

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 227
5411549

BETWEEN JOHN MERVYN LATHAM
 Applicant

A N D EM CONTRACTING LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Mark Nutsford, Advocate for Applicant
 Bennet Castelino, Counsel for Respondent

Investigation Meeting: 31 May 2013 at Auckland

Date of Determination: 05 June 2013

DETERMINATION OF THE AUTHORITY

A. EM Contracting Limited unjustifiably dismissed Mr John Latham.

It is ordered to pay him:

- (a) **\$11,830.88 lost remuneration;**
- (b) **\$6,000 distress compensation;**
- (c) **\$750 costs; and**
- (d) **\$71.56 for his filing fee.**

Employment relationship problem

[1] Mr Latham was employed by EM Contracting Limited (EM Contracting) on 3 September 2012 as a Fabricator/Welder. Mr Latham had a couple of other job opportunities available to him around the time he was offered employment, but he elected to accept EM Contracting's offer with the expectation of local on-going employment.

[2] Mr Latham was hired by Doug Ellett who was the son of the sole director of EM Contracting, Mrs Allison Ellett. Mr Ellett says he was involved in the business as a favour to help his mother but he was not an employee or a contractor and was not paid in any way for his assistance.

[3] Mr Latham reported to Mr Stephen Gould who Mr Ellett says was the client for which EM Contracting performed work. Mr Gould apparently lived at the business premises.

[4] Mr Latham says he experienced difficulties from the outset of his employment. He claims he was subjected to on-going abuse from Mr Gould and that he was not provided with an employment agreement, despite making numerous requests for one.

[5] Mr Latham approached the Ministry of Business Innovation and Employment call centre for advice and he sought mediation from Mediation Services for assistance with these difficulties and he believes that was the catalyst for his dismissal.

[6] On 22 November 2012 Mr Ellett pulled Mr Latham aside at work and told him that due to Mr Ellett's ill health he would have to sell the business so Mr Latham had two weeks' notice that his employment would end on 6 December 2012. Mr Latham worked out his notice period.

[7] Mr Latham says he tried to get information from Mr Ellett about who was buying the business so he could attempt to transfer his employment to the new owner. Mr Latham claims Mr Ellett was vague and elusive and would not answer his queries on the basis information about the alleged sale was commercially sensitive.

[8] Mr Latham requested written reasons for his dismissal, but these were never provided.

[9] Mr Latham was not paid his holiday pay until 20 May 2013, some five months after his employment ended. Mr Latham made inquiries with Inland Revenue Department (IRD) and found out that although EM Contracting had been deducting PAYE from Mr Latham's income it had not remitted that to IRD. Mr Latham is concerned his employer had been committing income tax fraud in relation to his wages.

[10] Mr Latham claims he was unjustifiably dismissed and he seeks lost remuneration, distress compensation and costs.

[11] EM Contracting says Mr Latham's dismissal was justified. It claims his employment was terminated because Mr Ellett who was supposed to be running the business but who was in fact unable to do so due to health problems could not continue his involvement in the business which resulted in the business facing financial problems.

Issues

[12] The issues to be determined are:

- a. Was Mr Latham's dismissal justified?
- b. if not, what if any remedies should be awarded?
- c. what costs should be awarded?

Was dismissal justified?

[13] Justification is to be determined in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This test requires the Authority to assess whether the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred.¹

[14] A fair and reasonable employer is expected to comply with its statutory obligations. EM Contracting did not do so.

[15] EM Contracting breached its good faith obligations under s.4(1A) of the Act. It failed to provide Mr Latham with information relevant to his on-going employment so he was deprived of an opportunity to comment on that information before he was dismissed, contrary to the requirements of s.4(1A) in the Act.

[16] EM Contracting failed to comply with any of the four procedural fairness tests set out in s.103A(3) of the Act.

¹ Section 103A(2) of the Act.

[17] EM Contracting also breached well established principles of natural justice, namely Mr Latham:

- a. was not given advance warning his on-going employment was in jeopardy;
- b. had no advance notice Mr Ellett would be meeting with him on 22 November 2012 to discuss issues that could result in his dismissal;
- c. was not given any information in advance of the termination meeting;
- d. had no opportunity to take advice or to prepare his response to the issues that adversely impacted on his on-going employment;
- e. had no opportunity to be accompanied at the dismissal meeting by a representative or support person;
- f. requests for information relevant to his dismissal were declined;

[18] I find that EM Contracting's "*actions, and how it acted*"² were not what a fair and reasonable employer would have done in all the circumstances at the time it dismissed Mr Latham.

What remedies should be awarded?

Mitigation

[19] Mr Latham produced evidence which showed he had made extensive efforts to mitigate his loss. It is clear he devoted maximum time and resources to obtaining new employment. This borne fruit as he obtained temporary work on 25 February 2013 which now appears to have developed into permanent employment.

Lost remuneration

[20] I am not satisfied on the balance of probabilities that it was a foregone conclusion that, had EM Contracting followed a fair and proper process, Mr Latham would have been dismissed. I consider there is some merit in Mr Latham's view that his pushing for an employment agreement may have been a catalyst for the ending of his employment. I consider this is not a situation where a fair and proper process

² Supra 1.

would have inevitably resulted in Mr Latham's dismissal so I find his remedies are not limited to distress compensation only.

[21] I am satisfied that Mr Latham lost remuneration of \$13,520 less the \$1,689.12 paid on 20 May 2013 by Mr Ellett as a "goodwill gesture". Mr Latham's actual loss for just short of three months' lost remuneration is \$11,830.88 so EM Contracting is ordered to pay Mr Latham that amount under s.128(2) of the Act.

Distress compensation

[22] It was obvious from Mr Latham's evidence and demeanour that he suffered significant distress, hurt and humiliation as a result of his unjustified dismissal. He appeared to still be adversely affected at the time he gave his evidence.

[23] Mr Latham was the only income earner in his family and he and his wife were placed under considerable pressure as a result of him losing his job just before Christmas. Mr Latham spoke about the pressure he was under to pay bills without an income coming into the household and about the how stressful he found door knocking to find new work.

[24] EM Contracting is ordered to pay Mr Latham \$6,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his unjustified dismissal.

PAYE

[25] It is evident from Mr Latham's IRD records that EM Contracting has failed to pay the PAYE it deducted from his wages to IRD. It is hereby ordered to do so. EM Contracting is ordered to pay IRD directly any tax which is due as a result of the payments it made to Mr Latham on 20 May 2013.

What costs should be awarded?

[26] I am satisfied Mr Latham incurred costs as per the invoice submitted by his representative. As the successful party Mr Latham is entitled to a contribution towards his actual costs.

[27] There are no factors which warrant an adjustment to the notional daily tariff which is currently \$3,500. EM Contracting is ordered to pay Mr Latham \$750

towards his costs being pro rata of the current notional daily tariff. It is also ordered to reimburse Mr Latham \$71.56 for his filing fee.

Rachel Larmer
Member of the Employment Relations Authority