

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 252
5452701

BETWEEN

SPENCER CLARK
Applicant

A N D

HANSEN BROWN &
ARMSTRONG LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Louise Darroch, Counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 17 June 2014 at Auckland

Date of Determination: 23 June 2014

DETERMINATION OF THE AUTHORITY

Orders:

- A. Mr Clark was unjustifiably dismissed by Hansen Brown & Armstrong Limited (Hansen Brown).**
- B. Hansen Brown is to pay Mr Clark compensation in the sum of \$5000 pursuant to s123(1)(c)(i) of the Employment Relations Act 2000 (the Act).**
- C. Hansen Brown is to pay Mr Clark the sum of \$26,100 gross under s128 of the Act, being 3 months wages lost by him as a result of his unjustified dismissal.**

- D. Hansen Brown is to pay Mr Clark unpaid wages for work completed by him totalling \$9000 gross and is to reimburse him the costs of \$1249.85 for tools and an airflight paid by him and to be reimbursed by Hansen Brown.**
- E. Hansen Brown is to pay Mr Clark costs of \$1000 and to reimburse the filing fee of \$71.56 in respect of his application to the Authority.**
- F. All of the sums of money to be paid by Hansen Brown to Mr Clark as above are to be paid within 21 days of the date of this determination.**

Non-appearance of respondent

[1] Hansen Brown & Armstrong Limited (Hansen Brown) failed to file a statement in reply and failed to attend the investigation meeting. I am satisfied that Hansen Brown was properly served with the statement of problem and subsequent correspondence from the Authority together with a notice of investigation meeting.

[2] In those circumstances, I proceeded to investigate the matter in the absence of Hansen Brown.

Employment relationship problem

[3] On 10 June 2014, the Authority in a preliminary determination¹ found that the law governing the applicant, Mr Spencer Clark's employment by Hansen Brown, to be the law of New Zealand, and that New Zealand was the appropriate or natural forum to hear Mr Clark's claim.

[4] Orders were made accordingly, together with an order reserving costs.

[5] An investigation meeting on 17 June 2014 was held for the purposes of investigation by the Authority of Mr Clark's claims of unjustifiable dismissal and recovery of wages.

¹ [2014] NZERA Auckland 227

[6] The background to the employment relationship problem was largely set out in the Authority's determination of 10 June 2014. However, I have more fully canvassed the background in this determination.

[7] Mr Clark is a certified electrician having completed four years as an electrical apprentice in the USA, before being certified. Mr Clark is experienced in both residential and commercial electrical work.

[8] In August 2011, Mr Clark and his family moved from USA to New Zealand. For the first few months in New Zealand, Mr Clark undertook security work for Armourguard NZ Limited and Redbadge Security. Through his in-laws, Mr Clark was introduced to Mr Garrick Cocker, Hansen Brown's Operations Manager. Following a series of telephone conversations and the exchange of a number of emails, Mr Cocker offered Mr Clark a role as a Project Manager with Hansen Brown. Mr Clark accepted the role and signed an employment agreement dated 7 April 2012.

[9] The employment agreement was expressed to be a *fixed term employment contract (the contract)*. The contract did not provide any reasons for its fixed term nature nor did it specify a date on which it was to expire. Mr Clark understood that he was to be employed by Hansen Brown under the contract, both in New Zealand and for a period of time on the rebuild work in Papua New Guinea.

[10] Mr Clark initially worked for Hansen Brown on a prototype residential building in Rotorua before travelling to Papua New Guinea to work on the construction project Hansen Brown had secured with the Government of Papua New Guinea to rebuild schools and residential houses.

[11] Section 66 of the Employment Relations Act 2000 (the Act) provides, in respect of fixed term employment arrangements:

- (1) *An employee and an employer may agree that the employment of the employee will end –*
 - (a) *at the close of a specified date or period; or*
 - (b) *on the occurrence of a specified event; or*
 - (c) *at the conclusion of a specified project.*
- (2) *Before an employer and employee agree that the employment of the employee will end in a way specified in sub-section (1), the employer must –*

- (a) *have genuine reasons based on reasonable grounds specifying that the employment of the employee is to end in that way; and*
 - (b) *advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*
- (3) ...
- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in sub-section (1), the employee's employment agreement must state in writing –*
- (a) *the way in which the employment will end; and*
 - (b) *the reasons for ending the employment in that way.*
- (5) ...
- (6) *... If the employer does not comply with sub-section (4) the employer may not rely on any term agreed under sub-section (1) –*
- (a) *to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
 - (b) *as having been effective to end the employee's employment, if that former employee elects to treat that term as ineffective.*

[12] I find that the contract did not comply with s.66 of the Act and that Mr Clark was entitled to treat the fixed term nature of the contract as ineffective.

[13] Mr Clark started work in Papua New Guinea on 23 May 2012. Mr Clark had a visitor's visa which was due to expire on approximately 22 June 2012. At this time, Hansen Brown was in the process of obtaining a work permit for him while he was working on the rebuild project.

[14] A couple of days before his visitor's visa was due to expire, Mr Clark travelled from Port Moresby, Papua New Guinea to Brisbane in order to renew his visa. The return airfare was paid for by Hansen Brown. Mr Clark was paid the equivalent of \$4,000 by Hansen Brown towards work performed by him up until that time.

[15] Mr Clark spent approximately one week in Brisbane getting his visa renewed. During this time, Mr Clark was contacted by Mr Cocker who informed him that he was to return to New Zealand because Hansen Brown was still waiting for funding from the Government of Papua New Guinea for the rebuild project. Mr Cocker asked Mr Clark pay for his ticket to New Zealand and told him Hansen Brown would reimburse him for the cost.

[16] In late June, Mr Clark returned to New Zealand and for a number of months was in regular contact with both Mr Albert Hansen, one of the directors of Hansen Brown and Mr Cocker about returning to Papua New Guinea to continue in his role as project manager for the rebuild project.

[17] In early July 2012, Mr Clark had conversations with both Mr Hansen and Mr Cocker over the situation he was in. Mr Clark raised a personal grievance with Hansen Brown at this time, informing both Mr Hansen and Mr Cocker that he was very unhappy, upset and frustrated about not being paid for the work he had done, and for not being able to continue to work on the project. Mr Clark felt he was being treated unfairly. Mr Clark says he and his wife had recently rented a home in New Zealand and his wife was pregnant with their fifth child at the time of these stressful events.

[18] Mr Clark and his wife now have five children aged 9, 8, 5, 3 and 1 years. Mr Clark says the financial stress he was under was unacceptable and unfair.

[19] Mr Clark's counsel, Ms Louise Darroch raised a personal grievance with Hansen Brown in writing on 22 October 2013. That letter and subsequent approaches by Ms Darroch to Hansen Brown to participate in a mediation to resolve Mr Clark's personal grievances did not receive a response.

[20] Mr Clark claims to have been unjustifiably dismissed by Hansen Brown and seeks compensation as a result. Mr Clark also claims recovery of wages and losses as a result of the personal grievance. Mr Clark seeks reimbursement of expenses paid by him which have not been reimbursed by Hansen Brown as agreed.

[21] Pursuant to Mr Clark's contract he was to be paid a salary by Hansen Brown of NZ\$104,000 per year *payable in equal instalments on the [15th and last day] of each month*. Mr Clark received one payment of \$4000 for work performed from early May until 22 June 2012. Mr Clark was entitled under his contract to \$13,000 for work completed during this time. From the end of June 2012, Mr Clark was not provided with further work by Hansen Brown nor was he paid his salary in accordance with his contract.

[22] I find Hansen Brown's failure to provide Mr Clark work or pay him salary due under his contract amounted to a repudiation by it of its contract with Mr Clark. In my

view, these actions amounted to a dismissal of Mr Clark. I find that Mr Clark was dismissed by Hansen Brown on approximately 23 June 2012.

[23] Once a dismissal has been established, it is for the employer to justify the dismissal. The statutory test of justification is contained in s.103A of the Act. Section 103A(2) sets out the test of justification which 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.*

[24] In the absence of any evidence by Hansen Brown, the facts as I have found are that Mr Clark was not provided with further work after 23 June and was instructed to return to New Zealand at his own cost. Mr Clark was told that when there was further funding there would be further work for him. This never occurred and Mr Clark was not paid what he was owed under the contract nor was he paid any further salary.

[25] If the work that Mr Clark was seconded to Papua New Guinea to undertake was dependent upon Hansen Brown obtaining funding, this should have been made clear to Mr Clark. It was not, nor was it a term of his contract.

[26] In all the circumstances, I find Mr Clark's dismissal to be unjustified.

Remedies

[27] Mr Clark suffered stress as a result of his unjustified dismissal. An award of \$5000 compensation pursuant to s.123(1)(c)(i) of the Act is appropriate in the circumstances.

[28] In approximately September 2012, three months after Mr Clark's dismissal by Hansen Brown, Mr Clark finally obtained work as a stevedore with the Ports of Auckland. Under s128 of the Act, I order Hansen Brown pay Mr Clark the equivalent of 3 months lost wages totalling \$26,100 gross.

[29] Mr Clark is owed wages for work performed by him and not paid by Hansen Brown. Unpaid wages total \$9000 gross, being the sum of \$13,000 gross owing for work performed from early May 2012 until 23 June 2012 less the sum of \$4,000 paid by Hansen Brown. Finally, Mr Clark is entitled to reimbursement of tools purchased by him at Hansen Brown's request for \$1,000 and for the airfare from Brisbane to New Zealand of \$249.85. These awards of remedies and reimbursement of expenses

are to be paid by Hansen Brown to Mr Clark within 21 days of the date of this determination.

Costs

[30] Mr Clark as the successful party is entitled to costs. The Authority determined the preliminary matter as to jurisdiction on 10 June 2013². The subsequent Investigation Meeting on the substantive matter took place on 17 June and took just over one hour. The normal daily tariff for costs in the Authority is \$3,500 a day. In the circumstances, I order payment by Hansen Brown of costs to Mr Clark of \$1,000 together with the cost of the filing fee of \$71.56. Costs are to be paid by Hansen Brown to Mr Clark within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority

² [2014] NZERA Auckland 227