

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 331
3033033

BETWEEN LIONEL CRAWFORD
 Applicant

AND PENGUIN WHOLESALERS
 2016 LIMITED
 Respondent

Member of Authority: Jenni Maree-Trotman

Representatives: Barry Nalder, advocate for the Applicant
 No appearance by the Respondent

Investigation Meeting: 30 May 2019

Date of Determination: 5 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lionel Crawford was employed by Penguin Wholesalers 2016 Limited (Penguin) as a delivery driver from 8 August 2017 until 3 April 2018.

[2] Mr Crawford claims he was unjustifiably constructively dismissed by Penguin. He further claims he suffered an unjustified disadvantage to his employment when Penguin suspended him. His claims are denied by Penguin.

The investigation process

[3] Prior to the investigation meeting a case management conference was held by telephone to discuss progression of this matter. The conference was attended by Mr Crawford's representative and Shaun Sullivan, Penguin's Director. Following this conference a minute dated 3 April 2019 was sent to the parties that recorded the matters agreed. This minute recorded, inter alia, that written witness statements were

not required; however the witnesses identified in the minute were expected to appear and answer questions about their evidence. The minute went on to advise:

[7] If any witness cannot attend in person and appearance by Skype or telephone is necessary, then the parties must advise the Authority by 4:00pm Friday, 18 April 2019. At this time the reason why the witness cannot attend in person, as well as their contact details, must be provided.

[8] Should any witness summons be required by either party, the request is to be made to the Authority by Friday, 3 May 2019.

[4] The minute also directed the parties to provide various documents that the Authority considered relevant to the investigation of Mr Crawford's claim.

[5] On 17 April 2019 Penguin was placed into receivership. Following enquiries from the Authority, and notification that the Authority intended to proceed with its investigation, the Receiver notified the Authority that it was not in a position to attend the investigation and, as it had not been provided with the Company's books and records, was unable to comply with the directions to provide the documents sought in the Authority's minute.

[6] There was no appearance for or on behalf of Penguin at the investigation meeting. None of Penguin's seven witnesses identified in the Authority's minute of 3 April 2019 appeared. This was despite waiting 20 minutes before commencing my investigation.

[7] As provided for in clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act as fully in the matter before me as if Penguin had duly attended or been represented. As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence received.

Issues

[8] The issues identified for investigation and determination are:

- a. Did Mr Crawford suffer an unjustified disadvantage to his employment arising from his suspension?
- b. Was Mr Crawford constructively dismissed? If so, was this justified?

- c. If Mr Crawford was unjustifiably constructively dismissed, or suffered an unjustified disadvantage to his employment what remedies should be awarded?
- d. If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct Mr Crawford that contributed to the situation giving rise to his grievance?
- e. Are any amounts due to Mr Crawford for holiday pay under s 27(1)(b) of the Holidays Act 2003? If so, what amount is payable and should interest be awarded on any amount outstanding?
- f. Should either party contribute to the costs of representation of the other party?

Relevant background facts

[9] Several months after commencing work for Penguin, Mr Crawford had a conversation with his Manager about occasionally taking his partner and child with him when he went on deliveries. This manager did not provide evidence and therefore I shall refer to her as “Ms X”. Ms X agreed that this was acceptable.

[10] Thereafter, approximately once per fortnight, Mr Crawford would load up his truck at Penguin’s depot and then collect his partner from home and take her with him while he undertook deliveries.

The events on 31 March 2018

[11] On Saturday 31 March 2019 Mr Crawford loaded up his truck at the depot and then called into his home to collect his partner and child on his way to deliver items to the far North. After collecting his family he proceeded on his delivery run, stopping once for some lunch.

[12] Around 5 pm that day he returned to the depot. His wife and child exited the truck and waited for him in Mr Crawford’s vehicle. Mr Crawford was handing in his paperwork when he was approached by Ms X and another manager. This manager did not provide evidence and therefore I shall refer to him as Mr Z. Ms X told Mr Crawford that a member of the public had phoned Penguin to advise that he had been viewed unloading company property at his home address. Checks of the GPS

tracking system had shown he was at his home address at the time identified by the complainant. She advised that they had contacted the Police and they considered he had stolen Company property.

[13] Mr Crawford was shocked. He adamantly denied the allegations and reiterated what had happened that day. He told Ms X that he had never exited the truck when he collected his partner and the Police were welcome to search his home as he had nothing to hide. He then asked if he could have his partner come in to verify his account of events. Ms X told him that she did not want to hear from his partner. She told him they had decided to suspend him without pay while they undertook an investigation.

[14] Mr Crawford heard nothing further from Penguin in the days that followed and has never heard from the Police.

[15] On Tuesday 3 April 2018 Mr Crawford went into the depot. He had realised he had forgotten to sign out on 31 March 2018 and wanted to attend to this to ensure he was paid. While he was there he approached Mr Z to ask him what was happening with the investigation. Mr Z told him he could not tell him. Mr Crawford was then approached by one of the office staff to tell him that he needed to hand in his cash book for the investigation. He told her where to locate this.

[16] That afternoon Mr Crawford went to visit his representative who drafted a personal grievance letter, that was sent that day, alleging he had suffered an unjustified disadvantage arising from his suspension and considered he had been constructively dismissed. No response was received from Penguin.

Issue one: Unjustified disadvantage

The legal position

[17] Under s 103(1)(b) an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[18] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time

the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

The suspension

[19] Clause 16(6) of Mr Crawford's individual employment agreement (IEA) permitted Penguin to suspend Mr Crawford, on pay, while an investigation of the circumstances surrounding allegations of serious misconduct was carried out. However, prior to doing so, it was required to provide Mr Crawford with "an opportunity to comment on and make representations concerning the proposed suspension".

[20] This contractual requirement is consistent with the rules of natural justice that require an employee to be told a suspension is being contemplated, and the reasons why, and given an opportunity to be heard before a decision is made.¹ As noted by the Court in *Yoon Cheol Hong v Auckland Transport*:²

These expectations are flexible, taking into account the surrounding circumstances. Ultimately, the test in each case is the fairness and reasonableness of the employer's conduct. The surrounding circumstances can include immediate safety issues as well as the length of the proposed suspension. But natural justice almost always requires some consultation before the decision to suspend is made. (Citations removed).

[21] The present situation did not involve the sort of circumstances that might otherwise justify a departure from an application of the usual rules relating to fair process. At the time Mr Crawford was suspended there was no issue of imminent danger or any other circumstance which might otherwise have justified summary suspension.

[22] The procedure followed when imposing Mr Crawford's suspension was flawed. While Mr Crawford managed to interrupt Ms X in an attempt to present her with his version of events, it is apparent that the decision to suspend had already been made. Mr Crawford ought to have been given an opportunity to comment on the proposal to suspend him prior to that decision being made.

[23] The process failings regarding the suspension, combined with Penguin's notification that it would not pay him for the period of time he was suspended, was

¹ *Singh v Sherildee Holdings Ltd t/a New World Opotiki* EmpC Auckland AC 53/05, 22 September 2005 at [93].

² [2019] NZEmpC 54 at [50].

contrary to Mr Crawford's IEA and constituted an unjustifiable disadvantage to his employment.

Issue two: Constructive dismissal

[24] The legal principles relating to constructive dismissal are well established and are not in dispute. Constructive dismissal includes, but is not limited to, cases where:³

- (a) An employer gives the employee the choice of resignation or dismissal;
- (b) An employer follows a course of conduct with the 'deliberate and dominant purpose' of coercing an employee to resign;
- (c) A breach of duty by the employer leads an employee to resign.

[25] The present case concerns the third of these categories.

[26] In reference to the third category of case, the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* stated:⁴

In such a case as this we consider that the first relevant question is whether the resignation has been caused by breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[27] If, after applying the above principles, the Authority concludes that there has been a constructive dismissal, it must then determine objectively whether it was justifiable in terms of the statutory test of justification under s 103A of the Act. To this end, Penguin must satisfy the Authority that its actions were what a fair and reasonable employer could have done in all the circumstances at the time.

Step One: Was there a breach of duty on the part of the Respondent? If so, was Mr Crawford's resignation caused by this breach?

³ *Auckland Etc Shop Employees Etc IUOW v Woolworths (NZ) Limited (NZ) Ltd* [1985] 2 NZLR 372.

⁴ [1994] 1 ERNZ 168 (CA).

[28] I have already found that Penguin adopted an unsatisfactory process in relation to Mr Crawford's suspension. It also failed to make payment to Mr Crawford for the period he was suspended before he resigned. It breached the IEA in that regard. In addition, its accusation of theft, reporting the matter to the Police without first speaking with Mr Crawford, and then failing to respond to Mr Crawford's queries as to what was happening with the investigation, breached its duty of good faith.

[29] Penguin's breaches were of sufficient seriousness to make it reasonably foreseeable that Mr Crawford would not be prepared to work under the conditions prevailing and there was a substantial risk of resignation.

[30] I find Mr Crawford was constructively dismissed.

Issue three: Remedies

Lost wages

[31] Section 123(1)(b) of the Act provides for the reimbursement by Penguin of the whole or any part of wages lost by Mr Crawford as a result of his grievance. Section 128(2) provides that I must order Penguin to pay Mr Crawford the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.⁵

[27] In *Allen v Transpacific Industries Group Ltd*⁶, Chief Judge Colgan emphasised that those representing dismissed employees intending to take personal grievances should keep complete records of their attempts to mitigate losses. He said:

[D]ismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[28] In *Xtreme Dining Limited v Dewar* the full Court confirmed that where the employer puts mitigation in issue, the employee must provide relevant information as to the steps taken to mitigate the asserted loss, but ultimately it is for the employer to

⁵ Employment Relations Act, s 128(3).

⁶ [2009] 6 NZELR 530.

persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.⁷

[29] In the present case, Penguin did not put mitigation in issue; however Mr Crawford provided evidence of the steps he took to mitigate his asserted loss. Having heard from Mr Crawford and his partner, and having reviewed the evidence provided, I am persuaded that Mr Crawford acted reasonably in attempting to mitigate his loss and that his lost wages are attributable to his personal grievance.

[30] It is reasonable in all the circumstances that Mr Crawford recovers lost wages for the period claimed being the period from 2 April 2018 to the date Mr Crawford commenced his new job on 8 May 2018. A total of 5 weeks and 1 day. This period takes into account the period he was suspended without pay.

[31] Mr Crawford's IEA provides that his usual hours of work each week were forty hours. At the time of his dismissal his hourly rate had increased to \$18.50. 5 weeks and 1 day equals \$3,848 gross. Penguin is ordered to make payment to Mr Crawford of the sum of \$3,848 gross for lost wages within 14 days of the date of this determination.

Compensation under s 123(1)(c)(i) of the Act

[32] Mr Crawford claimed compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i). He and his partner gave evidence of the effects that his suspension and dismissal had on him. The accusations that were made, and the process followed, left Mr Crawford feeling angry, humiliated and confused. His confidence was shattered and he felt upset that he could not support his family. Financially the family struggled until Mr Crawford was able to secure new employment.

[33] I am satisfied in the circumstances that Mr Crawford suffered humiliation, loss of dignity and injury to his feelings. Taking into account the impact his suspension and dismissal had on him, that there has been no on-going emotional injury after Mr Crawford secured a new job, combined with the short duration of his employment and his ability to secure new employment within a relatively short period of time, I

⁷ [2016] NZEmpC 136.

consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$10,000.

[34] Penguin is ordered to make payment to Mr Crawford the sum of \$10,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Issue four: Contribution

[32] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.⁸

[33] I am satisfied that Mr Crawford did not contribute to his personal grievance. There is no evidence to substantiate the allegations of theft pleaded in the Statement in Reply. For this reason I make no deduction to the remedies I have awarded.

Issue five: Holiday pay

[35] Calculation of Mr Crawford's annual leave entitlements must be made in accordance with s 23 of the Holidays Act 2003. This section applies where the employment of an employee comes to an end and the employee is not entitled to annual holidays because he or she has worked for less than 12 months. In such a case an employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount paid to the employee for annual holidays taken in advance.

[36] In my minute of 3 April 2019 I directed Penguin to provide, inter alia, a copy of Mr Crawford's wage and time records and his holiday records. Penguin and its Receivers failed to comply with this direction. In the absence of this information I have relied upon the oral evidence provided by Mr Crawford, the second to last payslip he was provided with (being only 1 of four that he had received from Penguin) and his bank statements.

⁸ Employment Relations Act, s 124.

[37] Mr Crawford's claim for holiday pay relates to the duration of his employment. During this period he said he did not take any annual leave. His second to last payslip, for the pay period ended 26 March 2018, shows he had earned \$25,088.98 gross in the year to that date. Thereafter his bank statements show he received one final payment from Penguin in the sum of \$521.81 net (\$607 gross). Using the total gross earnings of \$25,695.98 and multiplying this sum by 8% I reach a figure of \$2,055.67.

[38] In addition, Mr Crawford claims holiday pay on the amount awarded by the Authority for lost wages. 8% of \$3,848 gross equals \$307.84.

[39] Penguin is ordered to make payment to Mr Crawford the sum of \$2,363.51 gross for unpaid holiday pay. Payment of this sum must be made within 14 days of the date of this determination.

Issue Four: Interest

[40] In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion of interest on the amount awarded.⁹

[41] Mr Crawford claims interest on the holiday pay owing to him at the date of his dismissal i.e. the sum of \$2,055.67. In the circumstances I consider it appropriate to order interest is payable by Penguin from 3 April 2018.

[42] Penguin is ordered to pay interest on the sum of \$2,055.67 from 3 April 2018 continuing until payment at the applicable rate of 5% per annum.¹⁰ Payment of this sum must be made within 14 days of the date of this determination.

Issue Five: Costs

[34] Mr Crawford advised the Authority that he had not been issued with any invoices by his representative, nor paid any money to his representative. He said he had not entered into an agreement with his representative to pay him any costs associated with the Authority's investigation and the initial arrangement between the parties was that his representative would undertake the case pro-bono.

⁹ Employment Relations Act, Sch 2 cl 11.

¹⁰ Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4.

[35] In the foregoing circumstances, I confirm the preliminary indication provided to the parties that I would not be awarding any costs to Mr Crawford. However, it is fair that Mr Crawford be reimbursed the Authority's filing fee of \$71.56 that he paid when filing his Statement of Problem.

[36] Penguin is ordered to pay the sum of \$71.56 to Mr Crawford within 14 days of the date of this determination.

Outcome

[43] The overall outcome that I have reached is:

- a. Mr Crawford suffered an unjustified disadvantage to his employment when he was suspended by Penguin Wholesalers 2016 Limited.
- b. Mr Crawford was unjustifiably constructively dismissed from his employment with Penguin Wholesalers 2016 Limited.
- c. Penguin Wholesalers 2016 Limited is ordered to pay the following amounts to Mr Crawford within 14 days of the date of this determination:
 - i. The sum of \$3,848 gross for wages lost as a result of Mr Crawford's personal grievances.
 - ii. The sum of \$10,000 under s 123(1)(c) of the Employment Relations Act 2000.
 - iii. The sum of \$2,363.51 gross for holiday pay arrears.
 - iv. Interest on holiday pay outstanding to Mr Crawford at the date of termination (\$2,055.67) from 3 April 2018 continuing until payment at the applicable rate of 5% per annum.
 - v. The Authority's filing fee of \$71.56.

Certificate of Determination

[44] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, that Mr Crawford be provided with a certificate of determination, sealed with the seal of the Authority. This certificate is to record that, within 14 days of the date of this determination, Penguin Wholesalers 2016 Limited is ordered to pay the following amounts to Mr Crawford:

- a. The sum of \$3,848 gross for wages lost as a result of Mr Crawford's personal grievances.
- b. The sum of \$10,000 under s 123(1)(c) of the Employment Relations Act 2000.
- c. The sum of \$2,363.51 gross for holiday pay arrears.
- d. Interest on holiday pay outstanding to Mr Crawford at the date of termination (\$2,055.67) from 3 April 2018 continuing until payment at the applicable rate of 5% per annum.
- e. The Authority's filing fee of \$71.56.

Jenni-Maree Trotman
Member of the Employment Relations Authority