

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 77
5404203

BETWEEN

COLIN MCCORMICK
Applicant

A N D

MCMILLAN DRILLING
LIMITED trading as McMillan
Drilling Services
Respondent

Member of Authority: Christine Hickey

Representatives: Applicant in person
Jaron McMillan for respondent, no appearance at
hearing

Investigation meeting: 1 May 2013 at Christchurch

Date of Determination: 2 May 2013

DETERMINATION OF THE AUTHORITY

- A. McMillan Drilling Limited is to pay Colin McCormick \$1044.15 for amounts that were deducted or withheld from his final pay.**
- B. McMillan Drilling Limited is to reimburse Colin McCormick \$71.56 for the cost of the Authority's filing fee.**

Employment relationship problem

[1] Colin McCormick worked for McMillan Drilling Limited from 19 January 2012 until 23 September 2012.

[2] From 18 March 2012 until 24 September 2012 he rented a room from the respondent at \$60.00 per week, inclusive of the cost of power. There was no written tenancy agreement.

[3] Mr McCormick claims that his final pay was incorrect because the respondent deducted unauthorised amounts from it. Mr McCormick claims that:

- (a) he has been charged too much rent,
- (b) he should not have to pay \$100.00 deducted for cleaning his room,
- (c) he did not agree to purchase work boots and they remain the respondent's property and
- (d) \$50.00 has been deducted for an amount he did not borrow and does not owe.

[4] Mr McCormick also queried whether he had been paid the correct hourly rate of \$20.00 per hour. This matter was resolved to his satisfaction by the schedule to his individual employment agreement which set his ordinary rate of pay at \$20 per hour. That was inclusive of the 2% employer's Kiwisaver contribution; that is, the \$20 per hour was split \$19.61 as wages and 39 cents to Kiwisaver.

[5] The respondent did not file a Statement In Reply but did lodge a number of documents relevant to the claim. The first investigation meeting set for 10 April 2013 did not proceed due to illness in Mr McCormick's family. Neither party attended that meeting.

[6] I am satisfied that the respondent was served with the further Notice of Investigation Meeting which was set for Wednesday, 1 May 2013 at 9.30 a.m. The Notice of Investigation Meeting included advice that if the respondent did not attend the meeting that the Authority *may without hearing evidence from the Respondent, issue a determination in favour of the Applicant.*

[7] The Authority was instructed to deal with Jaron McMillan as representative of the respondent. Mr McMillan did not attend the investigation meeting. Because Mr McMillan was not present I delayed starting the meeting until 9.45 a.m. in case he was running late. However, Mr McMillan did not attend the meeting. Section 173(2) of the Employment Relations Act and clause 12 of Schedule 2 of the Act allow me to

proceed to investigate a matter in the absence of a party. I proceeded to investigate Mr McCormick's problem in the absence of Mr McMillan. I heard affirmed evidence from Mr McCormick. The investigation meeting concluded at 10.10 a.m.

Determination

How much rent should Mr McCormick have paid?

[8] Mr McCormick agreed to pay \$60.00 per week. The evidence I have seen establishes that he lived in the rented premises from Sunday 18 March 2012 until Sunday 23 September 2012. The rent week ran from Sunday to Saturday inclusive. Mr McCormick lived there for 27 weeks and two days. Therefore Mr McCormick should have paid $27 \times 60 = \$1620$ plus \$17.14 (for 2 days being Sunday 23 and Monday 24 September 2012). That is a total of \$1637.14 in rent. The respondent deducted \$1620.00 for rent. Therefore the applicant owes the respondent \$17.14 for the final two day's rent.

Did the respondent have the right to deduct \$100 from Mr McCormick's pay for room cleaning?

[9] The respondent deducted \$100 from Mr McCormick's last pay for cleaning the room he vacated.

[10] Section 4 of the Wages Protection Act 1983 provides that except in two specified circumstances when wages are payable to an employee an employer must pay the entire amount to the employee without any deduction. The exceptions are:

- (a) When there is written consent from a worker to make a deduction, or a written request from a worker to make a deduction¹; and
- (b) When there has been an overpayment to a worker an employer may recover that overpayment only after specified notice has been given to the worker, generally no later than the next pay day, that the employer intends to recover the overpayment. In addition, the employer must show that it was not reasonably practicable for the employer to avoid making the overpayment².

¹ Section 5(1)

² Section 6

[11] There was no written consent from Mr McCormick for the respondent to deduct any amount for room cleaning. Therefore, the deduction should not have been made. The respondent owes the applicant \$100.00.

Was the respondent entitled to deduct \$140.53 for work boots used by Mr McCormick?

[12] The respondent deducted \$140.53 from Mr McCormick's final pay for work boots. Mr McCormick says that he did not own his own work boots and was supplied with a pair by the respondent in May 2012. He did not agree to purchase the boots and did not ask the respondent to or consent in writing to the respondent making a deduction from his wages for the cost of the boots. Mr McCormick returned the boots to the respondent when he finished work. Therefore, the deduction should not have been made. The respondent owes the applicant \$140.53.

Did Mr McCormick owe the respondent \$50.00 that had been advanced to him?

[13] During the course of his employment Mr McCormick says that he was advanced a total of \$460.00 that he agreed could be deducted from his wages and was deducted. He also borrowed \$80 for fuel; making a total of \$540 to be repaid to the respondent. The first payslip shows \$260.00 was repaid in the period ending 29 January 2012. The respondent's spread sheet dated 6 March 2013 shows Mr McCormick repaid \$80.00 on 24 February 2012. The respondent then deducted \$250.00 from the final pay. However, as at that date only \$200.00 which had been advanced in August 2012 was still owed. Therefore, the deduction should not have been made. The respondent owes the applicant \$50.00.

Conclusion

[14] Mr McCormick has not been paid the full amount of holiday owed to him. He agrees with the respondent's evidence³ that the net amount of holiday outstanding is \$770.76. I have found that in addition the respondent also needs to pay Mr McCormick a total of \$290.53 but that Mr McCormick owes the respondent \$17.14. When I offset those two amounts, and add the outstanding \$770.76, the amount to be paid to Mr McCormick is \$1044.15.

³ In its spreadsheet dated 6 March 2013

Should Mr McCormick receive interest on the outstanding amount owed?

[15] Mr McCormick lodged his claim with the Authority in December 2012 after attempting to resolve his problems directly with the respondent. The respondent did not co-operate with the Authority by participating in telephone conferences. On 8 February 2013 the Authority directed the parties to mediation. Mr McCormick was willing to attend but on 12 February 2013 Mr McMillan stated that he would not make himself available to attend mediation.

[16] The Authority has the power to award interest pursuant to clause 11 of Schedule 2 of the Employment Relations Act 2000 at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum. The awarding of interest is within my discretion and need not be applied for.

[17] I consider that Mr McCormick is entitled to be paid interest on the amount of \$1044.15 because he has been deprived of the use of his money for a considerable period. Interest should be calculated from the date of filing the Statement of Problem, 3 December 2012, until the date of payment.

Costs

[18] Mr McCormick was not legally represented. He has not claimed any legal costs. However, the respondent must reimburse Mr McCormick the \$71.56 he paid to lodge this claim with the Authority.

Christine Hickey
Member of the Employment Relations Authority