

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 67
3018052

BETWEEN	TATE GIBBS Applicant
AND	ARTELIER DWELL LIMITED First Respondent
AND	CHANG LIU Second Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Applicant in person Chang Liu, in person and as agent for the First Respondent
Investigation Meeting:	23 February 2018
Additional documents received:	23 February 2018 from Applicant 23 February 2018 from Respondent
Determination:	27 February 2018

DETERMINATION OF THE AUTHORITY

A. Chang Liu is ordered to pay to the following amounts to Mr Gibbes within 14 days of the date of this determination:

- a. The sum of \$1,730.76 for unpaid wages;**
- b. The sum of \$1,800.00 gross for unpaid holiday pay;**
- c. The sum of \$71.56 as reimbursement for the Authority's filing fee**

B. Chang Liu is ordered to pay the sum of \$3,000.00 by way of penalty for breaching the Holidays Act 2003. 50% of that amount (\$1,500) is to be paid to Mr Gibbes. The remaining 50% (\$1,500.00) is to be paid to the

Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

C. Payment of the penalty must be paid within 28 days of the date of this determination.

Employment Relationship Problem

[1] Artelier Dwell Limited (ADL) is an architectural practice operating in Auckland. Chang Liu is the sole director of ADL. Mr Gibbes was employed by ADL or Mr Liu on 8 May 2017 in the role of Senior Technician.

[2] By July 2017 the parties' relationship had become strained. This resulted in a mutual agreement to end Mr Gibbes' employment. The parties agreed the notice period to be provided to Mr Gibbes was 10 working days pursuant to the trial provision clause contained in Mr Gibbes' individual employment agreement (IEA).

[3] On 31 July 2017 Mr Gibbes and Mr Liu had a disagreement. The outcome of that disagreement was that Mr Gibbes' employment was terminated summarily. Mr Gibbes claims outstanding wages, his outstanding annual leave entitlements, and a penalty under s 75 of the Holidays Act 2003. The Respondents deny any monies are owing to Mr Gibbes.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from Mr Gibbes and the Respondents but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues:

[5] The issues to be determined are:

- a) Who was Mr Gibbes employer?
- b) Has there been a default in monies payable to Mr Gibbes?

- c) If so, what monies are payable by the First or Second Respondent to Mr Gibbes for wage arrears and for holiday pay arrears?
- d) Should a penalty be imposed against the First or Second Respondent for breach of the Holidays Act 2003?
- e) What costs, if any, are payable?

Issue One: Who was Mr Gibbes employer?

[6] During the course of the investigation meeting it came to light that there was an issue as to who Mr Gibbes' employer was. Namely, whether it was ADL or whether it was Mr Liu. After discussing this with Mr Gibbes and Mr Liu, Mr Gibbes sought to amend his Statement of Problem by including Mr Liu as a Second Respondent. Mr Liu agreed that this was appropriate and that he suffered no prejudice from this amendment. Leave was accordingly granted to include Mr Liu as a Second Respondent.

[7] The IEA identified Mr Gibbes' employer as "Archi Studio and Design". This is who Mr Gibbes understood his employer to be. However, this is not a legal entity. Mr Liu said this is the trading name for his company, Artelier Dwell Limited.

[8] Mr Smith has the onus of establishing on the balance of probabilities who his employer was.

[9] The Employment Court judgment in *Mehta v Elliott (Labour Inspector)* provides guidance for the Authority in investigating the identity of the employer:¹

The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change. Because Messrs Sheikh and Mehta give different accounts of who they believed employed Mr Sheikh, it is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties. Put another way, who would an independent but knowledgeable observer have said was Mr Sheikh's employer when he commenced employment?

[10] Applying the foregoing legal principals to the present circumstances, I find an independent and knowledgeable observer would have said that Mr Gibbes was

¹ [2003] 1 ERNZ 451

employed by Mr Liu at the time he commenced employment. In reaching this finding, I have considered the following factors relevant:

- a) The advertisement for Mr Gibbes' position made no reference to ADL. Mr Liu was listed as the contact person.
- b) The offer of employment made no reference to ADL being the employer. Nor did it advise that Archi Studio and Design was ADL's trade name or that Mr Liu was acting for, or as an agent of, or offering employment on behalf of ADL.
- c) The IEA did not disclose that ADL was Mr Gibbes' employer. This omission has led to the current issue arising concerning the identity of Mr Gibbes' employer. Had the employer complied with the legal obligation in s 65 of the Act to name the employer then this issue could have been avoided.
- d) Mr Liu says he never told Mr Gibbes that ADL was his employer.
- e) No information was provided to Mr Gibbes, either prior to him accepting employment or during his employment that stated that ADL was his employer. In addition, all correspondence exchanged between Mr Gibbes and Mr Liu was signed by Mr Liu. Neither Mr Liu's email address, nor his signature, made reference to ADL.
- f) Mr Gibbes' wages were paid by ADL which supports it being the employer. However, I accept Mr Gibbes' evidence that he was not aware that his wages were being paid by ADL. Whilst some of the payslips provided to me by the Respondents identified ADL, these were prepared by the Respondents shortly before the investigation meeting. I do not therefore provide them with any weight.

[11] I am satisfied, on the balance of probabilities, that the evidence establishes that Mr Liu was Mr Gibbes' employer. Although it was open to Mr Liu to have acted as an agent or principal for ADL I find that the facts do not establish that he actually did so.

[12] Even if I am wrong in that regard, I would have found that the doctrine of undisclosed principal applied. This doctrine was recognised by the Employment

Court in *Cuttance (t/a Olympus Fitness Centres) v Purkis*.² Where a person claims to have been acting for another but does not disclose that to the employee at the time of the engagement, the employee is able to make an election as to who it pursues.

Issue two: Has there been a default in monies payable to Mr Gibbes?

Wage Arrears

[13] Where there has been default in payment to an employee of any wages or other money payable under an IEA, those monies may be recovered by the employee.³

[14] The terms and conditions of Mr Gibbes' employment are set out in an undated IEA. The version I was provided with was unsigned but I accept Mr Gibbes' evidence that the IEA was signed prior to him commencing employment.

[15] The terms of the IEA included a trial provision clause. During the 90 day trial period either party could end the agreement by giving 10 working days' notice before the trial period ended. For serious misconduct, it provided that Mr Gibbes may be dismissed without notice.

[16] On 24 July 2017 the parties agreed that Mr Gibbes' employment would be terminated on 10 working days' notice in accordance with the trial provision clause.

[17] On 31 July 2017 Mr Gibbes' was summarily dismissed from his employment for serious misconduct. The circumstances leading to his dismissal are largely agreed.

[18] Mr Gibbes worked in an open-plan office with several other people. On 31 July 2017, Mr Gibbes was heard smashing his keyboard loudly on the desk. Mr Gibbes explained that one of the keys on his keyboard was jammed so he had turned it over to try and remove a foreign object. Ms Barry, an employee who worked at the desk next to Mr Gibbes, confirmed this was the case. Mr Liu asked Mr Gibbs to stop making loud noises.

[19] Approximately 2.5 hours later, Mr Gibbs sneezed loudly. Mr Liu considered this to be intentional. Mr Liu asked to speak with Mr Gibbes in the corridor. He asked Mr Gibbes why he had made the noise he had. Mr Gibbes responded by stating that it was a sneeze and that he didn't do it on purpose. Mr Liu responded telling Mr

² *Cuttance (t/a Olympus Fitness Centres) v Purkiss* [1994] 2 ERNZ 321 at 332-333 and 338

³ Section 131 Employment Relations Act 2000

Gibbes that he was not to sneeze that loudly again and was to sneeze quietly into his hand in future. Mr Gibbes response was to tell him he was being ridiculous. It was a natural bodily function. Mr Gibbes then told him it would not happen again and asked if he could return to work.

[20] Mr Liu said he could not. Mr Liu told Mr Gibbs he was concerned about his recent absences from work and questioned whether they were genuine. Mr Gibbs' response was to refer to the medical certificate he had provided for the time-off. It is at this point where the parties version of events conflicts. Mr Liu said Mr Gibbs said *"This is fucking ridiculous, guess what, I'm gonna pack up my stuff and leave"*. Mr Gibbes denies saying this. He says he asked Mr Liu if he wanted him to continue with his employment to which he replied *"No, you are done"*.

[21] The parties agree that Mr Gibbes then returned to the office. As he was packing up his belongings he said to Mr Liu *"To clarify Richard, you are telling me to leave even though I am willing to work?"*. Mr Liu says his response to this was to tell Mr Gibbes *"just pack up and leave. You are terminated. You are still within the trial period and you are not entitled for any sick leaves and holiday pays"*. When Mr Gibbes pointed out Mr Liu's responsibilities under the Employment Relations Act and the Holidays Act, Mr Liu said he laughed and told him to get a lawyer. When Mr Gibbes said he would lodge a claim with the Employment Relations Authority, Mr Liu again told him to pack up and leave.

[22] I find that a fair and reasonable employer could not have concluded that these circumstances constituted serious misconduct. I am satisfied Mr Gibbs' employment was terminated under the guise of serious misconduct so as to avoid payment of his contractual notice period.

[23] Mr Gibbes is entitled to be paid the agreed notice period. The wages outstanding are for the period 31 July 2017 to 4 August 2017. Mr Gibbes was paid a salary of \$90,000 per annum. This equates to a weekly sum of \$1,730.76 gross.

[24] For completeness I record I did consider but decline to make any deductions from this sum for the sick leave alleged to have been paid to Mr Gibbes in advance of his entitlements. Section 63(3)(b) of the Holidays Act 2003 provides that an employer and an employee may agree that an employee may take sick leave in advance. In such cases that leave is to be deducted from the employee's entitlement to sick leave. In

the present case, there was no discussion between the parties about sick leave being taken in advance of Mr Gibbes' entitlements. Even if there was, the sick leave could only be deducted from Mr Gibbes' entitlement to sick leave.

[25] Mr Liu is ordered to pay Mr Gibbes the sum of \$1,730.76 gross for unpaid wages. Payment of this sum must be made within 14 days of the date of this determination.

Payment for annual leave due on termination

[26] Calculation of Mr Gibbes' annual leave entitlements must be made in accordance with s 23 of the Holidays Act 2003. This section applies where the employment of an employee comes to an end and the employee is not entitled to annual holidays because he or she has worked for less than 12 months. In such a case an employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount paid to the employee for annual holidays taken in advance.

[27] Mr Gibbes started working for the Respondent on 8 May 2017. Between this date and 4 August 2017 Mr Gibbes' gross earnings were \$22,500. 8% of this sum is \$1,800.

[28] I decline to make any deduction from this sum for the alleged annual leave taken in advance. The IEA provided that annual leave:

Will be taken at times the employee and employer agree together. If they cannot agree, the employer will decide the dates and give the employee at least 14 days' notice.

[29] There is no dispute that Mr Gibbes did not ask to take any annual leave. There was no discussion about his taking annual leave. The payslips prepared after his employment ended did include two deductions for annual leave but Mr Liu said these were incorrect. Having heard from the parties I am satisfied that any hours taken off by Mr Gibbes during the workday was not intended to be taken as annual leave. Instead it was expressly or impliedly agreed that these would be made up by additional hours he worked on other days. The time records I viewed supported Mr Gibbes' evidence that he made up any hours he did not work. Mr Liu accepted that this was common place in his business.

[30] The Respondent is ordered to pay Mr Gibbes the sum of \$1,800 gross for unpaid holiday pay. Payment of this sum must be made within 14 days of the date of this determination.

Issue Three: Penalty for breach of the Holidays Act 2003

[31] The failure to pay Mr Gibbes his holiday pay entitlements on termination breached the Holidays Act 2003. Mr Liu is therefore liable to a penalty by virtue of s 75 of that Act.

[32] Section 75 of the Holidays Act makes an employer who contravenes the provisions of s 75(2) liable to a penalty. In the case of an employer who is an individual, the penalty is a sum not exceeding \$10,000.

[33] The quantum of any penalty is to be determined using the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*.⁴

Step 1: Nature and number of breaches

[34] Step one is to identify the number of breaches and the maximum penalty applicable. In this case Mr Liu failed to pay holiday pay on one occasion. This means he is liable to a maximum penalty of \$10,000.

Step 2: Severity of the Breach

[35] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

Aggravating factors

[36] Factors to be taken into account when considering the first part of Step 2, aggravating factors, include whether the breach or breaches were committed knowingly and/or calculatedly, the duration of the breach or breaches, the number of persons affected adversely, the extent of any departure from the statutory requirements and any history of previous breaches.

⁴ [2016] NZEmpC 143

[37] Mr Liu said he had not intended to breach the Holidays Act. It was clear during the investigation meeting that he was not aware of his obligations in terms of the Holidays Act. However, ignorance is not a sufficient defence. As an employer it was Mr Liu's responsibility to know the law.

[38] The breach deprived Mr Gibbes of a minimum statutory entitlement to annual leave for a period of over 6 months. The harm caused to Mr Gibbes has partly been addressed by the orders made for payment of entitlements. However, during the period he was without his entitlements he suffered financial hardship. Whilst he found alternative work quickly after leaving employment, he did not receive wages for three weeks. He therefore had to use credit cards to pay his bills during this period which he says he is still trying to pay off.

[39] There was no evidence Mr Liu has been subject to proceedings of a similar nature so this is not an aggravating factor.

Mitigating factors

[40] The second part of step 2 is to consider any mitigating circumstances, whether compensation has been paid and/or steps taken to mitigate the effect of the breach.

[41] In this case I know of no mitigating circumstances. Mr Liu continues to be unfamiliar with the requirements of the Holidays Act. This is despite being in business and having employees for a number of years. In addition, he continues to maintain that any award of holiday pay should take into account the sick and annual leave Mr Gibbes allegedly took in advance of his entitlements. I have already found this position to be incorrect earlier in my determination.

[42] The need for deterrence favours the imposition of a penalty. A penalty is necessary to deter Mr Liu, and other employers, from doing the same thing.

[43] I assess the degree of severity for the penalty at 70%, a potential penalty of \$7,000.

Step 3: Ability to pay penalty

[44] Step 3 is an assessment of Mr Liu's ability to pay. Mr Liu told me that he would not have an issue paying a penalty within 28 days. I conclude that this stage has a neutral effect on my calculation.

Step 4: Proportionality of penalty

[45] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty I have arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances. Looking at recent Authority and Court imposed penalties I conclude an appropriate penalty is \$3,000. This sum is proportionate to the breaches and is sufficient to act as a deterrent to Mr Liu.

Conclusion on Quantum

[46] Adopting the approach applied by Judge Inglis in *Lumsden v Skycity Management* I consider it appropriate that part of the penalty be paid to Mr Gibbes as he has suffered the impact of the breach and has been obliged to take steps to enforce his rights.

[47] Mr Liu is ordered to pay \$3,000 by way of penalty for his breach of the Holidays Act 2003. I direct that 50% of that amount (\$1,500) is to be paid to Mr Gibbes. The remaining 25% (\$1,500) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[48] Payment of the penalty is to be paid within 28 days of the date of this determination.

Costs

[49] Mr Gibbes was not represented and therefore does not claim legal costs. However Mr Gibbes has paid the Authority's filing fee of \$71.56. This fee is an amount reasonably recoverable from Mr Liu. I order Mr Liu to pay the sum of \$71.56 within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority