

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2019] NZERA 565  
3024939

BETWEEN            JACK LANE  
                                 Applicant  
  
AND                    AB ROOFING LIMITED  
                                 Respondent

Member of Authority:    M B Loftus  
  
Representatives:        Kelly Coley, advocate for Applicant  
                                 No appearance for Respondent  
  
Investigation Meeting:    1 October 2019 at Palmerston North  
  
Submissions Received:    At the Investigation Meeting  
  
Record of Oral  
Determination:            2 October 2019

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**ORAL DETERMINATION OF THE AUTHORITY**

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[1]    The applicant, Jack Lane, claims he was unjustifiably dismissed by AB Roofing Limited (AB). Mr Lane also claims he did not receive his final pay and is owed both wages and holiday pay.

[2]    AB's position is unknown as its participation in the process has been less than fulsome. AB failed to respond to letters sent on Mr Lane's behalf and notwithstanding a promise one would be provided there is no statement in reply. It also failed to provide witness statements on a day it had agreed and ignored efforts to address this. AB then failed to attend the investigation without notice or explanation though that did raise the question of whether or not I proceed.

[3]    The answer is yes as I am satisfied AB is, or at least should be, aware of the investigation and the consequences of non-attendance. It was represented during the telephone conference at which the investigation was scheduled and agreed to the date. It also advised, during the discussion, an e-mail address it asked be used for the

service of documents. I am satisfied a Notice of Investigation Meeting was served to that address and note it includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.<sup>1</sup>

[4] Turning to Mr Lane's claims. Mr Lane commenced with AB on 16 February 2017. Mr Lane says he was the recipient of various forms of abuse, some of which are evidenced by e-mails from his employer, and these culminated with the events of 25 April 2017. On that day Mr Lane advised, by text, that he was ill and would be unable to work. The response was *harden up or no more job*. Mr Lane sent another text questioning the possible loss of his job to which an uncharitable response ended with ... *don't bother turning up. Over you wasting my time*.

[5] Mr Lane interpreted this as a dismissal. Even if that was not the case he did not return to work and his absence was not queried by the employer as a possible subsequent abandonment argument would require and as it was bound to do in any event. Mr Lane considers confirmation of the dismissal came on 29 April when he questioned where his final pay was and asked if he could get it in cash when he collected some property. The response was *u can f..k rite off mate*.

[6] Having heard Mr Lane's evidence and considered the texts and their context I conclude he was, as claimed, dismissed on 25 April.

[7] Once the fact of dismissal is established it falls upon the employer to justify its action. AB's absence means it has failed to do so and it follows the dismissal is unjustified.

[8] The conclusion Mr Lane's dismissal is unjustified raises the question of remedies. He seeks lost wages and compensation under to s 103(1)(c)(i) of the Act.

[9] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Mr Lane attained replacement employment five weeks after his dismissal. The Act requires his loss of 5 weeks wages (\$3,300) be recompensed.

[10] Turning to compensation. Mr Lane supported his claim with evidence of the hurt he felt. He spoke of the confusion he felt at being dismissed and, more importantly, a destruction of trust in one of the few people with which he had

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<sup>1</sup> Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

developed such a relationship. This affected his dealings with others and forced a decision to relocate in order to start anew. He spoke of falling into a dark hole especially as the dismissal brought an end to *the first time things were going right*.

[11] Having considered the evidence which I find relatively strong when compared to that I often hear along with current precedents I conclude an award of \$12,000 appropriate.

[12] Turning to the arrears claim. Mr Lane says he is yet to be paid for his last 47 hours work (\$775.50 gross) and holiday pay remains owing. In calculating the amount due under the later head, \$440 gross, he relies on wage slips he received which record the outstanding amount as it accrued.

[13] Again the evidence is compelling and to that I add the effect of s132 of the Act. I accept the claim in the absence of requested records<sup>2</sup> and any evidence it is unsustainable.

[14] Finally there are costs. Ms Coley advises these total \$3,750 plus GST. Normally the Authority uses a daily tariff approach when assessing costs.<sup>3</sup> The current rate is \$4,500 a day.

[15] Notwithstanding the fact the investigation took about an hour it was scheduled for a day which it could well have taken if it had been defended. It had to be prepared for on that basis. I also note unnecessary additional costs were generated by the respondent's lack of input which forced Mr Lane to prepare for multiple contingencies. In the circumstances I consider a contribution of \$3,000 plus GST reasonable and to that I add reimbursement of the Authorities filing fee. Mr Lane should not be penalised as a result of both he and his advocate being reasonable.

### **Conclusion and orders**

[16] For the above reasons I conclude Mr Lane was both unjustifiably dismissed and due unpaid wages. As a result I order the respondent, AB Roofing Limited, pay Mr Lane:

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<sup>2</sup> Letter raising grievance dated 11 May 2017 at [11]

<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

- a. \$3,300.00 (three thousand, three hundred dollars) gross being recompense of wages lost as a result of the dismissal; and
- b. A further \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i); and
- c. A further \$1215.50 (one thousand, two hundred and fifteen dollars and fifty cents) gross being outstanding wages and holiday pay; and
- d. A further \$3521.56 (three thousand, five hundred and twenty one dollars and fifty six cents) being a contribution toward Mr Lane's costs.

[17] The above awards total \$20,037.06 (twenty thousand and thirty seven dollars and six cents) and I order payment be made no later than 4.00pm, Wednesday 30 October 2019.

M B Loftus  
Member of the Employment Relations Authority