

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 164
3022111

BETWEEN

FRANK DOYLE

Applicant

AND

JAYCON CONCRETE
LIMITED

Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person
No appearance for the Respondent

Investigation Meeting: 16 May 2018

Additional documents
received: 16 May 2018

Determination: 21 May 2018

DETERMINATION OF THE AUTHORITY

- A. Frank Doyle was unjustifiably dismissed by Jaycon Concrete Limited.**
- B. Jaycon Concrete Limited is ordered to pay the following amounts to Mr Doyle within 14 days of the date of this determination:**
- a. The sum of \$8,400 gross for wages lost as a result of Mr Doyle's personal grievance.**
 - b. The sum of \$5,000 under s 123(1)(c) of the Employment Relations Act 2000.**
 - c. The sum of \$71.56 being the Authority's filing fee.**
- C. Jaycon Concrete Limited is ordered to pay \$1,000.00 by way of penalty for its breach of s 65 of the Employment Relations Act 2000. This sum**

must be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

D. Payment of the penalty is to be paid within 28 days of the date of this determination.

Employment Relationship Problem

[1] Jaycon Concrete Limited (Jaycon) is a concrete laying company operating in the Auckland region. Mr Doyle was employed by Jaycon as a concrete layer in or about April 2017.

[2] On 25 June 2017 Jaycon dismissed Mr Doyle by way of text message. Mr Doyle claims this dismissal was unjustified. He claims lost wages and for compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). In addition he asks the Authority to order Jaycon to pay a penalty for failing to provide him with a written employment agreement.

[3] No Statement in Reply was filed by Jaycon.

[4] Prior to the investigation meeting a minute setting out, inter alia, the date of the investigation meeting was personally served on Jaycon. In addition it was served with the notice of investigation meeting. The minute advised, inter alia, that pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, Jaycon would require the leave of the Authority to reply or respond to the Mr Doyle's application. Jaycon was advised that if an application for leave was filed this must explain the delay in filing the Statement in Reply on time and file a copy of the proposed Statement in Reply.

[5] No application for leave was received from Jaycon. However, at 4.58 pm on 15 May 2018, the day before the investigation was scheduled to take place, the Authority received an email that attached a medical certificate for Jaycon's director. The email stated:

Jason is unwell and unable to attend medical can be provided.
Please reschedule to next week.

[6] In response to that email the Authority Officer phoned and emailed Jaycon. Jaycon was advised that as it had not filed a Statement in Reply, nor sought leave to

do so out of time, the investigation meeting was to proceed. It was advised the start time of the meeting would be delayed by an hour, to 11 am, to enable the parties to attend.

[7] There was no appearance for or on behalf of Jaycon at the investigation meeting. This was despite my waiting until 11.10 am to commence my investigation.

[8] As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Jaycon had duly attended or been represented.

[9] As permitted by 174E of the Employment Relations Act 2000 (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 but has not recorded all evidence and submissions received.

The issues

[10] The issues requiring investigation and determination are:

- a) Was Mr Doyle unjustifiably dismissed?
- b) If Mr Doyle was unjustifiably dismissed, what remedies should be awarded?
- c) Did Jaycon breach s 65 of the Employment Relations Act 2000? If so, should a penalty be imposed?
- d) Should either party contribute to the costs of representation of the other party?

Issue One: Unjustified Dismissal

[11] Mr Doyle was notified of his dismissal by way of a text message dated 25 June 2017. This text message advised:

Hi Frank. You have muck up three times, no tarp on the job in Riverhead. You let us down last week as you weren't there for Blackbridge pour and no show last Saturday for the extra person. We can't have this going forward. It's too much pressure on Jay. If you can return your uniform and wet weather gear I will give you your final payment.

[12] The onus falls upon Jaycon to justify whether its actions in dismissing Mr Doyle were justified.

[13] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Jaycon, 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.

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

[15] 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 Doyle being treated unfairly.¹ A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

[16] The process leading to Mr Doyle's dismissal was defective. Jaycon failed to meet any of the mandatory considerations set out in s 103A(3). There was no investigation before dismissal. There was no reasonable opportunity afforded to Mr Doyle to respond to the concerns raised in the text message before dismissal. In effect the dismissal was immediate and abrupt. These defects were not minor and did result in Mr Doyle being treated unfairly.

[17] A decision to dismiss in all the circumstances known at the time was not one that a fair and reasonable employer could have made. Mr Doyle was unjustifiably dismissed from his employment with Jaycon and is entitled to remedies.

Issue Two: Remedies

Lost wages

[18] Mr Doyle claims ten weeks' lost wages.

[19] Section 123(1)(b) of the Act provides for the reimbursement by Jaycon of the whole or any part of wages lost by Mr Doyle as a result of his grievance. Section 128(2) provides that I must order Jaycon to pay Mr Doyle the lesser of a sum equal to

¹ s 103A(5)

his lost remuneration or to three months' ordinary time remuneration. However, I have a discretion to award greater compensation for remuneration lost than three months' equivalent.²

[20] Having heard from Mr Doyle, and viewed the job application forms he provided, I am satisfied that Mr Doyle has lost 6 weeks wages as a result of his personal grievance. In reaching this view I have taken into account that Mr Doyle applied for jobs through "Indeed" on 26 June, 30 June, 8 July, 1 August, 4 August and 7 August 2017. However, thereafter I am aware of no other attempts by him to find employment until October 2017.

Quantum of lost wages

[21] Mr Doyle claims the sum of \$18,000 for lost wages. He said this sum was calculated on the basis of him working 72 hours per week i.e. 6 days per week and 12 hours per day for which he was paid the sum of \$1,800.

[22] For the reasons that shall follow, I do not accept, on balance, that Mr Doyle worked 72 hours per week.

- a. I am satisfied the oral agreement reached with Jaycon was that Mr Doyle would be employed for 40 hours per week. Mr Doyle said he initially worked 40 hours per week. He said it was agreed that he would be paid \$35 per hour. This represents a sum of \$1,400 gross per week.
- b. There is no evidence that this agreement was varied. I am satisfied that any additional monies Mr Doyle received were payments for overtime and not a part of his regular pay.
- c. I do not find Mr Doyle's evidence credible. If he worked 72 hours per week then, in gross terms, he would have been earning \$2,520 per week. During the period he worked for Jaycon, Mr Doyle's bank statements show he was receiving a benefit from Work and Income New Zealand (WINZ). Mr Doyle said that when he was employed by Jaycon he told WINZ he was working. Despite this, the level of benefit he received from WINZ remained the same. I strongly doubt WINZ would have continued to pay him a benefit if it was aware that he was earning \$2,520 gross per week.

² s 128(3).

This may explain why he received payment of his wages in cash and why his IRD earnings record made no mention of the income he received from Jaycon. This is a matter which he may need to address with WINZ and IRD.

[23] In the circumstances, I calculate Mr Doyle's lost wages on the basis that he worked 40 hours per week. Multiplying 40 hours by Mr Doyle's hourly rate of \$35 I reach a weekly wage of \$1,400 gross. Multiplied by six weeks equals \$8,400 gross.

[24] Mr Doyle has lost the sum of \$8,400 gross as a result of his personal grievance. Jaycon is ordered to make payment of this sum within 14 days of the date of this determination.

Section 123(1)(c)(i) Compensation

[25] Mr Doyle claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act in the sum of \$15,000.

[26] Mr Doyle gave brief evidence of the effects his dismissal had on him. He explained that he felt confused and worthless when he was notified of his dismissal by way of text message. A medical certificate I viewed spoke of Mr Doyle suffering headaches, neck pain and poor sleep, however this was dated two days after his termination. I understand this was not an on-going issue.

[27] Mr Doyle's partner said Mr Doyle's termination affected his self esteem. She said he was disappointed that he was fired when his co-worker and friend remained working for the company. However, this co-worker was dismissed three weeks later. I take from this that this disappointment would have been short-lived. She also said he felt uncertain how his colleagues in the concrete industry felt about him.

[28] Taking into account the foregoing circumstances, and the short duration of his employment I am satisfied that Mr Doyle suffered humiliation, loss of dignity and injury to his feelings. However, this was at a relatively low level. As such, I award the amount of \$5,000 as compensation under s 123(1)(c)(i) of the Act.

[29] Jaycon is ordered to make payment to Mr Doyle the sum of \$5,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Issue five: Contribution

[30] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.³

[31] Having heard Mr Doyle's response to the matters raised in the text message, I am satisfied that he did not contribute to his personal grievance. For this reason I make no deduction to the remedies I have awarded.

Issue Four: Has the Respondent breached s 65 of the Employment Relations Act? If so, should a penalty be imposed?

[32] Section 65 of the Act requires that an individual employment agreement must be in writing. It must also contain six pieces of information, as set out in that section. Sub-section 65(4) provides that an employer who fails to comply with that section is liable to a penalty imposed by the Authority.

[33] There is no dispute that Jaycon failed to provide Mr Doyle with an employment agreement. Therefore, on the face of it, it is liable for a penalty.

[34] The quantum of any penalty is to be determined using the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*.⁴

[35] Step one is to identify the number of breaches and the maximum penalty applicable. In this case there was one breach of section 65. The maximum penalty that may be imposed upon a company is \$20,000 per breach. The starting point is, therefore, a penalty of \$20,000.

³ s 124.

⁴ [2016] NZEmpC 143

[36] Step 2 involves consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

[37] The requirement to provide an employment agreement has been in place for more than a decade. Ample assistance is available to help employers, small and large, to ensure they comply. I know of no reason why an employment agreement was not provided to Mr Doyle. He said he requested one on numerous occasions. I conclude that this stage has a neutral effect on my calculation.

[38] Step three requires the Authority to consider the means and ability of Jaycon to pay the penalty reached under Step 2. As I have no evidence that Jaycon will be unable to pay a penalty I conclude this stage has a neutral effect on my calculation.

[39] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty I have arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances. Looking at recent Authority and Court imposed penalties I conclude an appropriate penalty is \$1,000.00.

[40] A penalty of \$1000 is sufficient to act as a deterrent to other employers who might fail to properly complete the mandatory requirement to provide workers with a written employment agreement covering at least all the elements required by s 63A and s 65 of the Act. It is a penalty within the range imposed in comparable cases but still very much at the lower end of the levels of penalty that may be awarded against a company.

[41] Jaycon is ordered to pay \$1,000.00 by way of penalty for its breach of s 65 of the Act. This sum is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[42] Payment of the penalty is to be paid within 28 days of the date of this determination.

Costs

[43] Mr Doyle was represented by an Advocate in the early stages of this proceeding. However, this Advocate advised the Authority that he no longer represented Mr Doyle and did not appear at the investigation meeting.

[44] Mr Doyle said he has not incurred any legal costs. He said he has not received an invoice for costs and has not been told that he will have to pay any costs.

[45] In these circumstances, I make no award of costs other than payment of the Authority's filing fee of \$71.56. This fee is an amount reasonably recoverable from Jaycon. I order Jaycon to pay the sum of \$71.56 within 14 days of the date of this determination.

Additional Directions

[46] Due to the matters addressed at paragraphs 22 (c), I direct a copy of this determination be provided to the Work and Income New Zealand and the Inland Revenue Department.

Jenni-Maree Trotman
Member of the Employment Relations Authority