

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 536
3048733

BETWEEN JEROME HOLWOOD
 Applicant

AND SCORPION EUROPARTS LIMITED
 (in Liquidation)
 First Respondent

AND

 ADAM BAXTER
 Second Respondent

Member of Authority: Andrew Dallas

Representatives: Chrissy Gordon, advocate for the Applicant
 No appearance for the Respondent

Investigation Meeting 16 May 2019 with further information received up to
 and including 15 June 2019

Date of the Determination 16 September 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jerome Holwood said Adam Baxter dismissed him without any objectively verifiable process and/or justification. As remedies for his personal grievances, Mr Holwood sought an award of lost wages and compensation for hurt, humiliation and injury to feelings. Mr Holwood also said he was not provided with an employment agreement and sought that a penalty under the Employment Relations Act 2000 (the Act) be imposed on Mr Baxter for this.

The Authority's investigation

[2] Mr Baxter only engaged on a very limited basis with the Authority's processes. During a case management conference convened with the parties, Mr Baxter denied Mr Holwood's claims. However, he failed to attend the investigation meeting, the date for which he agreed upon, to have his position in respect of the claims fully examined. In Mr Baxter's absence the investigation meeting proceeded under cl 12 of sch 2 of the Employment Relations Act (the Act) as, in effect, a formal proof hearing of Mr Holwood's claims.

[3] Having regard to s 174E of the Act, while I have not referred to all the evidence received from Mr Holwood or the submissions advanced on his behalf in this determination, I have fully considered all material placed before the Authority.

Issues

[4] The issues that arose for determination were:

- (i) Was Mr Holwood employed by Mr Baxter or Scorpion Europarts Limited (in Liquidation)?;
- (ii) Was Mr Holwood's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?;
- (iii) If Mr Baxter's actions were not justified, what remedies should be awarded to Mr Holwood, considering:
 - a) Lost wages; and
 - b) Compensation for hurt, humiliation and injury to feelings; and
- (iv) Should a penalty be imposed on Mr Baxter for failure to provide an employment agreement to Ms Holwood? If so, in what amount and should be this be wholly or partially paid to Mr Holwood?; and
- (v) Should either party contribute to the costs of the representation of the other party?

Mr Baxter was Mr Holwood's employer

[5] To cover all this legal bases, Mr Holwood also named Scorpion Europarts Limited (in Liquidation), a company controlled by Mr Baxter, as a respondent to his proceedings. The naming of Scorpion as a respondent was because Mr Baxter used a bank account operated by Scorpion to pay him and remit Mr Holwood's PAYE tax to the Department of Inland Revenue in July 2018. However, I find this was most likely a vehicle of convenience for Mr Baxter because the evidence, supported by submissions as to the correct legal position, put before the Authority clearly points, on the balance of probabilities, to Mr Holwood being directly employed, in fact and law, by Mr Baxter.

What caused Mr Holwood's employment relationship problem with Mr Baxter?

[6] In May 2018, Mr Baxter approached Mr Holwood with an offer of employment. In essence the job was to assist Mr Baxter across his various business ventures including dealing with security and theft issues. Mr Holwood knew Mr Baxter as the two had previously transacted over the sale and purchase of two dogs.

[7] Mr Holwood did not immediately accept the offer of employment as he already had job, was considering another opportunity and was due to embark on a two week holiday.

[8] After further discussions, however, Mr Holwood decided the job was a good opportunity for him. The pair agreed Mr Holwood would be paid \$25 per hour, would have the use of a company vehicle and would start the job two days before Mr Holwood's scheduled holiday was due to start. No employment agreement was forthcoming and Mr Holwood understood Mr Baxter directly employed him. Nothing Mr Baxter did or said during the relatively short employment altered his understanding that this was the situation.

[9] Mr Holwood worked for Mr Baxter on 28 and 29 May 2018. He then went off on his holiday; returning on 18 June 2018 and worked for Mr Baxter for a further five days.

[10] On 25 June 2018, Mr Holwood text Mr Baxter to advise him he could not attend work that day, as he was too unwell. Mr Baxter responded to that text as follows:

Ok Mate. I am going to take over your position mate sorry it's not worked out the place is on its last legs and I need to get involved full time now I will sort your pay out on Wednesday

[11] Mr Holwood said he was in no doubt Mr Baxter gave him notice in that text message. Indeed, his final pay and holiday pay were deposited into this bank account later that week.

[12] Mr Holwood's representative raised a personal grievance with Mr Baxter for unjustified dismissal on 9 August 2018. While the letter clearly indicated that Mr Holwood believed Mr Baxter was his employer, as I have now found, it also raised a personal grievance against Scorpion to protect any legal position Mr Holwood had with that entity.

The Authority's view of Mr Holwood's employment relationship problems

Mr Holwood's dismissal

[13] The primary issue before the Authority is whether Mr Holwood's dismissal was justified. The test of justification under s 103A of the Act is to be applied on an objective basis by considering whether Mr Baxter's actions were what a fair and reasonable employer could have done in all the circumstances.

[14] I agree with Mr Holwood that there is no evidence of any process being undertaken by Mr Baxter before effecting his dismissal, let alone one that would satisfy the requirements of s 103A of the Act. I further agree with Mr Holwood that he:

- (i) was not put on notice by Mr Baxter that his job was in jeopardy;
- (ii) was not provided with any allegations (assuming such existed and there is no evidence to suggest they did) warranting his dismissal;
- (iii) was not provided with any tangible information about Mr Baxter's business ventures being on their "last legs" (other than, perhaps, a perfunctory and grammatically bereft text message); the affect that such "last legs", whatever this actually means, might have on the future of his employment; and

(iv) was not given an opportunity to answer or comment on any of the forgoing.

[15] Ultimately, I find, as a result, Mr Holwood was summarily and unjustifiably dismissed by Mr Baxter on 25 June 2018.

Remedies

[16] As Mr Holwood has been found to have a personal grievance for unjustified dismissal, he is entitled to an assessment of remedies.

Lost wages

[17] While Mr Holwood was able to find alternative employment reasonably expeditiously after his dismissal, he said he lost wages as a direct result and sought an award of \$5,000 to compensate him for his loss. It is clear then, that Mr Holwood not only made a reasonable attempt to mitigate the loss of his employment but also succeeded in doing so.

[18] So then, subject to any contribution, Mr Baxter must pay Mr Holwood \$5,000 as reimbursement for lost wages.

Compensation for hurt, humiliation and injury to feelings

[19] Mr Holwood sought compensation for hurt, humiliation and injury to feelings arising out of the termination of his employment by Mr Baxter. He did not specify a compensatory figure in his statement of problem.

[20] Mr Holwood receiving a text message from Mr Baxter dismissing him in circumstances where he had notified Mr Baxter, also by text, of his ill health, was a complete bombshell. Mr Holwood said he felt misled by Mr Baxter and had turned down other opportunities to go and work for him. He said he worried about how he would cope financially. Mr Holwood said he felt humiliated having “to go crawling back to a previous employer and beg for work”, which fortunately he was ultimately able to obtain.

[21] I accept Mr Holwood felt degraded, demeaned and diminished as a result of his unjustified dismissal by Mr Baxter and the circumstances within which that occurred. Taking these matters into account, it is appropriate for Mr Baxter to pay Mr Holwood \$15,000 under s 123(1)(c)(i) of the Act. As with other similar matters, this award is made mindful of the upward trend in non-economic compensatory awards being made by the Authority and is in line with the general guidance provided by the Court.

Contributory conduct by Mr Holwood?

[22] Having found that Mr Holwood was entitled to a remedy for a personal grievance for unjustified dismissal, I was required by s 124 of the Act to consider whether he contributed to the situation giving rise to his grievance.

[23] There was no evidence before the Authority of any conduct by Mr Holwood that contributed to his dismissal by Mr Baxter. Indeed, I find Mr Holwood could not have, on the evidence, known or reasonably believed he might be dismissed. Consequently, no deduction for contribution is made.

Penalty for failure to provide an employment agreement

[24] Mr Holwood sought a penalty under the Act for failure by Mr Baxter to provide him with an employment agreement. The maximum penalty that can be imposed on Mr Baxter is \$10,000.

[25] The Court in *Nicholson v Ford*¹ set out useful guidance about the relevant factors to be taken into account when considering the imposition of penalties. Taking these factors into account after considering the Mr Holwood's submissions, I find that \$2000 is an appropriate penalty to impose in all the circumstances of the case. As Mr Baxter, through his non-attendance at the investigation meeting, was not in a position oppose the payment of this penalty to Mr Holwood, and having regard to all the other relevant circumstances of the case, I have decided to exercise my discretion under s 136(2) of the Act to award the whole of the penalty to him.

¹ [2018] NZEmpC 132

Summary of orders

[26] Mr Baxter must pay Mr Holwood the following amounts within 28 days of the date of this determination:

- (i) As a remedy for his personal grievance, \$5,000 gross as reimbursement for lost wages under s 128(2) of the Act;
- (ii) As a further remedy for his grievance, \$15,000 as compensation for hurt, humiliation and injury to feelings under s 123(1)(c)(i) of the Act; and
- (iii) \$2,000 as a penalty for failure to provide an employment agreement.

Costs

[27] Having considered Mr Holwood's claim for costs against Mr Baxter, I am satisfied, although the investigation meeting was less than one notional day (six hours), Mr Baxter's failure to properly engage with the Authority's processes, including providing a statement in reply, his failure to attend the investigation meeting and his failure to accept a reasonable "Calderbank offer" made by Mr Holwood warrant the awarding of the daily tariff in all the circumstances.

[28] Mr Baxter must pay Mr Holwood \$4,500 as a contribution to the costs of representation within 28 days of the date of this determination. I am further satisfied that Mr Holwood should be reimbursed the Authority's filing fee of \$71.56. Mr Baxter must also pay this to Mr Holwood within 28 days of the date of this determination.

Certificate of Determination

[29] The Authority officer is directed to prepare a Certificate of Determination setting out the orders made in paragraphs [26] and [28] of this determination and to provide that to Mr Holwood.

Andrew Dallas
Member of the Employment Relations Authority