

BETWEEN

BILL MARSTERS
Applicant

AND

SPACEWALL LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Allan Silberstein, Advocate for Applicant
Raymond Fong, Advocate for Respondent

Investigation Meeting: 20 August 2013 at Auckland

Determination: 2 September 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Bill Marsters, claims that he is owed unpaid wages and unpaid holiday pay by the Respondent, Spacewall Limited (Spacewall), and that he was unjustifiably dismissed by Spacewall on 24 April 2013 when he was informed that his position was being terminated on the grounds of redundancy.

[2] Spacewall confirms that Mr Marsters is owed monies in respect of unpaid wages, however disagrees with the amounts claimed by the Applicant.

[3] Spacewall denies that Mr Marsters was unjustifiably dismissed by reason of redundancy.

Issues

[4] The issues for determination are:

- The amount of unpaid wages and other monies owed to Mr Marsters by Spacewall

- Whether or not Mr Marsters was unjustifiably dismissed by Spacewall as a result of redundancy.

Background Facts

[5] Mr Marsters commenced employment with Spacewall in May 2011 as a casual employee and in June 2011 was appointed as a permanent employee subject to an individual employment agreement (the Employment Agreement).

[6] The Employment Agreement stated:

7.3 Reimbursement of Travel and Accommodation Expenses

The Employer shall reimburse the Employee for their reasonable work related travel and accommodation costs upon production of appropriate receipts.

12.6 Notice of Termination due to redundancy

*In the event the Employee's employment is to be terminated by reason of redundancy, the Employee shall be provided with **1 month** notice in writing.*

[7] Mr Marsters had been the only permanent employee working for Spacewall; however there had also been a contractor and two casual employees, one of whom, Mr Daniel Heinekin, operated in a supervisory capacity.

[8] Mr Marsters had initially reported to Mr Raymond Fong, sole Director of Spacewall, but following the appointment of Mr Heinekin in early 2013 Mr Fong said Mr Marsters was expected to report to him.

[9] Mr Marsters said that during the course of his employment, there had been informal discussion involving some problems in connection with the work he had carried out, however no issues had been raised with him formally and he had not been the subject of any formal disciplinary action.

[10] Mr Fong agreed that, although there may have been some faults raised concerning Mr Marsters' work, there had never been any formal disciplinary process undertaken.

[11] Mr Marsters said that during 2013 he had received only sporadic payments of wages, and he had raised this as a concern with Mr Fong.

[12] Mr Marsters said he had sent many text messages and had left telephone messages asking Mr Fong to meet with him to discuss the sporadic payment of wages situation; however despite brief contact there had been no meeting to discuss the matter until 24 April 2013.

[13] During the meeting on 24 April 2013 Mr Marsters said he had been informed by Mr Fong that his position was redundant and that he would be provided with two weeks' notice, he also said that he had been advised that his position could revert to being casual.

Determination

The amount of unpaid wages and other monies owed to Mr Marsters by Spacewall

Statutory entitlement to wages

[14] The Wages Protection Act 1983 governs the payment of wages between an employer and an employee. In accordance with s 4: *an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*

[15] Mr Marsters claims that he is owed a total sum in the amount of \$14,628.25 in respect of unpaid wages, statutory annual leave entitlement, petrol monies, catering supplies, bank fees, and unpaid contractual notice entitlement.

[16] Mr Marsters supplied documentation in respect of these claims.

[17] Mr Fong disputed the level of the claims in respect of wages, annual leave and the contractual notice on the basis that Mr Marsters notice period was 2 weeks and not one month, however there were no time and wages records produced to substantiate his evidence and I note that clause 12.6 of the Employment Agreement clearly states an entitlement to 1 months' notice in the event of redundancy.

[18] I find that Mr Marsters is entitled to unpaid wages and other monies owed to him by Spacewall.

Was Mr Marsters unjustifiably dismissed by Spacewall as a result of redundancy?

(i) *Did Spacewall have a genuine reason for the redundancy of Mr Marsters' position?*

[19] Mr Fong said that he had made Mr Marsters and the other members of the Spacewall team aware that Spacewall had cash flow and financial problems prior to the decision to terminate Mr Marsters' position on the grounds of redundancy. As a result the contractor and the casual members of the team had obtained other employment and their involvement with Spacewall had ceased prior to 24 April 2013.

[20] Mr Marsters said he had been aware during 2013 that there had been very little work and that there had been cash flow problems, however he had hoped that Spacewall would obtain other contracts.

[21] I observe that during 2013 Mr Marsters had major concerns connected to the non-payment of his full entitlement to wages and that he had been aware that there were cash flow problems.

[22] Although following the termination of his employment Spacewall offered Mr Marsters on-going employment, I note that this was casual employment. The nature of casual employment is that there no onus on the employer to offer work, or on the employee to accept work. Work is offered only as and when it is available. As such the work offered cannot be held to constitute a continuation of Mr Marsters full-time permanent employment which had ceased.

[23] In these circumstances I find that Spacewall had genuine commercial reasons for the decision to terminate Mr Marsters' full-time permanent employment on the grounds of redundancy.

2. Did Spacewall follow a fair and proper process?

[24] The Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) addresses the question of whether or not an action was justifiable or is unjustifiable and states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer*

could have done in all the circumstances at the time the dismissal or action occurred.

[25] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[26] There is no evidence that Mr Marsters had been genuinely consulted about the redundancy of his position. Whilst Mr Marsters may have been aware of the financial problems facing Spacewall, Mr Fong confirmed to the Authority that he had not provided Mr Marsters with any information or given him the opportunity to offer feedback on a proposal to terminate his employment.

[27] In *Cammish v Parliamentary Service*¹ His Honour Judge Goddard observed:

“Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond.”

[28] I find that Spacewall did not follow a fair procedure in making Mr Marsters’ redundant.

[29] I determine that Mr Marsters has been unjustifiably dismissed.

¹ [1996] 1ERNZ 404

Remedies

Unpaid wages and other monies owed to Mr Marsters by Spacewall

[30] In respect of the unpaid wages and other monies claim Spacewall is ordered to pay Mr Marsters the following amounts:

- **\$4,644.00 gross in respect of unpaid wages** for the period 31 December 2012 to 28 April 2013 calculated as wages due under the Employment Agreement clauses 6.1 and 7.1 for:
 - i. January, February, and March equating to \$8,640.00 (160 hours x \$18.00 per hour, \$2,880.00 per month), plus
 - ii. April equating to \$2,304.00 (128 hours x \$18.00 per hour), less
 - iii. \$6,300.00 already paid by Spacewall.
- **\$2,304.00 gross in respect of unpaid statutory holiday entitlement** calculated as 25 days (rounded up to include days taken plus notice period days) at the existing rate of \$2,304.00 per month
- **\$30.00 gross in respect of unpaid petrol expenses** in accordance with clause 7.3 of the Employment Agreement

Unjustifiable Dismissal

[31] I find that Mr Marsters has been unjustifiably dismissed and he is entitled to remedies.

Lost Wages

[32] Mr Marsters' employment at Spacewall was terminated on the basis of redundancy. I have found Mr Marsters was dismissed on the grounds of a genuine redundancy. Consequently no remedy can be awarded for the loss of a job².

² *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601

[33] In accordance with clause 12.6 of the Employment Agreement Mr Marsters was entitled to 1 months' notice in the event of redundancy and is therefore entitled to payment in the sum of \$2,304.00 gross (128 hours x \$18.00).

Compensation pursuant to s 123(1) (c) (i) of the Act

[34] Mr Marsters said that he suffered hurt and humiliation as a result of the non-payment of his wages and other monies, and as a result of the termination of his employment.

[35] Whilst I accept that Mr Marsters suffered stress as a result of the non-payment of wages to which he was entitled, I find that the loss of his job due to a redundancy situation was reasonably foreseeable by him in circumstances in which payment of his wages had been adversely affected by the cash flow issues experienced by Spacewall and in which, as a result of the information provided by Mr Fong, the other team members had obtained alternative employment and left the employment of Spacewall as a result of its financial difficulties.

[36] Spacewall is to pay Mr Marsters the sum of **\$2,000.00 for humiliation, loss of dignity and injury to feelings**, pursuant to s 123(1) (c) (i) of the Act.

Costs

[37] The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ ("Da Cruz") that costs are modest. A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For an Investigation Meeting slightly in excess of half a day this would normally equate at the notional daily rate to an award of \$2,500.00.

[38] Having regard to the discretionary exercise of awarding costs, I consider that a costs award at the notional daily rate is appropriate. Accordingly Spacewall is ordered to pay Mr Marsters \$2,500.00 costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority

³ [2005] 1 ERNZ 808