

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 333
3085312

BETWEEN	SCOTT LEITH LLOYD Applicant
AND	P J VAPES LIMITED First Respondent
AND	PAUL JOFFRE FORSTER Second Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person
No appearance by respondents

Investigation Meeting: 20 August 2020 at Napier

Date of Determination: 24 August 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Scott Lloyd, claims he was unjustifiably dismissed, albeit constructively. He also seeks the payment of outstanding wages and the repayment of two loans.

[2] The respondents' position is unknown as their participation has been limited to one telephone conversation many months ago in which Mr Forster advised he intended defending the claims and would file a belated statement in reply. That did not occur and there has been no response to further correspondence. The lack of participation does, however, raise the question of whether or not I should proceed.

[3] The first respondent, P J Vapes Limited (PJ), is a company. Companies are required to have an address for service.¹ PJ's is a storage facility which, after delivery of various documents pertaining to the claim, the operator chose to return.

[4] That does not, however, convince me service has not been properly effected. A Company is required to retain an effective address for service. While the documents return suggests the registered address is not effective that is the company's problem and does not mean they have not been received there. Indeed, the way some have been returned confirms delivery did occur.

[5] In any event, and for the following reasons, I do not consider questions over service on the first respondent prevents the matter proceeding. The second respondent, Paul Forster, is PJ's sole director and majority shareholder. As with a company a director is required to maintain an address at which documents can be served.² Mr Forster's is 159 Kennedy Road, Marewa, Napier.

[6] All relevant documents have been served at that address with their receipt being confirmed. I am therefore satisfied Mr Forster has been properly served. As he is the personification of the company and given the telephone conversation referred to in [2], I conclude the company is, by default, also aware of the application and the Authority's requirements regarding its advancement. Mr Forster has also been cautioned about the consequences of non-participation

[7] The respondents' failure to participate means I know of no reason why Mr Lloyd should not have his claim heard and determined.

Background

[8] Mr Lloyd and Mr Forster were once friends. Mr Lloyd began performing some work for Mr Forster while the latter set up his business, PJ, in the second quarter of 2019. Mr Lloyd accepts he did this voluntarily during a seasonal shutdown from his normal job in a freezing works. He states that during that voluntary period Mr Forster offered him a job in a supervisory/managerial capacity.

¹ Section 192(1) of the Companies Act 1993

² Section 387A(1)(b) of the Companies Act 1993

[9] Mr Lloyd accepted and the terms of his engagement were confirmed in a written employment agreement. Further confirmation of the employment also exists through Mr Lloyd's evidence, which I accept, his bank records and various texts.

[10] It would be fair to say the business struggled and over the first few months Mr Lloyd's pay was both erratic and deficient. He initially accepted the situation hoping things would improve but having struggled to meet his personal commitments decided he had to raise the issue with Mr Forster. He did so on 15 September 2019 and was accompanied by a friend. He says Mr Forster's response was *erratic* and Mr Forster fixated on a position of *if I can go without pay why can't you*. The friend gave evidence she explained to Mr Forster the difference was that Mr Lloyd was an employee whilst Mr Forster was not and the conversation concluded with Mr Forster advising he would *get it sorted*.

[11] From that point some regularity returned to the frequency of payments but the amounts remained variable. The arrears were not addressed and there were additional deficiencies.

[12] It would be fair to say this caused the relationship between Messrs Lloyd and Forster to deteriorate with the situation escalating when Mr Lloyd, who lived with his parents, raised with them the issue of his board and sought a reduction. That led to queries from Mr Lloyd's father about why. Once the situation was explained Mr Lloyd's father started making inquiries of Mr Forster. As the witnesses put it, it was then things really turned nasty.

[13] In early November Mr Forster sent a text to Mr Lloyd advising he *take a week off* and stating Mr Forster would do likewise. Mr Lloyd did so and travelled to Palmerston North but Mr Forster immediately sought the return of Mr Lloyd's business keys. He then chose to try to enforce the request by visiting Mr Lloyd's parents' home late one night accompanied by what the father described as *undesirable elements*. That led to Mr Lloyd senior seeking a trespass order against Mr Forster. The friend did likewise.

[14] From there the relationship quickly deteriorated with Mr Forster sending threatening texts sent to Mr Lloyd, his father and the friend. Disparaging texts were also sent to others. That led to the Police advising Mr Lloyd he should not, for reasons of his own safety, return to work. He didn't.

[15] As if things were not bad enough there is evidence Mr Forster then engaged in a prolonged attack via social media aimed at denigrating both Mr Lloyd and others associated with him. This eventually resulted in a comprehensive restraining order being issued by the District Court against Mr Forster which totally precludes his having any interaction with or about Mr Lloyd.

Discussion

[16] At the end of the investigation I gave an oral indication of my conclusions and the reasons for them. Having reviewed the evidence I have had no reason to alter that preliminary view.

Dismissal

[17] Mr Lloyd is claiming he was constructively dismissed and attributes his departure to two things: PJ's failure to pay correct wages and Mr Forster's actions as the employment was nearing its end.

[18] In *Wellington Clerical Workers Union v Greenwich*³ the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[19] While a simplistic summary of more complex law, the underlying assumption is the employer's actions or words amounted to a breach which induced a subsequently proffered resignation. It is for the applicant to convince me that is the case.

[20] There must also be a causal link between the employer's conduct and the tendering of the resignation⁴ and the possibility of resignation should be foreseeable.⁵

[21] Turning to the reasons tendered by Mr Lloyd. The claim wage payments were both inconsistent and deficient was supported with the evidence of all three of Mr Lloyd's witnesses. All three also spoke of discussions they had with Mr Forster about the issue. Perhaps more important is the documentary evidence which includes

³ (1983) ERNZ Sel Cas 95; [1983] ACJ 965

⁴ *Z v A* [1993] 2 ERNZ 469

⁵ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

texts from Mr Forster conceding the issue and extracts from Mr Lloyd's bank statements which evidence its extent. I accept the claim.

[22] At its simplest employment is an exchange of labour for remuneration. PJ's failure to provide its consideration, the remuneration, is, in my view, a fundamental breach which warrants the response of resignation once concerns had been raised but not addressed. That the response of resignation was foreseeable is also established if only as a result of Mr Lloyd's representations to Mr Forster about the problems he was facing as a result of inadequate remuneration. This alone would have established there was a constructive dismissal but here is then the second claim.

[23] That claim is Mr Forster's behaviour in the employments final days was such Mr Lloyd could no longer return and consider himself safe. The texts from Mr Forster are, in my view, disturbing with the inclusion of threats along with other forms of intimidation. I conclude they also support a conclusion ongoing employment was no longer tenable and that was also the conclusion the Police reached. Add to that the fact the texts include notice Mr Lloyd would, if he returned, be unilaterally demoted from manager to *shop employee*. That constitutes a further breach.

[24] For the above reasons I conclude Mr Lloyd has established he was constructively dismissed given multiple serious breaches by Mr Forster in his capacity of director and owner of PJ.

[25] Once the fact of dismissal is established the onus moves to the respondent(s) to justify the dismissal. Their absence means there is no justification and the evidence I have, both oral and documentary, leaves me doubting one is even possible. The dismissal is unjustified which raises the issue of remedies. Mr Lloyd seeks lost wages and compensation for hurt and humiliation.

[26] When Mr Lloyd did ultimately obtain work it was as the owner of his own business conducting a similar operation to that of PJ. This venture did not commence for six months with Mr Lloyd feeling constrained by a non-competition clause in the employment agreement he had with PJ and his conclusion a breach would exacerbate an already tenuous situation with respect to Mr Forster's conduct.

[27] In the interim he was registered with WINZ which forced him to seek employment but with this he was unsuccessful. He attributes this in large part to a smear campaign Mr Forster was conducting via social media along with other means.

[28] Section 128(2) of the Employment Relations Act 2000 (the Act) requires the payment of three months wages or the actual loss, whichever is the lesser. That said s 128(3) of the Act then provides discretion to award a greater sum.

[29] The effect of these sections (and their predecessors) has been discussed at some length with the Employment Court having gone so far as to suggest *compensation for pecuniary losses was to be ordinarily addressed on a “full” basis* [and] ... *His broad position was that full compensation should be awarded unless there was a good reason to the contrary.* These are the words the Court of Appeal used in *Telecom New Zealand Ltd v Nutter*⁶ to describe the Employment Court’s earlier conclusion in *Trotter v Telecom Corp of NZ Ltd*.⁷

[30] While not wholeheartedly endorsing this approach the Court of Appeal did not say it was wrong – the issue was one of discretion. In this instance I consider it appropriate I exercise that discretion and award the wage loss in full. This is because the evidence satisfies me the loss was occasioned by Mr Lloyd’s unjustified dismissal and its length the result of his contractual obligations to PJ along with continued wrong doing by Mr Forster. Six months wages is \$20,800 gross which is payable.

[31] Turning to compensation for hurt and humiliation. While not quantified Mr Lloyd supported his claim with compelling evidence of the hurt he felt. He spoke of anxiety, uncertainty and depression which caused him to seek professional help and become reclusive. He also spoke of the debilitating effect of ongoing direct attacks via social media along with further impairment caused via messages sent, and comments made, to others. His evidence was supported by that of his supporters.

[32] Having weighed the evidence I consider a significant sum is warranted and having considered recent awards and trends conclude \$20,000 appropriate and there is no evidence of contribution which might reduce that award.⁸

Unpaid Wages

[33] Mr Lloyd claims that while working he was underpaid by \$8,823.90 net plus holiday pay. While he accepts this is an estimate he gave evidence supporting his

⁶ *Telecom New Zealand Ltd v Nutter* [2004] NZCA 154; [2004] 1 ERNZ 315 at [77]

⁷ *Trotter v Telecom Corp of NZ* [1993] 2 ERNZ 659 at 693

⁸ Requirement I consider contribution in accordance with s 124 of the Employment Relations Act 2000

calculation and its likely veracity. Mr Lloyd can also evidence discussion about the issue with Mr Forster and requests for clarification about amounts.

[34] In such circumstances s 132 of the Act allows me to accept the claim as quantified by the applicant. I will order payment accordingly.

[35] Turning to the claim against Mr Forster personally. His identification as a respondent was expressed as being for the purpose of transferring liability in the event PJ fails to pay.⁹

[36] The ability to transfer liability to a person is limited to wages and according to s 142Y of the Act it must be established that individual is a *person involved*. That Mr Forster is a person involved is clear. He was, and remains, PJ's sole director. He was therefore an officer to whom responsibility can be transferred under s 142W(2).¹⁰

[37] To that I add the fact the evidence shows it was he who was PJ's decision maker and who organised payment of the wages Mr Lloyd did receive. It follows he must be considered to have been involved by virtue of ss142W(1)(a) and (c).

[38] With respect to the issue of transferring liability for unpaid wages to a director I note there is a precondition and that is the company has either failed or is unable to pay. Here I note ample evidence suggesting the company is impecunious and it is on the verge of being removed from the companies register. While the evidence therefore suggests non-payment is a distinct possibility, it is yet to occur. That said my conclusion Mr Forster is a person involved means I accept the application responsibility transfer should PJ fail to pay by the date ordered.

Loans

[39] There are two loans Mr Lloyd seeks the repayment of. The first, in the amount of \$515 was made prior to the employment commencing. It was to cover the cost of materials required for the production of product and which PJ was unable to afford at the time. That the payment was made is evidenced by bank statements but Mr Lloyd also accepts this occurred prior to the offer of employment.

⁹ Section 142Y of the Employment Relations Act 2000

¹⁰ Section 142W(3)(a) of the Employment Relations Act 2000

[40] It follows this arrangement cannot have arisen from the employment relationship and its resolution must therefore fall outside the Authority's jurisdiction. I take this claim no further.

[41] The second loan, for \$267.78, was to cover the cost of website maintenance which, again, PJ could not cover. It occurred after the employment commenced and was again evidenced by bank statements and texts between Messrs Lloyd and Forster at the time it was arranged.

[42] The evidence is PJ was in some difficulty and the website was crucial to its revenue flow. Its failure meant no money and, from Mr Lloyd's perspective, even less chance his pay issues would be addressed. He therefore offered to pay and Mr Forster accepted stating he would repay the following Monday. That didn't occur.

[43] I am satisfied the loan was made and it resulted from the employment. I am also satisfied it was not repaid as promised meaning the money remains recoverable.

Costs

[44] Costs are also sought but as Mr Lloyd was self-represented these are limited to reimbursement of the Authority's filing fee. That is payable given his success.

Conclusion and Orders

[45] For the above reasons I conclude Mr Lloyd was, as claimed, unjustifiably dismissed. I also accept he is due unpaid wages and there is a recoverable debt. As a result I make the following orders:

- a. The first respondent, P J Vapes Limited, is to pay the applicant, Scott Lloyd:
 - i. \$20,800.00 (twenty thousand, eight hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
 - ii. A further \$20,000.00 (twenty thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and

- iii. A further \$9,529.81 (nine thousand, five hundred and twenty nine dollars and eighty one cents) net being outstanding wages and holiday pay; and
 - iv. A further \$267.78 (two hundred and sixty seven dollars and seventy eight cents) being repayment of further money due to Mr Lloyd; and
 - v. A further \$71.56 (seventy one dollars and fifty six cents) being a contribution toward costs.
- b. The amount ordered in paragraph 45(a)(iii) is net so PAYE is payable. That amount should be calculated by PJ and payment then made to the Inland Revenue Department.
 - c. The payments specified in paragraphs 45(a) and 45(b) are to be made no later than 4.00pm Monday 7 September 2020; and
 - d. Should P J Vapes Limited fail to make the payments in paragraph 45(a)(iii) and 45(b) by the ordered time Mr Forster shall become personally liable pursuant to ss142W and 142Y of the Act and payment is to be made no later than 4.00pm Monday 14 September 2020.

[46] In closing I caution the respondents that failure to comply with the above orders may result in further consequences. Should such a failure be pursued in the Employment Court¹¹ they potentially include the imposition of fines, the sequestration of property and/or imprisonment in Mr Forster's case. Conversely a certificate of determination may be obtained and the matter pursued in the District Court which might lead to liquidation of the company and/or bankruptcy for Mr Forster.¹²

Michael Loftus
Member of the Employment Relations Authority

¹¹ Sections 139 and 140 of the Employment Relations Act 2000

¹² *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC41 at [42] and *Broeks v Ross EmpC* Auckland AC36A/09, 11 November 2009 at [5]