

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 278
3033032

BETWEEN

NICHOLAS ASHURST
Applicant

AND

LANDFORM CIVIL LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: David Balfour for Applicant
Nick Bolt for Respondent

Investigation Meeting: 17 April 2019

Further Information Received: 23 April 2019

Determination: 10 May 2019

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Ashurst's employment were not affected to his disadvantage by the unjustified actions of Landform Civil Limited.**
- B. Mr Ashurst was unjustifiably dismissed. Landform Civil Limited is ordered to pay to Mr Ashurst the following sums within 28 days of the date of this determination:**
- a) Lost wages of \$3,269.24 gross under s 123(1)(b) of the Employment Relations Act 2000;**

b) Compensation of \$5,000 under s 123(1)(c)(i) of the Act.

C. Landform Civil Limited is ordered to pay Mr Ashurst the following amounts under s 131 of the Employment Relations Act 2000 within 28 days of the date of this determination:

a) Unpaid wages of \$980.64 gross; and

b) Holiday pay of \$1,307.70 net.

D. Landform Civil Limited is ordered to reimburse Mr Ashurst the sum of \$106.88 for his monthly mobile phone account within 28 days of the date of this determination.

E. The application for a penalty is declined.

F. Costs are reserved.

Employment relationship problem

[1] Mr Ashurst was employed by Landform Civil Limited from March 2018 until he was dismissed on 28 May 2018.

[2] After seeing an advertisement on Trademe for a Project Manager in December 2017 Mr Ashurst submitted an application and provided a copy of his CV. He attended an interview and was offered the role by way of a written employment agreement on 20 December.

[3] On 7 January Mr Ashurst contacted Mr Bolt, the sole director of Landform, and advised that he was unable to start work due to an injury and would not be available to work until March. Unknown to Mr Bolt Mr Ashurst started working for Pemberton Civil (Auckland) Ltd on 8 January 2018.

[4] In March, discussions between Mr Ashurst and Mr Bolt led to an agreement that Mr Ashurst would start work on 19 March. Despite this agreement Mr Ashurst attended the workplace on 15 March unexpectedly. Mr Bolt took Mr Ashurst through

the expectations and responsibilities of the role. Mr Ashurst undertook a site visit on the 16 March.

[5] A further copy of the intended employment agreement was emailed to Mr Ashurst on 18 March. On Monday 19 March Mr Ashurst and Mr Bolt negotiated and agreed on the salary rate which had not been included in the agreement emailed the previous day. Mr Ashurst was asked to return the signed agreement or contact Mr Bolt if he had any questions. Mr Ashurst did not return or sign the employment agreement.

[6] Mr Ashurst was dismissed without notice on 28 May 2018. He challenges his dismissal which he says was unjustified, claims he was unjustifiably disadvantaged in his employment, that Landform breached its statutory duty of good faith and claims he is owed arrears of wages and holiday pay.

[7] Landform denies the claims and says the Authority does not have jurisdiction to investigate Mr Ashurst's personal grievance for unjustified dismissal because he was subject to a 90 day trial.

Issues

[8] In order to resolve Mr Ashurst's employment relationship problems I must determine the following issues:

- a) Were one or more conditions of Mr Ashurst's employment affected to his disadvantage as a result of the unjustified actions of Landform? If so, what if any remedies should be awarded?
- b) Is Mr Ashurst barred from bringing a personal grievance for unjustified dismissal?
- c) If the answer to b) is no, was Mr Ashurst unjustifiably dismissed and if so, what, if any, remedies should be awarded?
- d) Is Mr Ashurst owed any outstanding wages and/or holiday pay?
- e) Is Mr Ashurst entitled to reimbursement for work related expenses?

- f) Did Landform breach its obligations of good faith and if so should a penalty be imposed?

[9] As permitted by s 174E of 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 as a result. It has not recorded all evidence and submissions received.

Credibility

[10] Where there are differences in the evidence between Mr Ashurst and Mr Bolt I have accepted the evidence of Mr Bolt as being more likely. Mr Ashurst's credibility was put into question during the investigation meeting when the following issues were raised:

- a) When Mr Ashurst submitted his application for the Project Manager role on 10 December 2017 he stated he had recently finished a civil engineering degree with hopes of completing his Masters in 2018. At the investigation meeting Mr Ashurst accepted this statement was not accurate and misrepresented his qualification. As at the date of the investigation meeting he had yet to complete his degree.
- b) In his CV Mr Ashurst holds himself out as being a self-employed civil contractor, a position he states he held from February 2015 to current (being December 2017). Mr Ashurst accepted at the investigation meeting that he operated his contracting business under Horizontal Contracting Limited, a company that went into receivership on 17 May 2016.
- c) Mr Ashurst gave evidence at the investigation meeting that he was unable to start working for Landform until March 2018. He told me this was because he had had surgery on his hand following a rugby injury and was on ACC and could not work. Mr Bolt has provided me with an email from Pemberton Civil (Auckland) Ltd which states Mr Ashurst had worked for that company from 8 January until 4 March 2018.

Unjustified disadvantage

[11] Mr Ashurst claims one or more conditions of his employment were affected to his disadvantage by Landform's unjustifiable acts including:

- a) the requirement that he work outside the agreed hours of work;
- b) demands that he travel at times which necessitated him paying for overnight accommodation;
- c) failure to organise his final pay in good time; and
- d) demanding the return of company property while the notice period was being worked out.

[12] Mr Ashurst bears the onus of establishing on the balance of probabilities that he was disadvantaged in his employment. If Mr Ashurst discharges that onus then the burden of proof moves to Landform to establish on the balance of probabilities that any disadvantage Mr Ashurst may have suffered was justified.

[13] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Landform's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

Requirement to work outside the agreed hours of work

[14] The first action Mr Ashurst says led to his disadvantage was a requirement by Mr Bolt that he work outside his agreed hours of work. Mr Ashurst has provided me with copies of text messages to support his contention.

[15] Mr Bolt's unchallenged evidence is that Mr Ashurst was never "required" to work outside his agreed hours. It was Mr Bolt's view that Mr Ashurst should have been able to complete his work within the hours set out in the intended employment agreement which was 44 hours each week to be worked Monday to Friday inclusive.

[16] Serious concerns about Mr Ashurst's ability to perform his job began to surface during his employment. Initially Mr Ashurst was responsible for the project management of two major projects, the Otahuhu project and the Matakana project.

[17] It was common ground that shortly after he started working Mr Ashurst requested that he be taken off the Otahuhu project so that he could focus on the Matakana project. Mr Bolt took over the Otahuhu project and discovered a number of errors had been made by Mr Ashurst on the project which needed to be rectified.

[18] By 21 April Mr Ashurst had also been taken off the project management of the Matakana job and was fulfilling a lesser role as foreman while Mr Bolt worked to manage the Matakana project back on track.

[19] The text messages produced by Mr Ashurst to support his contention that he was required to work outside his agreed hours are dated after 21 April. The text messages indicate Mr Ashurst worked on Saturday 21 and 28 April and Sunday 29 April.

[20] I find on the balance of probabilities that Mr Ashurst was expected to work outside his agreed hours. Certainly in the text messages I read, Mr Bolt did not raise any concerns about Mr Ashurst working on weekend days. In fact Mr Bolt's responses give the appearance that he condoned Mr Ashurst working.

[21] Working outside his agreed hours may constitute a disadvantage but I find the fact that he did so was not an unjustified action on the part of Landform. By 21 April Mr Ashurst had been taken off the role for which he had been employed because of serious concerns about his performance. Mr Ashurst took on the role of foreman while retaining his management salary and did not raise any objection at the time.

Travel and accommodation

[22] Mr Ashurst told me that working on the Matakana project and having to travel between Matakana and Auckland each day was taking its toll on him and that this caused him to be disadvantaged.

[23] Mr Ashurst was expected to travel to project sites as part of his role and was provided with a company car and fuel card for that purpose. I am satisfied that travel to and from the Matakana project was a requirement of the job. Mr Ashurst acknowledged at the investigation meeting that he never raised any concerns about the travel with Mr Bolt and never asked if he could stay overnight at the company's expense.

[24] Mr Ashurst has not established he was disadvantaged by traveling to and from the Matakana project.

Final pay and return to company property

[25] Mr Ashurst claims he was disadvantaged when he did not receive his final pay in a timely fashion and when he was required to return company property after his dismissal. Apart from conditions that survive the employment relationship a claim for disadvantage requires the disadvantageous action to have occurred during employment.¹

[26] Mr Ashurst was summarily dismissed, that is without notice, on 28 May 2018. By the time the actions relating to the payment of his final pay and the return of company property arose there was no longer an ongoing employment relationship. Accordingly I have no jurisdiction to investigate and determine this aspect of Mr Ashurst's claim.

Conclusion

[27] Mr Ashurst has not established to my satisfaction that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Landform.

Is Mr Ashurst barred from bringing a personal grievance claim for unjustified dismissal?

[28] Section 67A of the Act allows for written employment agreements to provide for a trial period of 90 days or less. The trial provision must be in writing and must state:

¹ Employment Relations Act 2000, s 103(1)(b).

- a) That for a period not exceeding 90 days starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- b) During that period the employer may dismiss the employee; and
- c) If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[29] Section 67B of the Act applies where an employer terminates an employment agreement containing a trial provision by giving notice of the termination of employment prior to the end of the trial period.

[30] The obligations set out in ss 67A and 67B of the Act are to be interpreted strictly. This is because these provisions of the Act remove a right of access to justice.²

[31] I have been provided with a copy of the intended employment agreement between the parties. Neither party has signed the agreement so it has not been properly executed.

[32] Because Mr Ashurst did not accept the terms of the written agreement they are not enforceable. Landform is not able to rely on s 67B of the Act and Mr Ashurst is entitled to have his personal grievance claims investigated and determined by the Authority.

Unjustified dismissal

[33] On 26 May Mr Ashurst received a text from Mr Bolt asking him to attend a meeting on 28 May. At that meeting Mr Bolt told Mr Ashurst he was not performing to the required standard and instructed him to return the company vehicle, keys and fuel card. I am satisfied that by his actions Mr Bolt summarily dismissed Mr Ashurst.

[34] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine

² Ibid at [82].

whether Landform's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[35] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d). These matters include whether, having regard to the resources available, Landform sufficiently investigated the allegations, raised the concerns with Mr Ashurst, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[36] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Ashurst being treated unfairly.³ A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

[37] Mr Bolt told me Mr Ashurst had been negligent in performing his duties. He had missed key dates and caused delays on the Matakana project causing significant losses and costs to Landform.

[38] On or about 17 April Mr Bolt was asked by the client's project team to take over leading the project after serious concerns about Mr Ashurst's abilities were raised. Mr Bolt told me he met with Mr Ashurst and told him to lift his game or he would be taking the project management role off him.

[39] From 17 April Mr Bolt took over the project management of the Matakana project with Mr Ashurst playing a lesser role.

[40] Mr Ashurst was dismissed without notice on 28 May 2018. At the investigation meeting Mr Bolt, correctly in my view, accepted Landform had not followed any of the mandatory considerations set out in s 103A(3).

[41] While Mr Bolt had told Mr Ashurst to lift his game Landform had not raised its concerns in a way that provided Mr Ashurst with the opportunity to respond to any concerns before the dismissal and so there was no genuine consideration of any explanation that may have been provided by Mr Ashurst.

³ Employment Relations Act 2000 (the Act), s 103A(5).

[42] The concerns raised by Mr Bolt were largely performance concerns. In those circumstances Mr Bolt had an obligation to put Mr Ashurst on notice that his continued employment was in jeopardy and should have put him through a performance management/monitoring process to improve performance before he was dismissed.

[43] These defects were not minor and resulted in Mr Ashurst being treated unfairly.⁴ Mr Ashurst's dismissal was unjustified and he is entitled to a consideration of remedies.

Remedies

[44] Mr Ashurst seeks reimbursement of lost wages and compensation to remedy his personal grievance. Mr Ashurst started in a new job on 29 June 2018. Therefore his lost wages amount to four weeks. The pay records show Mr Ashurst's weekly gross pay was \$1,634.62 making a total award of \$6,538.48 gross.

[45] Mr Ashurst claims \$20,000 compensation under s 123(1)(c)(i) of the Act. Mr Ashurst told me the dismissal caused him stress. He had twin daughters who were two years old and he was the sole income earner. He told me the financial situation became so difficult that his partner sold her engagement ring to provide money to pay bills. I consider an appropriate award of compensation of \$10,000 to be appropriate in this case.

[46] Having determined Mr Ashurst has a personal grievance I must consider the extent to which his actions contributed towards the situation that gave rise to the personal grievance. I must reduce the remedies if Mr Ashurst's actions contributed in some blameworthy way.⁵

[47] Mr Bolt told me he appointed Mr Ashurst on the strength of the experience and qualifications he set out in his application and CV. He told me he soon discovered Mr Ashurst did not have the skills required for the Project Manager's role.

⁴ The Act at s 103A(5).

⁵ Employment Relations Act 2000 s 124.

[48] Mr Ashurst purposely hid from Mr Bolt, the work he had completed for Pemberton's from January to March 2018. Mr Bolt understood Mr Ashurst was on ACC while he recovered from surgery during that time. If Mr Bolt had been aware of Mr Ashurst's employment with Pemberton's he would have learned that Mr Ashurst's departure from Pemberton's was at the initiation of the company and based on performance concerns.

[49] I am satisfied Mr Ashurst contributed in a blameworthy way to the actions giving rise to his personal grievance. Mr Ashurst conceded at the investigation meeting that the information contained in his CV was misleading. He also failed to disclose to Landform relevant information about his activities between January and March 2018.

[50] Mr Bolt told me that if he had known Mr Ashurst had not actually completed his Civil Engineering degree and that he was not working as a civil engineering consultant on his own behalf at the time of their interview he would never have employed him because he would not have the skills necessary for the project manager role.

[51] Mr Bolt told me that if he had known about Mr Ashurst's work at Pemberton's he would have been unlikely to offer him employment because Mr Ashurst had lied to him on 7 January when he said he could not start until March due to ACC and then starting at Pemberton's the following day on 8 January.

[52] It is for the potential employer to satisfy itself that the representations made by an applicant regarding his skills and qualifications are accurate and that the person to be employed is capable of meeting the requirements for the position. The discrepancy in Mr Ashurst's CV where he states that he was completing his degree and the information contained in his application form that he had completed it should have raised a flag with Mr Bolt and been an area for questioning during the interview process.

[53] Further, Mr Ashurst's CV states he worked for two separate companies as an employee from January to May 2017 and then from May 2017 up to and including the time he made his application to Landform. This information conflicted with the

information in his CV that he was in business on his own account as a civil contractor during that same period.

[54] The fact that Mr Ashurst was operating his own business while asserting he was employed elsewhere should have raised a flag with Mr Bolt who could have clarified with Mr Ashurst his intentions regarding his business when working for Landform. Had he done so it is possible Mr Ashurst would have disclosed to Mr Bolt that his company had been put into receivership in 2016.

[55] Of relevance to the question of contribution are the performance concerns raised with Mr Ashurst during his employment. By agreement he was taken off project manager for one job and told to focus on the Matakana project. When problems arose with that project Mr Bolt had to take over the project management of the job and the errors made by Mr Ashurst had financial impacts on Landform. Mr Bolt told me Landform continues to have issues with the quality of the work supervised by Mr Ashurst. He told me more than \$70,000 in payments has been retained by the client of the Matakana project due to the ongoing issues.

[56] Taking into account all of the circumstances of this case I have concluded Mr Ashurst has contributed to the actions giving rise to his dismissal in a blameworthy way. Accordingly the remedies awarded to Mr Ashurst will be reduced by 50%.

[57] Landform Civil Limited is ordered to pay to Mr Ashurst the following sums within 28 days of the date of this determination:

- a) Lost wages of \$3,269.24 gross under s 123(1)(b) of the Act;
- b) Compensation of \$5,000 under s 123(1)(c)(i) of the Act.

Arrears of wages

[58] Mr Ashurst claims payment for additional hours he says he worked and unpaid holiday pay.

Holiday pay

[59] At the investigation meeting the parties agreed the outstanding holiday pay amounted to \$1,307.70 net and Landform accepted its obligation to pay the outstanding amount.

Unpaid wages

[60] Mr Ashurst was paid an annual salary in equal weekly instalments. The agreed hours of work were 44 each week although the wage slips provided by Landform show he was paid for 45 hours each week. There is no provision for payments for work undertaken beyond the 45 hours. I accept Mr Bolt's evidence that he never "required" Mr Ashurst to work outside the 45 hours however the evidence shows that on at least three weekend days in April, Mr Ashurst was working on site at the Matakana project.

[61] Mr Ashurst has not established his claim for additional hours worked beyond the three days of 21, 28 and 29 April. On the basis that Mr Ashurst worked 9 hours on each of the three days he is entitled to recover lost wages amounting to \$980.64 gross. This amount has been calculated using the hourly rate of \$36.32 specified on the payslips provided by Landform.

[62] In addition Mr Ashurst claims payment for the week ending 28 May which he says has not been paid. Landform has provided wages and time records in the form of pay slips show Mr Ashurst received full payment for his final week of work.

[63] Landform Civil Limited is ordered to pay Mr Ashurst the following amounts under s 131 of the Act within 28 days of the date of this determination:

- c) Unpaid wages \$980.64 gross; and
- d) Holiday pay of \$1,307.70 net.

Reimbursement of work related expenses

[64] Mr Ashurst claims for the reimbursement of work related expenses. He seeks reimbursement of \$106.88 for his monthly mobile phone account and \$520 for motel accommodation he paid for in Matakana.

[65] I am satisfied there was an agreement between Landform and Mr Ashurst that Landform would reimburse Mr Ashurst's account for the use of his mobile phone. Landform Civil Limited is ordered to reimburse Mr Ashurst the sum of \$106.88 for his monthly mobile phone account within 28 days of the date of this determination.

[66] Mr Ashurst acknowledged at the investigation meeting that he did not seek or obtain approval to incur the expenses associated with the motel accommodation he used in Matakana. I have accepted Mr Bolt's evidence that he had no knowledge of Mr Ashurst staying in Matakana until another person brought it to his attention.

[67] As stated earlier, Mr Ashurst was provided with a company car and fuel card for the purpose of assisting him when travelling to and from project worksites. There was no agreement that Landform would pay for any accommodation for Mr Ashurst in Matakana and accordingly I have declined Mr Ashurst's claim for reimbursement.

Breach of good faith

[68] In his statement or problem Mr Ashurst has asked the Authority to impose penalties on Landform for breaches of good faith. There are no details as to the actual breaches complained of. I have concluded from the wording in the statement of problem and the evidence at the investigation meeting that the facts relied on for the allegations of breaches of good faith are the same facts relied on for the unjustified dismissal claim.

[69] The Employment Court has held that where remedies have been awarded for a successful grievance claim then to impose a penalty in respect of the same conduct amounts to double dipping and should be avoided, unless there are special facets of the breach which call for a punishment to be imposed on the employer on top of compensation to the employee.⁶

[70] Separate remedies have been awarded to compensate Mr Ashurst for his grievance, so the imposition of penalties on Landform for any breach would amount to double dipping. Mr Ashurst has not established there are any special facets of any breaches which call for a punishment to be imposed on top of the remedies already awarded. Accordingly the application for a penalty is declined.

⁶ *Xu v McIntosh* [2004] ERNZ 448.

Costs

[71] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Ashurst shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Landform shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[72] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority