IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 58
5327173

	BETWEEN	KEVIN ENOSA Applicant
	AND	BLACK & WHITE FIRE SYSTEMS LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	David Beck, Counsel for Applicant Sam Vaisevuraki, Advocate for Respondent
Investigation Meeting:	27 April 2011 at Christchurch
Further information:	29 April 2011 from Respondent
Determination:	2 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sam Vaisevuraki is the principal of Black & White Fire Systems Limited, a company which operates a business installing fire systems under contract. Kevin Enosa worked with Mr Vaisevuraki in this business until his employment was terminated in August 2010.

[2] Mr Enosa lodged a statement of problem with the Authority in which he said that he was employed by the company from January 2010 and that the problem he wanted the Authority to resolve was his unjustified summary dismissal for which he sought compensation, lost wages including unpaid holidays and not reinstatement.

[3] During a phone conference, which did not include the respondent because Mr Vaisevuraki was apparently unavailable at the appointed time despite having

earlier agreed to participate, arrangements were made for an investigation meeting with Mr Enosa to lodge and serve statements of evidence by 1 April 2011 and Mr Vaisevuraki for the respondent to lodge and serve statements by 13 April 2011. Neither party complied with this direction but the Authority did receive by email a statement on behalf of Mr Enosa at 5.43pm on Tuesday 26 April 2011. In that statement, Mr Enosa gave evidence about having been employed *firstly casual in September 2009 [and] paid in cash*. There was mention of receiving a lower hourly rate than promised, not receiving a written employment agreement until June 2010 and not being given an opportunity to seek independent advice about the agreement.

[4] During the investigation meeting counsel for Mr Enosa confirmed that there was no claim for arrears about the hourly rate of pay or for any penalty for breach of the law concerning the signing of the employment agreement. Counsel also confirmed that his client accepted the terms of the written employment agreement despite the controversy about when it was entered into. I will say no more about those matters. I do need to say more about the relevance of the pre-January 2010 work and payment for the purposes of the claim for holiday pay. Before turning to that issue I will mention the circumstances of the dismissal.

The dismissal of Mr Enosa

[5] Mr Enosa was due at work at 7.00 am on Friday 20 August 2010. It is common ground that he sent a text to Mr Vaisevuraki shortly before that time saying that he was unwell and would be absent. Mr Vaisevuraki rang Mr Enosa. He got no answer at first but eventually they spoke by phone. Mr Vaisevuraki's evidence is that he could tell from the phone conversation that Mr Enosa was intoxicated. He says he put that to Mr Enosa who denied it. He also says that Mr Enosa told him that he was at home. Mr Vaisevuraki was dissatisfied with Mr Enosa's responses so he decided to go around to Mr Enosa's home.

[6] Mr Enosa's evidence about their phone call is somewhat different. He says he was told that he was an *idiot* and *dumb*, and that Mr Vaisevuraki should come over and assault him.

[7] Throughout the Authority's investigation meeting, Mr Vaisevuraki behaved in an overbearing manner, frequently interrupting and sometimes using vulgar language. He displayed a patronising attitude towards Mr Enosa, sometimes describing him in the words Mr Enosa says were used during the phone call on 20 August 2010. Mr Vaisevuraki's conduct in front of the Authority despite frequent cautions from me leads me to think that he would have behaved similarly (or worse) in his private dealings with Mr Enosa. Accordingly I accept Mr Enosa's evidence mentioned above.

[8] Mr Vaisevuraki arrived at Mr Enosa's home a bit later in the morning, about 9.00 am or 10.00 am. Mr Enosa was not there. Mr Vaisevuraki tried to call and/or text Mr Enosa without success. He then returned to his own home. Mr Vaisevuraki told his wife *This guy is running me through the fucking mill*. The context was that Mr Vaisevuraki had started a contract at the Christchurch airport terminal project and Mr Enosa was his only employee. Mr Vaisevuraki's wife told him *Baby you don't need this*. She told him he needed someone who was reliable. Mr Vaisevuraki's evidence is that he sat down and thought about it, that part of him wanted to fire Mr Enosa but a big part of him did not want to do that. He wrote a letter dated 20 August 2010, returned to Mr Enosa's home and put it under the door in the early afternoon.

[9] It is helpful to set out part of the letter:

> *Many attempts have been made to contact you on your mobile number …with out your answer. This is the* ***4th time*** *you have failed to turn up for work due to being fully intoxicated on alcohol rendering you unable to perform you* ***"Obligations"*** *as a Fire Sprinkler fitter apprentice … Under* ***"12.2 Termination of Serious Misconduct"*** *(ii) dishonesty; (iv) serious or repeated failure to follow a reasonable instruction;*
>
> ***"Kevin Enosa"*** *you are no longer employed by* ***BWFS*** *and need to return all Airport passes and BWFS uniform and related items thereof;*
>
> **…**

[10] Mr Vaisevuraki's letter does not support the evidence now given by him. There is nothing equivocal about the letter but Mr Vaisevuraki's evidence is that he wrote the letter to Mr Enosa *to wake him up [and] I needed him to be on task*. Mr

Vaisevuraki further said *If the employment agreement wasn't working for Kevin throw it away [and] do another one. We would have sat down and decided on another one.* I do not accept this evidence. Mr Vaisevuraki was angry with Mr Enosa because he thought Mr Enosa had lied to him about being sick. There is evidence from Mr Enosa, which I accept, to the effect that in June 2010 Mr Vaisevuraki had been intolerant of him being sick, telling him it was *bullshit* when Mr Enosa told him that he was unwell and could not attend work. Given Mr Vaisevuraki's overbearing nature it is hardly surprising that Mr Enosa sent a text message on 20 August 2010 and did not answer his phone at first.

[11] Mr Enosa had in fact been at his partner's place during the morning on 20 August. He returned to his accommodation during the afternoon and discovered the letter. Mr Enosa rang Mr Vaisevuraki. There was a brief discussion following which Mr Vaisevuraki went round to see Mr Enosa. In evidence Mr Vaisevuraki said that he told Mr Enosa to forget about the termination letter and to take a week off unpaid but then later gave evidence that he told Mr Enosa to take a week off on pay. Mr Enosa gave almost no evidence of this discussion.

[12] The best evidence I have of this discussion is Mr Vaisevuraki's diary note, obviously made at the time. It seems that Mr Enosa was apologetic and explained that he had gone out for dinner and to a night club until 1.00am. Mr Vaisevuraki asked if he had a drinking problem but Mr Enosa denied that. Mr Vaisevuraki then asked if Mr Enosa liked his job and Mr Enosa replied that he did. There was some discussion about why Mr Enosa was always late for work. Mr Vaisevuraki then told Mr Enosa that he would give him one more chance, to take a week off work to think seriously about his apprenticeship and to call him on Friday 27 August 2010 to go over a new contract and conditions. Much of this exchange would have been Mr Vaisevuraki putting words into Mr Enosa's mouth in an overbearing manner with Mr Enosa timidly agreeing rather than disputing things and inviting further overbearing conduct from Mr Vaisevuraki. What Mr Enosa actually did after Mr Vaisevuraki's departure was to seek other employment which he obtained more or less straight away. Mr Enosa commenced his new job on Monday 23 August 2010.

[13] There were some other exchanges between Mr Enosa and Mr Vaisevuraki soon after their 20 August 2010 discussion but it is not necessary to canvass them at

this point other than to say that Mr Vaisevuraki became aware that Mr Enosa's new employer was the firm that the company did a lot of work for as a sub-contractor.

Justification

[14] Despite Mr Vaisevuraki's assertion in evidence that he was just trying to *wake up* Mr Enosa I find that he intended to and did dismiss Mr Enosa on 20 August 2010 when Mr Enosa found the letter that had been left for him. The later discussion about the possibility of re-employment, apparently on different terms and conditions after a week's unpaid leave did not undo the dismissal. Accordingly it is incumbent on the company to show that the dismissal and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[15] Mr Vaisevuraki thought that Mr Enosa was drunk or hung-over rather than genuinely sick He formed that view from the brief phone conversation. He drove around to Mr Enosa's accommodation to find him absent. He could see into Mr Enosa's room. The bed was still made. As Mr Vaisevuraki recorded in his diary *I then knew he was lying!!* and *I knew I had to terminate Kevin's employment*. Mr Vaisevuraki then returned home, wrote out the dismissal letter and delivered it.

[16] S.4(1A)(c) of the Employment Relations Act 2000 sets out the employers good faith obligations in a situation such as the present one. An employer must give access to relevant information and an opportunity to comment before making a decision to dismiss an employee. Mr Vaisevuraki completely failed to comply with this statutory obligation. Those are not the actions of a fair and reasonable employer so the dismissal must be unjustified.

[17] Even if Mr Vaisevuraki was right to think that Mr Enosa was hung-over rather than genuinely sick, no fair and reasonable employer would dismiss an employee for that reason without prior formal warnings. That also makes the dismissal unjustified.

[18] For these reasons Mr Enosa has a personal grievance against his former employer.

Remedies

[19] There is no claim for reimbursement of remuneration lost as a result of the grievance because Mr Enosa suffered no loss.

[20] There is a claim of $8,000.00 compensation for humiliation, loss of dignity and injured feelings arising from the grievance and subsequent events.

[21] Some of Mr Enosa's evidence in support of the claim is directed at events earlier in the employment. Those matters are irrelevant to an assessment of compensation for distress caused by the dismissal. However, I accept Mr Enosa's evidence that he felt harassed by Mr Vaisevuraki during the period immediately after the dismissal when Mr Vaisevuraki found out about Mr Enosa's new job. I have no doubt that Mr Vaisevuraki berated Mr Enosa then in the same way that he attempted to during the Authority's investigation. That finding is also supported by Mr Vaisevuraki's diary note made after he discovered about the new job which reads *WHAT A LYING LITTLE PRICK!!!* No doubt Mr Vaisevuraki conveyed that message to Mr Enosa in the exchanges on and shortly after 20 August 2010 and I accept Mr Enosa's evidence to the effect that he felt harassed, bullied and belittled. Mr Vaisevuraki also gave evidence (which I accept) that Mr Enosa cried during their discussion on 20 August 2010 after the dismissal. Balanced against that, this is not a case where the effects of an unjustified dismissal continued for months because of a difficulty in finding other employment. An appropriate award to compensate Mr Enosa for the proven distress is $6,000.00.

[22] The Authority must consider the extent to which Mr Enosa contributed in a blameworthy manner to the situation that gave rise to the grievance. There is insufficient evidence to say that Mr Enosa was hung-over rather than genuinely ill. Mr Vaisevuraki's evidence is that another reason for the dismissal was Mr Enosa's failure to admit to some mistakes apparently made by him during a job they worked on shortly before the dismissal. There is no mention of this alleged reason in Mr Vaisevuraki's diary notes, in any of the correspondence with Mr Enosa's lawyer or in any of the material provided to the Authority by Mr Vaisevuraki. I am not persuaded that it was genuinely a reason for the dismissal. Even if I had been so persuaded, I

would not have brought it to account for present purposes given the prejudicial way in which it was raised by Mr Vaisevuraki.

Arrears of holiday pay

[23] There is a claim for compensation for *lost wages including unpaid holidays*. Properly, that should be either a claim for arrears pursuant to s.131 of the Act and/or (given the circumstances explained below) a claim under the Wages Protection Act 1983.

[24] I need to say more about the relevance of the pre-January 2010 work and payments. Between October 2009 and December 2009 Mr Enosa received a regular payment into his bank account marked *AS Vaisevuraki salary*. Mr Vaisevuraki's evidence is that he paid Mr Enosa this money out of his personal money not company money. There is no reason to doubt this evidence. I am asked by counsel to exercise the Authority's powers to include this period in the current claim. I am not prepared to do this for the following reasons.

[25] The evidence points to the work in the pre-January 2010 period as being pursuant to an employment relationship between Mr Enosa and Mr Vaisevuraki personally rather than the company. If it had been brought to the Authority's attention in a timely manner that there were issues between Mr Enosa and Mr Vaisevuraki personally as an employer I would have considered joining him in his personal capacity as a party to the current proceedings. It was simply too late on the day of the investigation meeting to tell Mr Vaisevuraki he also needed to answer claims in his personal capacity. The state of evidence before the Authority does not disclose any arrears in holiday pay in any event. Mr Enosa was paid two week's *salary* in December 2009 despite the business closedown. It is possible given Mr Enosa's statement of evidence that he may have been paid less than the minimum wage; but that should have been properly identified in a timely manner if Mr Enosa wanted the Authority to deal with it as part of this investigation.

[26] One of the reasons why Mr Vaisevuraki did not pay Mr Enosa all the holiday pay accrued during his time working for the company is his claim that Mr Enosa took paid holidays in advance. On investigation it became apparent that Mr Vaisevuraki

was referring to the payments made in December 2009. Because that does not appear to be employment by the company, it cannot be brought to account in the manner now sought by Mr Vaisevuraki. I also doubt that the payments were requested or made as holidays in advance. Rather, the payments were simply made ex gratia by Mr Vaisevuraki. It is too late to try and characterise them differently now.

[27] Mr Vaisevuraki deducted several other payments from Mr Enosa's final pay related to damage he says that Mr Enosa caused in January 2010 to company equipment. This was a further deduction for fees connected to Mr Enosa's apprenticeship. I do not accept that Mr Enosa agreed at the time to reimburse the company for any of these costs or fees. In any event there is no written authorisation for the deductions and they are unlawful under the Wages Protection Act 1983. Mr Enosa is entitled to judgment for all the deducted amounts.

[28] There is no dispute that Mr Enosa's holiday pay accrued since January 2010 is $1,966.40 (gross). There will be an order for payment of that amount. There is no claim for interest.

Summary

[29] Mr Enosa has a personal grievance.

[30] Black & White Fire Systems Limited is to pay compensation of $6,000.00 to Mr Enosa, pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[31] The deductions made from Mr Enosa's holiday pay were unlawful. Black & White Fire Systems Limited is to pay Mr Enosa $1,966.40 (gross), being holiday pay that he should have been paid at the termination of his employment.

[32] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority