

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 229
5158394

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| BETWEEN | TASNEEM BEGUM (LABOUR INSPECTOR) Applicant |
| AND | EFFECTIVE FENCING NZ LIMITED First Respondent |
| AND | EFFECTIVE FENCING LIMITED Second Respondent |
| AND | MICHAEL O'CONNOR Third Respondent |

Member of Authority: Anna Fitzgibbon

Representatives: Shona Carr for Applicant
Sean Robertson-Welsh for Respondents

Investigation Meeting: 26 June 2012

Determination: 05 July 2012

DETERMINATION OF THE AUTHORITY

- A. Effective Fencing NZ Limited (EFNZL) is ordered to pay to Ms Tasneem Begum (Labour Inspector) \$957.17 gross for the use of Mr Chris Sucich.**
- B. Mr Michael O'Connor is ordered to pay (for Effective Fencing Limited) (EFL) to Ms Begum (Labour Inspector) \$1,187.33 gross for the use of Mr Sucich.**
- C. EFNZL and Mr O'Connor to pay the sum of \$1750.00 costs to Ms Begum being the notional tariff for a half day investigation meeting in the Authority.**

D. EFNZL and Mr O'Connor to reimburse Ms Begum the sum of \$70.00 for the filing fee.

Employment relationship problem

[1] Ms Begum (Labour Inspector) has brought a wage arrears claim on behalf of Mr Sucich, against EFNZL and EFL, to recover money payable by way of holiday pay and public holiday pay to Mr Sucich who was a former employee of EFL and EFNZL respectively. This determination follows a reopening of an earlier investigation into the matter.¹

[2] Pursuant to a further determination of the Authority on 26 April 2011², Mr O'Connor, sole director of EFL, has been made a party to the employment relationship problem in his personal capacity on the ground that he is jointly and severally liable pursuant to s.234 of the Employment Relations Act 2000 (the ERA) to pay any amounts recoverable against EFL in these proceedings. EFL itself has now been removed from the register of companies. For convenience, I shall continue to refer to EFL in this determination.

[3] Ms Begum claims as follows:

- (a) \$957.17 gross outstanding holiday pay from EFNZL;
- (b) \$654.70 in gross outstanding public holiday payments; and
- (c) \$532.63 in gross outstanding balance of holiday payments from EFL.

[4] Ms Begum seeks a total of \$2,144.50 gross from EFNZL and EFL, the major share of \$1,187.33 is claimed from EFL.

[5] EFNZL and EFL accept that EFNZL owes Mr Sucich the sum of \$957.17 gross outstanding holiday pay. They also accept that EFL owes Mr Sucich \$654.70 in gross outstanding public holiday payments. However, they do not accept that the sum of \$532.63 is owed by EFL to Mr Sucich for gross outstanding balance of holiday pay. They say the sum of \$370.80 gross outstanding balance of holiday pay is owing.

¹ *Tasneem Begum (Labour Inspector) v Effective Fencing NZ Ltd* (unreported, 3 March 2010, Employment Relations Authority Auckland, AA 94/10); *Tasneem Begum (Labour Inspector) v Effective Fencing NZ Ltd* [2011] NZERA Auckland 61

² *Tasneem Begum (Labour Inspector) v Effective Fencing NZ Ltd* [2011] NZERA Auckland 163

[6] The difference between what Ms Begum claims EFL owes and what EFL accepts it owes, amounts to \$161.83 gross. This amount relates to the day of Friday, 17 August 2007, at a time when Mr Sucich was employed by EFL. The parties disagree as to whether Mr Sucich took that day off as an annual leave day or whether he was at work.

[7] EFL and EFNZL claim that Mr Sucich owes them considerable sums of money as a result of thefts whilst he was in their respective employ and for which he was subsequently charged and convicted. They say the individual employment agreement with EFNZL dated 17 November 2008 applied at the time Mr Sucich resigned. EFL and EFNZL rely on a provision in that employment agreement which they say entitles them to deduct from any final pay owing to Mr Sucich any sums of money he may owe to them. On this basis, it is claimed there is no money owing to Mr Sucich.

[8] In the alternative, EFNZL and EFL claim that if the employment agreement dated 17 November 2008 was not the applicable employment agreement at the date Mr Sucich resigned, then the employment agreement dated 28 March 2005 applies. They rely on clause 11.6 of the handbook, which was attached to it and seek an indemnity from Mr Sucich for monies owed by him as a result of the theft of property from EFL and EFNZL.

[9] EFL and EFNZL seek an award of special damages against Mr Sucich for alleged breaches of his employment agreement arising from thefts by him of their property and claim a sum totalling \$16,379.85. An award of discretionary damages is also sought against Mr Sucich. By arrangement between the Authority and the parties that matter is not part of the present investigation, and will be addressed in the event that a separate statement of problem is lodged in respect of it.

Issues to be determined

[10] The issues to be determined include:

- (a) Which employment agreement applied to Mr Sucich's employment at the time of his resignation?
- (b) Is Mr Sucich owed outstanding holiday pay by EFL for Friday, 17 August 2007?

- (c) If the employment agreement dated 13 March 2005 between EFL and Mr Sucich was the applicable employment agreement, what is the effect of clause 11.6 of the employee handbook attached to it?
- (d) If the employment agreement dated 17 November 2008 with EFNZL was the applicable employment agreement, does clause 16 entitle monies to be deducted from any outstanding holiday pay owed by EFNZL to Mr Sucich?
- (e) If Mr Sucich is owed outstanding holiday pay and public holiday pay, has there been a breach of employment agreement for which a penalty should be imposed?

The first issue

Which employment agreement applied to Mr Sucich's employment at the time of his resignation?

[11] Mr Sucich commenced employment with EFL on 28 March 2005 in the role of delivery driver/yard person. Mr O'Connor, sole director of EFL, employed Mr Sucich and Mr Sucich signed the employment agreement on 26 August 2005. An employment handbook was attached to the employment agreement containing terms and conditions of employment.

[12] EFL encountered financial difficulties late in 2008. In November 2008, EFL's assets were sold to a newly formed company EFNZL. Mr Robertson-Welsh is the sole director of EFNZL. All employees of EFL including Mr Sucich were notified by EFL that as of 17 November 2008, EFNZL was to become their new employer and that they would be asked to sign a new employment contract which would be "*virtually the same as your existing contract, with a few amendments*".

[13] On 30 January 2009, Mr Sucich gave two weeks notice in writing of resignation from his employment with EFNZL. Mr Sucich's last day of employment was Friday, 13 February 2009.

[14] I consider that at the time Mr Sucich resigned from his employment with EFNZL, he was bound by the terms and conditions contained in the individual employment agreement dated 17 November 2008, which he had not signed. Mr Sucich's evidence is that he did not sign the employment agreement of

17 November 2008 because he did not agree with its contents. Mr Sucich says his terms and conditions of employment with EFNZL were based on the employment agreement dated 13 March 2005 with EFL, which he did sign. Mr Robertson-Welsh says Mr Sucich was bound by the employment agreement dated 17 November 2008. He says Mr Sucich accepted the offer of employment with EFNZL and conducted himself as if that employment agreement applied to him. He simply failed to return a signed copy of the employment agreement. I prefer Mr Robertson-Welsh's evidence on this issue.

[15] Mr Sucich and other employees of EFL were notified that their employer was to change and that they would be provided with new employment agreements which would be virtually the same as existing employment agreements with EFL. Mr Sucich did not discuss the new employment agreement with Mr Robertson-Welsh and did not indicate to Mr Robertson-Welsh that he did not accept the terms of the new employment agreement. In a letter dated 30 January 2009, Mr Sucich gave two weeks' notice as "*required*".

[16] Clause 10.1 of the individual employment agreement dated 17 November 2008 provides for either party to terminate the agreement on giving "*two weeks notice to the other party*". Clause.10.2 provides: "*If you do not give the required notice, the employer reserves the right to deduct an amount equivalent to payment for the notice period from payments due to you*".

[17] Mr Sucich in his letter of resignation says "*I am giving my required 2 weeks notice....*" Mr Sucich used the language contained in the employment agreement dated 17 November 2008. Further, the employment agreement with EFL dated 13 March 2005 provides that either party is to give four weeks notice of termination in writing. Mr Sucich did not give notice in accordance with the employment agreement dated 13 March 2005, he gave notice as required under the 17 November 2008 employment agreement. On 26 February 2009, Mr Sucich wrote to Mr Robertson-Welsh of EFNZL stating that he had been employed by EFNZL until February 2009 and seeking payment of wages and holiday pay he claimed were owing to him by EFNZL. Mr Sucich's actions indicate to me that Mr Sucich knew he was employed by EFNZL and knew that his terms of employment with EFNZL were those contained in the employment agreement dated 17 November 2008.

[18] It is my finding that Mr Sucich was employed by EFNZL on terms and conditions based on the individual employment agreement with EFNZL dated 17 November 2008 which he did not sign. Therefore, the applicable employment agreement between Mr Sucich and EFNZL at the time Mr Sucich resigned, was the employment agreement dated 17 November 2008.

The second issue

Is Mr Sucich owed outstanding holiday pay by EFL for Friday, 17 August 2007?

[19] The next question is whether Mr Sucich took a day off on annual leave on Friday, 17 August 2007 at a time he was employed by EFL or whether he worked on that day. Mr Sucich gave evidence that he worked on Friday, 17 August 2007. At about 4.30 to 5pm, when he finished work, Mr Sucich, his ex-fiancee, Chloe Leighton, and his mechanic, Gavin Brundell, travelled to Mansfield to race motorcycles. They arrived in Mansfield at approximately 2-2.30am on the Saturday morning. Ms Begum says that on the evidence available to her, Mr Sucich worked on 17 August 2007 and there were no records provided by EFL to show that Mr Sucich took that day off as annual leave. Mr Robertson-Welsh was not able to give any evidence in support of his claim that Mr Sucich took the day off on annual leave.

[20] It is my finding that Mr Sucich worked on 17 August 2007 and did not take annual leave. Mr Sucich is owed outstanding holiday pay by EFL for Friday, 17 August 2007, which sum totals \$161.83 gross.

The third issue

If the employment agreement dated 13 March 2005 between EFL and Mr Sucich was the applicable employment agreement, what is the effect of clause 11.6 of the employee handbook attached to it?

[21] My finding is that the employment agreement between EFNZL and Mr Sucich dated 17 November 2008 was the applicable employment agreement at the time of Mr Sucich's resignation and therefore I do not need to consider the employment agreement between Mr Sucich and EFL dated 13 March 2005 or the effect of clause 11.6 of the employee handbook attached to it.

The fourth issue

If the employment agreement dated 17 November 2008 with EFNZL was the applicable employment agreement, does clause 16 entitle monies to be deducted from any outstanding holiday pay owed by EFNZL to Mr Sucich?

[22] I have found that the employment agreement dated 17 November 2008 with EFNZL is the applicable employment agreement. I will now consider whether clause 16 of that agreement entitles EFNZL to deduct monies it says it is owed by Mr Sucich from any outstanding holiday pay owed by EFNZL to Mr Sucich.

[23] I have determined that Mr Sucich worked on 17 August 2007 and did not take that day as annual leave. Mr Sucich is owed the sum of \$161.83 as annual leave for 17 August 2007. The sums I find are owing by EFL to Mr Sucich are the sum of \$654.70 together with the sum of \$532.63. The total owing by EFL to Mr Sucich amounts to \$1,187.33.

[24] EFL and EFNZL seek to have any sums of money owed by Mr Sucich deducted from any outstanding holiday pay owed by them to him pursuant to clause 16 of the employment agreement dated 17 November 2008. EFL and EFNZL have repeatedly claimed they are owed sums of money by Mr Sucich for his theft of scrap metal. These sums have not been agreed to by Mr Sucich or established as owing by him.

[25] Section 4 of the Wages Protection Act 1983 (WPA) requires an employer to pay an employee's wages without deduction.

[26] Section 5 WPA entitles an employer to make deductions from an employee's pay with the written consent of or at the request of the employee.

[27] Even if an employee owes their employer money, the employer may not deduct the amount owing from an employee's wages without their express written consent. An employment agreement may contain such consent. An employee may withdraw their consent to deductions being made from their wages by giving the employer written notice, in which case deductions must cease as soon as practicable.³

³ Section 5(2) WPA

[28] Mr Sucich's annual holiday entitlement was to be calculated in accordance with the Holidays Act 2003 (HA03). Mr Sucich was entitled to be paid his annual holiday pay when his employment ended.⁴

[29] Mr Sucich was also entitled to outstanding public holiday pay and in accordance with HA03, EFL should have paid Mr Sucich for any public holiday in the pay that relates to the pay period in which the holiday occurred.⁵

[30] Mr Sucich did not sign the employment agreement dated 17 November 2008 and says that he did not give his consent for any sums of money to be deducted from his holiday pay. Mr Robertson-Welsh said that Mr Sucich's conduct was such that he had, by his actions, signed the employment agreement which entitled a deduction from any moneys owing by him pursuant to clause 16. The WPA is clear, any deductions from an employee's wages must be with their express written consent. This was not given by Mr Sucich and therefore there is no entitlement by the respondents to make any deductions from outstanding holiday pay they owe to Mr Sucich despite their strong feelings about thefts of scrap metal by Mr Sucich and his subsequent criminal conviction.

[31] I find that EFNZL is to pay the sum of \$957.17 gross outstanding holiday pay to Ms Begum for the use of Mr Sucich without deduction. I find that Mr O'Connor is to pay the total sum of \$1,187.33 gross made up of \$532.63 in outstanding holiday pay and \$654.70 public holiday pay, to Ms Begum for the use of Mr Sucich without deduction.

[32] Interest was sought on any outstanding holiday pay ordered owing by EFL and/or EFNZL from the date it became due, namely from when Mr Sucich's employment came to an end on 13 February 2009, down to the date of the investigation meeting on 26 June 2012. I am not prepared to order interest because this proceeding has taken a significant period of time to reach this stage for many reasons and no one party is entirely to blame.

⁴ Section 27(1)(b) HA03

⁵ Section 55 (HA03)

Should a penalty be imposed?

[33] Ms Begum seeks a penalty against EFNZL pursuant to s.134 of the Employment Relations Act 2000(ERA), for failing to pay holiday pay in breach of the employment agreement with Mr Sucich. A penalty of up to \$20,000 is sought under s.135(2)(b) ERA.

[34] Ms Begum also seeks a penalty against Mr O'Connor pursuant to s.134 of the Employment Relations Act 2000 (ERA), for failing to pay holiday pay and public holiday pay in breach of the employment agreement with Mr Sucich.. A penalty of up to \$10,000 is sought under s135(2)(a) ERA.

[35] S 135(5) of the ERA provides that an action for the recovery of a penalty must be commenced within 12 months after the date when the cause of action became known or should reasonably have become known to the person bringing the action which in this case is Ms Begum.

[36] Mr Sucich resigned with effect from 13 February 2009 which for the purposes of s135(5) of the ERA is the date of the cause of action. The original statement of problem filed by Ms Begum on 8 April 2009 did not seek a penalty. A penalty was not sought by Ms Begum until the filing of the amended statement of problem on 13 April 2011, over 2 years after the date of the cause of action. Ms Begum is out of time to recover a penalty.

Orders

[37] Ms Begum's wage arrears claim is upheld. I find that Mr Sucich has not been paid the full amounts of what he was owed by EFNZL, EFL and Mr O'Connor upon termination.

[38] I order that:

- (a) EFNZL is to pay to Ms Begum the sum of \$957.17 for the use of Mr Sucich without deduction.
- (b) Mr O'Connor is to pay the sum of \$1,187.33 owed by EFL to Ms Begum, for the use of Mr Sucich without deduction.

Costs

[39] EFNZL and Mr O'Connor are ordered to pay Ms Begum the sum of \$1750.00 being the notional tariff for a half day investigation meeting in the Authority.

[40] EFNZL and Mr O'Connor are ordered to reimburse Ms Begum the sum of \$70.00 for the filing fee.

Anna Fitzgibbon
Member of the Employment Relations Authority