

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 184
3036360

BETWEEN	JPB PAINTING CONTRACTORS 2006 LIMITED Applicant
AND	BEVAN PAUL Respondent

Member of Authority: Michael Loftus

Representatives: Jonathon Bacon for applicant
Bevan Paul on own behalf

Investigation Meeting: On the papers with various exchanges up to and including
11 March 2019

Written record issued: 12 April 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, JPB Painting Contractors 2006 Limited (JPB), seeks the repayment of overpaid wages along with further sums relating to property it claims Mr Paul failed to return upon cessation and recompense for Mr Paul's failure to give adequate notice.

[2] There was also a claim for \$4,500 as recompense for damage resulting from a loss of productivity incurred as a result of Mr Paul leaving JPB's employ without adequate notice but this was withdrawn albeit on a without prejudice basis.

[3] Mr Paul denies he owes the sums sought.

Conduct of the investigation

[4] It is fair to say Mr Paul has participated in the Authority's process reluctantly. He originally failed to respond to JPB's application and despite various attempts to serve and contact him he took no part till after an investigation meeting had been scheduled without his input,

[5] About a week prior to the meeting scheduled for 23 November 2018 he phoned the Authority and advised he would be unable to participate for medical reasons. He was told he would have to apply for an adjournment and provide evidence supporting his claim of medical incapacity which he did on 22 November. In answer to subsequent enquiries he advised he may well not be capable of participating in the process till the new-year.

[6] Mr Paul then failed to respond to attempts to continue the process in the new-year which led to advise during a telephone conference in which he did not participate that unless I had reason to reconsider I would determine the matter on the papers. The parties had till 14 February to respond.

[7] On 14 February Mr Paul sent further information which was followed by other exchanges over the next couple of week.

Discussion

[8] JPB operates a painting business and employed Mr Paul on an individual employment agreement. JPB says that having fallen ill Mr Paul requested and received holiday pay in advance and to which he had not yet earned an entitlement. He then resigned without notice and having not returned.

[9] As already said Mr Paul's action led to a variety of claims with one being that for damages. It was said Mr Paul's resignation left JPB short-staffed and this jeopardised an ongoing contract with one of its clients which caused a loss of productivity. JPB assesses the loss to be \$4,500 and for that it sought compensation.

[10] The claim was withdrawn after it was pointed out it might face numerous difficulties. First my powers in respect to a claim of this nature are limited to awarding damages for an established contractual breach and there is nothing other than the required notice period in Mr Paul's employment agreement to which such a

breach claim could attach. The second is even if that were not so JPB would be likely be incapable of meeting the requirement it accurately quantify the damage suffered. Third there are various Court decisions which question the propriety of holding employees responsible for risks the business should shoulder such as ensuring adequate staffing.¹ That said the withdrawal occurred on a without prejudice basis in order to progress this claim and should a challenge result JPB reserves its right to reinstitute the claim.

[11] The remaining claims relate to an overpayment of wages JPB seeks to recover; reimbursement for company property that was not returned and a further \$1800 for Mr Pauls's failure to give notice.

[12] JPB is claiming \$726.87 in respect to an overpayment occasioned by it having agreed to pay holidays to which Mr Paul was yet to attain an entitlement. In essence it is saying that in such circumstances the overpayment amounted to a loan and is repayable under a clause in the employment agreement which states that on termination the employee has a duty to repay any loans.²

[13] I accept, given the evidence, Mr Paul received payments to which he had not become entitled. JPB's evidence states so and Mr Paul's response appears to confirm that is correct. The payment related to leave taken in advance.

[14] Mr Paul's response then becomes contradictory. JPB says the absence related to ill-health with no sick leave remaining. Mr Paul does not comment on the state of his health at the pertinent time but offers two different rationales for what happened. On one hand he says the leave was related to a bereavement but as it was a fortnight it would exceed the normal parameters there-of and there is no evidence proffered by either party of a bereavement or a request for bereavement leave. He then says the leave was debited as annual and that was disputed as, according to him, a colleague had undertaken to underwrite the leave by having his annual leave balance debited. The lack of any documentary corroboration and Mr Paul's failure to evidence his assertion means it must be dismissed especially given the lack of a legal basis for such an approach.

[15] The amount is not disputed.

¹ *George v Auckland Council* [2013] NZEmpC 179 and *Rainbow Falls Organic Farm Limited v*

[16] The principle an employer may recover an overpayment is, in my view, enunciated in s 6(2) of the Wages Protection Act 1983. I also note none of the restrictions on recovery in that Act apply as JPB does not, and cannot, seek to recoup the amount via a deduction from future wages. The evidence of both parties suggests the absence was discussed and leads me to conclude the situation arose with a request made by Mr Paul to which JPB acceded. By not returning and earning the leave which provided collateral for the amount received Mr Paul has, in my view, created a debt which is now repayable.

[17] JPB also claims \$238.60 being the value of items of its property Mr Paul failed to return on termination as also required by his employment agreement.³

[18] Mr Paul accepts he disposed of the property claiming he was unaware he would be held accountable for it. That belief is contrary to a contractual obligation to return that property.⁴ Given the available evidence I accept he has failed to do so thereby creating another debt for which he is now liable.

[19] There is then a claim for two weeks wages which JBP justifies by referring to clause 3.1 of the employment agreement. The clause states either party must give two weeks' notice of termination and where the employee fails to do so he forfeits two weeks' salary.

[20] It is now established clauses such as that relied upon here cannot be enforced where they constitute a penalty for inadequate notice as opposed to being a properly evaluated liquidated damages provision.⁵ There is no evidence this clause constitutes the later. It is therefore unenforceable.

[21] Finally there is the issue of costs. While only partial, JPB has had success. It is entitled to costs though by handling the claim itself those are limited to the Authority's filing fee which should be reimbursed.

Conclusion and Orders

[22] For the above reasons I accept JPB has succeeded with some but not all of its claims. As a result I make the following orders.

Rockell [2014] NZEmpC 136

² Clause 18.1(c) of Mr Paul's employment agreement dated 19 September 2016

³ Above n 2 at clause 18.2(b)

[23] Bevan Paul is to pay JPB Painting Contractors 2006 Limited:

- a. \$726.87 (seven hundred and twenty six dollars and eighty seven cents) being the repayment of wages to which he was not entitled; and
- b. A further \$238.60 (two hundred and thirty eight dollars and sixty cents) being recompense for property he failed to return on cessation; and
- c. A further \$71.56 (seventy one dollars and fifty six cents) as a contribution toward JPB's costs.

[24] The above payments are to be made no later than 4.00pm on Friday 3 May 2019.

Michael Loftus
Member of the Employment Relations Authority

⁴ Clause 18.1(b) of Mr Paul's employment agreement

⁵ *G L Freeman Holdings Limited v Livingston* [2015] NZEmpC 120