

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 143
3079672

BETWEEN MATTHEW RICHARD EUSTON
Applicant

A N D MOORE DECORATING
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Jonathan Amtmann, counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 2 April 2020

Submissions Received: 2 April 2020 from the Applicant

Date of Determination: 8 April 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Matthew Euston was employed to work as a Painter/Decorator with Moore Decorating Limited from 24 January 2019.

[2] Mr Euston was paid for his first four weeks of work but was not paid his wages for his fifth week of work. This was subsequently paid in April 2019 but then he did not receive his wages for the last three weeks of April 2019.

[3] Mr Euston spoke to Moore Decorating about his wages and was not given a satisfactory response, leaving him unsure if he would be paid for the work he had done and unsure if he would be paid for any future work. So Mr Euston resigned; his last day of work with Moore Decorating was 26 April 2019.

[4] As of 26 April 2019, Mr Euston says he was owed wage arrears as follows:

- (a) \$2,562.50 in wages for three weeks work;
- (b) \$1,050.88 for public holidays that Mr Euston did not work but were otherwise working days for him; and
- (c) \$1,261.07 for holiday pay, payable to Mr Euston at the end of his employment.

[5] Mr Euston also says that he resigned because Moore Decorating did not pay his wages in April 2019 and therefore he was constructively dismissed. Mr Euston seeks compensation and reimbursement for this dismissal.

[6] The final complaint that Mr Euston has is that Moore Decorating did not provide him with an employment agreement. Mr Euston says a penalty should be imposed against Moore Decorating for this failure.

[7] These three sets of complaints make up Mr Euston's claim against Moore Decorating, detailed in his statement of problem, which I have investigated and this determination resolves.

Progress of this matter

[8] Mr Euston's statement of problem was lodged on 30 October 2019 and was subsequently served on Moore Decorating. Moore Decorating did not lodge a statement in reply in response to the statement of problem.

[9] In order to progress Mr Euston's claim and in an effort to get Moore Decorating to engage with the Authority I set this matter down for a case management conference, advising Moore Decorating of the time for the conference. Notwithstanding this notice being served on Moore Decorating, it did not participate in the case management conference.

[10] In a Notice of Direction dated 3 March 2020, I directed Moore Decorating to lodge, with the Authority, its wage and time records within 14 days. The Notice of

Direction also recorded that I would hold an investigation meeting on 2 April 2020, which was then confirmed in a Notice of Investigation Meeting.

[11] The Notice of Direction and Notice of Investigation Meeting were served on Moore Decorating. Despite this Moore Decorating did not lodge any wage and time records and it did not make a representative available for the Investigation Meeting. And it did not offer any explanation for this or seek an extension of time to comply or request an adjournment of the investigation meeting.

[12] The Notice of Investigation Meeting recorded that *“If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.”*

[13] Considering all of the above, there was no apparent reason why the investigation meeting could not continue without a representative for Moore Decorating. I therefore proceeded with the investigation meeting (by telephone conference) pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

Wage arrears

[14] Turning first to the wage arrears claims, as Moore Decorating has failed to provide wage and time records as directed I can rely on Mr Euston’s records of hours worked and wages owed.¹

[15] Mr Euston produced a record of hours he worked for Moore Decorating and the payments he received. I was able to check this against wages that were paid, for which pay slips had been provided to Mr Euston. This cross check showed that Mr Euston’s record is accurate. Further when I took evidence from Mr Euston, I found his account to be credible and his evidence to be reliable. Therefore I have no reason to doubt Mr Euston’s record and account of the hours he worked for which he was not paid, including public holidays and holiday pay owing at the end of his employment.

¹ Section 132 of the Employment Relations Act 2000.

[16] I am also satisfied that Mr Euston has accounted for all wage payments he has received and the amounts he claims as being owed to him are accurate.

[17] I conclude that Moore Decorating owes Mr Euston the following:

- (a) \$2,562.50 in wage arrears;
- (b) \$1,050.88 for public holidays that Mr Euston did not work but were otherwise working days for him; and
- (c) \$1,261.07 for holiday pay, payable to Mr Euston at the end of his employment.

[18] Mr Euston is also entitled to interest on these various amounts owed pursuant to clause 11 of Schedule 2 of the Act and Schedule 2 of the Interest on Money Claims Act 2016. This amount is \$151.64.

Unjustified dismissal

[19] Mr Euston's claim for unjustified dismissal arises because he resigned in response to Moore Decorating's failure to pay his wages; he says this is a constructive dismissal.

[20] In order to determine if Mr Euston's resignation amounts to a constructive dismissal I must consider:²

- (a) Was there a breach of duty by Moore Decorating;
- (b) Was that breach of duty sufficiently serious such that it was reasonably foreseeable that there was a substantial risk that Mr Euston might resign in response to that; and
- (c) Did Mr Euston resign in response to that breach of duty?

[21] I am satisfied that Moore Decorating failed to pay Mr Euston's wages and this is a breach of duty owed to him. Further this is a serious breach such that it was

² *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

foreseeable that Mr Euston might resign in response to it. And, finally I accept that Mr Euston did resign because of this breach of duty.

[22] In short this is a clear case of constructive dismissal.

[23] Given the circumstances of this dismissal, I also conclude that Moore Decorating did not act justifiably by bringing this dismissal about. As a result Moore Decorating has unjustifiably dismissed Mr Euston.

[24] As Moore Decorating unjustifiably dismissed Mr Euston, I can award Mr Euston any of the remedies provided for under s 123 of the Act; Mr Euston seeks compensation and reimbursement.

[25] Turning first to Mr Euston's claim for reimbursement of lost remuneration, I am satisfied that Mr Euston has a personal grievance and that he lost remuneration because of that grievance, so pursuant to s 128 of the Act I must award him the lesser of the lost remuneration or three months ordinary time remuneration.

[26] The remuneration lost by Mr Euston as a result of the unjustified dismissal is \$3,400.00 (gross). This is less than three months ordinary time remuneration for Mr Euston, so this is the amount I will award to him.

[27] Turning next to compensation, I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. This means Mr Euston is entitled to compensation for the loss and harm caused by the loss of dignity, humiliation and injury to feelings arising out of his dismissal. My task is to quantify that harm and loss.³

[28] Mr Euston seeks \$5,000.00 in compensation and having heard evidence from him of the impact of not receiving his wages and having to resign, I am satisfied that \$5,000.00 is an appropriate amount and award him this sum.

³ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[29] As I have awarded remedies to Mr Euston I must consider whether he has contributed to the situation that gave rise to his unjustified dismissal.⁴

[30] When assessing this I am looking for a causal link between Mr Euston's actions and the situation that gave rise to the dismissal. If I am satisfied that there is a link, then I must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies.⁵

[31] In this case there is no behaviour by Mr Euston which is linked in any way to him not receiving his wages and his conduct in resigning, which is linked to his dismissal, was not culpable or blameworthy. So, there is no basis for concluding that Mr Euston contributed to his unjustified dismissal and therefore, there is no reduction in the remedies awarded.

Penalty

[32] When Mr Euston commenced employment with Moore Decorating he discussed a possible employment agreement with it but this was never finalised. In fact after a discussion over the terms of his employment and a possible employment agreement there was no further discussion about an employment agreement and one was never produced for Mr Euston to consider.

[33] In the circumstances this is a failure by Moore Decorating to meet its obligation under sections 64 and 65 of the Act and it is appropriate to impose a penalty against it for this breach. Considering the quantum of penalties imposed in similar circumstances and the relevant factors, I order Moore Decorating to pay a penalty of \$500.00. And, I order that the penalty be paid to Mr Euston to compensate him for the loss caused to him by the failure to provide him with an employment agreement.

⁴ Section 124 of the Act.

⁵ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

Orders

[34] Moore Decorating owes the following in wage arrears to Mr Euston, and these arrears are to be paid to him within 14 days of this determination:

- (a) \$2,562.50 (gross) for unpaid wages;
- (b) \$1,050.88 (gross) for public holidays that Mr Euston did not work but were otherwise working days for him; and
- (c) \$1,261.07 (gross) for holiday pay, payable to Mr Euston at the end of his employment.

[35] Moore Decorating must also pay interest of \$151.64 on these wage arrears, pursuant to clause 11 of Schedule 2 of the Employment Relations Act 2000 and Schedule 2 of the Interest on Money Claims Act 2016, within 14 days of this determination.

[36] Moore Decorating unjustifiably dismissed Mr Euston and in satisfaction of this grievance it must pay to Mr Euston, within 14 days of this determination:

- (a) \$3,400.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000; and
- (b) \$5,000.00 without deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[37] Within 14 days of this determination, Moore Decorating must pay Mr Euston \$500.00 as payment of the penalty imposed for its failure to have an employment agreement.

Costs

[38] Counsel for Mr Euston sought costs based on Mr Euston having incurred costs of over \$2,500.00.

[39] As Mr Euston has been successful with his claim, he is entitled to a contribution to his costs. My starting point is to apply the daily tariff and then

consider whether this should be adjusted based on the principles in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*⁶, and *Davide Fagotti v. Acme & Co Ltd.*⁷

[40] My investigation of this matter took approximately one third of a day, so applying the appropriate proportion of the daily tariff of \$4,500 for the first day of an investigation meeting, the initial amount for costs is \$1,500.00.

[41] However given the work that Mr Euston's counsel put into this matter I am prepared to apply an uplift to the daily tariff of \$750.00.

[42] Mr Euston is also entitled to be paid the filing fee of \$71.56.

[43] Therefore, within 14 days of this determination, Moore Decorating must pay Mr Euston \$2,250.00, plus \$71.56, as a contribution to the costs he has incurred in this matter.

Peter van Keulen
Member of the Employment Relations Authority

⁶ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

⁷ *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135.