

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 83
5326726

BETWEEN	JOHN LLOYD Applicant
AND	UTILITY INSTALLATIONS LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	A Singh, Counsel for Applicant J Peebles, Advocate for Respondent
Investigation Meetings:	7 July 2011 and 10 August 2011 at Hamilton
Submissions Received	19 August 2011 from Applicant 5 September 2011 from Respondent
Determination:	2 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr John Lloyd, claims that he was unjustifiably dismissed on or about 6 December 2010. For reasons of completeness, I record that Mr Lloyd also had claims for arrears of wages and holiday pay lodged with the Authority, but during an adjournment of the investigation meeting on 7 July 2011, the parties reached a settlement of these claims with the assistance of a mediator. Hence, by consent of the parties, the matters remaining for determination by the Authority are:

- (a) Whether or not Mr Lloyd was unjustifiably dismissed and, if so, the appropriate remedies that should apply; and
- (b) Was there a breach of good faith pursuant to s.4 of the Employment Relations Act 2000 (the Act)?

[2] However, there appears to be one further matter that requires determination and that is whether or not a penalty should be imposed upon the respondent for not providing an employment agreement.

[3] Mr Lloyd has been employed by Utility Installations Limited (UIL) for two separate periods of employment. The first period of employment ended on or about June or July 2005. It seems that the departure of Mr Lloyd at this time involved a dispute in relation to the rightful ownership of some scrap metal. While the Authority is not required to make any findings about the nature of Mr Lloyd's departure from the employment of UIL in 2005, it appears that the parting of the ways took place with some animosity present. Indeed, the owners (and directors) of UIL, Mr Mark Graham and Mrs Marinella Graham, were of the view that Mr Lloyd should never be employed again by the company.

[4] However, the evidence of Mr Paul Graham,¹ the operations manager for UIL, and the brother of Mr Mark Graham, is that at some point in 2008 he needed to employ a person with a heavy traffic licence and he became aware that Mr Lloyd was unemployed at the time.

[5] It appears that Mr Graham found himself with somewhat of a dilemma. On the one hand, he required an experienced employee and Mr Lloyd was available, but on the other hand, he was aware of the views of the owners of the company that Mr Lloyd was not to be re-employed. Mr Graham's resolution of this dilemma was to employ Mr Lloyd on a purported casual basis with payment of wages being made, colloquially speaking, "under the table". Mr Graham says that the rate of pay agreed to was \$19 per hour. But Mr Lloyd says that the rate agreed to was \$25 per hour. However, I am not required to decide this matter as the parties have now reached a settlement in regard to all outstanding moneys that were claimed. Nonetheless, the matter of how Mr Lloyd was paid assumes some relevance and we shall address this later in the determination.

[6] Mr Lloyd commenced his second engagement with UIL on or about 11 September 2008. Mr Graham's evidence is that the nature of the employment was casual. But the wage and time records for UIL - for the period ending 30 March 2009² to 8 September 2010 - reveal that there was nothing casual about the employment

¹ The reference to Mr Graham throughout the determination is to Mr Paul Graham.

² When Mr Lloyd was paid via the UIL payroll system rather than "under the table".

status of Mr Lloyd. On the contrary, I find that he was employed as a full time employee albeit it may be arguable whether the employment was temporary or permanent.

[7] There was something very irregular about the pay arrangements with Mr Lloyd. The evidence is that while he was paid \$19 per hour (via the UIL pay system), for the pay period ending 30 March 2009 to 21 March 2010 and then \$21.50 per hour until 8 August 2010, there was a co-existing understanding in place between Mr Lloyd and Mr Graham that Mr Lloyd would have his pay effectively “made up” to \$25 per hour, via an adjustment over time; with the effect being that Mr Lloyd would in fact, be paid \$25 per hour as had been agreed between the two men when Mr Lloyd commenced his employment back in September 2008. While Mr Graham has attempted to suggest that there was never an agreement between him and Mr Lloyd that he would be paid \$25 per hour, I find that it is more probable than not that such agreement was reached and it was simply a matter that Mr Graham did not want the owners of the business to be aware of.

[8] The evidence of Mr Graham is that in early May 2010, he became aware, via another employee, that Mr Lloyd intended to travel to the United States of America for a period of time. This was confirmed to him by Mr Lloyd on or about 6 May 2010 when Mr Lloyd informed that he intended to travel to the USA for a period of three months having obtained the 90 day waiver of the visa requirements for the USA. Mr Graham says that he was surprised to be informed of this by Mr Lloyd but he accepted it as Mr Lloyd’s “*prerogative as a casual employee*” albeit I have found Mr Lloyd was not a casual employee, rather he was a full time employee. Mr Lloyd duly finished work with UIL on 21 May 2010 pending his travel to the USA.

[9] Before Mr Lloyd left, he gave Mr Graham written details of how he could be contacted and he also indicated (in writing) that he would be available for work again on 6 September 2010. Rather oddly, Mr Lloyd continued to be paid for 11 of the 14 weeks that he was away from work travelling in the USA. The evidence of Mr Graham about the continuing wage payments while Mr Lloyd was absent is that he continued to pay Mr Lloyd as he had given him a commitment to “*make it up to him somehow*” in relation to increasing the payment from \$19 per hour to \$25 per hour.

The return of Mr Lloyd

[10] The evidence of Mr Lloyd, via his written witness statement, is that he telephoned Mr Graham at 8:00a.m. on 6 September 2010 to confirm that he was coming back to work that day and that Mr Graham said he would “*get back*” to him. However, Mr Lloyd’s oral evidence to the Authority is that, when he got back from the USA, he started ringing Mr Graham. Mr Lloyd told the Authority that he rang Mr Graham on Friday, 3 September, Saturday, 4 September and Sunday, 5 September 2010 and sent a text but he received no response. The further oral evidence of Mr Lloyd is that Mr Graham phoned him somewhere between 7:00a.m. and 7.30a.m. on 6 September and indicated that he would “*get back*” to Mr Lloyd “*as soon as I get the boys away or something to that effect*”.

[11] The further evidence of Mr Lloyd is that Mr Graham rang him on 7 September 2010 and told him of someone by the name of “Mouse” who was looking for a work crew down in Wellington. Mr Lloyd says he took this as an implication from Mr Graham that he should find work with another company. Mr Lloyd says that he advised Mr Graham that he did not wish to work in Wellington and inquired “*what was going on with my employment and the payment of top ups*” to which Mr Graham responded, “*it would be sorted.*” Mr Lloyd says that he would “*regularly*” show up at the workplace and be advised by Mr Graham that there was more work coming up; but nothing eventuated. When pressed about when he came to the workplace, Mr Lloyd said the first time was 13 September 2010 but he was evasive about when any other visits took place. Mr Lloyd also attests that he arranged to meet Mr Graham at a local tavern on 8 October 2010 but Mr Graham never arrived. Mr Lloyd says that at 8:00p.m. on 8 October “*out of sheer frustration*” he phoned Mrs Graham, one of the owner/directors of UIL, and asked her what was going on and that Mrs Graham responded that she would speak to Paul Graham.

[12] The evidence of Mrs Graham is that Mr Lloyd spoke to her on 2 October 2010 and she took notes of the conversation. These have been produced to the Authority but the notes record that a conversation took place with Mr Lloyd on 7 October 2010. Nonetheless, they record that the general tenor of the conversation was about Mr Lloyd looking for employment and being owed holiday pay and indicating he would contact the Department of Labour about the money he was owed.

[13] While the evidence of Mrs Graham is somewhat confused in regard to the dates in question, the general tenor of what was discussed appears to be more or less consistent with that of Mr Lloyd.

[14] The evidence of both Mr Lloyd and Mrs Graham is that they had a further telephone conversation on 10 October 2010 and an undertaking was given by Mrs Graham that Mr Paul Graham would phone Mr Lloyd. Mr Lloyd's evidence is that, as he had not heard from Mr Graham by 17 October 2010, he phoned Mrs Graham again and she told him that Mr Graham had tried to contact him. Mr Lloyd says there was no contact by Mr Graham. Given that he has two phone numbers he can be contacted on and can be texted, it is clear, Mr Lloyd says, that Mr Graham did not try to contact him.

Mr Graham's evidence

[15] Mr Graham acknowledges that he was contacted by Mr Lloyd "in September" 2010 but he could not be specific about the date and that Mr Lloyd asked if any work was available. Mr Graham says that:

I told him there was a recession and we had laid staff off so there was no position for him. I did tell him that we had tendered for a big job and I was hopeful we would get this. This did not eventuate.

[16] The further evidence of Mr Graham is that Mr Lloyd called in to the office "occasionally" and Mr Graham told him of another company in Karaka that was looking for drill operators. Mr Graham says that he also offered to employ Mr Lloyd and "second" him to the Karaka company. Mr Graham also suggested that Mr Lloyd might prefer to approach that company and be directly employed by it. Mr Graham says that Mr Lloyd's response was that he would prefer to work in the Waikato area but in the meantime he would "probably go to Australia for a couple of months to help a friend".

[17] A letter has been produced to the Authority and it appears to have been provided by the company in Karaka that Mr Graham referred to. The relevant extract from the letter is:

Paul [Mr Graham] rang me early September to advise that John Lloyd had returned from the USA and that Paul had currently no work available for him and to inquire if I still required the assistance of a locator and gave me John's phone number. When John and I made

contact I offered John a position as drill locator in our company. John turned down the opportunity stating he had other commitments.

[18] The letter in question is undated and appears to have been provided relative to these proceedings, but nonetheless it appears to corroborate the evidence of Mr Graham in that he had attempted to obtain alternative employment for Mr Lloyd.

[19] Finally, Mr Graham says that apart from Mr Lloyd subsequently contacting him and “*demanding more holiday pay*”, there was no mention of a grievance until after Mr Lloyd had contacted a solicitor. Mr Graham’s evidence is that he believed that the discussions that he had with Mr Lloyd were quite amicable and that Mr Lloyd understood that the company was not in a position to re-employ him. Mr Graham says that:

He [Mr Lloyd] must have realised that he was walking out of a job when he left the company in May 2010. He knew after our discussions following his return to New Zealand that he was not an employee of the company, after all I told him there was no position for him and I was trying to find work for him elsewhere other than with Utility Installations Limited.

Was there a dismissal?

[20] The evidence is that when Mr Lloyd left work on 21 May 2010 to go on his sojourn to the USA, there was a commonly shared expectation that upon his return to New Zealand he would be available for work again on 6 September 2010. However, what is not commonly agreed is whether a job was held open for Mr Lloyd to come back to. Mr Graham was of the view that Mr Lloyd was entitled to go away for three months as he was under the misapprehension that Mr Lloyd was a casual employee and could come and go as he pleased. I accept that Mr Graham probably genuinely held this belief about Mr Lloyd’s employment status, albeit, as I have found from the overall evidence, it was a mistaken belief.

[21] That then raises the question of whether or not the employment of Mr Lloyd remained on foot or continuous while he was in the USA for three months. It seems to me that, despite Mr Graham’s mistaken view of the employment status of Mr Lloyd, it is most unlikely that Mr Lloyd genuinely believed that he was being given leave of absence as a permanent employee for three months simply to travel to the USA on holiday. Rather, I find that it is more probable than not that when Mr Lloyd left his employment with UIL, while his expectation was that Mr Graham would probably re-employ him, there was no guarantee of that. Furthermore, the subsequent actions of

Mr Lloyd, i.e. going to Australia for a period without raising any protest about there not being a job available for him, appear to be an acceptance by him that Mr Graham did not have a position available at that time.

[22] But there is also an alternative scenario. This is that while Mr Lloyd's position remained available when he left on 21 May 2010, by the time that he returned three months later, the recession in New Zealand had taken its toll on the operations of UIL and employees had been made redundant. The evidence of Mr Graham is that, as of 21 May 2010, the company employed 32 employees, but now only employed 18 people. The further evidence of Mr Graham was that Mr Lloyd was initially employed as a truck operator but upon another employee [Mr R] going on accident compensation, Mr Lloyd took over the duties of that person as a drill operator/locator. Mr Graham informed the Authority that Mr R returned to work before Mr Lloyd went overseas but Mr Lloyd remained as a drill operator/locator, albeit the company was "*struggling*" to keep two drills operating.

[23] Mr Graham also told the Authority that work for the company was beginning to decline before Mr Lloyd went to the USA and was "*real quiet*" when Mr Lloyd returned and one of the two drills was "*parked up.*" Mr Graham also informed that the company had incurred a substantial financial loss.

[24] Further information was sought from Mr Graham about the nature of other positions that were made redundant during the absence of Mr Lloyd and subsequently. This information has been provided but is somewhat inconclusive and appears to relate mainly to a number of casual employees or, possibly more correctly, employees who were employed specifically for short term projects.

[25] Nonetheless, it is clear that the company had been substantially affected by the economic downturn and that some permanent staff were made redundant, including administration staff. Whether Mr Lloyd would have remained in employment with UIL had he not gone to the USA, is not clear. However, more probably than not, Mr Lloyd would have understood before he went away that he was taking a chance and that there was no guarantee or undertaking given by his employer that he would have a job to come back to. This was not a situation where a reasonably lengthy (three months) leave of absence had been agreed to. Rather, I conclude that it suited both parties for Mr Lloyd to depart for a trip to the USA and the reality of the situation was that there may or may not have been work available for Mr Lloyd when he returned.

It subsequently transpired that there was no work available for him when he returned, and I have no doubts that Mr Lloyd understood this. Nonetheless, Mr Graham could have and should have been more explicit about the reality of the situation before Mr Lloyd departed for the USA and there should have been something recorded in writing about this to ensure that Mr Lloyd was clear about the position of UIL in regard to ongoing employment.

[26] In summary, the evidence largely points to the situation being thus:

- (a) Mr Lloyd was initially employed as a truck operator on or about 11 September 2008. The evidence about the status of this employment is inconclusive, but upon the incumbent and permanent drill operator/locater [Mr R] being absent on accident compensation, Mr Lloyd took over that role. This was always going to be temporary pending Mr R's return. However, when Mr R returned, Mr Lloyd remained employed until he left on 21 May 2010 to travel to the USA for three months.
- (b) While the conditions of Mr Lloyd's departure were never expressly discussed, I conclude that there was a mutual expectation as at 21 May 2010 that Mr Lloyd could return to employment with UIL, albeit in what capacity was never discussed and this remained inconclusive.
- (c) During Mr Lloyd's absence, the economic downturn led to some redundancies within UIL and the company suffered financial losses. Hence, when Mr Lloyd returned from the USA, the company was not able to re-employ him. While Mr Graham could have been more explicit about the reality of the position of the company and should have met with Mr Lloyd as arranged for 8 October 2010 rather than evading him, I conclude that Mr Lloyd most certainly understood that the economic circumstances of UIL had changed and the company was unable to employ him again. I reject Mr Lloyd's evidence that the situation was not made clear to him and hence he did not attempt to obtain other employment. Indeed, I find that Mr Graham made it clear that he could not re-employ Mr Lloyd because of the shortage of work and also because the company had failed to be successful in its tender for a project that would have created additional employment,

including, possibly, a role for Mr Lloyd. It was further confirmed that the company could not employ Mr Lloyd as evidenced by Mr Graham's attempts to obtain employment for him via his contacts with two other companies; even offering to employ Mr Lloyd and second him to the Karaka-based company. But Mr Lloyd rejected this offer.

- (d) Nonetheless, I conclude that Mr Lloyd, more probably than not, had an expectation that when he left on 21 May 2010, his employment with UIL remained intact or on foot. I accept that he was never informed otherwise and hence that expectation on his part was not unreasonable.

[27] I am left to conclude that when Mr Lloyd came back from the USA and indicated his availability to start work again; this was a reasonable expectation on his part. However, the reality of the situation was that because of the economic environment, there was no longer a job for him and hence a redundancy scenario existed. Therefore, I conclude that Mr Lloyd's employment was terminated from on or shortly after 6 September 2010 on the ground of redundancy.

Was the termination of Mr Lloyd's employment on the ground of redundancy genuine?

[28] While Mr Lloyd has sought to portray that the reason why he was not re-employed is that the owners of the company, Mr Mark Graham and Mrs Graham, did not want him employed there because of past differences, I do not accept that this is so. Rather, I find that due to the economic circumstances, and UIL failing to obtain a project that had been tendered for, the company was not in a financial position to re-employ Mr Lloyd and hence his redundancy was genuine. Normally, one would refer to a position being redundant, but given the circumstances, it is most unclear just what position Mr Lloyd might have been re-employed to, if the circumstances been more favourable.

[29] Having found that a genuine redundancy situation existed, the question then arises as to Mr Lloyd's entitlements. There was not an employment agreement in place and this is a matter I will address shortly. However, when Mr Lloyd was employed in 2005 there was an employment agreement and this appears to be the standard version adopted by the company. In the event of redundancy, this provides (at clause 32) that an employee is entitled to two weeks' notice. Given that Mr Lloyd

had a reasonable expectation of ongoing employment when he left on 21 May 2010; and he was never disabused of this expectation until he returned, I conclude that he is entitled to be paid for two weeks, being the standard notice period given by the company in a redundancy setting, as opposed to one week's notice for termination in general.

Was the dismissal of Mr Lloyd unjustifiable?

[30] Given the overall circumstances, including the uncertainty about Mr Lloyd's possible ongoing role with UIL, I do not find that there was anything unfair or unreasonable about the way Mr Lloyd was treated in the circumstances. On the whole, I conclude that there was little more that Mr Graham could have done. Indeed, Mr Lloyd's evidence is, that if Mr Graham had explicitly told him he was not going to be re-employed and paid him the money he was owed, he would have accepted this and gone on his way to find other employment. I have to say that it is difficult to understand why Mr Lloyd did not comprehend what Mr Graham was saying to him, and apart from putting it in writing, I fail to see what else could have been done.

[31] Therefore, I conclude that the termination of Mr Lloyd's employment on the ground of redundancy was an action that a fair and reasonable employer would have taken in all the circumstances and hence it was justifiable. Mr Lloyd does not have a personal grievance that warrants any further remedies in addition to the two weeks' pay in lieu of notice.

Determination

[32] For the reasons set out above, I find that the termination of Mr Lloyd's employment was justifiable in all the circumstances and that there was not a breach of any of the provisions of s.4 of the Employment Relations Act 2000 (the Act).

[33] However, I find that there is considerable validity in the claim that UIL failed to provide an employment agreement to Mr Lloyd pursuant to s.65 of the Act. Indeed, had there been an employment agreement in place, many of the issues that have come before the Authority may not have arisen and both parties would have been spared the expense of these proceedings. Therefore, it is appropriate that the company is liable for a penalty pursuant to s.135 of the Act in the sum of \$2,000. Pursuant to s.136 of the Act, \$1,000 is to be paid to Mr Lloyd with the other \$1,000 to be paid into the Authority for payment to the Crown Bank Account.

[34] Summary:

- (a) Utility Installations Limited is to pay to Mr Lloyd two weeks' wages in lieu of notice calculated on the basis of \$25 per hour and 40 hours per week; being the gross sum of \$2,000.
- (b) Utility Installations Limited is liable to a penalty for failing to provide an employment agreement pursuant to s.65 of the Act. The penalty ordered is \$2,000 to be paid on the basis set out above at para [33].

Costs

[35] Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority