

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 185  
5405718

BETWEEN            BERNARD YEATMAN  
                                 Applicant

AND                    HOSANNA BAPTIST  
                                 COMMUNITY CHURCH  
                                 T/A SHORELINE  
                                 CLEANING SERVICES  
                                 Respondent

Member of Authority:    Christine Hickey

Representatives:        Fiona McMillan, Counsel for the Applicant  
                                 No appearance for the Respondent

Investigation Meeting:    16 July 2013 at Christchurch

Submissions received:    At the investigation meeting from the Applicant

Determination:            6 September 2013

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**DETERMINATION OF THE AUTHORITY**

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**A. Hosanna Baptist Church trading as Shoreline Cleaning Services Limited is to pay Bernard (Bernie) Yeatman:**

- **\$477.36 gross in unpaid holiday pay;**
- **\$479.25 gross for underpaid wages from working on public holidays; and**
- **\$648.00 gross for alternative holidays not taken.**

**B. Hosanna Baptist Church trading as Shoreline Cleaning Services Limited is to pay Bernard (Bernie) Yeatman \$5,000 in compensation for humiliation, loss of dignity and injury to his feelings.**

**C. Hosanna Baptist Church trading as Shoreline Cleaning Services Limited is to pay Bernard (Bernie) Yeatman \$480.00 reimbursement for cleaning products bought on its behalf.**

**Employment relationship problem**

[1] Bernard (Bernie) Yeatman was employed as a cleaner. In May 2009 the respondent purchased the company Mr Yeatman was working for. His employment was transferred from the previous company to the respondent.

[2] Mr Yeatman did not receive a written employment agreement from the respondent. He was paid the minimum wage for 17 hours per week and expected to be paid by direct credit every week. However, from approximately March 2011 Mr Yeatman's pay became irregular. There were some weeks when he was not paid at all and many weeks where his pay was later in the week than expected. For those weeks pay was made up by a cheque once Mr Yeatman followed up on where his pay was.

[3] In August 2012 Mr Yeatman approached Fale Leota, who was the owner and manager of the respondent business. He asked Mr Leota why he was not being paid regularly. Mr Leota said that his business could not pay Mr Yeatman as it was not being paid by the client that Mr Yeatman worked for, Red Bus Limited.

[4] Also in August 2012 Mr Yeatman approached the Chief Executive Officer of Red Bus Limited (Red Bus), Paul McNoe. He was told that Red Bus was promptly paying invoices for cleaning that Shoreline Cleaning Services rendered to it.

[5] Mr Yeatman says that during the last six months of his employment he was not provided with the cleaning chemicals and other tools and equipment that he needed to do to complete his cleaning and had to buy the necessary equipment himself.

[6] On 30 September 2012 Mr Yeatman resigned from his employment with the respondent. He has been directly employed by Red Bus since then.

[7] Mr Yeatman claims that he was constructively dismissed and forced to resign from the respondent because:

- He was not receiving his wages in the manner he was lawfully entitled to and that placed him in the difficult financial position of being unable to pay his board/rent and having to take out loans at high interest for living expenses;
- He was being required to use his own money to pay for his “tools of the trade” because the respondent failed to provide them; and
- He had lost all trust and confidence in the respondent due to Mr Leota misleading him about the payment situation with Red Bus.

[8] Mr Yeatman also says that he was unjustifiably disadvantaged during his employment because:

- He did not receive his full pay on a regular basis so he could not meet his financial commitments such as paying rent;
- He was out of pocket by reason of having to pay for ‘tools of the trade’ to complete his duties for Red Bus; and
- He was misled by the respondent to a level where this breached his trust and confidence in it as his employer.

[9] By way of remedies, Mr Yeatman claims that he is owed outstanding annual leave entitlements and payment for alternative days off due but not taken from having worked a number of public holidays. He also believes he is entitled to an amount of payment for working public holidays to be calculated at time and a half.

[10] Mr Yeatman also claims that he should be reimbursed the amount of \$480 for money spent on tools and equipment in his role as a cleaner for the respondent and \$10,000 compensation for his unjustified dismissal, and \$5,000 compensation for unjustified disadvantage in his employment.

[11] Mr Yeatman asks the Authority to consider whether it should impose a penalty on the respondent for its failure to provide Mr Yeatman with a written employment agreement. However, this claim was not made until the investigation meeting and I decline to deal with it as the respondent had no advance knowledge of the claim.

[12] Mr Yeatman also seeks legal costs.

**Procedural background**

[13] Mr Yeatman's statement of problem was lodged with the Authority on 14 December 2012. It was personally served on Mr Leota on 19 February 2013 after some initial service difficulties. Mr Leota was informed by letter from the Authority, which was personally served on him, that he had 14 days from 19 February 2013 to lodge a statement in reply. On 12 March 2013 the Authority support officer sent Mr Leota a reminder that the statement in reply was overdue and offered him the opportunity to apply for an extension of time to file it.

[14] The Authority support officer made a number of attempts to contact Mr Leota and left messages on his voicemail. On 15 March 2013 he was invited by e-mail to get back to the support officer about when he could attend a case management teleconference. He did not respond to the voice messages or e-mail sent to him.

[15] On 21 March 2013 Mr Leota was posted and e-mailed a notice of a case management teleconference to take place on 11 April 2013 at 3 p.m. The notice advised that a failure to take part in the call could mean it would proceed without him.

[16] On 19 April 2013, the Authority member held a telephone conference with Michael Bendall in Fiona McMillan's absence, counsel for the applicant. Mr Leota was telephoned and answered his phone but declined to take part in the teleconference. At the teleconference a date for the investigation meeting was set for 16 July 2013 at 9.30 a.m.

[17] Also on 19 April 2013 the Authority issued a Notice of Direction directing the applicant to lodge his statements of evidence by 21 June 2013, subsequently enlarged to 1 July 2013. The respondent was directed to lodge its statements of evidence, if it had any by 5 July 2013, subsequently enlarged to 11 July 2013.

[18] The applicant lodged his statement of evidence in line with the directions. No statements of evidence were lodged by the respondent. No documents supporting the respondent's view were provided to the Authority in advance of the investigation meeting.

[19] A Notice of Investigation Meeting was also sent out on 19 April 2013. It notified the parties that the investigation meeting would be on Tuesday, 16 July 2013 at 9.30 a.m. The notes to the Notice read:

*... if the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant. ...*

*You are also advised that any legal costs incurred by the other party may be awarded should you not be successful in bringing or defending the claim.*

[20] I am satisfied that the notice of direction and notice of investigation meeting were served on the respondent.

[21] On 25 April 2013 Mr Leota e-mailed the support officer:

*I just open your letter dated on 21<sup>st</sup> March 2013 on Thursday Night ANZAC DAY. I want to know what's this all about. Could you e-mail me what is this.*

[22] On 26 April 2013 The Authority's support officer sent an email to Mr Leota advising him about the investigation meeting and dates contained in the notice of direction and notice of investigation meeting. Mr Leota's attention was drawn to the notes on the notice of investigation meeting.

[23] The investigation meeting was set to begin at 9.30 a.m. However, there was no representation for the respondent. Therefore I delayed the beginning of the investigation meeting in case Mr Leota was running late. However, when he was not present by 9.43 a.m. the investigation meeting began.

[24] I heard evidence from Mr Yeatman, Terry Foote, the Chief Financial Officer from Red Bus, and Heather Ngarae, Mr Yeatman's landlady. I also received some payslips from Mr Yeatman.

### **Issues**

[25] The issues the Authority needs to determine are:

- (i) Was Mr Yeatman constructively dismissed?
- (ii) Was Mr Yeatman unjustifiably disadvantaged in his employment?
- (iii) Is Mr Yeatman entitled to holiday pay and if so, how much?
- (iv) Is Mr Yeatman entitled to pay for alternative days off for working on public holidays and if so, how much?

- (v) Was Mr Yeatman paid time and a half for work done on public holidays?
- (vi) Is Mr Yeatman entitled to be reimbursed for buying chemicals and other cleaning products to do his job?
- (vii) Is Mr Yeatman entitled to compensation for humiliation, loss of dignity and injury to his feelings and if so, how much?

### **Determination**

[26] Under s.174 of the Employment Relations Act 2000 I do not need to set out a record of all the evidence or the findings on credibility of any evidence. Having said that, it is clear that because the respondent was not represented and presented no witness evidence at the investigation meeting my findings of fact are based on Mr Yeatman's evidence and that of his two witnesses. All three witnesses gave sworn or affirmed evidence and I was able to test their evidence by questioning them.

*Was Mr Yeatman constructively dismissed and unjustifiably disadvantaged?*

[27] In examining whether a constructive dismissal has occurred in these circumstances two questions arise:

- First, has there been a breach of duty on the part of the employer which has caused the resignation?
- Secondly, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation?

[28] Even if there has been a breach of an employer's duty in *NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holdings Limited*<sup>1</sup> the Labour Court said:

*...there is an obligation on the part of the innocent party to communicate acceptance of the guilty party's repudiation. A failure to do so may mean that the contract has not been rescinded as a result of the guilty party's breach*<sup>2</sup>.

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<sup>1</sup> [1991] 2 ERNZ 267

<sup>2</sup> Ibid, at 278

[29] In that case the Court found that the employee had continued to work without protest and left because he was unhappy with his employer's behaviour in a number of areas and because he had found another job. Therefore, it held that he had not been constructively dismissed<sup>3</sup>.

[30] However, in this case Mr Yeatman consistently raised his concerns about not being paid in full and on time with Mr Leota. Mr Yeatman did not accept his employer's repudiations of his contract.

[31] In examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of duty on the part of the employer which has caused the resignation? The respondent breached its duty to pay Mr Yeatman on time a number of times. Once he found out that Red Bus had been paying his employer every time it was invoiced Mr Yeatman says that he realised that he could not keep working for the respondent.

[32] Secondly, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation; that is, would there be a substantial risk of resignation?

[33] In *Wellington Clerical Workers IUOW v Greenwich*<sup>4</sup> the Employment Court observed that for this type of constructive dismissal:

*It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship*<sup>5</sup>.

[34] Ms McMillan submits that the fact that Mr Leota lied to Mr Yeatman when he said that Red Bus had not been paying him so he could not pay Mr Yeatman meant Mr Yeatman lost all trust and confidence in his employer to treat him fairly and to start paying him on time again.

[35] I find that Mr Leota's lie to Mr Yeatman about Red Bus's payments was an action which crossed the line between inconsiderate conduct and dismissive or

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<sup>3</sup> Ibid at 279.

<sup>4</sup> [1983] ACJ 965

<sup>5</sup> Ibid at 975

repudiatory conduct. Mr Leota should have been able to foresee that when Mr Yeatman discovered the truth about the Red Bus payments there was a substantial risk that he would resign. Therefore, Mr Yeatman has a personal grievance that he was unjustifiably constructively dismissed.

*Was Mr Yeatman unjustifiably disadvantaged?*

[36] To be successful in a claim for unjustified disadvantage the employee must show:

*that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer<sup>6</sup>*

[37] There are two limbs to the test for unjustifiable disadvantage. First, any disadvantage suffered must be to the employee's employment or 1 or more conditions of the employee's employment. Secondly, any action that was of disadvantage to the employee's condition/s of employment must have been unjustifiable.

[38] Mr Yeatman was economically disadvantaged by numerous failures to pay his salary on time. He was reliant on his weekly pay and not being paid on time caused him financial difficulties, such as being unable to pay his board to Ms Ngarae every week. I do not consider that the disadvantage affected his *employment*. However, it did affect *1 or more of his conditions of employment*. The failures of the respondent to pay him were disadvantageous to Mr Yeatman.

[39] In assessing whether any disadvantage to Mr Yeatman was unjustified I need to consider the test in s.103A of the Employment Relations Act 2000. Were the respondent's repeated failures to pay Mr Yeatman on time the actions that a fair and reasonable employer could have taken in all the circumstances at the time of each non-payment?

[40] Non-payment of wages on time can never be justified. Therefore, the respondent's actions were unjustified. Mr Yeatman does have a personal grievance for unjustified disadvantage.

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<sup>6</sup> Section 103(1)(b) Employment Relations Act 2000

*How much holiday pay is Mr Yeatman entitled to be paid?*

[41] Mr Yeatman's evidence was that he only ever took three weeks annual leave per year and therefore expected to be paid for the equivalent of one weeks leave per year in his final pay. However, he was not paid any holiday pay in his last pay.

[42] Mr Yeatman worked 6 days a week and was paid \$13.50 per hour. He worked three hours a day Monday to Friday and two hours on a Saturday.

[43] Mr Yeatman was entitled to 15 days paid annual leave before 1 April 2011. On 1 April 2011, under s.15 of the Holidays Act the minimum entitlement to annual leave became 20 days per year.

[44] Mr Yeatman's gross pay for one week was \$229.50. For a whole year he was due eight per cent of his annual pay as paid annual leave. Eight per cent of his annual wages is \$954.72. He must be paid a quarter of this amount - \$238.68 - being for a week of annual leave not taken between 1 April 2011 and 31 March 2012.

[45] For the period 1 April 2012 to 30 September 2012 (26 weeks) Mr Yeatman would have earned \$5,967. Eight per cent of that is \$477.36 or the equivalent of 10 days annual leave, given that he was only employed for 6 months out of the year. In the absence of any evidence from the respondent I accept Mr Yeatman's evidence that he was also owed payment for one week of annual leave for the last part year of his employment – being \$238.68.

*Should Mr Yeatman be paid for alternative days off he did not take after working on public holidays?*

[46] Mr Yeatman's evidence is that he worked every public holiday except Christmas Day and Easter Sunday from the time he was employed by the respondent in May 2009 until his last day on 30 September 2012. Mr Yeatman's usual days of work were Monday through to Saturday. He did not work on Sundays.

[47] Section 56 of the Holidays Act 2003 (Holidays Act) provides that if an employee works on a public holiday he is entitled to another day's holiday, known as an alternative holiday.

[48] Mr Yeatman worked the following public holiday<sup>7</sup>:

- Queen's Birthday, Labour Day, Show Day and Boxing Day (which was a Saturday) in 2009;
- New Year's Day, Good Friday, Easter Monday, Queens Birthday, Labour Day and Show Day in 2010;
- New Year's Day, Good Friday, Easter Monday/Anzac Day<sup>8</sup>, Queen's Birthday, Labour Day, Show Day and Boxing Day in 2011; and
- New Year's Day holiday (2/1/12) and the day after New Year's Day (3/1/12), Waitangi Day, Good Friday, Easter Monday, Anzac Day and Queens Birthday in 2012.

[49] Mr Yeatman is entitled to be paid:

- \$148.50 for 2009,
- \$162 for 2010,
- \$189 for 2011, and
- \$148.50 for 2012 = \$648 as an alternative to an alternative holidays having worked on 24 public holidays and only taken one alternative holiday.

*Was Mr Yeatman paid correctly for the public holidays on which he worked?*

[50] Mr Yeatman says that he was only ever paid his hourly rate for the public holidays on which he worked. Section 50 of the Holidays Act provides that an employee who works on a public holiday must be paid at least time and a half for those hours worked.

[51] Mr Yeatman worked a total of 71 hours on public holidays from 2009 to 2012 inclusive. He was paid \$13.50 per hour instead of \$20.25 per hour. Mr Yeatman is entitled to be paid a further \$6.75 per hour x 71 hours = \$479.25.

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<sup>7</sup> The number of days varied each year because some public holidays, such as Waitangi Day and Anzac Day, fell on Sundays which were not work days for Mr Yeatman.

<sup>8</sup> Which were the same day that year.

*Is Mr Yeatman entitled to be reimbursed for cleaning products he bought to use in his employment?*

[52] Mr Yeatman says that his employer supplied and delivered all cleaning products to Red Bus premises but that Mr Leota did not provide them regularly enough and so he sometimes ran out. However, despite Mr Yeatman asking Mr Leota a number of times to deliver more of the necessary goods more often and more consistently, it did not happen. For approximately his last 24 weeks of his employment Mr Yeatman himself paid approximately \$20 per week for equipment and products that he needed because without the products he could not do his job.

[53] If Mr Yeatman had not purchased the necessary products himself he would not have been able to carry out his work. That would have been detrimental to him and to Mr Leota's business. Mr Yeatman estimates that he spent somewhat over \$480.00

[54] I consider it fair that Mr Leota reimburse Mr Yeatman \$480 for necessary products bought so that he could satisfactorily do the job he was engaged by Mr Leota to do.

### **Remedies**

[55] Because I have found that Mr Yeatman was unjustifiably dismissed he is entitled to remedies. He has not claimed lost remuneration because he was immediately employed directly by Red Bus Limited.

[56] However, Mr Yeatman has claimed \$10,000 in compensation for unjustified dismissal and \$5,000 in compensation for unjustified disadvantage.

[57] Although I have found that Mr Yeatman was unjustifiably disadvantaged and unjustifiably dismissed it is not reasonable to award two different amounts of compensation given that the constructive dismissal arose out of the same situation as the unjustified disadvantage.

[58] Mr Yeatman is a humble man and was somewhat embarrassed to be asked to talk about the negative affects the situation had on him. However, he says when he was not paid he would not be able to pay his rent so he put off going home as long as possible because he was not sure how he was going to tell Ms Ngarae he couldn't pay

her. He felt that he *shouldn't be there if I couldn't pay*. He says he was *worried and embarrassed* people would think *I'd spent my pay*.

[59] Ms Ngarae says that she could tell it was humiliating for Mr Yeatman when he had to tell her he had no money for his rent that week. She also said that Mr Yeatman would go days without food because he did not have any money.

[60] He also says he *felt awful when I had to ring up about my pay and got quite annoyed*. He was also very embarrassed to have to go and ask Red Bus's CEO to pay the respondent so he could get paid. A number of staff at Red Bus got to know that Mr Yeatman was not being paid as the CEO ordered the accounts team to investigate what was happening with payments to the respondent from Red Bus.

[61] I consider that the respondent should pay Mr Yeatman \$5,000 as compensation for humiliation, loss of dignity and injury to his feelings.

[62] Mr Yeatman in no way contributed towards the situation that gave rise to his personal grievances.

### **Costs**

[63] Costs are reserved. The successful party, Mr Yeatman, is entitled to be paid a contribution towards his legal costs. Mr Yeatman was represented by his lawyer. The parties are encouraged to agree on costs. The Authority usually awards costs on the basis of \$3,500 for a full day of hearing. In this case the investigation meeting took less than half a day.

[64] If Ms McMillan needs to apply for costs she may do so within 28 days of this determination. The respondent may have a further 14 days in which to respond.

Christine Hickey

Member of the Employment Relations Authority