



New Zealand Employment Relations Authority Decisions

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Senice v BF7 Trading Limited (Auckland) [2018] NZERA 255; [2018] NZERA Auckland 255 (15 August 2018)

Last Updated: 19 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 255
3026831

BETWEEN ELIJA SENICE Applicant

AND BF7 TRADING LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Glenn Finnigan for Applicant

No Appearance for Respondent

Investigation Meeting: 14 August 2018

Oral Determination: 14 August 2018

Record of Oral

Determination:

15 August 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

A. Mr Senice was unjustifiably dismissed. BF7 Trading Limited is ordered to pay remedies as follows within 14 days of the date of this determination:

- \$9008.08 gross for lost wages under s 123(1)(b) of the

[Employment Relations Act 2000](#); and

- \$10,000 compensation under [s 123\(1\)\(c\)\(i\)](#) of the Employment

Relations Act 2000.

B. BF7 Trading Limited is ordered to pay to Mr Senice unpaid wages and holiday pay of \$3,121.28 gross (less a deduction of

\$500 net) under [s 131](#) of the [Employment Relations Act 2000](#) plus interest on that amount within 14 days of the date of this determination.

C. BF7 Trading Limited is ordered to pay to Mr Senice other money owed of \$400 under [s 131](#) of the [Employment Relations Act](#)

2000 plus interest on that amount within 14 days of the date of this determination.

D. BF7 Trading Limited is ordered to pay a penalty of \$2,000 under s 130(4) of the [Employment Relations Act 2000](#) to Mr Senice within 14 days of the date of this determination.

E. BF7 Trading Limited pay to Mr Senice the amount of \$2,571.56 as a contribution to his costs within 14 days of the date of this determination.

Employment relationship problem

[1] Mr Senice worked for BF7 Trading Limited for the period 5 September to 7

November 2017. BF7 Trading Limited is an online recruitment agency trading under the name Filled Roles. It specialises in labour hire in the building and construction industry.

[2] Mr Senice was engaged as a carpenter to work for BF7 on a construction site in Queenstown. On or about 13 October Mr Senice was advised by Mr Spencer Bishop, the sole director and a major shareholder of BF7, that his location for work had moved to Wanaka. Mr Spencer Bishop and Mr Senice agreed BF7 would cover the costs of his travel from Queenstown to Wanaka.

[3] On 2 November Mr Senice had to travel to Fiji to attend the funeral of a close relative. Because he had not received the expected payment of wages into his bank account Mr Senice rang Mr Ray Bishop (brother to Spencer) who advised him there was no more work for him.

[4] Mr Senice says the actions of BF7 constituted a dismissal which he says is unjustified. In addition he claims BF7 failed to reimburse him for the travel costs and owes him money for unpaid wages and holiday pay.

Procedural history

[5] Mr Senice lodged his statement of problem in the Authority on 23 March

2018. The Authority was unable to effect service on BF7 and so Mr Senice was directed to serve the statement of problem personally. Mr Finnigan, on behalf of Mr Senice, arranged for the service of the documents which were signed for by Mr Spencer Bishop at 8.49am on 14 June 2018. No statement in reply was received.

[6] On 4 July, in order to progress this matter, I proposed to the parties that this matter be progressed to an investigation meeting and made directions accordingly. The Notice of Direction and Notice of Investigation Meeting were served on BF7 at 11.37am on 6 July 2018. Included in the Notice of Direction was a direction to BF7 that any correspondence to the Authority must include an application for leave to respond to the matter.¹

[7] To date no statement in reply has been received from BF7. BF7 has not engaged in the Authority's process.

[8] The investigation meeting was delayed 15 minutes to allow BF7 time to attend at the Authority in case its representative had become caught up in traffic or had difficulty finding a park. No representative from BF7 attended.

[9] As provided in clause 12 of Schedule 2 of the [Employment Relations Act 2000](#) (the Act) I have proceeded to act fully in the matter as if BF7 had engaged in the process or was represented.

Issues

[10] In order to resolve the employment relationship problems between Mr Senice and BF7 I must determine the following issues:

- a) Was Mr Senice unjustifiably dismissed and if so what if any remedies should be awarded?
- b) What, if any orders should be made in respect of the claim that Mr Senice is owed arrears of wages and expenses?
- c) Did BF7 breach the Act and if so what if any penalty should be awarded?
- d) What contribution should be made to costs?

[11] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from Mr Senice but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Unjustified dismissal

[12] The employment agreement between the parties contains a 90-day trial period provision. Such provisions must be interpreted strictly. This is because these provisions of the Act remove a right of access to justice.²

[13] The wording of clause 2 of the agreement does not meet the requirements of s 67A of the Act as it does not specify a period starting at the beginning of the employee's employment. It simply refers to a period of 90 days without identifying when the 90 day period will start. I have concluded that on this basis the clause is not enforceable and Mr Senice is entitled to have his personal grievance investigated by the Authority.

[14] In November Mr Senice had to attend the funeral of a close relative in Fiji. He expected to receive his wages into his bank account on 3 November. When he checked his bank account he had not been paid. He contacted Mr Spencer Bishop who was himself on holiday and referred him to Mr Ray Bishop who advised him there was no further work available for him.

[15] No explanations for the lack of work were given at that time. Mr Senice has since discovered that BF7's contract with the contracting company in Wanaka had been terminated by the contracting company.

[16] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether BF7's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[17] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Senice being treated unfairly.³ A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[18] It is arguable Mr Senice was dismissed by reason of redundancy. However, even if that was the case, there is no evidence the dismissal was for genuine commercial reasons and the process was non-existent. BF7 failed to provide any information about the reasons or information to support the decision to dismiss.⁴ The dismissal was immediate and abrupt. These defects were not minor and resulted in Mr Senice being treated unfairly.⁵ In all the circumstances of this case BF7 has failed to act fairly and reasonably and the decision to dismiss Mr Senice was not an action an employer acting fairly and reasonably could have taken.

[19] The dismissal of Mr Senice was unjustified and he is entitled to a consideration of remedies.

Remedies

[20] Mr Senice seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings to resolve his personal grievance.

[21] Mr Senice was dismissed on 3 November. When he returned to New Zealand he had to move out of his accommodation in Queenstown but was able to secure a temporary job working for another company. He commenced that new job on 13 November which ended on 21 December.

[22] I am satisfied Mr Senice made adequate steps to mitigate his loss. The only position he could secure was a temporary role. He is entitled to reimbursement of lost

³ [Employment Relations Act 2000](#) (the Act), s 103A(5).

⁴ The Act at s 4 (1A) (c).

⁵ The Act at s 103A(5).

wages of up to three months. Mr Senice expected to work at least 40 hours each week. The three months equates to 13 weeks. Mr Senice is entitled to be reimbursed

13 weeks at 40 hours each week at \$32 per hour. This is a total of \$16,640 gross.

[23] Mr Senice earned a total of \$7,639.32 between 13 November and 21

December. After taking his earnings into account BF7 Trading Limited is ordered to pay to Mr Senice reimbursement of \$9,008.08 gross for lost wages under s 123(1)(b) of the Act within 14 days of the date of this determination.

[24] Mr Senice claims compensation of \$10,000 under section 123(1)(c)(i) of the Act. Mr Senice was dismissed while attending a funeral of a close relative. When he returned to New Zealand he had not been paid and had no money. He told me he felt stressed and worried because he was returning to New Zealand with no work and this happened at a time that was already inherently stressful.

[25] The sudden termination of his employment was a shock because he had been promised ongoing employment and had moved from Auckland to Queenstown on the basis of that promise. He had taken the job in Queenstown because he wanted to provide long term financial support for his daughter who lived in Auckland. The loss of his job meant he was no longer in

a position to provide the necessary financial support.

[26] Adding to his emotional distress was his inability to meet his cultural obligation to contribute to the expenses of the deceased's family. Further, he was unable to pay a hotel bill before he left Fiji. These factors added to his immense humiliation.

[27] In all the circumstances of this case and taking into account awards in similar cases an appropriate award is \$10,000. BF7 Trading Limited is ordered to pay to Mr Senice \$10,000 under s 123(1)(c)(i) of the Act within 14 days of the date of this determination.

[28] I am required to take into account the extent to which Mr Senice's actions contributed towards the situation that gave rise to his personal grievance. I must

reduce the remedies if Mr Senice's actions contributed in any blameworthy way.⁶

⁶ [Employment Relations Act 2000, s 124.](#)

[29] I am not satisfied Mr Senice contributed in any blameworthy way to the situation giving rise to the personal grievance such that the remedies should be reduced.

Arrears of wages

[30] Mr Senice claims arrears of wages being unpaid wages, and holiday pay.

Unpaid wages

[31] Mr Senice claims payment of \$2,288.00 gross being 71.5 hours he worked over nine days on 19, 20, 24, 25, 26, 27, 30 and 31 October and 1 November 2017. The employment agreement sets Mr Senice's rate of pay at \$32 per hour.

[32] Mr Senice received a one off payment of \$500 net in consideration of his outstanding wages on 7 November.

[33] I am satisfied Mr Senice has not been paid for work he completed and is entitled to be paid \$2,288.00 gross for the work. After calculating the net pay due to Mr Senice BF7 is entitled to deduct the \$500 paid on 7 November 2017.

Holiday pay

[34] Mr Senice has received no holiday pay. He is entitled to be paid holiday pay equivalent to 8% of his total gross wages. Mr Senice received wages totalling

\$8,128.00 gross during his employment. He is owed a further \$2,288.00 gross. On total gross earnings of \$10,416.00 Mr Senice is entitled to 8% holiday pay which equates to \$833.28 gross.

Conclusion

[35] BF7 Trading Limited is ordered to pay to Mr Senice a total of \$3,121.28 gross (less a deduction of \$500 net) under s 131 of the Act within 14 days of the date of this determination which has been calculated as follows:

a) \$2,288.00 gross for unpaid wages;

b) \$833.28 gross in holiday pay.

Reimbursement of expenses

[36] Mr Senice spoke with Mr Spencer Bishop on or about 13 October and they agreed BF7 would reimburse Mr Senice for his expenses in travelling to and from Wanaka. At the time Mr Senice advised Mr Bishop that he needed to pay for road user charges and Mr Bishop agreed to meet the cost of those charges.

[37] Mr Senice has produced evidence that he incurred travelling expenses relating to diesel purchases and road user charges. He is entitled to reimbursement of those expenses totalling \$400.

[38] BF7 Trading Limited is ordered to pay to Mr Senice a total of \$400 under s

131 of the Act within 14 days of the date of this determination.

Interest

[39] Mr Senice seeks interest on his arrears of wages and expenses. There can be no doubt that BF7 has, by failing to pay Mr Senice his wages and other money when it was due, continued to have use of money rightfully belonging to Mr Senice. In these circumstances it is appropriate to order interest be paid on the outstanding amounts.

[40] Interest should be calculated from 3 November 2017 until the payments are made, using the calculator established pursuant to s 13 of the Interest on Money Claims Act 21016.

Application for a penalty

[41] Mr Senice has asked the Authority to impose a penalty on BF7 under s 130 of the Act. Mr Senice raised his personal grievance on 22 December 2017. In his letter raising a grievance he requested copies of his wages and time record including all of his timesheets.

[42] The request went unanswered. Section 130(2) of the Act requires employers to provide an employee immediately upon request, access to or a copy or extract of the wages and time record. I am satisfied BF7 has failed to provide the requested wages and time records and that it is appropriate for a penalty to be imposed.

[43] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty, including whether the breach was intentional, inadvertent or negligent and the nature and extent of any loss or damaged suffered by the person in breach or the person involved in the breach.

[44] The Court in *Borsboom v Preet Pvt Limited & Ors* established a series of steps which the Authority must take in considering the imposition of penalties.⁷ There was one breach for which the maximum penalty amounts to \$20,000.

[45] The impact of the breach on Mr Senice was not significant. However, the failure to provide the records made it difficult for Mr Senice to identify and establish his arrears of wages claim.

[46] BF7 has a history of not engaging with its ex-employees or the Authority. This is one of four cases in the Authority where claims for arrears of wages have been made and where no wages and time records have been provided.

[47] I have no evidence of the ability of BF7's ability to pay a penalty. Taking into account aggravating and ameliorating factors, and proportionality of the outcome I find an appropriate penalty in the circumstances for the breach of s 130(2) to be \$2,000. The penalties are to be paid to Mr Senice.

[48] BF7 is ordered to pay penalties of \$2,000 to Mr Senice within 14 days of the date of this determination.

Costs

[49] Mr Senice is entitled to a consideration of costs. The discretion to award costs, while broad is to be exercised in a principled way. The primary principle is that costs follow the event. The principles applying to costs are well settled and do not require repeating.⁸

[50] The Authority applies a starting point of a notional daily tariff for quantifying costs which is \$4,500 for a one day investigation meeting. The investigation meeting

⁷ *Borsboom v Preet Pvt Limited & Ors* [2016] NZEmpC 132 at [137] – [151].

⁸ *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

took two hours including the issue of this oral determination. The starting point for calculating the daily tariff is \$1,485.

[51] Mr Senice has asked the Authority to uplift this amount to take into account the additional costs he has incurred in establishing his arrears of wages claim. He says his costs have increased also because of the failure of BF7 to engage with either him or the Authority. I am of the view that this matter should have been resolved in mediation. BF7 is a labour hire company may have been in a position to assist Mr Senice into alternative employment had it engaged with him.

[52] In addition to his legal costs Mr Senice is entitled to reimbursement of his filing fee of \$71.56.

[53] Taking all of the circumstances into account I consider it appropriate that BF7

Trading Limited pay to Mr Senice the amount of \$2,571.56 as a contribution to his costs and that this payment be made within 14 days of the date of this determination.

Certificate of determination

[54] Pursuant to Regulation 26 of the Employment Relations Authority Regulations

2000 Mr Senice is to be provided with a certificate of determination, sealed with the seal of the Authority recording that within 14 days of the date of this determination, BF7 Trading Limited is to pay Mr Senice:

- Remedies for his personal grievance:

- a) \$9008.08 gross for lost wages under s 123(1)(b) of the Employment Relations Act 2000; and

- b) \$10,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

- Unpaid wages and holiday pay of \$3,121.28 gross (less a deduction of \$500 net) under s 131 of the Employment Relations Act 2000 plus interest;
- Other money owed of \$400 under [s 131](#) of the [Employment Relations Act 2000](#) plus interest;
- A Penalty of \$2,000 under [s 130\(4\)](#) of the [Employment Relations Act 2000](#);
- Costs of \$2,571.56.

Vicki Campbell

Member of the Employment Relations Authority

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