

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2019] NZERA 611
3053892

BETWEEN PETER JAMES ADAMS
 Applicant

AND HEAVY TRANSPORT
 SERVICES CANTERBURY
 LIMITED
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Rachel Walsh, counsel for the Applicant
 No Appearance by the Respondent

Investigation Meeting: 16 October 2019

Submissions [and further Orally on 16 October 2019
Information] Received: Memorandum received 18 October 2019

Date of Determination: 25 October 2019

DETERMINATION OF THE AUTHORITY

[1] Mr Adams was unjustifiably dismissed.

[2] Heavy Transport Services Canterbury Limited is ordered to pay to Mr Adams the following within 14 days of the date of this determination:

- (a) Arrears of wages of \$46,550.00;
- (b) Holiday pay of \$7200.00;
- (c) The employer’s contribution towards Kiwi Saver of 3% totalling \$1,984.50;
- (d) The sum of \$23,000.00 under section 123(1)(c)(i) of the Employment Relations Act 2000; and
- (e) A contribution towards the applicant’s costs of \$6,000.00.

Employment Relationship Problem

[3] Heavy Transport Services Canterbury, despite having been served with a statement of problem, filing a statement in reply and receiving the notice of hearing did not attend the investigation meeting. An unsuccessful attempt to contact the Respondent was made at the commencement of the investigation. I considered whether to proceed in light of the non-attendance but was satisfied the Respondent was aware of the investigation and the consequences of non-attendance.

[4] Mr Adams commenced his employment with the respondent on 1 February 2018, although he says the employment agreement was not signed until sometime in June 2018. Nothing seems to turn on this.

[5] Mr Adams' terms and conditions of employment provided that he was to be paid at a rate of \$35 per hour for a 45 hour week. During the period of employment, which terminated on 22 November 2018, he received sporadic and inconsistent payment of wages. As evidence of this, Mr Adams produced bank account records.

[6] Mr Adams was concerned regarding the inconsistency and non-payment of wages and eventually approached the director of the company Mr Radley, to make his concerns clear. He says that Mr Radley responded by advising he would dismiss two other employees to help with outstanding bills, wages and to reduce overheads. Mr Radley apparently stated that the place wasn't paying its way and he was sick of putting money into a sinking ship.

[7] In November 2018 Mr Adams was contacted by the Inland Revenue Department and advised that no payments had been received from the respondent as his employer, in respect of Mr Adams' Kiwi Saver, child support, ACC levies and PAYE deductions. It transpired on 25 June 2018 Inland Revenue had written to Radley Haulage Limited, a company of which Mr Radley was also a director, forwarding a child support deduction notice applying to Mr Adams. Indeed, although at all times Mr Adams understood himself to be an employee of the respondent, it wasn't until May 2019 that the name of the respondent appeared in Mr Adams bank statements as the entity paying him his wages.

[8] Following the advice from the Inland Revenue Department, Mr Adams approached Mr Radley who advised him there had been a break down with the Inland Revenue site and

that everything was sorted. However, when he checked, Mr Adams found that the non-payments had continued.

[9] In mid-November 2018, Mr Adams approached Mr Radley telling him that he felt he had no other option but to look for alternative employment as there were significant arrears of wages accruing as a result of the sporadic payment and underpayment of wages. By Thursday, 22 November 2018, in the absence of any steps having been taken to correct the issue by the respondent, Mr Adams told Mr Radley he could not survive being paid irregularly, less than his entitlement and had had enough. Mr Radley responded by advising there was no money and that the company was a sinking ship. His employment then ended.

[10] On 27 November 2018, Mr Adams raised his personal grievance claiming constructive dismissal, along with his claim for arrears of wages, holiday pay and other losses related to Kiwi Saver, ACC and child support payments.

[11] A statement of problem was filed on 14 February 2019 with a statement in reply filed on 4 March 2019. The statement in reply included very serious allegations against Mr Adams including that he had acted in an inappropriate and unprofessional manner towards other employees. None of the allegations or complaints had been raised with Mr Adams during the course of his employment. Further, the prime complainant retracted her statement to the respondent, in writing, which was shown to me. I was told she had made the statement under extreme pressure by Mr Radley and that the allegation was incorrect.

[12] Mr Adams gave evidence as to the effect of the respondent's actions on him. He advised that he had suffered significant financial and emotional harm. It soured his relationship with his ex-partner and child. He stated this was exacerbated by the untrue statements contained not only in the statement of reply but espoused continuously by the respondent. He claimed the following losses:

- (a) Unpaid wages of \$46,550.00;
- (b) Unpaid Kiwi Saver deductions \$3,780.00;
- (c) Unpaid holiday pay comprising \$7,200.00;
- (d) Unpaid child support deductions \$2,526.30;
- (e) Two weeks' notice totalling \$3150.00; and

- (f) Damages for hurt and humiliation of \$30,000.00.

[13] Mr Adams also provided workings completed by his accountant calculating the amounts owing in respect of wages, Kiwi Saver, holiday pay and child support. I have gone through the accountant's figures and note there seems to be a doubling in respect of Kiwi Saver and child support. Because Mr Adams is claiming unpaid wages, the 3 percent contribution he would make towards Kiwi Saver would be included in that figure as would child support payments. However in respect of unpaid wages and holiday pay due, s 132 of the Employment Relations Act 2000 allows me to accept these claims as quantified. The Respondent has refused to provide wage and time records. As understandably Mr Adams did not give notice I have disallowed his claim in that respect.

[14] Mr Adams' evidence was that he had resigned from his employment because he had no alternative. He was not receiving regular wages, and when he did receive payments, they were irregular and did not match up with actual wages due. He also gave evidence that no Kiwi Saver deductions were being made and he now faced an ongoing liability in respect of child support which had added to his woes. Mr Adams says that although he resigned, he was forced to because he had no alternative and accordingly what appears to be a resignation was in reality a dismissal.

[15] The legal principles relating to claims of constructive dismissal are well settled. In *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd*¹ the Court described three non-exhaustive situations where constructive dismissals might occur:

- (g) When the employee is given a choice of resigning or being dismissed;
- (h) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign; and
- (i) Where a breach of duty by the employer leads an employee to resign.

[16] Not paying wages or salary and/or paying them erratically and inconsistently is a fundamental breach of the employment agreement the respondent had with Mr Adams. There was clear causation between that breach and the termination of employment.

[17] The breach of duty by the respondent goes to the heart of the employment relationship and was of sufficient seriousness to make it reasonably foreseeable by the respondent that

¹ *Auckland Shop Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372(CA) at 374.

Mr Adams would not be prepared to work under the conditions prevailing. (See *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)*.²)

[18] Accordingly, in these circumstances I find that Mr Adams was dismissed. There is no justification for the dismissal. He is entitled to unpaid wages holiday pay and the unpaid employer's contribution towards Kiwi Saver. Mr Adams also sought a payment of \$30,000.00 under section 123(1)(c)(i) of the Employment Relations Act 2000. I have not taken into account the unsubstantiated claims made by the respondent about Mr Adams. These occurred after the employment had ceased. However it was clear Mr Adams was extremely affected by the circumstances surrounding his dismissal. I consider \$23,000.00 to be an appropriate award under this heading.

[19] I have awarded remedies and so in accordance with section 124 of the Act I must consider whether Mr Adams has contributed to the situation which gave rise to his personal grievance. I have concluded that Mr Adams did not act or behave in any blameworthy or culpable way and accordingly there will be no reduction in remedies.

[20] Mr Adams also claimed penalties in his statement of problem. However, during the investigation meeting this claim was withdrawn.

Costs

[21] Ms Walsh made submissions that there should be an uplift above the normal tariff costs applied by the Authority, because of the conduct of the respondent during these proceedings including the raising of specious allegations against Mr Adams in the respondent's statement in reply. She stated that these required rebuttal including obtaining the evidence of one of the so-called complainants thus incurring further unnecessary costs. Further she was required to prepare for the investigation on the basis of an appearance by the Respondent. I accept that submission and order that the respondent pay costs of \$6,000.00.

Geoff O'Sullivan
Member of the Employment Relations Authority

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415 (CA) at 419.