

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 108/08
5084951

BETWEEN NIGEL McENANEY
 Applicant

AND EUSTRUCT LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Robert Thompson, Advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 8 July 2008

Determination: 28 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant was employed as a Foreman Carpenter by the respondent on a construction site at Lake Tekapo. He began work on 20 November 2006 and says he was unjustifiably dismissed on 15 January 2007. Mr McEnaney seeks wages lost as a result of his dismissal, compensation for hurt and humiliation, a penalty for failing to produce his time and wages record and costs.

[2] The respondent, having agreed to attend mediation on 21 May 2007, failed to attend. It briefed counsel for the Authority's investigation meeting, providing statements of evidence. However, counsel advised the Authority on 7 July 2008 that he had no current instructions from the respondent and would not be attending on its behalf. There was no appearance for the respondent.

What caused the problem?

[3] Mr McEnaney was employed following an interview with senior executives of the respondent on a salary of \$58,240 per annum. He says there was no mention of a written employment agreement at the interview but, when Mr Falcnik picked him up at his Ashburton home to begin work on an 11-day-on/3-day-off roster at Tekapo, and they were travelling, Mr Falcnik handed the applicant an agreement and told him to sign it. The applicant said that he declined as he wanted to read it through and have it vetted by his wife who has experience in these matters. On his return home after finishing his first roster, the two went through the proposed agreement and, on finding some issues needing discussion, decided the applicant should meet with the directors to discuss these issues.

[4] During his next trip to Tekapo, Mr McEnaney says he was approached by the general manager, Ms Tracey Currin, who asked for the signed agreement. The applicant explained there were a few issues he wanted to discuss with the directors. The company apparently took the view that until the agreement was signed the applicant was a casual employee. He says he never agreed to such an arrangement and would not have done so as he was leaving his previous, secure employment, had this suggestion ever been put to him.

[5] On Monday, 15 January 2007, the applicant was waiting at his home expecting Mr Falcnik to pick him up. When he did not arrive, Mr McEnaney rang the Christchurch office to be told by Ms Currin that Mr Falcnik had been delayed but would arrive around 11am. When Mr Falcnik did not arrive at that time, the applicant tried to contact both the directors and Ms Currin but without success. In order to get information, the applicant telephoned a fellow employee at the Tekapo site who told him *we heard you had been fired*.

[6] Hearing this, Mr McEnaney again tried to contact the directors and Ms Currin but was unable to do so. At about 7.30pm, Mr Falcnik arrived at the applicant's home. He handed Mr McEnaney a letter of dismissal and a cheque covering his final pay, his holiday pay and a week in lieu of notice. The couple's children witnessed this exchange.

[7] The applicant, after discussing the events with his wife, set off for Tekapo, arriving at the base house accommodation around 9.30pm. He collected his gear and

was asked by Mr Falcnik to hand over the company's cellphone and fuel card. The applicant told the directors that he was travelling to Christchurch the following day and would give them to Ms Currin at her office. At that point, Mr Riach, the other director, told the applicant he was going to cancel the cheque until it was decided whether Mr McEnaney owed the company any money. The applicant says he used the fuel card before leaving Ashburton for Tekapo to purchase fuel costing \$57.10. He says he never used it again before handing it in with the cellphone.

[8] The following morning, Mr McEnaney went into the bank to cash the cheque only to be advised that it had been cancelled.

[9] That same morning, 16 January 2007, Mr McEnaney drove to Christchurch and met Ms Currin. Curiously, she insisted that he sign the agreement. The applicant pointed out that, having been dismissed, there was little point and she advised him that he could work for the company but as a carpenter only. He declined. He said he decided not to press for a further week's notice to which he believed he was entitled under the terms of the proposed agreement, as he feared he might get nothing.

[10] After discussion, Ms Currin wrote out two cheques, one for lost tools and expenses, the other replacing the cancelled cheque. No deduction for the fuel was made at the time. The respondent later, on 14 March 2007, laid a complaint with the Police alleging theft. The matter did not proceed but it is worth noting that the Police complaint followed notice of the alleged grievance to the respondent.

[11] The applicant says the dismissal letter contained a number of reasons for his dismissal, some of which had been put to him during his employment and had been resolved at the time. Others he said were never brought to his attention.

[12] Finally, Mr McEnaney says he was humiliated in front of his wife and family, by having to deal with the Police investigation for the alleged theft, and by being told at the bank that his final pay cheque had been cancelled. He says he found full time employment and began earning four weeks after his dismissal.

The issues

[13] To resolve this matter, the Authority needs to decide the following issues:

- Was the applicant working as a permanent or casual employee at the time of the dismissal; and
- Was the dismissal unjustified; and
- What, if any, remedies are due to the applicant; and
- Did Mr McEnaney contribute in any way to the circumstances giving rise to his dismissal?

The investigation meeting

[14] I found Mr McEnaney an open and honest witness, his statement of evidence being clear and his responses to the Authority's questions direct and straightforward. I have no reason to doubt his evidence.

[15] The Authority has considered the unsigned and unsworn statements lodged by the respondent's solicitor. However, I have given them little weight and questioning of Mr McEnaney led me to accept that most of the issues raised had been dealt with while others were caused by either of the directors when they were on site.

Discussion and analysis

[16] There is little need for in depth analysis where a respondent declines to present its defence of an applicant's claims. The notice of investigation meeting makes it thoroughly clear that if the respondent fails to appear, the Authority may hear the applicant's evidence and determine the issues in the absence of the respondent. This is such a case.

[17] The only matter calling for some discussion is the employment status of the applicant during the time of his employment. The respondent claims that until Mr McEnaney signed the proposed employment agreement then his status was that of a casual. Mr McEnaney was quite clear, in response to a question from the Authority, that this had never been raised in his interview or subsequently until raised by Ms Currin at Tekapo during the second rostered period at Lake Tekapo.

[18] The draft employment agreement given to Mr McEnaney on 20 November 2006 is headed *Individual employment agreement Eustruct Limited permanent employee*. Nowhere in that document is the employee's status classed as casual even

pending the signing of the agreement by both parties. It is quite clear from Mr McEnaney's evidence that he had no wish to leave secure permanent employment for other than a secure permanent position with the respondent. I am satisfied, on the basis of the document itself and of Mr McEnaney's evidence, that the position offered and accepted was a permanent, full time position.

The determination

[19] Having considered the issues before me, I find:

- The applicant was unjustifiably dismissed; and
- The applicant has suffered financial loss as a result of that dismissal; and
- The applicant has suffered considerable hurt and humiliation exacerbated by the post-dismissal behaviour of the respondent's directors; and
- That Mr McEnaney did not contribute to the circumstances surrounding his dismissal.

Remedies

[20] The respondent is ordered to pay the applicant the following remedies:

- The sum of \$2,800 net of tax under s.123(1)(b) of the Employment Relations Act 2000;
- The compensatory sum of \$5,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.
- The application for a penalty is declined.

Costs

[21] The Authority accepts that the applicant has incurred costs in this matter. Those costs have clearly been increased by the lack of cooperation on the part of the respondent as evidenced by its failure to attend the agreed mediation. Having considered this particular issue and the amount of his advocate's time that needed to

be deployed in engaging with a most reluctant respondent, I think it just in all the circumstances to award Mr McEnaney the sum of \$1,500 as a reasonable contribution to his costs.

Paul Montgomery
Member of the Employment Relations Authority