

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 476  
3256159

BETWEEN                      RODRIGO DO SPIRITO SANTO  
Applicant

AND                              EXQUISITE TILING HB  
LIMITED  
Respondent

Member of Authority:      Geoff O’Sullivan

Representatives:            Kim Ahern, advocate for the Applicant  
No appearance for the Respondent

Investigation Meeting:     21 June 2024 in Napier

Submissions Received:     Up to including 24 June 2024 from the Applicant  
None received from the Respondent

Determination:              8 August 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Do Spirito Santo claims when Exquisite Tiling HB Limited (Exquisite Tiling) declared him redundant, it failed to follow a fair process. Specifically, he says Exquisite Tiling did not provide a selection criteria to determine which two positions were to be made redundant, nor did they give Mr Do Spirito Santo any documentation supporting the grounds of financial distress relied on for redundancy. Further, Mr Do Spirito Santo says that when he questioned the redundancy he was immediately made to go home and was not required to work out his notice. He says also that during this period Exquisite Tiling reduced his guaranteed 45 hours under his employment agreement to 30 without his permission. He says he was therefore unjustifiably dismissed.

[2] There has been limited engagement from Exquisite Tiling although Mr Hayden van Hooff, an employee of Exquisite Tiling, filed a statement in reply on behalf of the company where he denied that the redundancy was unjustified. The documentation attached to the statement in reply stated that Exquisite Tiling had made a very hard decision to make staff redundant due to a downturn in sales and profits. It stated that a formal meeting had been held with Exquisite Tiling's manager, Logan Bergamim, to consult with employees. It also addressed the claim that Mr Do Spirito Santo was working 30 hours a week when he had been contracted to do 45 hours a week and raised an issue as to whether or not Mr Do Spirito Santo had brought his claims within 90 days.

[3] As a result of what he claimed was an unjustified dismissal, Mr Do Spirito Santo claimed compensation under s 133(1)(c)(i) of the Employment Relations Act 2000 (the Act) for hurt and humiliation in relation to the unjustified dismissal, reimbursement of lost wages and reimbursement of costs. In terms of the compensation for hurt and humiliation, he claimed a sum of \$30,000.

[4] Exquisite Tiling did not attend the investigation meeting. Despite Mr Mark Spiekerman, the Director of Exquisite Tiling, having indicated the company would provide a witness, no-one appeared. It was clear from the Authority's file that Exquisite Tiling and Mr Spiekerman were aware of the proceedings but because there was no attendance at the investigation meeting, it raised the question of whether or not I should proceed in its absence. The commencement of the investigation meeting was adjourned for 15 minutes in case Exquisite Tiling or any proposed witnesses were running late. No-one appeared and accordingly I decided to proceed on the basis that as Exquisite Tiling was well aware the investigation meeting was being held and was aware of the date and time of the investigation, it had decided not to attend for its own reasons.

[5] Mr Do Spirito Santo gave evidence to the Authority on affirmation. The following issues were identified:

- (a) Was Mr Do Spirito Santo's redundancy substantially and procedurally fair?
- (b) Was Exquisite Tiling entitled to reduce Mr Do Spirito Santo's contracted hours of 45 hours per week down to 30 on the basis it was necessary for the company to survive?

- (c) As Exquisite Tiling seems to have raised an issue as to whether or not Mr Do Spirito Santo had raised his grievances in time, were Mr Do Spirito Santo's grievances raised within the 90 day period provided for in s 114 of the Act?
- (d) If Mr Do Spirito Santo's redundancy was substantially and procedurally deficient to the extent it constituted an unjustified dismissal, what remedies if any should be awarded?

## **Background**

[6] On 31 October 2022, Mr Do Spirito Santo was invited to a meeting which he attended with one other colleague. He says they were informed that the company was on the verge of bankruptcy. Mr Do Spirito Santo said he was upset and frustrated because he was beginning to panic regarding immigration issues, having no job and having to find another sponsor. He says no other information was given to him at the meeting.

[7] On 3 November 2022, Mr Do Spirito Santo received a letter from Exquisite Tiling which amongst other things advised him that his position had been made redundant effective Friday 18 November 2022. He was told he would be paid 30 hours per week over that time without having to go to work.

[8] Mr Do Spirito Santo's employment agreement provided for 45 hours per week. As indicated above, it seems Exquisite Tiling made a unilateral decision to change the contracted hours. Generally, he would have received \$1,100.00 per week and he was short paid notice by one week, equating to \$1,100.00.

[9] In respect of hurt and humiliation, he said the day started out as a normal day going to work and then suddenly he was told he was losing his job. He felt this was unfair and questioned Exquisite Tiling as to why they chose him. As a result of this, he was taken home, lost the use of a vehicle and felt that this was a retaliatory move, although he accepted he was paid for most of the notice period albeit at a lower rate. He says he was frustrated and very worried about staying in New Zealand. He had worked hard to try to improve his skills as a tiler. He had applied for residence in New Zealand and immediately faced the prospect of trying to find new work and new sponsorship. He felt his life plan had broken and he felt lost. He had no family in New Zealand.

[10] Fortunately for Mr Do Spirito Santo he found new work by the middle of December, so lost one month's salary.

### **Analysis and conclusions**

[11] Mr Do Spirito Santo's evidence was that when he asked why he had been selected for redundancy, Exquisite Tiling's reaction was to send him home. No criteria for selection were provided.

[12] In the first brief meeting with Exquisite Tiling, he was simply told that the company was facing bankruptcy but was given no financial information. Although Exquisite Tiling's director states he injected some \$125,000 into the company, no evidence as such was provided.

[13] As a result of being taken home suddenly having questioned his selection, Mr Do Spirito Santo lost the use of the company car unexpectedly. He felt not working out his notice was punitive and further notes that in discussions with the company, no redeployment opportunities were offered despite the fact that other employees remained with the company or were moved to positions in other entities controlled by Exquisite Tiling's director.

[14] Mr Do Spirito Santo's redundancy was both substantially and procedurally unfair. No selection criteria was given to him, there was at the best very limited consultation, no information was provided in support of the company's so called financial difficulties, and no redeployment options were explored. It follows therefore that Mr Do Spirito Santo was unjustifiably dismissed.

[15] As a result of the above, Mr Do Spirito Santo is entitled to remedies. I accept his claim that he is entitled to \$1,100.00 in respect of unpaid wages. I accept that as a result of his personal grievance he suffered significant hurt and humiliation and injury to feelings. This was not only as a result of sudden cessation of his employment, but also because of Exquisite Tiling's refusal to properly engage with him. I consider an award of \$20,000.00 to be appropriate under the circumstances.

[16] I also accept that Mr Do Spirito Santo was given 11 days' notice when the contractual period was three weeks' notice (15 working days). Accordingly, in respect of unpaid notice, Mr Do Spirito Santo is entitled to four days' notice which equates to \$1,026.00 gross.

[17] Mr Do Spirito Santo's employment agreement provided for payment for 45 hours per week. His evidence shows he was underpaid to the tune of \$3,421.09. Exquisite Tiling is ordered to pay that sum also.

[18] Although Exquisite Tiling claimed Mr Do Spirito Santo's grievance had been raised out of time, the basis for that claim was unclear. Mr Do Spirito Santo would have had until 16 February 2023 to raise his grievance and the evidence was that this was done no later than 9 February 2023, which was within time.

### **Summary of orders**

[19] Exquisite Tiling Exquisite Tiling Limited is to pay Rodrigo Do Spirito Santo the following:

- (a) Unpaid wages of \$3,421.09;
- (b) Unpaid notice - \$1,026.00;
- (c) Lost wages - \$1,539.00; and
- (d) Compensation for humiliation, loss of dignity and injury to feelings - \$20,000.00.

The above payments are to be made within 28 days from the date of this determination.

[20] Mr Mark Spiekerman, is reminded that in respect of the minimum entitlements which include unpaid wages as set out above, he is a person involved in the breach in terms of s 142W of the Act and leave has been granted to Mr Do Spirito Santo to recover minimum entitlements from him to the extent Exquisite Tiling HB Limited is unable to pay the arrears in wages or other money.

### **Costs**

[21] As the parties have been made aware, the Authority generally determines costs on a daily tariff basis. The current daily tariff is \$4,500.00. The investigation meeting occupied approximately half of a day and accordingly Exquisite Tiling HB Limited is further ordered to pay Mr Do Spirito Santo a sum of \$2,250.00 as a contribution towards his costs. Payment is to be made within 28 days from the date of this determination.

Geoff O'Sullivan  
Member of the Employment Relations Authority