

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 108
3076034

BETWEEN ASHLEY NICKLIN
Applicant

AND J K J OBORN LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Robert Morgan, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 4 March 2020 at Auckland

Oral Determination: 4 March 2020

Written record issued: 4 March 2020

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent, JKJ Oborn Limited (Oborn) operates a plumbing business. Mr Daniel Oborn is the sole director and shareholder.

[2] The applicant, Mr Ashley Nicklin was employed by Oborn as a plumber from July 2018 until his dismissal on 16 August 2019. Mr Nicklin says the dismissal was unjustified. Mr Nicklin seeks remedies including compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act), reimbursement of wages under s128 of the Act, outstanding holiday pay and seeks a penalty against Oborn for breaching the Holidays Act 2003.

Non-appearance of the respondent

[3] Mr Oborn filed a statement in reply on behalf of Oborn on 15 October 2019. In the Statement in Reply (SIR), Mr Oborn disputes Mr Nicklin's claims and makes allegations

about Mr Nicklin's conduct. Mr Oborn also indicated that he would not attend mediation. The parties were referred to mediation but mediation did not proceed because Mr Oborn declined to attend.

[4] Accordingly, a telephone conference between the parties was scheduled for 11 December 2019. Both parties were contacted by the Authority about the date and time of the telephone conference. Mr Oborn's response to the Authority on 10 December 2019, was as follows: "I haven't got time for this meeting. This doesn't fit into my busy schedule. Kind regards. Dan Oborn."

[5] On 11 December 2019, an Authority Officer attempted to contact Mr Oborn by phone. However, the call went to voicemail and there was no response by Mr Oborn. The Authority continued its communication with Mr Oborn about the investigation meeting. I am satisfied that Oborn was aware of the date and time of the investigation meeting. It received notice of the investigation meeting and other correspondence from the Authority. Therefore, I proceeded with the investigation meeting.

Investigation meeting

[6] An investigation meeting was held in Auckland on 4 March 2020. Mr Nicklin provided a witness statement, as did his partner's mother, Ms Colette Bazen and her partner, Mr Michael Edwards. Each of the witnesses affirmed that their written statements and answers to questions from the Authority were true and correct.

[7] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

Issues

[8] The issues for the Authority are whether Mr Nicklin was dismissed by Oborn and if he was, whether it was unjustified.

[9] Is Mr Nicklin owed holiday pay and if so should a penalty be ordered by the Authority.

Relevant facts

[10] Mr Nicklin is a registered plumber with more than 13 years' experience in the plumbing trade. Mr Nicklin undertook an apprenticeship through Unitec and became a registered plumber in 2012. Prior to his employment by Oborn, Mr Nicklin held other plumbing positions, including at MCB Plumbing Limited where he was employed for seven years. Prior to his employment by Oborn, Mr Nicklin was employed as a plumber for one of the Laser Plumbing franchises.

[11] In July 2018, Mr Nicklin saw an advertisement online placed by Oborn, for a plumber. Mr Nicklin applied for the role, enclosing references. Mr Oborn, who was on holiday in Japan at the time called Mr Nicklin. They discussed Mr Nicklin's experience and qualifications. Mr Oborn offered Mr Nicklin the position immediately, with a start date when Mr Oborn returned from Japan.

Employment by Oborn

[12] On Mr Nicklin's first day of work, he reported to Oborn's workshop in Glenfield at approximately 7am. Mr Oborn agreed to pay Mr Nicklin \$29 gross an hour and provide the use of a work van. There was no other induction by Mr Oborn. Mr Oborn gave Mr Nicklin the keys to a work van and he was sent to his first job, which was to pipe a 'new build' house in Papatoetoe.

[13] Later in the week Mr Nicklin gave Mr Oborn his Inland Revenue Department number (IRD) and bank account details so he could be paid wages. Mr Nicklin was not provided with an employment agreement.

[14] Either the night before a working day or on the morning of a working day, Mr Oborn would send a text to Mr Nicklin telling him what jobs he was to do during the day and vague details of what the jobs were. For example, "a leaking tap".

[15] Mr Oborn could keep track of Mr Nicklin's hours because each work van had a GPS system. Mr Nicklin's time of travel and time at a job was recorded by the GPS system and Mr Nicklin would prepare paper timesheets for each job which were sent to Mr Oborn.

[16] Mr Nicklin says the work relationship was a good one and that he received regular pay increases.

Mr Oborn's trip to Japan – July/August 2019

[17] Mr Oborn and his wife had a trip to Japan planned from 15 July 2019 to 7 August 2019. Mr Oborn asked Mr Nicklin to manage the day-to-day business of Oborn while he was away. Mr Oborn agreed to pay Mr Nicklin the sum of \$400 for each week he was away, over and above his wages, to run the business. Mr Nicklin took over these extra tasks from 15 July 2019 until 8 August 2019.

[18] Mr Nicklin had to take calls and texts from clients, allocate jobs to the other Oborn plumbers each day. Timesheets were sent to Mr Oborn and he arranged for wages to be paid remotely. Mr Nicklin also dealt with the invoicing of customers. Mr Nicklin was extremely busy and stressed with the running of the business while Mr Oborn was away.

Events leading to dismissal**8 August 2019**

[19] Mr Nicklin requested a meeting with Mr Oborn upon his return from Japan. This was so that he could hand back the work that he had taken over whilst Mr Oborn had been in Japan.

[20] Mr Nicklin was paid \$1,200 for the work that he had taken over while Mr Oborn was away. Mr Nicklin sent an email to Mr Oborn asking that he pay him for an extra 3 days, for which he had not been paid, while Mr Oborn was away and he was responsible for the business.

[21] This request appears to be the trigger point for a downturn in the relationship between Mr Oborn and Mr Nicklin.

[22] Following the meeting on 8 August 2019, Mr Nicklin requested the extra amount for the extra 3 days. Mr Oborn's response was:

We paid you 3x weeks already. We were away for 3 weeks. We left on the 16th and first \$400 payment was on 18th. That's fair.

Mr Nicklin responded at 5:08pm.

But I started looking after everything from the 15th til the 7th. That's closer to 4 weeks so maybe half the last payment is fair?

At 5:10pm, Mr Oborn responded:

No mate that's not fair. Don't get too greedy bro. I know what flux is for but when did you last brass on my jobs? My guess they're using on your jobs hah.

5:15pm Don't take me for a fool bro.

5:15 Mr Nicklin responded:

No I'm not using it on my jobs! I needed it on Rico's house and I use it on my hot water cylinders etc. Ask any of the clients I organised and did work for while you were gone. They'll tell you how above and beyond I went even organising on the weekends and late at night.

Mr Oborn responded at 5:19pm:

Yes I know and you have been paid mate. I was away for 3 weeks. Do the math.

At 5:22pm Mr Oborn sent a text to Mr Nicklin as follows:

Do not use van weekends. You've got it pretty dam good mate.

Mr Nicklin's response at 5:30pm was:

Wow that was a kick in the guts bro.

14 August 2019

[23] On 14 August 2019, Mr Nicklin was requested to do a job which he says he spent 7.5 hours doing, including travel time from the merchant. Mr Nicklin sent his timesheet to Mr Oborn who sent a text back saying he was not paying 7.5 hours for the day. Because of the way in which Mr Oborn had responded to his request for payment of the extra 3 days, Mr Nicklin decided not to take issue with the matter. Mr Oborn deducted what he thought was fit from the 7.5 hour timesheet.

15 August 2020

[24] At 6:32am on 15 August 2019 Mr Nicklin sent a text to Mr Oborn to tell him he was unable to work that day because his partner and their two young children, aged 5 months and 2 years of age, were all sick. Mr Oborn's response by text was that he would like to chat with Mr Nicklin "about a few things". Mr Oborn then immediately sent a further text to Mr Nicklin at 8:01am: "I'm not happy with you mate". Mr Nicklin responded "Are you serious". At 8:04am Mr Oborn responded: "Yea I am mate. I wanted to talk to you yesterday but you drove home. You overcharged me for yesterday. And more."

[25] Mr Nicklin then received some texts from the apprentice who he had been working with telling him that Mr Oborn had decided to remove him from working with Mr Nicklin any longer. Mr Nicklin also received a phone call from a builder client who told him that Mr Oborn was “bagging him”.

Dismissal

[26] On 16 August 2019, Mr Nicklin texted Mr Oborn at 6:42am to inform him that he would not be able to make it in because he was still at home with his partner and there had been a “nightmare with one of his kids”. Mr Oborn sent back the same text as he had sent to him the day before: “Ash, hope you are healthy and fit tomorrow. If you are let me know”.

[27] Later that day, at approximately 4:30pm, Mr Nicklin received a telephone call from Mr Oborn. Mr Oborn was shouting at him “Give me my fucking keys”. Mr Nicklin realised that Mr Oborn was at his work vehicle which was parked 100 metres or so down from his house. Mr Nicklin immediately ran out to the van. He was confronted by Mr Oborn who was screaming at him again “Give me my fucking keys”. Mr Nicklin asked why and was ignored by Mr Oborn who repeated: “Give me my fucking van keys”.

[28] Mr Nicklin was reluctant to do so immediately because he had a number of his own personal effects in the car, including safety work gear and plumbers’ tools. Mr Oborn became increasingly angry and Mr Nicklin handed over the keys. Mr Oborn was with two other men, one of whom was Mr Nicklin’s apprentice. Neighbours came out to see what the altercation was about.

[29] Mr Edwards, who lives with his partner, Ms Bazen a few houses from Mr Nicklin, saw what was happening and came over to investigate. Mr Edwards says he heard who he now knows to be Mr Oborn, yelling “this is my fucking van” and becoming extremely agitated and threatening. Another man was filming the incident. Mr Nicklin asked Mr Edwards to remain with him because he feared for his safety.

[30] Mr Oborn unloaded some of Mr Nicklin’s tools onto the side of the road and left. Ms Bazen also saw the altercation from her house. She said that there was a lot of shouting and swearing by Mr Oborn at Mr Nicklin. She felt the situation was extremely intimidating and threatening.

[31] Mr Nicklin says he was shocked by this treatment and felt humiliated and embarrassed.

[32] Mr Nicklin says he tried to communicate with Mr Oborn following this incident but was repeatedly abused and told he had “quit”. On 18 August 2019 at 5.42pm, Mr Nicklin sent Mr Oborn a text as follows:

Hi Dan I will not be attending work tomorrow because of your intimidating and threatening behaviour towards me. Following the events on Friday afternoon I fear for my safety at work. I am seeking legal advice and will contact you.

Mr Oborn replied at 5.46pm:

Good for you in taking legal action for your stealing hours and under the influence of alcohol and drugs. See you in court. You're a mess and have shocked all of us with your unprofessional manner. I have many clients who will back me up. You have made a down hill slop and your so in the wrong. See you in court.

Mr Oborn sent a further text at 5.51pm:

Straighten your life up and look after your family before you lose everything. I have evidence of things you don't want me to expose.

[33] Mr Nicklin was shocked by the false accusations that he was a thief who took drugs and alcohol and by the threats.

[34] Following questioning by the Authority, Mr Nicklin said that the two younger workers at Oborn's had also been treated very badly by Mr Oborn. Mr Nicklin had seen some of the text messages which contained swear words and threats. Both resigned or were dismissed.

[35] It is my view that the way in which Mr Oborn acted, in particular on 16 August 2019 when he came to Mr Nicklin's house while he was at home with his sick partner and children and demanded in a threatening manner for the return of his van, without an apparent reason, in front of family and neighbours was a fundamental breach of Mr Nicklin's employment agreement and amounted to a dismissal.

[36] Mr Nicklin was dismissed by Oborn on 16 August 2019.

[37] When Mr Nicklin tried to contact Mr Oborn to discuss matters following his dismissal he was told, “no you quit on Friday mate, that’s what you said. You are out of control and stole from me and you know it.... Stop playing your dumbass games with me.”

[38] If Mr Oborn had concerns about Mr Nicklin’s behaviour or had a concern about misconduct, it was his duty, as a fair and reasonable employer, to raise it with Mr Nicklin and seek a response. Mr Oborn did not do so and Mr Nicklin disputes any misconduct by him.

[39] For these reasons, Mr Nicklin has established his personal grievance for unjustified dismissal.

Remedies

[40] Mr Nicklin still has no understanding of the reason for the change in behaviour by Mr Oborn toward him, other than Mr Oborn was not happy he asked for payment for the extra 3 days work he undertook running the business when Mr Oborn was in Japan in July 2019.

[41] Mr Nicklin gave evidence of the impact of the unjustified dismissal on him and the way in which he was treated by Mr Oborn. He says Mr Oborn’s actions “ruined” his confidence.

[42] He was embarrassed and humiliated by the way in which he was sworn at and treated in front of his family and neighbours when Mr Oborn came and took his work vehicle away. He did not know why he was being treated in that manner by Mr Oborn.

[43] Mr Nicklin became withdrawn and sought professional assistance from his doctor. Mr Nicklin says he has not recovered from his treatment by Mr Oborn. For these reasons, Mr Nicklin felt unable to look for a position immediately. He obtained a position on 5 November 2019. Mr Nicklin was out of work and income for 11 weeks.

Compensation for humiliation, loss of dignity and injury to feelings

[44] Mr Nicklin was shocked and humiliated by the way in which he was treated by Mr Oborn, in front family, neighbours and work mates. He is still suffering. Mr Nicklin’s sense of humiliation, loss of dignity and injury to her feelings warrants an award of \$25,000 compensation under s123(1)(c)(i) of the Act.

Reimbursement of loss of income

[45] As a result of the loss of income, under s123(1)(b) and s128(2) of the Act, the Authority must order Oborn to pay Mr Nicklin “the lesser of a sum equal to the lost remuneration or to 3 months’ ordinary time remuneration”. Mr Nicklin was out of work for 11 weeks. On his ordinary annual income of \$63,700 gross (based on an average of 35 hours a week at \$35 gross an hour), this amounts to a loss of \$13,475 gross.

Reduction of remedies for contributory conduct

[46] Under s124 of the Act, the Authority must consider whether any remedies awarded to an employee for a personal grievance should be reduced because of “the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance.”

[47] There was no contributory conduct by Mr Nicklin, he asked a question about being paid for extra work performed by him. This was a legitimate question which triggered an unreasonable change in attitude towards him by Mr Oborn which ultimately led to his dismissal.

Wage arrears – unpaid holiday pay

[48] In breach of the Holidays Act 2003, Oborn failed to pay Mr Nicklin holiday pay owing to him when he was dismissed. Mr Nicklin’s annual income was \$63,700 gross. 8% for holiday pay amounts to \$5096 gross less 10 days holiday leave taken. The amount owing to Mr Nicklin for holiday pay is \$2,568 gross.

Penalty

[49] Oborn failed to pay Mr Nicklin holiday pay entitlements due to him at the end of his employment. Consequently, Oborn breached s 27 of the Holidays Act and is liable to a penalty under ss 75 and 76 of that Act.

[50] As Oborn is a company, the amount for each penalty it is liable for is \$20,000. Determining the appropriate level of penalty in each case is guided by the factors set out in s 133A of the Act, applied through the methodology developed by the Employment Court.¹

¹ See *Borsboom v Preet Pvt Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]

[51] A penalty is required in this case because Oborn's actions breached provisions of the employment standards defined in the Act. Those breaches caused loss to Mr Nicklin because he was not paid money due to him on time. At that time, Mr Nicklin was in financial difficulty as a result of his sudden dismissal. Because Oborn has failed to respond to Mr Nicklin's application to the Authority and has not taken part in the ensuing investigation, it cannot show any attempt to mitigate the effect of the breach of the Holidays Act. Neither has Oborn provided any information that could properly be taken into account in assessing its financial ability to pay any penalties imposed.

[52] Mr Nicklin gave evidence of two young employees who were treated poorly by Mr Oborn and who were either dismissed or resigned as a result. It is unclear whether they were denied their minimum entitlements.

[53] Mr Nicklin waited for his holiday pay. On 29 August 2019 at 9.23 am, he sent a text to Mr Oborn asking for it to be paid and pointing out he was acting illegally. Mr Oborn responded by sending the following texts to Mr Nicklin at 9.25, 9.26 and 9.27 am:

Take me to court you asshole

You fucking stole from me you little cunt

We prob owe you nothing you faggot

[54] A penalty is necessary to deter Oborn from similar practices in the future and to discourage other employers behaving in the same way. Considering consistency with penalties imposed in similar cases and the proportionality of outcome to the effect and extent of the breach in this case, the penalty for breach of the Holidays Act is \$5,000.

[55] Oborn must pay \$5,000 to the Authority for the identified breach of the Holidays Act within 28 days of the date of this determination. Once the penalty is paid to the Authority, the amount recovered must then be paid to the Crown account.

Costs

[56] Having succeeded in his application, Mr Nicklin is entitled to an order requiring Oborn to contribute to his costs of representation. The Authority's usual tariff for an investigation meeting is \$4,500 for a day. This matter took half a day of investigation

meeting time. Mr Nicklin's advocate is to provide copies of invoices and receipts and details of costs incurred before the Authority makes a determination as to costs.

Orders

[57] For the reasons given in this determination, Oborn must pay the following sums to Mr Nicklin within 28 days of the date of this determination:

- (a) \$25,000 as compensation for humiliation, loss of dignity and injury to feelings, to be paid without deduction
- (b) \$13,475 gross as reimbursement of lost remuneration, as a result of his grievance for unjustified dismissal
- (c) \$2,568 gross as arrears of holiday pay
- (d) \$71.56 reimbursement of the expense of the filing fee paid to lodge his application in the Authority.

[58] In the event the sums awarded are not paid, Mr Nicklin may enforce the orders for payment to be made to him by use of the procedures of the District Court under s 141(1) of the Act. If requested, a Certificate of Determination is to be issued for that purpose.

[59] Oborn must also pay the penalty of \$5,000 for the Holidays Act for a breach of the Holidays Act, to the Authority within 28 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority