

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 208
5626969

BETWEEN SAMUEL BENNETT
Applicant

AND DEAN KANE LANGDON
trading as DKL
CONSTRUCTION
Respondent

Member of Authority: Christine Hickey

Representatives: Rachele Boulton, counsel for the Applicant
No appearance by or for the Respondent

Investigation meeting: 8 November 2016

Submissions: From the applicant at the meeting

Determination: 29 November 2016

**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY
AFTER AN ORAL INDICATION**

- A. Dean Kane Langdon unjustifiably constructively dismissed Samuel Bennett.**
- B. Within 28 days of the date of this determination Dean Kane Langdon must pay Samuel Bennett:**
- (a) \$390.00 gross for outstanding wages and final holiday pay;**
 - (b) \$7,000.00 gross in lost wages;**
 - (c) \$8,000.00 in compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Within 28 days of the date of this determination Dean Kane Langdon must pay penalties totalling \$3,500.00 to the**

Christchurch office of the Employment Relations Authority for transfer to a Crown Bank Account.

- D. The Employment Relations Authority must transfer the first \$1,000 of the penalties received from Dean Kane Langdon to Samuel Bennett.**

Employment relationship problem

[1] The respondent employed Samuel Bennett as a painter and decorator. Mr Bennett worked from 14 September 2015. He was not provided with a written employment agreement. He was paid \$28 per hour and worked around 40 hours per week up until 22 December 2015.

[2] Mr Bennett claims:

- that his wages, now totalling \$261, were unilaterally withheld from him in breach of the Wages Protection Act 1983 (WPA), and should be paid and that Mr Langdon should be penalised for the breach;
- his final holiday pay of \$129 should be paid;
- he was unjustifiably constructively dismissed and should be paid lost wages, and
- compensation for humiliation, loss of dignity and injury to his feelings;
- he was not given a written employment agreement in breach of ss 63A and 65 of the Employment Relations Act 2000 (the Act) and that Mr Langdon should be penalised for that;
- Mr Langdon breached his duty of good faith to be responsive and communicative and should pay a penalty for that;
- Any penalties should be paid to him;
- Mr Langdon should pay legal costs and the cost of this application (\$71.56).

[3] I note that the Labour Inspectorate investigated these matters and found that s 65 of the Act was breached; s 25 of the Holidays Act 2003 was breached because Mr

Bennett was paid less than his minimum entitlement for his final holiday pay¹, and s 4 of the WPA was breached.

Who is the employer?

[4] Mr Bennett says Mr Langdon was his employer. Mr Bennett's payslips were issued in the name of DKL Construction. There is no registered company called DKL Construction Limited. Mr Langdon is the director of a company called DKL Consulting Limited. I am satisfied that DKL Construction is a trading name, not a company. I am satisfied that Dean Kane Langdon was Mr Bennett's employer.

Procedural background

[5] Mr Bennett lodged an application in the Authority on 23 May 2016. Mr Bennett's counsel sent a copy of the application to Mr Langdon's email address.

[6] I am satisfied that Mr Bennett's counsel had the application personally served on Mr Langdon at his home address on 7 July 2016.

[7] On 1 August 2016, the Authority officer sent a letter to Mr Langdon, at his home address, reminding him he had the opportunity to file a statement in reply.

[8] On 25 August 2016, the Authority officer sent an email to the parties to set up a case management teleconference. She received no response from Mr Langdon. On 30 August 2016, she sent a letter to Mr Langdon's home address confirming arrangements for the teleconference, to be held on 20 September 2016.

[9] Despite telephoning Mr Langdon twice, the Authority officer could not contact him for the teleconference, which proceeded in his absence. I set the date for the investigation meeting as 8 November 2016 and Mr Langdon was notified of this at his home address.

[10] The investigation meeting was due to begin at 9.30 am. Mr Langdon was not there at 9.30 am so I adjourned the start of the meeting until 9.40 am. However, Mr Langdon did not attend the meeting.

¹ Mr Bennett has not made a claim for a penalty under the Holidays Act because only a Labour Inspector can make such a claim.

[11] I conducted the investigation meeting in Mr Langdon's absence, as I am empowered to do under s 173(2) of the Act. I heard sworn evidence from Mr Bennett who answered my questions. I heard submissions from Ms Boulton on his behalf.

[12] At the end of the meeting, I gave an oral indication that I was satisfied the claims had been proved, but that I would need to consider the correct amount of lost wages, the appropriate amount of compensation and the claims for penalties.

Was Mr Bennett unjustifiably dismissed?

[13] Mr Bennett claims constructive dismissal because Mr Langdon breached his obligations to provide him work after the Christmas shutdown period, failed to pay him correctly by deducting \$1,250 from his wages, and failed to participate in any discussions or fair process to resolve matters.

[14] I am satisfied that despite lacking a written employment agreement, Mr Bennett had been a full-time permanent employee during the last four months of 2015 when he was regularly working 40 or more hours per week.

[15] Mr Langdon had a concern about Mr Bennett and the foreman doing a private job for a friend of Mr Langdon's. Mr Langdon did not start any disciplinary or investigative process but decided to deduct \$1,250 from Mr Bennett's wages.

[16] Mr Bennett's evidence is that the foreman asked him to assist with a job varnishing a wooden floor. He agreed and he and the foreman did the job during evenings and weekends and not during time for which they worked and were paid by Mr Langdon.

[17] During January 2016, Mr Bennett was not being provided with any work and was not being paid. Mr Bennett sent numerous texts to Mr Langdon seeking work and seeking to be paid the amount that Mr Langdon had withheld from his pay. Mr Bennett also organised mediation to which he invited Mr Langdon to try to resolve the issues between them. Mr Langdon declined to attend mediation.

[18] Mr Langdon gave Mr Bennett no information about the future of his employment and no indication of when he would next be paid. Mr Bennett is the sole income earner in his household and is a single parent, with a 12-year-old son. He desperately needed his income.

[19] Mr Bennett sent a text to Mr Langdon on 1 February 2016, saying that Mr Langdon had given him no opportunity but to give:

... one week's notice from today as u won't text me nd tell me what's happening with my job

[20] In an email to Mr Bennett's counsel, dated 10 February 2016, Mr Langdon says that he was unable to offer Mr Bennett any work in January because he simply had no work available for him. In addition, he made the allegation about Mr Bennett's working for one of Mr Langdon's clients.

[21] I am satisfied that in failing to initiate or undertake a process as required under s.103A of the Act, Mr Langdon failed to follow a fair process in relation to his allegation that Mr Bennett had somehow been deceitful in doing work for a client of Mr Langdon's. He withheld pay based on that assertion and may have withheld work too.

[22] Mr Langdon's 10 February 2016 email says that he considered that Mr Bennett gave notice of his resignation, and, therefore, had resigned and was not dismissed.

[23] I am satisfied that it was the lack of ongoing work and the withholding of his pay by Mr Langdon that caused Mr Bennett to resign. This was a constructive dismissal because Mr Langdon breached essential terms of Mr Bennett's contract of employment. Mr Bennett was unjustifiably dismissed.

Remedies

Lost wages

[24] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Mr Langdon of the whole or any part of wages Mr Bennett lost because of his grievance. Section 128(2) of the Act provides that I must order Mr Langdon to pay Mr Bennett the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. Since Mr Bennett obtained work within the three months after his dismissal, I need to award him his actual lost remuneration for the three months after his dismissal.

[25] Mr Langdon paid Mr Bennett \$28 per hour. Although during 2015 Mr Bennett worked more than 40 hours per week, I consider it reasonable to calculate his

lost wages based on 40 hours work for the three months after his dismissal. There was no guarantee that there would be more than 40 hours work per week.

[26] Mr Bennett took steps to mitigate his loss by seeking work immediately. He was without work until 16 February 2016 when he began a new job for 40 hours per week at an hourly rate of \$20 until 31 March 2016, earning \$4,360 gross. During April 2016, Mr Bennett also earned \$20 per hour for a 40-hour week, earning a weekly amount of \$800.00 gross.

[27] If Mr Bennett had remained employed by Mr Langdon for the three months (13 weeks) after his dismissal, he would have earned \$14,560.00 gross. He earned \$7,560 gross in his new job. Therefore, Mr Langdon must pay Mr Bennett lost remuneration of \$7,000 gross.

Compensation

[28] Section 123(1)(c)(i) of the Act allows me to order compensation for humiliation, loss of dignity and injury to Mr Bennett's feelings arising out of his unjustified dismissal.

[29] Mr Bennett says that the ongoing lack of work and the lack of the pay he was owed led him to be in severe financial hardship. He had to use savings, set aside to go on holiday with his son, for everyday living expenses such as food and power and phone bills. He could not pay his rent every week and was facing eviction so went to WINZ for an emergency grant. He was unable to keep up payments on his car and almost lost it.

[30] He says he was extremely stressed and upset and felt bad for not being able to provide properly for his son. His situation was amplified because he is a single parent. He was embarrassed that his son walked into the lounge one day to find him crying about his lack of work and income.

[31] I consider it is reasonable that Mr Bennett be compensated \$8,000 for his hurt and humiliation.

Contribution

[32] In an email of 10 February 2016, Mr Langdon raised the issue of the cash job done by Mr Bennett as being "deceitful" and done "behind my back." However, Mr Langdon did not rely on that as the reason for not giving Mr Bennett ongoing work.

[33] Mr Bennett did not contribute to the situation giving rise to his personal grievance and there will be no reduction in remedies.

What other money is still outstanding?

[34] In March 2016, Mr Langdon paid two separate amounts to Mr Bennett. Mr Bennett's evidence is that he has now been paid up until 31 January 2016 save for an amount of \$261, which is still outstanding, and \$129 holiday pay not paid.

[35] I am satisfied that Mr Langdon must pay those outstanding amounts, totalling \$390.00.

Was there a breach of good faith?

[36] Ms Boulton submits that Mr Langdon failed to engage with Mr Bennett in a responsive and communicative way during January 2016. Mr Bennett texted Mr Langdon frequently to try to get his withheld pay and to find out what was happening with work. Ms Boulton submits that Mr Langdon's failure to respond adequately and failure attend mediation were examples of breaches of good faith.

[37] Section 4 of the Act sets out the statutory definition of good faith. Some breaches of s 4 can lead to the imposition of a penalty under s 4A of the Act. In order to result in a penalty, a breach must be "deliberate, serious and sustained" or intended to undermine "an individual employment agreement ... or an employment relationship."²

[38] Mr Langdon's failure to attend mediation in January 2016 was not a breach of his duty of good faith. He advised Mr Bennett by text in advance that he would not be able to attend because he had to pick up his children. I understand that Mr Bennett does not accept that was a valid reason but without an opportunity to hear from Mr Langdon I am reluctant to find that he breached his duty of good faith.

[39] Nor do I consider that Mr Langdon was so uncommunicative with Mr Bennett that he breached his duty to be responsive and communicative. He did not reply to all Mr Bennett's texts but did respond to a number of them. In any event, even if I was to find a breach it did not reach the high threshold of "serious, sustained and deliberate" and without more evidence, I could not find that it had been intended to undermine

² These are the only kinds of breaches set out in s 4A that could apply to this case.

the employment relationship. I will not impose a penalty for a breach of s 4 of the Act.

Penalties for breaches of minimum code standards

[40] The main purposes of penalties are to punish and deter, rather than to compensate.

[41] Recent judicial guidance is contained in *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*.³ The Court set out a four-step analysis for reaching decisions on whether to penalise and how to fix penalties.

[42] For individual employers the maximum penalty the Authority can impose is \$10,000 for each breach.⁴ The maximum penalty was doubled in 2011 and was “enacted to mark stronger parliamentary disapproval” of activities that breach minimum standards, or provision of employment agreements.

Step One: Identification of nature and number of breaches

Failure to provide a written employment agreement

[43] Section 63A of the Act requires an employer to provide an employee with a written employment agreement. An employer who fails to do so is liable to a penalty imposed by the Authority.

[44] The provision of written employment agreement is a basic requirement that ensures an employee is fully informed of their rights and obligations.

[45] Mr Langdon did not provide Mr Bennett with a written employment agreement. Ms Boulton submits that I should impose a penalty for Mr Langdon’s breach of the Act and that the penalty should be paid to Mr Bennett.

[46] I am satisfied that I need to consider the imposition of a penalty for the breach of s 63A of the Act. It amounts to one breach. The maximum penalty the Authority can impose is \$10,000. That is the starting point for my consideration of a penalty for this breach.

³ [2016] NZEmpC 143

⁴ Section 135(2)(a) of the Employment Relations Act 2000.

Breach of the Wages Protection Act 1983

[47] Section 4 of the WPA means an employer must pay all wages without deduction when those wages are payable, except that an employer may make deductions if the employee has either provided written consent or made a written request for the deduction. In this case, Mr Bennett did not give written consent and made no written request for the deduction.

[48] Section 13(1) of the WPA sets out an employee's ability to claim a penalty under the Act for a breach of the WPA.

[49] Ms Boulton submits that I should impose a penalty for the breach of the Wages Protection Act, and order that to be paid to Mr Bennett personally.

[50] I am satisfied that Mr Langdon's withholding the sum of \$1,250 from Mr Bennett's pay was in breach of the WPA, and that I need to consider the imposition of a penalty. I consider it is one breach, despite the withholding continuing for at least a few months. The maximum penalty the Authority can impose is \$10,000. That is the starting point for my consideration of a penalty for this breach.

Is a global penalty appropriate?

[51] I do not consider that a global penalty is appropriate as the breaches were distinct and of two different pieces of legislation. The starting point for the two breaches when added together is \$20,000.

Step Two: Assessment of the severity of each breach – aggravating and mitigating factors*Breach of s 63A Employment Relations Act 2000**Aggravating factors*

[52] I heard evidence that other employees who worked with Mr Bennett had a written employment agreement. That is evidence that Mr Langdon knew he had an obligation to provide written employment agreements but chose not to do so in Mr Bennett's case. I consider the breach was intentional or negligent. This is an aggravating factor.

[53] The nature of the loss or damage to Mr Bennett from a lack of a written employment agreement is difficult to quantify. However, one of the mandatory

inclusions in a written individual employment is a plain language explanation of the services available for the resolution of employment relationship problems.

[54] I consider Mr Bennett was disadvantaged by the lack of a written employment agreement.

[55] Mr Langdon did not show any remorse and did not take any steps to mitigate any adverse effect on Mr Bennett of the lack of an employment agreement.

[56] Because this is not the most serious breach conceivable, the starting point for deductions or credits should be less than the maximum penalty. I consider the starting point should be 30% of the maximum penalty, or \$3,000.

Mitigating factors

[57] One mitigating factor is that Mr Langdon provided written employment agreements to other employees. That is, he did not have a policy of denying employees written employment agreements.

[58] Mr Bennett was not a particularly vulnerable employee in relation to this breach. He was able to access advice to assist him to approach Mr Langdon and was able to organise a mediation, despite lacking a written employment agreement.

[59] There is no evidence of Mr Langdon having been found to have engaged in similar conduct in the Authority or the Employment Court, meaning that this is a first 'offence'.

[60] The mitigating factors mean a reduction is reasonable from the provisional penalty of \$3,000 is required and I consider the final amount of appropriate penalty to be \$2,000, pending consideration of Steps Three and Four.

Breach of the WPA

Aggravating factors

[61] Mr Langdon deliberately failed to pay Mr Bennett. That was a very serious breach of Mr Bennett's right to be paid wages for work he had done. Because of the unjustified withholding of his pay, Mr Bennett suffered significant financial problems over what should have been a happy and relaxed Christmas holiday period with his son. The timing of the breach of the WPA is also an aggravating factor.

[62] Mr Bennett is the sole breadwinner for his family. That factor meant he was particularly vulnerable to the withholding of his pay.

[63] This breach is a more serious type of breach than failing to provide an employment agreement.

[64] Those aggravating features bring my provisional starting point for imposition of a penalty to 60% of the maximum, or \$6,000.

Mitigating factors

[65] A significant mitigating factor is that in March 2016 Mr Langdon paid Mr Bennett the majority of the withheld wages, leaving only \$261 outstanding. I consider this reduces the appropriate size of the penalty to \$2,500.

[66] There are no other mitigating factors.

Step Three: consider the defendant's financial circumstances

[67] The financial position of a defendant is relevant to the assessment of whether penalties should be imposed and, in particular, the amounts of such penalties.

[68] I have no evidence on Mr Langdon's financial circumstances and therefore I cannot consider any reduction in the amount of the penalties on that basis.

Step Four: Proportionality of outcome

[69] This is one of the earliest cases to use the approach set out in the *Preet* case. It is not possible to assess it in light of other cases so decided. However, according to *Preet* I need to assess:

the final provisional penalties by reference to all of the relevant circumstances together, to determine whether they are justly proportionate to the seriousness of the breaches and the harm done by them.⁵

[70] The combined amount of penalties to be imposed at this point is \$4,500.

[71] The level of penalties should have an optimal deterrent effect, not only specifically for Mr Langdon, but also more widely for all employers. However, penalties should not be so unrealistically high that:

⁵ *Preet*, *ibid*, paragraph [188], and *Otago Hotel etc IUOW v Pacific Park Motor Inn Ltd (t/a Pacific Park Dunedin)* [1989] 1 NZILR 175 at 181

defendants may not pay them at all and attempt to rearrange their corporate structures and financial affairs accordingly.⁶

[72] Stepping back and looking at all the circumstances, including the seriousness of the breaches and the harm done by them, I consider that a slight reduction in each penalty from \$2,000 to \$1,500.00 and \$2,500 to \$2,000, making total penalties of \$3,500.00, meets the requirements of justice in this case.

Should the penalties be paid to Mr Bennett?

[73] Section 136(1) of the Act states that every penalty recovered must be paid into the Authority, and not to the plaintiff, and must be paid by the Authority to a Crown Bank Account.

[74] Section 136(2) allows the Authority to order that the whole or any part of a penalty recovered must be paid to any person. In practice, that person is usually the plaintiff.

[75] In this case, Mr Bennett has been compensated for the effects on him of the withholding of his pay and the lack of a written employment agreement by my finding of an unjustified dismissal and the remedies I have ordered.

[76] However, in recognition of the financial hardship Mr Bennett endured from his pay being withheld, such as loss of interest from his savings, I consider it just that \$1,000 of the penalties be paid to him.

Costs

[77] Costs are reserved. I understand from the covering letter lodged with the statement of problem held on the Authority file that Mr Bennett is legally aided. If that is not the case, counsel for Mr Bennett may make submissions on costs within 28 days of the date of this determination. Mr Langdon may make submissions in response within 14 days of receiving Mr Bennett's submissions.

Christine Hickey
Member of the Employment Relations Authority

⁶ *Preet*, *ibid*, paragraph [192]

Appendix

Dean Kane Langdon

<i>Step 1: Nature & number of breaches – potential maximum penalties</i>		
WPA⁷		\$10,000
ERA⁸		\$10,000
	Subtotal	\$20,000
<i>Step 2: Aggravating factors as a proportion of maxima in Step 1</i>		
WPA (60%)		\$6,000
ERA (30%)		\$3,000
	Subtotal	\$9,000
<i>Step 2: Ameliorating factors (reducing aggravating factors subtotal)</i>		
WPA Down to \$2,500		\$2,500
ERA Down to \$2,000		\$2,000
	Subtotal	\$4,500
<i>Step 3: Defendant's financial circumstances</i>		
No reduction	Subtotal	\$4,500
<i>Step 4: Proportionality</i>		
Reduce modestly	TOTAL	\$3,500

⁷ Wages Protection Act 1983

⁸ Employment Relations Act 2000