

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 53  
3044031

BETWEEN           ASHLEY WAKEHAM  
Applicant

AND                 PACIFIC DECONTAMINATION  
SERVICES LIMITED  
Respondent

Member of Authority:     Jenni-Maree Trotman

Representatives:         Applicant in person  
No appearance for the Respondent

Investigation Meeting:    04 February 2019

Oral Determination:      04 February 2019

Written Record Issued:    04 February 2018

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Pacific Decontamination Service Limited is a decontamination company specialising in the removal of asbestos. Mr Wakeham was employed by Pacific Decontamination on 5 June 2018 as its Managing Director.

[2] On 25 June 2018 Pacific Decontamination dismissed Mr Wakeham. Mr Wakeham claims this dismissal was unjustified. He claims lost wages and for compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). In addition he claims wage arrears and requests the Authority to order Pacific Decontamination to pay a penalty for failing to provide him with a written employment agreement.

[3] No Statement in Reply was filed by Pacific Decontamination.

[4] Prior to the investigation meeting a minute setting out, inter alia, the date of the investigation meeting was personally served on Pacific Decontamination. In addition it was served with the notice of investigation meeting. The minute advised that, pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, Pacific Decontamination would require the leave of the Authority to reply or respond to Mr Wakeham's application. Pacific Decontamination was advised that if an application for leave was filed this must explain the delay in filing the Statement in Reply on time and file a copy of the proposed Statement in Reply.

[5] No application for leave was received from Pacific Decontamination and there was no appearance for or on behalf of the company at the investigation meeting. This was despite a brief delay to the commencement of my investigation.

[6] As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Pacific Decontamination had duly attended or been represented.

[7] As permitted by 174E of 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 but has not recorded all evidence and submissions received.

### **The issues**

[8] The issues requiring investigation and determination are:

- (a) Was Mr Wakeham unjustifiably dismissed?
- (b) If so, what remedies should be awarded?
- (c) Has there been a default in payment of wages and/or other monies payable to Mr Wakeham? If so, what monies are payable by Pacific Decontamination to Mr Wakeham?
- (d) Has Pacific Decontamination breached s 63A of the Act? If so, should a penalty be imposed by the Authority?

[9] The Statement of Problem also pleaded:

The decision to terminate his employment was made without consultation with him or deliberation over what he had to say and the lack of any proper process has unjustifiably disadvantaged him.

[10] As the facts relied upon to establish a disadvantage are the same as those relied upon to establish the unjustified dismissal, I consider it appropriate to address Mr Wakeham's grievance under the head of unjustified dismissal.<sup>1</sup>

### **Background facts**

[11] In early June 2018 Mr Wakeham was approached by the Director of Pacific Decontamination, Graeme Raymond. He met with Mr Raymond on 5 June 2018 and started working that same day. He was not provided with an individual employment agreement but says the parties verbally agreed:

- a. He would be paid a salary of \$100,000 per annum plus 1% of the Company's turnover.
- b. He would be required to work 8 hours per day on a Monday to Friday.
- c. He would be paid weekly.

[12] On 7 June 2018 Mr Wakeham suffered a seizure and was hospitalised. He returned to work on 9 June 2018. At this time Mr Raymond agreed to organise a driver to drive him to and from work sites.

[13] On 13 June 2018 Mr Wakeham received his first pay. This was less than he was expecting so he spoke with Pacific Decontamination's Accounts lady. She apologised and told him that the difference would be paid in the next pay run.

[14] On 20 June 2018 Mr Wakeham received his second pay. The wage arrears had not been paid. He again contacted Pacific Decontamination's Accounts lady. Not receiving the response he was after he phoned Mr Raymond. Mr Raymond told him that the Company was only prepared to pay him \$40 per hour as it was going to be incurring a lot more cost having to arrange a driver to transport him to and from work sites and meetings. Mr Wakeham told Mr Raymond that this was not what had previously been agreed and he was not happy. Mr Raymond told him to finish off the week and then come in the following Monday and they could discuss things.

[15] On 25 June 2018 Mr Wakeham was unwell. He phoned Mr Raymond who asked him to meet him at a local coffee shop. Upon arrival Mr Raymond told Mr Wakeham that he couldn't continue the employment relationship. When asked why,

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<sup>1</sup> Pursuant to the powers of the Authority under section 160(3) of the Employment Relations Act 2000.

he told Mr Wakeham that his seizure had caused unforeseen stress and would cause additional expense for the Company and he did not need him anymore. Mr Wakeham asked him if he was sure and he said yes. The meeting then ended.

### **Issue One: Unjustified Dismissal**

[16] The onus falls upon Pacific Decontamination to prove that its actions in dismissing Mr Wakeham on 25 June 2018 were justified.

[17] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Pacific Decontamination, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[18] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[19] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.<sup>2</sup>

[20] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

[21] I am satisfied the test of justification has not been satisfied.

[22] The process leading to Mr Wakeham's dismissal was defective. Pacific Decontamination failed to meet any of the mandatory considerations set out in s 103A(3). There was no investigation before dismissal. There was no reasonable opportunity afforded to Mr Wakeham to respond to any concerns about his health or

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<sup>2</sup> Section 103A(5), Employment Relations Act 2000

otherwise before dismissal. In effect the dismissal was immediate and abrupt. These defects were not minor and did result in Mr Wakeham being treated unfairly.

### *Finding on Issue One*

[23] I am satisfied that Pacific Decontamination's decision to terminate Mr Wakeham's employment did not fall within the range of what a notional fair and reasonable employer could have done in the circumstances at the time. Mr Wakeham was unjustifiably dismissed from his employment with Pacific Decontamination and is entitled to remedies.

### **Issue Two: Remedies**

#### *Lost wages*

[24] Mr Wakeham claims thirteen weeks' lost wages.

[25] Section 123(1)(b) of the Act provides for the reimbursement by Pacific Decontamination of the whole or any part of wages lost by Mr Wakeham as a result of his grievance. Section 128(2) provides that I must order Pacific Decontamination to pay Mr Wakeham the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have a discretion to award greater compensation for remuneration lost than three months' equivalent.<sup>3</sup>

[26] In *Allen v Transpacific Industries Group Ltd*<sup>4</sup>, Chief Judge Colgan emphasised that those representing dismissed employees intending to take personal grievances should keep complete records of their attempts to mitigate losses.

[27] In my minute of 3 December 2018 I directed Mr Wakeham to provide documents evidencing his attempts to mitigate his lost wages. He did not comply with this direction. However, he gave oral evidence as to the steps he took to find alternative employment.

[28] Mr Wakeham said that he applied for two jobs, both of which were with friends. One was a painting job and the other involved some construction work. He was not successful in securing either role. Other than this, he did not apply for other jobs. He said this was largely because his confidence had been affected by his

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<sup>3</sup> S 128(3).

<sup>4</sup> [2009] 6 NZELR 530 (EmpC)

dismissal but also because of other personal events such as his father suffering a stroke.

[29] I am satisfied Mr Wakeham suffered a loss of 4 weeks' wages. Any loss after this period was not as a result of his personal grievance.

[30] Based on a salary of \$100,000 gross per annum, Mr Wakeham's weekly salary was \$1,923 gross. Multiplying this sum by 4 weeks I reach a figure of \$7,692 gross.

[31] Pacific Decontamination is ordered to pay to Mr Wakeham the sum of \$7,692 gross within 14 days of the date of this determination.

#### *Section 123(1)(c)(i) Compensation*

[32] Mr Wakeham claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) in the sum of \$8,000.

[33] Mr Wakeham gave brief oral evidence of the effects his dismissal had on him. He explained that he had lost confidence as a result of his dismissal. He said he found it difficult to motivate himself to apply for another role and was worried about being terminated again if he was to secure a new job.

[34] I am satisfied in these circumstances that Mr Wakeham suffered humiliation, loss of dignity and injury to his feelings. However, this was at a relatively low level. I award him the sum of \$4,000 as compensation for hurt and humiliation. This sum takes into account the impact outlined by Mr Wakeham, the short duration of his employment, and there being no evidence of any longstanding impact.

[35] Pacific Decontamination is ordered to pay to Mr Wakeham the sum of \$4,000 as compensation under s 123(1)(c)(i) of the Act. Payment must be made within 14 days of the date of this determination.

#### **Issue Two: Wage Arrears**

[36] Where there has been default in payment to an employee of any wages or other money payable under an IEA, those monies may be recovered by the employee.<sup>5</sup>

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<sup>5</sup> Section 131 Employment Relations Act 2000

[37] By minute dated 3 December 2018 I directed Pacific Decontamination to provide the Authority with a copy of Mr Wakeham's wage and time records, leave and holiday records, payslips and final pay details. These were not provided.

*Hours worked*

[38] I accept as proven Mr Wakeham's claim:

- a. That he worked 8 hours on each of 5 and 6 June and 4.5 hours on 7 June 2018.
- b. That he worked 8 hours each day from 11 to 15 June 2018.
- c. That he worked 8 hours each day from 18 June to 22 June 2018.

[39] I do not accept as proven the hours claimed as being worked by Mr Wakeham on 7 June and 25 June 2018. On 7 June 2018 Mr Wakeham said he had a seizure in the morning and was taken to hospital. At best he could have worked 2 hours not the 4 hours he claims. In addition, Mr Wakeham claimed he worked 3 hours on 25 June 2018. However his oral evidence was that he did not work on this day as he was sick.

[40] The combined total hours worked for the period 5 June 2018 to 22 June 2018 equals 102.5 hours.

*Arrears*

[41] Mr Wakeham's weekly salary was \$1,923 gross. Dividing this sum by 40 hours per week I reach an hourly rate of \$48 gross.

[42] Based on 102.5 hours of work he was entitled to be paid \$4,920 gross.

[43] Mr Wakeham was paid \$1,145.26 gross (\$920 net) on 13 June 2018. He was paid a further \$1,440.91 gross (\$1,120 net) on 20 June 2018. A combined total of \$2,586.17 gross.

[44] \$4,920 less \$2,586.17 leaves an amount of wage arrears outstanding of \$2,333.83 gross.

[45] Pacific Decontamination is ordered to pay to Mr Wakeham the sum of \$2,333.83 for wage arrears under s 131 of the Act. Payment must be made within 14 days of the date of this determination.

### **Issue Three: Contribution**

[46] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.<sup>6</sup>

[47] I am satisfied that Mr Wakeham did not contribute to his personal grievance. For this reason I make no deduction to the remedies I have awarded.

### **Issue Four: Has the Respondent breached s 65 of the Employment Relations Act? If so, should a penalty be imposed?**

[48] Section 65 of the Act requires that an individual employment agreement must be in writing. It must also contain six pieces of information, as set out in that section. Sub-section 65(4) provides that an employer who fails to comply with that section is liable to a penalty imposed by the Authority.

[49] Pacific Decontamination failed to provide Mr Wakeham with an employment agreement. Therefore, on the face of it, it is liable for a penalty.

[50] The quantum of any penalty is to be determined using the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*.<sup>7</sup>

[51] Step one is to identify the number of breaches and the maximum penalty applicable. In this case there was one breach of section 65. The maximum penalty that may be imposed upon a company or other corporation is \$20,000 per breach. The starting point is, therefore, a penalty of \$20,000.

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<sup>6</sup> s 124.

<sup>7</sup> [2016] NZEmpC 143

[52] Step 2 involves consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach. The requirement to provide an employment agreement has been in place for more than a decade. Ample assistance is available to help employers, small and large, to ensure they comply. I conclude that this stage has a neutral effect on my calculation.

[53] Step three requires the Authority to consider the means and ability of Pacific Decontamination to pay the penalty reached under Step 2. I have no evidence of any financial or other hardship that Pacific Decontamination will suffer by the imposition of a penalty. I conclude that this stage has a neutral effect on my calculation.

[54] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty I have arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances. Looking at recent Authority and Court imposed penalties I conclude an appropriate penalty is \$1,000.

[55] A penalty of \$1000 is sufficient to act as a deterrent to other employers who might fail to properly complete the mandatory requirement to provide workers with a written employment agreement covering at least all the elements required by s 63A and s 65 of the Act. It is a penalty within the range imposed in comparable cases but still very much at the lower end of the levels of penalty that may be awarded against a company.

[56] Pacific Decontamination is ordered to pay \$1,000 by way of penalty for its breach of s 65 of the Act. This sum is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[57] Payment of the penalty is to be paid within 28 days of the date of this determination.

### **Costs**

[58] Mr Wakeham was represented by an Advocate in the early stages of this proceeding. However, this Advocate advised the Authority that he no longer represented Mr Wakeham and did not appear at the investigation meeting.

[59] Mr Wakeham said he has not incurred any legal costs. He said he has not received an invoice for costs and has not been told that he will have to pay any costs.

[60] In these circumstances, I make no award of costs other than payment of the Authority's filing fee of \$71.56. This fee is an amount reasonably recoverable from Pacific Decontamination. I order Pacific Decontamination to pay the sum of \$71.56 within 14 days of the date of this determination.

### **Outcome**

[61] The Authority makes the following orders:

- a. Ashley Wakeham was unjustifiably dismissed by Pacific Decontamination Service Limited.
- b. Pacific Decontamination Services Limited defaulted in payment to Ashley Wakeham of wages payable to him under his employment agreement.
- c. Pacific Decontamination Services Limited is ordered to pay to Ashley Wakeham the following amounts within 14 days of the date of this determination:
  - i. The sum of \$7,692 gross for lost wages.
  - ii. The sum of \$4,000 as compensation under s 123(1)(c)(i) of the Act.
  - iii. The sum of \$2,333.83 under s 131 of the Employment Relations Act 2000;
  - iv. The sum of \$71.56 for costs.
- d. Pacific Decontamination Services Limited breached s 65 of the Employment Relations Act. It is ordered to pay \$1,000.00 by way of penalty for this breach. This sum is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account. Payment of the penalty is to be paid within 28 days of the date of this determination.

### **Delivery of Oral Determination**

[62] The Applicant was advised that this oral determination would be delivered at 1.30 pm today. The Applicant was to be connected via Skype. He was unable to be reached and therefore the oral determination was delivered without his presence.

Jenni-Maree Trotman  
Member of the Employment Relations Authority