

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 187
3114272

BETWEEN	SIDNEY EASTHAM Applicant
AND	INFINITE BUILDING SOLUTIONS LIMITED Respondent

Member of Authority: Michael Loftus

Representatives: Belinda Brans, counsel for the Applicant
Michael McAleer, advocate for the Respondent (not
present at the Investigation Meeting)

Investigation Meeting: 6 May 2021 at Napier

Submissions Received: At the investigation meeting

Date of Determination: 6 May 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Sidney Eastham, claims he was unjustifiably dismissed by the respondent, Infinite Building Solutions Limited (IBS) on or about 11 March 2020.

[2] Mr Eastham also seeks to recover one week's wages (being the amount payable during his first week of absence due to ACC) along with other money he says was unlawfully deducted from his pay.

[3] Mr Eastham also sought the imposition of penalties but these claims were withdrawn during the investigation meeting.

[4] IBS's position is Mr Eastham was not dismissed but abandoned his employment. It says he did so in the face of disciplinary action for having worked while on ACC which, when combined with other alleged infractions, would undoubtedly have seen his dismissal.

Absence of the respondent

[5] IBS was absent from the investigation meeting which raised the question of whether or not it should proceed.

[6] That IBS is aware of the Investigation Meeting is not in doubt. Its advocate, Mr McAleer, participated in a telephone conference during which it was scheduled. That arrangement was then confirmed via a notice of Investigation Meeting which includes advice that should the respondent fail to attend the Authority may proceed and issue a determination without the respondents input.¹

[7] There is also no doubt IBS received that notice. Indeed, Mr McAleer, wrote to the Authority on 28 April advising, midst other things, that IBS had ceased trading and would soon be either *wound up or liquidated*. The letter then advised IBS would not be attending the investigation and *it will be up to the Authority as to whether it wishes to proceed with the investigation...* given IBS's situation.

[8] Mr McAleer was advised that notwithstanding the letter and for reasons soon to be explained the Authority intended to proceed at that stage. On 4 May Mr McAleer confirmed his clients would not attend and Mr Eastham's claims would not be defended.

[9] I consider the decision to continue appropriate for the following reasons. First, IBS remains extant and Mr Eastham should not be deprived of an opportunity to advance his claims simply because of some future possibility. Second, and perhaps more importantly, there has already been delay attributable to explanations given by IBS. The problem now faced is those reasons have become inconsistent and contradictory. Furthermore, they have not been supported with any current credible evidence of their veracity. In other words, they have no standing and should be disregarded.

[10] Given those facts, I am not aware of any valid reason why there should be further delay, especially given the threat of liquidation.

¹ Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

Background

[11] Mr Eastham was employed by IBS as a builder. On 24 February 2020 he fell from some scaffolding while on a work site and suffered injuries to his head, back and arm.

[12] Mr Eastham says he immediately informed IBS of the accident and was taken to hospital. He says he then kept IBS updated and provided it with a medical certificate declaring he was unfit for work until 8 March 2020.

[13] On 3 March Mr Eastham sent IBS a text regarding his first week's wages and the fact it was then unpaid. The response alleged IBS *...had a call this morning from an ACC investigator after you were apparently found working yesterday. I have been advised everything has been frozen until the investigation is complete.*

[14] In response, Mr Eastham made enquiries of the ACC and was advised he was not under investigation. He then sent a text to IBS advising them of that and again asking for his pay. The text also said that if he wasn't going to get paid he would have to come and collect his tools so he could sell them to pay his bills and buy food.

[15] Mr Eastham says he provided another medical certificate on 4 March which declared he would be unable to work until 31 March 2020. IBS denies receiving this though there were what I consider interesting conversations with ACC. ACC's records show IBS's claim that ACC was investigating an alleged impropriety by him are incorrect. They also record that on 4 March Paula Burns (the wife of IBS's owner) told ACC Mr Eastham *...is not longer wanted/needed back at work.*

[16] Next was a letter dated 11 March 2020 from Mr McAleer, which Mr Eastham received the following day. The letter reads:

We are the authorised representative of Infinite Building Solutions.
We have been instructed that you have not worked for our client for almost 3 weeks.
During this time you have been on ACC but you have also been working for Scobuild.
We have become aware that ACC are now investigating your claim.
You have quite clearly abandoned your employment with Infinite Building Solutions.
Your employment is now terminated pursuant to clause 25 of your employment agreement.

Yours faithfully.

[17] Clause 25 deals is assumed to deal with abandonment of employment but Mr Eastham has no access to a copy of his employment agreement and IBS has not provided one.

[18] Mr Eastham took issue with this and initiated his claims. Correspondence then passed between the parties with IBS maintaining Mr Eastham had been working while on ACC and that there was a police investigation into other allegations the company was making which, incidentally, continued to mount and included claims of criminal wrongdoing.

[19] Suffice to say Mr Eastham has consistently denied any of the claims have validity and it should be noted neither ACC nor the Police have taken any action. It should also be noted that ACC accepted Mr Eastham's claim as a work related accident.

Determination

[20] As already said, Mr Eastham's primary claim is he was unjustifiably dismissed. IBS says no on the basis Mr Eastham abandoned his employment.

[21] A dismissal is a sending away by the employer.

[22] The letter of 11 April advises Mr Eastham's employment had been terminated and the decision was conveyed by IBS's representative on its behalf. That is, in my view, a sending away by the employer. It is a dismissal, especially as the argument Mr Eastham had abandoned, and upon which IBS relies, is a total nonsense. For an employer to assert abandonment it must first attempt to confirm the employee has left. Here there is absolutely no evidence IBS attempted to confirm Mr Eastham's intentions which is not surprising – IBS knew exactly where Mr Eastham was, why he was absent and had an indication about how long he would be away.

[23] It is easy to reach a conclusion, confirmed by ACC's notes and the letter of 11 April, that IBS was alleging Mr Eastham was guilty of wrongdoing and was dismissing him absent any process or investigation while using the allegation of abandonment as a pretext.

[24] The evidence leads me to conclude IBS's approach is a travesty and not the actions of a fair and reasonable employer.

[25] I find Mr Eastham was dismissed and given IBS's absence, there is neither justification nor evidence to support the allegations of wrongdoing levelled against him.

[26] To the contrary, and putting aside Mr Eastham's denials which I accept, the evidence I have strongly suggests IBS's allegations are ill-founded. In fact, I would go so far as to say they constitute a disgraceful attempt to disparage Mr Eastham absent any credible evidence.

[27] There is then the claim for a weeks wages being those due for the first weeks absence on ACC. The fact ACC accepted Mr Eastham's was a work related injury means it is payable and as it relates to a period prior to dismissal it is due in addition to any wages awarded as a result of the dismissal.

[28] There is also the request monies deducted unlawfully from Mr Eastham's pay be returned. This relates to the fact the parties agreed \$100 would be deducted from Mr Eastham's pay each week to cover the cost of tools he bought on IBS's account and which it was intended he retain. The agreement was not, however, confirmed in writing as required by law.²

[29] Furthermore, and when requested wage records were eventually provided by IBS, they showed variable deductions inconsistent with the agreed \$100 per week.

[30] Finally, and perhaps most importantly. Mr Eastham's post dismissal request the tools be returned has been ignored. IBS still has the tools and their retention invalidates the rationale behind the deductions. This, when combined with the fact the deductions are illegal, leads me to conclude the amount sought, \$2,596.43, should be repaid.

[31] Returning to the conclusion the dismissal is unjustified as it raises the question of remedies. Mr Eastham seeks wages lost as a result of the dismissal and a compensatory payment of \$20,000.³

[32] With respect to lost wages s 128(2) of the Employment Relations Act 2000 (the Act) requires the payment of three months wages. That is what Mr Eastham seeks and given the variable nature of his weekly earnings he estimates the amount to be \$15,600 gross. The estimate is supported by reference to his wage records and is based on an average of his weekly earnings. Given evidence Mr Eastham was out of work for a period which exceeded three months after he was cleared to return to work, along with evidence of attempts to gain replacement employment, this is payable.

² Wages Protection Act 1983 at s 5(1)

³ Sections 123(1)(b) and (1)(c)(i) of the Employment Relations Act 2000

[33] Turning to compensation. Mr Eastham supports his claim with evidence of the hurt he felt and the stress he suffered as a result of IBS's actions. He talks about the false and unsupported allegations made against him with the resulting hurt being aggravated by the fact he now knows IBS simply wanted him gone for some unknown reason.

[34] I have already labelled IBS's conduct disgraceful and note the campaign to disparage and denigrate Mr Eastham is ongoing with new and previously unheralded accusations of poor workmanship being raised as recently as 15 April 2021 in a brief of evidence furnished by Mrs Burns.

[35] IBS has engaged in an ongoing campaign to besmirch Mr Eastham's integrity and competence while failing to support its claims with any credible evidence. From that serious hurt must emanate and it is Mr Eastham's evidence it has. Mr Eastham lodged a reasonable claim and given the circumstances, his evidence and current trends with respect to compensation I see no reason why it should not be granted in full.

[36] Having concluded Mr Eastham was unjustifiably dismissed and remedies accrue I must also consider whether they should be reduced due to contributory conduct.⁴ It must be obvious from what has already been said that there is no evidence which would justify such a reduction.

[37] Finally there are costs which the Authority normally addresses on a tariff basis. The starting point is \$4,500 for a one day investigation with adjustment then possible depending on the circumstances.⁵

[38] Mr Eastham seeks reimbursement of costs for one day at the daily tariff. The investigation was scheduled for a day and while it was truncated as a result of the respondent's absence it still had to be prepared for on the basis IBS might change its mind and attend. Actual costs exceeded the amount sought and having discussed the claim with counsel I consider it appropriate I award the amount sought.

⁴ Section 124 of the Employment Relations Act 2000

⁵ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

CONCLUSION AND ORDERS

[39] For the above reasons I conclude Mr Eastham has a personal grievance in that he was unjustifiably dismissed. He is also due wages, both those not paid and those improperly deducted. As a result I make the following orders:

- (a) The respondent, Infinite Building Solutions Limited, is to pay Sidney Eastham:
 - (i) \$15,600.00 (fifteen thousand, six hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
 - (ii) A further \$20,000.00 (twenty thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
 - (iii) A further \$1,200 (twelve hundred dollars) gross being payment for the first weeks absence on ACC; and
 - (iv) A further \$2,596.43 (two thousand, five hundred and ninety six dollars and forty three cents) being the restitution of money unlawfully deducted from Mr Eastham's wages; and
 - (v) A further \$4,500.00 (four thousand, five hundred dollars) being a contribution toward the costs Mr Eastham incurred pursuing his claims.
- (b) The amounts ordered in (a) above are to be paid no later than 4.00pm on Thursday 27 May 2021.

Michael Loftus
Member of the Employment Relations Authority