

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 150
5580586

BETWEEN GARRY JOHN MAIDEN
Applicant

A N D TIMBERTANK ENTERPRISES
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Mark Nutsford, Advocate for Applicant
Justin Jordan, Managing Director of Respondent

Investigation Meeting: 18 May 2016 at Auckland

Written record of Oral 19 May 2016
Determination:

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Maiden says he was employed by Timbertank Enterprises Limited (Timbertank) as a Project Manager for a total of 17 years. Mr Maiden told the Authority that his last period of employment was from around October 2007 to 2015.

[2] Mr Maiden says that throughout December 2014 and in the early stages of 2015 he was engaged in discussions with Timbertank regarding pay rates and its non-supply of payslips. This resulted in an agreed pay rise from \$30 per hour to \$36 per hour.

[3] However Mr Maiden claims that the agreement to increase his pay rate was not honoured and on 13 February 2015 he again challenged Timbertank about his pay rate.

[4] On 24 February 2015 Mr Maiden received a text from Timbertank's Managing Director, Justin Jordan, which said:

Timbertank's administration no longer wants to use you, rough and ready, tank cleans not being done and return trips for leaking liners meaning a different approach was required. Sorry and good luck.

[5] Mr Maiden says that he texted back saying "Does this dismissal by a text include a reference?" to which Timbertank replied "My position is not easy, reference yes."

[6] Mr Maiden raised his personal grievance for unjustified dismissal on 01 May 2015. Timbertank admits dismissing Mr Maiden without notice but says it believed it could do so because he was a "casual employee".

[7] Mr Maiden withdrew his penalty claim against Timbertank for failing to provide him with a copy of his wage and time records on request.

[8] In addition to his dismissal grievance Mr Maiden also claims wage arrears.

[9] During the course of the investigation meeting today it became clear that Timbertank owes Mr Maiden wage arrears. The amount Mr Maiden is owed cannot be determined with certainty today because Timbertank did not put the necessary information before the Authority.

[10] The parties have been given seven days to do the relevant wage arrears calculations and then revert to the Authority. Accordingly I find that Timbertank owes Mr Maiden unpaid public holiday entitlements and unpaid holiday pay. I have not set the amount that is actually owed pending further information from the parties.

[11] Timbertank believes that because Mr Maiden was a casual employee (who was only employed on an "as required" basis so had no minimum hours, pattern or days of work) then he cannot pursue a personal grievance claim. That is a misconception.

[12] An employee such as Mr Maiden who has no set or regular work pattern is still subject to the rights and protections of minimum code legislation. He was not working under a valid trial period.

[13] Nor was Mr Maiden employed on a valid fixed term engagement as a fixed term employee because none of the requirements of fixed term employment as required by s.66 of the Employment Relations Act 2000 (the Act) are met.

[14] Mr Maiden is therefore a permanent ongoing employee who has no fixed or set hours of work. He has the same rights as other permanent ongoing employees with the exception being that his hours of work are variable because they are based on Timbertanks' labour needs and not on a minimum number of agreed contractual days or hours of work.

The issues to be determined

[15] The following issues are to be determined:

- (a) Was Mr Maiden's dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) What, if any, costs should be awarded?

Was Mr Maiden's dismissal justified?

[16] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether Timbertank's actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time that Mr Maiden was dismissed.

[17] A fair and reasonable employer is expected to comply with its statutory obligations.

[18] These include the s.4(1A) good faith obligation to provide access to relevant information and an opportunity to comment on it before an adverse decision is made about an employee's ongoing employment.

[19] It also includes the obligations in s.103A(3) of the Act which sets out four procedural fairness tests that a fair and reasonable employer is expected to comply with.

[20] Failure by an employer to comply with its statutory obligations is likely to fundamentally undermine its ability to establish its actions or dismissal of an employee were justified.

[21] In addition to meeting statutory good faith and procedural fairness requirements, an employer must also have a good reason for regarding dismissing an employee. This is referred to as substantive justification.

[22] I find that Timbertank did not comply with its good faith obligations because Mr Maiden was dismissed without any warning. He was not made aware of the information on which Timbertank was relying on so it follows that he was deprived of an opportunity to comment on such relevant information before he was dismissed. This is in breach of the good faith requirements in s.4(1A) of the Act.

[23] I further find that Timbertank did not comply with any of the four procedural fairness tests in s.103A(3) of the Act. These are minimum procedural fairness requirements that every employer is expected to meet so Timbertank's failure to do so means it is unable to establish that it acted in a procedurally fair manner when dismissing Mr Maiden.

[24] I am also not satisfied that Timbertank had a good reason for dismissing Mr Maiden. A fair and proper process helps an employer reach a substantively justified decision and I find that did not occur here. Accordingly I find that Timbertank's alleged concerns about Mr Maiden were not established to the required standard of proof.

[25] Although Timbertank expressed unhappiness to the Authority about aspects of Mr Maiden's behaviour and performance I find that these issues were not fully or fairly put to him while he was employed.

[26] From what I heard it appears that the root of such issues was actually the way in which Timbertank was managing (or not as the case may be) its employment obligations. Mr Maiden was effectively a spokesman about employment issues and concerns for other employees which appears to have attracted Timbertank's dissatisfaction with him.

[27] I find that Timbertank's dismissal of Mr Maiden was substantively and procedurally unjustified.

What, if any, remedies should be awarded?

Mitigation

[28] Mr Maiden was under a duty to take appropriate steps to mitigate his loss. I am satisfied he did so because he picked up five weeks' short term work as a chef to cover for a permanent chef who went overseas for that period. It is to Mr Maiden's credit that this arrangement was then extended into ongoing work of two shifts per week.

[29] I am satisfied on the balance of probabilities that Mr Maiden took adequate steps to mitigate his loss so there is no reason why he should not be awarded compensation for the remuneration he has lost as a result of his unjustified dismissal.

Lost remuneration

[30] Mr Maiden is awarded six months' actual lost remuneration. This is to be calculated based on his average weekly earnings over the last six months of his employment with Timbertank less what he actually received in income over the six months following his dismissal.

[31] The parties are encouraged to agree on that amount over the next seven days. If agreement is not reached then either party may apply to the Authority to fix that amount.

Distress compensation

[32] Mr Maiden told the Authority of the hurt, humiliation and stress he had suffered as a result of his unjustified dismissal. He lives in a small community with limited work opportunities.

[33] Mr Maiden has found it challenging to live on income from only working two days a week. He had not worked over the Christmas period and had not started again with Timbertank until mid-February which had drained his resources.

[34] Mr Maiden explained how he has experienced financial pressure in meeting his commitments due to his dramatic reduction in income. He has also suffered a loss of status.

[35] Because of Mr Maiden's longstanding association with Timbertank he was known as the person who picked the crews who worked with him on Timbertanks' jobs. He therefore had a certain profile and respect within his community which he feels he has lost.

[36] Mr Maiden described his embarrassment at having to explain that he had been dismissed. He had never been dismissed before so found it quite a blow to his self-esteem and confidence.

[37] I also consider the fact that Timbertank appears to have been motivated by Mr Maiden's attempts to assert his employment rights (he had been pressing for a written employment agreement that reflected their agreed terms) aggravated Mr Maiden's distress.

[38] Mr Maiden described how his confidence was knocked and how he felt that he was prejudiced in seeking alternative employment because he felt the reference Timbertank provided him did not adequately reflect the approximately 17 years he had worked for it so would have set off red flags for potential employers.

[39] Timbertank is ordered to pay Mr Maiden \$9,000 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.

Contribution

[40] Having concluded that Mr Maiden has a personal grievance s.124 of the Act requires me to assess whether he engaged in blameworthy conduct which should result in his remedies being reduced. Such conduct is to be proven on the balance of probabilities.

[41] I am not satisfied that Mr Maiden engaged in blameworthy conduct which has been proven to the required standard. Accordingly his remedies are not to be reduced on the grounds of contribution.

What, if any, costs should be awarded?

[42] Mr Maiden as the successful party is entitled to a contribution towards his actual costs. I am satisfied that he has incurred costs in excess of the Authority's notional daily tariff which is currently \$3,500. This matter involved a three and a half

hour investigation meeting (excluding the time during which the oral determination was being prepared).

[43] The Authority adopts its usual notional daily tariff based approach to costs. Neither party identified any factors which would warrant adjusting the notional daily tariff. Accordingly, I adopt the tariff on a pro-rata basis.

[44] Timbertank is ordered to pay Mr Maiden \$1,750 towards his actual legal costs. Timbertank is also ordered to pay Mr Maiden \$71.56 to reimburse his filing fee.

Orders

[45] I order Timbertank within 28 days of the date of this determination to pay Mr Maiden:

- (a) Six months' lost remuneration under s.128(3) of the Act. The parties have 7 days within which to attempt to agree on this amount. If agreement is not reached then either party may apply to the Authority to fix that amount.
- (b) Wage arrears for failure to pay his public holiday entitlements for him working on Anzac Day in 2012, 2013 and 2014 and for not paying him his correct holiday pay entitlements. The parties have seven days to attempt to agree on this amount. If agreement is not reached then either party may apply to the Authority to fix that amount.
- (c) \$9,000 distress compensation under s.123(1)(c)(i) of the Act;
- (d) \$1,750 towards his actual legal costs;
- (e) \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority