

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 426/10
5299345

BETWEEN ROYAL GURNICK
Applicant

AND TE NGAHUE ENTERPRISES
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: S Munro, Advocate for Applicant
No Appearance for Respondent

Investigation Meeting: 18 August 2010 at Thames

Determination: 30 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Gurnick, raises a number of claims. These were not clearly set out in the *Statement of Problem* received by the Authority on 16th March 2010, but Mr Gurnick's advocate, Mr Munro, has clarified the circumstances pertaining to Mr Gurnick's claims. And, combined with the evidence of Mr Gurnick on the day of the investigation, the Authority now understands the claims of Mr Gurnick to be:

- (a) Unjustified dismissal, effective from on or about 12th February 2010.
- (b) Unauthorised deduction from wages of the sum of \$422.04.

[2] The respondent, Te Ngahue Enterprises Limited ("TNE") did not file a statement in reply. Rather, a response was received by the Authority on 5th May 2010 from the company's accountant, in the form of a letter setting out the position of TNE. On the apparent instructions of Mr Kevin Murray, the Managing Director of TNE, the substance of the letter informs that:

- (i) Mr Murray overpaid holiday pay to Mr Gurnick and provided him with a calculation detailing the amount overpaid and Mr Murray advised that this would be deducted from the next pay, albeit Mr Gurnick did not accept the calculation sheet.
- (ii) The hourly rate of pay for Mr Gurnick was \$14.00 per hour.
- (iii) Mr Murray had noted that the work performance of Mr Gurnick “has consistently been poor.”
- (iv) Mr Gurnick had failed drug tests carried out at work and had to be sent home because of this.
- (v) Due to poor work attendance by employees, including Mr Gurnick, and failed drug tests resulting in absence from work, the company had lost the forestry contract and the jobs provided accordingly.
- (vi) The company has more liabilities than assets and “will most certainly be liquidated.”¹

Failure of the respondent to attend the investigation meeting

[3] On the day of the investigation meeting there was no appearance for the respondent albeit the Authority delayed commencing the meeting to allow for the possibility of a company representative arriving. Having been satisfied that the respondent was appropriately served with the notice of meeting² and given the general lack of involvement in the proceedings by Mr Murray on behalf of TNE, in all the circumstances, I considered it was appropriate to proceed in the absence of the respondent pursuant to Clause 12 of Schedule 2 to the Employment Relations Act 2000. It provides that:

“If without good cause shown, any party to a matter before the Authority fails to attend or be represented, the Authority may act as fully in the matter before it as if that party had duly attended or been represented.”

Background facts and evidence

[4] Mr Gurnick was employed as a labourer engaged in forestry related work including pruning and other silviculture related tasks. The payslips provided by him show that at the point of the termination of his employment he was being paid \$14.00

¹ The records of the Companies Office, as of the date of this determination, reveal that the company remains registered and is not in liquidation.

² Couriered to the address of the Managing Director and the company accountant.

per hour albeit it seems that he could be paid \$15.00 per hour for tree planting work. Mr Gurnick told the Authority that he worked with two other employees, one of whom was the son of Mr Murray.

[5] It appears that an issue arose around the payment of holiday pay due to Mr Gurnick at the end of 2009, when work ceased for the Christmas/New Year break. Mr Gurnick says that this was resolved by Mr Murray withdrawing \$1,200 in cash from a local bank and giving it to Mr Gurnick as holiday pay. It seems that Mr Gurnick only worked for a short time into 2010 and his last day of work was 11th February 2010. While there was no formal or written notification of such to Mr Gurnick, it appears that the employment of Mr Gurnick (and others) ceased due to the withdrawal of the silviculture contract by a well known forestry company. Mr Gurnick says that on 12th February 2010, he was informed by Mr Murray's son, Daniel Murray, that there was no longer any work available and that Mr Kevin Murray was going to Australia for two weeks.

[6] The evidence of Mr Gurnick is that he went to the office of the accountant for TNE to receive his final pay. What appears to be the final pay slip for Mr Gurnick, shows that he was due the gross sum of \$707.00 but when all deductions were made, including an "*overpayment*" of \$422.04, Mr Gurnick received nothing. Mr Gurnick says that there was no discussion with him about receiving an overpayment and having to repay it, and that with a young child and his partner expecting twins, he had no money to survive on.

Was TNE entitled to deduct the sum of \$422.04 from the final pay?

[7] The circumstances applying to Mr Gurnick and his employer are provided for by section 6 of the Wages Protection Act 1983. It allows that an employer may recover overpayments in certain circumstances.³ But particularly relevant to Mr Gurnick's situation, is subsection (3):

No employer shall recover an overpayment under subsection (2) of this section unless-

- (a) By virtue of the methods or equipment used by that employer in arranging the payment of, or paying , wages to the worker concerned, it was not reasonably practicable for that employer to avoid making the overpayment; and

³ Subsection (2).

- (b) Before recovering that overpayment, that employer gives that worker notice of the employer's intention to recover it; and
- (c) That notice is given-
 - (i) Not later than 10 days after the next pay-day, in the case of a worker who has no fixed workplace:
 - (ii) Not later than the first day upon which that worker attends that worker's workplace after the next pay-day during normal working hours, in the case of a worker with one fixed workplace who did not attend that workplace during normal working hours on the next pay-day:
 - (iii) Not later than the first day upon which that worker attends one of that worker's workplaces after the next pay-day during normal working hours, in the case of a worker with 2 or more fixed workplaces who did not attend any of them during normal working hours on the next pay-day;
 - (iv) Not later than the next pay-day, in every other case.
- (d) That overpayment is recovered not later than two months after that notice is given.

[8] The letter from the accountant for TNE (5th May 2010) conveys that notice was given to Mr Gurnick, along with a calculation, that an overpayment had been made to him and that this would be deducted from his next pay. But no evidence of any such notice has been produced. Nor has any evidence been produced as to what the alleged overpayment relates to or when the "next pay" would have been. The evidence of Mr Gurnick is that he never received any such notice. While I have considered the possibility that the evidence of Mr Gurnick has a self-serving basis, he presented as a credible witness, albeit perhaps lacking a full understanding of certain matters. It is possible that Mr Gurnick may have been overpaid in regard to the amount of holiday pay he received via the cash payment of \$1,200 he was given by Mr Murray, as mentioned above. However, in the absence of any tangible evidence to the contrary from TNE, I find that the company is in breach of the above provisions of the Wages Protection Act 1983 in that it was "reasonably practicable" for the employer to avoid making the alleged overpayment⁴ and notwithstanding this, proper notice was not given to Mr Gurnick of the employer's intention to recover the alleged overpayment of \$422.04⁵, hence the deduction of this sum is unlawful and it must be repaid to Mr Gurnick. An order will follow.

⁴ Section 6(3)(a)

⁵ Section 6(3)(b) and (c)

Was Mr Gurnick unjustifiably dismissed?

[9] In the event of a dismissal, on the ground of redundancy or otherwise, the test of justification that the Authority must apply is provided by section 103A of the Employment Relations Act 2000 (“the Act”), in that whether a dismissal was justifiable must be determined, 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 the circumstances.

[10] The overall evidence is that the loss of Mr Gurnick’s employment was due to TNE losing the forestry contract that provided his employment. As a consequence, the position held by him was redundant. Mr Gurnick accepts that this is so and hence the genuineness of the redundancy is not at issue. What is at issue is the manner in which Mr Gurnick lost his employment and the affect upon him.

[11] The evidence of Mr Gurnick is that he went to work on 12th February 2010 and was told by Mr Daniel Murray, the son of his employer, that because of the loss of the forestry contract, work was no longer available and that Mr Murray, the owner of the business, was leaving for Australia for two weeks. Mr Gurnick says that there was no prior notice that he was about to lose his employment. The manner in which Mr Gurnick lost his employment was not the action of a fair and reasonable employer and for the reasons that follow; I find that Mr Gurnick was unjustifiably dismissed. He has a personal grievance for which remedies are available to him pursuant to section 123 of the Act.

Notice

[12] There was not a written employment agreement in place and so apart from the obvious and unlawful failure on the part of the employer to consult with Mr Gurnick, as required by section 4(1A)(c) of the Employment Relations Act 2000 (and common law precedent), the further question for determination is: What would have been a reasonable period of notice to Mr Gurnick of the termination of his employment? While the Authority has not been informed of the precise circumstances relating to the loss of the forestry contract, in particular regarding how much notice was given to TNE, I conclude that in all the circumstances, Mr Gurnick was entitled to a minimum of two weeks’ notice and he should be paid for such accordingly. The pay records

provided by Mr Gurnick show that he worked an average of 40 hours each week and was paid \$14.00 per hour. Therefore, 40 hours x 2 x \$14.00 = \$1,120.00. An order will follow.

The effect of the unjustified dismissal

[13] Mr Gurnick gave evidence of the effect on him and his family of the sudden loss of income that arose. He told the Authority about having a young child and of his partner expecting twins, problems with paying the rent and of relying on WINZ and a food bank, until he managed to obtain employment again from 12th April 2010. The sudden loss of his employment clearly had an effect that should be addressed as envisaged by section 123(1)(c)(i) of the Act, albeit the majority of that effect would have been incurred even if the employer had consulted with Mr Gurnick and given appropriate notice, as the loss of the employment appears to have been inevitable. In all the circumstances, I conclude that an award of \$2,000 is appropriate. An order follows.

[14] Pursuant to section 124 of the Act, having found that a personal grievance exists, the Authority must consider the extent to which the actions of the employee contributed towards the situation which gave rise to the grievance and if those actions so require, reduce the remedies that would otherwise be awarded. In the letter on behalf of TNE (5th May 2010), it is posited that Mr Gurnick and other employees caused the loss of forestry contract by their tardy attendance and drug taking related absence. Mr Gurnick says that he has never been drug tested and he denies the allegations of poor attendance. In the absence of any tangible evidence relating to Mr Gurnick contributing to the situation that gave rise to the grievance, I conclude that the remedies awarded to Mr Gurnick should not be reduced.

Determination

[15] For the reasons set out above I find the following:

- (a) The deduction of the sum of \$422.04 from the final pay of Mr Gurnick was unlawful. Te Ngahue Enterprises Limited is ordered to repay to Mr Gurnick the net sum of \$422.04, within 30 days of the date of this determination.

- (b) The dismissal of Mr Gurnick was unjustified.
- (c) Pursuant to section 123(1)(b) of the Act, Te Ngahue Enterprises Limited is ordered to pay to Mr Gurnick two weeks' wages in lieu of notice, being the gross sum of \$1,120.00, within 30 days of the date of this determination.
- (d) Pursuant to section 123(1)(c)(i) of the Act, Te Ngahue Enterprises Limited is ordered to pay to Mr Gurnick the net sum of \$2,000.00 within 30 days of the date of this determination.

K J Anderson
Member of the Employment Relations Authority