

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 221
5527645

BETWEEN EDWARD JAMES HORST
Applicant

A N D SWIFT PROPERTY
MAINTENANCE LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: J Ansell, Counsel for Applicant
 A Menzies, Respondent Director

Investigation Meeting: 24 July 2015 at Auckland

Submissions received: 24 July 2015 from both parties

Date of Oral
Determination : 24 July 2015

Date of Written
Determination: 27 July 2015

ORAL DETERMINATION OF THE AUTHORITY

- A. Edward James Horst was unjustifiably dismissed by Swift Property Maintenance Limited.**
- B. Swift Property Maintenance Limited is ordered to pay Edward James Horst wage arrears pursuant to s.131 of the Employment Relations Act totalling \$2,307.69 gross.**
- C. Swift Property Maintenance Limited pay Edward James Horst lost remuneration of \$2,657.92 pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**

D. Swift Property Maintenance Limited pay Edward James Horst compensation of \$5,000 pursuant to s.123(c)(i) and s.124 of the Employment Relations Act 2000.

E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment Relationship Problem

[1] This is an application about wage arrears for two month's work and an unjustified dismissal.

Facts

[2] The facts are largely undisputed. On 18 June 2014 the applicant, Edward (Ted) Horst signed an employment agreement with the respondent company, Swift Property Maintenance Limited. His agreement contained hours of work between 7am to 5pm Monday to Friday and including weekends, an hourly rate of \$16.50 per hour and wages to be paid on the 23rd of the month following the end of the relevant four weekly pay period. Termination was given upon 7 days' notice.

[3] On 25 June 2014 Mr Horst started work with the respondent.

[4] By 25 August 2014 Mr Horst had not been paid and stopped attending work.

[5] On 28 August 2014 he received text messages from the respondent director Aidan Menzies promising payment but none was made.

[6] Between 4 and 9 September Mr Horst text messaged Mr Menzies seeking return of his tools and wages.

[7] On 9 September 2014 the parties met at the Meadowbank Shopping Mall. There were accusations Mr Horst broke into a locked garage. Mr Menzies produced a copy of a complaint to the Police today but no further action has been taken about it.

[8] Between 10 September and 1 October 2014 Mr Horst continued texting and emailing Mr Menzies seeking the money owed.

[9] On 13 October 2014 Mr Horst raised a personal grievance of a disadvantage due to less than 40 hours work being offered and a constructive and justified dismissal and (again) sought payment of outstanding wages.

[10] On 5 November 2014 Mr Horst started a new job at AO Ducting.

[11] On 10 November 2014 he filed a statement of problem which is before me for determination.

Issues

[12] The issues are:

- (i) What were the wage arrears owed for the period 25 June to 22 August 2014;
- (ii) Was Mr Horst constructively and unjustifiably dismissed?

Parties positions

[13] Mr Horst alleges he is owed for 40 hours per week at \$16.50 per hour for the period 25 June to 22 August 2014. Otherwise he seeks payment for 129.50 hours not the 106.4 alleged by the respondent. He also alleges he was subsequently dismissed following non-payment and a series of promises to pay.

[14] The respondent did not file a statement in reply. I allowed it to attend the hearing and give evidence. Aidan Menzies appeared for the respondent and gave evidence. He accepted that there was no payment of wages which it calculates as \$2,925.95 including PAYE and holiday leave.

[15] Mr Menzies accepted that the applicant was a full-time employee, contracted to work Monday to Friday 7am to 5.30pm. He told me he expected him to work 30-40 hours per week but denied telling him he could expect 30-40 hours every week. He produced a number of documents which he alleges are his wage and leave records. These comprise an Outlook Express computer diary and a log book, although half way through the hearing Mr Menzies told me the log book he had produced was not in fact that for Mr Horst but belonged to another employee. He submitted I should take no notice of that log book despite evidence from the applicant that part of it looked like it was in the applicant's handwriting.

[16] Mr Menzies was sure Mr Horst had taken off at least three weeks due to bereavement leave and sickness. He submitted I should prefer his computer diary which had also accorded with Mr Horst's log book which had not been produced. When asked why it was not produced he told me it was an oversight and he had not brought the original log book with him to the hearing.

[17] Mr Menzies further submitted that it was Mr Horst who had terminated his employment because he did not present for work on Monday 25 August. Despite that Mr Menzies was of the opinion that Mr Horst remained employed up to and including 9 September. He alluded to some agreement reached with Mr Horst at the meeting at Meadowbank Mall on 9 September that he would return to work once wages had been paid.

Law

[18] The law pertaining to this matter is relatively simple, although lengthy. Constructive includes but is not limited to cases where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign or there is a breach of duty by the employer causes an employee to resign.¹

[19] The central question in constructive dismissal cases are:²

- (a) What were the terms of the contract; and
- (b) Was there a breach of those terms by the employer that were serious enough to warrant the employee leaving.

[20] In answering the first question I must examine all of the circumstances of the resignation, not merely the terms of notice of other communication whereby an employee has tendered his or her resignation. If there was a breach the next question is whether a substantial risk of resignation is reasonably foreseeable having regard to the seriousness of the breach.³

¹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

² *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 112-113.

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA).

[21] Employers must keep a holiday and leave record that complies with s.81 of the Holidays Act 2003 and a wage record that complies with s.130 of the Employment Relations Act 2000. If after hearing evidence I am satisfied that the employer has failed to comply with s.81 or s.130 of those respective Acts and that that failure has prevented a claimant from bringing an accurate claim, I may make a finding to that effect. I may then accept as proof in the absence of evidence to the contrary statements made by the employee about wages received and hours work, holiday pay received or leave actually taken by the employee.⁴

[22] There is a substantial conflict of evidence between these parties. This requires me to make express findings of credibility based upon evidence given orally at hearing and by way of brief. The credibility can be assessed on two bases, firstly the witness personally and the story the witness tells and some of those factors relevant to personal credibility include demeanour, inconsistencies and contradictions of all kinds, prevarication, reasons to lie and concessions made where due despite any perception by the witness the risk to credibility in giving that evidence. The credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts known or unknown to the witness – is this evidence absurd or is there other evidence making the conclusion inevitable?

[23] I may draw inferences and fill gaps in evidence by application of common sense and knowledge of human affairs and the statement of the industry in any matters that seems capable of being taken into account as indicating the probabilities of the situation.

Wage arrears

[24] The hours of work are not specified in this contract. My view of Mr Menzies evidence was that the respondent intended to employ the applicant for 30-40 hours but there was no agreement to any minimum 40 hour working week. This is supported by clause 37 of the agreement that provides for an unpaid day off work where there are weather problems. I also heard evidence (which both parties accepted) of a subsequent variation agreement for payment for half days if weather problems occurred. The agreement and subsequent conduct indicates that there cannot have been an express agreement about the minimum hours worked per week. Both the conduct and contract

⁴ Sections 833 and 4 of the Holidays Act 2003 and s.132 of the Employment Relations Act 2000

do not assist the applicant's argument he was guaranteed a minimum 40 hours per week.

[25] The parties differ about the amount of time taken off by Mr Horst sick or for bereavement leave. After hearing oral evidence and sighting the alleged wage and leave record of the computer diary produced by the respondent I am satisfied that the employer has failed to comply with s.81 of the Holiday Act 2003 and s.130 of the Employment Relations Act 2000. I do not accept the computer diary contradicts Mr Horst given it is based upon records which are disputed and not before me today. As a consequence I prefer Mr Horst's evidence that he worked 129.50 hours and is owed wage arrears at \$16.50 per hour and holiday leave.

Dismissal

[26] The non-payment of wages was a breach of a term of Mr Horst's contract. There is no situation I can envisage where a reasonable employer would not have foreseen that the breach of contract in this manner could not, in all the circumstances, result in termination. I do not accept Mr Horst was content to wait for payment or agreed to defer it indefinitely beyond 23 August. There was no justification for non-payment and in my view Mr Horst was constructively and unjustifiably dismissed.

Remedies

Wage arrears

[27] As I had noted above the hours worked had been determined as 129.5 hours which at \$16.50 per hour results in wage arrears of \$2,136.75 gross.

Lost remuneration

[28] Averaging Mr Horst's weekly pay over the period of employment, he was paid \$260.58 ordinary time remuneration per week. I am satisfied by the evidence he has produced that he mitigated his losses from 25 August to 10 November by asking friends and family for work and making applications through TradeMe for employment. He started work on 10 November 2014 which by my calculations is 10.2 weeks later.

[29] Accordingly his lost remuneration is 10.2 weeks x \$260.58 which was his average weekly wage, resulting in lost remuneration of \$2,657.92.

Compensation

[30] The purpose of damages is to place an applicant in the position they would have been if the dismissal had not occurred. I have heard evidence of a series of promises to pay which never eventuated. I heard evidence that there was serious financial hardship experienced by Mr Horst. He had to borrow significant sums of money from his parents. I heard from his mother that that totalled \$6,710.00. This was lent on the basis that he would be able to recoup that at some stage from wages to be paid.

[31] He told me also that he incurred financial penalties from lenders, a total of some \$100.

[32] He suffered humiliation in having to rely on friends and family to pay his living costs whilst waiting for payment and seeking a new job. In my view \$5,000 compensation is appropriate. I determine there was no contributing behaviour and no reduction is required under s.124 of the Act.

[33] Accordingly the following orders will now be made:

- (a) Edward James Horst was unjustifiably dismissed by Swift Property Maintenance Limited;
- (b) Swift Property Maintenance Limited is ordered to pay Edward James Horst wage arrears pursuant to s.131 of the Employment Relations Act totalling \$2,136.75 gross;
- (c) Swift Property Maintenance Limited pay Edward James Horst lost remuneration of \$2,657.92 pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000;
- (d) Swift Property Maintenance Limited pay Edward James Horst compensation of \$5,000 pursuant to s.123(c)(i) and s.124 of the Employment Relations Act 2000;
- (e) Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this

determination. The other party shall have 14 days to file and serve a reply.

Addendum

[34] I omitted to deal with holiday pay in my above oral determination. Mr Horst is entitled to holiday of 8% on the gross wages owed⁵ of \$2,136.75 totalling \$170.94. Accordingly the order in para [35] (b) is to amended to include the holiday pay as follows:

“Swift Property Maintenance Limited is ordered to pay Edward James Horst wage arrears pursuant to s.131 of the Employment Relations Act totalling \$2,307.69 gross;”

TG Tetitaha
Member of the Employment Relations Authority

⁵ Sections 25 and 28 Holidays Act 2003.