

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 104
5372512

BETWEEN

MARK WILSON
Applicant

A N D

BRUCE WILSON PAINTING
& DECORATING LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, Counsel for Applicant
Tony Stallard, Counsel for Respondent

Investigation meeting: 29 May 2013 at Nelson

Submissions Received: On the day

Date of Determination: 10 June 2013

DETERMINATION OF THE AUTHORITY

- A. I have amended the name of the respondent to Bruce Wilson Painting & Decorating Limited.**
- B. I have found that the applicant was unjustifiably dismissed from his employment.**
- C. I have ordered the respondent to pay the sum of \$14050.25 gross being reimbursement of lost wages to the applicant together with interest on that sum from 28 November 2012 until the date of payment at the rate of 5%.**
- D. I have ordered the respondent to pay to the applicant the sum of \$8000 compensation.**

- E. I have not awarded a penalty for a breach of good faith.**
- F. I have reserved the issue of costs and failing agreement set a timetable for the exchange of submissions.**

Identity of the respondent

[1] The Authority amended the name of the respondent from Bruce Wilson to Bruce Wilson Painting & Decorating Limited at the commencement of the investigation meeting. I shall briefly explain the reason for this.

[2] There was a written individual employment agreement between Mark Wilson and Wilson Painting & Decorating Limited. When the statement of problem was lodged with the Authority the respondent was named as Bruce Wilson, trading as Wilson Painting & Decorating. It was explained in the statement of problem that there was no company registered as Wilson Painting & Decorating Limited and that the only company that existed at the material time in respect of Bruce Wilson's business activities was Bruce Wilson Painting & Decorating Limited.

[3] For reasons that I do not need to set out there was a long period between the receipt in the Authority of the statement of problem and when the statement in reply was finally lodged in this matter. In between times the Authority held a telephone conference to set the matter down for an investigation meeting. The identity of the respondent was raised as an issue.

[4] The statement in reply said the respondent was not Bruce Wilson but his company, Bruce Wilson Painting & Decorating Ltd. Mark Wilson when his statement of evidence was lodged took no issue with that. I am satisfied that Mark Wilson was employed by Bruce Wilson Painting & Decorating Limited and that the difficulty arose because the name Bruce was left off the company described in the employment agreement.

[5] I was satisfied that a personal grievance was raised in a manner on 21 September 2011 by Mark Wilson so that I could conclude the company had notice of it. Mark Wilson then instructed Ms Sharma and she wrote on 16 November 2011

to Mr Stallard suggesting the parties undertake mediation. In doing so she referred to the company as described in the employment agreement.

[6] It was appropriate for the foregoing reason that the respondent be amended to Bruce Wilson Painting & Decorating Limited.

Prohibition of publication

[7] I prohibit from publication by consent the financial accounts of the respondent under clause 10 (1) of the second schedule to the Employment Relations Act 2000, except to the limited extent it is necessary to refer to them in this determination.

Employment relationship problem

[8] Mark and Bruce Wilson are brothers. They undertook their painting and decorating apprenticeship at the same time but Bruce Wilson set up a painting and decorating business following his apprenticeship and Mark Wilson worked for another company in Nelson as a painter.

[9] In 2003 Bruce Wilson and Mark Wilson entered into an employment relationship. Bruce Wilson Painting & Decorating Limited which I shall refer to hereafter as BWP was then incorporated on 29 April 2005. After this Bruce Wilson provided his brother a written employment agreement in 2006. I am satisfied this was the only written employment agreement provided to Mark Wilson. Although he recalled signing two documents I think it more likely that the only other document signed was a variation to schedule A of the employment agreement which increased his remuneration to \$21 per hour. For current purposes the material matters in the employment agreement are that no redundancy compensation is payable and that the notice period is one week. Both of these matters are referred to in schedule A to the agreement.

[10] On 23 August 2011 Mark Wilson was working at a subdivision undertaking some touch-up work with another BWP painter Mitchell. Bruce Wilson arrived to assist with some clean up and a conversation took place between Mark and Bruce Wilson and the other painter who was on site at that time. There was some dispute about exactly what was said. I don't find I am required to resolved that dispute except that I am satisfied Mark Wilson was left with the clear impression that Bruce Wilson

was going to *close up shop*. Mark Wilson was left with the impression that Bruce Wilson was going to give everyone four weeks notice to find another job.

[11] Mark Wilson said he probably would not have given any further thought to the discussion again as Bruce Wilson made such statements from time to time. However the next day, 24 August 2011, whilst Mark Wilson was working at another job, Bruce Wilson turned up and the evidence supports they chatted about general matters for some time. There is a dispute about whether before handing Mark Wilson a letter; Bruce Wilson advised him that he had been made redundant. Mark Wilson is adamant that Bruce Wilson simply handed him a letter and then left. Either way it was clear the decision to terminate Mark Wilson's employment had been made.

[12] The letter addressed to Mr Wilson was dated 24 August 2011 and provided amongst other matters:

Further to our conversation yesterday I confirm that your employment with us is terminated with effect from Tuesday 30th August 2011 being your final working day.

The reason for terminating your employment is that through hard economic times the house companies are not worth pursuing anymore, with this being your main working environment I will no longer have the work available for you.

[13] Mark Wilson said that he had never been made redundant before and although he said he was pretty shocked to read the letter and the suddenness of redundancy, he thought everyone else had been given the same letter and that the business was closing. He resigned himself to the situation. Mark Wilson and his brother Bruce did not talk again before his employment terminated. Mark Wilson left his employment and concentrated on finding another role.

[14] Mark Wilson then came to hear or see several things that led him to the view his redundancy was not genuine. He became aware that another painter Leigh Poindgestre had been taken on by BWP within about a fortnight of his redundancy. He concluded that Mr Poindgestre was his replacement as he drove the van that he used to drive. He said that it became clear that he was the only person who seemed to have had his employment terminated as two other employees left of their own accord. Mark Wilson also observed BWP working for various building companies during the nine months following his dismissal and he took photographs of the sites. The Authority was provided with one of the photographs. Mark Wilson said that it was

clear that the company was not stopping business as he said he was led to believe would be happening during his conversation on 23 August 2011 by Bruce Wilson and that BWP had plenty of work.

[15] Bruce Wilson said that the redundancy was a genuine one related to the financial position of the company although accepts that he should probably have undertaken a *slightly better process*. He said that the painting had slowed down considerably as a result of the difficult economic times and there was a downtime of about 12 months after Mark Wilson's redundancy for BWP but in late 2012 things came right again. The work that was on going was he said of a finishing up nature and the painter Mr Poindgestre was taken on initially as a contractor and not until much later as an employee. He accepted that Mark was the only employee made redundant but said that the other painters had told him they would look for something else and left in or about October or November 2011. Bruce Wilson did not accept that Mr Poindgestre replaced Mark Wilson and said in his oral evidence that he was taken on for his gibstopping/wall papering skills which Mark Wilson did not have.

[16] Mark Wilson says he was unjustifiably dismissed from his employment with BWP. He claims compensation for loss of income in the sum of \$48,873.25 gross, a penalty for a breach of good faith in the sum of \$5,000 and compensation for humiliation and loss of dignity in the sum of \$25,000 together with costs. Interest is also sought on the lost income award.

[17] Bruce Wilson does not accept that Mark Wilson was unjustifiably dismissed and says that the redundancy was genuine. Further there was an allegation in the statement in reply that Mark Wilson engaged in conduct during the course of his employment which if known at the time of his termination would have justified dismissal.

The issues

[18] The issues for the Authority to determine are as follows:

- Was Mark Wilson unjustifiably dismissed?
- If Mark Wilson was unjustifiably dismissed what remedies is he entitled to and are there issues of contribution, later discovered misconduct or other matters that should be taken into account?

- Should there be an award of a penalty for a breach of good faith?

[19] The dismissal took place on 30 August 2011 after 1 April 2011 when the new justification test under s.103A of the Employment Relations Act 2000 was substituted.

[20] The Authority needs to objectively determine under the new test in s.103A whether the actions of BWP and how BWP acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Authority must also consider the procedural matters set out in s. 103A (3) (a) – (d) as well as any other appropriate factors under s. 103A (4). The Authority must not determine a dismissal unjustifiable solely because defects in the process followed were minor and did not result in an employee being treated unfairly – s. 103A (5).

[21] Section 4(1A) (c) of the Employment Relations Act 2000 requires that an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of an employee provide the employee with the relevant information and an opportunity to comment on it. In *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825 Chief Judge Colgan stated at [65] that *a fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.*

Was Mark Wilson unjustifiably dismissed?

[22] It is not for the Authority to substitute its decision for the business decision of the employer – *GN Hale & Sons Limited v Wellington Caretakers IUOW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA). The Authority is though required to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the circumstances at the time. This does require inquiry into the merits of the decision. It is not enough for an employer to simply say that this was a genuine business decision - *Michael Rittson-Thomas trading as Totara Hills Farm v Hamish Davidson* [2013] NZEmpC 39.

[23] The Authority was provided with accounts for BWP for the year ending 31 March 2012. They show a small net loss. Bruce Wilson's income from the company was also reduced.

[24] Bruce Wilson could not satisfactorily answer a question from the Authority why the wages component of operating costs for the year ending 31 March 2012 for BWP was about \$58,000 higher than for the year ending 31 March 2011. It would have been expected that the wage component would have been reduced in circumstances where Mark Wilson had his employment terminated in August 2011 and Bruce Wilson gave evidence two other employees and one apprentice had also left of their own volition by the end of November 2011 and he could not recall taking anyone new on as an employee before 2012. I find that unusual even making some allowance for the possibility of BWP having to pay out accrued annual leave.

[25] The other matter that was unusual was the timing of the redundancy. Mark Wilson was the only employee who was made redundant in August. Other employees who did not remain left when they wanted to. The evidence seems to support that work even if it was of a finishing up nature was still being undertaken on homes.

[26] Bruce Wilson also said in evidence that he did not need employees who could simply paint but required those who could wall paper and gib stop. If that was the genuine reason for Mark Wilson's redundancy I would have expected the letter of 24 August 2011 to have stated that. Instead the letter provided that the house companies are not worth pursuing and there was no more work available. It did not state that Mark Wilson did not have the required skills for any on-going work. That is quite a different matter. I would have expected if that was the reason for making the decision it would have been said in the letter. I could not be satisfied from the evidence that that was one of the reasons for the termination of Mark Wilson's employment.

[27] Another matter that I find unsatisfactorily explained is the subsequent engagement of Mr Poindgestre some two weeks or so after the termination of Mark Wilson's employment. Bruce Wilson said that Mr Poindgestre was initially engaged as a contractor and then became an employee after about four months. Even if this engagement could be explained on the basis of gib stopping skills the evidence is clear that two or three of the other employees who stayed on had those same skills and it would seem inconsistent with reducing costs to then engage another worker.

[28] It was properly conceded in this case that there was no consultation as required under the Employment Relations Act 2000 leading up to Mark Wilson's dismissal. In fact there was no process at all. There was a brief discussion on 23 August 2012

which left Mark Wilson understanding that Bruce Wilson would close the business and then a letter given to Mark Wilson confirming termination for the reason of redundancy with a weeks' notice the next day.

[29] I could not be satisfied from the evidence as set out above that Mark Wilson's redundancy was genuine and not for some other ulterior motive. I have relied in particular on the lack of any consultation preceding the termination; the timing of the redundancy given other employees were simply able to leave when they found other work some months later; the engagement of another person about two weeks after the redundancy; the fact that there was an increase in the wages component of BWP's operating costs seven months after the redundancy and the fact that any need to retain certain skills was not mentioned in the letter of termination as the reason for the redundancy.

[30] BWP received no advice at the time it made the decision to terminate Mark Wilson's employment but none of the factors in s. 103A (3) were satisfied and the procedural defects were not, as Mr Stallard submitted, minor. They did result in Mark Wilson being treated unfairly.

Determination

[31] I find that BWP's decision to terminate Mark Wilson's employment, and how BWP acted was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Mark Wilson's dismissal was unjustified.

[32] Mark Wilson has a personal grievance that he was unjustifiably dismissed and is entitled to remedies.

Remedies

Lost Wages

[33] I am satisfied Mark Wilson attempted to mitigate his loss by approaching house contractors for painting work, checking vacancies on Trade Me, making two on-line applications, applying to a temp agency and completing as part of that an OSH course. I could not be satisfied that the receipt of a letter from Mr Stallard dated 7 September 2011 alleging Mark Wilson had engaged in undermining business

activities and work undertaken by BWP impacted on his job search although Mark Wilson did not accept that there was any validity to the allegations in the letter.

[34] Mark Wilson did obtain some work as a contractor from 2 October 2011. His Inland Revenue statement shows earnings from that company for the period to 31 March 2012 in the sum of \$22,032 gross. Mark Wilson claims a shortfall of \$14,051.25 as lost income that he would have received but for his dismissal.

[35] Mark Wilson is currently working as a subcontractor to another company. He is claiming a loss for the next income year of \$34,822 gross plus interest.

[36] I accept the calculations for anticipated earnings from BWP are correctly assessed as \$63,918.25. In the circumstances of this case I am prepared to exercise my discretion under s. 128 (3) of the Employment Relations Act 2000 and order a sum payable, for lost remuneration beyond three months, for a seven month period until the end of March 2012. I could not be satisfied that Mark Wilson's employment would have inevitably ended prior to that date but I could not be certain it would have continued thereafter so I am not prepared to award the full loss claimed.

[37] The combined earnings for the period from 1 April 2011 to 31 March 2012 from both BWP and his work as a sub-contractor were \$49,867 gross. \$63,918.25 gross less \$49,867 is \$14050.25 gross.

[38] I order Bruce Wilson Painting & Decorating to pay to Mark Wilson the sum of \$14050.25 gross being reimbursement of lost wages. Interest is claimed on the sum of \$14050.25.

[39] The Employment Court in *Salt v Fell* (2006) 3 NZELR 240 held that the words *recovery of money* enabled interest to be awarded on reimbursement of lost wages. I find that interest should be payable on the sum of \$14050.25 from the date the statement of problem was lodged with the Authority on 28 November 2012 until the date of payment under clause 11 of the second schedule to the Employment Relations Act 2000 at the rate prescribed under section 87(3) of the Judicature Act 1908 of 5%. I so order.

Compensation

[40] The evidence of humiliation, loss of dignity and injury to feelings was that it was most keenly felt after Mark Wilson discovered BWP was not ceasing business, that another worker had been taken on and the work performed by the company seemed to be on going. That was after the letter of termination had been provided. Mark Wilson described in his evidence feeling shafted. He said that he had trusted his brother when he gave him the letter of termination that he was not the only one affected and feels very bitter now about the situation having discovered that was not true. He described financial worries about being without employment and then the cost of setting up as a contractor. Mark Wilson did give evidence about Bruce Wilson badmouthing him to others in the industry around Nelson. Bruce Wilson did not accept that. I could not be satisfied to the required standard that the comments were made and/or that they prevented Mark Wilson getting work. I have taken into account that Mark Wilson was able to obtain some work as a contractor although not as an employee as he would have preferred within about two months of his termination. He did not have to leave Nelson.

[41] I accept that Mark Wilson was humiliated and that he felt considerable distress at the situation. I do not find though that the evidence is such it justifies an award of \$25,000. In all the circumstances I am of the view that an appropriate award for compensation is the sum of \$8000.

[42] I order Bruce Wilson Painting & Decorating Limited to pay to Mark Wilson the sum of \$8000 without deduction being compensation under s. 123 (1)(c)(i) of the Employment Relations Act 2000.

Allegations of misconduct discovered after dismissal

[43] Mark Wilson explained an arrangement about petrol and overtime and provided pay records that on their face supported the arrangement. Overall the evidence about any alleged wrongdoing was quite unsatisfactory and did not reach the required level of proof the Authority would expect when such an allegation is raised. Quite properly Mr Stallard did not pursue the matter in final submissions. I do not take this matter into account in terms of remedies.

Contribution

[44] I do not find under s. 124 of the Act that Mark Wilson contributed to the situation that gave rise to the personal grievance. I do not therefore reduce the remedies awarded.

Penalty

[45] I am not satisfied the circumstances in this case call for the imposition of a penalty under s4A of the Act. There is a high threshold to be met before a penalty is imposed. I do not find it met in this case. I am also mindful of the awards already made against BWP.

Costs

[46] I reserve the issue of costs. I would have thought that using the daily tariff agreement could be reached about costs. If that is not possible the Ms Sharma has until 24 June 2013 to lodge and serve submissions as to costs and Mr Stallard has until 8 July to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority