

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 197/09
5280973

BETWEEN	ALEXANDER R MILLER First Applicant
AND	SAMUEL ALEXANDER MILLER Second Applicant
AND	SIMON JAMES BONE Third Applicant
AND	HERBERT BUILDING AND CONSTRUCTION SERVICES LIMITED Respondent

Member of Authority: Philip Cheyne

Representatives: Rachel Brazil, Counsel for the Applicants
Neville Neems, Advocate for the Respondent

Investigation Meeting: 15 October 2009 at Invercargill

Determination: 17 November 2009

DETERMINATION OF THE AUTHORITY

[1] The applicants worked for Herbert Building and Construction Services Limited (Herbert) until their employment was terminated in July 2009. They lodged a statement of problem concerning personal grievance claims of unjustified dismissal and claims for arrears of wages and holiday pay. Penalties, interest and costs are also claimed. They asked for urgency because of threats apparently made to wind up Herbert to avoid it having to make any payments to them.

[2] Counsel served the statement of problem on the respondent as did the Authority, allowing 10 days for a statement in reply. Nothing was received so I set an investigation meeting to deal on an urgent basis with the arrears claims. The personal

grievance claims will have to wait their turn. Counsel served the notice of meeting and a notice of directions on the respondent. That prompted a statement in reply. The respondent says that only Alex Miller is owed any holiday pay and that it acted in accordance with legal advice, its payroll service and good faith in managing its recent failure, because of cash flow difficulties, to pay staff on time.

[3] Neville Neems is the respondent's sole director and a shareholder. He represented the respondent at the investigation meeting and gave evidence. I also heard evidence from the three applicants. Alex Miller is Sam Miller's father. Where there is a dispute in the evidence I prefer that of Alex Miller, Sam Miller and Simon Bone. I will first give an overview of what happened before turning to the claims for each applicant.

Overview

[4] The employment agreements for Alex Miller and Simon Bone are in evidence. It is common ground that Sam Miller's written agreement was identical to Mr Bone's. Alex Miller's and Mr Bone's standard hours of work are set as *40 hours per week* with payment for the hours worked at a set hourly rate. However they usually worked overtime of at least 1 hour per day and were paid extra for that time at their ordinary hourly rate. They normally worked Monday to Friday. The employment agreements required Herbert to pay wages fortnightly in arrears by direct credit to a nominated bank account. The pay period ended on a Sunday and the wages were in the bank accounts the following Thursday.

[5] The wages due to the applicants on 4 June 2009 for work up to 31 May were not paid on time. At a meeting on 5 June Mr Neems said that wages would be paid on 7 June. That did not happen either. These wages were part paid on 12 or 13 June with the balance paid on 16 or 17 June.

[6] The next fortnight's wages due on 18 June for work up to 14 June were not paid on time either. There was another meeting on 22 June where Mr Neems said that wages would again be late. The fortnight's wages were partly paid on 19 June with the balance on 23 June. The applicants continued to work despite these breaches of their employment agreement.

[7] Wages were next due on 2 July for work up to 28 June. On 1 July Mr Neems rang Alex Miller and told him that no-one would be paid their wages on 2 July and

that he could break that news to the other staff (including the other two applicants) at the end of the day. Alex Miller thought it was deceitful to keep that information from the others until the end of the day so he told them. As a result staff (including the applicants) told Mr Neems that they were available for work but required their wages paid in full before they would actually do anything further. Mr Neems gave various assurances in order to get the applicants to continue working but they remained steadfast demanding their due wages before they would do any more work. The impasse lasted for some days. Sam Miller received part of these wages on 6 July and the balance on Friday 10 July; Alex Miller and Sam Bone received part of these wages on 10 July and the balance on 13 July (Alex Miller was actually overpaid by \$400.00 and Sam Miller was overpaid \$147.54). The applicants resumed working on Monday 13 July.

[8] The next regular payday was 16 July for work up to 12 July. Payment was not made until 21 July. Wages were paid only for time worked plus an additional \$120.00 described as a *Good Will Payment*.

[9] Mr Bone's and Alex Miller's employment ended on 22 July while Sam Miller's ended on 26 July. Mr Bone and Sam Miller received further pay in instalments on 4 and 17 August while Alex Miller received further pay on 4 and 27 August and 24 September.

Alex Miller's claim

[10] Alex Miller is claiming arrears of wages for 3, 6, 7, 8, 9 and 10 July being the days that he did not work because Herbert had not paid him for the previous fortnight and had been late paying for the several previous fortnights. The evidence is clear that Mr Neems had work available to be performed but Alex Miller (and the other applicants) would not resume work until he was paid what was owed.

[11] I am referred to *Painter v Canstaff Limited*, 13/8/09, P Cheyne (Member), CA78A/09 at para [16] where the Authority said that there was no obligation on the employee to accept work on the basis that the employer did not intend to comply with the terms of the employment agreement as to rate of pay payable. The present circumstances are quite different. In *Painter* the employee's agreement specified a minimum number of hours and his claim was to recover that minimum. There was a specific finding that the employee made himself available for work. Here, Mr Miller

would not do any more work until he was paid what was already owed for his previous work and his employment agreement only requires payment for time actually worked.

[12] Without intending any criticism of Alex Miller for taking his stance, I find that the effect of him declining to do available work is that he is not entitled to any wages for the time not worked. That disposes of this part of the arrears claim.

[13] Alex Miller did work between 13 July and 17 July (inclusive), a total of 44 hours. He was entitled to \$1,540.00 (gross) for that work. In addition, there was an agreement between Herbert and Alex Miller that Herbert would assume liability for holiday pay owed to Alex Miller by his previous employer, a company associated with Mr Neems. It is common ground that this liability is \$3120.49 (gross). Finally Alex Miller was entitled to proportionate holiday pay of \$173.60 after allowing for holidays taken in advance during his employment with Herbert. His final pay should have been \$4,834.09 (gross) or \$3,782.53 (net).

[14] As noted above, Mr Miller received \$350.00, \$300.00 and \$300.00 on 4 August, 27 August and 24 September respectively, a total \$950.00. He is still owed a further \$2,832.53 (net).

[15] Also noted above, Herbert paid Alex Miller \$400.00 on 10 July then \$2,248.62 on 13 July when he should have been paid \$2,248.62 on 28 June. There is a provision in the employment agreement entitling Herbert to recover in subsequent pay periods an overpayment of wages made in an earlier pay period subject to prior written notification of an intention to do so and an explanation of the reasons for the overpayment. In this case neither condition has been complied with and I doubt anyway whether this contractual provision could override the Wages Protection Act 1983. Accordingly I do not allow any deduction from the final pay for that extra \$400.00.

[16] There is a claim for an extra hour per day for each of 9 statutory holidays. Alex Miller was given a day off on each occasion but was only paid 8 hours per day. I accept that he would have worked 9 hours on each such occasion but for the occurrence of the statutory holiday so he is entitled to an extra \$315.00 (gross) in holiday pay.

[17] There is a claim for holiday pay for holidays due but untaken as at the date the employment terminated. However, Alex Miller started with Herbert in December 2008 so he had not worked a full year, the carried over holiday pay from the previous employer is already included in the foregoing calculations and the evidence establishes that he took some holidays in advance while with Herbert. In these circumstances I accept the proportionate holiday pay calculations as reflected in the final payslip.

[18] To summarise, Herbert is to pay Alex Miller \$2,832.53 (net) as arrears of wages and holiday pay; and a further \$315.00 (gross) as arrears of holiday pay.

Sam Miller's claims

[19] Sam Miller's claim for arrears of wages for the working days between 3 and 10 July is rejected for the reason given above in respect of Alex Miller.

[20] Sam Miller is entitled to 1 hours pay for arrears of statutory holiday pay for the same reason given above in respect of Alex Miller, a total of \$17.50 (gross).

[21] I accept that the payroll calculation for proportionate holiday pay for Sam Miller is wrong. His total gross was \$7,456.05 plus \$17.50 as above, a sum of \$7473.55 so his proportionate holiday pay should have been \$597.88, \$45.58 more than was calculated. Herbert must pay him that difference as arrears of holiday pay.

Simon Bone's claims

[22] Mr Bone's claim for arrears of wages for the working days between 3 and 10 July is rejected for the reason given above in respect of Alex Miller.

[23] Mr Bone is entitled to 4 hours pay for arrears of statutory holiday pay for the same reason given above in respect of Alex Miller, a total of \$68.00 (gross).

[24] There is a claim for \$145.68 (net) shown on Mr Bone's final payslip as a deduction due to Herbert. I accept Mr Bone's evidence that he authorised two earlier deductions of the same amount to repay Herbert for spirit levels bought by Mr Bone on Herbert's account. That means that there was neither a debt due to Herbert nor any authority for it to make a further deduction from Mr Bone's final pay. Mr Neems accepted that the final payslip should not have shown a deduction but he claimed that

no deduction was actually made. I do not accept this evidence. Herbert must repay Mr Bone \$145.68 (net) being an unlawful deduction.

Penalty claims

[25] There are claims by each of the applicants for penalties for the breaches of their employment agreements arising because of Herbert's failure to pay wages on time.

[26] I accept that there have been breaches of each applicant's employment agreement by the failure to pay wages on time in June and July as detailed above. There is also a continuing breach in respect of the failure to pay Alex Miller's final wages. However, there is no reason to fix penalties as a matter of urgency and I reserve that for further consideration.

Orders

[27] Herbert Building and Construction Services Limited is to pay Alex Miller \$2,832.53 (net) as arrears of wages and holiday pay; and a further \$315.00 (gross) as arrears of holiday pay together with interest on these sums at the rate of 4.5% per annum starting on 22 July 2009 until the sums are paid in full.

[28] Herbert Building and Construction Services Limited is to pay Sam Miller \$45.58 (gross) as arrears of holiday pay, together with interest on this sum at the rate of 4.5% per annum starting on 22 July 2009 until the sum is paid in full.

[29] Herbert Building and Construction Services Limited is to pay Simon Bone \$68.00 (gross) as arrears of holiday pay and \$145.68 (net) being an unlawful deduction, together with interest on these sums at the rate of 4.5% per annum starting on 22 July 2009 until the sums are paid in full.

[30] Costs are reserved to be dealt with following disposition of the personal grievance and penalty claims.

Philip Cheyne
Member of the Employment Relations Authority