

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 146
3004011

BETWEEN	LESLIE THOMAS PENNAL Applicant
A N D	MICHAEL BENNY LEROY First Respondent
AND	JAMISON INVESTMENTS LIMITED Second Respondent
AND	TYRE RECYCLING SERVICES NEW ZEALAND LIMITED Third Respondent

Member of Authority:	Christine Hickey
Representatives:	Leslie Pennal, in person No appearance the for Respondents
Investigation Meeting:	4 July 2017 in Christchurch
Submissions Received:	From the Applicant at the investigation meeting None from the Respondent
Date of Determination:	4 September 2017

DETERMINATION OF THE AUTHORITY

- A. Jamison Investments Limited employed Leslie Pennal between 1 February 2016 and 31 August 2016, when it unjustifiably dismissed him.**
- B. Within 28 days of the date of this determination, Jamison Investments Limited must pay Leslie Pennal a total of \$6,391.00 gross in lost remuneration.**
- C. Within 28 days of the date of this determination, Jamison Investments Limited must pay Leslie Pennal a total of \$821.56 in legal costs and reimbursement for the filing fee.**

Employment relationship problem

[1] Leslie Pennal lodged an application to the Authority on 3 April 2017 alleging that Michael Leroy unjustifiably dismissed him. Mr Pennal claims three months lost wages arising out of the unjustified dismissal.

[2] On 10 April 2017, Mr Leroy wrote a letter from Jamison Investments Limited to the Authority. He says that he would not have personally employed anyone but would have done so through one of his companies because he does not trade as a sole trader. He requested a copy of Mr Pennal's "employment contract that he has a copy of". Mr Leroy closed by writing, "before I will even look at this the paperwork has to be right".

[3] The Authority officer engaged in some email communication with Mr Leroy and on 30 April 2017 Mr Leroy sent what he says was Mr Pennal's contract and a brief outline of Mr Pennal's behaviour "while being a contractor for Jamison Investments Limited".

[4] On 1 May 2016, Mr Leroy lodged a statement in reply. Mr Leroy did not deny that Mr Pennal was an employee and did not deny that he had employed him. Indeed, the statement in reply is headed "Les Pennal Employment 2016". Mr Leroy said that Mr Pennal abandoned his employment and therefore he replaced him.

[5] The Authority officer attempted to set up a telephone case management conference, however, Mr Leroy was not able to make himself available at any of the times suggested. The telephone conference took place on 24 May 2017. Mr Pennal participated.

[6] The Authority officer telephoned Mr Leroy. He answered the phone but indicated that he was too busy to speak to us. He said that everything he wanted to say was already in the document sent to the Authority. I explained that I would set the matter down for an investigation meeting date and that he would be informed of that date and time.

[7] During the telephone conference, Mr Pennal said that he did not have a copy of his individual employment agreement until it was sent to him by David Ballantyne, the solicitor of Jamison Investments Limited.

[8] I joined Jamison Investments Limited and Tyre Recycling Services New Zealand Limited as respondents as they were companies that Mr Leroy operated the business through. I needed to establish who had been Mr Pennal's employer.

[9] At the teleconference, I set the date and time of the investigation meeting as Tuesday, 4 July 2017 at 9:30am. Mr Pennal, Mr Leroy, Jamison Investments Limited and Tyre Recycling Services New Zealand Limited were all served with the Notice of Investigation Meeting. The Notice of Investigation Meeting clearly states:

If the respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant.

[10] On 3 July 2017, Mr Leroy telephoned the Authority officer to advise that he was not going to attend the investigation meeting the following day and that Jamison Investments Limited would not be represented. Mr Leroy's reason for not attending the investigation meeting was that he is in Australia "*out in the wops*".

[11] I decided to proceed with the investigation meeting. Mr Pennal attended the investigation meeting. I waited five minutes in case a representative of Tyre Recycling

Services New Zealand Limited was going to attend the meeting. However, none of the respondents was represented.

[12] I heard evidence from Mr Pennal. I also gave him an opportunity to provide some more specific evidence about his lost wages within the first three months after he finished working for Jamison. He did so after the investigation meeting.

[13] Mr Leroy is the sole director and shareholder of Jamison, and also acted on behalf of Tyre Recycling Services New Zealand Limited

[14] I have decided that Jamison Investments Limited is the correct employer, not Mr Leroy personally and not Tyre Recycling Services New Zealand Limited.

Was Mr Pennal an employee or an independent contractor?

[15] I am satisfied that the real nature of Mr Pennal's engagement was as an employee of Jamison for the following reasons.

[16] Mr Pennal provided the Authority with a copy of his individual employment agreement with Jamison. There is nothing in that document that suggests he was a contractor. The agreement was signed by Mr Pennal on 2 February 2016 and signed by a representative of Jamison, probably Mr Leroy, on 4 February 2016.

[17] The document provided by Mr Leroy setting out Mr Pennal's terms and conditions is headed "Jamison Investments Limited Individual Employment Agreement".

[18] The first page of the document provided by Mr Leroy is entitled "Individual Employment Agreement". Underneath that heading, it reads "This is an Individual Employment Agreement". I accept that on the first page Mr Pennal is referred to as a contractor. However, the rest of the agreement is typical of one between an employer and an employee. The fact that Mr Pennal is described as a contractor in the first two pages of the agreement is not definitive proof that that was his legal status.

[19] The contract provides for paid annual leave, which is not usual in a contract for services. It also allows for payment on public holidays in accordance with the Holidays Act. Mr Pennal was entitled to paid sick leave and paid bereavement leave under the agreement. There is a provision in relation to abandonment of employment.

[20] There is provision for redundancy and there is an employment protection provision as defined in the Employment Relations Amendment Act (No. 2) 2004.

[21] Finally, the agreement states:

Employment problems, grievances and disputes shall be as defined by the Employment Relations Act 2000 and shall be settled in accordance with the provisions of that Act and the plain language explanation of the services available for the resolution of employment relationship problems attached...

[22] The signature page is identical to that in Mr Pennal's individual employment agreement. It is very unlikely that the parties entered into two different agreements on the same day.

Was Mr Pennal dismissed?

[23] On Monday 29 August 2016, Mr Leroy summarily dismissed Mr Pennal after he refused to build a wall out of used tyres on the grounds that what he was being asked to do was unsafe.

[24] Later that evening Mr Leroy wrote to Mr Pennal by email:

I have had time to think about things and cool down.

I acted too quickly in terminating your employment as I am sick and tired of you not acting on my instructions as I am the boss you are not.

I will give you time to reconsider your position with the company over the next two days.

I will retract the termination comment and please consider today's discussion as a verbal warning.

Please let me know what your decision is.

[25] Mr Pennal responded the same evening by email:

Hi there Mike.

I am happy to be attending work as usual. Please put my keys and fuel card in the truck. However this will not be a verbal warning as I am following the below clause in the Health & Safety Act. Please read the attached document.

[26] Mr Pennal attached an extract of the Health & Safety at Work Act.

[27] Mr Leroy sent a further email on 29 August 2016 to Mr Pennal:

NO WE SORT THINGS OUT FIRST BEFORE IT HAPPENS.
WE WILL TALK TOMORROW.

[28] Mr Pennal responded:

What does that mean Mike? Am I working or not?

[29] Mr Leroy replied:

I have made other arrangements for Tuesday. Things will be sorted out first.
As I am working tomorrow the meeting will be on Wednesday.

[30] On Wednesday, 31 August 2016, Mr Pennal emailed Mr Leroy:

Hi Mike, when am I to return to work?

[31] Mr Leroy replied Mr Pennal:

Read the email I sent you.

[32] Mr Leroy was referring to an email sent that morning to Mr Pennal's wife's email address:

Hi Les.

As from 1 September 2016 tyre shredding Ltd takes over the running of the company. Everyone has to read for there position so if you want a position with new company you will have to send your can to Peter.

Benden@gmail.com.

Thanks mike

[33] Mr Pennal responded:

The email doesn't say my current job has finished just that I have to reapply within the new company so am I working tomorrow or not as my position is still active.

[34] Mr Leroy responded:

Your position in Jamison does not exist from 12pm midnight tonight. Reapply as the email says.

[35] On 2 September 2016, Mr Pennal responded to Mr Leroy:

It is now Friday. I have not heard anything from you. Can you please tell me what is happening to my pay and my gear that's been left in the cab?

He received no response from Mr Leroy.

[36] I have read and considered all of the documentation sent in by Mr Leroy in defence of Mr Pennal's application. Mr Leroy seems to suggest that initially he was concerned with Mr Pennal's performance of his role. However, there was no fair process engaged in in relation to telling Mr Pennal what his employer was concerned about, or giving him an opportunity to improve.

[37] Mr Leroy then states that because he withdrew his termination of Mr Pennal's employment in the evening of 29 August 2016 it was up to Mr Pennal to return to work. Mr Leroy says that he went to where he expected Mr Pennal to be working on the Tuesday, Wednesday, Thursday and Friday 2 September 2016 at 6:30am but Mr Pennal was not present on any of those days. That is what he relies on to decide that Mr Pennal had breached his obligations of employment and Mr Leroy says that clause 14 of the agreement between them states that if Mr Pennal was:

... absent from work for a continuous period exceeding three working days without the consent of the employer, or without notification to the employer, or without just cause, the contractor shall be deemed to have terminated employment without notice.

[38] The problem with that analysis is the series of emails and texts that were exchanged between Mr Leroy and Mr Pennal during that week. Mr Leroy instructed Mr Pennal not to go to work on Tuesday, 30 August.

[39] Mr Pennal was ready and willing to go back to work, although there were some issues to be discussed between the parties. Mr Leroy set up the possibility of meeting with Mr Pennal on Wednesday, 31 August. However, that meeting never happened and instead Mr Leroy sent Mr Pennal a text telling him that his employment was to end at midnight on Wednesday, 31 August 2016.

[40] I have no hesitation in deciding that Jamison dismissed Mr Pennal on 31 August 2016.

Was the dismissal unjustified?

[41] The test for whether an employee has been unjustifiably dismissed is set out at s 103A of the Employment Relations Act:

The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[42] In assessing whether the decision the employer made was one a fair and reasonable employer could have made, the Authority needs to consider subsection (3) of s 103A:

In applying the test in subsection (2), the Authority or the court must consider—

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[43] There was no semblance of a fair process required under s 103A(3) of the Act in the dismissal on 31 August 2016. The breaches of s 103A(3) were more than minor and resulted in Mr Pennal being treated unfairly.

[44] A fair and reasonable employer could not have made the decision to dismiss Mr Pennal in the way Jamison did. Jamison unjustifiably dismissed Mr Pennal.

Remedies

[45] Mr Pennal says that he did not receive his final pay or holiday pay. However, in his application he only claimed pay for "my 13 weeks owed by law". After hearing from Mr Pennal I am satisfied that he was claiming pay for the three months after his dismissal.

[46] I accept that Mr Pennal was not paid for the last seven days he worked and that he has not been paid any holiday pay. However, Jamison has not had any formal notification that Mr Pennal intended to claim those amounts in these proceedings so I cannot award them. Mr Pennal is able to lodge another claim for those amounts if he wishes to do so.

[47] Mr Pennal wishes to recover lost wages for the three months after his dismissal.

[48] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Jamison of the whole or any part of wages Mr Pennal lost as a result of his grievance. Section 128(2) of the Act provides that I must order Jamison to pay Mr Pennal the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. Mr Pennal obtained work in the three months after his dismissal. Therefore, the lesser sum is his actual lost remuneration for the three months (or 13 weeks) after his dismissal.

[49] Mr Pennal began work for his new employer in the week ending 18 September 2016. He had no income between his dismissal and that time. In the 13 weeks after his dismissal,

ending on 30 November 2016, Mr Pennal would have earned \$19,435.00 gross had he remained employed by Jamison.

[50] During that period in his new role he earned \$13,044.00 gross. Therefore, his actual loss is \$6,391.00 gross. Jamison must pay that amount of lost remuneration.

[51] Mr Pennal has not claimed compensation for humiliation, loss of dignity or injury to his feelings and so I make no award of compensation.

[52] I am satisfied that Mr Pennal did not contribute to the situation leading to his unjustified dismissal in any blameworthy way. Therefore, there is no reduction to his remedies.

Costs

[53] Mr Pennal attempted to resolve this matter directly with Jamison by engaging a lawyer to assist him. To date he has been billed \$2,829.26. Although Mr Pennal was not legally represented at the investigation meeting I am satisfied that the legal costs he has incurred are directly related to his unjustified dismissal and unpaid wages. Mr Pennal is entitled to recover a portion of his legal costs because he has been successful in his claim.

[54] The Authority usually awards costs on a daily tariff basis of \$4,500 for a full day investigation meeting. The investigation meeting took one hour. Jamison should contribute \$750.00 towards Mr Pennal's reasonably incurred legal costs. Mr Pennal also had to pay \$71.56 to file his claim in the Authority. Jamison must reimburse Mr Pennal for that cost.

Christine Hickey
Member of the Employment Relations Authority