

October he also sought to persuade Mr Nimick to agree to enter into an arrangement as an independent contractor. Mr Nimick declined. Instead a new employment agreement was signed. It included an increase in salary.

[4] Mr Nimick was concerned about the implications for him of the company's financial difficulties. On 21 October 2008 he asked Mr Carter when he could expect payment in respect of outstanding expenses and holiday pay.

The claim for holiday pay

[5] The employment agreement provided an entitlement to annual leave of 25 days per annum, and the entitlement was otherwise to be 'according to the provisions of the Holidays Act 2003'.

[6] Unfortunately Mr Nimick was not aware of section 16 of the Holidays Act, which provides:

“(1) At the end of each completed 12 months of continuous employment, an employee is entitled to not less than [4 weeks'] paid annual holidays.”

[7] Mr Nimick says he took some 2 weeks off work on paid annual leave during his first year of employment, and is owed 3 weeks and 1 day's annual leave not taken during that year. However at the relevant times he did not appreciate that the paid annual leave he received during the year was an advance on his entitlement. The entitlement itself crystallised at the end of the first twelve months of his employment, some 3 weeks before he began insisting on payment in full in respect of what he viewed as the remainder of his entitlement. He was not entitled to such payment. He was not proposing to take the leave, and the remainder of the entitlement was available for his use until either it was taken in terms of the employment agreement, or his employment ended.

[8] I record further that clause 8.2 of the employment agreement provided:

“Annual holidays are to be taken at a time to be agreed by the employer and employee and, failing agreement, as directed by the employer. The employer will, wherever possible, give at least two weeks' notice of the requirement for the employee to take annual leave.”

[9] Misunderstandings about the law in respect of these matters had a significant effect on what followed.

Events leading to the termination of employment

[10] I would accept that Mr Carter behaved unwisely on occasion during at least October 2008. At times his temper was short, and he probably made statements he should not have made. At the same time he was clearly under pressure not only in association with his attempts to secure new investors for the company but because his mother, for whom he had been caring, passed away during that time. Mr Nimick was aware of this because Mr Carter told him.

[11] Mr Nimick was also under pressure because of the possible threat to his employment. There were additional pressures from contractors concerned about payments to them on the one hand, and certain shareholders' requirements in respect of the matter on the other. On 7 November 2008 Mr Nimick visited his doctor, suffering from work-related stress. He took a period of sick leave, and was to return to work on 17 November.

[12] By emailed message dated Tuesday 11 November 2007 Mr Nimick informed Mr Carter that, on his next pay day, 15 November, he expected to be paid: the salary payment then due; backpay in respect of the increase in salary agreed in association with the new employment agreement; expenses; and what he believed was his outstanding entitlement to holiday pay in respect of the first year of his employment. He said he had been advised to initiate legal proceedings if these payments were not made.

[13] Mr Carter's response on Wednesday 12 November was to express the view that it was not a good idea to start 'that sort of action' as it would 'hurt everyone'. He suggested that 'we sort something out'. Mr Nimick maintained his insistence on payment in full. At the time, payment was paramount to Mr Nimick.

[14] Unfortunately a lengthy exchange of messages ensued that day, and matters began to escalate quite unnecessarily. Mr Carter's early responses to Mr Nimick were reasonable and moderate in tone. They contained assurances of payment (other than

in respect of the holiday pay) and invitations to discuss the future. Mr Carter told Mr Nimick he could not pay the holiday pay, and does not appear to have been aware that he was not obliged to make the payment Mr Nimick was requiring. At the same time, he sought to negotiate about the matter.

[15] Mr Nimick was not prepared to trust Mr Carter's responses or assurances. Matters were aggravated, again unnecessarily, by statements made to Mr Nimick by third parties about statements allegedly made to them about Mr Nimick's absence. That kind of discussion is rarely helpful, and it caused Mr Nimick further concern.

[16] Matters were aggravated again when, in the course of the failure to reach agreement during an exchange about whether Mr Nimick would take the leave instead of a cash payment, Mr Carter said he would have to instruct Mr Nimick to take the leave. Mr Nimick saw this as a threat. Whether or not Mr Carter's direction complied with clause 8.2 of the employment agreement, it should not have been seen as a threat.

[17] By the end of that day, Mr Carter was reacting adversely to Mr Nimick's references to the possibility of further action to enforce the payments he believed were due to him. Mr Carter said:

"Your demands for holiday pay and your threats to get others involved are nothing more than blackmail. ... If you go ahead with these threats I will have no alternative but to cancel your contract because I cannot tolerate this sort of behaviour from contractors and employees."

[18] The disagreement escalated further. On 13 November Mr Nimick informed Mr Carter that if he did not receive payment in full (including holiday pay) on 15 November he would take the leave and 'follow the advice of my solicitor'.

[19] On Friday 14 November Mr Carter emailed Mr Nimick saying:

"It is with much regret that I have to give you notice that it has been decided to terminate your employment effective immediately."

[20] On Saturday 15 November Mr Nimick copied that message to the company's contractors. He also asked Mr Carter why he had been dismissed.

[21] Mr Carter responded on Sunday 16 November, saying:

“You haven’t been dismissed. I was very angry that you expected to work with me and at the same time were planning to take action against me and the company which I felt at the time would put you and me in an impossible situation to continue to work together. However on reflection I have given you the benefit of the doubt that you have been under enormous stress and I have retracted terminating your employment. However I would like you and me to communicate better and sit down and work through the problems so we can move on and put this behind us.”

[22] Mr Nimick’s response on Monday 17 November was to say he had received legal advice regarding his dismissal, and the dismissal meant his contract was now terminated. To move forward, the parties would need to agree a new contract, and Mr Nimick should receive his full salary and holiday pay.

[23] Meanwhile on 14 November Mr Nimick received payment of his backpay and expenses. On 17 November he received the salary due to him.

[24] Mr Nimick continued to insist on receiving his holiday pay.

[25] Since the matter could not be resolved Mr Nimick’s employment has remained at an end. It is very unfortunate that is the case. On the one hand the fear of an uncertain future has contributed significantly to creating the reality, while on the other the business has lost the services of a qualified and experienced person.

The justification for the dismissal

[26] It is not open to an employer to dismiss an employee by way of an emailed message in the way that Mr Carter did. Such an approach is so deficient that the dismissal was unjustified.

Remedies

[27] Mr Nimick seeks reimbursement of remuneration lost as a result of his personal grievance, and compensation for the injury to his feelings caused by the grievance.

[28] He had also sought reinstatement, but acknowledged (and I would have found in any event) that reinstatement was not practicable because Xegen has sold its assets to the investors Mr Carter secured and is no longer trading.

A. Reimbursement of remuneration lost as a result of the grievance

[29] Mr Nimick has not obtained other employment.

[30] However, promptly after informing Mr Nimick of his dismissal Mr Carter apologised and sought to retract it. In doing so he was offering immediate reinstatement to Mr Nimick. Reinstatement has the effect of treating the employment relationship as having been continuous. If the relationship was continuous Mr Nimick's unused entitlement to annual leave remained available to him, while the lack of entitlement to a payment in respect of the unused entitlement also remained. The substantial reason for Mr Nimick's refusal to accept the offer of reinstatement was his misconception about his entitlement to a payment in respect of holiday pay.

[31] Mr Nimick did not act reasonably in requiring a payment that was due to him only if his employment was terminated, before he would accept the offer of reinstatement. As an alternative view he did not act reasonably in seeking to require the resolution in his favour of the dispute about holiday pay before agreeing to reinstatement, particularly as the dispute was based significantly on a misconception on his part. His action amounted either to a failure to mitigate the loss flowing from his dismissal, or to a break in the chain of causation of the loss.¹

[32] Accordingly there will be no order for the reimbursement of lost remuneration.

B. Compensation for injury to feelings

[33] The particular injury to feelings on which Mr Nimick relied was stress. He is entitled to compensation for that injury to the extent that it arose out of the unjustified dismissal. However much of the stress from which Mr Nimick suffered arose out of the economic circumstances Xegen was facing and the effect of that on his working

¹ **Finau v Carter Holt Building Supplies** [1993] 2 ERNZ 971.

life, as well as his concern to secure his holiday pay. He is not entitled to compensation in respect of those matters.

[34] Further to stress or other injury to feelings caused by the unjustified dismissal, Mr Nimick contributed to the circumstances of the dismissal in the manner already referred to. I reduce the amount I would otherwise have awarded in order to reflect that.

[35] Xegen is therefore ordered to compensate Mr Nimick for the injury to his feelings in the sum of \$1,000.

The claim for holiday pay

[36] Mr Nimick is now owed three weeks and 1 day's (or 16 days') pay in respect of the year ending September 2008, plus 10% of his earnings from 1 October 2008 to the date of termination of employment. Mr Carter believed payment had been made, but Mr Nimick's bank statements indicate that is not the case.

[37] Payment is calculated on the basis that Mr Nimick's annual salary was \$125,000 (gross) per annum at the date of termination of his employment. That is:

- a. $\$2,403.85/\text{week} \times 3.2 \text{ weeks} = \$7,692.32$ (gross); plus
- b. $\$2,403.85/\text{week} \times 6.5 \text{ weeks} \times 10\% = \$1,562.50$ (gross).

[38] Xegen is ordered to pay to Mr Nimick the sum of \$9,254.82 (gross).

Costs

[39] Mr Nimick sought costs. Xegen is ordered to reimburse Mr Nimick for the filing fee of \$70 because Mr Nimick has succeeded in obtaining an order for the payment of holiday pay, albeit for different reasons from those he advanced.

R A Monaghan

Member of the Employment Relations Authority