

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 269/09  
5150660**

BETWEEN

ALBERT THOMPSON  
Applicant

AND

DUNDEE LUMBER LIMITED  
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Marcus Steele for Applicant  
Murray Ferris, Director, for Respondent

Investigation Meeting: 21 April 2009

Determination: 10 August 2009

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] This matter relates to an allegation of unjustified dismissal. Mr Thompson was hired by the respondent on approximately 9 June 2008 to drive a truck and fork hoist and to sort and stack timber in the respondent's yard. Mr Ferris, director of the respondent company, claims that he put Mr Thompson on a three month trial during which he personally supervised him. He says that despite receiving many verbal warnings Mr Thompson failed to reach a satisfactory level of competence in the operation of the fork hoist or in identifying and sorting different timbers. For this reason, Mr Ferris says, he dismissed Mr Thompson. The dismissal took place on 5 September 2008, effective immediately.

[2] Mr Thompson says he was never provided with a written employment agreement and was not told he was on probation. He felt he was still learning the job and denies that he was warned that his job was at risk, although he says he was

subjected to personal and racist abuse by Mr Ferris. He says that the termination of his employment was unjustified.

[3] After the termination, through his representative, Mr Thompson made a formal request for the reasons for his dismissal and for his employment records.<sup>1</sup> Mr Ferris made no response.

[4] Mr Thompson claims remedies of lost earnings, compensation and penalties. The claim for penalties was not particularised in any way. I have inferred from the evidence and from what Mr Thompson and Mr Steele told me about Mr Thompson's concerns that the claim relates to the failure to provide a written agreement and (upon formal request by Mr Steele) the failure to provide reasons for the termination and employment records.

## Issues

[5] The issues for determination are:

- i. whether Mr Ferris failed to supply a written employment agreement and whether there was a probationary period;
- ii. whether the dismissal was justified, and
- iii. what if any remedies are in order.

### **(i) The employment agreement**

[6] Mr Thompson had his initial interview for the job with Mr Ferris himself. Mr Ferris told me that he always puts new staff on a trial period and told Mr Thompson this like everyone else. Mr Thompson disputed this.

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<sup>1</sup> It is not clear when Mr Steele's formal request for reasons was made. He supplied to the Authority a copy of a letter from him to "Dundee Interiors Ltd" dated 7 August 2008. Mr Steele told me that this date was an error and that the letter was written on 7 September 2008. His explanation is borne out by Mr Ferris's evidence that sometime early in September his accountant mentioned receipt of a letter which "may have been" Mr Steele's letter.

[7] Mr Ferris said he left it to his office staff to offer new employees their written agreements and to follow up on making sure such documents were properly signed and filed away. Usually, he said, this all happened within about a week after employment commenced. Mr Ferris produced in evidence a copy of an employment agreement for Mr Thompson, signed by him but not Mr Thompson. Mr Thompson denied ever seeing it. Mr Ferris said he had no first hand knowledge (or other evidence) of the document being presented to Mr Thompson for signing and said it appeared that “*for some reason [Mr Thompson’s contract] slipped though the cracks.*”

[8] Section 65 of the Employment Relations Act 2000 provides:

*“(1) The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer –*

*(a) must be in writing...”*

[9] While section 63A provides:

*“(1) This section applies when bargaining for terms and conditions of employment in the following situations:*

...

*(e) in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee:*

*(f) where a fixed term of employment, or probationary or trial period of employment, is proposed:*

*(2) The employer must do at least the following things:*

*(a) provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and*

*(b) advise the employee that he or she is entitled to seek independent advice about the intended agreement or any part of the intended agreement; and*

*(c) give the employee a reasonable opportunity to seek that advice; and*

*(d) consider any issues that the employee raises and respond to them.*

*(3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.”*

[10] Since there is no evidence that the written agreement was presented to Mr Thompson for signing the respondent company is in breach of sections 63A and section 65 of the Employment Relations Act.

[11] Section 67 (since superseded, but in force at the time of these events) provided:

*“(1) Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation after the commencement of the employment-*

*(a) the fact of the probation period must be specified in writing in the employment agreement; and*

...

*(3) ...if the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation if the employee elects, at any time, to treat that term as ineffective.”*

[12] This means that, without a written agreement, Dundee Lumber Limited cannot rely on the existence of a probationary period unless Mr Thompson elects to treat it as effective. Given that Mr Thompson disputes ever agreeing to a probationary period in the first place, he clearly has not elected to treat it as effective. As a result, the

respondent cannot rely on the existence of a probationary period as part of its justification for the dismissal.

**(ii) The dismissal**

[13] On the day of the dismissal Mr Thompson had been at work with the fork hoist unloading timber. Mr Ferris came to look at how he was doing and found the work unsatisfactory. He told Mr Thompson so in terms which he admitted became abusive and personal, although he said that Mr Thompson was aggressive and also “*had a lot to say.*” After this exchange, Mr Thompson set off walking up the road back to the factory. From where the two men had been working, this was a distance of several kilometres. Mr Ferris followed in his vehicle and picked Mr Thompson up. Mr Thompson said when he set off walking it had been in his mind to quit. However, he said nothing about this after being picked up.

[14] Later still, back at the factory, Mr Ferris told Mr Thompson he would finish him up that day with two weeks pay. However, when Mr Thompson collected his final pay it did not contain any pay in lieu of notice. Mr Ferris told me he changed his mind about making a payment in lieu after going back to the office, reading the contract, and deciding that there was “*no need to pay it.*”

[15] At the Authority investigation meeting Mr Ferris told me that Mr Thompson’s job would never have lasted long term because work was running out by the time of the dismissal. (Mr Thompson agreed that Mr Ferris had already told him this prior to the dismissal.) However Mr Ferris acknowledged that when he dismissed Mr Thompson there was still work available and that he hired someone to do it after Mr Thompson left. He told me that he dismissed Mr Thompson for poor performance.

[16] Mr Ferris relies on informal verbal warnings which are disputed. He has not been able to provide any specific detail about the warnings. I was not told when and how they were issued, precisely what they were for, what improvements were required or what the timeframe was for improvement. I cannot therefore be satisfied that Mr Thompson was properly warned.

[17] In addition Mr Thompson was dismissed without notice. Summary dismissal may be justified in circumstances of serious misconduct but as a general rule, notice is required in relation to a dismissal for poor performance. Mr Ferris was mistaken in his belief that there was no need to give notice.

[18] For these reasons alone, the respondent has failed to justify the dismissal.

### **(iii) Remedies**

#### *Personal Grievance*

[19] By way of remedies for his personal grievance Mr Thompson seeks reimbursement of lost earnings for the seven weeks it took him to find another job, as well as compensation.<sup>2</sup>

[20] Section 128 of the Employment Relations Act provides for reimbursement of remuneration lost as a result of a personal grievance, while section 124 requires the Authority to consider whether remedies should be reduced for contributing behaviour by the employee.

[21] Mr Thompson started another job, on the same rate of pay<sup>3</sup>, seven weeks after his dismissal. He seeks reimbursement of the seven weeks lost wages. As already indicated, there was very little evidence regarding the purported warnings and I cannot be satisfied that there were performance issues which amounted to contributory conduct on Mr Thompson's part. As for the altercation on the day of dismissal, Mr Ferris denied racist comments but said he "*probably*" called Mr Thompson a "*useless c....*" There was no evidence of Mr Thompson descending to this sort of abuse.

[22] Even in the most robust of work environments the language used by Mr Ferris would not be acceptable. I am satisfied that after being spoken to like this, it was

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<sup>2</sup> Mr Thompson initially sought reinstatement to his position however that claim was withdrawn at the investigation meeting.

<sup>3</sup> The employment agreement tabled by Mr Ferris indicated that the job was full time at an hourly rate of \$18.00. Mr Thompson did not dispute these details which are therefore accepted as accurate.

reasonable for Mr Thompson to leave Mr Ferris's presence and set off walking back to the factory. I do not find that anything in Mr Thompson's conduct on the last day warrants a reduction in remedies.

[23] Section 123 provides for compensation for humiliation, loss of dignity and injury to the feelings of the employee. Mr Thompson did not quantify his claim under this head. He did express strong feelings about Mr Ferris's conduct, in particular the language he had used towards him, and said he did not feel he should be spoken to in this way after having been in the workforce for 31 years. I have weighed these factors in the balance along with the relatively short period of employment, and the fact that Mr Thompson was considering resignation on the day of dismissal. I am satisfied that an award of \$3,000.00 is warranted under all the circumstances.

[24] Turning to the claim for penalties, I note that Section 133 (1) of the Employment Relations Act 2000 provides:

*“The Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under this Act-*

*(a) for any breach of an employment agreement; or*

*(b) for a breach of any provision of this Act for which a penalty in the Authority is provided in the particular provision.”*

*Failure to provide written agreement*

[25] As set out above, every employer who fails to comply with s.63A is liable to a penalty. Penalties are punitive that is to say they are similar in nature to a fine. They are payable to the Crown although the Authority has a discretion to order that the whole or any part of any penalty may be paid to any person.

[26] I accept Mr Ferris's evidence that Mr Thompson's contract *“fell through the cracks.”* I am not satisfied that a penalty is warranted in relation to the respondent's breach of section 63. However I caution that the respondent must ensure that the requirements of s.63 are met in full in the case of all future employees.

*Failure to provide reasons for termination*

[27] Section 120 of the Employment Relations Act provides as follows:

*“Where an employee is dismissed, that employee may, within 60 days after the dismissal or within 60 days after the employee has become aware of the dismissal, whichever is the later, request the employer to provide a statement in writing of the reasons for the dismissal.”*

[28] Section 120 makes no provision for penalties, and the requirement to give reasons was not incorporated into the employment agreement. Neither s. 133 (1) (a) nor s. 133 (1) (b) applies therefore. Whatever the date of Mr Steele’s request, it would not have been within the Authority’s jurisdiction to award a penalty for the failure to provide reasons.

*Request for records*

[29] In the same letter which made request for reasons for dismissal, Mr Steele made a request for Mr Thompson’s records pursuant to s.130 of the Employment Relations Act 2000 which provides:

*“(2) Every employer must, upon request by an employee or by a person authorised under section 236 to represent an employee, provide that employee or person immediately with access to or a copy of or an extract from any party or all of the wages and time record relating to the employment of the employee...”*

...

*(4) Every employer who fails to comply with any requirement of this section is liable to a penalty imposed by the Authority”*

[30] Mr Ferris told me he did nothing to respond because by the time he heard of the letter, arrangements were already in place to attend mediation.

[31] While this response is far from satisfactory, it does not appear that Mr Thompson was prejudiced in any way by the failure to supply wage and time records. He has said nothing to me to indicate any uncertainty about what he had been paid whilst employed or to suggest he might have a potential claim for arrears of wages. I am not satisfied that a penalty is warranted in this case. I do note, however, that the respondent must henceforth comply with its obligation to supply staff with access to wage and time records upon demand.

### **Summary of remedies**

[32] **The respondent is ordered to pay to the applicant the following sums:**

- i. Seven weeks wages, that is the sum of \$5,040.00 gross, and**
- ii. Compensation of \$3,000.00.**

### **Costs**

[33] This issue is reserved. Any application for costs must be made to the Authority within a period of 28 days and must be supported by submissions.

Yvonne Oldfield

Member of the Employment Relations Authority