

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 165
5466715

BETWEEN KAITLYN CLOUGH
 Applicant

A N D CONTRACT PLASTERING
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Kaitlyn Clough in person
 No appearance for Respondent

Investigation Meeting: 16 October 2014 at Christchurch

Date of Determination: 24 October 2014

DETERMINATION OF THE AUTHORITY

- A. Kaitlyn Clough was unjustifiably dismissed from Contract Plastering Limited.**
- B. Contract Plastering Limited is ordered to pay Kaitlyn Clough:**
- (a) Unpaid wages in the sum of \$144 gross**
 - (b) Holiday pay in the sum of \$720 gross**
 - (c) Lost wages in the sum of \$2,835.00**
 - (d) Compensation in the sum of \$5,000.00**
 - (e) Reimbursement of the filing fee in the sum of \$71.56**



Commencement of the proceedings and investigation process

[1] Kaitlyn Clough was employed by Contract Plastering Limited (Contract Plastering) from 1 May 2013 as a plasterer.

[2] The sole director of Contract Plastering is Jonathan Moody. The statement of problem named Mr Moody as the respondent although the statement of problem was served on Contract Plastering by courier at its address for service on 18 July 2014 at 7.05am. The administration file confirms that the Authority support officer left voice messages on Mr Moody's mobile phone after the time for lodging a statement in reply had expired but the messages were not returned.

[3] There was no communication from Contract Plastering after it was served with the Statement of Problem. On 18 August 2014 the support officer wrote to Mr Moody at Contract Plastering advising that the file had been referred to an Authority member and a telephone conference was scheduled with the Authority on 8 September 2014 at 2pm. The letter was delivered to the address for service of Contract Plastering on 19 August 2014.

[4] On 8 September at 2pm the support officer attempted to call Mr Moody on his mobile number but there was no answer. Ms Clough attended the telephone conference and a decision was made to proceed with the call. Ms Clough advised, although she had not retained a copy of her employment agreement, that she recalled the name of her employer in that agreement was Contract Plastering and she agreed that the respondent's name be amended from Mr Moody to Contract Plastering accordingly. During the telephone conference the Authority set a date for an investigation meeting on 16 October 2014 with a commencement time of 9.30am. A notice of direction was prepared that set out the issues discussed and this was sent to the parties together with a notice of investigation meeting setting out the date and time of the meeting and place of the meeting. I am satisfied from looking at the administration file that the notice of investigation meeting and the notice of direction was delivered to the address for service of Contract Plastering at 6.47am on Wednesday 10 September 2014. The notice of direction stated that if the parties had any questions they could communicate directly with a support officer from the Authority. A telephone number and an email address provided. There was no communication from Contract Plastering.

[5] On the day of the investigation meeting I delayed the commencement of the meeting but there was no appearance on behalf of Contract Plastering.

[6] There was no good cause shown as to why there was no appearance on behalf of Contract Plastering and the Authority decided to proceed with the investigation meeting under clause 12 of the second schedule to the Employment Relations Act 2000 (the Act) and heard evidence from Ms Clough.

Employment Relationship Problem

[7] Ms Clough had had some surgery during the week commencing 21 April 2014. She sent Mr Moody a text towards the end of the week to advise that she would be well enough to return to work on Monday 28 April 2014.

[8] Mr Moody telephoned Ms Clough on Sunday 27 April in response to her text message. He advised Ms Clough that Contract Plastering had gone into receivership and Ms Clough did not have work from Monday 28 April. Ms Clough questioned payment of her wages and Mr Moody advised her that the Inland Revenue Department (IRD) had put the business into receivership and she should direct her queries to them.

[9] Ms Clough said she was quite shocked at the news but when she made enquiries with IRD she was advised they were not the responsible party for the receivership. Ms Clough was advised to contact the Companies Office which she duly did. She was advised that Contract Plastering had not been placed into receivership. Ms Clough described herself as feeling quite distressed at this stage that Mr Moody had not been truthful to her. She had had no prior warning that her job may be at risk.

[10] Ms Clough says that her dismissal was unjustified.

[11] Ms Clough seeks a letter of reference. That is not one of the remedies that the Authority is able to award. Ms Clough also seeks payment of unpaid wages/sick pay for the week commencing 21 April, eight weeks lost wages, holiday pay and compensation for humiliation and loss of dignity.

The Issues

[12] The issues for determination are as follows:

- (i) Is Ms Clough owed unpaid wages for the week commencing 21 April 2014?
- (ii) Is Ms Clough owed holiday pay?
- (iii) Was Ms Clough's dismissal unjustified?
- (iv) If it was then what remedies should be awarded and are there issues of contribution or mitigation?.

Unpaid wages

[13] Ms Clough seeks unpaid wages for the week of 21 April during which she said in evidence she took three sick leave days. 21 April was Easter Monday and the Friday of that week was Anzac day. I concluded that there was a real possibility that Ms Clough may have exhausted her sick leave as at the week of 21 April 2014. Her evidence was that she had already taken about six day's sick leave. Without records these matters are difficult. Ms Clough had not been given a copy of her employment agreement and she was not provided with pay slips. I will consider the matter on the basis that the sick leave entitlement was that in the Holidays Act 2003 without enhancement.

[14] The Holidays Act provides that an employee is entitled to 5 days' sick leave for the 12-month period beginning at the end of the completion by an employee of 6 months employment. If Ms Clough is correct that she had already as at 21 April taken about six days sick leave then she in all likelihood had no sick leave available to her. That is not the end of the matter though as there were two public holidays either side of the sick leave. They were both days which Ms Clough would ordinarily have worked.

[15] I could not be satisfied that Ms Clough would have been fit to return on Anzac day if it had not been a public holiday but I am not satisfied that she was unwell on Easter Monday. There is to be one day's reimbursement of unpaid wages for 21 April, a public holiday.

[16] Ms Clough was paid an hourly rate of \$18 and I will assess that on the basis of an eight hour day.

[17] I order Contract Plastering Limited to pay to Kaitlyn Clough the sum of \$144 gross for 21 April 2014 which was a public holiday.

Holiday pay

[18] Ms Clough agreed that she had taken some leave whilst employed by Contract Plastering Limited. Her employment ended by a narrow margin within 12 months of commencement. Holiday pay is calculated therefore in accordance with s 23 of the Holidays Act 2003 on the basis of 8% of gross earnings less any amount paid to Ms Clough for annual holidays taken in advance.

[19] There are no records about what leave Ms Clough took and what she was paid so I have relied solely on the evidence given by Ms Clough at the investigation meeting. Ms Clough referred to having a week's leave before Christmas and two weeks over January 2014.

[20] At best I can ascertain from the evidence Ms Clough took about three weeks leave. She was not absolutely clear about payment for those weeks. The fairest approach I find is to make an award for holiday pay for one week in circumstances where Contract Plastering have taken no steps to verify if holiday pay is owing to Ms Clough.

[21] I order Contract Plastering Limited to pay to Kaitlyn Clough the sum of \$720 gross being one week's holiday pay.

Was Ms Clough's dismissal unjustified?

[22] The Authority in assessing the justification of a dismissal applies the test in s.103A of the Act. This test requires the Authority to objectively assess whether the actions of Contract Plastering and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms Clough was dismissed.

[23] There are also statutory good faith obligations that require an employer who is proposing to make an adverse decision about an employee's ongoing employment to

provide all relevant information before making a final decision. There are four procedural fairness requirements set out in s.103A (3) of the Act.

[24] The evidence supports that Contract Plastering failed to comply with any of the procedural fairness tests in s.103A(3) because there was no process followed before Ms Clough's employment was terminated by telephone. That is not what a fair and reasonable employer could have done.

[25] Parties to an employment relationship must act towards each other in good faith and not mislead and deceive each other. Contract Plastering in breach of its duty of good faith misled and deceived her about the reason for her termination. Contract Plastering is unable to justify its dismissal of Ms Clough in terms of the test in s.103A of the Act. Ms Clough has a personal grievance that her dismissal was unjustified. She is entitled to remedies.

Remedies

Lost Wages

[26] I am satisfied Ms Clough for the eight week following termination of employment attempted to mitigate her job loss. She has provided details of earnings received between 1 May and 30 June 2014 in the gross sum of \$2,925.00. Ms Clough after this period returned to study.

[27] In all the circumstances I am satisfied that Ms Clough is entitled to be reimbursed for lost wages for a period of eight weeks from 28 April to week ending 20 June 2014. I find that it is appropriate to calculate lost wages on the basis of \$18 per hour for a 40 hour week. For an eight week period that is the sum of \$5,760.00 gross. From that sum earnings received after 27 April 2014 are to be taken into account in the sum of \$2,925.00 gross.

[28] I order Contract Plastering Limited to pay Kaitlyn Clough the sum of \$2,835.00 gross being lost wages under s.123(1)(b) of the Act.

Compensation

[29] Ms Clough seeks the sum of \$5,000 for compensation. From my observation of Ms Clough when she was giving evidence she was clearly distressed by the manner

of the termination of her employment. This was her first job and the abruptness of the termination after a period where she was unwell and required surgery was distressing.

[30] I find that an appropriate award for compensation would be the sum of \$5,000.

[31] I order Contract Plastering Limited to pay to Kaitlyn Clough the sum of \$5,000 being compensation under s.123 (1)(c)(i) of the Act.

Costs

[32] Ms Clough was not formally represented although she was assisted by a student advisor from the Polytech. She is entitled to reimbursement of her filing fee of \$71.56 and I so order.



Helen Doyle
Member of the Employment Relations Authority



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