



# New Zealand Employment Relations Authority Decisions

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## Downes v Home Improvers Ltd CA 147/07 (Christchurch) [2007] NZERA 861 (5 December 2007)

Last Updated: 23 November 2021

### IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 147/07 5016984

BETWEEN REBECCA DOWNES

Applicant

AND HOME IMPROVERS LIMITED

Respondent

Member of Authority: Paul Montgomery

Representatives: Leah Winter, Counsel for Applicant

Robert Thompson, Advocate for Respondent Investigation Meeting: 10 July 2007 at Christchurch

Submissions received: 24 and 31 July 2007 from Applicant

26 July and 2 August 2007 from Respondent

Determination: 5 December 2007

### DETERMINATION OF THE AUTHORITY

#### Employment relationship problem

[1] The applicant was employed as a painter by the respondent under a fixed term employment agreement due to end on 14 January 2006. The applicant says she was summarily dismissed on 14 October 2005. Ms Downes seeks payment of her holiday pay and for the day in lieu for working on Queen's Birthday and for the week ending

17 October 2005, reimbursement of lost remuneration in the sum of \$5,797.07, compensation of \$7,500 under s.123(1)(c)(i) of the Act and costs.

[2] The respondent denies dismissing the applicant saying she left the work site after being spoken to about performance concerns following an alleged complaint from a customer of the respondent. It says it has paid her wages through to 17 October 2005 and is entitled to withhold holiday pay as the applicant left without giving notice. It also declines to meet the applicant's other remedies.

[3] The parties attended mediation but were unable to resolve their differences.

#### What caused the problem

[4] Ms Downes began working as a painter with the respondent on 14 January 2005, a fixed term arrangement to expire on 14 January 2006. She had no previous painting experience but was keen to secure an apprenticeship if that was possible. The applicant began on an hourly rate of \$9 which was increased to \$10 in late February and increased again in late May to \$10.80.

[5] On 4 July 2005, Ms Downes received a telephone call from Mike Brown, the director of the respondent. He asked her to meet him at his home at 7.30am the following day for a chat. On arrival, the applicant was handed a letter dated 5 July 2005 headed *Notice of restructuring of company employee and verbal warning for actions which potentially seriously damage the employer's reputation due to poor workmanship*. The letter goes on to detail four instances of alleged poor workmanship and ends with a summary which reads:

*With all the above considered Rebecca has left Mike Brown with no option but to issue her with a verbal warning and to have her working with Mike Brown on a constant and regular basis to retrain the necessary skills to Rebecca so she can forward her skills in the painting trade. This will be done with the intent to give Rebecca another opportunity to work on the crews again. ... The hours Rebecca will work will range from 0-50 hours per week to enable Rebecca to be accompanied by Mike Brown on all work sites to enable him to retain a high standard of the painting.*

[6] The applicant considered the letter and replied on 10 July 2005. Essentially, Ms Downes took issue with the claim that, as an inexperienced, junior painter, she could seriously damage the employer's reputation and then addresses each of the four matters raised, stating that in two she had not had sufficient training, and in the remaining two admits to making some mistakes.

[7] The applicant then tells Mr Brown that under normal circumstances she would have expected that he would discuss any shortcomings in her work and be given the chance to remedy any faults. She says no such discussion occurred before she was given this letter. Ms Downes also comments on being summonsed without notice to what was in effect a disciplinary meeting, and without the benefit of a support person or representative. Also, the applicant points out that she had received a pay rise of

\$0.80 an hour in May 2005, then was criticised for poor work and finally asks for

payment for a week she was asked not to work because Mr Brown was out of the country. In closing, Ms Downes wrote:

*I enjoy my job working as a painter for Property Improvers Limited and I do not wish to resign or have my position terminated.*

[8] Mr Brown replied on 11 July 2005 agreeing to meet the lost wages, undertaking to supervise the applicant on all jobs giving her more training, and if he was unable to be with her on a job would ask another crew if she could work with them. He said all he wanted was for everyone to work together as a team in a productive working environment.

[9] On 24 July 2005, Mr Brown gave Ms Downes a new individual employment agreement which he had signed and dated that day. The applicant says she was not satisfied with some of the terms contained in the agreement and did not sign it, preferring to remain under the existing agreement.

[10] The applicant was about to start working at a property in Curries Road when Tony Cameron, a fellow employee, told her not to start as Mr Brown wanted to see her. She inquired whether Mr Cameron knew what it was about but he replied that he did not.

[11] Mr Brown arrived and met the applicant in the driveway. He told Ms Downes that he had gone to pick up a payment from a client who had some properties in St Albans. The client refused to pay the account in full because the applicant had not done the work, but slacked around rolling cigarettes, talking and listening to the radio. The applicant says it was a weather-dependent job and could only be done in good conditions. Further, she says the client was rarely on site and mainly towards the end of the project. She protested that the claims were untrue. However, Mr Brown told her he had proof and then said, *I've had enough, you're out of here, leave all your gear here. You can drop your t-shirt and overalls off on Monday*. Ms Downes says Mr Brown told her she could pick up her wages and holiday pay when she dropped off her gear. She says he then said he wanted a meeting on the Monday and for Ms Downes to get some advice if she wanted someone at that meeting.

[12] Following this exchange, the applicant went into the kitchen and told Mr Cameron that Mr Brown had just dismissed her. She says Mr Cameron told her he couldn't believe this as Mr Brown had been praising her work the previous day. After

picking up her gear, she then left the site. After speaking to her uncle later that day, she took legal advice.

[13] On the following Sunday, Ms Downes received a text message from Mr Brown asking if she was attending the Monday meeting. She did not reply. On Monday Mr Brown rang the applicant's cellphone and when she did not reply left a voice message asking why she was not at the meeting and saying it would be rescheduled. That day, the applicant, accompanied by her mother, returned the company's property to Mr Brown's home leaving it on a patio at the rear of the house.

[14] Ms Downes says Mr Brown rang her later on the Monday asking why she had not come to the meeting. She says she told him she had dropped off her uniform and asked about her pay. According to Ms Downes, Mr Brown told her she would not get her holiday pay until she replaced a blind she had damaged on a work site. As the applicant had already taken the blind in for repair, she said she would pick it up and take it back to the client. She says she was told not to take it to the client. The blind was collected on Wednesday, 19 October 2005 and Ms Downes then took it to a site where she knew Mr Brown was working. He took the blind from Ms Downes and ordered her from the property. She says he *made it very clear that if I turned up at that or any other of his sites again he would take action*. The applicant says she was threatened with a trespass order.

[15] Mr Brown does not dispute any issues prior to the 14 October incident. His version of events is that, having been told by his client that he was not going to pay for the 80 hours billed on the painting at his St Albans property, he immediately contacted I R Thompson Associates Limited for advice. He says he spoke to the principal of that company and received advice that he was able to call a disciplinary meeting with the applicant, to get her explanation, that the applicant was entitled to be represented and that Mr Brown needed to give sufficient notice of that meeting. Mr Brown says he was mindful of the need to follow a correct procedure.

[16] Mr Brown says *the applicant repeatedly asked me if I had fired her and I repeatedly advised her that we needed her to attend a meeting to explain her side of the story and that she was entitled to be represented at the meeting*.

[17] Further, Mr Brown says he spoke with *the staff concerned and they had confirmed the allegations that had been levelled against the applicant. I was*

*prepared to attend this meeting with an open mind; however, I did have serious concerns regarding the applicant's attitude and her level of commitment to my company*. Later, in his statement of evidence, in the context of a letter from Ms Downes' solicitors, he says *I had given no impression to the applicant that her employment had been terminated*.

## **The issues**

[18] In order to determine this matter, the Authority needs to resolve the following issues:

- Was the applicant dismissed from her employment with the respondent on 17 October 2005; and
- If so, was the dismissal justified; and
- If not, what remedies are appropriate; and
- Are there any outstanding payments due to the applicant?

## **The test**

[19] The test to be applied is set out in [s.103A](#) of the [Employment Relations Act 2000](#). This requires the Authority to determine, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

## **The investigation meeting**

[20] At the investigation meeting, the Authority heard evidence from Ms Downes in person. For the respondent, evidence from Mr Brown was heard as was that of Tony Cameron. In addition, the respondent produced on the day of the meeting a series of letters from co-employees of the applicant. As the Authority and counsel for the applicant were unable to test the assertions in these statements, no weight has been accorded them in the

Authority's determination.

[21] In the course of the investigation, several issues were usefully brought to the Authority's attention. The first was that in spite of the respondent's assertion that

Ms Downes was not dismissed, the respondent had clearly expended considerable energy in having its employees prepare documents, possibly with assistance, to support a dismissal on the ground of performance. This is curious. Mr Brown said he did not dismiss the applicant, so the question posed is, why attempt to defend the application on the basis that Ms Downes was dismissed?

[22] The respondent says poor performance, and in particular the applicant's failure to perform adequately on the job at the St Albans property led him to set up a disciplinary meeting on Monday, 17 October 2005.

[23] Having heard and observed both the applicant and the respondent under questioning by the Authority and counsel, I am of the view that Mr Brown was inconsistent in his evidence and at times his recall was poor. Where there are material differences and conflicts of evidence I have, due to Mr Brown's uncertainty on some issues, tended to favour the plain, unadorned evidence of Ms Downes.

### **Analysis and discussion**

[24] It is apparent that in June 2005 the respondent had some concerns about the standard Ms Downes was achieving in her work and drew them to her attention. Regrettably, Mr Brown also issued a verbal warning without hearing the applicant's point of view. The applicant responded appropriately, and affirmed her intention to improve and remain employed by the respondent. Mr Brown undertook to oversee her work closely to ensure she had the training and instruction to work to the required standard. That should have been the end of the matter. It is somewhat unclear, on the evidence before the Authority, as to whether Mr Brown followed through with the close supervision and training he undertook to give the applicant. Ms Downes' evidence was that she was frequently on site with other crews and that at no stage was she under the close supervision of the crew leaders.

[25] Unfortunately, Mr Brown had a rough morning on 14 October 2005. A client had refused to pay for work done on one of his properties by Ms Downes and, naturally vexed at this refusal, Mr Brown set off to take the matter up with the applicant.

[26] I am not persuaded that Mr Brown took advice before the altercation with Ms Downes. This is because the respondent adduced no evidence from the adviser he insisted he had consulted while driving to the Curries Road address. Then, his actions

on arrival, displayed the antithesis of advice likely to have been given by an experienced employment law consultant.

[27] I believe Mr Brown did take advice, but only once he had sent the applicant packing, at which stage he attempted to rescue the situation by formally convening the meeting the applicant says he referred to after he told her she was dismissed.

[28] It is also clear from the evidence of Mr Brown at the investigation meeting that he heard Ms Downes tell Tony Cameron she had been fired. If his version of events is correct, his hearing the applicant say this to Mr Cameron gave him the opportunity to correct any misapprehension the applicant may have been labouring under. He did not do so. That comment appears to support the view that Ms Downes had been dismissed and the emphasis on the Monday meeting changed to an attempt to minimise the damage after he had taken advice.

### **The determination**

[29] Returning to the issues set out above in this determination.

Personal grievance

- I find the applicant was dismissed by the respondent.
- I find the dismissal was unjustified.
- I find that while issues had arisen in respect of the applicant's performance, these were addressed by the parties in July

and were resolved. There is no evidence before the Authority that the applicant's work at the disgruntled client's property was deficient and so I make no deduction for contribution.

#### Arrears of wages

- I find the applicant is owed the sum of \$240.30 gross which is payment for working Queen's Birthday and the paid day in lieu.
- I find the evidence regarding the payment of the final week's wages is unclear. The respondent produced a page from its bank statement which purports to record the transfer of wages to the applicant's account on 18 October 2005 in the sum of \$367.32 net. The applicant denies she was paid this but did not

provide bank statements to confirm non-receipt of this sum. Ms Downes did point to the wages record provided by the respondent, observing that she has signed for all her previous wages, but had not signed for those due 17 October 2005. The representatives are to confer on this issue and in the event Ms Downes' bank statements for the period do not confirm receipt of the wages, the respondent is to pay the applicant the sum of \$367.32 net of tax.

- I find the respondent unlawfully withheld the applicant's holiday pay. The respondent is to pay Ms Downes the sum of \$1,038.75 gross. Having considered a penalty in regard to this action by the respondent, I decline a penalty. The respondent is cautioned and can expect any repetition of such an action to result in a penalty being imposed.
- Interest on the above sums is to be paid from 18 October 2005 up to the date of issue of this determination at the rate of 9% per annum.

#### Remedies

[30] Having found the applicant has a personal grievance, I turn to the remedies.

- The respondent is to pay the applicant the sum of \$6,566 gross being the wages payable to the expiry of the fixed term agreement and which Ms Downes would have received but for the unjustified dismissal.
- The respondent is to pay the applicant the sum of \$3,000 without deduction under [s.123\(1\)\(c\)\(i\)](#) of the Act.
- The respondent is to pay interest at 9% per annum on the lost remuneration component of these remedies only.

#### Summary of orders

#### Wage arrears

- \$240.30 gross for statutory holiday and lieu day.
- \$367.32 net of tax for unpaid wages for the final week contingent on the applicant's bank statement confirming non-receipt of these wages.
- \$1,038.75 gross for unpaid holiday pay.
- Interest on these sums at 9% per annum.

#### Grievance remedies

- \$6,566 gross for lost remuneration plus interest at 9% per annum.
- \$3,000 without deduction for hurt and humiliation.

#### Costs

[31] Costs are reserved.

Paul Montgomery

Member of the Employment Relations Authority

