

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 216
3083372

BETWEEN STEPHEN BRYANT
 Applicant

AND INFINITE BUILDING
 SOLUTIONS LIMITED
 First Respondent

AND RICHARD BURNS
 Second Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Megan Williams, advocate for the Applicant
 Michael McAleer, advocate for the first and second
 Respondents (not present at the investigation meeting)

Investigation Meeting: 7 May 2021 at Napier

Submissions [and further At the investigation meeting
Information] Received:

Date of Determination: 20 May 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Stephen Bryant, claims he was unjustifiably dismissed by Infinite Building Solutions Limited (IBS) on 23 April 2019. He also says there had been a breach of his employment agreement which provided for a work week of 44 hours but his hours often fell short of that. He says he is owed unpaid wages. Mr Bryant also claims unpaid holidays and statutory days together with a sum of \$10,000 reflecting hurt and humiliation he says he has suffered.

[2] IBS's view was that Mr Bryant had not been dismissed, but had abandoned his employment. It says he did this following an absence from work on ACC. IBS said Mr Bryant had been asked to keep in touch and update them regarding his recovery progress and that when he returned to work he was confrontational and aggressive. IBS says he then left, never to return.

Absence of the respondents

[3] IBS and Mr Burns did not attend the investigation meeting. This was no surprise as both IBS and Mr Burns had advised the Authority, through Mr McAleer, that they would not be present. Indeed, the Authority was advised that the company was to cease trading and was not in a position to meet any award made against it in any event. This raised the question of whether or not the investigation meeting should proceed.

[4] That IBS and Mr Burns were aware of the investigation meeting is not in doubt. Mr McAleer confirmed his clients were aware of the meeting but had made a conscious decision not to attend.

[5] I consider the decision to continue with the investigation was appropriate, because IBS was not in liquidation, and because Mr Burns was also named in the Statement of Problem filed by Mr Bryant as a respondent.

Background

[6] Mr Bryant commenced employment with IBS in October 2018 as a plasterer. His employment agreement provided for a minimum of 44 hours of work a week. I was told that at the time he started his job Mr Bryant's wife was ill and going through chemotherapy. Accordingly the parties agreed that initially he would not be required to be present for the 44 hours.

[7] That changed sometime after but IBS did not appear to be in a position to comply with the employment agreement.

[8] When Mr Bryant returned to work following his recovery and just prior to Easter 2019, he was asked to go to Mr Burns' office with another staff member, Mr Russ. He had no idea what the meeting was to be about, and assumed it would be nothing other than a normal work meeting. Instead however, Mr Burns said to him that there had been complaints and he wanted

the return of the company's keys, fuel card and invoice book. Mr Burns then said: *"I'm sick of you. I don't want you here anymore. Go."*

[9] Mr Bryant said he then asked for confirmation that he was going to be paid his statutory holidays for Easter. He was worried about money. He told Mr Burns he was going to see his lawyer and says Mr Burns responded saying *"Don't threaten me, do whatever you want, I don't want you here. You're fired."*

[10] It is trite law to say that once the fact of a dismissal has been established, the onus of justifying it falls to the employer party. In this case, Mr Bryant's evidence is that there was a clear sending away and having had the opportunity to test the evidence I accept it. Because neither IBS nor Mr Burns were present, it follows there has been no justification of the dismissal.

[11] Mr Bryant gave compelling evidence as to the hurt and humiliation he suffered as a result of the dismissal. He felt it had affected his reputation badly and caused him considerable stress and worry in respect of his finances. He says his confidence struggled and he found the whole episode extremely embarrassing. His evidence supports his claim.

[12] He claimed payment for Easter Monday and Good Friday (\$404.80), payment for his contracted hours, which were short by on average 25 hours a week (\$5,681), holiday pay of eight per cent on the \$5,681 (\$454.48). I was told that Mr Burns was a person involved in a breach in terms of s 142W and 142Y of the Employment Relations Act 2000. I also heard evidence regarding Mr Burns' involvement in not paying the contracted hours.

[13] I was asked, based on the evidence before me and on IBS's admission that the company was unable to pay any awards which may be made against it, to find that Mr Burns, as a person involved in a breach, be held liable in respect of minimum entitlements. I was asked to give leave to recover arrears in wages from Mr Burns. Leave was given on the basis that it was clear that Mr Burns as a director of IBS was a person involved in a breach in terms of s 142W of the Employment Relations Act 2000. The evidence showed he had at least aided, abetted, counselled or procured the underpayment of the wages provided for in the employment agreement. Further, there had already been an admission that IBS would be unable to pay the arrears in wages or other moneys.

Conclusion and orders

[14] IBS is ordered to pay Mr Bryant within 14 days, the following:

- (a) The sum of \$10,000 as a compensatory payment under s 123(1)(c)(i) of the Employment Relations Act 2000;
- (b) The sum of \$404.80 as unpaid statutory holidays;
- (c) \$454.48 on account of holiday pay;
- (d) \$5,681 on account of unpaid wages.

[15] Should, as I have been told it will, IBS fail to make payment, I order Mr Burns, as a person involved in the breach within the meaning of section 142W of the act, to pay the following by no later than the 10th of June 2021:

- (a) The sum of \$404.80 on account of unpaid statutory holidays;
- (b) The sum of \$454.48 on account of unpaid holiday pay;
- (c) The sum of \$5,681 on account of unpaid wages.

Costs

[16] The respondents are jointly and severally liable for a payment of \$3,000 towards the costs incurred by Mr Bryant. Payment of costs is also to be made within 14 days.

Geoff O’Sullivan
Member of the Employment Relations Authority