

NOTE: An order for the payment of
a penalty appears at [39] of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 39
5353985

BETWEEN

MARTIN CLARK
Applicant

AND

THE SWEDISH SAUNA
COMPANY LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: M Clark in person
No appearance for respondent

Investigation Meeting: 23 January 2012

Determination: 27 January 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Martin Clark says he was dismissed unjustifiably by his former employer, The Swedish Sauna Company Limited (TSSCL). He seeks remedies for the grievance in the form of reimbursement of lost remuneration and compensation for injury to his feelings.

[2] He also seeks orders for the payment of unpaid wages, holiday pay, penalties for breach of good faith and for the failure to provide a written employment agreement, and an order for the return of property belonging to him.

[3] TSSCL lodged a statement in reply saying variously that Mr Clark was never hired but was given a work trial to test his abilities, which it found were unsatisfactory, and that there could be no dismissal as Mr Clark was employed on a trial period.

[4] During a teleconference call with the Authority TSSCL suggested that Mr Clark was a contractor. Nothing in the rest of the material available provided any support for that suggestion, and in any event Mr Clark denied it, so I do not pursue it.

Preliminary matter

[5] TSSCL did not appear and was not represented at the investigation meeting. No reason was provided for the failure to appear, and there was no response to the Authority's attempts to contact it by telephone after the notified commencement time.

[6] TSSCL was aware of the contents of the statement of problem, and participated in the usual teleconference call between the Authority and the parties at which the date of the investigation meeting was also discussed and set. A notice of meeting was subsequently served on TSSCL at one of the addresses provided for service. Post Office records indicated that the notice was uplifted.

[7] I am satisfied TSSCL had notice of the problem and of the investigation meeting. As it has not shown good cause for its failure to appear or be represented I have proceeded to hear and determine this matter under Schedule 2 clause 12 of the Employment Relations Act 2000.

Background

[8] In or about early May 2011 Mr Clark saw an online advertisement for a builder/cabinetmaker for an 'extremely busy West Auckland based sauna business'. The position required the building and installation of saunas and steam rooms. Some were prepared in kitset form and installed on customers' sites, and some were built and installed on-site. Mr Clark has no formal builder's or cabinetmaker's qualifications, but has 10 years' experience in the building industry working on related tasks. He described himself as a jack of all trades.

[9] Mr Clark contacted TSSCL and spoke to Sue Burgoyne. They arranged a preliminary meeting, at which the nature of the position and Mr Clark's skills and experience were discussed. A second meeting was arranged to allow Mr Clark to

meet Bede Burgoyne, the managing director and major shareholder, at the company's premises.

[10] The second meeting went ahead on 9 May 2011. There was a further discussion about Mr Clark's skills and experience as well as of the contents of a CD Mr Clark had prepared, showing photographs of work he had done. Hours of work were full time Monday - Friday, with overtime in the evening and on Saturdays as required. The rate of pay was \$25 per hour before tax. Mr Clark asked for a written agreement, and Mr Burgoyne replied that he did not have time to prepare one. Mr Burgoyne also asked Mr Clark to start work immediately as the company had fallen behind in its work.

[11] Mr Clark agreed, and Mr Burgoyne showed him through the factory. Mr Clark spent the rest of the day familiarising himself with the factory. The next day he was asked to build a sauna, and began by making some small doors. The material TSSCL provided indicated Mr Burgoyne was dissatisfied with the dimensions of one of the doors. In the absence of any evidence from TSSCL I accept Mr Clark's statement that he was experienced in hanging doors and there was nothing wrong with his work, rather Mr Burgoyne's concern arose because he viewed a door before it was finished. TSSCL also alleged a lack of speed and of confidence, which Mr Clark denied.

[12] On Monday 16 May Mr Clark reported to work, only to be told there was no work available. However on Friday 20 May Mr Burgoyne took Mr Clark to view a site where he was to work the following week. The customer wanted a sauna built and installed on the site. Mr Clark was to batten it, insulate it, line it with silver paper and construct a door frame. He indicated to Mr Burgoyne that the work would take four days and Mr Burgoyne found the indication satisfactory. Again in the absence of evidence from TSSCL I accept Mr Clark's account.

[13] On Monday 23 May Mr Clark reported to the site. On that day he prepared the space, purchased the timber, and ramset the battens into concrete block walls. The work had to be re-done the next day because the customer raised a concern that the battening was wet. Mr Clark accepted that the timber was wet, but said it had appeared dry to him when he purchased it and in any event any moisture contained in

it would have dried out. He offered to repay the cost of the timber, and not to accept payment for one day's work.

[14] Mr Clark worked until Thursday 26 May, and completed the work he said he would complete in that time. Mr Burgoyne was absent in the South Island that week, and instructed Mr Clark not to do any more work on the site until he returned. In particular Mr Clark was not to complete the installation in the sauna of a cedar lining. Mr Clark acknowledged there had been a complaint from the customer, and believed the customer wanted Mr Burgoyne on the site either to oversee or carry out the work.

[15] On Saturday 28 May Mr Clark reported to the office to collect payment for the preceding week's work. He asked again for an employment agreement and Sue Burgoyne told him it would have to wait until Mr Burgoyne's return. He was given a cheque for \$640 in respect of three days' work, and \$40 for petrol. He sought to cash the cheque immediately, but was unable to do so. He has not subsequently received payment for that week.

[16] On or about 30 May Mr Clark asked Ms Burgoyne for payment in cash, as he needed the money. Discussion about the payment escalated into an exchange in which Mr Clark said he would not work without being paid and Ms Burgoyne replied that he was not required because he was too slow. Mr Clark said a dismissal was effected by text message from Ms Burgoyne saying his services were no longer required, although he did not produce the message. However the information provided by TSSCL supported a conclusion that Ms Burgoyne ended the parties' relationship because of dissatisfaction with the standard of Mr Clark's work.

[17] The next day, 31 May, Mr Clark went to the company's premises to pick up his tools. He said in a letter to TSSCL dated 22 June 2011 that two countersink bits, various router bits in an orange container, and the charger and battery for a paslode nailgun were missing.

[18] Also on 31 May Mr Clark asked Ms Burgoyne for his final pay, and for a statement of the reasons for his dismissal. By letter dated 3 June 2011 he again asked for a statement of the reasons for dismissal and for a copy of his wage and time records. None of these requests was met.

The personal grievance

1. Can Mr Clark raise or bring a personal grievance?

[19] For completeness I comment on the concerns to which TSSCL referred in the statement in reply and during the teleconference call, in that they are relevant to whether Mr Clark can raise or bring a personal grievance.

[20] As I have indicated, no grounds were provided on which to pursue an allegation that Mr Clark and TSSCL were in a relationship of principal and contractor. Accordingly that factor does not operate to prevent the raising of a personal grievance.

[21] Secondly, if TSSCL sought to say no legal relationship of any kind was entered into - rather there was an arrangement under which Mr Clark would try out the work and the arrangement was unsuccessful - that was not the evidence and I find the parties entered into an employment relationship. The relationship was terminated by Mr Clark's dismissal. Mr Clark believes the dismissal was unjustified and is entitled to raise a personal grievance.

[22] Thirdly, and assuming an employment relationship was entered into, it was not clear what TSSCL sought to say about the relevance of a trial period. If it relied in a general way on the existence of a trial or probationary period which was not completed to its satisfaction, there was no provision in the parties' agreement for a trial or probationary period. If it was purporting to invoke the trial period regime in ss 67A and 67B of the Employment Relations Act 2000, which prevents an employee from bringing a personal grievance in specified circumstances, it cannot do so. Among other things a written employment agreement containing the relevant provision is required if the regime is to apply. There was no written employment agreement between Mr Clark and TSSCL.

[23] Accordingly the allegations regarding a trial period do not prevent Mr Clark from bringing a personal grievance.

2. Whether the dismissal was justified

[24] The failure of TSSCL to appear and give evidence means I accept what Mr Clark said about the quality of his work. TSSCL's conclusion that his work did not meet an acceptable standard was not a conclusion an employer acting fairly and reasonably could have reached.

[25] Moreover, even on the information TSSCL provided, Mr Clark was summarily dismissed without any form of disciplinary procedure having been undertaken.

[26] The dismissal was unjustified.

3. Remedies

[27] Mr Clark sought the reimbursement of three months' remuneration lost as a result of his personal grievance.

[28] I accept Mr Clark has lost remuneration in at least that amount, but he has an obligation to mitigate the loss. He did not attempt to find alternative employment, and with the assistance of his family he is attempting to establish his own business. While I accept he has reasons for making that choice, including the circumstances he faced in June 2011, this does not excuse him from the obligation to mitigate his loss. Accordingly his remedy is limited to an amount in respect of the period of notice of termination which at least he should have received.

[29] TSSCL is therefore ordered to reimburse Mr Clark for four weeks' wages, in the sum of \$4,000.

[30] Mr Clark also sought compensation for injury to his feelings as a result of the personal grievance. I accept he suffered such injury, but the principal matter raised in support was directly concerned with the circumstances of a tenancy and not directly with the personal grievance. Mr Clark is entitled to compensation for the injury caused by the fact and the manner of his unjustified dismissal.

[31] TSSL is therefore ordered to compensate Mr Clark for injury to his feelings in the sum of \$3,000.

Wages and holiday pay

1. Wages

[32] Mr Clarke seeks payment for the work done in the week beginning 23 May. He sought \$750 plus \$40 as reimbursement for the petrol he purchased.

[33] In effect he seeks four days' pay, plus \$40. Payment was not received, and is ordered accordingly.

2. Holiday pay

[34] Mr Clarke is entitled to holiday pay calculated as 8% of his total gross earnings. Taking into account the above order, the total was \$1450. He is owed holiday pay of:

$$8\% \times \$1450 = \$116$$

[35] Payment is ordered accordingly.

Penalties

1. Failure to provide written employment agreement

[36] Section 63A of the Employment Relations Act requires employers, when negotiating the terms of an individual employment agreement, to provide an employee with a copy of the intended agreement as well as an opportunity to obtain advice on the agreement. Section 63A(3) provides that an employer is liable to a penalty for the failure to comply with these provisions.

[37] Section 65 of the Act requires individual employment agreements to be in writing when the work in question is not covered by a collective agreement binding

on the employer. Section 65(4) provides that an employer who fails to comply with the section is liable to a penalty in an action brought by a Labour Inspector. No such action was brought here.

[38] No written agreement was provided to Mr Clark when the agreement was being negotiated, contrary to s 63A. No reason was provided for the failure to do so. A penalty is warranted.

[39] TSSCL is ordered to pay a penalty of \$500 for the breach of s 63A.

2. Breach of good faith

[40] The duty of good faith has statutory expression in s 4 of the Employment Relations Act. Section 4A provides that a penalty for failure to comply with the duty is payable if: -

- (a) *the failure was deliberate, serious and sustained; or*
- (b) *the failure was intended to undermine –*
 - (i)
 - (ii) *an individual employment agreement ...; or*
 - (iii) *an employment relationship; or ...*

[41] In that the employer's conduct in relation to the dismissal is subsumed in the finding that the dismissal was unjustified, I would not make an additional order for the payment of a penalty. Otherwise I do not accept that anything in the above circumstances falls within s 4A, and there will be no order for payment of a penalty.

Return of property

[42] Mr Clark seeks an order for the return of the property listed at [17].

[43] When employment relationships end, it is not unusual for disputes to arise over the return by one party to the other of property belonging to the other party. When an employment agreement or a settlement agreement addresses the matter, their terms provide a ground on which the Authority may address the return of the property. However no such provision was applicable here, and without one there may be doubt

about the power of the Authority to make an order for the return of the property.¹ Proof of possession and ownership would also be required before such an order could be made.

[44] Since I am not satisfied there are grounds on which to do so, I make no order.

Summary of orders

[45] TSSCL is ordered to pay to Mr Clark:

- (a) \$4,000 as reimbursement of remuneration lost as a result of his personal grievance;
- (b) \$3,000 as compensation for injury to his feelings caused by the personal grievance;
- (c) \$750 as unpaid wages;
- (d) \$40 as reimbursement for petrol purchased;
- (e) \$116 as holiday pay; and
- (f) \$500 as a penalty for the breach of s 63A.

Costs

[46] TSSCL is further ordered to reimburse Mr Clark for the Authority's filing fee of \$71.56.

R A Monaghan

Member of the Employment Relations Authority

¹ As commented on in *Mason Engineers (NZ) Limited v Hodgson* [2011] NZEmpC 147