

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 322  
3175062

BETWEEN	LOSEFA AKEIMO Applicant
AND	LRS CONSTRUCTION LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Andrea Kelleher, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	26 April 2023 in Auckland
Submissions and/or further evidence	26 April 2023 from the Applicant None from the Respondent
Determination:	16 June 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Losefa Akeimo, claims he was unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, LRS Construction Limited (LRS).

[2] Akeimo further claims that LRS failed in its duty of good faith and did not pay him holiday pay entitlement or provide him with wages and time records pursuant to his request.

**The Authority's investigation**

[3] Mr Akeimo was unable to attend the Authority's investigation due to a family bereavement but attended the investigation meeting by Zoom. He supplemented his written evidence by oral evidence pursuant to an affirmation.

[4] Documents were couriered to LRS construction and I am satisfied were properly served. LRS Construction did not file a Statement in Reply, however Mr Lloyd Stidolph, sole director and shareholder of LRS Construction, emailed the Authority on 14 October 2022

stating that the matter had been settled and therefore he was unaware of the reason it was before the Authority.

[5] Mr Stidolph did not attend the case management conference held on 22 December 2022, nor did he attend the Investigation Meeting, but he had emailed the Authority prior to it to advise that he did not intend to engage with the Authority's process.

[6] Accordingly, I decided that the meeting should proceed pursuant to clause 12 Schedule 2 of the Employment Relations Act 2000 (the Act).

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Issues**

[8] The issues requiring investigation are whether or not Mr Akeimo:

- Was unjustifiably dismissed by LRS?
- Is owed wages by the Respondent?
- Is owed holiday pay by the Respondent?
- Should a penalty be awarded against LRS for:
  - not providing a written employment agreement?
  - breaching the duty of good faith it owed to Mr Akeimo?
  - not providing time and wage records when requested to do so?
  - not paying outstanding holiday entitlement when required to do so?

### **Background**

[9] LRS Construction Limited (LRS) is a small building and construction company based in Auckland. Mr Lloyd Stidolph is the sole director and shareholder.

[10] Mr Akeimo moved to Auckland and applied for a position with LRS. He was successful and appointed to the position of Foreman on 26 April 2022. Mr Akeimo said that he understood LRS to be a new company. There were two other employees beside himself. Mr Stidolph arranged the contracted projects with clients, and Mr Akeimo and his team would present on site and carry out the requisite work.

[11] Two weeks after his employment commenced Mr Akeimo said he was provided with an individual employment agreement which he took home to consider. Mr Akeimo provided a copy of the unsigned written employment agreement to the Authority. It set out Mr Akeimo's

position as Foreman, and his rate of pay as \$45.00 per hour for a 40-hour working week, Monday to Friday.

[12] Mr Akeimo had not signed and returned the employment agreement.

[13] Mr Akeimo said he would provide Mr Stidolph with a list of materials required to complete the relevant client job for Mr Stidolph to purchase, but sometimes Mr Stidolph could not do so in time, so he would buy them himself for Mr Stidolph to reimburse. This was a situation covered in the unsigned employment agreement which stated that:

The employer will repay any authorised and reasonable work-related expenses the employee has to cover while doing their job. The employee must provide proof of purchase.

[14] Mr Akeimo said that he did not receive reimbursement, but he had not retained any records of proof of purchase, so was unable to quantify loss.

[15] Mr Akeimo said he had a good working relationship with Mr Stidolph, although they did have an exchange of views on one occasion about the particular piece of building work involving a pagoda which Mr Akeimo and his team were being asked to carry out.

[16] On Friday 13 May 2022 Mr Akeimo said he received a message from Mr Stidolph after he had contacted him to ask about the paint materials required for a project. The text message exchange between them resulted in Mr Stidolph informing Mr Akeimo that the relationship was not: “working out”: The text messages included the following:

**Mr Akeimo:** I wasn't sure with what paint to use...

**Mr Stidolph:** I wrote clear instructions for every job on the tradify app. Haylee said the list was good.

If you can't get that or make decisions based on our clients wants/needs then your not foreman material. If I have to make every decision myself anyway then What am I paying you for? ...

Also I was told Levi was winding you up and you were both complaining about simple jobs a 1<sup>st</sup> year apprentice could do with his eyes closed.

Not happy at all.

**Mr Akeimo:** I'm not sure who told you that I was complaining all I was trying to make sure he knows what to do b4 I go to miter10 this is unprofessional Lloyd why can't you pick up your phone and ring me or answer a phone call. ...

**Mr Stidolph:** Look Joe. Its not working out for me.

Im sorry mate but I've worked too hard to have anything stuff this up for me.

Please have the ban (sic) ready for me to collect before 2 pm.

**Mr Akeimo:** swt I'm seeking legal advice don't forget I've got a contract mate

I want my weekly pay now in cash when you pick up the van

No written warning just instant dismissal that's not professional...

Make sure you bring my pay and the outstanding money

[17] In a continuance of the text messages Mr Akeimo said he was supplying his lawyers details. He did so because he said he hoped it would encourage Mr Stidolph to seek legal advice.

[18] When Mr Stidolph arrived later that day to collect the van, Mr Akeimo said he would see him in court.

[19] Mr Akeimo said he was paid his last week's pay, but was not convinced it was correct. However, he was unable to provide any details of the hours which had been claimed.

[20] Mr Akeimo raised a personal grievance on 3 June 2022. LRS responded that Mr Akeimo's employment was subject to a trial period provision, however the written unsigned employment agreement contained no such provision and therefore did not meet the requirements of s 67A and s67B of the Act.<sup>1</sup>

[21] Ms Kelleher who was representing Mr Akeimo, advised that she was not aware of Mr Akeimo having settled the matter. She had asked Mr Stidolph in an email exchange about his assertion that the matter had been settled, however he had not responded with any details.

[22] Mr Akeimo was questioned about the alleged settlement. He said Ms Kelleher was his sole representative and he knew nothing of any agreement to resolve the matter having taken place

[23] There is no information before the Authority that the personal grievance had been resolved, nor did LRS provide any corroborating evidence of a resolution.

### **Was Mr Akeimo unjustifiably dismissed by LRS?**

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<sup>1</sup> *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152

[24] Justification for dismissal is set out in s 103A of the Act and states:

**S103A Test of Justification**

- (1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[25] A dismissal must be justifiable on both substantive and procedural grounds.

[26] It is indicated from the text message exchange that Mr Stidolph had concerns about Mr Akeimo's work performance and that the employment relationship between them was not working out.

[27] However I find the evidence supports that the impetus for the ending of the employment relationship came from the employer as indicated by Mr Stidolph messaging Mr Akeimo on 13 May 2022 that the employment was not working out and advising that he would be collecting the van which was the means by which Mr Akeimo transported himself and work materials to the work sites.

[28] Whilst it may be correct that Mr Stidolph had concern about Mr Akeimo's work performance, there was no indication or evidence that there had been any disciplinary action taken about the issue.

[29] There was no evidence that any formal disciplinary process had been entered into with Mr Akeimo about his quality of work, and his evidence was that he believed he and Mr Stidolph had a good working relationship and he had received good feedback about his performance until the text message exchange.

[30] I find there was no evidence supporting substantive justification for Mr Akeimo's employment to be terminated.

[31] It is also required pursuant to s 103A of the Act that a fair process is followed by the employer in the context of disciplinary action. The minimum requirements are that:

- (a) ... the employer sufficiently investigated the allegations against the employee ...

- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ... the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[32] I note also that employers and employees are under a duty of good faith to behave towards each other in good faith pursuant to s 4 of the Act. In accordance with s 4(1A)(c) an employer who is proposing to make a decision that will, or is likely to have, an adverse effect on the continuance of an employee's employment is required to provide the affected employee with:

- (i) Access to information relevant to the continuation of the employees' employment, about the decision, and
- (ii) An opportunity to comment on the information to their employer before a decision is made.

[33] I find that there is no evidence that LRS followed any process, still less a fair one, in the case of Mr Akeimo. Mr Stidolph merely informed Mr Akeimo that the employment was not working out and that he would be collecting the van.

[34] I determine that Mr Akeimo was unjustifiably dismissed by LRS.

#### **Is Mr Akeimo owed wages by LRS?**

[35] Mr Akeimo's evidence on the pay he received during his three week period of employment with LRS was unclear. He said that he received one payment prior to receiving usage of the van, and that only one pay went into his account: "Rest was cash".

[36] On that basis I consider I have insufficient evidence on which to conclude that Mr Akeimo is owed any wages by LRS.

#### **Is Mr Akeimo owed holiday pay by LRS?**

[37] Mr Akeimo said that he was not paid any holiday pay entitlement upon the ending of his employment by LRS. Employees are entitled to receive any outstanding accrued annual leave entitlement upon termination of employment pursuant to s23 of the holidays Act 2003.

[38] I find Mr Akeimo is entitled to statutory holiday pay for the period of his employment with LRS.

### **Remedies**

#### *Lost Wages*

[39] Mr Akeimo said he sought new employment immediately and obtained another job: “within one or two weeks” but he did not provide a date when he commenced the new employment.

[40] On that basis I take two weeks as the appropriate period and award him two weeks in respect of lost wages.

**[41] I order LRS to pay Mr Akeimo the sum of \$3,600.00 gross (calculated as \$45.00 per hour x 40 hours x 2 weeks) pursuant to s 28(3) of the Act.**

#### *Unpaid notice period*

[42] Mr Akeimo was not paid two weeks salary in lieu of notice by LRS which it was required to do pursuant to the written employment agreement.

**[43] I order that LRS pay Mr Akeimo the sum of \$3,600.00 gross (calculated as \$45.00 per hour x 40 hours x 2 weeks) in respect of salary in lieu.**

#### *Unpaid annual leave entitlement*

[44] Mr Akeimo is entitled to receive statutory holiday entitlement for the period of his employment with LRS.

**[45] I order LRS to pay Mr Akeimo the sum of \$432.00 (calculated as \$45.00 per hour x 40 hours x 3 weeks x 8%) pursuant to s 23 of the Holidays Act 2003.**

#### *Compensation*

[46] Mr Akeimo said that the abrupt ending of his employment at LRS affected his ability to meet financial commitments and adversely affected his relationship with his partner which resulted in the ending of their relationship.

[47] I accept that there was humiliation and injury to feelings to Mr Akeimo in the manner of his dismissal from LRS.

[48] **LRS is ordered to pay Mr Akeimo the sum of \$6,000.00 as compensation pursuant to s 123(1)(c)(1) of the Act.**

*Contribution*

[49] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[50] There was no evidence filed by LRS which would support Mr Akeimo having contributed to his dismissal. Accordingly, I find no contributing conduct by Mr Akeimo and there will be no reduction in the remedies ordered.

**Penalties**

*Written employment agreement*

[51] Mr Akeimo is seeking a penalty in respect of the failure to provide him with a written employment agreement.

[52] I note that LRS did provide Mr Akeimo with a written employment which he produced to the Authority. His evidence was that he did not sign and return it.

[53] On that basis, I order no penalty in respect of this issue because LRS provided a written employment agreement pursuant to s65 of the Act, and it was Mr Akeimo who failed to sign and return it.

*Good faith breaches*

[54] Mr Akeimo is seeking a penalty in respect of a breach of good faith pursuant to s 4A of the Act in regard to the manner in which his employment was abruptly terminated.

[55] I have already awarded compensation to Mr Akeimo to compensate him for the dismissal and the manner in which it took place.

[56] On that basis, I order no penalty in respect of this aspect of the good faith claim.

[57] Mr Akeimo is also seeking a penalty pursuant to the duty of good faith due to the failure of LRS to engage with him after he raised a personal grievance.

[58] The duty of good faith as set out in s 4A of the Act applies to parties engaged in an employment relationship. Mr Akeimo's employment was terminated by LRS and therefore was no longer in place at the time he raised a personal grievance, and there is no basis for a penalty<sup>2</sup>.

*Wages and time records*

[59] Mr Akeimo is seeking a penalty in respect of the failure to provide him with wages and time records after he requested them pursuant to s 130(2) of the Act and to pay him holiday pay entitlement pursuant to s28 of the Holidays Act 2003.

*Unpaid Holiday Pay Entitlement*

[60] Mr Akeimo is seeking a penalty in respect of LRS's failure to pay him accrued annual leave when his employment ended in breach of s 130(2) of the Act.

[61] Penalties for breaches of various sections of the statutory acts render a company liable to penalties up to a maximum amount of \$20,000.00 per penalty.

[62] In deciding whether to impose a penalty and if I decide to do so, how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.<sup>3</sup>

[63] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[64] Failure to provide the wages and time records prevented Mr Akeimo from quantifying how much he had been paid and if it was correctly calculated in respect of the hours he had worked and the expenses he had incurred on behalf of LRS. The failure to pay his annual holiday pay upon termination added to his financial difficulties.

*Identify the nature and number of statutory breaches*

[65] There is two statutory breaches identified, meriting a penalty to a maximum amount of \$20,000.00. This is a potential total penalty of \$40,000.00.

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<sup>2</sup> *Lumsden v Skycity Management Limited* [2017] NZEmpC 30 at [24]

<sup>3</sup> *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*. [2016] NZEmpC

*Step Two- assess the severity of the breaches*

[66] The aggravating factors include the fact that Mr Akeimo was unable to accurately quantify his wage payments.

[67] Ameliorating factors on the part of LRS is that it is a small employer lacking the HR assistance of a larger organisation.

[68] I consider that the penalty amount should be reduced to 10%.

*The Respondent's financial circumstances*

[69] I have no information that would support the view that the Respondent's financial position is precarious.

[70] In the circumstances, no reduction is made to the penalty on this basis.

*Proportionality*

[71] In considering the level of penalties awarded in similar cases decided since *Preet* and considering the impact on the Applicant in this case, I consider the appropriate level of the penalties in this matter to be \$1,500.00.

*Should any part of the penalty be paid to Mr Akeimo?*

[72] The purpose of penalties is to deter, not to compensate. However, I accept that the failure to provide wage and time records upon request and to pay him outstanding holiday pay entitlement were matters of concern to Mr Akeimo.

[73] In the circumstances \$1,500 is an appropriate penalty for the two statutory breaches.

[74] **I order LRS to pay Mr Akeimo \$400.00, with the balance of \$1,100.00 to be paid to the Authority for payment into a Crown Bank Account pursuant to s136 of the Act.**

**Costs**

[75] There was no appearance on the part of LRS and the Investigation Meeting took less than half a day.

[76] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

**[77] Accordingly, LRS is ordered to pay Mr Akeimo the sum of \$2,250.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.**

**Filing Fee**

**[78] I order LRS to pay Mr Akeimo the filing fee of \$71.56.**

Eleanor Robinson  
Member of the Employment Relations Authority