Employment Court of New Zealand

The Cabinet Place Limited v Kubesch [2015] NZEmpC 193 (3 November 2015)

Last Updated: 11 November 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 193

EMPC 93/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	THE CABINET PLACE LIMITED Plaintiff
AND	FRANZ KUBESCH Defendant

Hearing:	19 October 2015 (Heard at Auckland)
Appearances:	C Baumann, as agent for plaintiff F Kubesch, in person
Judgment:	3 November 2015

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Mr Franz Kubesch commenced employment as a cabinet maker with The Cabinet Place Limited (CPL) on 20 January 2014. His employment was terminated formally by letter on 28 April 2014. The letter also sought his confirmation that he had received all money owing to him and that he had no personal grievance arising from the dismissal. He was asked to endorse the letter by his signature. He did not sign it.

[2] Mr Kubesch raised a personal grievance arising out of his dismissal. This was not resolved and he commenced a claim in the Employment Relations Authority (the Authority). He was successful in his claim. In a determination dated 12 March 2015[1] the following declarations were made and remedies awarded to him:

[1] *Kubesch v The Cabinet Place Ltd* [2015] NZERA Auckland 72.

(a) That his employment with CPL was on a continuous basis, not as a casual or fixed term employee or as an independent contractor.

(b) CPL's termination of Mr Kubesch's employment on 28 April 2014

was unjustified.

(c) At the end of his employment CPL owed Mr Kubesch for nine days he worked but was not paid, one public holiday and five days of annual leave.

(d) CPL must settle Mr Kubesch's personal grievance and wage arrears due by paying him the following sums within 28 days of the date of the determination:

(i) $4,536 as lost wages under s 123(1)(b) of the Employment

Relations Act 2000 (the Act);

(ii) $5,000 as compensation under s 123(1)(c)(i) of the Act; (iii) $2,916 as wage arrears under s 131 of the Act;

(iv) $126.22 as interest on the wage arrears for the period from 29

April 2014 to 10 March 2015.

[3] On 9 April 2015 CPL filed a challenge to the determination. The election it made in the challenge related to the whole of the determination and it sought a hearing de novo. Mr Kubesch opposed the challenge by filing a statement of defence. He did not file a cross-challenge but sought within the confines of the claims he made to the Authority, to have the Court increase some of the remedies awarded to him. This included asking the Court to increase the level of compensation awarded to him even though the Authority granted him the total sum

he sought.[2]

2 Pursuant to ss183(1) and (2) of the Employment Relations Act 2000 following a de novo hearing the Court must make its own decision on the matter and any relevant issues. Once the Court has made a decision the determination of the Authority is set aside.

The employment agreement

[4] Mr Kubesch had a previous relationship with CPL carrying out work on a contract basis. In January 2014 he was offered a position of employment with CPL. Following discussions, he began work for CPL on 20 January 2014. He remained in employment until 28 April 2014 when CPL formally terminated his employment. This was ostensibly on the basis that he was not a permanent employee but on a fixed term agreement and the initial purpose of his employment had ended. Mr Kubesch vehemently denies the allegation of CPL that he was employed for a fixed term to assist only with a specific contract of CPL or that he was employed on a casual basis or that he was an independent contractor as has been variously alleged by CPL. The true basis of Mr Kubesch's employment with CPL is the primary issue in this challenge.

[5] CPL alleged that after Mr Kubesch commenced his employment on 20

January 2014 he was asked to sign a written employment agreement, a copy of which has been produced in evidence. Mr Kubesch denied being given this agreement to sign. The copy in evidence is not signed by him. CPL alleged that the document was given to Mr Kubesch by Mr Sergey Shchechka. Mr Shchechka was the former project manager for CPL. He is the father-in-law of Mr Carlos Baumann, the representative and General Manager of CPL. It was proposed Mr Shchechka would give evidence by video link from Russia where I presume he now permanently resides. For reasons to be discussed, he was not able to give evidence.

[6] As will also be discussed further in this judgment, even if Mr Kubesch was given the employment agreement by Mr Shchechka and signed it, it would not provide a defence to the claim Mr Kubesch is making that he was unjustifiably dismissed. Mr Kubesch was not a casual employee as stated in the agreement. The attempt made to allege he was on a fixed term contract also fails because it is not validly recorded in the agreement in compliance with the provisions of the Act. He certainly was not an independent contractor. There was also an attempt made by Mr Baumann to allege in closing submissions during the course of the hearing that Mr Kubesch was on a 90-day trial period. There is a provision in the alleged written agreement that Mr Kubesch was subject to the 90-day trial period. While this was

not actually pleaded by CPL, the submission made that the 90-day trial period applied to Mr Kubesch is similarly invalid for reasons which will be discussed later.

[7] Mr Kubesch's employment appears to have proceeded uneventfully until around mid-April 2014. The arrangement was that Mr Kubesch would provide details of his hours worked to Mrs Liudmila Korneeva. She was the accounts and payroll administrator for CPL. She is also Mr Baumann's wife and the step-daughter of Mr Shchechka, the proposed witness now living in Russia. Mrs Korneeva would then calculate Mr Kubesch's pay for the hours which she confirmed with her father. Once this was confirmed, Mr Kubesch's wages were paid to him. Mrs Korneeva gave evidence to the effect that Mr Kubesch was on a different payroll arrangement from other employees as to calculation and payment of his wages. She alleges that this was because he was a temporary or casual employee. Payroll for other permanent employees was managed by a computer software programme called Workflow Max.

Hearing issue

[8] When this matter was first set down for a hearing by the Court, CPL sought an adjournment of the hearing. This application was made a mere five working days prior to the commencement date of the hearing. The grounds given were that Mr Shchechka, a key witness, was in Russia. He had been detained there as a result of a family bereavement and was not able to travel back to New Zealand in time for the hearing. His evidence could not be taken by video link as he was in a remote part of Russia. The proceedings were adjourned over the objection of Mr Kubesch. CPL was informed that once the new date was allocated, no further adjournments would be countenanced.

[9] Mr Shchechka did not in fact return to New Zealand for the hearing on 19

October 2015. CPL sought to have his evidence given by video link. In view of the length of time which had elapsed since the adjournment, no explanation was given as to why such an application was left until a mere six days before the new hearing date which had been set. Mr Kubesch did not oppose the application to have the evidence given by video link from Moscow and the application was granted. It then

transpired, however, that CPL had arranged for the video link in Moscow to take place on 20 October 2015. The Court only became aware of this on the day of the hearing. Apparently video link facilities were ascertained to be unavailable on 19

October 2015 when the plaintiff would be calling its witnesses at the hearing. This was problematic as the plaintiff's case was anticipated to be completed on the first day and in fact was completed prior to the lunch adjournment on that day. When the matter was first set down for hearing it was anticipated that seven witnesses would be giving evidence; accordingly two days had been allocated for the hearing. As the hearing date approached, however, it was plain that there would only be four witnesses giving evidence, including Mr Shchechka and only one day would be required.

[10] At the commencement of the hearing CPL requested that Mr Shchechka give evidence, either by way of interpolation during Mr Kubesch's evidence or following it. I indicated to Mr Baumann that I would only allow a witness's evidence to be interpolated during or at the completion of Mr Kubesch's evidence if Mr Kubesch consented. He did not consent. Indeed Mr Kubesch's evidence was also completed prior to the end of the first day of hearing and closing submissions were also able to be completed on that day. It had been made plain to Mr Baumann that it was his responsibility to arrange for his witness from Russia to give evidence as part of the plaintiff's case and if necessary for an interpreter to be available. It was anticipated when the adjournment of the first hearing date was granted that Mr Shchechka would be returning to New Zealand for the adjourned hearing. The reason given for being unable to arrange a video link for the day when the plaintiff would be calling evidence was that the video link room in Moscow was not available. It seems inconceivable that in a city the size of Moscow, other facilities were not available to the plaintiff. The booking had clearly not been arranged in a timely fashion.

[11] Mr Kubesch was entitled to object to the evidence being given by way of interpolation during his own evidence or after he had completed his own evidence. While he knew what evidence-in-chief would be given from Mr Shchechka's brief, he would not have had adequate notice of any further evidence which might be led. Mr Kubesch is German by nationality and English is his second language. With the language difficulties involving a witness who might be speaking Russian, he would

also have been substantially prejudiced when it came to cross-examination at that point. While he did not object to the witness giving evidence by video link, he would not have anticipated that CPL would then wish to have the evidence led either during or after his own evidence had been given. An issue of how he would reply to such evidence would then arise and have the potential of unreasonably prolonging the hearing. The hearing therefore proceeded on the basis that if the plaintiff's evidence was not completed on the first day, then the video link could sequentially occur at the beginning of the following day. The hearing in its entirety was completed on the first day and therefore the plaintiff's third witness did not give evidence.

Factual issues and the Authority's determination

[12] While Mr Baumann, on behalf of CPL, disputes the findings of the Authority, the determination deals with virtually the same issues and evidence that have been presented to the Court by CPL. The determination contains well reasoned rejections of the contentions by CPL. Even in the written employment agreement which CPL is attempting to rely upon, there are substantial inconsistencies. These are also confirmed in particular by the evidence of Mrs Korneeva who referred to Mr Kubesch as a casual employee. The primary contention of CPL is that Mr Kubesch was on a fixed term contract, but as the Authority Member has stated in his determination, if that were the case, the agreement does not contain the provisions which are required under the Act and in particular the method by which Mr Kubesch's employment would eventually come to an end and the way that he would be given adequate notice of that. In addition, however, the agreement in one part also refers to Mr Kubesch as a casual employee and it also contains a provision that he was supposed to be subject to a 90-day trial period.

[13] There are numerous other inconsistencies in the document. Mrs Korneeva stated in evidence that a template agreement had been prepared by the legal advisors for CPL. She stated that she had prepared the written agreement for Mr Kubesch by inserting appropriate clauses into the template. That has resulted in the agreement containing several provisions that would never be appropriate to Mr Kubesch if he was indeed employed on a temporary basis. They are more consistent with Mr

Kubesch being a permanent employee. The entire matter has not been adequately thought through. CPL is now endeavouring to use the agreement to justify what was indeed an unjustifiable dismissal of Mr Kubesch. During closing submissions delivered by Mr Baumann at the conclusion of the evidence, he conceded that CPL may not have provided appropriate wording in the alleged employment agreement or during oral discussions with Mr Kubesch at the time that he was dismissed nor in the final letter confirming his dismissal. However, he submitted that CPL had acted throughout in good faith and relied upon mutual trust between CPL and Mr Kubesch, which Mr Baumann claimed exists between CPL and all of its employees.

[14] Mr Kubesch stated in his evidence and submissions that the reason that CPL dismissed him when it did was to endeavour to avoid paying him holiday pay for the then imminent Easter vacation followed by the Anzac day holiday. Certainly the timing of the termination of his employment would provide some corroboration for that. If it was so, then it would certainly run counter to Mr Baumann's protestations that CPL acted throughout in good faith.

[15] Surrounding the period just prior to Mr Kubesch being forced to leave the employment with CPL, there was a dispute relating to the final wages which he claimed. CPL disputed the days worked and hours claimed by Mr Kubesch from 10

April 2014 until 28 April 2014 when his formal notice took effect. In the sheets apparently prepared by Mr Shchechka, there is an

assertion that Mr Kubesch was absent from work for four days. This is between 10 April 2014 and 16 April 2014. In the records for CPL there is also an inexplicable deletion of two workdays from the recorded hours when Mr Kubesch was not paid and yet it is clear he was at work. There was no assertion by CPL that he did not work on those two days. The alleged absent days appeared in the week prior to the week of the Easter break and in the days leading up to Good Friday 2014. A problem which CPL faces in respect of its assertions is that Mr Kubesch, who appeared to be in the habit of having himself photographed alongside his workmanship for CPL, has produced in evidence photographs taken of him, and taken by him of other employees, at worksites during the very days when he is alleged to have been absent from work. Mr Kubesch also made the explanation in evidence that Mr Shchechka may not have considered the fact that he was required on occasion to purchase componentry from suppliers to

complete the work he was required to do. He may have been absent from the worksites attending to this when Mr Shchechka, who appeared to have overall oversight, was visiting.

[16] All of the evidence from CPL in respect of the wages dispute is totally unsatisfactory. I accept Mr Kubesch's evidence that he did in fact work as he has claimed, that his claim to hours worked and therefore the entitlement to be paid for them is correct.

[17] There was other evidence which corroborated Mr Kubesch's denial that he was on a fixed term contract. Mr Baumann alleged that Mr Kubesch was informed at the outset of his employment that he would only be working on a particular project at Stamford Park Road, Mt Roskill; and that when this was completed his employment would come to an end. The alleged written employment agreement attempts to confirm this. However, Mr Kubesch has provided evidence that during the course of his employment with CPL he was not asked only to carry out work on the Stamford Park Road project. There is evidence that he worked on other projects for CPL including a project which he describes as the Curtis kitchen. His photographs show some of his workmanship at the Curtis kitchen project and also in relation to a circular counter for another project over which there was some dispute at the time. In addition to this, Mr Baumann took Mr Kubesch with him to view a potential contract CPL was endeavouring to obtain for the Manukau District Court project. There was a photograph showing Mr Kubesch at the site. Mr Baumann agreed that Mr Kubesch's photographs confirm that Mr Kubesch was given a copy of the plans for the Manukau Court project to consider. Mr Kubesch stated that even if his contract depended on the Stamford Park Road project, that was not complete at the time of his dismissal. Mr Baumann claimed that Mr Kubesch's work on that property was complete although other tradesmen were continuing to work there. CPL did not call any evidence to corroborate Mr Baumann's assertions in this regard.

[18] In providing details of his hours worked to Mrs Korneeva, Mr Kubesch clearly included hours worked on these other projects; and in the weeks leading up to termination of his employment he was paid for them. Mr Kubesch's allegations in this regard are also corroborated by an undisputed text message exchange between

himself and Mrs Korneeva. These text messages would also appear to justify his denial of Mr Shchechka's allegations that he was absent from work.

[19] Perhaps for good measure Mr Baumann also made some oblique assertions as to performance issues on Mr Kubesch's part. None of these was used as a basis for termination of Mr Kubesch's employment. They are not pleaded, and in any event, even if CPL was now endeavouring to justify Mr Kubesch's dismissal on performance grounds, any procedures which CPL may have adopted in the termination process would be hopelessly inadequate to meet those fairly required.

Conclusions

[20] I am not prepared to accept that Mr Kubesch was on a fixed term employment agreement. While there was an allegation that Mr Kubesch was given a copy of the written employment agreement to sign and return to CPL, it was denied by him and there was inadequate evidence on CPL's part to confirm it. Mr Shchechka is apparently the person alleged to have handed the agreement to Mr Kubesch, which Mr Kubesch vehemently denies. As indicated, even if the agreement was given to him, it is so contradictory in its terms on the exact nature of his employment that it could not justify the assertion that Mr Kubesch was indeed on a fixed term contract. Quite apart from that, the agreement itself does not adequately comply with the Act as to the procedures which would be required to be adopted and included in the contract for the purposes of termination. For similar reasons there can be no justification for the assertion that CPL could simply terminate Mr Kubesch's employment at will on the basis of a 90-day trial period. All these issues have already been appropriately considered and determined by the Authority. I agree with the determination that any 90-day trial period would have needed to have been agreed to by Mr Kubesch prior to commencement of employment. Even if he had been given the written agreement as alleged, that would not have occurred prior to him commencing working for CPL.

[21] As Mr Kubesch was a permanent employee his dismissal and the method by which that was carried out were not what a fair and reasonable employer could have

done in all the circumstances at the time the dismissal occurred. It was neither substantively nor procedurally fair. Mr Kubesch was unjustifiably dismissed.

[22] Mr Kubesch spoke of the humiliation, loss of dignity and injury to feelings which he suffered as a result of the termination of employment. He provided evidence of his attempts to find alternative employment. All of that has been well documented by Mr Kubesch. Mr Baumann alleged that the nature of the industry was such at that time that Mr Kubesch should have had no difficulty in finding alternative employment almost immediately. Mr Baumann also submitted that in any event Mr Kubesch had previously run a business of his own and would have been able to set up a new business had he chosen to do so. I do not accept those submissions. Mr Kubesch is clearly a person of considerable skills as a cabinet maker. Such skills are confirmed in details he gave of his previous work experience and qualifications. He is also the holder of a university degree. Even with these skills it was clear that it took him some time to obtain alternative employment. The Authority Member in the determination has allowed him loss of income for one month

following termination of employment. It is unclear exactly what evidence Mr Kubesch provided to the Authority as to his attempts at obtaining alternative employment, but on the basis of the evidence provided at the challenge an allowance of four weeks would be inadequate.

[23] Insofar as compensation for humiliation, loss of dignity and injury to feelings is concerned, Mr Kubesch is seeking to increase the amount of $5,000 awarded by the Authority. It is clear that he only claimed $5,000 in the Authority and this is the total sum which has been awarded to him. In the statement of defence which he filed to the challenge, he sought simply to uphold the determination of the Authority with which he was generally satisfied; but in submissions before the Court he sought an increase of compensation to $10,000. He did not file any cross-challenge to the determination. He would have had to seek leave to do so in any event, as by the time he filed a statement of defence to the challenge by CPL the 28 day period following the determination had well expired. Accordingly, it is not appropriate to award an increase in the compensation claimed in the proceedings before the Authority, and

that part of Mr Kubesch's claim which emerged only when he gave evidence and submissions before the Court is not tenable.3

[24] Insofar as Mr Kubesch's claims for unpaid wages and holiday pay is concerned, I agree with the determination of the Authority that he is entitled to the payments and reject CPL's allegations that his claims to hours worked are inflated. The evidence produced and the contemporary documents confirm Mr Kubesch's assertions in this regard. CPL was not able to provide sufficient evidence to prove to the required standard that Mr Kubesch was absent from work on the days alleged or that he did not work the hours that he claimed.

[25] There was also one area of the wages claim which appears to have been overlooked by the Authority Member in his determination. This relates to the issue of payment for notice. Mr Kubesch was not given formal written notice of his termination until 28 April 2014. Some discussions had taken place prior to this but those discussions could not be described as the giving of adequate notice. The letter which Mr Baumann provided had the effect of summarily dismissing Mr Kubesch when notice was in fact required. Even in the written employment agreement, which CPL alleges it can rely upon, the period of notice under that agreement is one week or payment in lieu. However, in what I have decided was effectively an oral employment agreement between the parties, reasonable notice of termination would be required. This is a discretionary matter but one indicator often adopted for

employees at Mr Kubesch's level is the pay period which prevailed.4 Mr Kubesch

was paid on a fortnightly basis. Accordingly, he was entitled to receive two week's

notice or payment in lieu.

[26] Insofar as holiday pay is concerned, I note that the written employment agreement provided that Mr Kubesch was to receive holiday pay included in his regular fortnightly pay pursuant to s 28 of the Holidays Act 2003. This does not appear to have ever been done. Quite apart from the point that this is one further fact

corroborating Mr Kubesch's evidence that he did not receive the agreement and it

3 *Smith v Life to the Max Horowhenua Trust* [2010] NZEmpC 152, (2010) 8 NZELR 440 at [31];

Eden v Rutherford & Bonds Toyota Ltd [2010] NZEmpC 43 at [22].

4 See, for instance, *McKenzie v Fast Cat Ferries Ltd* [2001] NZEmpC 30; [2000] 2 ERNZ 292 at [72]- [74]; Also Richard

Rudman, *New Zealand Employment Law Guide* (CCH, Auckland, 2011) at 223.

did not apply to him, the Authority held in the determination, and I agree, that Mr Kubesch was entitled to holiday pay at the date of termination of his employment. It appears that eventually he was paid holiday pay for the Easter break but not the one day for the Anzac Day holiday. The amount owing to Mr Kubesch for annual holiday pay as provided by the Authority will now have to be reviewed to take account of the further payment he is to receive for wages in lieu of the proper notice period. In addition Mr Kubesch is entitled to receive interest. The Authority Member did include calculation for interest but this will also need to be reviewed to take account of the increased payments Mr Kubesch is to receive for wages and holiday pay. Interest will be payable at the relevant statutory rate of five per cent per annum from 29 April 2014 until the date of actual payment.

[27] Insofar as costs are concerned, neither of the parties would be entitled to costs in view of the fact that they represented themselves at the challenge. However, Mr Kubesch has incurred certain disbursements for the hearing and in endeavouring to enforce the determination. While he was not successful in procuring any funds from CPL, no stay of enforcement was sought by CPL or granted and Mr Kubesch is entitled to reimbursement for his disbursements. He has provided details of a filing fee he had to pay and is clear he has incurred substantial photocopying charges.

Contributory Behaviour

[28] There was a submission made by CPL before the Authority that actions of Mr Kubesch had contributed towards the circumstances leading to his personal grievance. It was dealt with and rejected in the determination. At the Court hearing, apart from oblique references by Mr Baumann to conduct issues, no submission was made on contributory behaviour and no supporting evidence was given. I find there was no contributory behaviour on Mr Kubesch's part.

Disposition

[29] The challenge is dismissed. The award of compensation of $5,000 contained in the determination is confirmed. Mr Kubesch is entitled to unpaid wages and holiday pay amounting to $5,365.44, being the $2,916 awarded by the Authority plus

a further ten days wages and holiday pay for the period of notice required. I also review and increase the order of lost wages from four weeks to eight weeks pursuant to s 123(1)(b) of the Act, calculated in the same way as the determination on the basis of a 42 hour week at Mr Kubesch's hourly rate of $27. This amounts to

$9,072. These are gross figures and Mr Kubesch will need to attend to the payment of any tax owing. There will also be an award of interest on the wages arrears and holiday pay at five per cent per annum from 29 April 2014 until the date of this judgment. Interest at five per cent per annum will of course accrue due on the total judgment sum from that date. In addition Mr Kubesch is entitled to reimbursement of disbursements amounting to $250. This sum is made up of a filing fee of $200 Mr Kubesch incurred in an attempt to enforce the determination together with an allowance of $50 for photocopying charges. He is not entitled to any award of costs as he represented himself.

M E Perkins

Judge

Judgment signed at 2 pm on 3 November 2015
