

[97] Accordingly, Icarus is ordered to pay \$2,000 of the penalty imposed on it to Mr Woodcock directly and the remaining \$1,000 of the penalty to the Crown Bank Account.

**What, if any, costs should be awarded?**

[98] Mr Woodcock has been put to the cost of proving his claim.

[99] He has also had his costs unnecessarily increased as a result of inappropriate and unprofessional communications that Icarus has had with the Authority about this matter. Mr Woodcock's representative has been copied these communications, so this has cost Mr Woodcock.

[100] The Authority will adopt its usual notional daily tariff based approach to costs, which are pro-rated to reflect the fact that the Authority's investigation meeting took an hour and a half.

[101] The current notional daily tariff is \$4,500 for the first day of an investigation meeting. On a pro-rata based this means that the notional starting point for assessing costs is \$1,000.

[102] This notional starting tariff should be increased by \$1,500 to reflect the fact that Mr Woodcock's costs have been unreasonably increased by Icarus' failure to keep wage and time records and holiday and leave records, or to provide any of the information that the Authority asked it to provide.

[103] Icarus has put Mr Woodcock's representative to additional work and it unnecessarily has lengthened the time required for the Authority's investigation meeting in terms of the evidence that it needed to obtain from Mr Woodcock about the content of some of the communications received from Icarus.

[104] Icarus is ordered to pay Mr Woodcock \$2,500 towards his actual legal costs and to reimburse him \$71.56 for his filing fee.

### **Orders**

[105] Within 28 days of the date of this determination Icarus is ordered to pay:

- (a) The Crown Bank Account \$1,000 of the \$3,000 penalty that has been imposed on him for breaching the WPA; and
- (b) IRD all of the PAYE that is currently outstanding and/or is due and owing in accordance with this determination on Mr Woodcock's total gross earnings. Any penalties that may be associated with Icarus's failure to remit the PAYE it deducted from Mr Woodcock's wages and/or to pay the PAYE that it has been ordered to pay under this determination is a matter that is between IRD and Icarus.

[106] Because Mr Crawford and Ms Szonert have both indicated that Icarus is going into liquidation, a 14 day timeframe is appropriate for Icarus to pay Mr Woodcock.

[107] Accordingly, within 14 days of the date of this determination, Icarus is ordered to pay Mr Woodcock \$27,440.48 (excluding the PAYE that is to be paid directly to IRD). This amount consists of:

- (a) \$810 for hours worked but not paid;

- (b) \$190 public holiday pay arrears;
- (c) \$50 unpaid tool allowance;
- (d) \$200 to repay the unlawful deduction it made from his wages;
- (e) \$1,219.92 holiday pay on his total gross earnings;
- (f) All of the outstanding PAYE on his total gross earnings (note this amount is to be paid by Icarus directly to the IRD);
- (g) \$2,000 of the \$3,000 penalty imposed on its breaches of the WPA;
- (h) \$10,000 distress compensation;
- (i) \$10,399 lost remuneration;
- (j) \$2,571.56 to reimburse his actual costs and disbursements;

**Icarus' tools claim**

[108] Icarus alleges that Mr Woodcock failed to return tools it owned after he was dismissed. The reasons for him doing that have been addressed in this determination. Just to be clear it was Icarus' unlawful actions in terms of failing to pay Mr Woodcock money he was legally entitled to that caused that situation.

[109] However in an effort to resolve all matters between the parties, this order regarding reimbursement for the tools in issue has been made in order to resolve Icarus' concerns about that issue.

[110] Once Icarus has paid Mr Woodcock all of the \$27,440.48 it has been ordered to pay him in this determination, and once it has paid IRD all of the PAYE that is due on Mr Woodcock's total gross earnings, then Mr Woodcock is ordered to repay Icarus \$500 to compensate it for the tools he retained after his employment ended.

[111] The Authority wants to make it clear that Mr Woodcock is not required to pay Icarus any money for the tools he retained unless/until Icarus has paid to him and to IRD (on his behalf) all of the money that is owed under this determination, as arising from his employment with it.

**Rachel Larmer**  
**Member of the Employment Relations Authority**