

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 78/10

File Number: 5287101

BETWEEN Joseph Davy
 Applicant

AND Raymond Durney & Chesterton
 Holdings Limited
 Respondents

Member of Authority: Denis Asher

Representatives: Mr Davy represented himself
 Mr Durney represented himself and the Company

Investigation Meeting By telephone, 26 April 2010

Submissions Received During the investigation

Determination: 27 April 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Mr Davy says he was unjustifiably constructively dismissed by the respondents and is owed various monies including unpaid wages and holiday pay. He seeks compensation for hurt, lost earnings, costs and penalties.

[2] No statement in reply was received from the respondents.

[3] While a mediated settlement was drawn up by the parties it was not signed off by the respondents.

The Investigation

[4] By letter dated 16 March 2010 the parties were advised that the Authority would be conducting a telephone conference call at 9.00 a.m. on Wednesday 7 April 2010.

[5] Despite advice of the conference call being sent to the address for service of the respondent Company, and that the Authority would be attempting to contact Mr Durney on a given telephone number, the respondents did not make themselves available to participate in the conference: the given number proved to be disconnected and no alternative was provided.

[6] During the telephone conference call I directed that this matter would proceed to a telephone investigation commencing at 10.00 a.m. on Monday 26 April 2010. That arrangement was prompted by Mr Davy's relocation, in pursuit of employment, out of the Hawkes Bay, and the failure of the respondent to date to participate in the Authority's process.

[7] During today's investigation contact was made with Mr Durney by way of another telephone number, and he and the applicant participated fully in the investigation, giving their evidence by affirmation.

Background

[8] The respondents employed Mr Davy from November 2008 until November 2009. He undertook orchard work including thinning and picking, mowing, mulching, pruning and spraying as well as other, general duties. There was no written employment agreement between the parties.

[9] In an email to the applicant dated 1 February 2010 Mr Durney expressed "*serious regret that the situation arose regarding the inability of the company to meet your wages date. This was brought about initially by the collapse of the finance company's (sic),*

added to that, the huge loss of approximately \$700,000 we have had on the orchard this season ... The liquidators have been appointed to Durney Land Company, our parent company. All of our properties sold at a less than market value, and it has been necessary to sell the orchard in total” (copy on Authority file).

[10] During today’s investigation, Mr Durney agreed that, from September 2009, wages were paid erratically to Mr Davy: the former attributes the problem to the slow arrival of funds. Mr Durney agreed that Mr Davy left because of the erratic payment of wages, but says he did so of “*his own free will*” (oral evidence), and denied the applicant was unjustifiably constructively dismissed.

[11] Mr Durney also referred to extensive financial problems affecting the respondent Company: he cited various loss figures, including one of \$3m and over \$30m. He declined the Authority’s offer to contact his accountants for confirmation of the situation on the ground it would cost the respondents.

[12] A search today of the NZ Companies Office confirmed that the respondent Company continues trading whereas Durney Land Company is in receivership and under liquidation.

[13] Mr Durney accepted that he and the Company owe Mr Davy the following monies:

- a. Unpaid wages \$818.76 nett; and
- b. Unpaid holiday pay \$860.40 nett

[14] Mr Durney denied the applicant’s claims that he was entitled to compensation of \$1,950, being the course costs for a certificate of horticulture which Mr Davy claimed was promised verbally, as a term and condition of his employment.

[15] Mr Durney denied the applicant’s claim that he was unjustifiably constructively dismissed, and was therefore entitled to 3-months lost wages of \$1,013.50 gross, being the difference between what he earned after leaving his

employment with the respondents and what he would have received had he stayed and been paid correctly.

[16] For the same reason, Mr Durney denied the applicant's claim of \$6,500 compensation for stress and humiliation arising out of financial pressure resulting from erratic pay and the claimed unjustified constructive dismissal.

[17] Mr Durney offered to pay the applicant for money 'legally owed him' while at the same time rejecting elements of his claim: Mr Davey declined the invitation to enter into further communication with the respondents.

Mr Davy's Position Summarised

[18] Mr Davy's position is set out in an attachment to his statement of problem. It is simply this: because of erratic payment of wages and the resulting pressure and stress on himself and family (he supports his wife and 3-children), and the failure of the respondents to correct the situation after his complaints, but in light of confirmation it was likely to continue into the foreseeable future, Mr Davy resigned his employment and found alternative work.

The Respondents' Position Summarised

[19] The respondents' position is set out above.

Discussion and Findings

[20] In *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, the full Employment Court, at para [37], observed that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[21] By way of applying this test, consistent with my findings set out below, I am satisfied that – objectively reviewed – the respondents' failure to meet its lawful obligations to pay Mr Davy consistently and regularly were not the actions of a fair

and reasonable employer, notwithstanding its apparently urgent financial circumstances, and is the basis of the applicant's unjustified constructive dismissal.

[22] In other words, I do not accept the claim Mr Davy left of his own free will but instead was forced to resign because of the respondents' unfair and unreasonable actions.

Remedies

[23] The claimed verbal agreement in respect of compensation of fees for a certificate of horticulture is denied by Mr Durney. There is no copy of payments by the applicant in respect of a course: his claim appears to be instead one of lost opportunity. In the absence of a written employment agreement, and because the matter is actively disputed, on a balance of probabilities basis I am not prepared to find that Mr Davy has a contractual entitlement to these monies.

[24] The parties agree Mr Davy is entitled to unpaid wages and holiday pay. The respondents are directed to pay these monies to the applicant.

[25] Because he was unjustifiably constructively dismissed, and because I am satisfied from the evidence that Mr Davy promptly mitigated his losses, I accept his claim he is entitled to 3-months loss of earnings.

[26] Because he was unjustifiably constructively dismissed, and because his claim is made out on a balance of probabilities basis, I accept Mr Davy's claim he should be compensated for the stress and humiliation caused him resulting from erratic wage payments and – in the circumstances – his entirely justifiable decision to resign his employment. I am satisfied the sum claimed is appropriate in all the circumstances.

Contributory Fault

[27] There is no evidence of actions by Mr Davy contributing to the situation that gave rise to the personal grievance.

Penalty

[28] In *Xu v McIntosh* [2004] 2 ERNZ 448, 451 the Employment Court found that:

In determining the quantum of penalties to be imposed for the breaches of the ERA ... the first question to ask was, how much harm had the breach occasioned? Further, how important was it to bring home to the party in default that such behaviour was unacceptable, or to deter others from it? The next question ... was: was the breach technical or inadvertent, or was it flagrant and deliberate?

[29] The respondents were in breach of a fundamental obligation of their employment relationship to Mr Davy, to pay him correctly and regularly for his services. It is also a breach of the Wages Protection Act. In an important sense, the breach was deliberate, i.e. a knowing response to, apparently, a significant cash flow problem. However, given the compensation awarded the applicant I see little merit in adding to, what appear to be, significant financial problems being experienced by the respondents and decline to exercise my discretion in favour of a penalty.

Costs

[30] Mr Davy has incurred costs in pursuing this matter but only in respect of his own time and effort. I therefore decline to compensate him other than to order reimbursement of his \$70 filing fee.

Determination

[31] The respondents are to pay to Mr Davy:

- a. Unpaid wages \$818.76 nett (eight hundred and eighteen dollars and seventy-six dollars); and
- b. Unpaid holiday pay \$860.40 nett (eight hundred and sixty dollars and forty cents); and
- c. Lost earnings \$1013.50 gross (one thousand and thirteen dollars and fifty cents); and

- d. Compensation for hurt and humiliation \$6,500 nett (six thousand
and five hundred dollars); and

- e. Filing fee \$70 (seventy dollars).

Denis Asher

Member of the Employment Relations Authority