

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 55/09  
5133292

BETWEEN

JEFFREY HAMILTON  
Applicant

AND

LOVELL CONTRACTORS  
LIMITED  
Respondent

Member of Authority: Paul Montgomery

Representatives: Stephen Thomas, Counsel for Applicant  
No appearance for Respondent

Investigation Meeting: 12 February 2009 at Nelson

Determination: 30 April 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant began work with the respondent on 19 July 2007 and says he was dismissed on 3 June 2008. Upon starting, Mr Hamilton says he was told he must be available to work at least 50 hours per week. He says he was dismissed unjustifiably without notice and further, that he is owed money for 11 public holidays, one of which was worked. In summary, Mr Hamilton says the total weeks worked, including the unpaid public holidays for which he should have been paid, is 44 weeks and 3 days. He says he was paid on average \$1,060 per week, that is, 53 hours @ \$20 per hour. The applicant also seeks penalties against the respondent in respect of its failure to provide him with an employment agreement.

[2] In spite of repeated requests to secure time and wage records from the respondent, none has been received.

[3] The Authority's support officer convened an initial telephone conference on 23 October 2008. Mr Lovell, the sole shareholder and director of the respondent company, did not participate in spite of his being advised of the time of that conference.

[4] The Authority's notice of direction required the respondent to lodge and serve a statement in reply setting out its view of the facts. In addition, it was directed to lodge and serve copies of Mr Hamilton's time and wage record under s.130 of the Employment Relations Act 2000.

[5] An investigation meeting was scheduled for 9am on 12 February 2009 at Nelson and the respondent notified by service to its registered office in Blenheim.

[6] No records nor statement in reply were received by the Authority or Mr Thomas and the investigation meeting proceeded as scheduled.

### **Issues**

[7] To resolve this matter, the Authority needs to decide the following issues:

- Was the applicant unjustifiably dismissed; and
- Is the applicant owed wages, that is holiday and statutory holiday pay, by the respondent; and
- Did the applicant contribute to the circumstances which gave rise to his dismissal; and
- Is a penalty justified in the circumstances; and
- What remedies are appropriate in the circumstances?

### **The investigation meeting**

[8] Mr Hamilton, through his counsel, had lodged a statement of problem and given the lack of response from the company and in order to avoid costs to the applicant, the Authority undertook its investigation without a full written statement of evidence from the applicant. Instead, Mr Hamilton was questioned on the information

he had provided to the Authority in the statement of problem and was invited to expand on those points.

[9] Mr Hamilton gave his answers to the Authority's questions in an uncomplicated and forthright manner. In essence, I found him an open and honest man whose expectations of his employer was one of fair dealing but who simply wanted his entitlements and to get on with his life.

[10] An affidavit from his brother, Peter Hamilton, was put before the Authority. That document confirmed the applicant's evidence that he, together with the applicant's parents, had loaned him the funds *in total approximately \$2,500 to \$3,000* to enable Mr Hamilton to pay for a pre-arranged trip to Australia with friends. Mr Peter Hamilton says *initially Jeffrey seemed reluctant to accept our offer of a loan however upon persisting he borrowed the money*. This, including the embarrassed reluctance, was evident under the Authority's questioning. He was clearly a man who preferred to stand on his own but who, having made a commitment as yet unpaid, accepted the assistance and it remains unpaid due to his unexpected dismissal.

### **Discussion and analysis**

[11] The applicant was never provided with an employment agreement for his consideration. He was provided with no pay slips, the only link to the respondent being the entry on his bank statements that his wages were paid by *Lovell Contracting*. On that basis, I have concluded the company, not Mr Lovell personally, was the employer.

[12] The applicant took no paid holidays while employed by the respondent but at the time of dismissal a *one off* payment of eight days' pay was accredited to his account part of which appears to be in lieu of notice.

[13] Mr Hamilton was notified by Mr Lovell, by telephone, that there was no further work available and from that call took it that his employment was at an end. The deposit of \$900 in his account confirmed that view. The applicant says he obtained employment after telephoning Mr Lovell on the advice of a friend. The work was located at Hanmer Springs and, after a discussion on the telephone, an agreement was reached.

[14] Mr Hamilton was paid fortnightly after telephoning his hours to Mr Lovell. The applicant believes that his bank statement showed the deposits came from Lovell Contracting as noted above, and he also confirmed that there was no written agreement.

[15] Mr Hamilton said when he raised the issue of holiday pay and public holidays on two occasions with Mr Lovell, the latter told him he did not pay those but that Mr Hamilton could *use the ute*.

[16] The applicant told the Authority he was working on the inland Kaikoura road on the Monday of Queen's Birthday when he was telephoned by Mr Lovell who told him it was too wet for the job. Mr Lovell rang the following day and told Mr Hamilton that the job was not continuing and that there was no further work for him.

[17] The applicant was paid \$900 for his final four days 40 hours of work, but as no pay slips were ever provided, he is unsure as to what the additional \$100 relates. At the investigation meeting, he claimed for public holiday arrears and holiday pay arrears. He also spoke of the hurt and humiliation he had suffered as a result of being dismissed which he says was heightened at the time by having his teenage son staying with him.

### **Other events**

[18] On 3 April 2009, at the High Court in Blenheim, the respondent company was put into liquidation. The liquidators have set 31 May 2009 as the day on or before which creditors are to make their claims and to establish any priority their claims may have under s.312 of the Companies Act 1993. Mr Hamilton appears to rank as an unsecured creditor but with priority in respect of unpaid wages.

[19] Owing to this notice, the Authority has regard to those sections of the applicant's claim that fall under s.312 of the Companies Act 1993 and has also considered his other claims in respect of s.123 of the Employment Relations Act 2000.

### **The determination**

[20] Returning to the issues set out above in this determination, I find:

- The applicant was unjustifiably dismissed without reasonable notice.
- On the evidence before the Authority, I find the respondent is required to pay Mr Hamilton the following sums:
  - (a) In respect of arrears of unpaid public holidays, the sum of \$2,438 gross;
  - (b) In respect of holiday pay arrears, the sum of \$6,398.16 gross.
- I find that the reasonable notice to which the applicant was entitled in this case is two weeks. Accordingly, I order the respondent to pay the applicant the sum of \$2,120 gross for its failure to give appropriate notice.
- I find that in these circumstances the awarding of a penalty against the respondent in liquidation is a futile exercise. In the normal course of events, I would have levied a penalty of \$500 against the respondent for failure to provide an employment agreement.
- I find no evidence that the applicant contributed in any way to the circumstances which gave rise to his unjustified dismissal.
- I find the applicant was without work for 14 working days which equates to 2.8 weeks. I order the respondent to pay to the applicant the sum of \$2,968 gross based on his average weekly pay of \$1,060. In addition, the respondent is to pay the applicant the sum of \$237.44 as holiday pay on the sum to be reimbursed. This equates to a total of \$3,205.44 gross.
- Having assessed the evidence in respect of the hurt and humiliation suffered by the applicant, and in the light of the relatively brutal manner of the dismissal, I award the applicant the compensatory sum of \$6,000.

### **Costs**

[21] Prior to the investigation meeting being convened, I had requested that Mr Thomas bring to that meeting invoices relating to Mr Hamilton's claim. Mr Thomas duly tendered those at the close of the meeting.

[22] The applicant has incurred legal costs of \$3,055.50 in pursuing his claim. Further, disbursements totalled \$85 and a document service fee for serving Authority documents on the respondent amounted to \$135.

[23] The investigation meeting was not particularly prolonged. However, I accept that the behaviour of the respondent has materially affected the amount of time Mr Thomas needed to deploy on behalf of his client. In those circumstances, I think it just to award the applicant the sum of \$2,000 as a contribution to his reasonably incurred costs. Further, I order the respondent to pay the disbursements of \$85, the document service fee of \$135, and to refund to the applicant the \$70 filing fee incurred by bringing this matter to the Authority.

Paul Montgomery  
Member of the Employment Relations Authority