

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 196
3175724

BETWEEN

CORY DIXON
Applicant

AND

JOSHUA AUSTIN t/a AUSTIN
BUILDING LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Dave Cain, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 13 April 2023 at Whanganui

Submissions Received: 13 April 2023

Date of Determination: 19 April 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Cory Dixon, was employed by Joshua Austin as a Hammer Hand from 4 November 2021 through until his dismissal on 5 January 2022. Although Mr Dixon started his employment on 4 November 2021, he was not presented with an employment agreement until sometime later. Mr Dixon says he took the employment agreement home and had it checked by his parents before he signed it on 17 November 2021.

[2] Although the employment agreement contained a 90-day trial provision, the trial provision was defective and therefore ineffective because:

- (a) It did not provide for notice; and

(b) The agreement was signed after employment had already started.

[3] Almost immediately, Mr Dixon experienced issues with payment of wages. Mr Dixon's evidence was that the non-payment of wages put him in a difficult predicament financially and also caused an unjustifiable disadvantage.

[4] Mr Dixon raised his concerns a number of times with Mr Austin who appeared unsympathetic. On 5 January 2022, Mr Austin advised by text:

I fucking told u it's not on me ffs u just turn up to my house again I won't be friendly fresh books is sorting you out as of now your trial has ended.

[5] Mr Dixon regarded the text as a dismissal from his employment and indeed that was his last day of work. He says his dismissal this way was unjustified and claims the following:

- (a) \$4,000 salary plus eight percent holiday pay, which remained owing as at the date of the termination of his employment;
- (b) A sum of \$3,000 as compensation for salary loss he incurred as a result of his grievance. He was out of work from 5 January 2022 through to 25 January 2022 when he secured alternative employment;
- (c) A penalty for breaches of the Wages Protection Act 1983. This relates to Mr Austin's failure to pay Mr Dixon wages when they fell due.

[6] Mr Dixon was also concerned that it appears from records from Inland Revenue that Mr Austin may not have paid PAYE that was due whilst Mr Dixon was in Mr Austin's employ.

The Authority's investigation

[7] Mr Austin has not engaged at all in these proceedings, despite having been served a copy of the Statement of Problem and Notice of Hearing. He did not attend the investigation meeting, which raised the question of whether or not it should proceed. As a result, the investigation meeting was delayed somewhat before I decided to proceed on the basis that Mr Austin was well aware of the time and date of the investigation meeting, but for his own reasons chose not to attend.

Discussion

[8] In the absence of any contrary evidence, I accept Mr Dixon's claim for lost and unpaid wages and entitlements.

[9] I also accept Mr Dixon's evidence that Mr Austin was guilty of breaches of the Employment Relations Act 2000 and the Wages Protection Act 1983 for which Mr Dixon sought unspecified penalties. He is still owed unpaid wages.

Unjustified dismissal

[10] Mr Dixon was entitled to rely on the 5 January text as terminating his employment. The dismissal came with no engagement by Mr Austin, no justification and out of the blue. The inescapable conclusion is that Mr Austin decided to terminate Mr Dixon's employment at least in part relying on the defective 90-day trial provision contained in the employment agreement. It is clear that the dismissal was instigated by Mr Dixon's requests to be paid wages owing, in a timely manner. Mr Austin did not appear before the Authority to attempt to justify the dismissal. There is no doubt the dismissal of an employee in this way would almost certainly always be unjustified. Mr Dixon accordingly was unjustifiably dismissed. As a result he is entitled to an assessment of remedies.

Humiliation, loss of dignity, and injury to feelings

[11] Mr Dixon gave harrowing evidence as to the effect Mr Austin's treatment, and the subsequent dismissal had on him. He was left in a position where he could not pay rent to his parents. He had been saving for a new truck but instead had to use that money to pay bills and buy food and petrol. His dismissal also happened in the middle of the speedway season, which was a hobby of Mr Dixon, and in his words, he almost had to give it up. He felt depressed and humiliated and ashamed. Being a builder had been an ambition for some considerable time and he felt now that the opportunity to carry on in a building career was lost. The loss of his job caused him deep embarrassment and shame.

[12] Mr Clyde Dixon gave further evidence on the effect Mr Austin's actions had on his son. He also noted the adverse effect the dismissal had on his son's demeanour, causing him to withdraw from his friends and even from social media.

Identity of employer

[13] The employment agreement seemed to identify the employer as Austin Building Ltd. However, a search of the Companies Register did not disclose that such a company existed. The employment agreement under the heading "*Employee acknowledgement*" also provided that "*Joshua Austin offer this employment agreement to Cory Dixon*". Mr Dixon's bank

statement also showed that wage payments that were made, came from Mr Austin and not from any other entity. Accordingly, the evidence before the Authority shows that the employment relationship was between Mr Austin personally and Mr Dixon.

Conclusion and orders

[14] Mr Dixon has been unjustifiably dismissed and although he may have been disadvantaged because of the late payment of wages, it seems that the non-payment and the dismissal are inextricably linked. Accordingly, I have not given separate remedies but have taken the effect of the non-payment of wages into account when assessing non-pecuniary loss. Mr Austin is ordered to pay Mr Dixon within 28 days, the following:

- (a) Unpaid wages - \$4,000.00 gross plus eight percent holiday pay of \$320.00.
- (b) The sum of \$3,000.00 gross on account of lost wages;
- (c) The sum of \$20,000.00 without deduction for humiliation, loss of dignity and injury to feelings and;
- (d) A penalty of \$2,000.00, half of which is to be paid to Mr Dixon;
- (e) A contribution towards costs of \$1,500.00, plus the filing fee of \$71.56.

Geoff O'Sullivan
Member of the Employment Relations Authority