

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 298
5405043

BETWEEN

FRED COX
Applicant

AND

DJ THOMPSON BUILDING
SERVICES LIMITED

Respondent

Member of Authority: R A Monaghan

Representatives: T Grimwood, counsel for applicant
D Andrews, counsel for respondent

Investigation Meeting: 6 May 2013 at Rotorua

Further submissions received: 28 June, 3 and 9 July 2013

Determination: 12 July 2013

DETERMINATION OF THE AUTHORITY

- A. DJ Thompson Building Services Ltd is ordered to pay to Fred Cox:**
- (i) \$4,810.63 net of tax in respect of underpaid wages;**
 - (ii) \$5,383.32 net of tax in respect of unpaid holiday pay;**
- B. Fred Cox is ordered to pay to DJ Thompson Building Services Ltd:**
- (i) \$3,000 in repayment of a loan;**
 - (ii) \$333 paid to Rotorua Joinery; and**
 - (iii) \$886 for a television.**
- C. DJ Thompson Building Services Limited dismissed Mr Cox unjustifiably but Mr Cox did not suffer any loss as a result.**

Employment relationship problem

[1] Fred Cox is a builder with project management experience. He says his former employer, DJ Thompson Building Services Limited (DJT) employed him in that capacity. He also says DJT: breached a number of terms of the parties'

employment agreement; withheld holiday pay owed at the termination of his employment; underpaid public holiday pay; breached certain statutory duties including its obligation of good faith; and dismissed him unjustifiably.

[2] The breaches of the employment agreement concerned alleged failures to:

- (i) pay wages at the agreed rate;
- (ii) honour an agreement to offer a partnership to Mr Cox;
- (iii) pay costs associated with Mr Cox' work-related use of his personal vehicle, and
- (iv) return tools belonging to Mr Cox, or to return tools in perfect working order.

[3] The alleged breaches of statutory duty were:

- (i) failure to provide a written employment agreement;
- (ii) failure to pay holiday pay;
- (iii) failure to pay public holiday pay; and
- (iv) breach of good faith.

[4] Finally, DJT says the dismissal was imposed on the ground of redundancy, because it did not have sufficient work to offer Mr Cox. Mr Cox says:

- (i) the redundancy was not genuine;
- (ii) he was not consulted and was not given access to relevant information; and
- (iii) no alternatives to redundancy were canvassed.

[5] DJT denies all of Mr Cox' claims, except that it agrees it withheld holiday pay. It has counterclaimed to recover the money it says Mr Cox owes it.

Breach of employment agreement

1. Failure to pay wages at the agreed rate

[6] There was no written employment agreement. In the absence of a written agreement or other written material in support, I turn first to identify whether the

parties had an oral agreement regarding Mr Cox' rate of pay. Mr Cox says the agreed rate was \$1,100 per week net of tax. The agreement was reached after his employment commenced in October 2010, and included an agreement that payment be backdated to the date of commencement of employment. DJT's managing director, Dylan Thompson, says the agreed rate was always \$950 per week net of tax.

[7] The evidence conflicted in several respects. However it was common ground that, during relevant discussions, Mr Cox told Mr Thompson he would require a certain minimum amount 'in the bank' in order to meet his financial obligations. The figure discussed in that context was \$950 per week, and as at the commencement of employment that was the agreed figure. The gross equivalent (if the only deduction is PAYE tax) is approximately \$1,160 per week.

[8] The conflict centred on whether there was a later agreement that Mr Cox be paid \$1,100 net of tax per week, and, if so, the date from which the entitlement would commence.

[9] Mr Cox says the figure of \$950 per week was discussed on the basis that his employment would begin immediately, and detailed terms and conditions would be finalised later. At the time both parties were working on the same site, and Mr Cox had become very dissatisfied with his then-employer. The arrangement allowed both parties to continue with DJT effectively stepping into the shoes of Mr Cox' former employer. On the information Mr Cox provided \$950 per week was higher than his existing rate, so he suffered no loss.

[10] Mr Cox says that, a few days after his employment commenced, there was a further discussion about rate of pay. He says Mr Thompson had offered \$1,200 net of tax per week, but the offer was withdrawn and the parties agreed on \$1,100 net of tax per week. Mr Cox also said Mr Thompson advised DJT was able to pay him only the bare minimum he needed.

[11] Mr Thompson denied ever offering Mr Cox either \$1,200 or \$1,100 net of tax per week.

[12] I find it likely the figure of \$1,100 was discussed, although it is not clear when or in what context. Both that figure and the figure of \$1,200 are close enough to the

gross equivalent of \$950 net (taking into account variations caused by the effect of Kiwisaver deductions), to suggest this dispute is really about whether Mr Cox' rate of remuneration was to be net of tax or gross.

[13] Further, an increase of \$160 per week net of tax is a large increase. Not only was Mr Cox already receiving more than he had in his previous employment, and on what he expected at the time to be a more reliable basis, but there was no apparent reason for such a large increase. I say this particularly because Mr Cox said in evidence that the discussion regarding an increase in pay occurred before the discussion about a possible partnership, and was not part of that discussion.

[14] Turning to the subsequent conduct of the parties, with minor exceptions \$916.35 was paid into Mr Cox' bank account weekly from the commencement of his employment in October 2010 to mid-April 2011. DJT did not explain the figure beyond vague references to the withholding of amounts in respect of payments Mr Cox owed it, unsupported by any further detail. Nevertheless, from mid-April 2011 there was considerable variation in even that payment.

[15] Mr Cox did not question the amounts he was paid at the time, rather he says he accepted them in the belief that he was a partner in DJT and was assisting with the finances of the business. In that respect he did not rely on any agreement that the full entitlement to \$1,100 per week net of tax would eventually be paid with backdated effect.

[16] Overall I am not persuaded that anything in the parties' discussions amounted to an agreement that payment of \$1,100 net of tax per week would be made, and would be backdated to the commencement of employment.

[17] Even so, Mr Cox was underpaid. Based on a rate of \$950 per week net of tax, Mr Cox calculated he was underpaid \$10,410.63 net of tax over the period of his employment. I accept that figure.

[18] Amounts totalling \$5,600 were withheld and accumulated, and eventually paid into a Cox family trust account in order to fund Mr Cox' purchase of a vehicle. That amount is deducted accordingly.

[19] The resulting calculation is:

Underpaid wages	\$10,410.63 net of tax
Less	\$ 5,600
 TOTAL	 \$ 4,810.63 net of tax

[20] DJT is therefore ordered to pay Mr Cox \$4,810.63 net of tax.

[21] I record that Mr Cox made other claims for the reimbursement of various expenses or other small payments. I am not satisfied those amounts are owed, and make no order.

2. Failure to honour offer of partnership or share in profits

[22] Again in the absence of a written employment agreement or other written material in support, I turn first to identify whether the parties had an oral agreement regarding partnership. Since it was common ground that the matter was at least raised during the course of and in association with Mr Cox' employment, I accept it relates to or arises out of an employment relationship problem.¹ The Authority has jurisdiction to inquire into it.²

[23] Mr Cox says the terms and conditions of his employment included an offer of partnership. He says the offer was made some two weeks after his employment commenced, after he advised Mr Thompson he had received another job offer. That offer included a similar rate of pay to the rate Mr Cox was receiving at DJT, but was for a labour only position which did not include supervisory responsibilities. Mr Thompson responded by saying he could not offer any more money to Mr Cox, but could offer a partnership. Mr Cox says he took time to consider the offer, and accepted it about a week later. Mr Thompson said he would 'organise something'.

[24] Mr Thompson says Mr Cox did not accept the other offer of employment because he liked the job at DJT. He acknowledged raising with Mr Cox the possibility of a partnership, but not that any agreement was reached.

¹ s 161 Employment Relations Act 2000

² *Newick v Working In Limited* [2012] NZEmpC 156

[25] Consistently with that discussion: a relatively loose approach was taken to the payment of wages on the one hand, and to Mr Cox' use of the company accounts for personal and other items on the other hand; and T-shirts were printed reading 'Thompson & Cox.' I find unlikely Mr Thompson's explanation of the purpose of the T-shirts. If the intention was simply to indicate that Mr Cox was working for DJT, there would be no need to include his name on the T-shirts.

[26] However no discussion of any kind was entered into regarding the sharing of profits from the business, a mechanism for apportioning the partners' shares, or any other detail at all regarding the operation of the partnership. Mr Cox raised the matter of the partnership in a general way in or about September 2011, and Mr Thompson told him he would follow up.

[27] The prospect of a shareholding in DJT itself was raised briefly at a meeting in or about November 2011, but there has been no suggestion that Mr Cox was entitled to a shareholding and the prospect was not pursued with any vigour. At most Mr Thompson indicated to Mr Cox early in 2012 that he was considering a shareholding of 10-25%. DJT later decided not to offer a shareholding.

[28] Overall it is clear the prospect of partnership was raised with Mr Cox, but no action was taken to proceed with the partnership.

[29] By way of remedy, Mr Cox has asked the Authority to inquire into the value of the benefit he lost as a result. Counsel relied in submissions on a judgment of the Court of Appeal in *Walker Corporation Limited v P O'Sullivan*.³ There, in the context of the remedies for a personal grievance, the Court of Appeal addressed compensation in respect of an equity share in the employer. Unlike here, there was a relevant written term of employment which contained some indication of the nature of the share to be offered. The Court of Appeal found the Employment Court had not construed the relevant provision correctly, and that on a correct construction the employee had lost a benefit for which compensation could be considered.

[30] Although an inquiry into the value of the benefit was found to be open to the Employment Court, I do not accept there are grounds for such an inquiry here. There is too little detail of what the profit sharing arrangement was, or of how it should be

³ Richardson P, Thomas J and Keith J, CA 212/95, 20 August 1996.

ascertained. If the Authority proceeded it would be obliged to set for itself these fundamental terms of the agreement before considering what benefit was lost. It cannot go that far.

[31] Counsel also raised Mr Cox' loss of opportunity. However the offer Mr Cox says he declined in preference to the prospect of partnership was for a lesser, labour-only position, so there was no loss of opportunity to advance for example. Nor was there any loss of opportunity in respect of remuneration. If Mr Cox lost an opportunity to spend more time with his family, in the circumstances I regard the possibility as speculative.

[32] In conclusion, while DJT failed to pursue the prospect of partnership which it offered Mr Cox, no remedy is available in the present context. I return to the matter in the context of the allegation of breach of good faith.

3. Failure to pay costs of personal vehicle

[33] Again there was nothing in writing regarding vehicles. As for the oral evidence, it was at least common ground that DJT agreed to pay for the running costs of Mr Cox' personal vehicle on the understanding that the vehicle would be used for business purposes. DJT paid the insurance and provided a fuel card for the vehicle. It also paid for the servicing of the vehicle in November 2010, and for the replacement of all four tyres in September 2011.

[34] Mr Cox now seeks payment for the cost of servicing his vehicle in the sum of \$756.27. The invoice produced in support was dated 7 August 2012, after his employment ended. DJT is not obliged to reimburse Mr Cox for that payment.

[35] Mr Cox also seeks a payment for repairs to his vehicle after it was badly scratched while he was driving to a work site at Waikaremoana. DJT says the damage resulted from the way Mr Cox was driving and he is personally responsible for it. There is a question of whether the damage was covered by insurance, and if not why not. In any event, the document provided in support of the claim was an estimate of the cost of repair and was prepared for the purposes of the Authority's investigation. It was not the invoice for the repair of the damage. I am not satisfied DJT is obliged to reimburse Mr Cox in the amount claimed, or in any amount.

4. Failure to return tools or to return tools in perfect working order

[36] DJT says it returned all tools belonging to Mr Cox, save for those listed in Mr Thompson's witness statement. Those tools were to be made available to Mr Cox to collect. That was done. I consider the matter resolved and make no order in respect of what may be a dispute arising about the state of a wheelbarrow.

[37] The remaining dispute about tools concerns a Makita post hole borer. It was purchased before the employment relationship began, and the parties held a half share each. They now dispute the extent of the use of the borer during the employment relationship, and whether the value of the half shares should be calculated with reference to the depreciated value or full purchase value. Negotiations appear to be continuing.

[38] I make no order but I urge the parties to set aside what appear to be increasingly petty disputes and to resolve the matter.

Breach of statutory duties

1. Written employment agreement

[39] This employment relationship problem is an example of the difficulties created when the terms of an employment agreement are not placed in writing, and emphasises the importance of doing so. However no remedy has been sought in respect of the associated breach by DJT of the Employment Relations Act 2000, so I do not address it any further.

2. Holiday pay

[40] An entitlement to holiday pay was outstanding as at the date of termination of Mr Cox' employment. Payment was withheld because DJT considered Mr Cox owed a larger sum of money to it. Again none of the associated arrangements were in writing. Withholding payment as DJT says it did is a breach of the Wages Protection Act 1983, but no remedy has been sought for that breach. Accordingly I address the matter only with reference to Mr Cox' claim for payment of holiday pay.

[41] It was common ground that Mr Cox is owed holiday pay for 25 working days. DJT quantified the amount as \$5,383.32 gross, but the parties accepted during the investigation meeting that their argument rested on whether the amount was net of tax or gross.

[42] On an application of the formula in the Holidays Act, the figure of \$5,383.32 closely approximates the amount payable if Mr Cox' rate of pay was the figure of \$950 per week. Since that amount was net of tax, so is the amount of holiday pay in the sum of \$5,383.32. Payment is ordered accordingly.

3. Public holiday pay

[43] The claim for payment of public holiday pay concerns the Christmas-New Year holidays of 2010-2011. Mr Cox was paid as if he had observed the holidays, but he says he worked on those days. Accordingly he seeks a further payment of \$1,320, calculated at the rate of \$1,100 nett per week, in respect of that time.

[44] DJT does not accept that Mr Cox worked on those holidays. Mr Thompson says the client at the site being worked on at the time informed him that Mr Cox did not attend the site on the public holidays, and worked for half days during the rest of the Christmas holiday week. He does not accept Mr Cox' explanation that he worked on a second site at Waikaremoana during that time. In support DJT's other director, Junette Putaranui produced fuel card invoices showing Mr Cox did not make the purchases that would be expected if he was travelling to Waikaremoana.

[45] Mr Cox' former employer was a subcontractor on the Waikaremoana site. That company arranged with DJT to secure Mr Cox' services to supervise the work from Christmas to the end of January 2011. There was no written record of the time so spent. However Mr Cox' evidence was that his role was one of oversight, and he said he visited the site some 5-6 times during the period. I find at least some of those visits were made other than on public holidays. This does not amount to evidence that Mr Cox worked as he said he did on the relevant public holidays.

[46] For these reasons I am not persuaded Mr Cox is entitled to the payment he seeks for work done on the public holidays in question. There will be no order.

4. Good faith

[47] The alleged breach of good faith referred to a number of minor disputes between the parties which I do not regard as breaches of good faith. Other allegations in support concerned breaches identified and dealt with elsewhere in this determination, and there is no need to address them twice. The most significant of the allegations concerns the failure to act on the promise of partnership.

[48] The prospect was put to Mr Cox early in his employment, and although Mr Cox raised it again nothing had been done about it over a year later. I consider the failure to act in a timely way on the discussions was a breach of the obligation to be responsive and communicative, and in turn amounts to a breach of good faith⁴.

[49] However no quantifiable loss has been suffered, and no penalty has been sought. No remedy is available.

The dismissal

[50] In February 2012 Mr Thompson advised Mr Cox there was a shortage of work, and suggested he start looking for another job. In late April 2012 Mr Thompson advised Mr Cox there was no more work available for him.

[51] The shortage of work occurred because DJT's business had included significant reliance on kohanga reo projects. One of these was completed in March 2012 and two were completed in April 2012. A fourth, in Auckland, was not due to commence until July 2012.

[52] Some cleaning up work was available, but Mr Cox had been on ACC because of a shoulder injury which would prevent him from doing that work. After a period off work, he had returned early in April 2012 to carry out light duties under a graduated return to work programme. Later in April he reported to the ACC that he had injured his other shoulder, and that he intended to remain on light duties until an orthopaedic surgeon cleared him for full duties. There was no evidence that he was cleared for a return to full duties.

⁴ s 4 Employment Relations Act

[53] The parties disagree about whether Mr Thompson told Mr Cox in late April that his employment was terminated - with the possibility of an offer of work if it became available in future - or whether the two had an understanding to the effect that Mr Cox would return in July and remain on ACC in the interim. Because Mr Cox raised a personal grievance on 7 May 2012 alleging unjustified dismissal on the ground of redundancy, I find the first of these more likely. Moreover, it is likely that he had already obtained alternative employment by 7 May.

1. Was the redundancy genuine

[54] Mr Cox believes the redundancy was not genuine because other work was available but was not offered to him. That understanding was based on his observation of other employees carrying out the clean-up work he was unable to do. He also observed a sub-contractor installing flashings and roofing on a particular job, however the individual concerned was obliged to do the work as the relevant certified installer. I am satisfied the redundancy was genuine.

2. Did DJT consult adequately

[55] DJT did not provide Mr Cox with the information employers are expected to provide to employees during the consultation process preceding a redundancy. On Mr Thompson's evidence he merely advised there was no more work, to which Mr Cox responded that this would not be a problem because he would be on ACC. At the time both men anticipated that Mr Cox would be re-engaged in or about June, when work on the new kohanga reo project began.

3. Were alternatives to redundancy considered

[56] DJT was a small business whose workflow had dried up. In the circumstances it made appropriate decisions as to who should carry out the limited work available at the time, and there was no prospect of an alternative to redundancy for Mr Cox.

4. Was the dismissal justified

[57] Failures to consult adequately regarding a prospective redundancy are serious. The failure here was sufficiently serious to render Mr Cox' dismissal unjustified.

5. Remedy

[58] Mr Cox commenced alternative employment almost immediately. I am not satisfied that he lost remuneration as a result of his personal grievance.

[59] I do not accept Mr Cox suffered any injury to his feelings as a result of the personal grievance. I make no award in that respect.

The counterclaim

[60] Mr Cox agrees that he owes DJT:

- \$3,000 as repayment of a loan;
- \$333 paid to Rotorua Joinery on his behalf; and
- \$886 for a television purchased from The Appliance Shed.

[61] During the parties' dispute DJT put in correspondence to Mr Cox various additional claims for the repayment of monies. None of these was raised in a corresponding form in the Authority. As a result what, if anything, was being formally pursued by way of the necessary counterclaim remained unclear at the commencement of the investigation meeting, and I raised the matter with the parties at the time.

[62] In addition to the items just set out, it seems there was an issue with telephone charges. I was told the matter was raised at mediation, but it was not before the Authority. In the absence of any evidence about the matter I take it no further.

[63] Other allegations were made regarding the purchase of materials from Bunnings and ITM. A payment was also said to be owed in respect of Diamond Roofing. However none of these matters were before the Authority, and there was no evidence in support of any of them. I take them no further.

[64] DJT also said it was owed money for expenses incurred when Mr Cox made three unauthorised trips to Taupo to work on sites other than DJT's sites. The trips themselves were discussed in the evidence in the context of DJT's attempts to show Mr Cox was guilty of misconduct which should be reflected in any remedy awarded

to him. It has not been necessary to pursue that matter, but for present purposes I accept the trips were made. However there was no evidence in support of the claim for expenses and I make no order in respect of it.

[65] Finally DJT raised the matter of two laptops together with accessories, purchased at a cost of \$1,425.64 and \$1,007.94 respectively. The purchases were made in August and September 2010, before the employment relationship began.

[66] It was common ground that the laptops were purchased for the use of Mr Cox, but it seems repayment was to be obtained by invoicing Mr Cox' former employer. The matter does not appear to be one for the Authority, but in any event the evidence was too unclear to allow a finding that the purchase price was not repaid and should be reimbursed. I make no order.

Costs

[67] Costs are reserved.

[68] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority