Determination Number: AA 73/07
File Number: AEA 32/06

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Darren Yates (Applicant)
AND	Owaikura Holdings Limited t/a Pratts Plumbing Limited (Respondent)
REPRESENTATIVES	Darren Yates In person Neil Pratt, Advocate for Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	15 February 2007
FURTHER INFORMATION	19 February 2007 12 March 2007
DATE OF DETERMINATION	14 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Darren Yates was employed by Owaikura Holdings Limited t/a Pratts Plumbing Limited ("Pratts Plumbing") from March 2005 until he resigned his employment in January 2006. Deductions were made from Mr Yates' final pay for items said to have been purchased by him for his own personal use during his employment, tools allegedly missing from his van when it was returned to the company, and for an overpayment of wages made on 23 December 2005. Mr Yates says the deductions were unlawful and seeks reimbursement of $964.67.

[2] Mr Neil Pratt, managing director of Pratts Plumbing, denies the deductions were unlawful and says the employment agreement allowed for the deductions from Mr Yates final pay.

The employment Agreement

[3] Mr Yates was subject to a written individual employment agreement. The relevant terms of that agreement were contained in the clause entitled "Special Conditions":

> 1. **Monies owed to the Company at the time of Contract termination.**
>   All monies owed to (sic) by the Employee at the term of their Contract ae(sic) required to be paid in full by the Employee on his final day of work for the Company.

> The Company reserves the right to deduct monies owed by the Employee from their final pay. Should this exceed their final pay the Employee will be responsible to reimburse the Company for the additional monies within seven days of the termination of their employment.
>
> **2. Tools**
> All tools provided by the Company, for the specific use of an employee, in a tool kit provided by the Company, shall be returned upon the termination of their Contract or Employment.
>
> The Company reserves the right to deduct the replacement value of these tools, should the employee not return all said tools, from their final pay.

[4] The employment agreement stipulates a list of tools Mr Yates was required to provide for himself. However, there is no similar list indicating the list of tools to be provided by the company.

[5] Mr Yates resigned from his employment by letter dated 1 January 2006 giving two weeks notice and indicating that he was happy to continue working until 16 January 2006. This was done in accordance with his obligation under the employment agreement. Mr Yates put his letter of resignation in Mr Pratt's residential letter box.

[6] At the time of writing his resignation Mr Yates was on leave as it was the Christmas/New year period. He was due to return to work on 9 January 2006. In his statement in reply Mr Pratt says that Mr Yates terminated his employment without prior notice. I do not accept that. I am satisfied that Mr Yates provided the required notice to Pratts Plumbing of his intention to leave on 16 January 2006. This was also the period for which Mr Yates received payment in lieu of the requirement for him to work out his notice.

Deductions

[7] Mr Pratt was out of town, on leave, at the time Mr Yates put his letter in the letterbox, however, the letter was passed on to Mr Yates' supervisor, Mr Neustroski by Mr Pratt's father. Mr Neustroski rang Mr Yates and a discussion ensued about whether Mr Yates would work out his notice or leave immediately. It was common ground that Mr Yates agreed not to work out his notice period and would be paid in lieu instead, as he had another job already lined up. Mr Neustroski arranged to pick the van up from Mr Yates that day.

[8] Mr Neustroski told me that he checked the van the following day to see what tools were there and what was missing. He told me that when the van was originally handed over to Mr Yates in March 2005 the tools provided in the van were recorded in a Tools Checklist. Mr Neustroski told me he used this same checklist again when he checked the van on its return.

[9] A copy of the checklist was provided to the Authority following the investigation meeting. The validity of this checklist is very dubious. Mr Yates has never been shown this document, either at the time he took possession of the van or at any time thereafter. I would expect that an employer, acting in good faith, would have provided the checklist together with the van when it was handed over to Mr Yates in March 2005. At the very least, I would expect the company to seek Mr Yates confirmation and agreement that the tools listed on the checklist were actually present in the van at the time of handover. It would make sense for this to occur particularly, where, as here, the employer is relying on the list and holding the employee accountable for not returning some of the tools said to have been in the van at the time.

[10] Also, on 10 January 2006 Mr Pratt advised Mr Yates in writing, that his final pay could not be calculated until he had received more information relating to items Mr Pratt claimed Mr Yates had purchased throughout his employment for his personal use and tools which were purportedly missing from the van when it was returned to Mr Neustroski. At the investigation meeting Mr Pratt told me he relied on Mr Neustroski's reconciled van list to identify the items missing from the Van. That evidence is not consistent with the contemporaneous documented evidence. The 10 January letter listed tools missing, including an electric drill. The checklist provided by Mr Neustroski dated 4 January (although it was common ground the checklist wasn't completed until 5 January) does not have an electric drill listed as being missing from the van. Indeed the checklist shows the drill has been accounted for.

[11] In discussions with Mr Pratt, following receipt by Mr Yates of the 10 January letter, Mr Yates denied responsibility for any tools missing from the van. Subsequent to their conversation Mr Pratt revised the list of missing equipment and personal purchases and on 13 January 2006 confirmed that the following deductions would be made from Mr Yates' final pay:

De Walt kit – 3 batteries + 1 charger @$190 ea	$760.00
Heat gun	$44.96
Nut setters	19.70
Wiring netting	$14.35
Timber	$21.66
Easycrete	$24.00
Commercial cleaning of van	$80.00
	$964.67

[12] At the investigation meeting Mr Yates conceded that the deductions for the wiring netting, timber and easycrete were lawful deductions as they were purchased for his own personal use. I am satisfied that the nut setters were also items purchased for Mr Yates own personal use and therefore the amount attributed to that purchase, was also, lawfully deducted.

[13] Mr Yates has maintained throughout this investigation, that he did not lose any items out of the van. He told me he had an apprentice working with him who shared the tools provided by Pratts Plumbing, and that the apprentice was constantly losing, not only Pratts Plumbing equipment and tools, but also personal tools belonging to Mr Yates. I accept Mr Yates evidence that he told his supervisor about this problem. During my interview with Mr Neustroski, he clearly recalled being told by Mr Yates that the apprentice was losing his (Mr Yates) tools. Mr Neustroski told me he didn't believe Mr Yates. That certainly wasn't made clear to Mr Yates during his employment when he raised his concerns about his own tools being lost by the apprentice.

[14] I have concluded that it is more likely than not, that the apprentice had lost tools while working with Mr Yates and that some of these tools belonged to Mr Yates while others belonged to Pratts Plumbing. I am not satisfied the Pratts Plumbing has shown it had any reasonable basis on which to conclude Mr Yates was responsible for the missing tools. It follows that I find the deductions from Mr Yates pay for the De Walt kit batteries and charger, and the heat gun were unlawful.

[15] The company also made a deduction for the cost of having the van commercially cleaned after it was returned to Pratts Plumbing. There was no contractual right or other agreement between the parties, to hold Mr Yates liable for the cost of having the van cleaned commercially. I find the deduction of $80 to have the van cleaned was unlawful.

Owaikura Holdings Limited t/a Pratts Plumbing Limited is ordered to reimburse Mr Yates for the unlawful deductions made from his final pay in the amount of $884.96 gross within 14 days of the date of this determination.

Penalty

[16] Mr Yates seeks a penalty against Pratts Plumbing for a breach of the employment agreement and the Holidays Act. Mr Yates originally claimed unpaid holiday pay, but withdrew this claim at the investigation meeting as this issue has now been resolved with Pratts Plumbing making full payment. Mr Yates confirmed at the investigation that he wished to continue to pursue the penalty action against Pratts Plumbing.

[17] I am not satisfied that this is not a case in which a penalty should be awarded. This claim is declined.

Costs

[18] Although he was unrepresented at the investigation meeting Mr Yates is entitled to recover the cost of filing his application with the Authority.

Owaikura Holdings Limited t/a Pratts Plumbing Limited is ordered to pay Mr Yates $70 being the reimbursement of his filing fee in addition to the amount set out above.

Vicki Campbell
Member of Employment Relations Authority