

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 159
3056474

BETWEEN RICKY OSGOOD
 Applicant

AND WRIGHT TANKS LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: P J Drummond, counsel for the Applicant
 Andrew Wright, for the Respondent

Investigation Meeting: 28 February 2020 at Palmerston North

Submissions and
Further Information On the day of the investigation from the Applicant
Received: 10 February 2021 from the Respondent
 19 February 2021 from the Applicant

Date of Determination: 21 April 2021

SECOND DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Background

[1] In a determination dated 27 November 2020 I was required to consider whether Wright Tanks Ltd (“Wright Tanks”) was able to rely on a signed ‘Record of Settlement’ which purported to represent “*full and final settlement of any and all claims associated with [Mr Ricky Osgood’s] employment with [it]*”.¹

¹ *Osgood v Wright Tanks Ltd* [2020] NZERA 487

[2] It is not necessary to repeat all the evidence on the matter, but it is useful to briefly summarize the key events and findings recorded in that determination, as follows.

[3] I found that on 20 September 2018 the director of Wright Tanks, Mr Andrew Wright, told Mr Osgood his position was redundant, effectively immediately. Mr Wright offered to pay Mr Osgood a “*settlement*” of \$1,500 to “*keep him out of trouble while he looked for work*”.

[4] The next day Mr Wright sent a text inviting Mr Osgood to “... *come in [to work] to sign for the cash*”. On arrival, Mr Osgood was presented with the Record of Settlement and asked to sign it, which he did. Monies were deposited into Mr Osgood’s account later that day, a matter I shall return to.

[5] The Record of Settlement was not sent to, nor signed off, by a Mediator appointed by the Ministry of Business, Innovation & Employment.

[6] Mr Wright has subsequently pointed out that execution of the Record of Settlement was witnessed by another person. However there is no dispute Mr Osgood signed the agreement. At issue was whether Mr Osgood reasonably understood what he was signing.

[7] I found there was no meeting of the minds by the parties as to the meaning of the Record of Settlement. This was because, firstly, there was no live dispute between them at the time the document was signed. Highly significant also was that there had been no discussion between Mr Wright and Mr Osgood about the nature and effect of the exchange, nor had Mr Osgood been given an opportunity to consider the contents of the document or obtain legal advice in respect of it.

[8] Although not determinative given the above findings, I also considered it questionable as to whether the parties’ agreement was supported by consideration where the sum of money paid under the Record of Settlement was substantially less than the \$3,397.44 (gross)² Mr Osgood was contractually and statutorily entitled to receive at the time his employment ended.

[9] I concluded the settlement agreement did not reflect the necessary legal components of “*accord and satisfaction*” which would allow Wright Tanks to enforce the agreement, and Mr Osgood was free to pursue his claims concerning the way his employment ended.

² Mr Osgood was entitled to the sum equal to 3 days’ outstanding wages and corresponding holiday pay and 2 weeks’ contractual notice, and holiday pay.

The issues

[10] The Authority must now determine is whether;

- (a) Whether Mr Osgood was dismissed and if so was his dismissal unjustified;
- (b) If Mr Osgood was unjustifiably dismissed, what remedies (if any) should be ordered?
- (c) Whether Wright Tanks failed to pay Mr Osgood his contractual notice period, and wages for the week beginning 17 September 2018.
- (d) Whether Wright Tanks failed to pay holiday pay corresponding to the entitlements alleged at (c).
- (e) If Wright Tanks did breach its obligations at (c) and (d) should penalties be imposed.

Was Mr Osgood dismissed unjustifiably

[11] The onus sits with Wright Tanks to demonstrate that the actions in dismissing Mr Osgood were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[12] Firstly, an employer must have genuine grounds for which it considers a position has become redundant. Next, when an employer is proposing to disestablish a position on grounds of redundancy, it must communicate and consult with the incumbent employee in respect of the proposal, the basis for it, and provide him or her with information that is relevant to the employer's view. The employer must then allow the employee a reasonable time to reflect on the matter and an opportunity to comment on it. The employer is obliged to consider the employee's response before a decision is made, and whether there is alternative work the employee could do.

The discussion leading to the redundancy

[13] By way of background, Wright Tanks Ltd had employed Mr Osgood to drive and operate a hiab truck and crane. Throughout the length of his 7 months' of employment however, he generally performed labouring duties where the hiab truck was not operational.

[14] Whilst Mr Osgood and Mr Wright differ as to when the conversation concerning the redundancy occurred – a matter I shall return to - there is no real dispute Mr Osgood's

employment had ended by the conclusion of their discussion. It is not necessary to detail the entirety of their exchange or set out those aspects on which evidence diverges, but I have summarised the key aspects of the discussion and my findings in relation to it.

[15] It is common ground that the reason proffered by Mr Wright for the redundancy was because the hiab truck remained out of action. At the Authority's meeting, Mr Wright acknowledged that the topic of redundancy was introduced into the parties' conversation before Mr Osgood made some personal disclosures to him.

[16] That both parties agree the crane on the hiab truck required ongoing remedial work provides some support that there were genuine grounds for the dismissal. Against that contention, the suggestion that Mr Osgood might have been able to return to work in two weeks' time casts some doubt that the role had truly gone.

[17] I note also that Mr Osgood had worked as a general labourer for the duration of his employment. It is accepted there was no discussion between Mr Wright and Mr Osgood about why that arrangement could not continue or whether labouring work remained available. I have already noted that a fair and reasonable employer would consider if the employee could be redeployed. There is no evidence this occurred in this case.

[18] I do not accept, as is implied by Mr Wright's testimony, that no consultation was required as Mr Osgood agreed the role was redundant. I am unwilling to accept that is an acceptable assessment for the following reasons.

[19] Mr Wright acknowledged he did not give Mr Osgood any information or prior notice that his job was at risk before their discussion on 20 September 2018, and I accept Mr Osgood's evidence that Mr Wright simply announced, as a *fait accompli*, that there was no work for him and his position was gone. That Mr Osgood did not protest Mr Wright's pronouncement regarding the redundancy was a likely consequence of having insufficient information to meaningfully question the decision. I find Mr Osgood's statement that he felt he had no choice but to accept Mr Wright's decision is likely a more accurate reflection of his response when told he was redundant.

[20] The absence of any process by which Mr Osgood could comment on or have any input into the decision to terminate his employment was unfair and not the action of a reasonable

employer. The procedural failure cannot be regarded as minor, and Mr Osgood was unjustifiably dismissed.

Is Mr Osgood owed monies?

[21] After signing the Record of Settlement Mr Osgood was paid \$1,500.11 (nett) later on in the afternoon, ostensibly in accordance with Mr Record of Settlement (and Mr Wright's offer).

[22] A payslip for the period ending 21 September 2018 records a payment of \$2,025.84 comprising: one day's pay (8 hours) equalling \$180.00 gross; holiday pay of \$675.84 gross, and; a redundancy payment of \$1,170 gross. Mr Osgood claims he was not paid full wages owed to him for his final week of employment, and that he was not paid his contractual notice.

Wages

[23] Mr Osgood seeks 4 days' wages for 17 to 20 September 2018.

[24] A wage report indicates Mr Osgood's wages were calculated and paid on a weekly basis. Each week appears to begin on the Monday.³ The pay slip for the week (beginning 17 September 2018) in which Mr Osgood's employment finished indicates he was paid one day's wages only.

[25] As foreshadowed, Mr Osgood and Mr Wright differ as to when Mr Osgood was advised he was redundant. That date assumes some importance as it impacts on Mr Osgood's wage claim.

[26] I have found the discussion leading to Mr Osgood's immediate redundancy more likely to have been on Thursday 20 September 2018 than Monday 17 September 2018. I prefer that date because it is the day the Record of Settlement says Wright Tanks made Mr Osgood's position redundant. This document provides the best evidence available as to when Mr Osgood's employment finished.

[27] I note there is no information on the final payslip (or any other document) as to which day the wages that were paid were assigned to. Moreover there is nothing in the payslip which indicates how the remaining three days were treated in a payroll context. For example, there is

³ Document 6 attached to the Amended Statement of Problem.

no record that Mr Osgood was on leave (paid or unpaid) for 3 of the 4 days between 17 and 20 September 2018 (inclusive).

[28] Wright Tanks has been unable to properly account as to why Mr Osgood was not paid for 3 days wages when he remained employed and scheduled to work.

[29] I am satisfied Mr Osgood is owed a further 3 days' wages corresponding to his last week of employment. I calculate this sum to be \$583.20 (inclusive of holiday pay).⁴

Payment of Notice

[30] As foreshadowed, the second claim concerns the contractual notice period. Under the heading "*General Termination*, cl 2.2 of the parties' employment agreement provided:

The employer may terminate this agreement for cause, by providing two **weeks notice** in writing to the employee. ... The Employer may at its discretion, pay remuneration in lieu of some or all this notice period.

[31] It is clear from the final pay slip that the sum equal to two weeks' notice was not paid. Wright Tanks must comply with the provisions of its employment agreement with Mr Osgood and is ordered to pay \$1,944 gross (inclusive of holiday pay).⁵

Remedies associated with the dismissal

[32] Notably, there is no claim for lost wages following the termination of Mr Osgood's position, as he began working for a new employer on 8 October 2018. However, Mr Osgood seeks an unspecified amount in compensation for the non-economic losses the dismissal had on him.

[33] Mr Osgood said he was shocked by the suddenness of his dismissal and further embarrassed at having to advise his partner that he had been fired. He said this put an additional strain on their relationship and they separated shortly afterwards. Mr Osgood conceded his dismissal was not the primary factor that caused the breakup.

⁴ Mr Osgood's rate of pay was \$22.50 per hour. Wages at \$180 (gross) per 8 hour day plus \$14.40 per day as 8% on gross earnings as holiday pay = \$194.40 per day x 3 days = \$583.20 (gross)

⁵ See calculation of Mr Osgood's daily rate (including holiday pay) above. \$194.40 per day x 2 weeks (the contractual notice period) on the basis of Monday to Friday week = \$1,944.00 (gross)

[34] There is no evidence to suggest Mr Osgood contributed in blameworthy way to the situation that lead to his dismissal.

[35] On balance the evidence concerning loss of dignity and injury to feelings warrants an award of \$10,000 compensation under s 123(1)(c)(i) of the Employment Relation Act 2000.

Should a penalty be awarded?

[36] Various claims alleging a breach of the parties' employment agreement by Wright Tanks have not been made out.⁶

[37] I accept however that Wright Tanks failed to pay Mr Osgood \$583.20 in outstanding wages (and holiday pay corresponding to those wages). Although not specifically claimed in the pleadings, these may be respectively regarded as a breach of the employment agreement, and a breach of s 24 of the Holidays Act 2003.

[38] On balance, I am unwilling to impose a penalty in response to the omissions. I am satisfied the breaches have arisen where I find it more likely that Mr Wright was simply mistaken as to date on which Mr Osgood's employment finished and no longer entitled to wages.

[39] A penalty is not warranted in these circumstances.

Costs

[40] Mr Osgood has been largely successful with his claims before the Authority and he is entitled to a contribution towards his costs.

[41] Applying the Authority's notional tariff to assess costs, I find it appropriate to order Wright Tanks to reimburse the filing fee of \$71.56 required to lodge Mr Osgood's claim with the Authority, and contribute \$2,250 towards his costs incurred to progress the investigation of claims by the Authority over the course of half a day or thereabouts.

⁶ Paragraph 17 of the Amended Statement of Problem asserted breaches of cl 4 of the parties' employment agreement and of the Employment Relations Act 2000. The action alleged to have breached cl 4.1(i) was not identified in the pleadings or evidence before the Authority and cannot be determined. The second alleged breach to cl 4.2(i) concerns the "Obligations of the Employee", and could not form the basis of a claim of breach by the employer. No remedy was requested in relation to an allegation of breach of good faith, and the imposition of a penalty is not available under the Act for a breach of s 103A.

Summary of orders

[42] Wright Tanks Ltd is ordered to pay Mr Ricky Osgood the following;

- (a) \$10,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act; and
- (b) \$1,944.00 minus any tax payable, as the sum of the contractual notice period between the parties (including holiday pay) between the parties; and
- (c) \$583.20 minus any tax payable, as the sum equal to 3 days' unpaid wages (including holiday pay);
- (d) \$2,250 as a contribution towards Mr Osgood's costs; and
- (e) \$71.56 as reimbursement of the Authority's filing fee.

Michele Ryan
Member of the Employment Relations Authority