IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 24
5306673

BETWEEN	TIAGO GENTILE de PEYON Applicant
A N D	HI TECH PANEL & PAINT (2006) LIMITED (IN LIQUIDATION) Respondent

Member of Authority:	James Crichton
Representatives:	Jonny Sanders, Advocate for Applicant No appearance for Respondent
Investigation Meeting:	3 February 2011 at Christchurch
Date of Determination:	4 February 2011

DETERMINATION OF THE AUTHORITY

Introduction

[1] The respondent employer (Hi Tech) was placed in liquidation on 30 November 2010 after the present proceedings were filed and served, after a statement in reply had been filed and served, but before the matter came before the Authority for the investigation meeting.

[2] The liquidators, Messrs Iain Andrew Nellies and Wayne John Deuchrass, have provided the Authority with written consent for the investigation meeting to continue and for any determination to be made available to the liquidator.

[3] I record the Authority's appreciation to the liquidators for allowing the Authority's process to continue unimpeded. I carefully explained to the applicant (Mr de Peyon) that the fact that the liquidators have been prepared to allow the Authority's process to continue is, of itself, no guarantee that any awards made by the Authority in this matter will be able to be satisfied.

Employment relationship problem

[4] Mr de Peyon was employed by Hi Tech as an apprentice panel beater/painter, commencing those duties in January 2010. The employment relationship was not documented by a written employment agreement. There were difficulties in the relationship. In March 2010 Mr de Peyon's hourly rate was arbitrarily reduced by Hi Tech from $18 per hour to $16 per hour. Then on 13 April 2010, Hi Tech's Earl Tremain handed Mr de Peyon payslips detailing his final pay, told him his employment was at an end and that he was not to attend the workplace any more.

[5] Hi Tech had maintained throughout the proceedings that Mr de Peyon was employed pursuant to a trial period. But there was no written agreement and no documented basis for the trial period. Hi Tech also maintain Mr de Peyon agreed to the reduction in his hourly rate because of problems with his workmanship, although that latter claim is denied by Mr de Peyon on oath.

[6] Two mediations have been scheduled to progress the resolution of Mr de Peyon's employment relationship problem, but on neither occasion was Hi Tech represented.

Issues

[7] The Authority has to determine the following issues:

(a) Was the claimed trial period legal?

(b) Was the wage reduction legal?

(c) Was Mr de Peyon unjustifiably dismissed?

(d) Did Mr de Peyon suffer disadvantage?

Was the trial period legal?

[8] I am satisfied the trial period claimed by Hi Tech was completely illegal as it did not comply with the terms of the statute. First, the Employment Relations Act requires employment agreements to be in writing: s.65(1) of the Act. Second, pursuant to s.67A of the Act, subclause (2) requires that a trial provision be *a written provision*.

[9] It follows that Hi Tech's claim that Mr de Peyon was employed pursuant to a trial provision in accordance with the law is simply mistaken and I reject that contention. There was no properly constituted trial provision in respect to Mr de Peyon's employment with Hi Tech.

Was the wage reduction unilateral?

[10] I am satisfied on the evidence before the Authority that the reduction in Mr de Peyon's wages, made in March 2010, from $18 per hour to $16 per hour was not agreed to by Mr de Peyon. Hi Tech's position, so far as can be discerned, is that it proposed a reduction in his hourly rate because of difficulties with his workmanship. There are various claims about how that alleged difficulty was managed.

[11] The short point is that I am satisfied on the sworn evidence of Mr de Peyon that he never agreed to the reduction. It is clear that such a reduction cannot be imposed on a worker. It follows that Mr de Peyon is entitled to be paid for the difference between what he was paid and what he should have been paid in the period in question.

Was Mr de Peyon unjustifiably dismissed?

[12] On the evidence before the Authority, I am satisfied Mr de Peyon was unjustifiably dismissed from his employment. He was simply told on 13 April 2010 not to turn up for work the following day. There is no process, no consultation, no opportunity to be heard, indeed nothing that would grace this precipitate action as a justified dismissal.

[13] Of course, Hi Tech rely on their mistaken belief that Mr de Peyon was employed on a trial period and therefore they could dismiss him at will. But as I have already found, that belief was a mistaken one; there was no legal trial period in place at all and Mr de Peyon's employment was, in effect, *at large*.

Has Mr de Peyon suffered disadvantage?

[14] I am also clear that Mr de Peyon has suffered disadvantage as a consequence of the unjustified actions of Hi Tech, in their arbitrary reduction of Mr de Peyon's hourly rate of pay. In a bilateral relationship such as the relationship of employment,

nothing can justify the imposition of unagreed changes to the terms of the engagement.

Determination

[15] I am satisfied that Mr de Peyon has suffered personal grievances by unjustified dismissal and disadvantage and is entitled to remedies. Mr de Peyon gave me graphic testimony of the effect the dismissal had on his self esteem, his relationships with his wife and young family, and his enjoyment of life in general. I am satisfied that he is entitled to be compensated for the hurt, humiliation and injury to his feelings that the dismissal caused. I am also satisfied that Mr de Peyon has done nothing whatever to contribute to the circumstances giving rise to his dismissal: s.124 of the Employment Relations Act considered.

[16] The disadvantage grievance is also made out and again, Mr de Peyon gave evidence of the mortifying effect of being required to continue working having sustained a drop in pay of two dollars per hour. While it appears this arbitrary reduction was prompted by the alleged deficits in Mr de Peyon's work, that apparent response of the employer can not justify a finding that Mr de Peyon contributed to this grievance in any way. If the employer had issues with Mr de Peyon's workmanship, it did not follow any process in dealing with those issues and give Mr de Peyon a chance to put any alleged deficits right.

[17] Mr de Peyon is also entitled to be reimbursed the wages he lost during the employment when his hourly rate was unilaterally cut and he is entitled to recover a contribution to his income lost as a consequence of the dismissal; Mr de Peyon was unemployed after the dismissal for almost 12 months and I am satisfied that a proper award would reimburse him for all of the wages he lost in that period, less an allowance for other (benefit) income gained in the period.

[18] Further, Mr de Peyon is entitled to have his costs paid in pursuing his former employer through the Authority and the failure of Hi Tech to provide a written employment agreement as the law requires, ought, in the present case to sound in penalty. This dispute would not have arisen if a written employment agreement has been provided.

[19] Accordingly, I make the following awards:

(a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $5,000, such figure being to compensate Mr de Peyon both for the unjustified dismissal and the unjustified disadvantage claim.

(b) Lost wages from the employment in the sum of $401.50 gross.

(c) Lost wages consequent upon the dismissal in the sum of $15,000 gross.

(d) A penalty of $1,000 for the employer's failure to provide Mr De Peyon with an employment agreement as required by law, such penalty to be paid to Mr de Peyon.

(e) Legal costs fixed at $1,000.

James Crichton
Member of the Employment Relations Authority