

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 27
5360899

BETWEEN	THE NEW ZEALAND FURNITURE MANUFACTURING & ASSOCIATED WORKERS' UNION INC First Applicant
AND	DAVID STEVENS Second Applicant
AND	CUDBY & MEADE LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	Graeme Clarke, Advocate for the Applicants Harry Memelink, Advocate for the Respondent by phone
Investigation meeting	11 January 2013 at Wellington
Determination:	18 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application filed by the applicants claiming that Cudby & Meade Limited (Cudby & Meade) has failed to comply with the terms of a consent determination¹.

[2] The applicants also claim that Cudby & Meade failed to pay Mr Stevens holiday pay on the termination of his employment with the respondent.

[3] Cudby and Meade, through its director Harry Memolink, deny the claims.

¹ *New Zealand Furniture Manufacturing & Associated Workers' Union v. Cudby & Meade Ltd* WA132/09 dated 15 September 2009 unreported.

[4] During the Authority's investigation meeting I requested Mr Memelink to make arrangements to file the wage time and holiday records for Mr Stevens. He has explained this would take some time. The records have not arrived and he has had since January 2013 to provide them or to make such arrangements for them to be produced. I consider now that he has had plenty of time to provide them and I have decided to proceed without the records.

The law

[5] The law does not permit contracting out of the statutory requirements of paying holiday pay.

[6] The following sections of the Act are applicable to the deduction of union fees and read as follows:

55. Deduction of union fees

- (1) A collective agreement is to be treated as if it contains a provision that requires an employer as a party to the agreement to deduct, with the consent of a union member, the member's union fee from the member's salary or wages on a regular basis during the year.*
- (2) A collective agreement may exclude or vary the effect of subsection (1).*
- (3) Union fees deducted from a member's salary or wages must be paid to the union concerned in accordance with any arrangement agreed with the union.*

[7] The next applicable section reads as follows:

65A. Deduction of union fees

- (1) An individual employment agreement of an employee who is a member of a union is to be treated as if it contains a provision that requires the employer to deduct, with consent of the employee, the employee's union fee from the employee's salary or wages on a regular basis during the year.*
- (2) An individual employment agreement may exclude or vary the effect of subsection (1).*
- (3) Union fees deducted from an employee's salary or wages under subsection (1) must be paid to the union concerned in accordance with any arrangement agreed with the union.*

[8] Section 65A (3) of the Act commenced on 1 December 2004.

[9] The Supreme Court judgment in *New Zealand Airline Pilots Assoc International Union of Workers Inc v Air New Zealand Ltd* [2007] NZSC 89, [2008] 2 NZLR 1 applies. At [19] Tipping J, on behalf of himself and Blanchard and McGrath JJ, stated that s 6 of the Holidays Act 2003 prevents contracting out of the statutory entitlements (the same point was made again at [46])

The facts

[10] The Authority's consent determination dated 15 September 2009 involved a settlement agreement signed by a representative of the New Zealand Furniture Manufacturing & Associated Workers' Union (the Union) and Mr Memelink for and on behalf of Cudby & Meade in regard to matters including the non-payment of wages and the non-payment of union fees deducted. The Authority member incorporated the settlement into a consent determination making it an order of the Authority.

[11] Cudby & Meade failed to comply with the consent determination to remit union fees fortnightly to the Union. Mr Memelink accepted the sum of \$490 had not been remitted to the union. The Authority's order is enforceable under s 137 (1) (b) of the Act.

[12] Cudby and Meade failed to pay Mr Stevens his holiday pay. Mr Stevens terminated his employment with the respondent on 2 September 2009. Mr Memelink accepts that holiday pay has not been paid because he says it was included in the settlement sum.

[13] The Union claims that \$490 union fees have not been remitted. Also, Mr Stevens has not been paid \$6,720 holiday pay. The former sum is payable under the Authority's consent order. The latter payment I accept is owed to Mr Stevens by Cudby and Meade.

[14] The parties in the originating proceedings went to mediation, but subsequently settled in the Authority with a consent determination between the union and Cudby and Meade. The terms of the settlement signed off by the parties involved a pay out to Mr Stevens, but without any reference to holiday pay. Even although the

settlement was a full and final settlement between the union and Cudby and Meade. Mr Stevens was not bound by it although he apparently accepted the payout. Mr Stevens was not otherwise a party to the Authority's consent order. Mr Memelink feels cheated by the arrangement with the union, but be what may, Cudby and Meade is required to pay holiday pay because the parties cannot contract out of their statutory rights and obligations.

[15] I considered mediation as I must under s 159 of the Act and noted that there were issues surrounding that. It now falls to the Authority to make a determination.

Discussion

[16] I am satisfied that there is a consent determination that provides orders for enforcement based on a settlement reached by the union and Cudby & Meade on 15 September 2009 at least in respect of the union dues matter. The Authority's consent order made pursuant to clause 10 of schedule 2 to the Act incorporated the following:

The parties wish to record the following is in full and final settlement of all matters outstanding between them:

1. *Cudby & Meade will sign the collective agreement rolled over for six months from expiry.*
2. *The respondent will recognise the Union's right of access going forward.*
3. *The respondent will deduct union fees and remit same at fortnightly intervals utilising Smart Payroll.*
4. *The respondent will pay David Stevens the sum of \$2,000 under s.123 of the Employment Relations Act for humiliation and injury to feelings.*
5. *The \$2,000 payment will be paid over a six week timeframe with \$1,000 to be paid in two weeks from the above date and \$1,000 within four weeks of the first payment.*

The parties ask the Employment Relations Authority to record this settlement as a consent determination with a prohibition of publication other than the matter is settled.

Signed G P Larkins on behalf of applicant

Signed H Memelink on behalf of respondent

[17] Mr Memelink, for and on behalf of Cudby & Meade, denies the claims and this is based on the company's inability to pay and that the settlement was full and final. He relies upon the signed agreement on which the Authority made the consent

order. Further, he claims that the company cannot afford to pay any holiday pay if it is owed. He has referred to an accident that he had in June last year that seriously impacted on his health and ability to work. In addition the sole remaining skilled employee of the company suffered a significant workplace injury in December 2011. That person has been off work for some time, only returning for spasmodic periods. Mr Memelink relies on these difficulties preventing the company from fully operating and the reason for not remitting the union fees.

[18] Union fees were deducted previously and paid to the union in March 2010 in the sum of \$206.50. This was confirmed by Monica Tukaki, the union organiser. Mr Memelink accepted making the payment. I am satisfied that the two employees at Cudby and Meade were members of the union at all relevant times and that they were covered by the appropriate collective employment agreement and a union deductions clause applied under s 55 of the Employment Relations Act. Also I am satisfied that the union deduction provision continued to apply under s 65A of the Employment Relations Act to the remaining employee after Mr Stevens left. The payment was for fees for two members up to Mr Stevens left Cudby & Meade, and applied to the remaining employee after Mr Stevens left. Ms Tukaki gave Mr Memelink an invoice from the union for unpaid union fees dated 14 July 2011. The amount owing at that time was assessed as \$490. There has been no payment. I am satisfied that Mr Memelink accepts the amount is due, but the sum has not been remitted. He accepted that the payment had not been made.

[19] Cudby and Meade is obliged to pay the remittance.

[20] Also Cudby and Meade is required to pay Mr Stevens his holiday pay. Mr Memelink has gone into detail about the negotiations and what comprised the agreed sum in the Authority's order. The nature of the payment is not directly relevant to this claim since the parties are not able to contract out of the Holidays Act. Therefore as the settlement sum is not about holiday pay and Mr Stevens is not a party to the Authority's order and he was not a signatory to the terms as agreed, on the face of it he is entitled to his holiday pay because that is what the law requires.

The Authority's orders

[21] Cudby and Meade Limited is to pay

- a. \$490 union fees to the New Zealand Furniture Manufacturing & Associated Workers' Union Inc; and
- b. \$6,720 holiday pay to David Stevens.
- c. \$76.51 filing fee to the New Zealand Furniture Manufacturing & Associated Workers' Union Inc, which incurred the costs for filing.

P R Stapp
Member of the Employment Relations Authority