

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 147  
5340495

BETWEEN                      MICHAEL DUNLOP  
   Applicant  
  
AND                                CPC NEW ZEALAND  
   LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              J Tannahill, counsel for applicant  
   D Parbhu, advocate for respondent  
  
Investigation Meeting:        25 August 2011  
  
Additional information        1 September 2011  
provided:  
  
Determination:                23 September 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

- [1]     Michael Dunlop seeks:
- (a)    A finding that he was dismissed unjustifiably by his former employer, and the remedies flowing from that;
  - (b)    An order for the payment of wages and holiday pay owed as at the date of termination;
  - (c)    A penalty for the former employer's failure to have in place a written employment agreement; and
  - (d)    A penalty for the failure to pay wages and holiday pay.
- [2]     The former employer, CPC New Zealand Limited (CPC) says the termination of Mr Dunlop's employment on the ground of redundancy was justified, and says

there was a written employment agreement in place. It says it was unable to calculate correctly the wages and holiday pay due to Mr Dunlop because he had not provided it with the records it needed to do so, and that in any event it was withholding payment for reasons associated with its view that Mr Dunlop breached a promise not to provide confidential information to his intended new employer.

### **The dismissal**

#### 1. The facts

[3] CPC employed Mr Dunlop as a salesperson, commencing on or about 31 March 2008. Mr Dunlop sold specialised cleaning and related products.

[4] Mr Dunlop reported directly to the then-general manager, Steve Todd, until about late 2009. In June 2009 Mr Todd gave Mr Dunlop a written employment agreement, together with a job description which included a requirement that Mr Dunlop achieve sales of not less than \$40,000 per month 'after the first 12 months'. It was common ground that Mr Dunlop was not meeting that target. It was also common ground that, at that time, Mr Dunlop was forwarding his call sheets in bundles on up to a fortnightly basis, rather than daily as required. Finally, Mr Todd said, and I accept, that from time to time he would ask Mr Dunlop what other assistance he could give in reaching the target, and Mr Dunlop would assure him the target would be reached.

[5] In late 2009 Dennis Parbhu, the managing director, took over the direct management of the sales representatives including Mr Dunlop. Mr Parbhu, too, was concerned at Mr Dunlop's sales performance, and sought to provide Mr Dunlop with incentives to do better. For those reasons Mr Parbhu wrote to Mr Dunlop in January 2010 advising of an increase in salary to \$40,000 pa as well as offering other financial incentives. The incentives were accompanied by increases in sales targets. Mr Parbhu also required Mr Dunlop to communicate with him on a daily basis, and to provide details of the number of calls and quality of the calls made each day.

[6] Mr Dunlop did not communicate with the frequency and in the form requested. He also continued to miss his sales targets. The reason for the form of

communication Mr Parbhu sought was that for planning purposes he wished to stay closely informed of the nature and quality of the calls being made.

[7] In April 2010 Mr Parbhu prompted Mr Dunlop to provide call sheets and to report to him by telephone. He did not receive the response he required.

[8] Discussions escalated on 27 May 2010. In an emailed message of that date Mr Parbhu expressed concern about the absence of call sheets, and said:

*I cannot carry on much longer, I will have to reduce your salary or make the position redundant if you cannot get the call sheets to me daily and I see lots of new calls being made.*

[9] Mr Dunlop replied saying he was waiting for daily figures. He complained of CPC's failures to: pay a bonus; replace his phone; reimburse expenses; and maintain stock levels. He said he was tired of working with 'a team of idiots', and referred to an earlier query about the amount of holiday pay owed to him.

[10] In response Mr Parbhu repeated his concerns about Mr Dunlop's sales figures and hours of work. He informed Mr Dunlop:

*We have four choices:*

- 1. You resign*
- 2. We make your position redundant*
- 3. You quickly start performing and growing sales and providing detailed call sheets every day and we reduce your salary back down to \$35k (we can do this because this was a gifted incentive for you to grow sales past \$40k which has not happened now)*

*Please make your choice*

[11] Mr Dunlop did not reply. On 1 June 2010 Mr Parbhu sent Mr Dunlop a text message informing him his employment was terminated on the ground of redundancy.

[12] Mr Dunlop said his response was to telephone Mr Parbhu. He indicated he would treat his redundancy as effective immediately, and that he sought one month's pay in lieu of notice and holiday pay. He hoped the relationship could end on good terms.

[13] Mr Parbhu said Mr Dunlop also promised not to share its confidential information with his intended employer, and breached his promise the same day. That matter has not been pursued in this employment relationship problem, although it may yet be the subject of an application by CPC.

## 2. Determination

[14] There was no justification for terminating Mr Dunlop's employment as Mr Parbhu did. He managed the matter poorly and should have sought professional advice.

## 3. Remedies

[15] Mr Dunlop's employment would probably have terminated for economic reasons despite the deficiencies in CPC's approach to its implementation. CPC also had genuine and justified concerns about Mr Dunlop's performance. Although it had not done so in a disciplinary context it had drawn these to his attention and required him to address them. Thirdly, the attitude Mr Dunlop displayed towards his employer indicated that the termination of the relationship at his initiative would probably have occurred before much longer.

[16] In addition Mr Dunlop obtained alternative employment on an interim basis almost immediately, before commencing a permanent position with an organisation trading as Biotech 2000 and conducting business in what I describe for now as a similar field.

[17] Other than through the failure to make payment in lieu of notice, which I address later in this determination, I am not satisfied that Mr Dunlop has lost remuneration as a result of his personal grievance. If I am wrong in this I would find that through his performance and attitude Mr Dunlop contributed to the circumstances of his dismissal and would reduce significantly the order for reimbursement I would otherwise have made.

[18] For these reasons, save to the extent that I address payment in lieu of notice, there will be no order for the reimbursement of remuneration lost as a result of the personal grievance.

[19] Regarding the claim for compensation for injury to feelings as a result of the personal grievance, Mr Dunlop said at the investigation meeting his concern was to obtain the wages and holiday pay owed to him rather than with his dismissal. The lack of attention in his written brief of evidence to the circumstances of the dismissal, as well as the conduct of the discussion of the background to the matter during the investigation meeting, was consistent with that approach.

[20] I find there was no injury to Mr Dunlop's feelings as a result of his personal grievance. There will be no order for compensation.

### **Wages and holiday pay**

[21] The employment agreement provided for termination by the parties on the giving of four weeks' notice. Mr Dunlop received one week's pay instead. He is entitled to the balance in the sum of \$2,307.69.

[22] Holiday pay in the sum of \$3,658.81 was calculated as owed to Mr Dunlop on the basis that he worked a 40 hour week. It was not paid to him.

[23] One reason for the failure to pay was that it had come to CPC's attention that Mr Dunlop had been working at a local radio station on Mondays. Mr Dunlop acknowledged that he worked at the station on Monday afternoons, but said he obtained his sales manager's consent and he made up the time by working after hours or on weekends. CPC required the records showing his hours of work to enable it to make an accurate calculation of the wages and holiday pay owed. Not surprisingly in the light of Mr Dunlop's approach to record-keeping, there was no such record.

[24] At the same time, Mr Dunlop was salaried and his hours of work were flexible. The mere fact that he worked elsewhere on Mondays was not in itself evidence of a breach of the employment agreement on his part.

[25] Mr Parbhu was also considerably exercised by his view that Mr Dunlop was planning to commence employment with Biotech 2000, and had passed CPC's confidential customer information to Biotech 2000. In a message dated 14 June 2010 he informed Mr Dunlop the payments of wages and holiday pay were being suspended until Mr Dunlop answered a number of questions Mr Parbhu posed in that respect. Mr Parbhu repeated his position in subsequent exchanges with Mr Tannahill.

[26] Mr Dunlop was entitled to receive outstanding pay and holiday pay at the termination of his employment. The above matters do not give Mr Parbhu any right to refuse to pay.

[27] CPC is therefore ordered to pay to Mr Dunlop the sum of:

- (a) \$3,658.81 as holiday pay; and
- (b) \$2,307.69 as payment in lieu of notice.

**Penalty for failure to provide written employment agreement**

[28] Although I am not satisfied Mr Dunlop was presented with a written employment agreement prior to entry into the employment relationship in 2008, a written agreement was presented to him in June 2009. The contents were considered and discussed, and a minor change made as a result. Mr Todd followed up with Mr Dunlop, seeking Mr Dunlop's signature and return of the agreement, and was assured the matter was in hand. However it was not, and instead of returning the agreement Mr Dunlop left it in his company car. It found its way under the car seat, where it was located while the car was being cleaned after Mr Dunlop's employment ended.

[29] Further, as is too frequently the case, the claim for a penalty was not supported by any reference to the relevant provisions in the Employment Relations Act on which this claim must be based. Reference to relevant provisions in Part 6 of the Act, as well as to s 133 and 135(5), is advisable when such claims are being considered.

[30] The claim was without merit. There will be no order for the payment of a penalty in respect of the written employment agreement.

**Penalty for failure to pay wages and holiday pay**

[31] Again there was no reference to the statutory or any other provision on which the claim for a penalty was founded. Such provisions, along with the alleged breaches, should be properly identified when a penalty is being sought. Claims for penalties should not be treated as boilerplate matters. Complicating factors may include a question of statutory interpretation or a less than straightforward application of the provisions of a statute to the facts, they may involve a time limit, or as in the above claim for penalty they may raise a question of standing. Such factors should be considered when framing an application for a penalty.

[32] Regarding holiday pay, broad references to s 27 of the Holidays Act 2003 in correspondence between the parties or with a labour inspector, for example, do not cure the defect as far as the Authority is concerned. Section 75 of the Holidays Act sets out the liability of an employer to a penalty for the failure to comply with specified provisions of the Holidays Act. The provisions include s 27, which includes an obligation to pay annual holiday pay in the pay that relates to the employee's final period of employment. However s 76 provides that a labour inspector is the only person who may bring an action against an employer to recover a penalty under s 75. For that reason, if it relies on a breach of s 27, the present claim cannot succeed.

[33] There was no separate reference to the failure to make payment in lieu of notice, or any other reference to the failure to pay holiday pay, in the context of any breach of any provision for which a penalty is available.

[34] In such circumstances there will be no order for a penalty.

**Summary of orders**

[35] CPC is ordered to pay to Mr Dunlop:

- (a) \$3,658.81 as holiday pay; and
- (b) \$2,307.69 as wages owed.

[36] I order that interest be paid on the above sums calculated as 5% from the date of this determination to the date of payment.

[37] I also record that, although I have not made an order for a penalty in respect of the failures to pay wages and holiday pay, CPC's obligation to pay has been drawn to Mr Parbhu's attention and he has been advised that he is not entitled to withhold payment as he has. If he continues to withhold payment, and to act in breach of the Authority's orders to pay, he and CPC will risk becoming liable to further orders from the Authority.

### **Costs**

[38] Costs are reserved.

[39] If either party seeks an order for costs there shall be 28 days from the date of this determination in which to file and serve a written statement of what is sought by way of costs, and why. The other party shall have 14 days from the date of receipt of the statement in which to file and serve a statement in response.

R A Monaghan

Member of the Employment Relations Authority