

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 203  
5467642

BETWEEN                      BARRY BLANCHARD  
   Applicant  
  
AND                              ALTO PACKAGING  
   LIMITED  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Applicant in person  
   Daniel Erickson, counsel for the Respondent  
  
Investigation Meeting:      6 July 2015  
  
Determination:              8 July 2015

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**DETERMINATION OF THE AUTHORITY**

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[1] Barry Blanchard is employed by Alto Packaging Limited (Alto) at its Takanini plant. The plant manufactures plastic bottles for Fonterra products. Mr Blanchard was previously employed by Fonterra but his employment transferred to Alto when it took over operation of the Takanini plant in 2007. He is a member of the Dairy Workers Union. His terms of employment are set by a collective employment agreement between the union, Fonterra and Alto.

**Employment relationship problem**

[2] In his application to the Authority Mr Blanchard said his pay and “*all aspects of it*” were wrong and Alto had broken his conditions of employment by not keeping accurate records, had caused him ill health and had tried to “*construct*” his dismissal.

[3] In a letter to the Authority dated 29 June 2014 he provided further details of the monetary components of his claim and said Alto got personal details about him without his permission.

[4] Alto's reply to Mr Blanchard's claim referred to concerns he raised about his pay in 2012. A company investigation of those concerns identified underpayments of \$2440.18, an amount Alto then paid Mr Blanchard in December 2012. In February 2014 Mr Blanchard, through a solicitor, advised he was pursuing further pay arrears. Alto had then begun another investigation of the accuracy of payments made to Mr Blanchard since his employment transferred from Fonterra to Alto. Its reply to the Authority sought more details from Mr Blanchard about the alleged shortcomings in payments made to him.

[5] The parties attended mediation in September 2014 without resolving the matter. At the Authority's suggestion a request was made for assistance from a Labour Inspector but the inspectorate refused to help because Mr Blanchard's claim related to both statutory and contractual entitlements. An Authority investigation was then scheduled.

[6] In a case management conference with Mr Blanchard and Alto's counsel I identified the following issues for investigation and determination:

- (i) Had Alto properly investigated and addressed concerns raised by Mr Blanchard about whether he is owed arrears of wages?
- (ii) Had Alto used or disclosed Mr Blanchard's personal information in a way that breached his terms and conditions of employment?
- (iii) Had Alto breached its general obligations of fair dealing, trust and confidence to Mr Blanchard by acting in a manner that had:
  - (a) damaged his health; and/or
  - (b) been intended to end the employment relationship?
- (iv) Did Alto owe Mr Blanchard wage arrears for any identified due but unpaid amounts?

[7] For the investigation Alto lodged the report of a pay audit carried out by Andrew Bettany, a project accountant. It also lodged three witness statements – one from Mr Bettany, setting out the methodology and conclusions of his audit; one from Alto's Takanini plant operations manager Ian Isemonger; and one from Alto's human resources manager Keith Fraser.

[8] Mr Blanchard did not lodge a witness statement as provided for in the Authority's timetable directions but by email (27 May 2015) he stated that he relied

on earlier documents he had lodged as “*a list of what was wrong and what the effect was on us*”. He also listed the following issues:

*“Paid sick leave when at work – without authority using up my sick pay which resulted in me have to claim ACC when I had my breakdown which got me a warning on my file for claiming ACC. Not paid annual leave rates ... lieu pay accumulated disappeared. Annual leave accumulated disappeared. All leaves moved on and off payslips leaving confusion. Negotiated pay increases via the union not paid on the date agreed but in some cases months later ... pension scheme employer contributions short ...I have been harassed and threatened to stop pursuing getting paid money I am legally owed. Something like 15 times I have been short paid hours ... The overall effect on all this was I planned to renew my marriage vows with my wife on our 25<sup>th</sup> wedding anniversary and was unable to do so as they held my pension pay out back due to a date error my wife made while filling out several documents at once. We did ring and correct this with Fonterra when we realised but due to change of ownership this maybe didn't follow through at the time. In any case Alto should not have had this document or any others in my employment file as I did not sign permission for them to do so. If I have been paid properly all the way through the years since 2007 I may still have been able to renew my vows ... ”*

[9] Mr Blanchard had also lodged some folders of supporting documents. They contained pay slips, correspondence and some additional handwritten statements by him. Those statements included allegations that:

- (i) Mr Isemonger had asked him how he was “*handling the pressure*” and had told him that “*when I was finished with Alto, Alto would not be finished with me*”.
- (ii) Mr Blanchard was told that he was not allowed on new machines.
- (iii) Mr Fraser had got a copy of Mr Blanchard’s original Dairy Industry Superannuation Scheme (DISS) application form released from Fonterra’s archives without Mr Blanchard’s consent.

[10] One handwritten page provided a list giving specific amounts comprising a total wages arrears claim of \$12,660.96: Annual leave not paid, \$4600; Lieu hours missing, \$3840.81; Sick leave entitlement hours missing, \$629.90; lieu days error \$128.00; 40 hours ordinary not paid, \$868.60; 16 hours annual leave withheld, \$480 - \$511.36; ordinary pay short \$1855.10; annual paid as ordinary rate \$120; and “*payed overtime not statutory*” (sic), \$207.80. The component figures did not tally with the total amount of wage arrears claimed.

[11] Mr Blanchard sent a one page handwritten response to the witness statements lodged by Alto. His note included the following comments:

*... I started to read found irritating factual errors, I won't read it all. I am a simple man, poorly educated, left school at the age of 15 years old. I put milk bottles into plastic bags at work or I take bottles out of bags. [Alto] appears to be play [sic] games beyond me. I will place [Alto's] response amongst my other works of fiction. ...*

[12] He also provided a note, dated 4 January 2013, which he said he had given to the Dairy Workers Union, that included the following comment:

*"I have until now played a move known as 'pawn's gambit'. I shall leave the rest to you. ... As I've been phucked (sic) around by experts in the past I hope they are up to the challenge. I have plans from A – C. Union is plan A."*

[13] Although Mr Blanchard referred to himself as poorly educated I considered his written and oral evidence demonstrated a sophisticated knowledge of the relevant information. If he really needed any assistance in preparing and considering the evidence about his claim, including the large spreadsheet Alto provided of the pay audit conducted by Mr Bettany, he had the assistance of his wife, Heather, an accountant. Mrs Blanchard attended the investigation meeting and, although she had not provided a written witness statement in compliance with the timetable directions made for the Authority investigation, gave oral evidence under affirmation.

[14] The parties were given an oral indication of preliminary findings at the conclusion of the investigation meeting.<sup>1</sup> As permitted by s174E of the Employment Relations Act 2000 (the Act) this written determination has not recorded all the evidence given (under affirmation) by the five witnesses and has not set out the full closing submissions received. It has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. Findings are made on the civil standard of the balance of probabilities, that is on my assessment of the evidence as to what was more likely than not to have been the case.

### **Alto's investigation**

[15] The pay audit carried out by Mr Bettany was set out in an Excel spreadsheet. The transaction data comprised 4600 rows, each row showing one particular component of Mr Blanchard's pay in a particular pay period.

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<sup>1</sup> Section 174B of the Employment Relations Act 2000.

[16] The audit covered payments made between August 2007 and June 2014. Some elements of the arrears claimed by Mr Blanchard – to do with sick leave entitlements and an error in calculation of pay for a lieu day – that fell outside that timespan were analysed separately by an Alto pay clerk and reported in the evidence of Mr Bettany and Mr Fraser.

[17] Mr Fraser's evidence confirmed Alto had experienced problems with the accuracy of payments to Mr Blanchard and other workers at its Takanini plant. However Alto believed it had addressed Mr Blanchard's problems in the 2012 review of his pay. Mr Fraser said Alto had worked constructively with representatives of the Dairy Workers Union on resolving problems for other workers.

[18] Mr Bettany's audit comprised several steps of data extraction and analysis. It looked at what Mr Blanchard was actually paid, what he should have been paid, and whether he had already been compensated for any errors made. The overall conclusion of the audit was that Mr Blanchard was, in fact, overpaid by \$1,474.09 during the timespan reviewed. According to Mr Bettany's analysis that overpayment was, in part, due to a sum of \$1,740.53 being wrongly included in the back pay made to Mr Blanchard in December 2012. It was an amount paid for a service allowance omitted from Mr Blanchard's payslips but the clerk undertaking the analysis in 2012 appeared to have misunderstood that allowance had already been incorporated into Mr Blanchard's ordinary hourly rate. There were some other shortcomings identified in payments made to Mr Blanchard – including an underpayment for a public holiday lieu day in February 2015 – but the overall conclusion of the audit was that for the period from August 2007 to June 2014 Mr Blanchard was paid more than he was entitled to be paid.

[19] Mr Blanchard's evidence disclosed no flaw or omission in Mr Bettany's analysis. Mr Bettany's evidence established that ongoing concerns Mr Blanchard had raised in February 2014 about his pay were thoroughly and properly investigated. And, although Mr Blanchard appeared to have been overpaid rather than underpaid, Alto confirmed (through its counsel's closing submissions) that it had no intention of seeking repayment of that amount, so the benefit of any errors seemed to rest with Mr Blanchard.

**Disclosure of personal information**

[20] In January 2014 Mr Blanchard applied to withdraw his funds from his DISS account (that comprised contributions he and his employer had made over the years). A representative of Mercer, which administered the scheme, asked Alto to confirm Mr Blanchard's total contributions for the previous year and to cease his contributions. In response Mr Fraser advised Mercer that Alto's records showed a date of birth for Mr Blanchard that meant he was 61 at the time and not eligible to withdraw funds. He was entitled to do so from the age of 65 years. His application for the withdrawal of funds was accompanied by copies of a driver's licence and a Gold Card that showed a date of birth – which proved to be correct – that meant he was 65 years at the time.

[21] As confirmed by Mr Blanchard's evidence the incorrect date of birth recorded in Alto's pay records was the result of an error his wife had made when she filled in his original DISS membership application form in 2006. He said he had subsequently advised Fonterra – his employer at the time – of the error. However no correction appeared to have been made on the payroll records which continued to be used when his employment transferred to Alto.

[22] In the course of correspondence with Mercer about the correct birth date, a Mercer representative sent Mr Fraser a copy of Mr Blanchard's 2006 DISS application form. Mr Blanchard complained this was a breach of his privacy which had somehow been instigated by Mr Fraser.

[23] It was not. The form included authorisation for personal information relating to the scheme member – in this case, Mr Blanchard – to be disclosed to the administrator, the insurer and the employer "*as necessary for the purposes of the scheme and to obtain personal information from any of those sources for the purposes of the scheme*". Checking Mr Blanchard's date of birth to ensure his eligibility to withdraw funds at the age of 65 was entirely within the scope of the purposes of the scheme. The fact that Fonterra has previously provided the form to Mercer, and Mercer sent Alto the form during the steps of making that check, was for that authorised purpose.

[24] The problem about inconsistent records of Mr Blanchard's date of birth was ultimately resolved by Mercer requesting a copy of his birth certificate but Mr

Blanchard blamed Mr Fraser for the resulting delay (of about two months) in receiving his superannuation funds. There was nothing improper in Mr Fraser raising the apparent inconsistency of dates with Mercer. Rather, as Alto was an employer contributing funds to the scheme, it was entirely proper for a representative of Alto to do so.

### **Any breaches of fair dealing?**

[25] Mr Isemonger's evidence was that it was possible that he had used words such as 'handling the pressure' in a conversation sometime after Mr Blanchard had talked about a stressful family situation around three or four years ago. And he said he may have asked Mr Blanchard about that situation later, out of concern for him, but the phrase was not used in relation to Mr Blanchard's wage queries.

[26] Mr Isemonger denied making any comments to Mr Blanchard about being "*finished with Alto*". Mr Blanchard insisted Mr Isemonger had done and said this was supported by a note Mr Blanchard wrote in January 2013 that mentioned those comments having been made.

[27] There was no evidence of any other witnesses to those alleged comments or any other corroborating information. I did not consider the conflict in the recall of the two men – which at best was a 'he said: he said' difference with little detail of the context – could fairly be resolved by any finding of credibility about what either man might have said at various times over the last several years. Rather there was insufficient evidence to establish the fact or motivation of the comments Mr Blanchard alleged were made so that he had not, on the balance of probabilities, proved the allegations he made.

[28] Similarly Mr Blanchard's allegation that Alto had damaged his health by the way it had dealt with his pay, or dealt with him over his concerns about it, lacked sufficient supporting evidence to meet the onus of proof to the balance of probabilities. Mr Blanchard's oral evidence was that he had been losing sleep and felt isolated at work over what he felt was people taking money from him. In February 2013 he had spoken to his doctor about those concerns and, on the basis of what he told her and what she observed about him, he was prescribed sleeping tablets and given a medical certificate for six weeks off work "*due to work stress*". He had

returned to work before the end of that period because he did not have enough paid leave.

[29] There was no independent medical evidence to support Mr Blanchard's view of those events. I did not consider his own account was sufficient to establish that actions or failures by Alto were the prime or significantly contributing cause of ill health Mr Blanchard experienced at that time.

[30] He also complained that he was subject to a large number of small instances of interference with his work at the Takanini plant and he had not been permitted to work on new machines. One instance referred to, by way of example, involved a situation where another employee had altered the weights on the machine on which Mr Blanchard worked and when he informed the team leader, the other worker was told to put the weights back.

[31] Mr Blanchard's evidence on those issues did not establish, I concluded, that he had suffered any unjustified disadvantage in how he was dealt with by Alto managers. I accepted and preferred Mr Isemonger's evidence that operators assigned to work on new machines were those who demonstrated the skills to adapt to different requirements. Mr Blanchard could have talked about the alleged 'interference' with his team leader, his manager, a human resources advisor, his union delegate or his union organiser but there was no evidence that he had used any or all of those avenues to address his concerns.

### **Wage arrears – is Mr Blanchard owed any money?**

[32] Mr Blanchard bore the onus of proof to establish there was a default in payments due to him and to establish that any default had not been remedied.<sup>2</sup>

[33] Mr Blanchard had raised what appeared, at first sight, to be defaults in payment to him. There were inadequacies in how he did so. He provided some calculations and original pay slips and correspondence that he said supported his analysis but what he lodged in the Authority did not clearly set out the steps required to understand the basis for his conclusions about the amounts he said he was owed.

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<sup>2</sup> *Employment Law* (online loose leaf ed, Brookers) ER 131.07(1) and *Mazengarb's Employment Law* (online ed, LexisNexis) **ERA131.15**.

[34] However the pay audit conducted for Alto by Mr Bettany provided ‘the full picture’, to the extent it could be established from Alto pay and time records. Mr Blanchard then had the onus and burden of showing that analysis was inadequate. Having put Alto to the proof of preparing its workings to demonstrate that it was not in default, he had to show that it was wrong. As submitted by Alto, Mr Bettany’s analysis was the best evidence and nothing Mr Blanchard or Mrs Blanchard had said in their evidence caused any real doubt as to the quality or accuracy of the data and analysis. As a result I preferred the evidence of Mr Bettany, and the supporting evidence of Mr Fraser, in concluding there were no outstanding underpayments that would have warranted an order for wage arrears to be paid by Alto to Mr Blanchard under s131 of the Act. Rather, overall, he had been overcompensated for his wages (including by part of the back pay made to him in December 2012).

[35] I have accepted the following conclusions as summarised in, and paraphrased from, Alto’s submissions on the wage arrears issue, that

- (i) Mr Blanchard was correctly paid for Anzac Day 2015; and
- (ii) Apparent shortfall in payments for ordinary hours was a result of an ‘averaging’ exercise Alto operated to provide consistent fortnightly wage packets where the total number of days worked varied due to a 4-on, 4-off rotating shift system and those shortfalls were remedied in subsequent pay periods; and
- (iii) Apparent shortfalls in annual leave payments, also arising from operation of the averaging system, were remedied in later pay periods; and
- (iv) An alleged underpayment of ordinary hours in November 2010 was remedied in later pay periods (with the confusion caused, as noted in Mr Bettany’s oral evidence, by an incorrect notation on a pay slip); and
- (v) Mr Blanchard had not missed out on lieu hour entitlements as an Alto analysis showed he was credited with 440 hours but had taken 446.58 hours; and
- (vi) Some identified minor errors in hourly rates used in calculation of annual leave were remedied by way of various back pays; and
- (vii) An analysis of sick leave entitlement hours confirmed none remained due to Mr Blanchard; and

- (viii) An error was made on payment for a lieu day (in February 2015), worth \$128, but no order for arrears was required due to the total amount of overpayments made to Mr Blanchard.

[36] Accordingly Mr Blanchard's application for an order for wage arrears is dismissed.

### **Costs**

[37] Costs are reserved. If there is an issue as to costs and the parties are not able to resolve it between themselves, the parties could expect the Authority to determine costs – if asked to do so – on its usual 'daily tariff' basis (currently \$3500), unless particular circumstances or factors required an adjustment upwards or downwards.<sup>3</sup> I have not set a timetable for costs submissions but would expect Alto (having succeeded in its reply to Mr Blanchard's claims) to ask for one if it wished to seek a determination of costs.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>3</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.