

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 733
3048198

BETWEEN	BENNY YAN First Applicant
AND	PAUL JOHNS Second Applicant
AND	MAG AND TYRE DIRECT LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	First and second applicants' in person Michael Laird, advocate for the respondent
Investigation Meeting:	8 November 2019 at Christchurch
Submissions Received:	On the day
Date of Determination:	23 December 2019

DETERMINATION OF THE AUTHORITY

A Within 28 days from the date of this determination Mag and Tyre Direct Limited is to pay to Benny Yan:

- (a) The sum of \$176 gross being payment for working on 12 September 2018.**
- (b) The sum of \$6075.74 gross being holiday pay.**
- (c) The sum of \$262.34 being interest on the above amounts.**
- (d) The sum of \$1725.70 being a contribution towards legal costs incurred in pursuit of payment.**

B Within 28 days from the date of this determination Mag and Tyre Direct Limited is to pay to Paul Johns:

- (a) The sum of \$148 gross for working on 12 September 2018.**
- (b) The sum of \$4,333.53 gross being holiday pay.**
- (c) The sum of \$188.05 being interest on the above amounts.**

Employment Relationship Problem

[1] Benny Yan and Paul Johns were employed by Mag and Tyre Direct Limited (Mag and Tyre). Mr Yan was employed as the wheel and tyre shop manager and Mr Johns as a tyre fitter.

[2] Mr Yan and Mr Johns gave notice of their intention to resign from employment with Mag and Tyre in separate letters on 24 August 2018. They both gave notice of 3 weeks and 1 day with their final day being Saturday, 15 September 2018.

[3] Mr Yan and Mr Johns say they are owed 3 and a half days pay for their final week of employment and holiday pay.

[4] Michael Laird is the sole director of Mag and Tyre.

[5] Mr Laird says that for the final week of employment Mr Yan and Mr Johns took sick leave on 13, 14 and 15 September 2018. He says that this sick leave was not supported by a doctor's certificate as required in the employment agreement and as requested and therefore there is no obligation to pay sick pay.

[6] During the Authority investigation meeting Mr Yan and Mr Johns gave evidence that they were also not paid for 12 September 2018 which was a day they both worked.

[7] Mr Laird says that holiday pay was withheld for both Mr Yan and Mr Johns. In the statement in reply he said that this was for consistent and deliberate timesheet falsification, resulting in significant overpayment to Mr Johns and Mr Yan and more generally referred to numerous other issues resulting in a "believed" debt owed by Mr Yan and Mr Johns to Mag and Tyre.

[8] Mr Yan obtained some legal advice after the non-payment of his holiday pay and there were letters exchanged between his legal representative and the legal representative for Mag and Tyre about payment of holiday pay, sick leave and the reason why payment was being resisted by Mag and Tyre.

[9] The Authority held a case management conference and there was an exchange of documents in order to clarify the amount of holiday pay and the reasons for withholding payment. After an extended exchange of material between the parties the Authority proceeded to conduct an investigation meeting. Mr Laird attended that meeting by way of Skype from China and Mr Yan and Mr Johns attended in person.

[10] The Authority needs to determine the following issues in this case:

- (a) Is there money owed to Mr Yan and Mr Johns for their final week of employment?
- (b) What holiday pay is owed to Mr Yan and Mr Johns?
- (c) Is there any ability in the employment agreements to withhold payment of holiday pay?
- (d) Why did Mag and Tyre withhold payment of holiday pay?
- (e) Should orders for payment of holiday pay be made?
- (f) Should there be an award of interest?
- (g) Should there be an order for payment of a contribution towards legal costs incurred by Mr Yan in attempting to obtain payments.

Is there money owed to Mr Yan and Mr Johns for their final week of employment?

12 September 2018

[11] Mr Yan and Mr Johns worked on 12 September 2018. The information obtained by Mr Laird during and after the Authority investigation meeting did not confirm payment had been made for that day. This may have been because the usual pay period ended Tuesday of each week. 12 September 2018 was a Wednesday and would fall into the next pay period. I accept the evidence supports Mr Yan and Mr Johns were not paid for that day. They should have been paid.

[12] Mr Yan's hours of work in clause 6 of the employment agreement are 44 hours per week from Monday to Saturday. On Saturday the work was between 9am to 1pm (four hours) and Monday to Friday between 8.30am to 5pm with a 30 minute unpaid lunch break.

[13] Mr Johns hours were the same as Mr Yan. Mr Yan was paid \$22 per hour and Mr Johns \$18.50. I have calculated the daily rate based on an eight hour day.

[14] I order Mag and Tyre Direct Limited within 28 days of this determination to pay Benny Yan the sum of \$176 gross being reimbursement of unpaid wages for working on 12 September 2018.

[15] I order Mag and Tyre Direct Limited within 28 days of this determination to pay Paul Johns the sum of \$148 gross being reimbursement of unpaid wages for working on 12 September 2018.

Sick days – 13, 14 and 15 September 2018

[16] Mr Yan and Mr Johns in their evidence said that they both ate at a restaurant on the evening of 12 September 2018 and became unwell with suspected food poisoning. Mr Yan sent a message to Mr Laird and advised that both he and Mr Johns were unwell. Mr Yan and Mr Johns said in their evidence that they continued to feel unwell until after Saturday 15 September 2018 which was to have been their last day of work. Mr Yan said that a medical certificate was not requested until after the employment relationship had ended.

[17] The evidence about when the medical certificate was requested is consistent with letters sent to Mr Johns and Mr Yan from the lawyer for Mag and Tyre dated 11 October 2018. Paragraph six of the letter refers to a medical certificate having been requested by Mag and Tyre on 21 September 2018.

[18] Clause 8.4 of Mr Yan's and Mr Johns' employment agreements provide as follows:

Where the Employee has taken sick leave and has been absent from work for at least three consecutive calendar days, the Employer shall be entitled to require the employee to provide proof of entitlement to sick leave, at the employee's cost.

The Employer shall also be entitled to require the employee to provide proof of entitlement to sick leave within the three consecutive calendar days at the employer's cost. The employer will inform the employee as early as possible that such proof may be required and agree to meet any reasonable expenses in getting this proof.

[19] Mr Yan and Mr Johns were absent from work on sick leave for three consecutive calendar days. Clause 8.4 of their employment agreements provides that Mag and Tyre could ask for proof of entitlement to sick leave which would be at the employee's expense.

[20] The ability for an employer to ask for proof of sickness for sick leave taken if the leave is for a period of 3 or more consecutive days is consistent with s 68 of the Holidays Act 2003. Mr Laird asked Mr Johns and Mr Yan for proof of their entitlement to sick leave six days (five working days) after their employment ended, on 21 September 2018. They did not obtain proof for a number of reasons including that they wanted Mag and Tyre to pay. In the employment agreement the obligation for the employer to pay is where an employer requires proof of sickness within the three consecutive days. That is different to this situation.

[21] I accept that it may have been challenging given the passage of time to obtain proof of sickness however a medical certificate confirming what Mr Yan and Mr Johns said to a doctor about the reasons for illness and symptoms over those three days would probably have been sufficient.

[22] In the absence of any proof of sickness requested under the employment agreement I do not uphold the claim for payment of sick leave for the days 13, 14 and 15 September 2018.

What holiday pay is owed to Mr Yan and Mr Johns?

[23] The Authority has been provided with the annual leave reports and pay slips which show the outstanding and accrued annual leave for Mr Yan and Mr Johns.

[24] Mr Yan is owed the sum of \$6,061.66 gross for holiday pay.

[25] Mr Johns is owed the sum of \$4,321.69 gross for holiday pay.

Is there ability in the employment agreement to make deductions from or withhold payment of holiday pay?

[26] There is no ability in either Mr Johns or Mr Yan's employment agreements to withhold holiday pay except where there is an overpayment for leave taken in advance. That is not the situation in this case.¹ Mr Yan and Mr Johns did not consent to the withholding of their holiday pay.

¹ Clause 15.5 in each employment agreement

[27] As the Authority explained to Mr Laird the law and the employment agreements do not enable the withholding of holiday pay on a basis that there may be money owed to Mag and Tyre.

Why did Mag and Tyre withhold payment of holiday pay?

[28] Mr Laird raised multiple issues about money he said that Mag and Tyre were owed by Mr Johns and Mr Yan. I advised Mr Laird that the statement in reply was not treated by the Authority as a counterclaim. It referenced matters that suggested further investigation or inquiry. The Authority did give Mr Laird an opportunity to talk to those matters at the investigation meeting and he provided some further information in advance.

[29] Mr Yan and Mr Johns were able to respond. The Authority considered that was important given there had been a general suggestion of serious wrongdoing on the part of Mr Yan and Mr Johns with no real ability for them to respond. Mr Laird refused mediation suggested at an early time and at one stage concerns about defamation were raised by Mr Yan's lawyer about what was purportedly being said by Mag and Tyre to those in other businesses.

[30] I shall briefly set out the nature of the concerns that were raised with the Authority and the responses.

Time sheets

[31] There was a concern that timesheets had been falsified. Alarm deactivation records were provided and relied on for various deactivations/activations of the alarm. Mr Yan said that he would pick up tyres early in the morning for jobs that were required to be completed before the tyres could arrive on the delivery truck at 11am. Sometime also he would have to go out during the day to customers and for missed pick-ups and deliveries.

[32] In support of that explanation Mr Yan obtained a letter from a person at a business that delivers stock to Mag and Tyre who I shall call Graeme. Graeme wrote that he recalled frequently seeing Mr Yan in the early morning picking up tyres for his morning jobs as Graeme would not do his delivery until later in the morning. He noted in his letter that Mr Yan was a cheerful and enthusiastic person particularly when it came to his work and that

the store always seemed to be quite busy when he was there with regular deliveries and pickups but he noticed a decline when Mr Yan left.

[33] Initially Mr Yan had an intention of buying into the business and it appeared to be accepted that after his employment turnover went up. Mr Yan and Mr Johns said that they both did their best in what they described as trying circumstances and further that Mr Laird did not raise any concerns about work hours and timesheets whilst they were employed.

[34] There is a clear dispute about what Mr Laird is suggesting occurred from the alarm records. The evidence given by Mr Johns and Mr Yan could answer any concerns and support that work was still being undertaken.

Short paid invoices

[35] One of the issues of concern was that Mr Yan and Mr Johns would purchase items at cost from Mag and Tyre. Mr Yan and Mr Johns agreed that they would purchase items at cost describing it as a common practice. They both said that Mr Laird knew about this and no issues were raised. Mr Laird denied that and said this was not an acceptable practice. The purchases made by Mr Yan and Mr Johns were clearly invoiced in their names and that must have been able to be assessed by those who dealt with the accounts at that time. No issue was raised with either of them during their employment.

Was Mr Yan operating his own business whilst employed by Mag and Tyre?

[36] Mr Laird provided information that he said suggested that Mr Yan was operating his own business. The information was that Mr Yan used the Mag and Tyre courier to undertake deliveries of his own products.

[37] Mr Yan said in his evidence that he did not have a business but that he does sell car parts. He said that started out as a hobby and he packed stuff at home. Further that he was very open with sending his parts by courier at work and that he highlighted and paid for each of his packages. He also said that he works most time through his lunch and morning and afternoon tea breaks with respect to time taken on this.

[38] Mr Laird could have instructed Mr Yan not to have undertaken this activity during his employment. He did not. For present purposes there was no evidence that Mag and Tyre paid for the packages belonging to Mr Yan to be couriered to support a financial loss.

Eagle

[39] There was a concern that Mr Yan sold some wheels that he had at home to a customer. Mr Yan said that Mag and Tyre did not stock that brand and he happened to have some at home and thought he was being helpful. After Mr Yan left his employment the customer asked for them to be repaired. Mr Laird said that Mag and Tyre then had to pay for them to be repaired.

[40] I accept that may be something Mag and Tyre could pursue with Mr Yan. He was unaware of the issue of repair until the investigation meeting. I am not however satisfied that the Authority has jurisdiction to deal with the matter as it was not something that “directly and essentially concerns the employment relationship.”²

Missing money

[41] There was a query about missing money. If that money was missing there was no evidence to support what could have happened to it and there would need to be if it was to be suggested that Mr Johns had taken it.

[42] There were some other issues raised about other invoices and matching sales but in a more general way.

[43] In conclusion Mr Yan and Mr Johns say that satisfactory explanations exist in respect of the concerns or in the case of the alleged missing money there was no knowledge of what could have occurred. The Eagle wheels issue is not within the jurisdiction of the Authority.

Should orders for payment of holiday pay be made?

[44] There should be orders for payment of holiday pay.

[45] There will also need to be holiday pay assessed on the payments found owing for 12 September 2018 and that is to be added to the holiday pay amounts owed.

[46] For Mr Yan that is \$176 gross multiplied by 8% which is \$14.08 gross.

[47] For Mr Johns that is \$148 gross multiplied by 8% which is \$11.84 gross.

² *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618 at [95]

[48] I order Mag and Tyre Direct Limited to pay to Benny Yan the sum of \$6,075.74 gross being holiday pay within 28 days of the date of this determination.

[49] I order Mag and Tyre Direct Limited to pay to Paul Johns the sum of \$4,333.53 gross being holiday pay within 28 days of the date of this determination.

Should there be an award of interest?

[50] Mr Johns and Mr Yan have been waiting for payment of their holiday pay and payment for the day they both worked on 12 September 2018 for a long time. The Authority may under clause 11 of the second schedule to the Employment Relations Act 2000 order the inclusion of interest in the sum it determines is owed. I consider that an award of interest is appropriate in this case. The last day of employment was 15 September 2018. The final pay would have been expected on the Wednesday after that date which is 21 September 2018 and I shall assess interest from that date.

[51] The Authority is required to assess interest in accordance with schedule 2 of the Interest on Money Claims Act 2016.

[52] The total amount on which interest is to be assessed for Mr Yan is \$6251.74 and for Mr Johns is \$4481.53.

[53] The interest payable to Mr Yan is the sum of \$262.34

[54] The interest payable to Mr Johns is the sum of \$188.05.

Contribution towards costs

[55] Mr Yan attended a lawyer to attempt to recover payments he and Mr Johns were owed. He has provided the Authority with invoices for total costs in the sum of \$2,876.16. Mr Yan undertook the steps of lodging the statement of problem and appearance at the investigation meeting without legal assistance.

[56] The Authority may under clause 15 of the second schedule to the Employment Relations Act 2000 order any party to a matter to pay costs and expenses considered reasonable of the other party. There was no basis for Mr Yan and Mr Johns holiday pay to be withheld and it should have been paid without the need for legal advice to be sought. Instead they were met with a large number of allegations without much supporting information.

[57] It would be unusual to award full costs. I weigh that Mr Yan and Mr Johns were not successful on their claim for sick pay. I consider a reasonable contribution towards costs incurred by Mr Yan is 60% of his actual costs which is the sum of \$1725.70.

[58] I order Mag and Tyre Direct limited to pay to Mr Yan the sum of \$1725.70 being costs.

Summary of orders made

[59] Within 28 days of the date of this determination Mag and Tyre Direct Limited is ordered to pay the following sums to Benny Yan:

- (a) The sum of \$176 gross being payment for working on 12 September 2018.
- (b) The sum of \$6075.74 gross being holiday pay.
- (c) The sum of \$262.34 being interest on the above amounts.
- (d) The sum of \$1725.70 being a contribution towards legal costs incurred.

[60] Within 28 days of the date of this determination Mag and Tyre Direct Limited is ordered to pay the following sums to Paul Johns:

- (a) The sum of \$148 gross for working on 12 September 2018.
- (b) The sum of \$4333.53 gross being holiday pay.
- (c) The sum of \$188.05 being interest on the above amounts.

Helen Doyle
Member of the Employment Relations Authority