

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 191
5467227

BETWEEN LLOYD WILLIAMS,
EXECUTOR OF THE ESTATE
OF DOROTHY WILLIAMS
Applicant

AND K H CONSULTING LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
James Kidd, director of Respondent

Investigation Meeting: 25 June 2015

Oral Determination: 25 June 2015

Written record issued: 25 June 2015

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dorothy Williams lodged a wage arrears claim in the Authority against her former employer, K H Consulting Limited (KHCL), but died before her claim could be investigated and determined. Her husband, Lloyd Williams pursued the claim in his capacity as executor of Mrs Williams' estate.

[2] Mrs Williams worked for KHCL from 2002 to October 2013. KHCL is the legal entity through which its director James Kidd carries out business consultancy work. Mrs Williams did KHCL's administrative work. In October 2013 Mr Kidd advised Mrs Williams that the business had no money to pay her wages and ended her employment.

[3] Over the following months Mrs Williams asked Mr Kidd to provide an account of wages remaining due to her for the 2011, 2012 and 2013 years. She also agreed that some of the money owed to her as wages could be offset against fees that she and Mr Williams owed KHCL for project management work that Mr Kidd had undertaken on an investment property in Remuera owned by Mr and Mrs Williams.

[4] In April 2014 Mr Kidd sent Mrs Williams a document headed "*Dorothy Williams – Wages Summary*". It showed wages due for months in 2011, 2012 and 2013 totalling \$39,096 gross. It itemised project management work undertaken on four occasions for fees totalling \$14,740, with GST added of \$2,211 making a total of \$16,951 for those fees. Deducting those fees (GST included) from what was described as "*total wages due*" left what was listed as a "*balance*" of \$22,145.

[5] Mrs Williams lodged an application in the Authority on 29 October 2014 seeking "*outstanding wages, holiday pay and any other outstanding amount due to me paid in full*". The parties had already attended mediation but had not resolved their differences there.

[6] In a statement of reply KHCL said the parties had always agreed that payment would be made when fees due to KHCL were paid by a company called Phoenix Gluten Free Products Limited (Phoenix).¹

[7] Mr Williams had invested in Phoenix, which ran a bakery business, in 2010. He and Mr Kidd each held a 50 per cent shareholding in Phoenix when the company went into voluntary administration on 6 March 2014 and then into liquidation on 27 May 2014. The assets of the business were subsequently purchased from the liquidators by a company owned by Mr Kidd's sister and brother-in-law.²

[8] A letter from Mr Kidd sent to the Authority on 29 May 2015 confirmed he had told Mrs Williams that he would "*arrange to pay her*". However Mr Kidd said his promise was based on the fact that Phoenix was still operating and showing signs of improvement so he believed it would be able to pay KHCL in the future. He said that did not eventuate because of "*actions of Mr Williams*".

¹ Now registered as Old PGFP Limited (3018640) in liquidation.

² Phoenix Gluten Free Limited (1669347), previously named Kandoo Food Group Limited.

[9] On 29 May 2015 Mr Kidd also provided an amended version of his summary of wages owed to Mrs Williams. The amounts listed as due for periods in 2011, 2012 and 2013 were higher and he included a calculation of holiday pay also owed for those years, resulting in a total of \$47,112.84 gross due in wages. The amount for deductions for project management work remained the same (including the GST amount of \$2,211). The resulting balance given for total wages due was \$30,161.84.

[10] Both Mr Williams and Mr Kidd gave written and oral evidence, under oath, at the Authority investigation meeting and had an opportunity to give oral closing submissions on the issues for resolution. As permitted under s174A and s174E of the Employment Relations Act 2000 (the Act) this determination has not set out all evidence and submissions received but states findings, expresses conclusions on the issues requiring resolution, and specifies orders made.

[11] The issues for resolution were:

- (i) Could the gross amount of \$47,112.84 in wages and holiday pay said to be due to Mrs Williams, according to Mr Kidd's 29 May 2015 summary, reasonably be accepted as correct?
- (ii) Should GST be included on an agreed deduction from wages owed to Mrs Williams, and if so, was Mr Williams entitled (as her executor) to have a GST inclusive invoice for those amount?
- (iii) Was KHCL entitled to withhold or refuse payment of the resulting balance of wages and holiday pay owed subject to the contingency of Phoenix paying fees to KHCL?

[12] During the investigation meeting Mr Williams confirmed that no interest was sought on any amount found to be owed and no legal costs were sought in relation to the matter.

The amount of wages and holiday pay owed

[13] Mrs Williams' application to the Authority in October 2014 referred to Mr Kidd's 4 April 2014 reconciliation of wages due to her. It identified two queries about the calculations – one as to whether GST should be charged for the agreed

deduction to pay fees owed to KHCL and one as to why no holiday entitlement was provided for 2013. She made no overall query about the total amount given as due.

[14] Mr Kidd has since provided the 29 May 2015 summary that includes amounts for holiday pay and increased amounts for wages still owing for the three years of 2011, 2012 and 2013. He has also provided wage and time records. Mr Williams said he was prepared to accept Mr Kidd's calculations "*on faith*" and I have concluded the amounts stated in that summary, confirmed by Mr Kidd under oath as having been correctly calculated to the best of his knowledge, could reasonably be taken as correct.

[15] Accordingly I have found the wages and holiday pay due to Mrs Williams at the date of the end of her employment in 2013 totalled \$47,112.84 (gross).

The GST deduction

[16] There was no dispute Mrs Williams had agreed to the deduction of fees she and Mr Williams owed to KHCL for property management services. The fees totalled \$14,740.

[17] As the fees were for services provided, the addition of GST (to be paid by her and Mr Williams as the clients in respect of those services) was appropriate.

[18] However there was a problem and an inconsistency with the calculation that Mrs Williams appeared to expect from the transaction, as raised by her query about the inclusion of GST in Mr Kidd's reckoning. In an email she had sent Mr Kidd on 4 April 2014 she asked: "*How come you are charging GST when no invoice has been issued and it was originally a contra deal*". Mr Williams has now asked that, if the GST amounts are to be included in the calculation of any balance of wages owed, that KHCL provide an invoice showing the GST so Mrs Williams' estate can have the benefit of it in its IRD return.

[19] However Mr Kidd pointed out, correctly in my view, that the amounts for payment of the KHCL fees (and GST) were notionally taken from the gross amount of wages owed to Mrs Williams, not the net (that is after the deduction of PAYE) amount due.

[20] To ensure lawful compliance with income and services tax requirements, any calculation of wages should include the PAYE obligations, with deduction for KHCL fees (including the GST amount) that Mrs Williams had agreed to pay being made from the net amount of wages due to her. It is also proper that KHCL provide a tax paid invoice (showing the GST) to Mr Williams, in his capacity as executor of Mrs Williams' estate, so he can then use the invoice for any necessary tax reconciliation in relation to Mrs Williams' estate (and KHCL can use it in its own business tax accounting).

[21] I cannot require KHCL to provide that documentation but have determined Mrs Williams' wages arrears entitlement on the basis that the calculations should account for PAYE (as well as the agreed deductions for KHCL's fees including GST).

Was KHCL entitled to withhold wages and holiday pay due to Mrs Williams until or unless fees were paid by Phoenix?

[22] In his letter to the Authority dated 29 May 2015 Mr Kidd said that he had discussed with Mrs Williams "*many times*" that payment of her wages was based on KHCL being paid for its work related to Phoenix.

[23] Mr Kidd's oral evidence was that Mrs Williams was fully aware of the importance of income from Phoenix as she had handled the financial transaction whereby Mr Williams had invested in Phoenix and much of her administrative work for KHCL involved matters to do with Phoenix. However he accepted there was no written agreement whereby she had agreed to forego wages or make payment to her for her work for KHCL contingent on payments from Phoenix.

[24] Mr Williams' evidence was that he had not heard Mrs Williams refer to any such arrangement and he submitted that her actions in pursuing the wage claim before her death was "*her own statement on that*".

[25] I have concluded there was no legal basis on which KHCL could properly withhold payment of wages and holiday pay due to Mrs Williams at the end of her employment in October 2013. She had been employed by and worked for KHCL, not Phoenix, and was entitled to be paid by KHCL for the time spent doing so. It was

clearly the case from Mr Kidd's point of view – and was a business decision that he was entitled to make – that KHCL could not afford to keep Mrs Williams working for it unless there was sufficient income, including what it hoped to receive in payment of fees for services KHCL (through work done by Mr Kidd) provided to Phoenix. On that basis Mr Kidd was entitled to take steps to end Mrs Williams' employment at KHCL and he did so. There was no issue raised about how that was done. The Authority was asked to look at the wage arrears issue, not the justifiability of why and how she was dismissed on the basis, essentially, of redundancy.

[26] However, taking what Mr Kidd did in ending Mrs Williams' employment as a legitimate business decision, there was no reliable basis established from his evidence for Mrs Williams' wage and holiday pay entitlements to be withheld or to be contingent on payments from Phoenix (or its shareholders such as Mr Williams).

[27] The obligation KHCL had on dismissing Mrs Williams in October 2013 was to pay the entire amount of the wages owing to her at that time without any deduction or delay, apart from the deductions to which she was accepted to have agreed.³

[28] The precise amount required further calculation that I was not able to make on the information available. The starting point is the sum of \$47,112.84 due as wages and holiday pay, as calculated in Mr Kidd's 29 May 2015 summary. From that total two amounts must be deducted – firstly, the appropriate amount of PAYE and secondly, \$16,951 (including GST of \$2,211). The amount due as arrears under s131 of the Act is the balance from that calculation.

Orders

[29] The order of the Authority is that KHCL make the calculation described in paragraph [28] and pay the balance within 28 days of the date of this determination. Whether the parties wish to make an arrangement for payment to be made over a longer period – as Mr Williams indicated Mrs Williams had been prepared to accept – is a matter between them but if such arrangements cannot be agreed, Mr Williams will be able to exercise the enforcement options available to him under s141 of the Act.

³ Wages Protection Act 1983 ss 4 and 5 and Holidays Act 2003 s27.

[30] In summary KHCL must pay Mr Williams, in his capacity as executor of Mrs Williams' estate, arrears of wages and holiday pay owed to Mrs Williams at the date of the end of her employment (after deducting PAYE and the agreed amount of \$16,951) within 28 days of the date of this determination. Leave is reserved for Mr Williams to request a certificate of determination specifying the precise amount after the necessary PAYE calculations have been made.

Robin Arthur
Member of the Employment Relations Authority