

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 48  
5568135

BETWEEN            JOHN HAREN  
                                 Applicant

A N D                SHANE LACEY  
                                 Respondent

Member of Authority:    Peter van Keulen

Representatives:        Applicant in person  
                                 Respondent in person

Investigation Meeting:    12 April 2016 at Christchurch

Submissions Received:    Oral submissions from Applicant on 12 April 2016  
                                 Oral submissions from Respondent on 12 April 2016

Date of Determination:    15 April 2016

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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- A.    The applicant has not raised personal grievances for unjustified dismissal and unjustified action causing disadvantage within the 90-day timeframe.**
- B.    I do not grant the applicant leave to raise personal grievances for unjustified dismissal and unjustified action causing disadvantage outside of the 90-day timeframe.**
- C.    I decline the applicant's claim for wage arrears, other remuneration and expenses associated with the performance of his job or its termination.**
- D.    I decline the applicant's claim for payment of one month's notice.**

**E. I do not impose a penalty against either party for breach of the duty of good faith.**

**F. Costs are reserved.**

### **Employment relationship problem**

[1] In a statement of problem lodged on 16 July 2015 the applicant, Mr Haren, claims:

- (a) He was not paid correctly by his employer, Mr Lacey, for the work he undertook between 16 March 2015 and 28 April 2015;
- (b) He should be paid for expenses incurred in relocating and performing his employment;
- (c) That his employment was terminated for redundancy and he is entitled to one month's notice.

[2] Mr Lacey responds by saying he paid Mr Haren correctly for the work he did including any entitlements and he does not owe Mr Haren anything.

[3] Further, Mr Lacey states there was no agreement regarding the expenses claimed by Mr Haren. He also states that he did not make Mr Haren redundant but rather he walked out of his job and is not entitled to any notice payment.

### **Preliminary matter**

[4] In a statement of evidence dated 18 March 2016, Mr Haren claims he was constructively dismissed and that he has a personal grievance for unjustified disadvantage. He concludes his evidence by saying he is seeking the following remedies:

- a. lost wages and accrued annual leave;
- b. compensation in the sum of \$8,000 for unjustified dismissal;
- c. compensation in the sum of \$3,000 for unjustified disadvantage;
- d. reimbursement for expenses and costs incurred in moving to Christchurch and back to Auckland;

- e. penalties for breach of contract and breach of good faith;
- f. the costs of making the application including all legal costs;
- g. costs for travel, accommodation, and car rental incurred in attending the investigation meeting.

[5] If these grievances are first raised in the statement of evidence they are clearly outside of the 90-day period<sup>1</sup> from when the grievances are alleged to have occurred.

[6] Mr Lacey objects to the raising of personal grievances outside of the 90-day period. He also notes that Mr Haren has not sought leave from the Authority to raise these grievances outside of the 90-day period.

[7] In response to my question about the personal grievances being raised in time, Mr Haren says:

- a. He believes his statement of problem has raised the grievances as this refers to Mr Lacey's failure to agree the terms of employment. And this gives rise to his grievances. All of his issues set out in the statement of problem are the grievance;
- b. In any event he is not a lawyer and did not understand the requirements, so he sought advice from the Ministry of Business, Innovation and Employment and followed the process he was advised to follow;
- c. He intended to use mediation as the opportunity to discuss his grievances but Mr Lacey refused to attend mediation. If his correspondence or the statement of problem did not raise the grievances then Mr Lacey's refusal to attend mediation meant he did not get the chance to fix that.

[8] Mr Haren was aware of the requirement to notify Mr Lacey of any grievance within 90 days. This was set out in a draft employment agreement that he had received from Mr Lacey and was part of the information he received from MBIE.

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<sup>1</sup> s 114 of the Employment Relations Act 2000

[9] I am satisfied that at the time that Mr Haren's employment came to an end he believed that Mr Lacey was responsible for failing to agree the terms of his employment and Mr Lacey had terminated his employment, as there was insufficient work, which he took to mean he had been made redundant.

[10] As a result, Mr Haren believed he had claims against Mr Lacey for contractual entitlements including a notice payment. He also believed he was entitled to expenses incurred by him in carrying out his employment duties and relocation costs, as that money was lost because of Mr Lacey terminating his employment.

[11] These claims and the basis for them are set out in the statement of problem and the correspondence inviting Mr Lacey to attend mediation is consistent with this.

[12] Therefore, Mr Haren raised the claims he believed he had against Mr Lacey within the 90-day period. However, these claims were not the personal grievances he subsequently alleged he had in his witness evidence.

[13] Mr Haren has not raised personal grievances for unjustified dismissal or unjustified action causing disadvantage in any correspondence. There was no letter raising a personal grievance of any kind. There was an email exchange inviting Mr Lacey to mediation to "*sort out the wages owed to me and the contract issues.*"

[14] Mr Haren then lodged his statement of problem, and again, there is no reference to a personal grievance. The only reference to termination of employment is a reference to termination because of "*the employer not having any work, the redundancy clause would be invoked meaning a months' notice \$4,800 gross pay*". The statement of problem has not raised the personal grievances for unjustified dismissal or unjustified action causing disadvantage.

[15] Section 114 of the Employment Relations Act 2000 (the Act) provides:

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer with the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) ...

(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

- (a) Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and
- (b) Considers it just to do so.

[16] Section 115 of the Act provides:

For the purposes of section 114(4)(a), exceptional circumstances include –

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of the employment relationship problems that is required by section 54 and section 55, as the case may be; or
- (d) where the employer has failed to comply with the obligations under section 120(1) to provide a statement of reasons for dismissal.

[17] I am not satisfied that there are special circumstances or that it is just for me to grant leave to raise the personal grievances outside of the 90-day period.

### **Issues**

[18] The claim to contractual entitlements and expenses associated with relocating and performing the required work requires me to consider:

- a. What were the terms of employment for Mr Haren?

- b. What work did Mr Haren perform?
- c. What payments did Mr Haren receive?
- d. What should Mr Haren have been paid based on the terms of employment that were agreed and the work undertaken by him.
- e. Is there an amount owing to Mr Haren?

[19] The questions I must answer regarding the claim for notice for the termination of employment are:

- a. How did Mr Haren's employment end?
- b. If Mr Haren was dismissed, because of redundancy or otherwise, is he entitled to a payment for notice?

[20] Mr Haren and Mr Lacey both seek penalties against the other for breaching the duty of good faith. So I must also consider if either of them has breached the duty of good faith and if so, does the breach warrant the imposition of a penalty.

### **Facts giving rise to the employment relationship problem**

[21] Mr Haren and Mr Lacey are cousins. They have known each other all of their lives and have socialised within their family throughout this time.

[22] In early 2015 Mr Haren and Mr Lacey met each other under unfortunate circumstances. Mr Lacey's mother was ill and was in hospital. She subsequently passed away. During the course of his mother's illness and subsequently, Mr Lacey met Mr Haren and they had some discussions around Mr Lacey's proposed new business venture and the possibility of work for Mr Haren in Christchurch.

[23] Mr Lacey was purchasing a Hire a Hubby franchise and had a significant amount of work lined up in the greater Christchurch area. This work included work under the Hire a Hubby franchise as well as additional work remedying earthquake repairs for a building company, Benchmark Homes.

[24] Mr Haren and Mr Lacey discussed the possibility of work by text messages and through one email.

[25] In an email of 9 February 2015, Mr Lacey outlined to Mr Haren the plan for his new business. He also outlined how he thought Mr Haren might be involved. That email makes it quite clear that rate of pay for the Hire a Hubby work would be \$30.00 per hour to Mr Haren. The pay rate for the work for Benchmark Homes would be \$25.00 per hour. There was also a suggestion in that email that there might be work up to 40 hours per week Monday to Friday.

[26] Mr Haren travelled to Christchurch around 18 February 2015 and stayed with Mr Lacey. There was some discussion about the potential job offer and Mr Haren requested an employment agreement to go over. Mr Lacey gave him a copy of an existing employment agreement and agreed that he would send one to Mr Haren shortly.

[27] Mr Lacey emailed a draft individual employment agreement to Mr Haren on 1 March 2015 (the IEA).

[28] Mr Haren moved to Christchurch in the weekend of 14 March 2015. It had been agreed that Mr Haren would live in a self-contained sleep out at Mr Lacey's property for a short period of time.

[29] During that first weekend, Mr Haren gave Mr Lacey some handwritten notes. These notes made references to things like "*work clothes?*" and "*use of work car*".

[30] Mr Haren was due to commence work on 16 March 2016. On 16 March, he provided a copy of the unsigned IEA that had some written notes on it to Mr Lacey. A person Mr Haren had spoken to about the IEA had made these notes.

[31] Mr Haren's concerns with the IEA included:

- a. It was not a complete agreement. Mr Haren could not identify what was missing or what he expected to be included but he had been told that a standard employment agreement needed to cover other matters. As a result, he offered to produce an employment agreement from the MBIE website.
- b. That the employer was not correctly identified. Mr Haren understood there were different entities operated by Mr Lacey for the separate

parts of his business and he was not sure if one of these entities was in fact the employer rather than Mr Lacey personally.

- c. If the role was casual then holiday pay should be included in the fortnightly payment at an additional rate of 8%.
- d. There was no job description and the IEA failed to list the separate tasks he would do and the location in which the tasks would be undertaken.
- e. The car allowance of \$50.00 per week was unusual but he would accept it initially subject to a review in a couple of months.

[32] Mr Haren says he discussed other terms of employment with Mr Lacey. These included:

- a. A mobile phone allowance of \$40.00 per month.
- b. That he should be paid the IRD rate of 77 cents per kilometre for any travel he did in his own car on work related matters.
- c. That he should be paid travel time of 30 minutes for the work that he travelled to.

[33] Mr Haren and Mr Lacey never finalised the terms of the IEA. Mr Lacey says they never agreed any of the additional terms Mr Haren says were agreed. In particular:

- a. There was a discussion about employees having to use mobile phones for work in the future and if this happened then he would put them on pre-paid mobile phone plans at \$19.00 per month. This was merely a discussion concerning possible plans for the future and it was never an agreed benefit for employees.
- b. Employees would be paid the weekly car allowance for having their car available to use on work matters. It was paid regardless of what travel was undertaken and was a better way of compensating employees for any use of their cars during work time. Employees

would not be paid an additional payment based on the IRD rate per kilometre.

- c. The charge out rate for Hire A Hubby work included travel time and employees could include that time in their time sheets at an average rate of 30 minutes each way. The charge out rate for other work did not include this and employees had to get themselves to work sites in their own time and could not record any travel time in their time sheets.

[34] Notwithstanding that the IEA had not been signed and the concerns Mr Haren had about the IEA he commenced work on 16 March 2015 with an induction.

[35] As part of the terms of the franchise agreement with Hire a Hubby, Mr Lacey was required to complete a criminal records check on any employee he employed to do Hire a Hubby work. On 16 March 2016, Mr Lacey gave Mr Haren a “Request Criminal Convictions History – Third Party form”, that he had obtained from the Ministry of Justice website. Mr Haren did not complete this form. And Mr Lacey was unable to complete the criminal records check.

[36] Mr Lacey made it clear to Mr Haren that without the criminal record check Mr Haren could not work on any of the Hire a Hubby jobs.

[37] During the course of his employment Mr Haren had concerns about:

- a. the number of hours work he was given, as he had expected the role to be full time;
- b. the rate he was paid, as he claimed he was undertaking Hire A Hubby work some of the time but only being paid \$25.00 per hour for all work he did;
- c. the number of hours he was paid for as he expected to be paid for travel time to jobs he was assigned;
- d. whether he should be paid 77 cents per kilometre for travel that he did in his own car, as the car allowance didn't properly cover the petrol and running costs he was incurring;

- e. that he wasn't paid the mobile phone allowance; and
- f. that the terms of the IEA were never finalised so it could be signed.

[38] Mr Haren says Mr Lacey did not want to address the concerns, Mr Lacey always thought he was right and simply did not engage with him or dismissed the issues when raised.

[39] In contrast, Mr Lacey says Mr Haren was the unreasonable one, there was no discussion with him as he was always aggressive and if he did not hear what he wanted to then he would storm off.

[40] The failure to address the issues that Mr Haren had come to a head on the evening of 28 April 2015. Mr Lacey was away from home and Mr Lacey's wife, Tricina Lacey was at home with their seven year old daughter.

[41] Mr Haren entered the Lacey's house around 7:00 pm. He demanded a stapler, then stapled some papers together and threw those papers on the kitchen table. He told Mrs Lacey that they owed him \$200 for hours worked.

[42] Mrs Lacey looked at the papers and worked through the hours. She tried to explain to Mr Haren that they had the same hours it was just that he was paid \$25.00 per hour for all of the work and not \$30.00 per hour for some of it as he claimed he should be.

[43] Mr Haren was agitated and confrontational. He started raising issues he had about the IEA and the terms of his employment. Mrs Lacey tried to discuss these issues with him but he became more agitated. Mrs Lacey then told him he would have to wait until Mr Lacey was back the next day. At this point Mr Lacey stepped around the table towards Mrs Lacey. Mrs Lacey backed into a kitchen cabinet and as she was standing there, Mr Haren stood over her shouting and pushing a finger in her face. Mrs Lacey was scared, intimidated and unable to move. She began crying and Mr Haren continued to shout at her. Mrs Lacey's daughter was in the room and was also crying. Mr Haren then backed away shouting that he would sue them and make them pay. He shouted "*you will regret ever employing me*" and then he stormed out yelling, "*that's it, today is my last day, I quit*".

[44] Mr Haren denies confronting Mrs Lacey in the manner described. He also denies saying that he quit, rather he said, "*I'm leaving*". Mr Haren says he got angry, raised his voice and was aggressive toward Mrs Lacey but he would never physically harm her (or anyone) and he was not aggressive or intimidating in the manner alleged nor did he threaten her.

[45] I accept Mrs Lacey's evidence on what occurred. Mr Haren was aggressive and intimidating. He did confront Mrs Lacey in the manner she described and was threatening to her.

[46] In terms of what was said, I believe, in the heat of the moment Mrs Lacey may not have heard exactly what Mr Haren said as he stormed out but she believed he was quitting.

[47] The confrontation ended with Mr Haren leaving the house, leaving the premises and never returning to work again for Mr Lacey.

[48] Mr Lacey followed up the events of 28 April 2015 by sending an email to Mr Haren on 1 May 2015. He says he did so because he wanted to ensure Mr Haren was clear that his employment was at an end. He had obtained advice from his employment advisor at the time and sent the following email:

We have been advised that as we have been unable to come to an agreement with you about your contract, we are to remind you that your employment is on a casual basis.

We currently have no work for you at this stage and will contact you if any work arises for you.

[49] It is because of this email that Mr Haren says his employment was terminated by reason of redundancy.

### **Terms of the IEA**

[50] The IEA was never signed, as there were some issues between the parties. However, Mr Haren did perform work and I must determine the terms under which he carried out that work.

[51] I am not satisfied that the discussions, including the email of 9 February 2015, amount to a clear offer of employment reflecting terms such as payment, allowances

and guaranteed hours. The discussions prior to the IEA were merely discussions around the business venture and the possibility of Mr Lacey employing Mr Haren.

[52] I conclude that the IEA is the best evidence of the offer of terms of employment. The IEA included the following:

- a. The employment relationship was specified as being a casual relationship.
- b. There were two rates of pay listed in the IEA. One rate of \$25.00 per hour for non Hire a Hubby work and the other of \$30.00 per hour for Hire a Hubby work;
- c. There was a car allowance of \$50.00 per week;
- d. Notice was two weeks.

[53] I am satisfied, therefore, that Mr Haren was employed as a casual employee and was to be paid \$25.00 per hour for non Hire a Hubby work. Hire a Hubby work was to be paid at \$30.00 per hour, but because the criminal records check was never completed he was unable to undertake that work for Mr Lacey.

[54] Mr Haren was also entitled to a weekly car allowance of \$50.00, but there were no other expenses agreed or allowances to which he was entitled. As Mr Haren was a casual employee, his holiday pay was rolled-up into his hourly rate and he was paid an additional 8%.

#### **What work did Mr Haren perform?**

[55] Mr Haren did not do any Hire A Hubby jobs whilst employed by Mr Lacey. I am satisfied that the only work that could have been performed by Mr Haren was non Hire a Hubby work at the rate of \$25.00 per hour.

[56] There were conflicting records of the number of hours worked. Based on the evidence including the documents provided, I conclude that Mr Haren worked the following:

- (a) 17 March to 26 March: 52 hours.
- (b) 27 March to 9 April: 54.75 hours.

- (c) 10 April to 23 April: 54.25 hours.
- (d) 24 April to 28 April: 14.75 hours.

**What was Mr Haren paid?**

[57] The amount that Mr Haren was paid was not disputed. He received the following payments:

- (a) 17 March to 26 March: paid for 54 hours at \$25.00 per hour, plus \$100.00 car allowance, plus 8% holiday pay. A net payment of \$1,350.00
- (b) 27 March to 9 April: paid 54 hours at \$25.00 per hour, plus \$100.00 car allowance, plus 8% holiday pay. A net payment of \$1,351.00
- (c) 10 April to 23 April: paid 54.25 hours at \$25.00 per hour, plus \$100.00 car allowance, plus 8% holiday payment. A net payment of \$1,325.89.
- (d) 24 April to 28 April: paid 14.75 hours at \$25.00 per hour, plus \$100.00 car allowance, plus 8% holiday payment. A net payment of \$450.67.

**What is Mr Haren owed?**

[58] I concluded that Mr Haren is not entitled to any other benefits other than the car allowance of \$50.00 per month.

[59] Mr Haren claims he is entitled to expenses related to the purchase of a car in order to perform his work tasks and relocation expenses. I am not convinced that any terms were agreed in relation to payment of any these expenses. Therefore, Mr Haren is not entitled to any additional payment for this.

[60] Overall, in terms of the payments that Mr Haren received, I am satisfied that the payments he received largely reflect his net entitlement for the hours worked plus the car allowance plus 8% holiday pay. But I note that:

- a. Mr Haren received cash payments for the first two fortnightly pay cycles as Mr Lacey had not yet set up his payroll software. The net amount paid to him was approximately \$40 more than the actual entitlement.

- b. I conclude that Mr Haren only worked 52 hours in the first fortnightly pay cycle but was in fact paid for 54 hours. In the second fortnightly pay cycle he was underpaid by .75 hours. In total, Mr Haren has been overpaid by 1.25 hours.
- c. So overall Mr Haren has been overpaid by approximately \$105.00

### **How did Mr Haren's employment end?**

[61] There are two possibilities regarding the termination of Mr Haren's employment. He resigned on 28 April 2015 or Mr Lacey terminated his employment when he sent the email of 1 May 2015.

[62] An inconsistency arises on the evidence I have heard. The question is if Mrs Lacey believed Mr Haren had quit by what he said when he stormed out on the evening of 28 April 2015, why did Mr Lacey feel it was necessary to send the email on 1 May 2015.

[63] Despite this inconsistency, there is one clear conclusion I can draw. I am satisfied on the evidence that Mr Lacey did not terminate Mr Haren's employment for redundancy. There was sufficient work for him to do, albeit not full time and not Hire A Hubby work. If Mr Lacey did terminate Mr Haren's employment, it was not because there was not enough work.

[64] I interpret the email of 1 May 2015 as stating Mr Lacey did not want to give Mr Lacey any work because of the issues between them. Whilst the email refers to the issue of the failure to resolve the IEA, the issues also included Mr Haren's behaviour and aggressive manner toward Mr and Mrs Lacey and in particular the events of 28 April 2015.

[65] I also accept that Mr Lacey sent the email, on advice, in order to ensure that there was no ambiguity over the end of the employment relationship.

[66] Despite this, I find that Mr Haren resigned on the evening of 28 April 2015. He walked out of his employment because he was unhappy with the issues not being resolved. In the circumstances, I find he is not entitled to any notice payment.

[67] If I am wrong on this and in fact, Mr Lacey terminated Mr Haren's employment because of the issues between them that I have identified in [64] then

that may give rise to an unjustified dismissal claim. However, two matters arise. First, I have already determined a personal grievance for unjustified dismissal was not raised within the requisite 90-day period and cannot now be raised. Second, even if a personal grievance could be brought I am satisfied on the evidence before me that there would be contribution arising from Mr Haren's conduct. He contributed fully to any grievance and therefore, if successful, any remedies would be reduced by 100%.

**Has either party breached the duty of good faith?**

[68] I am not satisfied that either Mr Haren nor Mr Lacey has breached the duty of good faith to an extent that warrants the imposition of a penalty. I believe both were at fault for the failure to finalise the terms of the IEA. Both did not meet the standard expected of an employee or an employer for the duty of good faith. In particular, they were not active and constructive in maintaining the employment relationship. Both parties could, and should, have done more to discuss and resolve the issues.

[69] The issue is whether the failings by both parties were deliberate, serious and sustained, as required for a penalty to be imposed<sup>2</sup>. The evidence from both parties was that the other failed to engage properly in discussions over the terms of the IEA but when pushed for examples both Mr Haren and Mr Lacey were unable to provide many specific examples of this failure. The evidence consisted of only one such incident that occurred on 15 April 2015. I accept that the failure to properly engage in negotiation over the terms of an IEA is serious however, I cannot conclude that the failure was deliberate and sustained.

[70] There is also the behaviour of Mr Haren on the evening of 28 April 2015. This amounted to a breach of the duty of good faith but it was not sustained being a one off event. It was arguably not deliberate but rather a reaction to the build-up of frustration that Mr Haren had over the perceived unfair behaviour of his employer. I do not condone that behaviour and it may well have amounted to serious misconduct warranting immediate dismissal but it does not satisfy the requirements for a penalty to be imposed.

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<sup>2</sup> s 4A of the Act

**Determination**

[71] Mr Haren has not raised the personal grievances for unjustified dismissal or unjustified action causing disadvantage within the 90-day period.

[72] There are no exceptional circumstances relating to this delay and I do not grant leave to Mr Haren to raise the personal grievances for unjustified dismissal or unjustified action causing disadvantage outside the 90-day period.

[73] Mr Haren's claim for payment of wage arrears and other benefits he claims to be entitled to under the terms of his employment does not succeed.

[74] Mr Haren's claim to be paid notice because of termination of employment due to redundancy does not succeed.

[75] Neither party will have a penalty imposed against him for any breach of the duty of good faith.

**Costs**

[76] Costs are reserved.

**Peter van Keulen**  
**Member of the Employment Relations Authority**