

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 547
3141801

BETWEEN	MUSTAFA HUSSAINI Applicant
AND	ASIA PACIFIC GROUP LIMITED in liquidation Respondent

Member of Authority: Antoinette Baker

Representatives: Dave Cain, advocate for the Applicant
Melanie Smith (Tatana) for the Respondent

Investigation Meeting: 10 August 2022

Submissions received: On the day

Determination: 26 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Hussaini was employed by the respondent (APG) from March 2020 to 31 December 2020 when he was dismissed. He claims the dismissal was unjustified. He also says

APG made unauthorised deductions from his final pay and seeks lost wages and interest, compensation, costs and penalties.

[2] APG denies the claim.

The Authority's investigation

[3] The Authority held an investigation meeting. Questions were asked of Mr Hussaini and of Ms Smith the co-director of APG. The Authority heard submissions.

[4] After the investigation meeting APG was liquidated on 23 September 2022. In a letter to the applicant's representative dated 17 October 2022 Ms Mandy Savin, counsel for the Official Assignee Liquidator (the liquidator) communicated the liquidator's approval to continue these proceedings pursuant to s248(1)(c) Companies Act 1993. This allows me to complete this determination.

[5] As permitted by s174E of the Employment Relations Act 2000 (the Act) this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It does not record all evidence and submissions received.

The issues

[6] The issues are:

- (a) Was Mr Hussaini unjustifiably dismissed?
- (b) If so, what remedies should be awarded for:
 - i. loss of earnings under s123(1)(b) of the Act
 - ii. compensation under s123(1)(c)(i) of the Act
- (c) Did APG breach the employment agreement by not giving a weeks' notice at termination and if so, what is the remedy, and should a penalty and interest be awarded?

- (d) Did APG breach the Wages Protection Act 1983 by deducting from Mr Hussaini's final pay without agreement and if so, what is the remedy, and should a penalty and interest be awarded?
- (e) If compensation is awarded should this be reduced under s124 of the Act for blameworthy conduct by Mr Hussaini?
- (f) Should a penalty be awarded for a breach of good faith under s4 of the Act?
- (g) Should either party contribute to the costs of representation of the other?

Background

[7] Mr Hussaini was employed by APG as an asbestos removal labourer in about March 2020. He completed government funded training before commencing this work. He was employed for a minimum of 30 hours per week. APG would place him at their clients' sites to complete work.

[8] On 15 October 2020 Ms Smith sent two communications to Mr Hussaini. She sent him a forwarded email from a client saying he was late to site and the client did not want him back. Ms Smith also texted Mr Hussaini saying:

Hi Mustafa you and I will need to have a sit down and sort what happens from here. I have had an email from [client] not wanting you back. Complaint at [another client] for your health and safety practices. Complaints from [Wellington client] re health and safety and not wanting to work at heights ...” (15 October email).

[9] There was no further written communication to Mr Hussaini from APG about these issues until after Mr Hussaini was dismissed on 31 December 2020.

[10] During the APG's Christmas close-down in 2020 Mr Hussaini rang Ms Smith on 31 December 2020. There is a dispute about the reason for the call. Mr Hussaini's evidence is

that he was distressed about having no money at Christmas and was making the call to Ms Smith on 31 December 2020 to sort this out. Ms Smith says Ms Hussaini did not follow the process to obtain financial government assistance for the shutdown period and that the phone call was about him saying he could not meet with her that day to discuss issues with his performance.

[11] In the phone call on 31 December 2020 Ms Smith dismissed Mr Hussaini without notice.

[12] On 7 January 2021 Mr Hussaini through his representative raised a personal grievance for unjustified dismissal including a claim that his final pay was short.

[13] Ms Smith for APG responded to Mr Hussaini's representative in an email dated 7 January 2021.

[14] On 8 January 2021 Ms Smith emailed Mr Hussaini a termination letter dated 31 December 2020 (the termination letter). The letter included:

As discussed through the course of the last few months the following incidents have occurred as agreed by you.

[Client A] -walking through decontamination area without decontaminating risking contamination to site and work safe fine

[Client B] -leaving respiratory equipment in dirty zone and not detailing risking your own health

[Client C] -advised would not like you to return to their sites

[Client D] -advised do not want you to return to their sites

We offered you painting which you refused, we also suggested we find you alternative work to which you replied you wanted to do asbestos removal only. However, you risk

your own health and the health of others by not adhering to the guidelines, we cannot keep you in asbestos removal nor can we keep you as no client wishes to have you on their sites.

Due to the above incidents, we cannot keep you in employment and we have terminated your employment effective 31.12.2020.

Previously when we discussed your termination you had asked for a redundancy package; however, your position is not being made redundant.

Kind Regards

Melanie Tatana
Director
Asia Pacific Group

Legal framework for assessing whether a dismissal is justified

[15] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the dismissal and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[16] Under s103A(3) of the Act the following factors are considered to measure an employer's fair process leading to a decision to dismiss

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated

- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback

Was Mr Hussaini unjustifiably dismissed?

Allegations raised, opportunity to respond, genuine consideration of feedback

[17] I accept the submissions on behalf of Mr Hussaini that APG “by passed any sort of formal process”, that the defects in the process were not minor, that he was treated unfairly and that overall APG did not act the way a fair and reasonable employer could have done in the circumstances at the time.

[18] Mr Hussaini was not likely made aware of the specifics of the complaints against him beyond a few informal discussions about him doing painting work which he reasonably refused to do because that was not what he was employed to do. Mr Hussaini was not provided with any detail about APG’s concerns about his performance and he was not provided the opportunity to have support or to give feedback and have that feedback genuinely considered.

[19] Ms Smith says Mr Hussaini avoided meeting with her after the 15 October 2020 email and that it was his fault that she could not meet face to face with him to discuss the issues being raised by clients and decide what should be done about this. However, Mr Hussaini says he and Ms Smith could not get a time to meet compounded by issues of him not having transport. He says Ms Smith seemed to give up on trying to arrange the meeting and he did not understand the issues were of any importance or that they raised issues that may lead to dismissal. I prefer Mr Hussaini’s evidence. His messages support this. Ms Smith also

acknowledges there was a time of no follow up after the 15 October email. I find that period of time was from mid-October to the end of December 2020. I find it reasonable that Mr Hussaini formed a view that APG had no serious issues to follow-up with him.

[20] Ms Smith has said that Mr Hussaini received “verbal warnings” for the things he was dismissed for¹ but she gave oral evidence that she did not consider any of the client concerns were things that warranted warnings. She explained they were either things that she did not accept were a problem such as Mr Hussaini standing up for APG to those at one site who were criticising APG, or that some things could have been dealt with by providing training and support.

[21] When asked about the inconsistency in her evidence, Ms Smith said the reason to dismiss was because APG could not afford to keep paying Mr Hussaini the contractual minimum of 30 hours per week until APG found a client that would accept him. This describes a commercial situation for APG. It does not justify a dismissal that had no fair process and was not based on the decision maker’s belief that any of the concerns raised were important enough for disciplinary steps.

[22] I do not find that the defects in the procedure carried out by APG were minimal. I find the significant lack of any process resulted in Mr Hussaini being treated unfairly.

Sufficiency of investigation

[23] Ms Smith’s response to Mr Hussaini’s representative on 7 January 2021 after the grievance was raised stated that, “All clients are willing to make formal statements in regard to Health and Safety breaches on site as well as not wanting him back onsite.” The same email lists seven clients although the subsequent termination letter only referred to four clients. These written communications from Ms Smith are inconsistent with each other and

¹ APG’s 07 January 2021 email response to Mr Hussaini’s representative to the raising of personal grievance.

with Ms Smith's oral evidence in that she says that no clients wanted to provide written reasons for their concerns.

[24] Based on Ms Smith's inconsistent evidence, I find that APG could not be said to have sufficiently investigated the grounds expressed in the termination letter.

[25] I further find that Ms Smith's oral evidence that she did not consider any of the grounds stated in the termination letter to be disciplinary, supports that APG did not have substantive grounds to dismiss. It also supports Mr Hussaini's evidence that he thought any issues referred to in the 15 October 2020 email were sorted out or that he did not think they were serious.

[26] In these circumstances I find the investigation was insufficient and that the dismissal was not substantively justified.

Resources available

[27] Upon hearing from Ms Smith, I did not find her without ability. Ms Smith and Mr Hussaini confirmed the involvement of a human resources person employed by APG for a period of time. Ms Smith explained she did not agree with the advice that person gave her which was an email dated 6 October 2020 outlining steps (albeit brief) of what appear to include steps that a reasonable employer could take in raising performance concerns with an employee. Accordingly, I do not accept that APG was without access to resources to have better understood its obligations as an employer.

Third party involvement in the employment relationship

[28] I do not accept Ms Smith's submission that there was a third party with obligations in the employment relationship that formed part of the reason to dismiss or in some way

mitigated the approach she decided to take for APG. I accept that Mr Hussaini may have owed duties under a third-party agreement and that the third party may have had rights to bring an end to his employment. However, the employment relationship between APG and Mr Hussaini was terminated based on stated issues relating to performance in the employment relationship and not in relation to a different relationship.

[29] Accordingly, I do not accept that any communications APG may have had with a third party to Mr Hussaini's employment circumstances to be relevant to my investigation.

[30] In summary, based on the above I find that Mr Hussaini was unjustifiably dismissed both substantively and procedurally. I will now consider the remedies.

What is to be awarded for loss of earnings under s123(1)(b) of the Act?

[31] The summary of lost earnings submitted for Mr Hussaini represents the difference between what Mr Hussaini was earning before and after his dismissal. This calculation is supported by the New Zealand Inland Revenue (IR) earnings record. I accept that Mr Hussaini was suddenly left without employment on New Year's Eve and there would likely have been challenges securing further work to the same level of 30 hours per week at that time of the year. I also accept that Mr Hussaini mitigated his loss by securing what employment he could with another agency. While Ms Smith raised an issue about the government benefits that Mr Hussaini received, benefits are not considered in relation to a lost earnings claim. The issue raised by Ms Smith as to whether there had been an overpayment to Mr Hussaini in government benefits is not relevant to my investigation.

[32] Accordingly, I find that Mr Hussaini should be paid for the three months post termination shortfall in his earnings caused by the sudden unjustified dismissal. I accept that this payment is to be \$3,376.24 gross.

What compensation is to be awarded under s 123(1)(c)(i) of the Act?

[33] I find there was a likely adverse effect on Mr Hussaini due to the sudden and unfair nature of the dismissal. I accept that the dismissal came as a shock in the context of Mr Hussaini being stressed about finances during the Christmas break and occurred on a day that was at a celebratory time of the year. That Ms Smith then chose to blame Mr Hussaini for the dismissal on grounds that I have found were inconsistent has likely added to the hurt and humiliation that Mr Hussaini says that he felt.

[34] In these circumstances I find that an award of \$18,000.00 is appropriate compensation.

Did APG breach the employment agreement by not giving a weeks' notice at termination and if so, what is the remedy, and should a penalty be awarded?

[35] It was submitted that Mr Hussaini was short of a week's notice given the instant dismissal. I agree that a consequence of an unjustified instant dismissal would leave an employee short of wages for a period of notice. However, the final payslip appears to show payment of 8.76 days for the period 4 to 10 January 2021 referring to this as "Annual Leave." While annual leave could not be the basis to pay a final notice week of an employee's pay the APG pay records show a significant amount of annual leave hours paid in advance of entitlement. Under s 23 Holidays Act 2003 Mr Hussaini by only working a part year would have been entitled to an annual leave payment at termination of 8% of his total gross earnings less holiday pay paid in advance of entitlement. The annual leave paid in advance of entitlement appears to have well exceeded the s 23 HA entitlement.

[36] Accordingly, I consider the 8.76 days paid to Mr Hussaini at termination as "Annual Leave" is commensurate with a final week of notice pay or in reality is above what he might have expected ordinarily given the annual leave paid out to him in advance. In these circumstances I do not consider he has been unpaid for a notice period at termination that

would justify any arrears to be ordered for a week of wages. I have not then considered the claim for interest and a penalty under this heading.

Did APG breach the Wages Protection Act 1983 by deducting money from Mr Hussaini's final pay without agreement and if so, what is the remedy, and should a penalty and or interest be awarded?

[37] It was submitted for Mr Hussaini that he was paid a shortfall of \$414.66 of the net amount he should have received according to his final payslip. During the investigation meeting Ms Smith provided a record of a payment to Mr Hussaini for \$414.66. Mr Hussaini said he was unclear what that payment was for. I find some likelihood that this amount was the short fall claimed given the exact amount matches the sum that he claims was short. Ms Smith says she made this payment to Mr Hussaini in advance of the final pay. The record provided shows it as a December 2020 withdrawal which is consistent with Ms Smith's evidence. Accordingly, I have not ordered this sum to be paid and have not considered a penalty or interest under this heading.

If compensation is awarded should this be reduced under s124 of the Act for blameworthy conduct by Mr Hussaini?

[38] Section 124 of the Act requires me to consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance. If those actions require it, I must consider whether to reduce the remedies otherwise awarded.

[39] In the circumstances as I have outlined above, I find no reason to find that Mr Hussaini contributed to the grievance that would require a reduction in the remedies I have awarded.

Should a penalty be awarded for a breach of good faith under s4 of the Act?

[40] It is submitted for Mr Hussaini that I should order penalties against APG. I have already declined above, two of the three penalties sought. I am left to consider the submission that a penalty should be ordered against APG for a breach of good faith under s4 of the Act in relation to the “unilateral decision to summarily dismiss without cause.” It is further submitted that if a penalty is to be ordered Mr Hussaini should be entitled to at least half of this sum because he has been “financially disadvantaged as a direct result of the actions/inactions of the respondent” causing him “significant hurt, frustration and financial embarrassment.”

[41] While I accept that the manner of the dismissal likely constitutes a breach of good faith by APG in that there was no clear communication about the concerns that were raised, APG is in liquidation. Any penalty awarded in this circumstance would not be a productive step to take. While Mr Hussaini seeks to have some part of any penalty paid to him, the reasons submitted to support this are those already considered as part of the remedies I have ordered under the grievance.

Should either party contribute to the costs of representation of the other?

[42] Mr Hussaini’s representative has asked that costs be reserved. This was a request made before APG was liquidated. I reserve the issue of costs. The parties are encouraged to resolve the issues of costs noting that the liquidator now controls the assets and liabilities of APG and will need to be involved in or give authorisation for any agreement reached. If costs cannot be resolved, then Mr Hussaini may lodge and serve a costs submission within 14 days from the date of this determination. APG as controlled and authorised by the liquidator will have a further 14 days from receipt of the submission to lodge and serve a reply to submission as to costs. Costs will not be considered outside of that period unless prior leave to do so is sought

and granted. The Authority usually determines costs on its' national daily rate unless circumstances require an upward or downward adjustment of the tariff.²

Summary of orders

[43] Asia Pacific Group Limited (in liquidation) is ordered to pay Mustafa Hussaini within 28 days:

- a. \$3,376.24 gross for lost earnings under s 123(1)(b) of the Act
- b. \$18,000.00 compensation under s 123(1)(c) of the Act

Antoinette Baker
Member of the Employment Relations Authority

² Please note the Authority has issued an updated Practice Note on costs, effective from 2 May 2022, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>