IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 774
3207799

	BETWEEN	STEPHEN BRYANT Applicant
	AND	ALLIED INVESTMENTS LIMITED trading as ALLIED SECURITY Respondent

Member of Authority:	Andrew Dallas
Representatives:	Jenny Beck and Bethany Hyslop, counsel for the Applicant Brenda Thom, counsel for the Respondent
Investigation Meeting:	16 May 2023 at Dunedin
Submissions and other: material received:	Up to, and including, 20 November 2023
Determination:	20 December 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stephen Bryant was employed by Allied Investments Limited trading as Allied Security (Allied) as an Accounts Manager in May 2022. Mr Bryant seeks $2,205.23 as underpayment of wages. Allied rejects Mr Bryant's claim and counterclaims that he unjustly enriched himself through overpayments of wages by either $1,777.87 *or* $639.12 plus interest.

[2] At the investigation meeting, Mr Bryant said he had a live personal grievance for unjustifiable disadvantage based on information provided in his statement of problem. Mr Bryant, who was self-represented during the early stages of his employment relationship problem, had not explicitly articulated this during a case management conference held with the parties by another Member of the Authority. When it became apparent at the meeting that this was now Mr Bryant's position, it was strongly resisted by Allied. We shall return to all of this below.

The Authority's Investigation

[3] During my investigation meeting, I heard evidence from Mr Bryant and for Allied, evidence was given by managing director, Damian Black and payroll manager, Norman Dalebrook.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[5] The following are the issues for investigation and determination:

(i) Is Mr Bryant owed wages by Allied in the amount of $2,205.23?;

(ii) If not, was Mr Bryant "unjustly enriched" by Allied through overpayments of wages by either $1,777.87 *or* $639.12 plus interest?;

(iii) Was Allied entitled to deduct most of Mr Bryant's final holiday pay?;

(iv) Did Mr Bryant raise with Allied a personal grievance for unjustified action causing disadvantage arising out of the restructuring process that led to his redundancy?;

(v) If so, what should the next steps be?; and

(vi) Should either party contribute towards the cost of representation of the other?

What caused Mr Bryant's employment relationship problem?

[6] Mr Bryant was employed by Allied pursuant to an individual employment agreement (IEA). Mr Bryant was paid $52,000 per annum based on a 40 hour week. The parties agreed that Mr Bryant's salary would be reviewed after an initial period of three months. However, following a meeting barely a month into the employment relationship, Allied increased Mr Bryant's pay to $57,200 per annum. In an email to Mr Bryant dated 13 June 2022, Mr Black described it as an increase of his base rate to $27.50 per hour.

[7] Understanding Mr Bryant's hours of work is critical to understanding the employment relationship problem between the parties. Mr Bryant's hours of work were notionally set out in cl 4.0 of his IEA, which relevantly provided:

> 4.0 The Employee shall work 40 hours per week at such times as to be mutually agreed between the Employer and Employee. The Employee shall work additional hours at the reasonable discretion of the Employer and in consultation with the Employee.

[8] However, Mr Black amended his IEA to read: "working hours between 7 am – 3 pm or to suit as mutually agreed". Ostensibly, this was to provide greater flexibility for one, or both parties.

[9] A short while after the commencement of Mr Bryant's employment, it was further agreed between Mr Black and Mr Bryant that Mr Bryant's hours would be further varied to 7.30am – 3.00pm. There was a dispute in the evidence whether this variation was initiated by Mr Bryant or Mr Black but there was no dispute the variation was given effect to. This mutual variation was not recorded in writing.

[10] A review of Mr Bryant's payslips from the commencement of his employment discloses three things. First, he was paid $1000 a week gross (with net pay of $719.64), based on a published salary of $52,000, with no reference to hours for pay periods between 15 May and 12 June 2022 (first phase of employment). Second, Mr Bryant was paid $1100 a week gross (with net pay of $778.18) based on a published salary of $57,200, with no reference to hours for pay periods between 19 June and 4 September 2022 (second phase of employment). Third, no reduction was made by Allied to Mr Bryant's weekly pay as a result of either variations to his hours of work until the pay period ending on 11 September 2022.

[11] During the first phase of his employment, Mr Bryant worked 8 hours a day between 7.00am and 3.00pm inclusive of a 30-minute meal break. During the second phase of his employment, Mr Bryant worked 7.5 hours a day between 7.30am and 3.00pm inclusive of a 30 minute meal break. Mr Black, supported by Mr Dalebrook, said Mr Bryant's meal breaks were "unpaid".

[12] Mr Black contended that after he reached agreement with Mr Bryant for the second phase hours of work variation, he advised Mr Dalebrook to make a downward adjustment to Mr Bryant's pay. Mr Dalebrook said he recalled Mr Black asked him to do this and made a note to this effect "but somehow [he] forgot to action this pay roll change". Mr Bryant said a salary reduction was not part of the common intention of the agreement he reached with Mr Black to reduce his hours of work.

[13] In early September 2022, Allied commenced a consultation process with staff in its accounts department, including Mr Bryant, over a proposed restructuring. Mr Black said as a result of reviewing various matters, he discovered that Mr Bryant was being paid a salary based on 40 hours work.

[14] On 14 September 2022, Mr Black emailed Mr Dalebrook and directed him to "adjust" Mr Bryant's salary. In the body of the email, Mr Black stated: "it looks like we pay 40hrs a week but [Mr Bryant] opted to work less than 40hrs so this should have been adjusted". Mr Black further wrote: "[o]n the IEA I wrote workings hours between 7am – 3pm or to suit mutually agreed so [Mr Bryant] could adjust his hours but I am unsure when these went to 7.30am etc".

[15] Allied then reduced Mr Bryant's salary to $50,050 a year which comprised, on Mr Black's evidence, "35 hours per week (7.30am – 3pm with an unpaid 30-minute lunch break)". Various email exchanges subsequently took place between Mr Bryant and Allied. Mr Bryant initially appeared at cross-purposes with Mr Dalebrook and the positions of the parties crystallised in emails exchanged between Mr Black and Mr Bryant. In one email dated 15 September 2023, Mr Bryant accused Mr Black of being a "bully" and that his wages had been cut "hoping he would quit". Mr Bryant also advised Mr Black he would be "filing a personal grievance" when he did leave.

[16] As a result of the finalisation of the review of the accounts department, Mr Bryant was made redundant by Allied with effect from 14 October 2022. He was the only employee affected. On one approach to the facts, it is a curious coincidence that an employee who is in dispute with his employer about an over/underpayment of wages and has alleged their employer is a "bully" would be made redundant.

[17] On 25 October 2022, Mr Black wrote to Mr Bryant confirming an overpayment of wages of $2167.50 and advising that $389.63 would be recovered from his final payment of annual leave under cl 8.6 of his IEA. This clause relevantly provided:

> 8.6 In the event of an overpayment of wages to the Employee, the Employer may recover the amount of overpayment by way of deduction from any subsequent payment due to the Employee, provided the Employee is given written notification of the Employer's intention to recover the overpayment, the amount to be recovered, and a full explanation of the reasons for the overpayment.

[18] As a result Mr Bryant received final holiday pay in the amount of $48.45. Allied still maintained that Mr Bryant owed $1777.87 in overpaid wages and Mr Black's letter confirmed that if arrangements were not made to pay this amount, recovery from Mr Bryant would be sought through the Authority.

[19] After Mr Bryant's redundancy, the parties attended mediation before he lodged a statement of problem in the Authority on 6 January 2023. Further mediation was attempted on 28 March 2023. As set out at paragraph [2] above, during the investigation meeting Mr Bryant said he had raised a personal grievance for an unjustifiable action causing disadvantage in respect of Allied's redundancy process in his statement of problem – which was lodged within 90 days of the end of Mr Bryant's employment and there was no dispute between the parties about that – saying information provided therein sufficiently put Allied on notice of a grievance. Allied strongly contested this.

The Authority's view of the employment relationship problem

[20] Unfortunately for Allied, it is largely responsible for its own misfortune in relation to the kerfuffle over Mr Bryant's wages. There are two main reasons for this. First, the practical effects of the two amendments to Mr Bryant's hours of work during his employment were he was working defined hours, inclusive of a 30 minute meal-break. Second, Mr Bryant was being paid for all his breaks during these defined working hours.

[21] Upon review, and also confirmed by Mr Black, the only reference to rest and meal breaks in Mr Bryant's IEA is found at cl 4.5 which relevantly provides:

> 4.5 The employee shall arrange rest and meal breaks so that they do not cause disruption to the operational requirements of the employer.

[22] While s 69ZD of the Act provides for an unpaid meal break, and regardless of the action or inaction of Mr Dalebrook in respect of the calculation of Mr Bryant's wages, the effect of the agreed variations to Mr Bryant's hours of work resulted in two rest breaks, which were required to be paid under the Act, and one meal break a day, which the Act does not oust the possibility of payment for and which Mr Bryant's IEA was, at best for Allied, silent about being paid for breaks.

Was Allied entitled to deduct most of Mr Bryant's final holiday pay?

[23] Given the contractual findings made above, it follows that the deduction to Mr Bryant's salary on or about and from 14 September 2022 was unlawful. Allied is directed to calculate the amount owed to Mr Bryant and pay it to him within 14 days of the date of this determination. Prior to payment the parties should confer about the method of calculation and the amount to be paid. For completeness, Mr Bryant calculated this amount as $2,205.23. In the event not agreement is possible, leave is granted for Mr Bryant to return to the Authority to have the amount determined.

[24] It further follows that Allied had no basis to seek to make a deduction from Mr Bryant's final holiday pay because nothing was owed by him.

[25] However, a deduction has occurred. So, even if I am wrong about my conclusion about Mr Bryant's hours of work, was it open to Allied to seek to recover an apparent overpayment?

[26] An IEA must not contain anything which is contrary to law.[1] Section 5 of the Wages Protection Act 1983 does contemplate the insertion of a general consent provision it an employment agreement, enabling the deduction of an overpayment from wages. However, even then an employer must consult with the affected employee before making the deduction.[2] On its face, clause 8.6 of Mr Bryant's IEA allows Allied

[1] Employment Relations Act 2000, s 65(2)(b)(i)
[2] Wages Protection Act 1983, s 5(1)(a)

to recover an overpayment by way of deduction from any subsequent payment due to Mr Bryant.

[27] In his letter to Mr Bryant dated 25 October 2022, Mr Black:

(i) invited Mr Bryant to propose a repayment plan for the alleged overpayment of wages that was "mutually suitable",
(ii) threatened proceedings in the Authority for the recovery of the alleged overpayment in the event the plan was not forthcoming;
(iii) advised that Allied would invoke clause 8.6 to recover $389.63, which was not the amount of the alleged overpayment, from Mr Bryant's final holiday pay; and
(iv) asked Mr Bryant to make contact as soon as possible.

[28] While Mr Black's letter articulated various things, none could be described as providing a means by which meaningful consultation, as that concept is commonly understood in the employment jurisdiction, would or could occur. Nor was it apparently supposed to, for on 26 October 2022 Allied deducted $389.63 from Mr Bryant's final holiday pay.

[29] I find that Allied breached s 5(1)(a) of the Wages Protection Act by deducting $389.63 from Mr Bryant's final holiday pay without consulting with him.

[30] The trouble for Allied does not end there. Section 27 of the Holidays Act 2003 required Allied to pay Mr Bryant his outstanding annual leave entitlements in the pay that related to his final period of employment. This did not occur. While cl 8.6 of Mr Bryant's IEA purported to allow Allied to make a deduction from "any subsequent payment due" in light of the operation of s 27 of the Holidays Act, this must be read down to encompass only subsequent payments due excluding holiday pay.

[31] I further find Allied also breached s 27 of the Holidays Act by deducting $389.63 from Mr Bryant's final holiday pay on 26 October 2022. The amount of the deduction appears random. It is not clear how the figure was arrived at. It is not the figure said to be overpaid and the small residual amount of holiday pay actually paid to Mr Bryant makes little sense in context. If Allied believed it was on solid ground regarding an overpayment to Mr Bryant, it should have made good on its threat to

pursue him in the Authority rather than deducting a random amount of money without consultation and exposing itself to liability now found to exist.

Was a personal grievance raised by Mr Bryant?

[32] There is no specific form of words, whether conveyed orally or in writing, or actions required for an employee to raise a personal grievance with their employer. What is required here is for Mr Bryant to have a complaint against his employer which comes within the ambit of s 103 of the Act and that he has made or has taken reasonable steps to make Allied aware he wants this addressed.[3] To make an employer "aware" in this context is to provide sufficient detail to enable the complaint to at least be responded to by the employer but also more obviously, and hopefully, successfully resolved between the parties.

[33] Without knowing what occurred at two previous mediations, and being unable to inquire[4], an assessment turns on what Mr Bryant said in his statement of problem. The evidence disclosed that Mr Bryant, who was self-represented at the time, followed the guidance for submitting a statement of problem in the Authority provided by the Ministry of Business, Innovation and Employment on its Employment New Zealand website. He had already submitted an electronic request for mediation assistance.

[34] Mr Bryant lodged his statement of problem with the Authority on 6 January 2023 (a Friday) and it was served on Allied on 9 January 2023 (a Monday). His employment with Allied having come to end 87 days before on 14 October 2022. In the first section of the problem, which requires an applicant to state the problem they wish the Authority to resolve, Mr Bryant wrote: "Mr Black, as my employer, changed my hours with my permission. Upon my dismissal, *after a faulty review of over staffing*, he kept my last two days of holiday pay, without my permission, as he believes I was overpaid".[5]

[35] In the second section of the problem, which requests an applicant set out the facts giving rise to the problem, Mr Bryant wrote:

> [a] restructuring email was receive[d] about accounts being overstaffed. So, a review would be held … [e]ventually, we self-assessed our contributions to the company, as part of the review. Next was supposed to be interviews. Only I was called into Mr Black's office, and I [was] told it was me to be let go. I

[3] Employment Relations Act, s 114(2)
[4] Employment Relations Act, s 148
[5] Emphasis added.

> "worked from home" for the final two weeks. My final holiday pay was withheld as Mr Black was still claiming I was over paid.

[36] In the third section of the statement of problem which requests that an applicant outlines how they would like their employment relationship resolved by the Authority, Mr Bryant wrote, in addition to seeking recovering an underpayment of wages, that he wished to be "compensated" for the "fair amount of emotional distress".

[37] Taken together the matters set out above, as drawn from Mr Bryant's statement of problem, plainly demonstrate that he made, or at the least took, reasonable steps to make Allied aware that he had a complaint in the form of a personal grievance for unjustifiable action to his disadvantage about the restructuring process he was subject to. A restructuring process that ultimately saw him out of a job. Further, it is clear on the face of the statement of problem this complaint is separate, distinct and in addition to his complaint about underpayment of wages.

[38] I am fortified in my view that Mr Bryant raised a personal grievance with his employer for two further, albeit collateral, reasons. First, in his email of 15 September 2023, Mr Bryant advised Mr Black he would be "filing a personal grievance" when he left Allied. Second, Mr Black felt compelled to address the restructuring process in his witness statement, including addressing several matters raised by Mr Bryant in his statement of problem. Indeed, Mr Black said the "process was robust and conducted in a fair and reasonable manner".[6]

[39] For completeness, having regard to his statement of problem, it is very arguable that Mr Bryant likely also raised personal grievances for unjustifiable actions to his disadvantage arising out of Allied's conduct and behaviour surrounding the reduction of his salary and making deductions to his final pay. These potential personal grievances have not been pressed by Mr Bryant at this stage. Although the deduction in wages complaint could also be addressed through a recovery of arrears action and the seeking of the imposition of penalties. As to the latter, Mr Bryant in his submissions appears, belatedly, to be seeking penalties for the deduction from his final pay. This matter was not raised in his statement of problem or during the investigation meeting. On its face, such a penalty claim would be in time, if pressed by him and entertained

[6] Damian Black, *Witness Statement*, 26 May 2023 at [15]

by the Authority.[7] The parties were asked for comment about this. It may be that this matter can be addressed in any subsequent determination, if required.

Next steps

[40] As the Authority has found that Mr Bryant has raised a personal grievance for an unjustifiable action to his disadvantage with Allied, it is appropriate the parties attempt further mediation to resolve this.[8] The parties are directed to attend mediation. Having regard for the pending summer break, this is to occur within **60 days** of the date of this determination. Mr Bryant, through his representative, is to advise the Authority if mediation has been successful. If the matter remains unresolved, the Authority will move to determine the substance of Mr Bryant's grievance and, if successfully made out by him, what remedies may flow from that and any other outstanding matters.

Costs

[41] Costs are reserved.

Andrew Dallas
Chief of the Employment Relations Authority

[7] Employment Relations Act, s 135(5)
[8] Employment Relations Act, s 159(1)(b)(c)