

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 310A/08
5124420

BETWEEN	JAN THOMAS Applicant
AND	DAVID WALKINSHAW First Respondent
AND	DRJT LIMITED Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person David Walkinshaw for Respondents
Investigation Meeting:	14 October 2008 at Auckland
Determination:	15 October 2008

DETERMINATION OF THE AUTHORITY

[1] Jan Thomas says he was unjustifiably dismissed after working for 11 days at Bike 360, a bicycle supplies and repair shop. His employment ended after a heated discussion between him and David Walkinshaw about why he had not been paid.

[2] He seeks recovery of outstanding wages and monetary remedies to compensate for the effects of his dismissal.

[3] Mr Walkinshaw says Mr Thomas was paid in full for any outstanding wages following mediation and denies anything further is due. Mr Walkinshaw says the two men had earlier agreed that he could bring the employment to an end in the way that he did.

[4] The two men disagree over whether Mr Thomas was employed by Mr

Walkinshaw directly or by DRJT Limited, a company of which Mr Walkinshaw is the director and sole shareholder.

Issues

[5] The issues for resolution are:

- (i) what was the nature of the employment; and
- (ii) who was the employer; and
- (iii) whether the employer's actions in ending the employment were justified; and
- (iv) if not, what remedies are warranted, after allowing for what Mr Thomas has done to mitigate any lost wages and how he may have contributed to the situation giving rise to any grievance; and
- (v) What wages, if any, remain due to Mr Thomas?

[6] Mr Thomas and Mr Walkinshaw attended the investigation meeting. Both men, under oath, confirmed earlier statements and documents lodged in the Authority and then answered questions. I have not found it necessary to interview any other witnesses to resolve this matter.

Nature of employment

[7] Mr Thomas began working at the bike shop on 14 April 2008. He and Mr Walkinshaw had discussed arrangements for the job on 9 April.

[8] Mr Walkinshaw accepts that, as a result of that discussion, the employment was intended to be on an ongoing basis but that Mr Thomas would initially have time off during some days in the coming weeks. This was specifically to enable Mr Thomas to take his wife to various medical appointments as she had a broken arm and for Mr Thomas to do two days work for a previous employer. Otherwise Mr Thomas was to work as many hours as he could.

[9] There was no written employment agreement but Mr Walkinshaw accepts that he intended to formalise the employment arrangement and he intended Mr Thomas to work full-time once other personal commitments diminished.

[10] Accordingly I find that the employment relationship in existence between the parties from 14 April 2008 was of an on-going, permanent nature rather than on a casual, as-required basis.

Who was the employer?

[11] Mr Walkinshaw says the shop was operated by DRJT Limited trading as Bike 360. He says the limited liability company was the entity that employed Mr Thomas, as it also employed two other full-time staff and a part-time worker.

[12] However Mr Thomas says that he was never told that the employment relationship was with DRJT Limited. In making the arrangements for him to work in the shop, Mr Walkinshaw referred to working for Bike 360 but not the company. Mr Thomas alleges that the employment relationship was with Mr Walkinshaw directly so that he is liable for any wages and other remedies that may be awarded.

[13] I find, on the balance of probabilities, that Mr Thomas was not aware of the role of DRJT Limited for the following reasons:

- (i) Mr Walkinshaw said the limited liability company was clearly identified on A4-sized sales invoices generated in the shop but when Mr Thomas produced a copy of one such invoice, showing only the trading name Bike 360, accepted this was not the case.
- (ii) Mr Walkinshaw said the company was identified on the pay slip for employees but Mr Thomas was never given a payslip while employed.
- (iii) Mr Walkinshaw said the company was identified on pay cheques but Mr Thomas was never paid while employed at the shop. On Mr Walkinshaw's version of events, the earliest Mr Thomas may have seen such a cheque was one said to have been sent to him by post (but never presented) after 30 April.
- (iv) Mr Walkinshaw gave Mr Thomas an email address to which to send his record of hours worked. That address included the letters "DRJT" but there was nothing in it that suggested it referred to a limited liability company.

[14] On that basis I find that Mr Walkinshaw intended Mr Thomas to be an employee of DRJT Limited. However the identity of that company, or the intention to employ him on that basis, was not communicated to Mr Thomas by Mr Walkinshaw. In his evidence to the Authority Mr Walkinshaw described it as “*my mistake*” not to have let Mr Thomas know that Bike 360 was the trading name of DRJT Limited.

[15] Accordingly I find that DRJT Limited was the undisclosed principal at the time that Mr Walkinshaw employed Mr Thomas. Not having discharged the onus to identify the principal to Mr Thomas, personal liability rests on Mr Walkinshaw: *Cuttance v Perkis* [1994] 2ERNZ 321, 333 applies. Mr Thomas, as he is entitled to do, has elected to pursue Mr Walkinshaw personally for liabilities arising out of that employment relationship and how it ended.

The end of the employment

[16] Two incidents created tension between Mr Walkinshaw and Mr Thomas which ultimately led to the end of the employment.

[17] On 22 April Mr Walkinshaw was in the Coromandel but hurriedly returned to the shop in Auckland after receiving a phone call from another shop staff member saying that Mr Thomas would be unexpectedly absent from work that day. The absences were to take his wife to an acupuncture appointment and to get a hair cut. When Mr Thomas arrived at work later that day, Mr Walkinshaw let him know that he was unhappy Mr Thomas had not told him in advance about taking time off.

[18] On 29 April there was a further tense exchange between the two men. Mr Thomas had not been paid, unlike the other two staff members. Mr Walkinshaw says that was because, late in the previous week, Mr Thomas was asked to send him a record of hours by email but had not done so. Mr Thomas says he had sent the email and produced a copy. Mr Walkinshaw denies having received the email.

[19] From another staff member Mr Walkinshaw had heard that Mr Thomas told that staff member he was not paid because the company had no money. He confronted Mr Thomas about that alleged comment, and the reason he had not been paid. He described Mr Thomas’ comments as “*irresponsible*”, told him to raise any

concerns directly with him and not with other staff, and reassured Mr Thomas he would be paid. He says the conversation as “*slightly louder than normal*”.

[20] Mr Walkinshaw says that around ten minutes later he told Mr Thomas to “*finish up*” as he was no longer needed. Mr Thomas was asked to return his key to the shop – which he did – and left shortly after.

[21] The following day Mr Thomas sent Mr Walkinshaw a letter raising a personal grievance over his dismissal, asking for reasons, and requesting payment of all outstanding wages and holiday pay.

[22] Relying Mr Walkinshaw’s account of events alone, I find that his actions were unjustified in all the circumstances at the time. He had earlier agreed to some flexibility of hours for Mr Thomas. He then had a disagreement about those hours through what appears to have an oversight by Mr Thomas in clearly communicating what would be happening on one day. He then had concerns about how Mr Thomas had handled a problem in getting paid for hours he had worked over the previous fortnight. Both issues showed a clear need for better communication. Neither justified a summary dismissal.

[23] Mr Walkinshaw’s evidence was that, before the employment has started, he and Mr Thomas had “*decided that if things didn’t work out for either party we would shake hands and move on*”. While Mr Thomas disputes that was agreed, even if it were, such an arrangement cannot be taken to have precluded basic employment rights to have any problems addressed in good faith before either party took unilateral steps to terminate the relationship.

[24] Mr Thomas has a personal grievance for unjustified dismissal which requires remedies.

Remedies

Lost wages

[25] Mr Thomas did not have paid employment between 30 April and 4 August

when he started working for a company which has since taken over the bike shop previously operated by DRJT Limited.

[26] I do not accept his claim for lost wages for that entire 13 week period because Mr Walkinshaw closed the shop at the end of May. At that time the employment of the other staff also ceased. Mr Thomas would, likely, have continued working for the shop up to but not beyond that time.

[27] He is entitled to lost wages for four weeks which is awarded on the basis of a 45 hour week at \$17 an hour, that is \$765 a week, and a total of \$3060 gross.

[28] I accept that in that period Mr Thomas reasonably attempted to mitigate his loss by seeking other employment.

Compensation

[29] Mr Thomas says he was “*devastated*” by his sudden dismissal which occurred in a small office with another staff member little more than a metre away.

[30] Mr Thomas is involved in cycling groups. He says it was embarrassing when it became known that he was dismissed from his job in the bike shop. He felt the dismissal created a “*blight*” on his character when he was seeking jobs at other bike shops.

[31] Taking account of the particular circumstances of this case – including the short period of actual employment – and the general range of awards in cases of this type, the sum of \$2500 is awarded as compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for the humiliation and injury to feelings caused to Mr Thomas by his unjustified dismissal.

Contribution

[32] Remedies awarded for lost wages and distress compensation are to be reduced by ten per cent for conduct of Mr Thomas that contributed to the situation giving rise to his grievance.

[33] Mr Thomas had not adequately communicated with Mr Walkinshaw about some of the time he took off. He had arranged for some flexibility because of appointments for his wife related to her broken arm. However if he wanted time off to take his son to a dentist's appointment and to have a hair cut, this should have been better communicated.

[34] Similarly, while Mr Thomas was entitled to feel anxious about not having been paid for hours worked over the previous fortnight, his allegations to other staff (who had been paid) about why he had not been paid were unnecessary and provocative.

[35] Both parties must bear some responsibility for communicating in good faith.

Wages due

[36] After mediation on 14 July 2008 Mr Thomas was paid for 84 hours work and holiday pay at eight per cent on that amount, totalling \$1542.24. However he says he should be paid for a total of 96 hours, including one day's pay for a statutory holiday that fell during the time he was employed.

[37] While Mr Walkinshaw says he had posted Mr Thomas a pay cheque on or soon after 30 April, Mr Thomas says he never received it.

[38] Two issues arise: (i) are any further wages and holiday pay still owed; and (ii) is Mr Thomas entitled to interest on wages and holiday pay not paid to him at the time of his dismissal?

Wages

[39] Mr Walkinshaw says some of the hours claimed were reduced for meal breaks taken although he accepts he was not always at the shop and cannot confirm whether or not Mr Thomas worked through breaks as he alleges.

[40] In the absence of time and wage records, which Mr Thomas had requested but

were not provided, I accept his account of hours worked and to which he is entitled. Accordingly Mr Thomas is entitled to a further 12 hours pay at \$17 an hour and a further eight per cent as holiday pay on that amount. This totals \$204 plus \$16.32.

[41] These are gross amounts, as was the payment for 84 hours already made. Mr Thomas must now deal with his own tax liabilities on those amounts but that is a matter between him and IRD.

Interest

[42] Mr Thomas is entitled to interest on the sum of \$1542.24 from 30 April to 16 July 2008 – a period of 48 days.

[43] He is also entitled to interest on the sum of \$220.32 from 30 April to 14 October 2008 – a period of 168 days.

[44] The applicable interest rate is today's 90-day bill rate of 7.34 per cent plus two percent (9.25%): refer clause 11 of Schedule 2 of the Act.

[45] The respective amounts are \$18.94 and \$9.47, a total of \$28.41.

Costs

[46] Mr Walkinshaw is to reimburse Mr Thomas for the \$70 fee to lodge his application in the Authority. Other costs are reserved. If the parties cannot resolve costs between themselves, Mr Thomas may lodge an application for costs within 28 days of the date of this application. Mr Walkinshaw will then have 14 days to reply before the Authority determines costs.

[47] I note that Mr Thomas has presented an invoice for \$1200 for advice from an employment advocate. This includes advice relating to preparation for and attendance at mediation for which costs cannot be granted. He was not represented at the investigation meeting but says he expects an invoice for legal advice.

Summary of outcome

[48] Mr Thomas was unjustifiably dismissed.

[49] DRJT was the undisclosed principal to the employment relationship and Mr Walkinshaw, its agent (as sole director and shareholder) is personally liable for remedies awarded to Mr Thomas.

[50] After having deducted 10 per cent for his contribution to the situation giving rise to his grievance, Mr Thomas is awarded the following remedies to be paid to him by Mr Walkinshaw within 28 days of the date of this determination:

- (i) \$2754 in lost wages under s123(1)(b) of the Act; and
- (ii) \$2250 in compensation for humiliation and injury to feelings under s123(c)(i) of the Act.

[51] Mr Walkinshaw is also to pay to Mr Thomas the following further sums:

- (i) \$220.32 as the balance of wages and holiday pay due to him; and
- (ii) \$28.41 as interest on wages and holiday pay not paid when due.
- (iii) \$70.00 in reimbursement of the Authority's lodgement fee.

[52] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority