

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 556
3061296

BETWEEN	CORY GATES Applicant
AND	DC CLADDING AND RE-CLAD SOLUTIONS LIMITED First Respondent
AND	DEAN COOK Second Respondent

Member of Authority: Rachel Larmer

Representatives: Paul Mathews, Advocate for the Applicant
Respondent in Person

Investigation Meeting: On the papers

Submissions and further Information Received: 20 August 2019 from the Applicant
5 September 2019 from Respondent
5 September 2019 from Applicant

Date of Determination: 1 October 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Cory Gates succeeded in his claims against DC Cladding and Re-Clad Solutions Limited (DC Cladding).¹ This determination assesses Mr Gates' remedies and penalties.

¹ [2019] NZERA 453.

[2] Although DC Cladding filed information on 5 September (outside of the timetable for doing so), the information provided was not relevant to remedies or penalties, because it sought to revisit the Authority's substantive determination.

Issues

[3] The following issues are to be determined:

- (a) What wage arrears is Mr Gates owed?
- (b) What remedies should Mr Gates be awarded for his successful personal grievance claims?
- (c) What penalty should be imposed on DC Cladding for its failure to provide Mr Gates with a written employment agreement, in breach of s 65 of the Employment Relations Act 2000 (the Act);
- (d) What penalty should be imposed on DC Cladding for breaching its s 4A of the Act good faith obligations?
- (e) What costs should Mr Gates be awarded?

What wages arrears is Mr Gates owed?

[4] Mr Gates is owed total wage arrears of \$2,869.60

[5] This consists of \$2,037.60 wage arrears for hours Mr Gates worked but was not paid plus \$832.00 for driving activities he undertook outside of his normal hours of work at Mr Dean Cook's express request.

[6] This driving work was in addition to the work that Mr Gates had been employed by DC Cladding to do during his usual work hours, so Mr Cook had confirmed that Mr Gates would be paid for this extra work.

[7] The \$2,037.60 that Mr Gates is owed for the hours that he worked but was not paid consists of \$519.20 that he was due to have been paid on 21 December 2018, but which was never paid, \$634.40 that he was due to have been paid on 28 December 2018 and \$884.00 he was due to have been paid on 2 January 2019.

[8] The \$832.00 claimed by Mr Gates for the driving that he did for Mr Cook covers all of the driving work that he did while employed by DC Cladding, but was not paid for.

[9] In addition to these wage arrears, DC Cladding also failed to pay Mr Gates any holiday pay entitlements. Because Mr Gates had worked for less than 12 months he was entitled to 8% of his total gross earnings, under s 23 of the Holidays Act 2003 (HAO3).

[10] Mr Gates did not take any paid annual holiday while employed.

[11] Mr Gates said he had been paid \$2,290.10 net by DC Cladding, which Mr Gates said amounted to \$2,862.62 gross.

[12] The wage arrears of \$2,869.60 Mr Gates has been awarded, in paragraph [4] above, must be added to the amount he has already been paid to calculate Mr Gates' total gross earnings that he is entitled to annual holiday pay on.

[13] Mr Gates is therefore owed unpaid holiday pay of \$458.57, being 8% of \$5,732.22 (\$2,862.62 he was paid plus \$2,869.60 wage arrears he has been awarded).

What remedies should Mr Gates be awarded for his successful personal grievance claims?

[14] Mr Gates' successful unjustified disadvantage and unjustified dismissal grievances succeeded, so he is entitled to remedies for these.

Distress compensation

[15] Because Mr Gates did not separately identify the distress he suffered as a result of each separate successful personal grievance, distress compensation for his successful grievances has been dealt with on a globalised basis.

[16] Mr Gates and his domestic partner provided evidence of the adverse effects that his unjustified dismissal had caused him.

[17] Mr Gates' partner explained the changes in his personality and temperament that she had observed had occurred after his unjustified dismissal. Mr Gates also provided evidence about the adverse effect that his unjustified disadvantage and dismissal grievances had had on him.

[18] The Authority accepts Mr Gates' evidence that his unjustified dismissal had a huge adverse impact on him to the extent that he lost all interest in continuing to do cladding work which he had previously been passionate about.

[19] Mr Gates' personal relationships have been adversely affected, as has his mood and temperament. He suffered humiliation as a result of the financial difficulties his unjustified dismissal has caused him and the failure to pay him his wages when they became due and owing.

[20] Mr Gates' wage arrears were withheld from him over the Christmas and New Year period, which is an expensive period for most families. Because Mr Gates' family did not have any income from him, due to his employer's breaches, Mr Gates' family had to miss out on family outings and events due to lack of funds.

[21] Mr Gates also gave evidence about his loss of confidence and loss of trust that DC Cladding's actions caused him.

[22] Although Mr Gates sought \$28,000.00 distress compensation the evidence did not support an award at that level. An award of \$18,000.00 under section 123(1)(c)(i) of the Act is appropriate to compensate Mr Gates for the humiliation, loss of dignity, and injury to feelings he has suffered as a result of his successful personal grievance claims.

Mitigation

[23] The Authority is satisfied that Mr Gates has appropriately mitigated his loss.

Lost remuneration

[24] Mr Gates sought \$14,196 as three months' lost remuneration for the period from 7 January 2019, based on \$26 per hour, for 42 hours a week.

[25] Mr Gates earned \$407.16 gross wages for the one day he worked for a company, Pro Clad.

[26] Mr Gates then obtained work as an independent contractor for a company called Double R Construction doing refrigerator panels for factories. He worked for Double R Construction from 7 February 2019 until 7 April 2019. This was a new line of work for Mr

Gates, but it was only temporary work while that company needed some short term help to finish its outstanding jobs.

[27] He earned \$6,534.66 (being \$407.16 gross from Pro Clad plus \$6,127.50 from Double R Construction) in the three months following his unjustified dismissal so that amount is to be deducted from his award of lost remuneration.

[28] DC Cladding is ordered to pay Mr Gates \$7,661.34 (being \$14,196 three months lost remuneration less \$6,534.66 he earned over that same period), under section 128(2) of the Act.

Contribution

[29] Having determined that Mr Gates has successful personal grievance claims, s 124 of the Act requires the Authority to consider the extent to which Mr Gates contributed to the situation that gave rise to his personal grievances. Contribution is blameworthy conduct that is proven on the balance of probabilities.

[30] There was no evidence of any blameworthy conduct by Mr Gates. The personal grievances arose entirely because DC Cladding had breached its employment obligations to Mr Gates, and not as a result of any blameworthy actions by Mr Gates.

[31] Mr Gates' remedies are not to be reduced under s 124 of the Act.

What penalties should be imposed on DC Cladding?

[32] Section 133A of the Act sets out the factors that the Authority must consider when assessing penalties.

[33] The full Employment Court decision in *Borsboom v Preet PVT Limited* set out a four step process that is to be applied by the Authority when it is assessing penalties. This consists of:²

- (a) Step one – identify the nature and number of breaches, the maximum penalties available for each breach and whether globalisation was appropriate;
- (b) Step two - assesses the severity of the breach to establish a provisional starting point;

² [2016] NZEmpC 143.

- (c) Step three - consider ability to pay; and
- (d) Step four - apply the proportionality or totality test to the proposed final penalty to ensure it's just in all the circumstances.

What penalty is to be imposed for DC Cladding's failure to provide Mr Gates with a written employment agreement

[34] Section 3 of the Act states that one of the objects of it is to promote the effective enforcement of employment standards and to acknowledge and address the inherent inequality of power in employment relationships. The failure to provide a written employment agreement is contrary to these objects.

[35] The failure to provide a written employment agreement involves one breach of section 65 of the Act. That breach attracts a maximum potential penalty of \$20,000.00 for a company, such as DC Cladding.

[36] DC Cladding failed to fulfil its legal obligations under s 65 of the Act. This breach creating possible confusion over Mr Gates' status, so required the Authority to determine 'the real nature of the relationship' between the parties involved in these proceedings.

[37] That requirement put Mr Gates to additional time and cost, uncertainty and it also delayed the resolution of his substantive claims, because the jurisdiction issue had to be dealt with.

[38] There was no evidence that DC Cladding took any steps to mitigate the effects of its breach, or to avoid such breaches occurring in future, for example by ensuring that all of its other employees had written employment agreements. Nor was there evidence of any remorse or contrition by DC Cladding for its breach.

[39] DC Cladding has not appeared in the Authority previously for a breach of this nature, so it will be treated as a 'first offender' for the purposes of assessing this penalty.

[40] Deterrence is a relevant factor when assessing the level of penalties that are required to bring home to DC Cladding that it is required to provide all employees with a written employment agreement and to deter other employers in the community who may be breaching or intend to breach the obligations in this regard.

[41] There is no evidence relating to DC Cladding's ability to pay a penalty, so that it is treated as a neutral factor.

[42] A penalty of \$2,000.00 is appropriate. DC Cladding is ordered to pay a penalty of \$2,000.00 to the Crown bank account of which \$1,000.00 is to be paid to Mr Gates to recognise the harm that DC Cladding's breach has caused him personally.

What penalty should be imposed on DC Cladding for its breaches of its good faith obligations?

[43] Section 4A of the Act sets out the requirements for a penalty for a breach of good faith. That penalty pre-requisites in s 4A of the Act are met.

[44] DC Cladding deliberately misled and deceived Mr Gates by advising him it was in liquidation in order to discourage him from pursuing his wage arrears claim. That is serious behaviour that must have been intended to undermine the employment relationship, by depriving Mr Gates of wages that he had already earned.

[45] The breaches of good faith that occurred will be treated as one breach of good faith, for the purposes of assessing penalties. Breaches of good faith are contrary to the object of the Act that is stated to promote good faith in all aspects of the employment environment and the employment relationship.

[46] The breach of good faith also undermined the object of promoting the effective enforcement of employment standards and of acknowledging and addressing the inherent inequality of power in employment relationships.

[47] One breach of good faith attracts a maximum potential penalty of \$20,000.00, for a company, such as DC Cladding.

[48] The breach was intentional because Mr Dean Cook, on behalf of DC Cladding, gave Mr Gates false and deceptive information, in order to deter Mr Gates from exerting his statutory employment rights, namely to be paid for the work he had done.

[49] This was a serious breach of good faith and it resulted in Mr Gates holding off taking enforcement proceedings regarding his wage arrears. The detriment that this caused Mr Gates' family was set out by Mr Gates' partner in her affidavit to the Authority dated 19 August 2019.

[50] DC Cladding has not taken any steps to mitigate the breach of good faith that occurred. It is a first defender in terms of assessing penalties by the Authority under the Act.

[51] Deterrence is necessary, so that DC Cladding does not deceive and mislead its other employees going forward, and to deter other employers who may be tempted to mislead and deceive employees about the payment of their wages, with the intention of depriving those employees of the wages that they have earned but not been paid.

[52] DC Cladding is ordered to pay a penalty of \$3,000 to the Crown bank account for its breaches of good faith. Half of this penalty is to be paid to Mr Gates to recognise the harm the breaches of good faith caused him.

What costs should Mr Gates be awarded?

[53] Mr Gates as the successful party is entitled to recover some of the legal costs he has actually incurred. Mr Gates is entitled to be reimbursed \$71.56 for his filing fee, because he actually incurred that amount when filing this claim.

[54] Mr Gates was represented by his advocate on a 'no win no fee' basis. Although he is not paid any actual costs to date, Mr Gates expected to do so once his remedies have been determined.

[55] Mr Gates has seven days from the date of this determination within which to file proof of the legal costs he has actually incurred. DC Cladding has seven days from receipt of that information to file any response it may wish to make to the costs application Mr Gates has made.

Orders

[56] The Authority makes the following orders:

- (a) Within 28 days of the date of this determination, D C Cladding is to pay Mr Gates;
 - (i) \$2,869.60 wage arrears;
 - (ii) \$458.57 holiday pay;
 - (iii) \$18,000 distress compensation;
 - (iv) \$7,661.34 lost remuneration; and

- (v) \$71.56 to reimburse his filing fee.
- (b) Within 28 days of the date of this determination, D C Cladding is to pay to the Crown bank account;
 - (i) \$2,000.00 as a penalty for failing to provide a written employment agreement; and
 - (ii) \$3,000.00 as a penalty for breaching its good faith obligations under the Act.
- (c) The Authority further orders the Crown to pay, from the penalties it recovers, to Mr Gates:
 - (i) \$1,000.00 of the penalty recovered for the breach associated with the failure to provide Mr Gates with a written employment agreement; and
 - (ii) \$1,500.00 of the penalty recovered for DC Cladding's breach of good faith under the Act.
- (d) Costs will be assessed after Mr Gates provides proof of the actual costs he has actually incurred, as opposed to estimates of costs he is likely to incur.

Rachel Larmer
Member of the Employment Relations Authority