

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 382
5452498**

BETWEEN DANIEL HARDING
Applicant
AND M.S.J. LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Dean Organ, Advocate for Applicant
Mark Nutsford, Advocate for Respondent
Investigation Meeting: 28 August 2014 at Auckland
Submissions received: 28 August 2014 from Applicant and from Respondent
Determination: 15 September 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Daniel Harding, claims that he was unjustifiably dismissed by the Respondent, M.S.J. Limited (MSJ) on 24 December 2013.

[2] Mr Harding further claims penalties in respect of breaches by MSJ by its failure to pay his wages, by its failure to pay him outstanding holiday pay entitlement in accordance with s 25 of the Holidays Act 2003, by the making of unlawful deductions from his final pay, and that it breached the Employment Relations Act 2000 by failing to provide him with a written employment agreement.

[3] MSJ denies that Mr Harding was unjustifiably dismissed and claims that he was justifiably dismissed by reason of redundancy.

[4] MSJ further claims that the failure to supply a written employment agreement was not deliberate, and that all outstanding holiday entitlements have now been paid to Mr Harding.

Issues

[5] The issues for determination are whether or not:

- Mr Harding was unjustifiably dismissed by MSJ
- MSJ should be penalised in respect of:
 - The failure to pay wages and holiday pay pursuant to s. 25 of the Holidays Act 2000
 - Making deductions from Mr Harding's final pay: s.4 of the Wages Protection Act 1983
 - The non-provision of a written employment agreement

Background Facts

[6] MSJ is an operating entity which trades as Superior Sheds, a stand-alone business specialising in the construction of farm buildings and sheds. MSJ operates from the home property of Mr Michael Siemelink and his wife, Mrs Sheree Siemelink, joint directors and shareholders of MSJ.

[7] MSJ had employed tradespeople as employees previously, but at the time of Mr Harding's employment it engaged only independent contractors. Work was allocated as it was obtained and necessitated the independent contractors travelling to various locations.

[8] Mr Harding responded to an advertisement placed by MSJ on Trade-me and was employed as a Hammerhand/Carpenter on or about early-September 2013. Mr Siemelink said his preference had been to engage Mr Harding as an independent contractor, however Mr Harding's preference had been for employment and that had been agreed.

[9] Mr Harding's hours of work were agreed to be between 7.00 a.m. to 5.00 p.m. Monday to Friday and he worked an average of 40 hours per week, occasionally working overtime for which he was reimbursed, and he was received an hourly rate of \$19.00.

[10] Mr Harding said that he had requested a written employment agreement from Mr Siemelink on many occasions, however one had not been provided.

[11] Mr Siemelink said he did not recall Mr Harding ever requesting a written employment agreement; however he had previously provided written employment agreements to MSJ employees in the past, and he had intended to do so on this occasion.

[12] He had decided to wait a few weeks to ascertain Mr Harding's work standard and see if \$19.00 per hour had been a fair rate of hourly pay before finalising the employment agreement. However he had subsequently forgotten to issue a written employment agreement and Mr Harding had not reminded him to do so.

[13] Mr Harding worked mainly under the supervision of Mr Blake Coulter, a contractor who had worked for MSJ for approximately three years. He also worked alongside various other contractors from time to time.

[14] Mr Harding's relationship with Mr Siemelink was limited, but both described it as a good working relationship, Mr Siemelink stating that he and Mrs Siemelink had been pleased with the standard of Mr Harding's work. Mr Harding said he had rarely had contact with Mrs Siemelink whose role was largely administrative.

[15] Mr Harding said that towards the latter part of his employment with MSJ he had found Mr Siemelink to be: "*grumpy*" towards him.

[16] Mr Siemelink said he had not been aware that his attitude may have appeared unfriendly to Mr Harding, but that by October 2013 he and Mrs Siemelink had become increasingly concerned about the financial position of MSJ, which had been exacerbated when the 3 anticipated jobs that month had not eventuated. He agreed that he had been stressed and that this may have affected how he had responded to Mr Harding at that time.

Meetings 9 December 2013

[17] Mr Siemelink said that by the end of November 2013 the financial situation of MSJ had become severe, and on 9 December 2013 he had held separate meetings with Mr Harding and Mr Coulter.

[18] During the meetings Mr Siemelink said he had advised Mr Harding and Mr Coulter that he was concerned about the situation regarding future income for MSJ, and that there was little work in place for the future months. He had also expressed his concern about the ability of MSJ to pay wages after Christmas 2013, and that he might have to stop engaging and employing either or both of them unless the situation improved.

[19] Mr Harding denied that the alleged meeting had been held with him on 9 December 2013.

[20] Mr Coulter said that he had been advised by Mr Siemelink at a meeting held on 9 December 2013 of both the financial situation of MSJ and the prospect of on-going work being limited after Christmas 2013.

[21] Mr Coulter said that whilst he had not been aware of the financial situation of MSJ prior to the meeting, he had been aware by December 2013 that of on-going work for MSJ being sparse from the beginning of 2014.

[22] He also confirmed that during the meeting Mr Siemelink had asked him his opinion about which independent contractors needed to be retained, and he had suggested that Mr Harding be released, as his understanding had been that Mr Harding was also an independent contractor and as the last one engaged by MSJ, he should be the first to leave. He had understood that Mr Siemelink was then intending to speak to Mr Harding.

[23] Mr Kane Parker, a contractor to MSJ for approximately 2 years, said he had had a conversation with Mr Harding in early December 2013 during which Mr Harding had told him he was: “going *take the Siemelinks for everything they had*”.

[24] Mr Coulter confirmed that he had overheard the comment and intervened in the conversation between Mr Harding and Mr Parker and told Mr Harding to desist making such comments about Mr and Mrs Siemelink.

21 – 25 December 2013

[25] Mr Harding said that on Saturday 21 December 2013 Mr Siemelink spoke to him as he was leaving and had informed him that there would be no work until early February 2014. Mr Siemelink had also told him that if he found alternative work; there would be no objection to his taking it.

[26] Mr Siemelink confirmed that as there had been no further work forthcoming for MSJ by the end of the year, he had told Mr Harding on 21 December 2013 that there would be no further work for him until February 2014.

[27] He stated at the Investigation Meeting that he had not told Mr Harding his position was being made redundant. He confirmed that he had advised Mr Harding that if alternative work presented itself, he should accept it, but also advised him that there should be work again in February 2014.

[28] Mr Siemelink said Mr Harding had not appeared surprised and had indicated that he understood the situation.

[29] Mr Harding said he had viewed the information from Mr Siemelink about the lack of work in December 2013 and January 2014 in the light of an extended holiday, and had believed that his employment with MSJ would resume in February 2014.

Email exchange 22 to 24 December 2013

[30] Mrs Hayley Harding said that Mr Harding had mentioned to her that he needed to email his hours through to Mrs Siemelink for payment as was the standard practice, and she had mentioned that he should check when his holiday pay would be paid, whether in weekly payments or in one total payment.

[31] Accordingly on 22 December 2013 Mr Harding emailed Mrs Siemelink outlining the hours he had worked during the previous week and asking:

*Also can u please confirm that I am being paid all my holiday pay,
And all public holidays to the end of January as there is no work till
February.*

[32] Mrs Siemelink had responded by email dated 24 December 2013 attached to which was a letter dated 22 December 2013 which stated:

Dear Daniel,

Please find attached your final pay calculations ...

*We also have a couple of invoices that you have charged on our
account at Mitre 10, as per attached, this totals \$525.51. This makes
the total balance due to you \$1,276.84.*

*Unfortunately as discussed with Mike Siemelink, due to a decline in
our workload we have no more work for you and regret to have to
make your position redundant. ...*

*Please return by email that you accept this as full and final pay and
shall have no further claims against Michael or Sheree Siemelink,
M.S.J. Limited – T/A Superior Sheds.*

[33] In the email to which the letter was attached Mrs Siemelink had stated: “*any queries please phone me ...*”

[34] Mr Harding received a further email from Mrs Siemelink that same day, 24 December 2013, telling him to reply to a different email address.

[35] Mr Harding said he had been angry when he had received the emails and letter from Mrs Siemelink, and had responded by email to Mrs Siemelink dated 25 December 2013 stating:

I do not except (sic) this as the situation surrounding my position differs from what was said to me verbally by Michael siemelink. I was told that there was no work for me till early feb. Not that I was no longer employed by you. I will be passing all information on to my employment lawyer.

[36] Later that same day he had sent a second email headed: "PAY" and stating:

Can u please confirm that I am paying the exclusive of gst prices at mitre 10 as per my conversation with Michael Siemelink the amounts are differing from what was said to me.

[37] Mr Harding explained that the second email he had sent on 25 December 2013 had referred to an arrangement whereby MSJ allowed him to purchase items for his own personal use on their Mitre 10 account at GST exclusive prices.

[38] Mrs Siemelink said her understanding had been that Mr Harding's employment was to be terminated on 21 December 2013, and that he would be contacted if the financial situation improved, at which stage he would be re-employed. She had described Mr Harding's employment as being: 'redundant' as she thought there had to be a reason for the ending of the employment relationship, and as he had been: "laid off", she thought his position had been made redundant.

[39] Mrs Siemelink said she had shocked when she had received Mr Harding's email dated 25 December 2013 saying he did not accept the situation and that he was going to engage an employment lawyer.

[40] As Mr Harding had stated that he would be seeking legal advice, Mrs Siemelink said that she had not responded to his email dated 25 December 2013, and had not paid the outstanding holiday pay entitlement as there was a dispute concerning the Mitre 10 purchases made by Mr Harding.

[41] The parties subsequently attended mediation, but this did not resolve matters, and on 18 March 2013 Mr Harding filed a Statement of Problem with the Authority.

Determination

Was Mr Harding unjustifiably dismissed by MSJ?

[42] Mrs Siemelink stated that her understanding had been that Mr Harding's position was redundant.

Genuine reason for the redundancy

[43] It was the evidence of Mr and Mrs Siemelink at the Investigation Meeting that the financial situation of MSJ was precarious. I am satisfied that financial evidence filed with the Authority subsequent to the Investigation Meeting corroborates the financial situation of MSJ as serious and that such financial difficulties would provide a genuine reason for a redundancy situation arising .

[44] However the employer must not only have a genuine reason for a redundancy situation, but must also treat the employer in a fair and reasonable manner, acting in good faith throughout.

Fair Procedure

[45] The Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) addresses the question of whether or not an action was justifiable or was unjustifiable and states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[46] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for

parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[47] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act, in particular there must be consultation prior to a decision being made¹.

[48] Mr Siemelink stated that he had met with Mr Harding on 9 December 2013 and advised him of the financial situation MSJ was facing, and that he might not have continued employment as a result.

[49] Mr Harding denied this meeting had taken place, and whilst Mr Coulter’s evidence was that he had understood it to have taken place because he had met with Mr Siemelink that same day, he was not present at any meeting between Mr Harding and Mr Siemelink.

[50] Even had the meeting taken place, there is no evidence that Mr Harding was presented at that meeting with information relevant to continuation of his employment or provided with an opportunity to comment on it prior to a decision being made.

[51] Mr Harding said that he had not been advised that his position was redundant by Mr Siemelink on 21 December 2013, his understanding had been that he was being placed on extended leave with work resuming in February 2014.

[52] Mr Siemelink confirmed in his evidence was that whilst he had advised Mr Harding on 21 December 2013 that he would not be provided with work during January 2014, he had not told him that he was being made redundant. Furthermore he confirmed that he had told Mr Harding that there would be work for him on or about February 2014.

¹ *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825,842

[53] Mrs Siemelink said her understanding had been that Mr Harding had been made redundant, and she had written the letter dated 22 December 2013 on the basis of that understanding.

[54] Whilst Mrs Siemelink had invited Mr Harding to contact her if he had any queries in the email dated 22 December 2013, I find that this falls short of a consultation process as by that stage the decision to make Mr Harding's position redundant had been presented as a *fait accompli*. Accordingly I find that Mr Harding's position with MSJ had been made redundant without MSJ following a fair and reasonable procedure.

[55] I note that MSJ is a small business without the resources available to a larger employer and that it states in s 103A (5) of the Act that:

The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-

(a) Minor; and

(b) Did not result in the employee being treated unfairly.

[56] I find in this case however that the defects in the process were not minor and they resulted in Mr Harding being treated unfairly in that he was deprived of any opportunity to comment on the redundancy proposal prior to a final decision in the matter being taken.

[57] I determine that Mr Harding was unjustifiably dismissed by MSJ.

Remedies

[58] Mr Harding has been unjustifiably dismissed and he is entitled to remedies.

Lost Wages

[59] Mr Harding provided evidence to the Authority of his efforts to mitigate his loss following the termination of his employment with MSJ. He did not obtain full-time employment until 16 June 2014, although he obtained one temporary position as a contractor for a period of 2 weeks.

[60] I am satisfied by the financial evidence provided to the Authority, that MSJ is in severe financial difficulties, and that this was the situation at the time of Mr Harding's employment being terminated, and that redundancy may have become a reality in the early

part of 2014, which would by necessity impact on the prospect of his on-going employment with MSJ.

[61] In these circumstances I order MSJ to pay Mr Harding the sum of \$8,480.00 gross inclusive of 2 weeks in lieu of notice (calculated as \$19.00 per hour x 40 hrs per week x 13 weeks, less \$1,400.00 earned as a contractor during the period) in respect of lost wages pursuant to s 128(2) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[62] Mr Harding is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Mr Harding suffered hurt and humiliation in addition to financial difficulties which impacted on him and his family.

[63] I order MSJ pay Mr Harding the sum of \$4,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Interest

[64] Mr Harding has applied for interest on the outstanding sums owed to him.

[65] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum².

[66] I consider that it is appropriate that MSJ is ordered to pay interest on the outstanding sums owed to Mr Harding.

[67] MSJ is to pay interest of 5% on the outstanding sums due to Mr Harding from the date of determination until the amounts owed are paid in full.

Contribution

[68] I have considered the matter of contribution as I am required to do under s124 of the Act. There is no evidence that Mr Harding contributed to the situation which gave rise to the grievances. There is to be no reduction in remedies.

Instalments

[69] The Authority may order that the above amounts payable to Mr Harding by MSJ be paid by instalments pursuant to s 123(2) of the Act which states:

² Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

When making an order under subsection (1)(b) or (c), the Authority or court may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[70] In this case I am satisfied that the financial circumstances of MSJ require that payments of the sums owed to Mr Harding should be by instalments. The parties are urged to agree the instalment amounts between themselves, but if they are unable to do so leave is reserved to return to the Authority.

Should MSJ be penalised in respect of the breaches claimed by Mr Harding?

The failure to pay wages and holiday pay pursuant to s 25 of the Holidays Act 2003:

[71] Mr Harding has made no claim that he was not paid in full and on time throughout the period of his employment with MSJ. Consequently this is a claim that he was not paid his final wage payment and outstanding holiday pay entitlement in a timely manner.

[72] I note that Mr Harding received his final salary payment and outstanding holiday pay entitlement following MSJ appointing Mr Nutsford and acting on his advice in this matter, and it is no longer outstanding.

[73] I find that the non-payment arose in circumstances in which there was an understanding, albeit mistaken, on the part of MSJ that the figure amounts due to Mr Harding were in dispute and had not been agreed and that, in that situation, it was entitled to withhold the payment pending agreement on the final sum. Once advice had been received that this was not correct, MSJ paid the outstanding amount in a timely manner.

[74] I do not find that a penalty against MSJ is warranted in this situation.

Making deductions from Mr Harding's final pay: s 4 Wages Protection Act 1983

[75] Deductions from wages are in accordance with s. 5 of the Wages Protection Act 1983 are only to be made with the written consent of the worker. In this case there is no written employment agreement, and no consent has been provided in writing.

[76] However I find that the email from Mr Harding to Mrs Siemelink on 25 December 2013 indicates that Mr Harding accepted that he had responsibility for reimbursing the purchases made by him on the MSJ Mitre 10 account.

[77] In this situation therefore, I do not find that a penalty against MSJ is warranted.

Failure to provide a written employment agreement

[78] Mr Siemelink said that MSJ's failure to provide Mr Harding with an employment agreement was an oversight, rather than a deliberate act. He also said at the Investigation Meeting that an employment agreement had previously been issued to MSJ employees.

[79] On that basis, I am not persuaded that MSJ had intended not to issue an employment agreement to Mr Harding, and that the situation may have been rectified in due course.

[80] However in the circumstances in which MSJ initially advised Mr Harding that he was to be without work for a period from the end of December 2013 until at the earliest February 2014, and subsequently advised him that his position had been made redundant, I find that the lack of an employment agreement adversely affected him by depriving Mr Harding of knowledge of the agreed terms and conditions of his employment and of the process for addressing employment relationship issues.

[81] The then Chief Judge Goddard considered the question of whether or not to award penalties in the Employment Court case *Xu v McIntosh*³, and observed that there are three issues to be considered:

- i. How much harm has the breach occasioned?*
- ii. How important is it to bring home to the party in default that such behaviour is unacceptable?*
- iii. Was the breach technical and inadvertent or was it flagrant and deliberate?*

[82] I find that Mr Harding as a result of not being provided with an employment agreement was placed in a position of uncertainty regarding the terms of his employment at a time when his continued employment with MSJ was uncertain. However I do not find that the breach to have been flagrant and deliberate.

[83] Nonetheless MSJ was required to provide Mr Harding with an employment agreement in accordance with the legislative requirements. I consider that public policy considerations require employers to act responsibly in adhering to statutory imperatives.

³ [2004] 2 ERNZ 448

[84] MSJ is ordered to pay a penalty of \$1,000.00 for the non-provision of an employment agreement to Mr Harding, of which \$250.00 is to be paid to Mr Harding, and \$750.00 is to be paid to the Crown.

Costs

[85] Costs are reserved. I consider that this is an appropriate case for letting costs lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve the matter between them. If they are unable to do so, the Applicant may file and serve memorandum to costs within 28 days with reply submissions to be lodged within 14 days of the days of receipt. I will not consider any costs submissions outside that time frame.

Eleanor Robinson
Member of the Employment Relations Authority