

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 292  
5418331

BETWEEN            MICHAEL ZAHORODNY  
                                 Applicant  
  
A N D                    INSIGHT PLUMBING LIMITED  
                                 Respondent

Member of Authority:    Rachel Larmer  
  
Representatives:         David Prisk, Advocate for Applicant  
                                 No appearance by Respondent  
  
Investigation Meeting:    09 July 2013 at Auckland  
  
Date of Determination:    09 July 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.    Insight Plumbing Limited (Insight Plumbing) unjustifiably disadvantaged and unjustifiably dismissed Mr Michael Zahorodny.**
- B.    Insight Plumbing is ordered to pay Mr Zahorodny:**
- (a)    \$2,840.36 lost remuneration;**
  - (b)    \$4,000 distress compensation;**
  - (c)    \$52.36 holiday pay;**
  - (d)    \$300 costs;**
  - (e)    \$109.25 to reimburse his service fees;**
  - (f)    \$71.56 to reimburse his filing fee.**

## **Employment relationship problem**

[1] Mr Zahorodny began employment with Insight as an apprentice plumber in 2008. He was made redundant 18 months later but then (after a period with another employer) he was subsequently asked by Mr Greg Durrant (one of the directors) to return to Insight Plumbing in 2010.

[2] Mr Zahorodny's employment ended when he was handed a letter on 04 February 2013 which asked him to resign or be dismissed. Mr Zahorodny claims he was unjustifiably dismissed and unjustifiably disadvantaged in his employment.

[3] Mr Zahorodny says that in 2011 Mr Roinee Rundberg bought into Insight Plumbing and started running the business and Mr Durrant moved to Australia. Mr Zahorodny says he had a good relationship with Mr Durrant but that Mr Rundberg did not like him.

[4] Mr Zahorodny says at the start of 2013 he told Mr Rundberg he was required to complete a two week block course in order to obtain his apprenticeship. Mr Zahorodny claims Mr Rundberg told him if he did the course he would not have a job to come back to. Mr Zahorodny thinks that was because Insight Plumbing would have had to increase his pay once he received his apprenticeship.

[5] At the end of January Mr Zahorodny took two weeks approved leave. Whilst he was on leave Insight Plumbing hired another plumber it prepared a letter dated 28 January 2013 which gave Mr Zahorodny the option of resigning or being dismissed.

[6] When Mr Zahorodny walked into the office on the morning of Monday 4 February 2013 ready to be allocated his jobs for the day Mr Rundberg handed him the letter of 28 January without saying anything and walked outside. The letter says (amongst other things):

*“Michael,*

*I would like you to resign, or I will have no alternative over than to dismiss you from your employment with Insight Plumbing.”*

[7] The letter raises issues about five jobs which Mr Rundberg appears to hold Mr Zahorodny responsible for. Mr Zahorodny says that none of the issues referred to had ever been discussed with him and he does not believe he is at fault for any of the jobs referred to in the letter.

[8] Mr Zahorodny says he was extremely shocked and distressed to lose his job in this way. He did not know what to do so he left work and went home. Mr Zahorodny was so distressed he saw his doctor and was signed off work. He did not return to work and was paid his final pay on 12 February 2013. His final pay slip shows a leave balance of 3.08 hours.

[9] Mr Zahorodny claims four weeks' lost remuneration, unpaid holiday pay entitlements upon termination of 3.08 hours, \$6,000 distress compensation and full indemnity costs.

### **No appearance by Insight Plumbing**

[10] Although the parties attended mediation Insight Plumbing did not file a Statement in Reply, it did not seek leave to file a Statement in Reply out of time and it did not respond to the Authority's communications reminding it to apply for leave to file a Statement in Reply out of time if it wanted to defend Mr Zahorodny's claims.

[11] Insight Plumbing did not attend the Authority's investigation meeting. I am satisfied that the Statement of Problem, the Notice of Hearing, and Mr Zahorodny's witness statement were all personally served on Mr Rundberg, a director of Insight Plumbing. As notified in the Notice of hearing the Authority conducted its investigation in Insight Plumbing's absence.

### **Issues**

[12] The following issues require determination:

- (a) Was Mr Zahorodny unjustifiably disadvantaged in his employment?
- (b) If so, what if any remedies should be awarded?
- (c) Was Mr Zahorodny dismissed?
- (d) If so, was dismissal justified?
- (e) If not, what if any remedies should be awarded?
- (f) What annual holiday pay is owed?
- (g) What if any costs should be awarded?

### **Was Mr Zahorodny unjustifiably disadvantaged in his employment?**

[13] Mr Zahorodny claims he was unjustifiably disadvantaged in his employment because;

- a. he was not provided with a written employment agreement; and
- b. Insight Plumbing did not follow a fair or proper process before it constructively dismissed him.

[14] There was nothing to contradict Mr Zahorodny's evidence he did not receive a written employment agreement from Insight Plumbing. I find Mr Zahorodny was unjustifiably disadvantaged by Insight Plumbing's failure to provide him with a written employment agreement contrary to the requirements of s.65 of the Employment Relations Act 2000 (the Act).

[15] I also find Mr Zahorodny was unjustifiably disadvantaged in his employment because Insight Plumbing did not follow a fair or proper process before constructively dismissing him.

### **What remedies should be awarded?**

[16] I decline to award Mr Zahorodny a remedy for Insight Plumbing's failure to follow fair and proper process before constructively dismissing him because I consider the same facts give rise to his unjustified dismissal claim so will form part of that overall compensation.

[17] Insight Plumbing is ordered to pay Mr Zahorodny \$500 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered because of Insight Plumbing's breach of s.65 of the Act.

### **Was Mr Zahorodny dismissed?**

[18] Mr Zahorodny bears the onus of establishing on the balance of probabilities he was dismissed. Mr Zahorodny was told to resign or be dismissed. That amounts to a dismissal because it is a sending away which occurred at the employer's initiative. It was not a genuine or voluntary resignation so I find he was dismissed.

### **Was dismissal justified?**

[19] Insight Plumbing bears the onus to establish on the balance of probabilities dismissal was justified. I find it has not discharged that onus.

[20] Insight Plumbing did not comply with its statutory good faith obligations under s.4(1A) of the Act to provide Mr Zahorodny with access to information relevant to his ongoing employment and an opportunity to comment on that before he was dismissed. Insight Plumbing also failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act.

[21] I find Insight Plumbing's dismissal of Mr Zahorodny was unjustified.

### **What remedies should be awarded?**

#### *Mitigation*

[22] I am satisfied Mr Zahorodny took appropriate steps to mitigate his loss because he immediately applied for jobs and went door knocking to obtain new employment.

#### *Lost remuneration*

[23] Mr Zahorodny started a new job on 04 March 2013. Insight Plumbing is ordered to pay Mr Zahorodny \$2,840.36 under s.128(2) of the Act being the actual remuneration he lost.

#### *Distress compensation*

[24] I am satisfied Mr Zahorodny suffered considerable shock, distress and upset as a result of his unjustified dismissal. He required medical attention and described how his dismissal was a huge blow to his confidence.

[25] Insight Plumbing is ordered to pay Mr Zahorodny \$3,500 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his unjustified dismissal.

#### *Contribution*

[26] Having determined that Mr Zahorodny has grievance claims, s.124 of the Act requires me to assess the extent to which he contributed to the situations which gave rise to his two grievances and if appropriate to reduce remedies accordingly.

[27] Contribution denotes blameworthy conduct which must be established on the balance of probabilities. The references to performance concerns in Insight Plumbing's 28 January letter do not meet the required standard of proof. I therefore find Mr Zahorodny did not contribute to the situation which gave rise to his grievances so his remedies are not to be reduced.

#### **What annual holiday pay is owed?**

[28] Mr Zahorodny's final pay advice shows he was owed 3.08 hours annual holiday. He says he was not paid any annual holiday pay upon termination and he calculates he is owed \$52.36 outstanding annual holiday pay.

[29] Insight Plumbing is ordered to pay Mr Zahorodny \$52.36 annual holiday pay.

#### **What costs should be awarded?**

[30] Mr Zahorodny as the successful party is entitled to a contribution towards his actual legal costs. Although Mr Zahorodny seeks full indemnity costs, this is not one of those rare matters in which indemnity costs are appropriate.

[31] I adopt the Authority's usual notional daily tariff based approach to costs, with the costs awarded being adjusted on a pro rata basis to reflect the actual time spent in the Authority's investigation meeting.

[32] There are no factors which warrant an adjustment to the notional daily tariff which is currently \$3,500. Insight Plumbing is ordered to pay Mr Zahorodny \$300 towards his actual costs.

*Disbursements*

[33] Insight Plumbing is ordered to reimburse Mr Zahorodny \$109.25 for the costs he incurred when serving the relevant documentation on Insight Plumbing prior to the Authority's investigation meeting together with \$71.56 to reimburse his filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**