

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 393
3020871

BETWEEN CAMERON HORE
 Applicant

A N D ACL CONSTRUCTION
 LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Peter McSkimming, Advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 14 December 2017 at Auckland

Date of Oral Indication: 14 December 2017

Date of Written
Determination: 18 December 2017

**WRITTEN DETERMINATION FOLLOWING ORAL INDICATION
OF THE AUTHORITY**

- A. Cameron Hore was unjustifiably dismissed by ACL Construction Limited (ACL). ACL is ordered to pay Mr Hore the sum of \$8,000.00 without deduction under s 123(1)(i)(c)(i) of the Employment Relations Act 2000, within 28 days of the date of this determination.**
- B. Within 14 days of the date of this determination ACL is to pay Mr Hore the following sums:**
- (i) \$1,943.50 gross in wage arrears;**
 - (ii) \$3,276.00 gross as wages in lieu of notice; and**
 - (iii) \$2,097.70 gross as holiday pay.**

Within 14 days of the date of this determination ACL is to pay to

- C. the Inland Revenue Department on Mr Hore's behalf:**
- (i) \$2,245.50 as employee KiwiSaver contributions;**
 - (ii) \$1,122.75 as employer KiwiSaver contributions; and**
 - (iii) the PAYE which it deducted from Mr Hore's wages.**
- D. A copy of this determination is to be provided to the Inland Revenue Department.**
- E. ACL is to pay Mr Hore \$1,500.00 as a contribution towards his costs and \$71.56 for the filing fee.**

Non-appearance by the Respondent

[1] The Applicant Cameron Hore filed his claim in the Authority on 16 October 2017. On behalf of the Respondent ACL Construction Limited (ACL or the company), Hedley Ruffell filed a statement in reply on 2 November 2017. Mr Ruffell is ACL's sole director and shareholder.

[2] A telephone conference was held on 9 November 2017 which Mr Ruffell participated in. Mr Ruffell indicated that there were sums owing to Mr Hore. A timetable was set for provision of documents and Mr Ruffell's witness statement, and the date of 14 December 2017 agreed for the investigation meeting. A minute was later sent to the parties setting out the timetable, along with a notice of the investigation meeting.

[3] ACL subsequently filed a summary of earnings document as directed by the Authority. However, Mr Hedley's witness statement was not filed as the Authority directed and, despite reminders from the Authority, no statement was received prior to the investigation meeting.

[4] I am satisfied that ACL was properly served with the notice of the investigation meeting. However, there was no appearance for ACL at the designated start time for the investigation meeting, namely 10am. An Authority officer telephoned Mr Ruffell's cell phone and left a message regarding the investigation meeting. After receiving no reply by 10.20 am, I commenced the investigation meeting.

[5] Mr Ruffell did subsequently telephone the Authority officer and say that he had the meeting in his diary for the following day. On being informed that the investigation meeting was proceeding Mr Ruffell expressed no concern and did not seek to have involvement or obtain an adjournment. I am therefore proceeding to issue this written determination.

Employment relationship problem

[6] Mr Hore and Mr Ruffell played cricket together for a few years. Then Mr Ruffell offered Mr Hore a job with ACL as an apprentice builder. Mr Hore had been working in a different role for a large company for a few years but gave that job up to come to work for ACL and start the apprenticeship. Mr Hore commenced with ACL on 20 February 2017.

[7] Mr Hore's employment agreement with ACL set out his normal hours of work. During the course of his employment Mr Hore had occasional difficulties getting either full or any payment for various weeks' wages.

[8] In the late afternoon of 6 July 2017 Mr Ruffell handed Mr Hore a letter. The letter was dated 19 June 2017 and stated that the employment agreement between ACL and Mr Hore would be terminated on 16 July 2017. Mr Hore noted on it that it was received on 6 July 2017.

[9] The following day, having taken a photo of it, Mr Hore handed the letter back to Mr Ruffell with the note about receipt time and that Mr Hore was owed various wage amounts and that payslips had not been given.

[10] On 11 July 2017 Mr Hore gave Mr Ruffell a letter outlining his personal grievance claim for unjustified dismissal. Mr Ruffell responded by telling Mr Hore to "fuck off" from the job. Mr Hore left the worksite and did no further work for ACL.

[11] Mr Hore claims that ACL breached his employment agreement, failed to pay all of his wages, failed to pay his notice period and holiday pay and unjustifiably dismissed him. ACL's statement in reply refers to Mr Ruffell being unable to financially support himself and Mr Hore.

[12] At the investigation meeting on 14 December 2017 I heard evidence from Mr Hore. I then gave an oral indication of my preliminary findings.

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

The issues

[14] The issues for investigation and determination are:

- (a) Was Mr Hore unjustifiably dismissed by ACL?
- (b) If so, what remedies, if any, should he receive?
- (c) Does ACL owe Mr Hore any arrears of wages and, if so, how much?
- (d) Does ACL owe Mr Hore any holiday pay and, if so, how much?
- (e) Does ACL owe Mr Hore wages regarding the notice period?
- (f) Does ACL owe any money regarding Kiwisaver contributions?
- (g) Should either party be required to contribute to the other's costs?

Wages problems

[15] Mr Hore had difficulties getting his wages paid properly by ACL but was assured by Mr Ruffell that everything would be sorted out. While at ACL he did not receive any payslip or other record setting out what payments ACL was making. He had asked about pay slips but that was brushed off by Mr Ruffell.

[16] In June 2017 Mr Hore was trying to compile his income tax return and wrote to Mr Ruffell asking for a copy of his wage records from the start of his employment. These were not provided in response, despite ACL's obligation under s 130(2) of the Act to provide wage and time records on an employee's request.

[17] Mr Hore also raised with Mr Ruffell the fact that IRD appeared not to have received any PAYE payments from ACL on Mr Hore's behalf.

The dismissal

[18] Prior to the dismissal Mr Hore had not been the subject of any disciplinary action. He considered that he had been working hard for ACL, that he was punctual and worked longer hours than the employment agreement required him to. The company seemed to have plenty of work on over a number of sites.

[19] I find credible Mr Hore's evidence that the dismissal letter, although dated 19 June 2017, was not given to Mr Hore until 6 July 2017, almost three weeks later.

[20] Mr Hore was surprised to receive the dismissal letter out of the blue. He was not aware of any difficulties with his work, or with the state of the business. He now wonders whether his raising of the issues about payslips, and the PAYE not being paid by ACL to IRD, were behind the dismissal. The date on the dismissal letter is the same day that Mr Hore requested his wage records in writing.

[21] The dismissal letter does not offer any reason for the termination. Mr Ruffell said at the time the letter was given that there was a conflict of personalities. Presumably this referred to between Mr Ruffell and Mr Hore, as they were the only two people working for ACL. This comment also surprised Mr Hore, as the two men had played in the same cricket team over a few seasons and so knew each other prior to working together. The statement about conflict does not appear consistent with the financial situation referred to in the statement in reply which suggests a redundancy scenario.

[22] I find that Mr Hore was dismissed by ACL on 11 July 2017 when he was told to leave the workplace. There was no evidence of any attempt by Mr Ruffell to seek Mr Hore's return to work.

Unjustified dismissal

[23] Under s 103A of the Act I must determine whether on an objective basis, ACL's actions were what a reasonable employer could have done in all the circumstances.

[24] In doing so I must consider under s 103A(3) whether the employer :

- (a) Having regard to the resources available, sufficiently investigated the allegations against the employee before dismissing;
- (b) Raised the concerns with the employee before dismissing;
- (c) Gave the employee a reasonable opportunity to respond to the employer's concerns; and
- (d) Genuinely considered the employee's explanation (if any).

[25] I recognise that this was a very small employer. However, I cannot see why having a discussion with Mr Hore about what any issues were and what he had to say for himself, was beyond the capabilities of ACL.

[26] Mr Hore was simply presented with a *fait accompli* in the form of a letter advising him of the termination of his employment. The reason for the dismissal is not clear and I do not find that there was any good reason to dismiss him. None of the steps outlined in s 103A(3) of the Act were followed. If this was a redundancy situation, then the requirements of the agreement and the Act for consultation, were not followed.

[27] There is also the issue of the failure to allow Mr Hore to work out the notice period or pay him in lieu thereof. Mr Hore raising a personal grievance claim is not a justification for sending him away from his workplace and not allowing him to work out his notice period, or paying him in lieu thereof.

[28] There can be no doubt that Mr Hore's dismissal was not carried out in a manner which a fair and reasonable employer could have adopted. There was no discussion with him beforehand. He was simply handed the decision in writing with a lack of clarity about any reason for the decision. When he challenged that decision he was sent away and not provided with the notice period which the agreement specified. Mr Hore was unjustifiably dismissed by ACL.

Remedies

[29] Mr Hore does not make a claim for lost wages as such. He only claims payment for the unpaid remainder of the notice period, which is dealt with below under arrears.

[30] Mr Hore does claim compensation for the humiliation, loss of dignity and injury to feelings caused by the dismissal.

[31] The dismissal had a stressful effect on Mr Hore. His family was suddenly left without income. His partner worked part time and they have a child to support. Mr Hore was worried about them. He had to immediately find other employment. It also became apparent after the dismissal that the employer had not forwarded either PAYE payments to IRD, or Kiwisaver contributions as it is required to do under the Kiwisaver Act 2006.

[32] Mr Hore had given up a position with a well-established employer to work for a man he thought that he could rely on due to their sporting connection. He was excited by the prospect of becoming a builder and had paid all his apprenticeship fees up front as he was expecting the ACL position to be long term. Instead he was very disappointed to be dismissed out of the blue without there being any apparent reason for that to happen.

[33] In these circumstances I order ACL to pay to Mr Hore \$8,000.00 under s 123(1)(c)(i) of the Act. I do not find there to be any contribution by Mr Hore to his dismissal.

Wage records

[34] Despite requests, while Mr Hore was working at ACL, he was not provided with any weekly payslips or other payment records showing details of his wages, hours worked, or deductions. However, it is apparent from his bank account records, filed in the Authority, that on a number of occasions he did not receive his standard pay.

[35] As directed by the Authority, Mr Ruffell for ACL filed a summary of earnings document. The summary appears to be a typed list rather than something electronically generated. It indicates that deductions were made from Mr Hore's gross salary for tax, his Kiwisaver contributions and notes the employer's Kiwisaver contributions. There is no net wage figure stated.

[36] Mr Hore's bank records show that amounts which he actually received in some weeks were less than the usual net figure, whereas the summary which Mr Ruffell provided showed standard entries for those weeks which should have resulted in the usual net payment. I am therefore not satisfied with the validity of the summary. I accept the accuracy of Mr Hore's bank records to show what he received.

Wage arrears

[37] Mr Hore claims that ACL did not pay him wages due at various times over his employment. In the pay week 17 to 21 April 2017 Mr Hore was paid less than the usual payment, and this appears to be on the basis of a failure to pay for 45 minutes of

work. There was no explanation for this non-payment. I find that ACL owes Mr Hore \$19.50 gross in arrears for that week.

[38] For the week of 24 to 28 April 2017 Mr Hore should have been paid \$1,092 gross and did not receive any payment. AWL owes him that sum in arrears.

[39] For the four weeks from 19 June to 14 July 2017 Mr Ruffell told Mr Hore not to come in to work on the Mondays and did not pay him for those days. I find that he should be paid for that time as it was part of the normal hours of work in his employment agreement and he had not agreed to have unpaid leave for those days. ACL owes Mr Hore four days at \$208 per day (for an eight hour day), totalling \$832.00 gross. The total arrears owing is therefore \$1943.50 gross¹.

[40] Mr Hore also claims \$3,276 gross being three weeks' notice period, at the standard rate of \$1092 gross per week. I accept that Mr Hore was entitled to four weeks' notice, but did not receive it all, in either work time or payment in lieu of notice and ACL owes him \$3,276 gross.

[41] Regarding holiday pay, Mr Hore claims holiday pay for the period of his employment. He did not take any paid leave during the time that he worked for ACL and was not paid any holiday pay on termination. I order ACL to pay Mr Hore the sum of \$2,097.70 gross as holiday pay.

Non-payment of tax by ACL

[42] Mr Hore discovered that IRD has no record of receiving any payments from ACL for Mr Hore's PAYE despite deductions being made from Mr Hore's wages. Mr Hore's IRD account information filled in the Authority confirms this.

[43] I order ACL to pay directly to IRD Mr Hore's PAYE deductions within 14 days of the date of this determination. A copy of this determination is to be provided to IRD.

Non-payment of Kiwisaver contributions by ACL

[44] Mr Hore was a Kiwisaver member prior to starting at ACL. At the start of his employment Mr Hore instructed ACL to deduct 8% of his wages to lodge with IRD

¹ \$19.50, \$1,092.00 and \$832.00

for his Kiwisaver account. The summary provided by Mr Ruffell shows deductions made for Mr Hore's Kiwisaver contributions.

[45] Under the employment agreement ACL agreed to pay an employer Kiwisaver contribution 4% of gross salary or wages.

[46] As far as Mr Hore has been able to determine, without having accurate time and wage records or payslips, if he had been paid correctly ² a total of \$2,079.17 would have been deducted from his wages as his Kiwisaver contributions with a further \$166.33 contribution coming from his holiday pay. In total \$2,245.50 should have been deducted and paid to IRD.

[47] However, after his employment ceased Mr Hore made contact with IRD which informed him that no employee or employer contributions have been lodged by ACL since the commencement of his employment with the company. This is evidenced by a summary of transactions provided by IRD.

[48] On contacting IRD Mr Hore was informed that his Kiwisaver account was in "holiday" mode. He initially understood that this was a result of non-payment of Kiwisaver contributions by ACL, but later discovered that was not the case. The holiday mode did not prevent Mr Hore's employer immediately prior to ACL making contributions on his behalf, recorded in the transactions summary.

[49] I order ACL to pay to IRD on Mr Hore's behalf the sum of \$2,245.50 to being deductions from his wages made for the purposes of going to Kiwisaver but not actually paid.

[50] I further order ACL to pay to IRD the sum of \$1,122.75 being the 4% employer contribution which the company should have paid based on Mr Hore's actual earnings and the sums which I have found in wages and holiday pay that ACL owes Mr Hore.

Costs

[51] Mr Hore seeks payment of his costs and other expenses incurred in relation to the pursuit of this claim. Some of these costs relate to Mr Hore's participation in

² Ie there was no outstanding wage arrears or notice

mediation. Mediation costs are not usually claimable through the Authority's process and I make no award for them.

[52] I am satisfied that Mr Hore has incurred expenses for advice as a result of having to bring this proceeding. These include advice obtained from a lawyer about his situation at a cost of \$803.56 inclusive of GST. The investigation meeting lasted slightly less than two hours. The Authority's notional daily tariff for a day's investigation meeting is \$4,500. I order ACL to pay Mr Hore the sum of \$1,500.00 as a contribution towards his costs and \$71.56 as the filing fee in the Authority.

Nicola Craig
Member of the Employment Relations Authority