

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2012] NZERA Christchurch 240  
5351882

BETWEEN            ANTHONY DAY  
                                 Applicant  
  
AND                    AGMECH LIMITED  
                                 Respondent

Member of Authority:    M B Loftus  
  
Representatives:        Philippa Tucker, Counsel for Applicant  
                                 Gary Baker, representative of Respondent  
  
Investigation Meeting:    1 November 2012 at Christchurch  
  
Submissions received:    At the investigation meeting  
  
Determination:            2 November 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Tony Day, claims to have been unjustifiably dismissed from his employ with the respondent, Agmech Limited, on or about 8 July 2011.

[2]     He also has two claims concerning unpaid wages. The first relates to a promised wage increase he did not receive and the second relates to three days upon which he was not required to work due to Agmech's premises having no power as the result of an earthquake.

[3]     Agmech denies it dismissed Mr Day and claims his cessation was mutually agreed. It did not reply to the arrears claims until during the investigation meeting.

**Background**

[4]     Mr Day responded to an advertisement Agmech placed on TradeMe for a fitter turner and fitter welder. The resulting interview took place late one afternoon over a

period of about 2 hours. During the interview Mr Day and Mr Gary Baker (a director of Agmech) viewed the premises before retiring to an office where, according to Mr Baker, they discussed terms and conditions and company expectations. Those expectations are said to include performance expectations and advice Agmech operated a probationary system. A new employee would initially be engaged as a casual and ineligible for *full time employment benefits* including leave accruals for the first two weeks. Assuming that *probationary* period is successfully completed, there is a three month *trial* during which the employee remains a casual but becomes entitled to the benefits of a permanent staff member. Again assuming success, the employee attains permanent full time status. These arrangements are reflected in form documents that were attached to the statement in reply.

[5] Mr Day denies being advised of these arrangements and adds that had he been aware of them he would have opted for another job he was offered at the same time. He says the discussion was limited to issue such as hours of work, which were agreed to be 40 per week, and the rate of pay. He says they agreed an initial rate of \$20 per hour which would increase to \$22.50 upon the completion of four weeks and \$25 at the end of a further four weeks. On these details Agmech agrees but the parties never signed any documents formalising the arrangement. According to Agmech, this was the result of an oversight.

[6] It would be fair to say the relationship soon faced difficulties, although there is some disagreement about the reasons. Mr Day says he was required to provide items to four workers. He says they impeded his ability to do so by issuing competing and conflicting demands which were often inadequately detailed. Agmech's view is Mr Day was simply incapable of performing as required. Mr Baker says, in oral evidence, he was getting feedback concerning Mr Day's inability to work at the company's required speed and this was obvious from day one.

[7] Notwithstanding these concerns Mr Day alleges, and Agmech accepts, these issues were never formally discussed. To the contrary, the parties agree that approximately four weeks into the employment Mr Day made an attempt to raise his concerns with Mr Baker and the latter responded by advising he was happy with Mr Day's work.

[8] On Tuesday 21 June 2011 there was an earthquake which cut the electrical supply to Agmech's premises. Power was not restored for over three days. Mr Day

reported for work on both the Wednesday and Thursday but told to go home. On the Friday he sent a text asking if he should come to work and was advised not to. He was not paid for the three days and takes issue with that as he believes others were allowed to work and paid.

[9] Agmech states approximately one third of its workforce who had little or no leave and/or made a strong representation to be allowed to perform some type of task were allocated maintenance and administrative functions. The rest, who did not work, were not paid.

[10] That then leads to the events of Wednesday 29 June 2011. Mr Day says Mr Baker approached him while he was at his workstation. He says a relatively short conversation ensued in which:

*Mr Baker told me that I was dismissed. ... He told me I was no longer required as he had ordered components from China and that meant there would be considerable less lathe work to do. Mr Baker also told me that I was a railroad worker and I was not dynamic enough.*

[11] Mr Day goes on to say he was then told he would finish up on Friday (July 1). He says he protested that on the ground it gave insufficient time to find alternative employment and Mr Baker responded by giving a further weeks notice.

[12] Mr Baker, in the statement in reply, states

*We felt he [Mr Day] didn't want to work at Agmech - so when the opportunity arose to allow Tony to leave we offered this and he accepted.*

[13] When asked to explain what he meant by this, he said it was an agreed termination. He said he knew Mr Day was getting frustrated but felt he was not a guy who would jump up and down. Mr Baker therefore chose to discuss the situation with Mr Day. Mr Baker said he approached Mr Day and asked how he was going. Mr Day responded *not too bad*. He says the conversation progressed in a way that made him realise within 30 seconds that Mr Day was *on a downer*. Mr Baker claims Mr Days responses *were all negative*. Mr Baker says he asked Mr Day whether he was settling in, to which the response was *not really*. That led to Mr Baker asking *do you think this job's for you?* Mr Baker says the response was *not really* and that led to a discussion about cessation dates.

[14] As events transpired, Mr Day used the notice period, during which he continued working, to source other employment. He finished with Agmech on Friday 8 July and commenced work with an agency the following Monday. The agency paid a lower hourly rate of pay but provided ongoing employment for the following seven months.

### **Determination**

[15] There are three issues that require determination. They are:

- (a) The nature of employment arrangement;
- (b) Whether there was a dismissal and, if so, can it be justified; and
- (c) Whether there are any monies owing.

[16] Questions about the nature of the employment relationship arise as there could, arguably, be dismissal at will if Mr Day was a casual. I conclude he was not. I do so for the following reasons:

- (a) Mr Day is adamant such an arrangement was never discussed with him. Mr Baker's response is while he is fairly certain he would have raised it he can not be absolute about it. He also says written confirmation was the domain of an administrative officer and he, Mr Baker, has no knowledge as to whether or not that individual discussed the issue with Mr Day. I conclude I must accept Mr Day's assertions over the more nebulous response;
- (b) Irrespective of whether or not the arrangement was discussed, its adoption was never confirmed in writing; and
- (c) It is difficult to consider the arrangement casual. A casual arrangement requires the absence of predictability and regularity (see *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 103). That is not the case here – there were fixed hours and days and the parties agree they intended entering into a permanent ongoing relationship and that was the tenor of their discussion.

[17] In terms of the question of whether or not there was a dismissal, I have, as outlined above, two very different versions of the pertinent discussion. That said, those were the initial positions.

[18] When giving oral evidence Mr Day's recital of events remained consistent with the written statement outlined above. The same could not be said of Mr Baker. He gave two subsequent spontaneous recitals of what occurred during the conversation.

[19] In the first of those, Mr Baker said that having asked Mr Day how the job was progressing he commented *you're not getting work out*, Mr Day responded *no* and he (Mr Baker) then said it was a case of *okay, goodbye then*.

[20] A dismissal need not be express but is, instead, a sending away at the instigation of the employer. A statement such as *okay, goodbye then* is, I conclude, indicative of a sending away and in this case it was made by, and therefore at the instigation of, the employer. It is indicative of a dismissal.

[21] In the second spontaneous description Mr Baker said he asked whether Mr Day was getting the work out to which the response was *no*. He then asked *is this job for you* and the response was *no*. He (Mr Baker) then said *how about finishing on Friday* to which Mr Day replied *how about the next Friday*. Again, the comment *how about finishing on Friday* is indicative of a sending away instigated by the employer.

[22] Two of Mr Baker's versions indicated he had uttered the words of dismissal and while the first (paragraph 13 above) did not go that far it was accompanied by an admission Mr Baker could not actually remember the exact words. In such circumstances and given Mr Day's consistent allegations, I accept his evidence as preferable and conclude this was a dismissal.

[23] The conclusion this was a dismissal means Agmech must justify it.

[24] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

*... must be determined, on an objective basis, [by considering] 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 ... occurred.*

[25] In applying that test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[26] Subsections (b) to (d) above codify the requirements of a fair process. In essence an employer is required to put issues in its mind, allow an explanation and consider it. There can be no doubt this did not occur in this instance and Agmech does not suggest otherwise. While Agmech claims to have had serious concerns about Mr Days productivity it accepts it never said so, even during the conversation of 29 June. It also accepts the claim it failed to avail itself of the opportunity which arose during the discussion some four weeks into the employment with Mr Baker then advising he was happy with Mr Day's performance. A total failure to adhere to the statutory requirements must, in normal circumstances, render a dismissal unjustified.

[27] I say normal circumstances as there is the issue of resources (25(a) above) and this was indirectly referred to by Mr Baker during the investigation meeting. As he put it, Agmech is a relatively small business. It does not cross t's or dot i's, but relies on integrity. I considered these comments but conclude that size does not exonerate Agmech from responsibility for its deficient, indeed non-existent, process. Agmech made no attempt to seek advice or assistance and aggravated the situation by misleading Mr Day into thinking he was performing adequately when it thought otherwise.

[28] For the above reasons I conclude the dismissal was unjustified.

**Remedies**

[29] The conclusion the dismissal was unjustified raises the question of remedies. Mr Day seeks wages lost as a result of his dismissal and compensation pursuant to section 123(1)(c)(i) of the Act 2000.

[30] In respect to wages, section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. In this instance Mr Day attained replacement employment which he commenced one working day after cessation but at a lesser rate. He seeks the difference between amounts earned in the new job and that he would have received had he stayed at Agmech.

[31] Assuming the agreed wage rises had occurred, the difference would have been \$3,020. His computation indicates a lesser amount but that is because he considers twelve weeks to equate to three months, as opposed to the thirteen as it actually is. This is a loss which results from what I have found to be an unjustified dismissal. It is payable.

[32] Next there is the issue of compensation. Mr Day seeks an unspecified amount of compensation pursuant to s.123(1)(c)(i). In support he offered evidence that notwithstanding his ability to get a replacement job, he felt hurt. These events left him demoralised and distrustful of employers. Having considered the circumstances and the evidence I conclude an award of \$5,000 to be appropriate.

[33] The conclusion remedies accrue means I must, as required by s.124 of the Act, address whether or not Mr Day contributed to his demise in a significant way. Agmech may argue he did by virtue of his performance but are, in my view, precluded from doing so by virtue of the fact they failed to raise those concerns with Mr Day thereby depriving him of an opportunity to address them.

**Wages Arrears**

[34] As said earlier the arrears claim comes in two parts. The first relates to the unpaid increase and the second to the three days pay lost as a result of the power failure.

[35] There can be no doubt the employment agreement, as entered into, included a provision for the claimed increase given Agmech's acceptance that was agreed. Similarly, there is no disagreement it has not been paid.

[36] Agmech has a contractual obligation. It relies on Mr Day's alleged performance deficiencies as justifying non compliance. That is not, in my view, acceptable given Agmech's failure to raise the allegations and allow Mr Day an opportunity to address the alleged failures. The amount in question is \$322.50 and I conclude it is payable.

[37] The second claim relates to three days Mr Day did not work as a result of Agmech telling him to stay away as a result of a lack of power caused by an earthquake. There is no dispute Mr Day was available to work but his offer of service was rejected.

[38] Agmech made no attempt to defend this claim. While these are not the words used, its position is, essentially, that it sent Mr Day home while allowing others to work as his performance did not warrant the granting of an indulgence. This is not, in my view, adequate. I reach this conclusion for three reasons:

- a. There is no possibility frustration applies. Frustration assumes the employment relationship ends as a result of circumstances beyond the parties' control. This relationship did not end. There was a three day break before it simply continued;
- b. As the employment relationship did not end, Mr Day was not in default having offered himself for work on the three days in question and there is no contractual base upon which Agmech can rely for halting payment when unable to offer work, payment must remain due; and
- c. The reason it relies upon for accepting approaches from others to be allowed to continue working while rejecting Mr Day's overtures is simply unacceptable. The decision was made on the basis of views held about his performance which were never put and which Mr Day has not, therefore, had an opportunity to address.

[39] For the above reasons I conclude the days should, as claimed, be paid. The amount owing is \$540.

**Conclusion and Orders**

[40] For the above reasons I conclude Mr Day has a personal grievance in that he was unjustifiably dismissed.

[41] As a result the respondent, Agmech Limited, is ordered to pay the applicant, Mr Anthony Day, the following:

- i. \$3,020 (three thousand and twenty dollars), being the difference in wages Mr Day would have earned at Agmech and those earned in his new employment for a period of three months following dismissal; and
- ii. A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act;
- iii. A further \$322.50 (three hundred twenty two dollars and fifty cents) being money owing as a result of Agmech's failure to apply an agreed wage increase; and
- iv. A further \$540.00 (five hundred dollars), being money owing as a result of Agmech's failure to pay Mr Day for the three days it asked him to stay at home as a result of the power failure.

[42] Costs are reserved.

Mike Loftus

Member of the Employment Relations Authority