

Determination Number: WA 66/07
File Number: 5070423

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

Under the employment Relations Act 2000

BETWEEN Lee Haenga (Applicant)
AND Armadillo Roofing Limited of Paekakariki (Respondent)
Member of Authority: P R Stapp
Representatives: Graeme Ogilvie for Applicant
 Lars Nilsson for Respondent
Investigation Meeting: Wellington, 24 April 2007
Determination: 30 April 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an employment relationship problem that Lee Haenga has with his employer, Armadillo Roofing Limited (Armadillo) not paying him his wages and holiday pay, a claim that he was unjustifiably dismissed and the failure of Armadillo to provide an intended employment agreement and time and wage records.

[2] In a statement in reply provided on 20 November 2006 Armadillo says that Mr Haenga quit his job without notice, he did not turn up to work and he made no calls, he tried to extract money from his employer, and he lied about most things. Mr Lars Nilsson general manager undertook to provide a copy of an employment agreement and the wages and time record during a telephone conference on 9 February. He failed to deliver it by the deadline set by the Authority for 23 February 2007.

[3] I considered mediation as I must and it was agreed by the parties that they would attend mediation to be provided by a mediator from the Department of Labour. There were two

mediations but both parties only went to one of them. Mr Nilsson missed one. There was no further follow up. The matter remains unresolved and thus the Authority is required to determine the matter.

The issues

[4] Is Mr Haenga owed any wages and holiday pay? Were Mr Haenga's wages topped up? What were the circumstances of him leaving his employment? Has Armadillo failed to provide an intended employment agreement and wage and time records as requested?

The facts

[5] Mr Haenga was employed by Armadillo for about six months on a Job Plus scheme as a roofing technician. He says he was not provided with an intended employment agreement when he started work. Subsequently he was provided with an employment agreement but it was never signed. He produced a copy at the investigation meeting.

[6] He says it was agreed he would work a minimum of 30 hours per week but his wages would be topped up if fewer hours were worked. He says he was paid \$16.00 per hour. He says there were times when he was not paid all his wages and he had to make arrangements with Mr Nilsson to get the balance owing paid.

[7] The records produced by Mr Nilsson at the Authority's investigation meeting support that Mr Haenga was required to work up to 30 hours per week, that he was paid \$16.00 per hour and in the weeks where he worked less than 30 hours his pay was topped up by his employer.

[8] Mr Haenga says that on 8 September 2006 Mr Nilsson made an offensive comment to him. I have decided not to refer to the comment directly because of my findings reported later in this decision. An application was also made for a non publication order to protect certain third parties. This approach avoids that. Mr Haenga says the comment upset him a lot. He thought about the comment over night and discussed the matter with his mother. He says his mother telephoned Mr Nilsson and she put a question to Mr Nilsson about his behaviour, which I have also decided not to refer to directly for the same reasons above, but in addition, because Mr Haenga's mother did not attend to give evidence at the Authority's investigation meeting. Mr Nilsson says he was outraged at Mr Haenga's mother's question and suggested she should go to the Police. Later he says he said to Mr Haenga to go to the Police because he did not make the comment and had nothing to hide. He has adamantly denied making the comment Mr Haenga alleged he made and took offence at.

Mr Nilsson also says he did make a less offensive comment on a roof of a job at the Terrace and his brother and another person were present. He says the discussion he did have with Mr Haenga on the roof at the Terrace, put in context, was a joke and was not offensive. Mr Haenga denied any knowledge of that discussion. I will come back to it later.

[9] Mr Haenga decided that he had to do something about the comment he alleges was made, and he says that he raised his feelings about it with Mr Nilsson over lunch at a fish and chip shop in Berhampore and as a result of their discussion Mr Nilsson looked him in the eye and they shook hands. Mr Nilsson says he thought that any disagreement over the comment was settled then.

[10] Mr Haenga says he could not treat the alleged comment as a joke and over the next two weeks let it fester making him feel too sick to work. He says he telephoned his foreman, "Steve", that he was too sick to work. He says he could not face going back to work. He says that one week after the incident and before he decided to leave he was only given 16 hours work and not paid the full 30 hour minimum he considered he was entitled to. He decided he could no longer work for Mr Nilsson. He resigned and did not go back to work after 27 September 2006. His last day at work was 25 September. He disputed receiving a written warning that Mr Nilsson says he sent to him on 11 September 2006 for failing to turn up to work and to discuss employment issues that needed to be addressed. Mr Nilsson suggested they go to mediation.

[11] Mr Haenga says he has not been paid his last week's wages and holiday pay.

Armadillo's role in the Authority's investigation

[12] An adjournment to the start of the investigation meeting was given to enable Mr Nilsson to get to the investigation meeting. He was late because he says he overlooked it. The Authority's investigation meeting was on notice and served and Mr Nilsson was reminded by emails of the date and time by the support officer. Also, Mr Nilsson participated in a telephone conference when he agreed to the date, time and place. During the telephone conference he also agreed to provide a copy of the employment agreement referred to above, the wages and time record and any other relevant correspondence. Nothing was received from him prior to the investigation meeting despite reminders in writing and over the telephone from the support officer. A bundle of time sheets and correspondence was produced by Mr Nilsson at the investigation meeting.

Determination

[13] I am satisfied that Mr Haenga was employed by Armadillo to work 30 hours per week at \$16.00 per hour. He started work according to the “Job Plus” scheme application on 24 April 2006, and according to his evidence, finished on or about 27 September 2006 when he decided not to return to work. The records produced show a total gross sum of \$12,925 was paid.

[14] There is a credibility issue between Mr Nilsson and Mr Haenga about whether or not Mr Nilsson made the comment Mr Haenga has alleged. Mr Nilsson denied making it. The following evidence supports Mr Haenga:

- He was consistent.
- He kept a diary and referred to it at the investigation meeting, which included the comment that he wrote down not long after it was made. I accept that the diary note could be accurate because evidence he gave verbally to the hours he worked was consistent with the wage and time record produced by Mr Nilsson later in the investigation meeting that Mr Haenga had not been provided with. The diary was not produced.
- He put Mr Nilsson on written notice of the comment through a representative on 6 October 2006. There was no reply from Mr Nilsson, at the very least to even deny it. Mr Nilsson says he had seen the letter and the comment and had discussed it with his wife.
- Mr Haenga continued to work and left sometime later. It was submitted by Mr Nilsson this makes the allegation improbable. However, Mr Haenga explained that he needed to work for financial reasons. He festered on the comment. He took time off. He raised it with his mother to get action. Mr Nilsson did not deny she telephoned him. Mr Haenga took time to get legal advice.
- Mr Nilsson’s recollection of him raising his concern about the comment and looking each other in the eye and shaking hands is more consistent with something more untoward than a less offensive joke, and which was made at a disputed time and place. It does signal that they settled something.
- There was insufficient evidence from Mr Nilsson that Mr Haenga was allegedly extorting money from his employer as claimed and that “he told a lot of lies” as alleged.
- Mr Nilsson has attempted to impugn Mr Haenga when he wrote to Work and Income that Mr Haenga had “an extremely poor work ethic, on numerous occasions Lee would turn up to work looking dishevelled and smelling of alcohol. Lee is unreliable, disloyal, and malicious. We have had several loyal customers inform us

that Lee has been bad mouthing our company. Armadillo intends to take legal action against Lee Haenga”. No action appears to have been taken. Mr Haenga had never seen the letter before.

[15] A number of factors cast some doubt on whether or not the comment was made and affects Mr Haenga’s ability to establish his grounds for claiming a constructive dismissal. These include:

- Differences between the two about when the discussion occurred and when and where Mr Haenga followed up the matter with Mr Nilsson. They brought no witnesses to support them.
- Both of them referred to other people being involved but neither of them brought them to the Authority’s investigation meeting for independent evidence to support them.
- Mr Haenga did not put forward that he owed Armadillo advances. It would have been reasonable to expect him to have disclosed this information prior to the investigation meeting since he did put in a written statement. It is common ground that Mr Haenga owes Armadillo Roofing \$300.
- Mr Haenga did not disclose that he had been given an earlier warning that he accepted was for good cause during his employment (as opposed to the written warning dated 11 September he disputed receiving). Also, it would have been reasonable for him to have disclosed this information.
- There were other issues between Mr Haenga and Mr Nilsson in their employment.

[16] Mr Haenga did not return to work after taking exception to something. Even if Mr Haenga did not receive a copy of Mr Nilsson’s letter dated 11 September inviting him to attend mediation, Mr Haenga should have reasonably noted from the copy of the employment agreement that mediation is the primary process to resolve differences in employment and that it was an alternative to leaving.

[17] As such although Mr Haenga was not paid his full wages for his last week there had been past instances requiring his pay to be topped up. He did not resign then and payments were settled by his employer. Both the incidents Mr Haenga relied upon would be sufficiently serious reasons for an employee to resign over and caused at the initiative of the employer if it involved an offensive comment and non-payment of wages. A fair and reasonable employer would know that such behaviour is unacceptable and would make it foreseeable a worker would not have to put up with a

comment of the sort alleged and non-payment of wages, and resign. Indeed Mr Nilsson acknowledged the alleged comment was awful and would be upsetting.

[18] However, I conclude that in this matter the existence of other employment issues, the wages were previously topped up, and Mr Haenga did not resign then and there, that he has not established that Mr Nilsson actually made the comment he alleged. Thus, I conclude Mr Haenga has not established grounds for claiming a constructive dismissal. I conclude he left of his own accord without any notice probably because of a range of reasons about issues he had at work. The balance of the week was not paid by the employer because Mr Haenga was not at work. Because the employment agreement was not signed, and in the absence of agreement on notice and any forfeiture of wages, Mr Haenga is entitled to the balance because the minimum was regularly paid during the employment when his wages were topped up and he decided not to return after not getting paid.

[19] Mr Haenga's evidence was that he had no holidays in advance. This was not challenged.

Orders

[20] Armadillo Roofing Limited is to pay Lee Haenga the balance of his wages owing ie \$224.00 for 14 hours.

[21] Armadillo Roofing Limited is to pay Lee Haenga holiday pay, which I have calculated on my assessment of his gross earnings (\$12,925), as \$775.50 holiday pay. By consent the parties have agreed to offset the \$300 that Mr Haenga owes on advance from Armadillo.

[22] Mr Haenga's claim for a personal grievance is dismissed.

[23] There will be no penalty against Armadillo for failing to provide an intended employment agreement because one exists and was given to Mr Haenga. The Authority requested Armadillo to provide the employment agreement and it did not do so but the applicant found he had possession of a copy and produced it. It was never signed to apply. This would not be a ground to order a penalty, except to note that Armadillo did not comply with an order of the Authority. Mr Nilsson did produce wage and time records as required although not on time as requested. I have decided no to impose a penalty, although I will deal with it in costs where it does have an implication.

Costs

[24] Lee Haenga has claimed reasonable costs should be awarded on \$3,000 for his representation and preparation, and a disbursement of \$70 for the filing fee. Mr Haenga has been put to unnecessary costs and delays that could have been avoided if the respondent had complied with the timetabling and had produced documents such as the wage and time record and any written statement of evidence when requested. The start of the investigation was delayed at the employer's convenience for a morning because of Mr Nilsson's lateness. I have also had regard to Mr Haenga's success and that he did not succeed on his personal grievance. Not much affects this because Mr Nilsson had every opportunity to put his position prior to the investigation meeting, and if he had done so, it might have avoided the need to cover the wider issues. Also, I have noted that Mr Haenga was very genuine about his claim and that it turned on credibility.

[25] I order Armadillo Roofing Limited to pay Lee Haenga a contribution of \$3,000 towards his costs and the filing fee of \$70.

P R Stapp
Member of the Authority