Employment Court of New Zealand

The Wellesley Limited v Adsett WC 31/07 [2007] NZEmpC 152 (3 December 2007)

Last Updated: 15 December 2007

IN THE EMPLOYMENT COURT

WELLINGTONWC 31/07WRC 11/07

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN THE WELLESLEY LIMITED
Plaintiff

AND CRAIG ADSETT
Defendant

Hearing: 16 October 2007

(Heard at Wellington)

Appearances: Bridget Fleming, Counsel for the Plaintiff
S N Meikle, Counsel for the Defendant

Judgment: 3 December 2007

JUDGMENT OF JUDGE C M SHAW

[1] The Wellesley Limited (The Wellesley) employed Craig Adsett for about 2 weeks during which he worked at its camp conference centre. He believed he had a permanent position, The Wellesley says he was employed casually on an “as and when required” basis. Mr Adsett believes he was unjustifiably dismissed, The Wellesley says he was not removed from its roster but left his employment.
[2] Mr Adsett’s personal grievance was initially heard and upheld by the Employment Relations Authority. The Wellesley challenges its determination.
[3] The Authority found that Mr Adsett’s account of relevant events was to be preferred. He was employed as a permanent camp manager and The Wellesley repudiated its agreement with him by not requiring his full time attendance at the camp and reducing his pay. It was therefore open to him to regard these unilateral actions as terminating his employment. It ordered payment for loss of wages, $6,000 compensation for hurt and humiliation and a $100 penalty for material breaches of the Employment Relations Act 2000.

The challenge

[4] The Wellesley elected to have the whole matter reheard by the Court. In defending the challenge, Mr Adsett seeks reimbursement of all lost income plus interest, unpaid holiday pay, $10,000 compensation, and the imposition of statutory penalties on the plaintiff for breaches of the Employment Relations Act 2000 payable in this case to him.

The issues

[5] The issues in this case are primarily factual and to a significant extent require findings of credibility. They are:

(i) Was Mr Adsett a permanent or casual employee?
(ii) Was he dismissed actually or constructively?
(iii) Were the actions of the plaintiff those of a fair and reasonable employer?

The facts

[6] The Wellesley is a company which owns a number of business entities relating to hospitality in the Wellington region. Its owner and director is Wayne Coffey. Mr Coffey is also the major shareholder in a company called Wellesley Akatarawa Limited which owns land on which The Wellesley Limited manages a camp.
[7] Mr Coffey purchased the camp at Akatarawa from the Salvation Army with the intention of running it as a successful commercial venture while, as much as possible, supporting community and church programmes. In line with that aim, he said he made a decision to employ people who might not otherwise gain employment opportunities. He often employs students on a casual basis and also has employed people from distressed social backgrounds to give them an opportunity to clean up, get some accommodation, and get them back on their feet although Mr Adsett was not in that category.
[8] The Akatarawa camp comprises accommodation and a number of outdoor facilities. The primary users of the camp are schools which use the facilities for teambuilding for children aged 7 upwards. The camp provides a venue and catering for these groups and supervision is provided by the schools.
[9] The Wellesley uses a roster system to engage its staff which comprise 10 to 15 casuals. It is the responsibility of The Wellesley's general manager, operations, Phillip Temple, to hire casual employees for The Wellesley either from an agency or from a list of available students. Lisa Noedl, The Wellesley's general manager, is also involved in this employment and is responsible for the documentation of the employment agreements. In the normal course of events, Mr Temple said he signs the casual employment agreements on behalf of The Wellesley although Mr Coffey said it was the rule that he signed them.
[10] Before Mr Adsett started, Wayne Snowden, Anna Wood, and Debbie Channing were permanently situated at the camp. There was no overall manager at Akatarawa but when there was a camp group in, these three would be designated on a rotational basis in the roster as responsible for that particular camp.
[11] Mr Snowden was employed on a written casual employment agreement as an on-call cook and general maintenance employee. He regularly worked a 40-hour week and after another maintenance worker left in March 2006 he said he was asked by Mr Coffey to take responsibility for running the camp. Mr Coffey said that he never intended to have Mr Snowden act as camp manager because of his lack of qualifications and his performance but he was employed as a duty manager when groups came in and otherwise did odd jobs around the place for about 40 hours a week.
[12] In October 2006, The Wellesley placed an advertisement for the position of country club/camp manager. It read:

Country Club/Camp Manager

 # Role with career development opportunities & flexible hours

 # Stunning rural scenery

 # Exciting, rapidly expanding, hospitality group

The Wellesley Group operates the Wellesley Boutique Hotel, Wellesley Harbour Cruise Ship, Wellesley Hovercraft and the Wellesley Country Club in Wellington. Also operated by the group is the Wellesley Resort Fiji and the Wellesley Apartments at London Tower Bridge, UK.

Our new product, the Wellesley Country Club in Akatarawa seeks an experienced individual to manage daily operations at this property. Duties include hosting of clients (from community groups through to senior corporate clients), responsibility for the presentation and security of the property as well as overseeing catering and recreational activities. As the company intents [sic] *to substantially develop this property, maintenance and hands on development work will also be a significant component of this role. Experience in this area would be highly desired.*

Salary, hours and an accommodation component can be negotiated with the successful applicant.

[13] Mr Coffey wanted to employ a senior manager to oversee the development of the camp including building work as well as general operations on the site. He said that the role was to have a strategic focus.
[14] Mr Adsett applied for the position. There was significant dispute about what was said and agreed at the subsequent job interview and what he was employed as.

Mr Adsett's engagement

[15] Mr Temple and Ms Noedl conducted the job interview with Mr Adsett. Ms Noedl told him about The Wellesley and its background as a company. She then described the facilities at the camp, the way it was run, and its need for changing and flexible staffing. She explained that the country club/camp manager role was permanent and was to assist Mr Coffey in managing the club/camp through its next development phase. Large-scale catering skills were desirable as well as a history of interacting with children, the camp's most frequent users. In addition to overseeing the daily operations of the club/camp and managing the team of casual employees, the role required a strong focus on development work.
[16] Ms Noedl told the Court that in answer to questions from Mr Adsett she explained the seasonal nature of the work which meant that employees were engaged as casuals on an "as and when required" basis and managed by a weekly roster. She also told him there were three main casual employees involved in servicing the camp and running it on a day to day basis, as well as a builder.
[17] It was Ms Noedl's evidence that Mr Adsett told her that if he was not successful in obtaining the advertised position he would be like to be considered for any other work available as his partner was sick and he was unemployed. She told him it may be possible to immediately offer him casual employment at a lower position. Mr Temple supported her evidence in this regard. When asked his salary expectations, Mr Adsett told them that he was looking for a salary of about $35,000.
[18] Mr Adsett's account of the interview was that Ms Noedl had talked about the development of a new confidence course and a golf tee area. He told them his father had been a builder and he had limited building experience but had a background in the army infantry. He described his experience as a secretary/manager of a club, his coaching and experience with age-grade sports, and that he had a 7-year-old daughter. He said he was told that having been in the army would be of benefit for the confidence course.
[19] Mr Adsett denied saying he would accept casual employment if unsuccessful and certainly did not suggest or imply that he was desperate for work because his partner was ill. His partner told the Court that although she had been ill and had to change jobs, she had been employed as a shop manager for a month before Mr Adsett's interview. Because he lived in Lower Hutt, he explained it would not be worth his while to be a casual employee given the travel that would be involved.
[20] Ms Noedl and Mr Temple denied that they spoke about the confidence course, and that Mr Adsett had mentioned his coaching experience with children.
[21] The meeting ended with Mr Adsett being told that a short list of applicants would be compiled, that Mr Coffey would make a final decision, and then conduct any negotiations with the successful applicant.
[22] Mr Temple, Ms Noedl, and Mr Coffey later discussed the application. They agreed that Mr Adsett would not be suitable for the advertised role because he didn't have the necessary experience in project management including large-scale construction or large-scale catering operations, nor experience with working with children. However, because Mr Adsett had fallen on hard times and they were short staffed the next week, they decided to give him an opportunity to prove what he could achieve.
[23] Mr Coffey said it was not a formal meeting, no minutes were taken, and it was done very very quickly. He asked Mr Temple to check Mr Adsett's references but he had already made up his mind. After another quick discussion to confirm that they would engage Mr Adsett, Mr Temple phoned him on 25 October 2006. There was significant dispute about what was said in that phone call.
[24] Mr Temple's version is that he advised Mr Adsett that he had been unsuccessful in his application for the country club/camp manager role, but that the camp was busy and they were able to offer him casual work doing jobs such as preparing meals and helping to clean the camp on an "as and when required" basis. He said he told him he would be paid an hourly rate on the submission of timesheets. This phone call took no more than 5 minutes.
[25] Mr Temple arranged to contact Mr Adsett later with more information about the amount of the hourly rate and the starting time. Having discussed matters with Ms Noedl, they decided to offer him $16.83 gross per hour on the basis of a $35,000 per annum salary. Ms Noedl has no memory of another discussion about Mr Adsett's employment.
[26] Mr Temple said he phoned Mr Adsett on 27 October and offered him casual work commencing on 30 October. He told him he could stay overnight if he didn't want to travel back to Lower Hutt each day. He was told he would be supervised by and report to Mr Snowden. Mr Temple told the Court that he asked Mr Adsett if he understood the terms of his employment with The Wellesley and he stated that he understood he was being offered casual employment with no fixed hours and on an hourly rate. He agreed to start work immediately.
[27] In contrast, Mr Adsett's account is that when Mr Temple rang on 25 October he first asked how he was and then told him he had been given the job. He asked if Mr Adsett could start at 9am the following Monday, 30

October. He was told he would be paid $35,000 with a 3-month trial and a salary review after the trial period. He said he was asked to report to Mr Snowden who would show him the ropes. Mr Temple told Mr Adsett to "*watch Wayne Coffey as he could be difficult.*" Mr Adsett said he was very pleased and immediately rang his partner.
[28] Mr Adsett said that when Mr Temple rang again on Friday, 27 October he confirmed that he would start on 30 October. He denies Mr Temple mentioned anything about casual employment.
[29] The Court has the benefit of two other witnesses to assist with the assessment of this evidence. Gretchen Lines, Mr Adsett's partner, recalls a phone call she received at her work from Mr Adsett to tell her that he had got the full time camp manager's job with a 3-month trial period and a salary of $35,000 to be reviewed. She said they were over the moon and "*wrapped*".
[30] Ms Lines was challenged as to the date of the call. It is clear that the phone call was on 25 October rather than 20 October as she recalled. However, she was not challenged on the content of the call.
[31] The other witness was Mr Snowden. He said he was phoned by Mr Temple on 27 October and told that Mr Adsett would be starting at the camp on Monday as full time acting camp manager for the times that Mr Snowden was not there. Mr Snowden was concerned about his own position as a result of this information.
[32] Mr Snowden said that when Mr Adsett started on the Monday it was clear that he thought he was the camp manager. Mr Snowden rang Mr Temple to clarify the position about who was camp manager. Mr Temple told him that when Mr Snowden was at the camp he was the manager, and although Mr Adsett was a camp manager, he was there to give him a hand.
[33] Mr Snowden said that, on 5 November after he had sent through Mr Adsett's timesheets, Mr Temple rang him to say he didn't need to send them in because Mr Adsett was on a salary.
[34] Mr Temple accepted under cross-examination that he had made the calls on 27 October to Mr Adsett and to Mr Snowden and spoke to Mr Snowden later about who was the manager. He said that, in his view, Mr Snowden would be in charge when he was there and that Mr Adsett would be next in line to be in charge when he wasn't there.

Conclusion on nature of engagement

[35] I find that it is most probable that Mr Temple's communications to both Mr Adsett and Mr Snowden referred to Mr Adsett's role of manager, not in the sense of overall strategic management because I accept that the decision had been made that Mr Adsett was not suitable for that position, but in the sense of day to day management of the camp. Whether The Wellesley intended Mr Adsett to be casual or not, I find that there was no or inadequate communication of that aspect of his employment to Mr Adsett and that when he began his work he believed he was permanently employed.
[36] Mr Adsett is unlikely to have happily phoned his partner to say he was on a 3-month trial for a permanent position if he had been offered casual employment. Equally, it is most unlikely that he would have given Mr Snowden the impression he thought he was the camp manager if that had not been communicated to him by Mr Temple.
[37] The fact that he was being paid at a rate equivalent to the $35,000 that he had requested at his interview, underscores the basis for his belief. Mr Snowden was paid only $13 an hour. If The Wellesley had seriously intended that Mr Adsett, who they said they thought was inexperienced and in need of assistance because he was down on his luck, would be a casual employee then it is highly improbable that they would pay him a premium hourly rate over their established and experienced employees.
[38] That no written agreement was prepared and signed off before Mr Adsett's employment began is very unhelpful. The plaintiff's witnesses were at great pains to explain that one had been prepared but was not sent out to Mr Adsett before he started because he had not advised his address. In fact, Mr Adsett was at Akatarawa from 9am on Monday, 30 October and no effort was made to get him an agreement to sign from that point on.
[39] A draft agreement for casual employment was produced to the Court but this was unsigned by either party and the rate of pay was at $16 rather than the $16.83 received by Mr Adsett. It is of no assistance in establishing Mr Adsett's employment status.
[40] I find it more probable than not that Mr Temple in fact offered Mr Adsett work as a camp manager to perform similar roles to those performed by Mr Snowden. Whatever was in his mind at the time, he did not make it clear that this work was to be casual in the sense that Mr Adsett's weekly hours could be reduced dramatically. Mr Adsett believed that he was in permanent employment and that belief was, I find, based on reasonable grounds.

The employment and termination

[41] Mr Adsett agreed that the work he did was operational – cleaning, preparing meals, looking after the grounds, overnight supervision, and security checks. He was paid on an hourly rate based on timesheets which he submitted. For the first week he worked 50.5 hours and for the second week up to 12 November he worked 33½ hours. He stayed overnight at the camp for 6 nights out of 13 days that he worked. In the third week he worked for 3 days only before his employment ended.
[42] In the second week, Mr Coffey came to the camp and met Mr Adsett for the first time. He spoke to him about the sort of work he was doing and directed him to shift some firewood. Mr Adsett described his manner as

unfriendly.
[43] The following weekend when Mr Coffey returned to the camp, he noticed a number of matters that he was unhappy with including doors being left open and heaters left on. He said he was upset about these and spoke to "*the manager*". Mr Snowden said Mr Coffey rang him and spoke to him about the rosters and who was working. He queried why there were three staff on. Mr Snowden said that Mr Adsett was there because he was a full time employee. Mr Coffey said that he was not full time, that he was to get rid of him and send him home. Mr Snowden was embarrassed and offered to Mr Adsett that he would go home in his place.
[44] Mr Coffey's account to the Court of this incident was less than convincing. He first spoke of his concern about some of Mr Adsett's out of work activities, then about the way Mr Snowden set the rosters, and then asked to take back that evidence. He next said that Mr Adsett was taking work off other staff and that it was his responsibility to check that the hours were appropriate to the work.
[45] On 13 November Mr Adsett rang Mr Temple to show an interest in the job and to check that everything was okay. He said Mr Temple told him that he was no longer the camp manager because he was not good enough and he was now a casual employee. When he protested, he was told to ring Mr Coffey. He left a message for Mr Coffey but this call was not returned.
[46] The next day, 14 November, Mr Temple rang Mr Snowden to talk about the roster. Mr Snowden asked him how many hours he was to roster Mr Adsett for and he was told about 15. When Mr Adsett was told this he consulted a lawyer and notified The Wellesley of a personal grievance of unjustified disadvantage.
[47] Mr Adsett said that on 20 November he received a phone call from Mr Temple who told him that he would not be getting any more work at all as they were making changes to the camp. Mr Snowden said that Mr Temple rang him on the same day and told him that Mr Adsett would not be returning.
[48] Mr Temple's versions of those phone calls was that he was simply saying that there would be no more work the following week because they were having staff coming back from leave. It is the plaintiff's position that this was simply a reduction in hours of casual work and not a dismissal.

Conclusion on termination

[49] I find that, following Mr Adsett's employment, Mr Coffey became dissatisfied with either Mr Adsett himself, his performance, or the amount of hours he was rostered to work. It is possible that each of these factors contributed to his decision that he did not want Mr Adsett to be employed. It is also likely that he became angered when he realised that Mr Adsett had been led to believe that he was going to be a permanent employee. Whatever the reason, he peremptorily and without discussion with Mr Adsett, directed Mr Temple that Mr Adsett's hours be dramatically reduced. Although there was no direct evidence on this point, it can reasonably be inferred that he directed Mr Temple to ring Mr Adsett and tell him he was no longer to be camp manager. I find this amounted to a dismissal as he had been employed to do that job. Even if he were not directly dismissed, there is no doubt that his rostered hours were reduced to the point that his employment effectively ceased. Mr Adsett was entitled to believe that he was no longer employed in the position for which he was engaged.

Decision

[50] I find that the employment practices at The Wellesley at the time in question were far from satisfactory. Regardless of Mr Coffey's motives for employing people who would not otherwise have work, its tendency to treat all its employees as casual workers showed a less than perfect understanding of the notion of casual work. Mr Snowden's employment was so regular that it is questionable whether it was truly casual, although that is not a point that requires a decision. Mr Temple, who seemed to be in charge of the employment at least of casual staff, was not aware of the obligation of an employer to pay casual staff their holiday pay for each block of work they did. He described this as an oversight. He was not aware if Mr Adsett had been paid holiday pay on his gross salary.
[51] There was confusion between Mr Coffey and Mr Temple about who was responsible for signing off employment agreements, each alleging that it was for them to do it.
[52] The method of engagement of Mr Adsett appeared to be remarkably informal. Following the interview, it took a 5-minute informal conversation with Mr Coffey to determine that he would be engaged and it is apparent from what followed that at that stage little or no thought was given to the exact nature of his employment.
[53] The evidence for the plaintiff in some respects was both contradictory and unreliable. Mr Temple, for example, at one stage said that he had been to see Mr Adsett at work several times but when challenged appeared confused about how many times he had been. He agreed that he had told Mr Adsett on the first visit that Mr Coffey could be difficult but later sought to soften that judgment by saying that he meant that he could be demanding and required high standards from employees. Mr Temple's original brief of evidence failed to mention Mr Adsett's phone call to him on 13 November to ask how the customers felt about their stay at the camp but, when challenged on that, conceded that the call had happened.
[54] Finally, Mr Temple did not mention in his brief of evidence that he had rung Mr Adsett on 20 November to tell him there would be no more rostered work available. When challenged on that, he accepted he had made the phone call but again qualified it by saying that it was just for that week to come. Given that this effectively ended

Mr Adsett's employment, this was not the action of a fair and reasonable employer.
[55] I find that Mr Adsett's account, supported as it was by Mr Snowden and to a lesser extent Ms Lines, to be more accurate than the evidence for the plaintiff although Mr Coffey alleged Mr Snowden had an axe to grind.

Decision

(i) I find that Mr Adsett was employed initially as a camp manager although not as initially advertised and was led to believe that this was a permanent position. There was no agreement by him that he would be a casual employee.
(ii) Mr Adsett was dismissed. This was either a constructive dismissal by the diminution of his rostered hours first to 15 and then to zero on the pretext that this could be done as he was a casual worker, or he was told by Mr Temple that he was no longer employed as a camp manager. This would amount to an actual dismissal.
(iii) Either way Mr Adsett's dismissal was procedurally unfair. The plaintiff has denied any dismissal and did not attempt to justify its reasons for not further employing Mr Adsett. It has therefore not established that it was justified in any respect in relation to the termination of his employment and the dismissal was unjustified.

Conclusion

[56] I find the plaintiff did not act in the manner of a fair and reasonable employer and Mr Adsett has a personal grievance having been unjustifiably dismissed.

Remedies

Loss of income

[57] Over the Christmas period that followed the termination of his employment, Mr Adsett had no income and relied on his partner's wages of $430 a week. He made 11 attempts to get a permanent job between 20 November 2006 and 27 February 2007 when the Employment Relations Authority meeting was held. He lost an opportunity to be employed by Telstra when he could not attend a training session because of the Employment Relations Authority meeting although accepted that he made no attempt to have that meeting changed.
[58] During that time he obtained temporary work at New Zealand Spring Works and Allied Workforce earning $620.76 instead of the $9,557.59 gross he would have earned had he continued to be employed by The Wellesley at $35,000 per annum.
[59] Following the Employment Relations Authority meeting and until 15 September 2007 he made three more attempts to get permanent work but had to rely on temporary work where he earned $1,503.60 instead of a potential $28,941.99 gross. On 15 September he obtained work as a vacuum cleaner salesperson. However, because he also worked for some time with his partner, he is seeking lost wages from the date of dismissal on 20 November 2006 till mid June 2007. This is calculated at $13,921.31 and I order that this amount is to be paid to him.

Distress compensation

[60] I accept that Mr Adsett was deeply affected by the dismissal. He had spent a period of time looking after his ill partner and had high expectations of restarting his career. He said that he suffered stress and depression and was unable to get out of bed and was put on another course of Prozac. He did not produce any medical evidence to support this but it was not challenged as to its substance.
[61] Mr Adsett sought $7,000 compensation in the Authority but in the amended statement of claim filed by different counsel in the Court his claim was increased to $10,000. Ms Fleming submitted that the Authority's award of $6,000 was, in all the circumstances, disproportionately out of line with other awards made by the Authority. She cited two cases where in circumstances of longer periods of employment – 3 and 10 months – and arguably more serious breaches of employment rights, the Authority had awarded compensation for hurt, humiliation, and distress of $3,000 and $4,000 respectively.
[62] The first point to be made is that an award under s123(1)(c)(i) is not to recompense a grievant for the loss of a particular job or to punish an employer for its behaviour. Loss of the job is measured in loss of wages under s123(1)(b) or benefits under s123(1)(c)(ii). Sections 133 to 135 are designed to penalise an employer for breaches which are expressly defined in the Employment Relations Act 2000.
[63] Awards under s123(1) are to compensate for humiliation, loss of dignity, and injury to feelings of an employee. The damages are to be measured in light of the degree of harm to the employee. The length of time an employee holds a position for is not the sole nor even a reliable indicator of the measure of compensation for any particular individual.
[64] In the present case, it is relevant that Mr Adsett had been out of work for some time before getting his position with The Wellesley. He had been nursing his sick partner and was finding it hard to get back into the workforce. Obtaining the position with The Wellesley gave him the opportunity he had been looking for. He had a job which was seemingly permanent and with the salary he had asked for. He also had the opportunity to show his capabilities over the next 3 months with the hope that his salary would increase.
[65] His delight was described by his partner. The dashing of these expectations had a serious effect on him. I

accept that he was reduced to taking medication because of it. He was depressed, angry, and upset. On some days he was unable to get out of bed. His partner, Ms Lines, said she had never seen him so down and the dismissal and its consequences nearly pulled their relationship apart. It is apparent that it was Ms Lines who motivated him to start looking for another job.
[66] In the light of that evidence, an award of $6,000 is in my view very low although I accept that the Court received more detailed evidence about this aspect of the remedies than was presented to the Authority.
[67] In the circumstances, an award of $10,000 is appropriate to compensate Mr Adsett for the debilitating effects on him of the loss of a much desired job.

Holiday pay

[68] The plaintiff failed to pay Mr Adsett any holiday pay. If he had been truly a casual employee this should have been paid as a component of his hourly rate. If, as found, he was engaged in permanent employment, it should have been paid at the termination of his employment. The plaintiff is to pay the sum of $102.95 to the defendant for holiday pay owing to him.

Penalty

[69] Mr Adsett has applied for the plaintiff to be ordered to pay a penalty for failing to provide an employment agreement.
[70] The Authority said that, because he was successful in his claim and awarded significant remedies, the harm occasioned by the breach had been largely remedied and only a nominal penalty should be awarded.
[71] The plaintiff accepted through counsel that it was required to provide an employment agreement under s65 of the Employment Relations Act 2000 and is prepared to accept responsibility for that failure.
[72] Section 133(1) of the Act, which concerns jurisdiction for recovery of penalties, provides in subsection (b) that a penalty may be recovered for a breach of any provision of the Act where a penalty is provided in the particular provision.
[73] The Authority and therefore the Court derive their jurisdiction to impose penalties for failing to provide a copy of an individual employment agreement from s63A of the Act. Section 63A was inserted into the Employment Relations Act 2000 on 1 December 2004 by s23 of the Employment Relations Amendment Act (No 2) 2004 and subsumed the requirement to provide an employment agreement that previously existed under s64 of the Act. Section 64 was repealed at the same time.
[74] In reliance on *Xu v McIntosh*[1], Ms Fleming submitted that, in imposing any penalty, the Court should consider the questions of how much harm was occasioned by the breach, how important it is to bring home to the defaulting party that its behaviour is unacceptable or to deter others; and whether the breach was inadvertent and technical or flagrant and deliberate.
[75] In applying these principles, I note that assessing the harm caused under this section is not the same as the exercise to be undertaken under s123(1)(c). In this case, the harm caused by the lack of an employment agreement was considerable. If a written employment agreement had been settled at the commencement of Mr Adsett's employment it is unlikely that this case would have come to the Court or even to the Authority. The harm it caused was the loss of a job and, because of the lack of certainty, the prolongation of litigation arising from the dismissal.
[76] The plaintiff alleges that the breach was inadvertent but its explanation was unsatisfactory. Even if an agreement had been prepared, and that is doubted, there was no evidence that any attempt was made to give this to Mr Adsett even once he had started work. It was not a technical breach.
[77] For these reasons, a penalty is appropriate and should be one that sends a message to this plaintiff and other employers that the provision of an employment agreement is an important aspect of employment law.
[78] I set the penalty payable by the plaintiff at $1,000 which is 10 percent of the maximum penalty of $10,000 for a breach by a company. This penalty does not form part of the compensation payable to the defendant and is to be paid by the plaintiff to the Registrar of the Employment Court for payment into the Crown bank account.

Costs

[79] Counsel are encouraged to resolve the question of costs between them. If this is not possible, the defendant is file a memorandum as to costs within 28 days of this decision. The plaintiff will have 14 days thereafter to respond to that memorandum.

C M Shaw
JUDGE

Judgment signed at 9.30am on 3 December 2007

[1] [2004] NZEmpC 125; [2004] 2 ERNZ 448
