

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 382/08
5123757

BETWEEN

IAN WAYNE ERIKSEN
Applicant

AND

J E & I M LOCKLEY t/as
JOHN LOCKLEY
TRANSPORT
Respondent

Member of Authority: R A Monaghan

Representatives: I Eriksen in person
JE and IM Lockley in person

Investigation Meeting: 3 November 2008 at Tauranga

Determination: 7 November 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ian Wayne Eriksen says his former employers, JE and IM Lockley, owe him:

- a. \$2,460.81 as unpaid salary;
- b. \$4,000 as unpaid holiday pay;
- c. payment for a week during which he should have received “first week compensation” in respect of a work injury; and
- d. compensation in respect of his unjustified dismissal.

[2] Mr and Mrs Lockley deny that they owe any money to Mr Eriksen, and deny that he was dismissed.

Unpaid salary

1. The facts

[3] Mr Eriksen's employment commenced on 10 April 2007. There was no written employment agreement, but there was an oral agreement that his remuneration was a salary of \$50,000 per annum. Further, the agreed hours of work were Monday-Friday, and a half day (5 hours) on Saturdays.

[4] Mr Eriksen's employment had lasted for slightly over a year when he suffered the injury associated with his claim for first week compensation. The total gross payment he had received in respect of the period of his employment was \$46,552.48. He says he should have received the nett equivalent of the full \$50,000. The difference is not the \$2,460.81 sought, and Mr Eriksen was unable to provide a clear statement of how he calculated that sum. I assume he had a method of calculation, and note the wage and time records were available to him prior to the investigation meeting and he was given payslips every month. I note, too, that from time to time deductions were made in respect of items such as Mr Eriksen's purchases of petrol. Accordingly I address the sum as claimed.

[5] From the outset Mr Eriksen was not available to work on Saturdays, because that was the day on which he was required to carry out a sentence of community service. He had not advised Mr and Mrs Lockley of this. Nevertheless between April and October 2007 no deductions were made from his salary in respect of time not worked on Saturdays. Commencing in November 2007, however, deductions were made for absences on Saturdays, as well as other absences.

[6] Mr Eriksen seeks payment in respect of those deductions. He has not invoked the Wages Protection Act 1983, but Mr and Mrs Lockley should familiarise themselves with it. Mr Eriksen's claim is made on the ground that he says he made time up by starting early on weekdays, and working some Sundays.

[7] The record shows he worked on two Sundays, for which he was paid. Mr and Mrs Lockley accepted that Mr Eriksen started early at times, but said he also left early on those days. They did not accept that any of the time was made up. I prefer their evidence to Mr Eriksen's.

2. Determination

[8] By definition, a 'salary' is an agreement to pay a particular sum on an annual basis. That payment may, in practice or by further agreement, be paid in weekly, fortnightly or monthly instalments does not change the essential nature of a 'salary'.

[9] In the absence of an agreement permitting any form of rateable deduction from salary in respect of an employee's default - for example an employee's failure to report for work during periods when there was an obligation to report - such deduction is a breach of the employment agreement. Mrs Lockley said all employees had deductions from their monthly payments in respect of time off. She should review and seek advice on that practice, particularly if none of the employees concerned has a written employment agreement.

[10] The effect of the practice here is that Mr Eriksen did not receive the agreed sum of \$50,000 in a year. On the face of the matter, he is entitled to seek payment of the balance.

[11] At the same time, Mr Eriksen was in breach of the agreement that he report for work on Saturdays. On the face of the matter, his breach entitled Mr and Mrs Lockley to seek a remedy from him. However Mr and Mrs Lockley continued to pay Mr Eriksen's salary in full - despite his default - for so long that they must be taken to have acquiesced in it.

[12] JE and IM Lockley are therefore ordered to pay to Mr Eriksen the balance of his salary as claimed, namely \$2,460.81 (gross).

[13] Copies of attachment orders made by the District Court were produced. This order is subject to those and any other any attachment orders that may remain in force. That is, if any such order remains in force and applicable, it may be taken into account and acted on before remitting a nett amount to Mr Eriksen.

Holiday pay

1. The facts

[14] Mr Eriksen calculated the holiday pay he says is owed by taking 8% of his \$50,000 salary. The sum is \$4,000.

[15] To that extent the claim is misconceived. It was not for Mr Eriksen to 'authorise' Mrs Lockley to treat as annual leave certain paid absences from work, and claim payment if such 'authority' was not provided. Nor was it open to him to ignore the fact that he received paid annual leave during his employment, and that he received a payment on the termination of his employment in the sum of \$616.47 for unpaid holiday pay. It was common ground, for example, that he was on leave from 21 December 2007 – 14 January 2008, and was paid in respect of other absences of shorter duration during the year. Holiday pay in respect of leave actually taken came to \$3,107.73. The total holiday payment overall was \$3,724.20.

[16] If holiday pay is calculated on the basis that Mr Eriksen's total gross earnings were \$46,552.48, then 8% of that figure is \$3,724.20. That payment was made.

2. Determination

[17] I have found that Mr Eriksen is owed a further \$2,460.81 as unpaid salary. He is entitled to holiday pay in respect of that amount, calculated as $8\% \times \$2,460.81 = \196.86 (gross). Payment is ordered accordingly, subject again to the terms of any attachment order as it affects the nett amount payable to Mr Eriksen.

First week compensation

1. The facts

[18] Mr Eriksen says he suffered an injury to his eye while at work on 16 April 2008. That date is recorded on communications from the ACC as the date of injury. However Mr Eriksen did not leave the workplace at the time, and continued to report for work on 17 and 18 April. His eye injury was observed that day. He left work at or about midday to consult a doctor, and a claim was forwarded to the ACC. An initial medical certificate stated Mr Eriksen would be unfit for work for 4 days, while a subsequent certificate stated that he was unable to resume any duties for a further 7 days.

[19] Mr Eriksen had already resigned from his employment, in circumstances I set out in the next section of this determination. For the reasons also set out in that section, I find his employment ended on 18 April on grounds unrelated to the fact of the injury.

[20] In that he says the injury was a work injury, Mr Eriksen seeks payment in respect of the first week of incapacity in the sum of 80% of his lost earnings.

2. Determination

[21] Mr Eriksen's claim is based on s 97 of the Injury Prevention, Rehabilitation and Compensation Act 2001 ("IPRC Act"). Section 98 of the Act obliges the employer to make the payment if the injury is a work injury.

[22] Mr and Mrs Lockley do not accept that the injury was sustained at work. The ACC has not treated the injury as a work injury, although I have no evidence about why. The only evidence that the injury was a work injury was Mr Eriksen's assertion that it occurred at work on 16 April.

[23] There is not enough evidence to establish that the injury was a work injury, and that the employer is liable for payments of first week compensation. There will be no order for payment.

Whether there was a dismissal

1. The facts

[24] In or about mid-March 2008 Mr Eriksen attended an interview for an alternative position. Although his appointment had not been confirmed by 1 April 2008, on that day he advised Mr Lockley he was resigning to take up the position. He said he had not received confirmation but expected to be leaving in 'a couple of weeks'. The parties understood that to mean Mr Eriksen was giving two weeks' notice. Mr Lockley told Mr Eriksen some work would be made available to carry him over if there were delays in obtaining confirmation.

[25] At the time, both parties expected that Mr Lockley's last day of work would be 11 April 2008. However, during that week, Mr Eriksen told Mr Lockley he would not be starting the new job for another week. The parties agreed Mr Eriksen's last day of work would now be 18 April.

[26] During the week ending 18 April, Mr Eriksen advised Mr Lockley he would not be starting in his new position until early May. He said at the investigation meeting that confirmation of the appointment was received on 3 May, and but for his injury he would have been ready to start immediately. At the time, however, Mr Eriksen suggested to Mr Lockley that he would be available for part time work after 18 April. Mr Lockley said he would 'look at that'.

[27] Matters went no further because Mr Eriksen's injury supervened. Mr Eriksen did not return to work for Mr and Mrs Lockley. He took up his new position later in May, as soon as he had recovered sufficiently from his injury to start work.

2. Determination

[28] Mr Eriksen is not entitled to compensation for unjustified dismissal if there was no dismissal. I have no hesitation in finding there was no dismissal. There will be no order for the payment of compensation.

Summary of orders

[29] Mr and Mrs Lockley are ordered to pay to Mr Eriksen:

- a. \$2,460.81 (gross) as unpaid salary; and
- b. \$196.86 (gross) as holiday pay.

[30] These orders do not prevent Mr and Mrs Lockley from acting on any attachment order still in force when calculating and remitting the nett amount payable to Mr Eriksen.

Costs

[31] Since neither party was represented and both achieved a measure of success in this matter, I am minded to allow costs to lie where they fall.

[32] However if either party seeks an order for costs, the party seeking an order shall have 28 days from the date of this determination in which to file in the Authority, and copy to the other party, a written statement of the amount of costs they seek and an explanation of why. The other party shall have 14 days from the date of receipt of that statement in which to file in the Authority, and copy to the other party, a written reply.

R A Monaghan

Member of the Employment Relations Authority