

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 26
5392922

BETWEEN GLENN HAWES
 Applicant

AND SELECT DOUBTLESS BAY
 VILLAS LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Tim Braithwaite, Counsel for Applicant
 No appearance by Respondent

Investigation Meeting: 22 January 2013 at Auckland

Determination: 24 January 2013

DETERMINATION OF THE AUTHORITY

A Select Doubtless Bay Villas Limited unjustifiably dismissed Mr Glenn Hawes. It is ordered to pay him, within 28 days of the date of this determination:

- (a) \$10,000 distress compensation;**
- (b) \$8,796 lost remuneration;**
- (c) \$4,800 lost accommodation benefits**
- (d) \$805 wage arrears;**
- (e) \$1,452 unpaid overtime;**
- (f) \$726 extra half time for working on a public holiday;**
- (g) \$1,716 alternative holidays pay;**
- (h) \$2,595.19 annual holiday pay;**
- (i) \$3,000 legal costs**
- (j) \$71.56 filing fee.**

Employment Relationship Problem

[1] From the beginning of 2010 Mr Hawes worked in a variety of roles for Mr Tony Balch, director of Select Doubtless Bay Villas Limited. Mr Hawes worked his

way up from various low levels positions to become the live in Resort Manager of the Select Doubtless Bay Villas on 14 April 2011. He was not provided with an employment agreement.

[2] Mr Hawes claims he was unjustifiably dismissed and that he is owed:

- a. wages arrears
- b. unpaid overtime
- c. holiday pay
- d. unpaid alternative days' holiday pay
- e. unpaid extra half pay for the public holidays he worked.

Non appearance of Respondent

[3] Mr Murray Withers of the Papanui law firm Murray Withers and Associates was initially representing the respondent but withdrew on 23 October 2012. Mr Withers is a director of Select Doubtless Bay Villas Limited together with Mr Tony Balch.

[4] Mr Withers advised the Authority that the respondent would not attend mediation and that Mr Balch would not travel to Auckland for mediation. He said the company was insolvent. However as at the date of this determination it remains registered on the companies office website.

[5] I am satisfied the Notice of Hearing was served on the respondent and that it elected not to attend the Authority's investigation meeting.

Issues

[6] The following issues are to be determined:

- a. Was Mr Hawes' dismissal justified?
- b. If not, what remedies should be awarded?
- c. Is Mr Hawes owed wages arrears, in particular:
 - i. Salary for his last week and one day of work
 - ii. Unpaid overtime
 - iii. An extra half day's pay for the public holidays he worked

- iv. Pay for the alternative holidays he had not taken as at termination.

Was Mr Hawes' dismissal justified?

[7] On 29 January 2012 Mr Jarrod Taylor (an employee of Select Braemar Lodge) turned up at the Doubtless Bay villas with two people Mr Hawes did not know. Mr Taylor told Mr Hawes Mr Balch would be calling him, which happened soon after. When Mr Balch called Mr Hawes he said he had been getting complaints so was terminating Mr Hawes employment immediately. Mr Balch told Mr Hawes he had to be on a 5pm flight that night or would have to find his own way back to Auckland.

[8] Mr Hawes was unable to pack up in time to be on the 5pm flight. Mr Hawes says he had difficulty packing because Mr Taylor was interfering. Mr Taylor also refused to give Mr Hawes a ride into town with his property, which left Mr Hawes geographically isolated because he did not have a vehicle.

[9] The onus is on the employer to justify its actions and how it acted in light of the justification test in s.103A of the Act. Select Doubtless Bay Villas has failed to do so. Accordingly, I find Mr Hawes' dismissal was unjustified. Mr Hawes was dismissed out of the blue without any specific allegations or disciplinary concerns first having been put to him to respond to.

What remedies should be awarded?

Hurt and humiliation

[10] Mr Hawes asked Mr Taylor to get Mr Balch to pay his final pay so he had funds to leave Doubtless Bay. Mr Hawes says he was not paid his final pay and was not paid for his last one week and one day of employment because his salary was not processed as usual on the due date.

[11] The day after his dismissal the police issued Mr Hawes with a trespass order for the Select Doubtless Bay Villas and for other Select properties. Mr Hawes did not have transport so the police gave him a lift into Kaitaia so he could purchase a bus

ticket. Mr Hawes says he was very embarrassed to be seen leaving in a police car by people who knew him.

[12] Mr Hawes had to sleep rough for the first month after his dismissal because he had no money. He says when he registered with Work and Income New Zealand (WINZ) there was a stand down time for him receiving a benefit because he had been dismissed. WINZ assisted him with emergency food grants. Mr Hawes also existed on food parcels from the City Mission.

[13] Mr Hawes says he suffered a breakdown as a result of his dismissal. He was diagnosed by his GP with “an acute reaction to stress” and has been unable to work for an extensive period due to his medical issues. Mr Hawes says he did not have any previous medical problems before he suffered a breakdown which he wholly attributes to the manner of his unjustified dismissal.

[14] The effects of the dismissal on Mr Hawes were extremely adverse. He lost his accommodation, he had to leave town without having money to do so, his health suffered to the extent he was unable to work and he was under medical care for the remainder of the year. I award Mr Hawes \$10,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered.

Lost remuneration

[15] Mr Hawes received a sickness benefit after the required stand down period. He remained unfit to work at all until he was certified as fit to return to part time work on 05 September 2009. Mr Hawes did not obtain part time work and remained in receipt of a sickness benefit until he returned to the workforce full time in December 2012.

[16] I am satisfied Mr Hawes lost at least three months’ remuneration as a result of his unjustified dismissal. I award him \$8,796¹ lost remuneration under s.128(2) of the Act.

¹ 12 weeks x \$733 pw.

Lost benefits

[17] Whilst employed Mr Hawes received the benefit of living in 5 star accommodation. His employer covered all accommodation related expenses including phone, power, water, cable TV, etc. Mr Hawes estimated the benefit of his accommodation would have been around \$400-\$500 per week. His dismissal deprived him of these accommodation related benefits so he is entitled to be compensated for that. I award Mr Hawes \$4,800 under s.123(1)(c)(ii) of the Act.²

Contribution

[18] Section 124 of the Act requires me to consider whether remedies should be reduced to reflect contribution. Evidence of contribution must be established on the balance of probabilities. Whilst the respondent provided the Authority with some information prior to its investigation meeting about why Mr Hawes had been dismissed, the information submitted was disputed by Mr Hawes. The information before the Authority amounts to untested allegations only so cannot reach the standard required before a finding of contribution may be made.

[19] I therefore find the evidence does not support a finding of contribution, so Mr Hawes remedies are not to be reduced.

Is Mr Hawes owed wages arrears?

Unpaid salary

[20] Mr Hawes never received his final pay. He says he was not paid for his last week and one day of work because his salary was not deposited into his bank account as it normally would have been. I award him \$805 wage arrears.

² \$400 for 12 weeks.

Overtime

[21] Mr Hawes claims he worked an extra day per week from November 2011 until his dismissal but was not paid for that. He claims \$1,452 being 11 days at his ordinary daily rate of \$132. I award Mr Hawes the amount claimed.

Extra half day's pay for working on public holidays

[22] Mr Hawes says he received his normal time pay rate instead of time and a half when he worked on the following public holidays – 25 December 2010; 26 December 2010; 03 January 2011; 04 January 2011; 30 January 2011; 22 April 2011; 25 April 2011; 06 June 2011; 24 October 2011; 26 December 2011; 27 December 2011.

[23] Mr Hawes claims he is owed an extra \$66 per day, so I award him \$726.

Alternative holidays

[24] Mr Hawes says he has not been paid for 13 alternative days' holidays he earned for working on public holidays. Mr Hawes says he earned public holidays for working on the 11 public holidays identified in paragraph [22] above plus 01 and 02 January 2012.³ He claims \$1,716 and I award him that amount.

Holiday pay

[25] Mr Hawes says he was not paid holiday pay upon termination. He says he was paid out 5 days pay in lieu of his forth week's annual holiday. He also accepts he took the 6 days annual holiday recorded in the respondent's leave records. Mr Hawes claims he is owed unpaid holiday pay of \$2,595.19. I award him that amount.

Costs

[26] Mr Hawes has incurred legal costs of \$4,117.⁴ This matter involved a half day investigation which would normally attract a notional daily tariff of \$1,750. However,

³ He says he was paid time and a half for working on 01 and 02 January 2012.

⁴ An invoice was produced by his counsel.

I consider it appropriate to increase that notional tariff to reflect that the respondent's conduct unnecessarily increased Mr Hawes' legal costs.

[27] In particular, the respondent refused to attend two scheduled mediation dates, it failed to provide information requested by Mr Hawes' counsel, it misled the Authority that it had copied (what it described as) wage and time records it had filed to Mr Hawes' counsel when it had not in fact done so. That resulted in the time for the investigation meeting being extended to allow Mr Hawes and his counsel to consider this new information.

[28] The respondent also failed to provide wage and time records which complied with the requirements of s.103 of the Act. The wage records provided were unhelpful and ambiguous without explanation which it never provided. Additional unnecessary time and cost was incurred by Mr Hawes having to work through this material on the day of the investigation meeting. I award Mr Hawes legal costs of \$3,000 plus his filing fee of \$71.56.

Summary

[29] I order Select Doubtless Bay Villas Limited to pay Mr Hawes, within 28 days of the date of this determination:

- a. \$10,000 distress compensation
- b. \$8,796 lost remuneration
- c. \$4,800 lost accommodation benefits
- d. 805 wage arrears;
- e. \$1,452 unpaid overtime;
- f. \$726 extra half time for working on a public holiday;
- g. \$1,716 alternative holidays pay;
- h. \$2,595.19 annual holiday pay;
- i. \$3,000 legal costs;
- j. \$71.26 filing fee.

Rachel Larmer
Member of the Employment Relations Authority

