

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 61
3135547

BETWEEN DRE TAYLOR
 Applicant

AND MARK MANA
 Respondent

Member of Authority: Marija Urlich

Representatives: Dave Cain, for the Applicant
 No appearance for the Respondent

Investigation Meeting: 24 February 2022, by audio-visual link

Further information and At the investigation meeting
submissions:

Determination: 28 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Taylor worked for Mark Mana as a painter from 8 to 23 December 2020 when his employment ended. He says he has not been paid for every hour worked or been paid holiday pay. He seeks awards of arrears of those sums and a calculation of interest. He also says he was unjustifiably constructively dismissed for which he seeks remedies of lost wages and damages for hurt feelings. He also seeks findings that Mr Mana breached statutory duties and the award of penalties a portion of any to be ordered to him.

[2] Mr Mana has not filed a statement in reply, filed relevant documents as directed or otherwise participated in the Authority process.

The Authority's investigation

[3] As stated above Mr Mana has not participated in the Authority process. I am satisfied he is aware of and has been served with the statement of problem, minute dated 1 November 2021 (the minute) and notice of hearing. In the minute the Authority identified the issues to be investigated and determined and proposed timetabling directions including that a direction to mediation be issued, dates for filing of witness statements and relevant documents and an investigation meeting date. The parties were invited to file any objection to the proposal within seven days of the date of the minute. Additionally, the minute directed Mr Mana to file documents related to Mr Taylor's employment including wage and time records, holiday and leave records, payslips and final pay details. The minute stated Mr Mana would require leave to file a statement in reply. Mr Taylor confirmed the proposed timetabling. Mr Mana provided no comment. The proposed timetable was duly confirmed. For completeness the parties have not attended mediation.

[4] Shortly after the scheduled start time of the investigation meeting at my direction an Authority Officer rang Mr Mana on the mobile telephone number on which he has communicated with the Authority previously and left a message on his voice mail that the investigation would commence shortly. The start of the investigation meeting was delayed by a further 10 minutes to accommodate lateness on his part. Mr Mana did not participate in the investigation meeting and has not returned the Authority officer's voice message or otherwise subsequently contacted the Authority.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and information received.

Issues

[6] The issues identified for investigation and determination are:

- a. Was Mr Taylor unjustifiably constructively dismissed?
- b. Is Mr Taylor entitled to a consideration of remedies including:

- Compensation for hurt and humiliation under section 123(1)(c)(i) of the Employment Relations Act 2000?
 - Reimbursement of lost wages under section 123(1)(b) of the Employment Relations Act 2000?
- c. Is Mr Taylor entitled to wage arrears and holiday pay?
- d. If so, should interest be calculated on any arrears?
- e. Has Mark Mana breached the duty of good faith under section 4 of ERA 2000, section 64 of ERA 2000 and/or section 13 of Wages Protection Act 1983? If a breach or breaches are established is a penalty warranted?
- f. Should either party contribute to the costs of representation of the other party?

Background

[7] Mr Taylor gave unchallenged evidence to the Authority. His account of events is supported by the social media and text messages he exchanged with Mr Mana at the relevant time. These messages have been provided to the Authority.

[8] On 29 November 2020 Mr Taylor posted on a social media platform that he was looking for work as a painter. Mr Mana sent him a message by the same platform the following day that he was looking for two full-time painters to join his crew. Mr Mana operates a painting and decorating business trading under the name Hibiscus Painters and Decorators. At this stage the men were unknown to each other.

[9] Further messages were exchanged, and I am satisfied by 6 December the parties had agreed that Mr Taylor would start work for Mr Mana as a painter on Tuesday 8 December on \$25 per hour for 40 hours per week and that pay day would be every Thursday. No written employment agreement was provided.

[10] As agreed Mr Taylor started work on 8 December. The first painting job Mr Taylor worked on was located at a residential address in east Auckland at which he worked until 16 December. Mr Taylor did not receive a wage payment on Thursday 10 December as he expected. He raised this with Mr Mana who said wages were paid

fortnightly but to 'tide him over' he would give Mr Taylor \$250 made up of \$200 by way of a wages advance and \$50 for petrol to assist with transportation costs. Mr Mana gave Mr Taylor \$250 cash.

[11] Mr Taylor worked Monday, Tuesday and Wednesday of the week beginning 14 December. Due to transport difficulties, he was unable to attend work on Thursday and Friday of that week. He made Mr Mana aware of the circumstances which prevented him attending work on those days.

[12] Mr Taylor did not receive a wage payment on the advised pay day Thursday 17 December.

[13] On 18 December Mr Taylor told Mr Mana he could not do any further work for him until he had been paid. Mr Mana said he could not pay him until he had been paid by the client and that he expected to be paid soon.

[14] Over the weekend of 19 and 20 December Mr Mana represented to Mr Taylor he would be paid on Wednesday 23 December but that he needed him to work that week at a new job located in Mairangi Bay otherwise "I'll look for someone else". Mr Taylor attended work on Monday at the new location as directed. After the new job started Mr Mana advised pay day had shifted to Thursday 24 December. This further extension of the expected pay day alarmed Mr Taylor who was concerned he would not be paid at all, and this concern was compounded by the increased travel costs associated with the new job location. He raised these concerns with Mr Mana whose various messages in response included "Once I pay you. I won't need you anymore. Thanks" and "You don't need to message anymore. You will get paid and that's (sic) all you need to know. Thanks".

[15] On 23 December Mr Taylor messaged Mr Mana including:

I have no option but to resign as I simply cannot survive without getting paid.
With no Employment agreement, how much notice do I need to give?

[16] Mr Taylor was not paid the following day, the 24th, despite Mr Mana's assurance. He did not return to work for Mr Mana. I am satisfied 23 December was Mr Taylor's final date of employment.

Discussion

Did Mr Mana employ Mr Taylor and if so on what terms?

[17] The evidence establishes Mr Mana employed Mr Taylor on the following agreed terms – he would work as a painter for him for 40 hours per week at the rate of \$25 per hour. The evidence also establishes from 8 until 22 December 2020 Mr Taylor performed the work he had agreed to perform under the employment agreement. I am satisfied that Mr Taylor was unaware of his employer being other than Mr Mana. If there was a company that was never identified and disclosed to him.

Was Mr Taylor unjustifiably constructively dismissed?

[18] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.¹

[19] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.²

- (i) *Did Mr Mana breach the terms of the employment agreement causing Mr Taylor to resign?*

[20] Failure to pay wages in full when due and owing is a serious breach of the duty owed to Mr Taylor as his employee.³ Mr Mana breached this duty owed to Mr Taylor because he did not pay Mr Taylor for hours worked. Mr Taylor's evidence was he

¹*Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

²*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

³*Wages Protection Act 1983, s 4.*

resigned because Mr Mana did not pay him for his work, he could not afford to continue to work without pay and due to the shifting pay dates and Mr Mana's increasing antagonism to his requests for payment he had little confidence that he would be paid. I am satisfied Mr Taylor resigned because of Mr Mana's breaches of duty.

(ii) *If so, was Mr Taylor's resignation reasonably foreseeable given the nature of the breaches?*

[21] Yes. The failure to pay in the circumstances of this matter was a breach of duty of sufficient seriousness to make it reasonably foreseeable Mr Taylor would resign. On 18 December Mr Taylor told Mr Mana he could not do any further work until he was paid for the work he had done. Aware of this Mr Mana promised a payment date and, I am satisfied, implied Mr Taylor's employment would end if he did not attend work on 21 December. Without explanation the payment date was unilaterally shifted again. Mr Taylor had a reasonable basis to be concerned that Mr Mana did not intend to be bound by the terms of the parties' employment agreement, including paying wages for hours worked given the shifting dates with little or no explanation for the delay and the unreasonable response from Mr Mana to an entirely reasonable request to be paid for hours worked in the terms agreed. I am satisfied Mr Taylor made it clear to Mr Mana that his personal circumstances were such that he could not work without pay and that he did not agree to further delay in payment of the wages which were due and owing. His resignation on 23 December in the circumstances of the found breaches was reasonably foreseeable.

[22] Mr Taylor was unjustifiably constructively dismissed.

Remedies in relation the personal grievance

[23] Mr Taylor has established a personal grievance for unjustified constructive dismissal. He is entitled to a consideration of the remedies sought.

Reimbursement

[24] Mr Taylor seeks reimbursement of earnings lost as a result of his dismissal pursuant to section 123(1)(b) and 128 of the Act. I am satisfied the appropriate period of claim runs for 12 weeks from his final date of employment being 23 December 2020.

[25] After reviewing the evidence of loss and Mr Taylor's attempts to secure employment, the Authority is satisfied he is entitled to an award of three months lost remuneration to be calculated at the agreed rate of pay and hours of work.⁴

Compensation for humiliation, loss of dignity and injury to feelings

[26] Mr Taylor said his dismissal and the circumstances leading up to it was an extremely difficult time in his life and he felt very down and depressed. He said he had hoped this job would be a turning point for him, but it ended with him feeling he had hit rock bottom. He also said his employment situation had a profoundly negative impact on his family and this impact was intensified by the proximity to a family celebration held around this time and Christmas.

[27] The Authority is satisfied Mr Taylor has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation.⁵ Having regard to the particular circumstances of this case, I consider that an award of \$8,000 under section 123(1)(c)(i) is appropriate.⁶

Contribution

[28] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[29] Mr Taylor did not contribute in a blameworthy way to the circumstances which led to his employment ending. The evidence establishes Mr Mana was more than satisfied with the work Mr Taylor performed. It is not unreasonable for an employee to request payment for wages due and owing.

[30] There are no deductions from the monetary remedies for reasons of contribution.

⁴ Mr Taylor worked 40 hours per week at an hourly rate of \$25, 12 weeks lost wages = \$12,000.

⁵ *Richora Group Limited v Cheng* [2018] NZEmpC 113.

⁶ *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

Wage arrears

Are arrears of wages due and owing?

[31] Mr Taylor is entitled to be paid by Mr Mana for hours he worked at the agreed rate of pay, which was \$25 per hour. Mr Mana is ordered to pay Mr Taylor wage arrears totalling \$1,637.50 (gross) because the evidence establishes Mr Taylor worked 73.5 hours for Mr Mana for which he should have been paid at the rate of \$25.00 per hour (less the \$200 advance) and that these arrears remain unpaid.

Holiday pay

[32] As an employee Mr Taylor was entitled to holiday pay upon the termination of his employment.⁷

[33] Mr Taylor is entitled to be paid holiday pay on the 73.5 hours wage arrears calculated at eight per cent of total gross earnings.

[34] Mark Mana is ordered to pay Mr Taylor \$147.00 in holiday pay entitlements within 14 days of the date of this determination.

Interest

[36] Mr Taylor is entitled to an award of interest on the wage arrears awarded including the holiday pay component. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[37] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[38] Mark Mana is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:⁸

- (i) Interest on the sum of \$1,784.50 calculated from 24 December 2020 until the date payment is made in full.

⁷ Holidays Act 2003, s 27.

⁸ www.justice.govt.nz/fines/civil-debt-interest-calculator.

[39] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Is Mr Mana liable to a penalty for found breaches?

[40] As found above Mr Mana's failure to pay wages and holiday pay when they were due and owing are breaches of statutory duty. Mr Mana failed to provide a written employment agreement which is also a breach of statutory duty.⁹ Mr Mana's communications with Mr Taylor regarding when he would be paid were not consistent with and amount to a breach of the section 4 duty of good faith because they were misleading and deceptive and undermined Mr Taylor's confidence in the employment relationship.

[41] The penalty sought under s 134A for obstruction or delay of the Authority investigation is declined. While it is correct Mr Mana has not engaged with the Authority including not complying with directions to attend mediation and provide wage, time and holiday records, records which as an employer he had a statutory duty to maintain, these are not failures which, in these circumstances meet the s 134A requirements.

[42] For the remaining established breaches of statutory duty in considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.¹⁰

[43] The maximum penalty against an individual person is \$10,000.¹¹ There are four statutory breaches. Three of the breaches (failure to provide a written employment agreement and pay wages and holiday pay) are sufficiently similar in nature to warrant globalisation. The starting point for penalties is \$20,000.

⁹ Employment Relations Act 2000, s 65.

¹⁰ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

¹¹ Employment Relations Act 2000, s 135.

[44] Mr Mana's actions have been found to amount to breaches of statutory obligations and have undermined the employment relationship to such a degree that it caused Mr Taylor to resign. There are no factors which weigh in mitigation. While the record of the messages between the parties indicate Mr Mana was conciliatory when the failure to pay was first raised that tone changed to an aggressive and personalised attack on Mr Taylor when he sought to assert the fundamental obligation to be paid for work performed under agreed terms. Mr Mana has taken no steps to mitigate what I am satisfied have been intentional actions in breach of obligations he owed Mr Taylor.

[45] Mr Mana's actions were intentional and his culpability high. As the employer he was responsible for providing Mr Taylor a written employment agreement, paying his wages and holiday pay and conducting himself in a manner which maintained and supported the duty of good faith. The failures to do so are serious breaches.

[46] There is compelling evidence of direct loss suffered by Mr Taylor as a result of Mr Mana's breaches of duty including having to sell his car to try to make ends meet for his family in the Christmas period. In addition, he has spent time and resources seeking to enforce obligations owed under the employment agreement.

[47] There is no relevant previous conduct of Mr Mana to consider. There is no specific evidence before the Authority of any financial difficulty Mr Mana may have in paying any penalty.

[48] Standing back, looking at that figure, including in comparison to other cases, I conclude that a fair penalty is \$6,000. Mr Mana is ordered to pay half the penalty to Mr Taylor to compensate him for the inconvenience and resources expended in pursuing this matter. The penalty is to be paid within 14 days of the date of this determination.

Summary of orders

[49] The Authority orders as follows:

Within 14 days of the date of determination Mark Mana is ordered to pay Dre Taylor the following sums:

- (i) \$8,000 under s 123(1)(c)(i);
- (ii) \$12,000 under s 123(1)(b);
- (iii) \$1,784.50 in wage and holiday pay arrears;
- (iv) \$6,000 penalty half of which is to be paid to Dre Taylor and half to the Crown; and
- (v) Mr Mana is to calculate and pay interest on total arrears.

Costs

[50] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, Mr Taylor is to file and serve any costs memorandum within 10 working days of the date of determination and Mr Mana may file and serve any memorandum in reply within a further 5 working days.

Marija Urlich
Member of the Employment Relations Authority