

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
OTAUTAHI ROHE**

[2021] NZERA 558  
3140443

BETWEEN      STUART KENNETH HANDLEY  
Applicant  
  
AND              SPOTLESS FACILITY SERVICES (NZ)  
LIMITED  
Respondent

Member of Authority:      David G Beck  
  
Representatives:              Applicant in person  
   Kirsti Laird, counsel for the Respondent  
  
Investigation Meeting:      4 November 2021 in Christchurch  
  
Submissions Received:      6 November 2021 from the Applicant  
   26 November 2021 from the Respondent  
  
Date of Determination:      15 December 2021

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**DETERMINATION OF THE AUTHORITY**

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**The Employment Relationship Problem**

[1]      Stuart Handley claims he has been unjustifiably disadvantaged by his employer's inaction or omission to recognise and appropriately remunerate him for work he undertakes outside the scope of his employment agreement and role description.

[2]      By contrast, Spotless Facility Services Limited (Spotless) contend that Mr Handley is appropriately remunerated for the additional duties he agreed to undertake, that the concerns

he has raised have been appropriately addressed, and that he has not been unjustifiably disadvantaged.

[3] The parties were unable to resolve their differences in mediation. Mr Handley has asked the Authority to resolve matters by finding that he was unjustifiably disadvantaged and granting him lost wages and compensation.

### **The Authority's Investigation**

[4] The investigation took until mid-afternoon in Christchurch and I considered evidence 'in person' from Stuart Handley, his current manager Kevan Sparey, his former manager, Shane Austin and Sonya McIsaac, Human Resources Partner (by tele-visual link).

[5] I received helpful submissions and additional documentation from both parties following the investigation meeting. I have carefully considered the information provided and submissions. As permitted by s 174E of the Act I have not set out a full record of every event or matter in dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of the applicant's claims. I also signal that in view of the identified issues, the fact that the parties are in an existing employment relationship, and that Mr Handley is representing himself, I will consider the discretion the Authority has under s 160(3) of the Act to not be bound to treat this as a matter as described by the parties. However, I made it clear at the outset of the investigation that the Authority has no discretion to alter or fix Mr Handley's salary rate.

### **Issues**

[6] The issues I have to resolve are:

- i. Are the additional tasks Mr Handley has agreed to undertake outside the reasonable contemplation of his role description?
- ii. If so, has Mr Handley been disadvantaged by the manner in which Spotless addressed his concern that he was not being adequately

remunerated for the additional work he voluntarily has agreed to undertake?

- iii. If an unjustified disadvantage claim is established what remedies if any, should be awarded and should they be reduced by Mr Main's contribution, if any, to the situation that gave rise to his personal grievance?
- iv. An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[7] Spotless Facilities Services (NZ) Limited (Spotless) is part of the Downer group of companies that provides assistance to various organisations in managing and maintaining their facilities.

[8] Mr Handley commenced employment with Spotless on 6 December 2017. Prior to commencing employment Mr Handley signed an individual employment agreement on 27 November 2017 with a second schedule describing his position description as a "Document Destruction Handler" located at the New Zealand Defence Force's Burnham Military Camp, Christchurch, and reporting to the Health and Safety Compliance Officer. The detailed position description expounds at length the person requirements of the position and generalised employer expectations but it is scant on describing the actual duties involved beyond saying this role:

.... entails working unsupervised, or as part of a team, to deliver a high quality service. You will be responsible for the Management of the Document Destruction process for our Client. Shredder Machinery is first class and is operated within a controlled environment, in which the role holder will be responsible for. The position therefore requires an individual with the willingness to work flexible hours and the ability to manage their own time, and the time of others, in order to meet deadlines. The role is hands-on and requires you to perform a number of physical activities including lifting, bending, standing for extended periods, towing trailers, communicating with both Cliental & Staff.

[9] Further, tucked away under the heading “Key Result Area” in the position description is:

The job holder is expected to perform other duties, as assigned by your manager, that can be reasonably regarded as related to the role and which can be reasonably expected to be within the experience and capabilities of the position holder.

[10] Mr Handley recalls negotiating a starting salary of \$23.50 per hour that he says was a compromise of his expectations, but he says he was assured by Shane Austin, then Southern Facilities Manager, that his remuneration would be reviewed after twelve months had expired. The hours of work are described as between 0700 and 1900 Monday to Sunday and should “not normally exceed on average 40 hours per week”. Mr Handley’s signature page of the employment agreement specifies a minimum number of hours to 32 and he is categorised as “Permanent Part Time”.

[11] Mr Handley disclosed an email of 17 October 2019 to him from David Boyer, then Spotless’ Safety and Compliance Coordinator, indicating:

Shane has also authorised that I can go to 23.50 per hr as an offer to you and that would be set for the next 12 months and we could look at reviewing it after that as that is the way the pays are structured within Spotless Services Limited.

[12] Mr Handley says it soon became apparent that document destruction was not sufficient to keep him busy and he willingly agreed to take on building warrant of fitness checks in January 2018, and then soon thereafter responsibility for completing sub-contractors site inductions and, then in mid – 2018, thermal imaging work. Mr Handley says he assented to additional tasks to demonstrate his capabilities and essentially support his view that he was deserving of a higher hourly rate once it got reviewed after twelve months.

[13] By way of a letter of 8 August 2018 to Mr Handley from Spotless’ General Manager Defence, Claire Hanrahan, it was communicated that an “Annual Remuneration Review” decision had been made to increase Mr Handley’s hourly rate by .29c backdated to the first pay period of July 2018. Whilst I observe that no performance assessment or individual

consultation was undertaken, and no supporting documentation was disclosed, the letter claimed that the review had "... taken into consideration your current remuneration as compared to your peers, your individual contribution over the past year and recent overall Company performance".

[14] Mr Handley says the review he thought was due in December 2018 was not undertaken and his manager, Mr Austin, left Spotless in early 2019. Mr Handley says as his manager appeared pre-occupied he did not approach him with his concerns. Around the same time, Mr Handley added asbestos checking duties to his tasks.

[15] Mr Austin recalls Mr Handley seeking a higher starting rate than that on offer and him get approval for what he said was "above Spotless' going rate" (\$23.50 per hour). Mr Austin was unable to recall specifically what assurances he gave Mr Handley about his pay being reviewed when he recruited him beyond what he says all new employees were told about Spotless carrying out an "annual pay review".

[16] Mr Austin recalled that at the time Mr Handley was appointed there was not enough document destruction work to fill his four days of employment but it was anticipated (wrongly it turned out) that this work would increase in the short term. Mr Austin, in an email to Mr Handley of 14 June 2021, says "it became apparent that Stuart had capacity and the skill set to undertake additional tasks as document destruction did not require the full 4 days". I observe that it was not entirely clear whether Spotless apprised Mr Handley of the latter premise at the time he was interviewed – I am inclined to think they did not. Mr Austin said he initiated the discussion with Mr Handley that led to him taking on additional tasks that Mr Austin says Mr Handley willingly and uncomplainingly took on.

[17] A new manager commenced in March 2019 (Hannah) and in mid – August 2019 Mr Handley recalled meeting Hannah to discuss his concerns. Mr Handley recalls this conversation included Hannah presenting him with an unsigned employment agreement she had found in his personal file (not produced) and saying his new tasks were incorporated in it. Mr Handley says Hannah appeared supportive of his concerns and had accepted document

destruction was only 20% of his work tasks undertaken at the time. However Mr Handley says Hannah indicated she could not do anything for him but was aware of that a head office salary review was due.

[18] Mr Handley resolved to formalise his concerns and, by letter of 24 August 2019 that he handed to Hannah, he set out his additional duties and work history including his expectation of a specific pay review Mr Austin had indicated would happen. Ms McIssac indicated, when she reviewed Mr Handley's file, that she could not locate Mr Handley's letter of 24 August 2019.

[19] Mr Handley indicated that due to a health issue he experienced around late August 2019 he did not promptly focus on following up his letter until he met Hannah on 17 October 2019. At this meeting, Mr Handley says he was assured Hannah would investigate his situation.

[20] In the interim, by way of a letter dated October 2019 over the signature of Claire Hanrahan, now National Manager – Defence, Spotless communicated to Mr Handley a "Remuneration Review". The letter indicated that as Spotless had integrated its business with Downer the annual remuneration review would move from July to October, and that to avoid disadvantage Mr Handley's remuneration increase was pro-rated over a 15 month period. The result being Mr Handley's hourly rate was increased from \$23.79 to \$24.68 per hour. No basis for the increase was disclosed.

[21] Mr Handley says he heard nothing more until early March 2020 when Hannah advised via a third party that he would not be paid for his additional tasks as they were outside his job description.

[22] Mr Handley says the Covid lockdown (March to May 2020) then took his focus off pay concerns and then Hannah left Spotless in May 2020.

[23] Mr Handley then recalls giving Claire Hanrahan a letter of 4 August 2020 headed “Request for Salary Increase” in which, after politely backgrounding issues, he asks for a meeting:

... not to seek remuneration above what would be expected for this level of employment, but to simply be paid for the work I have given to Spotless, above and beyond what is defined within my employment contract over the last few years and into the future, remembering I signed the is employment contract not knowing that extra, above and beyond work, would be handed to me.

[24] I was not provided with a letter from Spotless that acknowledging Mr Handley’s 24 August letter. The letter made the point that all previous correspondence had been ignored

[25] Mr Handley’s third manager, Kevan Sparey, commenced with Spotless in September 2020. Mr Sparey says he had no formal handover from the previous manager and was not apprised of Mr Handley’s concerns about recognition of his workload. Mr Sparey recalls Mr Handley discussing his issues in early November and responding he would have to involve management. Mr Handley then emailed Mr Sparey a letter of 19 November 2020 headed “Re:Request to be paid for work carried out outside my employment contract” setting out background and his current duties noting that security/induction administration tasks took up most of his time in a 36 hours/4 day week. Mr Sparey also recalled removing and reassigning elsewhere, thermal imaging work and asbestos checking from Mr Handley shortly after he commenced, but made the point that no hours were reduced and Mr Handley did not object. Mr Sparey suggested the unilateral removal of tasks was “consistent with the general flexibility regarding duties in his contract”. Mr Sparey acknowledged that extra duties could only be allocated if they “can be reasonably regarded as related to his role” but that Mr Handley had an “obligation on him to perform his duties and additional tasks willingly and consistently with going the extra mile”. Mr Sparey and all Spotless witnesses stressed Mr Handley did a good job and was cooperative and flexible.

[26] A November 2020 “Remuneration Review” letter to Mr Handley indicated:

This year’s waged remuneration review takes into account the external environment we operate in, general labour market movements, and consideration of internal relativities. Within an overall annual review pool, each individual is then reviewed taking into account current remuneration, nature of work delivered, and individual performance. The result being Mr Handley’s hourly rate increased by a further 49c (to \$25.17).

[27] Mr Handley did not participate in any process of performance review and Mr Sparey indicated he was not approached about Mr Handley’s pay level or job content.

[28] Mr Sparey passed Mr Handley’s 19 November letter to his manager Margot Mortland which resulted in them both meeting with Mr Handley on 14 January 2021.

[29] At the short meeting, Mr Handley recalled explaining his concerns, Ms Mortland flagging that his role may go down to two days and at the end no agreement on the central issue for Mr Handley was reached (pay recognition of his extra tasks beyond his job description). Mr Sparey recalls Ms Mortland indicating “she felt that Stuart was adequately paid for that work” and that “his starting wage had been higher than what she expected”.

[30] The matter was then escalated to Spotless Human Resources as Mr Handley sought MBIE mediation assistance. Sonya McIsaac called Mr Handley on 16 March 2021, Mr Handley responded by email the same day appending background correspondence including his briefing for the MBIE mediation and on 18 March Ms McIsaac indicated by return email she was going to look at his concerns and needed to collect information.

### **Spotless HR review results**

[31] In a letter of 24 March 2021 headed “Concerns Raised” Ms McIsaac indicated in summary:

- It was clear Mr Handley’s “role has evolved” but he had agreed to take on extra work.

- She was unable to respond on why the first year anniversary remuneration review had not occurred as no information was on file but it had been done prior to this in July 2018 meeting any commitments made.
- No related records on file made it difficult to ascertain if Mr Handley's concerns had been responded to but she noted he received a letter each year confirming the results of a remuneration review.
- That after he had raised a concern by letter of 19 November 2020 Spotless had engaged and "shared that the company's position was that you were paid appropriately".

[32] Ms McIsaac's letter concluded:

That said, I have reviewed your remuneration in relation to complexity and scope, and also compared to similar roles across our business. On that basis, it appears that you are remunerated appropriately, and in line with internal equity, for the role that you hold. I appreciate this is not the outcome you wish to receive, however I anticipate this will now close this matter.

[33] The parties then attended an inconclusive mediation on 3 May 2021.

[34] In giving evidence on how the aforementioned review was conducted Ms McIsaac disclosed no documentation. In being asked how she went about the review Ms McIsaac indicated she discussed the role with Ms Mortland who spent two days every fortnight at the worksite but not his manager Mr Sparey. Ms McIsaac had no documentation around which positions she contrasted Mr Handley's with, conceded she did not produce an updated job description and did not interview Mr Handley about his job. When pushed on the methodology she adopted Ms McIsaac indicated "it's not rocket science" and she had personal knowledge of comparable roles. Ms McIsaac's written brief indicated a comparison table was created in relation to other roles' "complexity and scope" to ensure internal equity but this was not disclosed to Mr Handley at the time and not provided to the Authority.

[35] I found Ms McIsaac's evidence straightforward but it was clear that no follow up occurred to formalise the changes made to Mr Handley's role or explain what positions he had been compared with. I observe the tone of Ms McIsaac's correspondence, although not aggressive, does not offer any apology for the significant length of time it took to address matters and does not provide any formal appreciation or basic recognition to Mr Handley of his willingness to 'go the extra mile' for his employer.

**Issue one - were the additional tasks Mr Handley agreed to undertake outside the reasonable contemplation of his role description?**

[36] Ms Laird for Spotless did not address the above question in submissions but chose to contend that mutual agreement was present as to the changes of duties and that Mr Handley's concern was not additional duties being imposed per se but the fact he was not remunerated for such. Ms Laird asserted no obligation is owed to an employee to provide an accurate or updated job description despite Ms McIsaac conceding in evidence that this would have been a good idea.

[37] Mr Handley claimed his employment agreement had been illegally varied, that he had been misled into believing his pay would be individually assessed after twelve months, that such a review would take account of the additional duties he had agreed to take on, and that the overall manner by which he had been treated did not accord with good faith obligations owed to him.

**Finding**

[38] I find that the additional tasks Mr Handley undertook were not within the contemplation of his job description that was essentially a manual type role. The additional duties involved administration work of some complexity that could not be "reasonably regarded as related to the role" of a document destruction handler or even loosely allied to such a role. Whilst no analysis was documented by Spotless as to the breakdown of Mr

Handley's tasks, it was not challenged that the document destruction component of the role had diminished to, at best, 25% of his time spent at work.

**Issue two: has Mr Handley been disadvantaged by the manner in which Spotless addressed his concern that he was not being adequately remunerated for the additional work he voluntarily has agreed to undertake?**

[39] In addressing the above I have to first resolve the dispute of what was communicated to Mr Handley about his hourly rate review when he commenced employment. Two opposing views present:

- 1) Mr Handley's expectation was an individual pay review based essentially on his performance in the job to address his concern that his starting rate was inadequate and latterly to take account of the increasing complexity of his role.
- 2) Spotless' retrospectively expressed view that Mr Handley be treated no different to other Spotless employees and consistent with an undisclosed remuneration policy process based on the employment agreement provision and, at the time of his appointment, an undisclosed view that Mr Handley's individual straight rate was excessive.

*The agreement term*

[40] Mr Handley's employment agreement at clause 6.2 indicates:

The remuneration will be reviewed not less than once a year, in accordance with the employer's remuneration review policies and practices. There shall be no obligation on the employer to increase the employee's remuneration following such review.

[41] I observe that the first portion of the above obligation was met early by the 8 August 2018 review that led to a salary increase. One has to assume though that the second part of the obligation was met (an assessment against a policy) but no policy was disclosed to Mr Handley including assuring him his individual situation had been assessed.

## Finding

[42] By a bare minimum of the fact that a “review” was undertaken, I find that Spotless did not breach the term of Mr Handley’s employment agreement relating to an obligation to review his remuneration annually. However, I find that oral representations made to Mr Handley, more likely than not, led him to believe that something more of a bare review was promised. That was not, in the circumstances, an unreasonable expectation particularly as Mr Handley accepted the appointment after some negotiation of his starting wage and took on additional duties outside the scope of the role agreed upon, howsoever willingly. The expectation of a specific review was not unreasonable nor was a belief that it should be fairly conducted in consultation with Mr Handley and him having some input.

[43] I find Spotless has not acted in good faith in failing to promptly and fairly address Mr Handley’s legitimate concerns and expectations. Section 4(1A) of the Act is clear that the duty of good faith is “wider in scope” than the obligation to maintain trust and confidence and:

Requires the parties to an employment relationship to be active and communicative in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;<sup>1</sup>

[44] A failure to disclose relevant information is also specific breach of s 4(1A)(i) of the Act and although no penalty is sought I need to consider whether the failure to disclose to Mr Handley the basis on which his remuneration had been reviewed, including contrasting comparator groups, caused him detriment. As Judge Corkill recently indicated in *Restaurant Brands Limited v Gill*

It is well established that a breach of good faith can constitute an unjustified disadvantage. That is because the duty of good faith is a condition of employment. Further, given the breadth of the test of justification which involves an assessment of what a fair and reasonable employer could have done “in all the circumstances” at the time the dismissal or action occurred the duty of good faith may well fall for consideration as being a relevant circumstance.<sup>2</sup>

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<sup>1</sup> Section 4(1A)(b) Employment Relations Act 2000.

<sup>2</sup> *Restaurant Brands v Gill* [2021] NZEmpC 186 at [56].

[45] Further, in *Restaurant Brands* Judge Corkill noted that:

A disadvantage grievance requires an assessment of the test of justification. Thus, an applicant may need to establish a prima facie case that there was a relevant action affecting their employment to their disadvantage. The onus then lies on the employer to justify the alleged action under the s 103A test of justification.<sup>3</sup>

[46] Given an action includes an omission and I have made a finding that Spotless transgressed good faith obligations by failing to promptly address Mr Handley's legitimate expectations and, in eventually doing so, failed to properly consult and disclose documentation, I find Mr Handley has established a component of his disadvantage grievance.

[47] It falls to now consider whether Mr Handley has met the prime facie onus as to disadvantage. In the latter respect I find that a fair and reasonable employer, in all the contextual circumstances that included how the initial offer of employment was portrayed to Mr Handley, would have promptly addressed the disputed remuneration. This could have spared Mr Handley ongoing distress, loss of dignity and alienation from his employer at being treated in an exceedingly off-hand manner. Spotless had other options in the employment agreement that they overlooked such as the provision under clause 7 to consider paying a discretionary 'one off' bonus. I also find that a failure to update Mr Handley's job description was an unjustified omission that failed to appreciate the status and recognition he was seeking.

[48] I find Mr Handley has discharged the onus as to him being unjustifiably disadvantaged and as a result is entitled to consideration of remedies.

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<sup>3</sup> Op cit at [105].

## **What remedies should Mr Handley be awarded?**

### *Lost wages*

[49] As outlined I cannot direct Spotless to fix Mr Handley's wage rate and do not consider lost wages can be awarded.

### *Compensation for humiliation, loss of dignity and injury to feelings*

[50] I heard from Mr Handley that he otherwise enjoyed his work but that the failure over a sustained period to get Spotless to recognise his additional contribution has caused him distress and a loss of dignity. Mr Handley struck me as a decent man who placed great value on being treated with respect, integrity and fairness. For a number of unaccountable reasons his employer has failed to fulfil these ideals and by contrast from Mr Handley has been met with dignity and forbearance. All Spotless witnesses spoke highly of Mr Handley's work ethic.

[51] I found Mr Handley to be a credible witness who has understandably found it hard to move on from a keen sense of unfairness but whilst his degree of stress is not insignificant it is not debilitating or manifesting itself in relationship breakdowns with colleagues.

[52] Having carefully considered Mr Handley's evidence, I am convinced that the impact of the neglectful approach to him was not transitory and that he, at the time, suffered loss of dignity, humiliation and injury to feelings caused by the manner in which his additional contributions have been left unacknowledged.

[53] In considering analogous cases of both the Authority and the Courts that discuss compensatory issues to be assessed, I consider that Mr Handley's level of distress at the impact of Spotless' neglect and indifference warrants a moderate amount of compensation. I fix that amount at \$4,500 pursuant to section 123(1)(c)(i) of the Act.

## **Contribution**

[54] Section 124 of the Act indicates that I must consider the extent to which, if at all, Mr Handley's actions contributed to the situation that gave rise to his personal grievance and assess whether any calculated remedy should be reduced. In these circumstances, I can find no cogent reason to reduce the remedy awarded.

## **Outcome**

[55] Overall I have found that:

- a. Stuart Handley was unjustifiably disadvantaged in his employment and his employer breached good faith obligations owed to him.
- b. Spotless Facility Services Limited must pay Stuart Handley the sum of \$4,500 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of this determination being issued.

## **Costs**

[56] Costs are at the discretion of the Authority and here Mr Handley represented himself during the investigation meeting and the preparation for such so no costs issues arise but I find Mr Handley is entitled to recover his application fee from Spotless Facility Services Limited in the amount of \$71.56.

David G Beck  
Member of the Employment Relations Authority