

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 301/09
5133770

BETWEEN KEVIN O'DONNELL
 Applicant

AND WAAHI PARAONE LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Marcus Steele, for Applicant
 Wayne & Toni Brown, for Respondent

Investigation Meeting: 26 June 2009

Submissions received: 27 June and 9 July 2009

Determination: 25 August 2009

DETERMINATION OF THE AUTHORITY

[1] Mr O'Donnell worked for Waahi Paraone gardening and mowing lawns for many years. After a break he was re-employed in early 2008, employment which ended later that year in July. Mr O'Donnell says he was dismissed and that his dismissal was unjustified. Waahi Paraone says he left to take up a new position.

[2] Mr O'Donnell also seeks findings that Waahi Paraone failed to comply with its statutory obligations and provide a written employment agreement, employment records, reasons for dismissal and made unlawful deductions from Mr O'Donnell's wages¹. He says these alleged breaches warrant the award of penalties. Waahi Paraone accepts no written employment agreement was provided but denies any other breach of its statutory obligations. It says in any event no penalty is warranted. Mr O'Donnell withdrew a claim of racial harassment and a wage claim at the investigation meeting.

¹ See Statement of Problem lodged 18 March 2009

[3] To determine this employment relationship problem the Authority must consider the following:

- (i) Was Mr O'Donnell dismissed?
- (ii) If so, was his dismissal unjustified?
- (iii) Did Waahi Paraone breach one of the following statutory obligations – fail to provide a written employment agreement, fail to provide employment records, fail to provide written reasons for dismissal, unlawfully deduct monies from Mr O'Donnell's wages?
- (iv) If so, is the award of a penalty warranted?

Was Mr O'Donnell dismissed?

[4] A dismissal is a sending away at the initiation of the employer.

[5] Mr O'Donnell said in his evidence to the Authority that Wayne Brown, a director of Waahi Paraone, told him in July 2008 that he would have to find other work because they were running out of work for him to do and there might be weekend mowing work available. He said Mr Brown set up a meeting for him with a council contractor, who he met at Mr Brown's property, with a view to getting work and that he completed a form for the contractor with his personal details. The contractor offered him work (doing what he was unsure) and told him to turn up to work at Waipapa, on the outskirts of Kerikeri the following Monday.

[6] Mr O'Donnell said in evidence that he told Mr and Mrs Brown that 30 July would be his last day of employment with Waahi Paraone.

[7] Mr O'Donnell also said in evidence that he intended to start work at Waipapa but while cycling out to the job was unsettled by a passing vehicle, turned around and cycled home. He has had no further contact with the contractor. Mr O'Donnell told the Authority he did not take up Mr Brown's offer of weekend work because he needed his weekends for himself.

[8] Mr O'Donnell said he raised a personal grievance for unjustified dismissal with Waahi Paraone because Mr and Mrs Brown had pushed him into taking up

employment with the contractor by arranging for the contractor to come to their property, where Mr O'Donnell was working, and getting him to sign up with them.

[9] Mr Brown told the Authority he told Mr O'Donnell that work was drying up and he (Mr O'Donnell) needed to think about things; sales were poor in the subdivision development in which Mr O'Donnell was primarily employed and a number of staff had been laid off already that year. He said he would try to get Mr O'Donnell a job with a contractor to the council and he understood Mr O'Donnell agreed with this idea. He told Mr O'Donnell there was weekend mowing work available. Mr Brown made representations to the council contractor that Mr O'Donnell was suited to gardening and lawn mowing work and arranged a meeting with the contractor and Mr O'Donnell to discuss a job.

[10] Following that meeting Mr Brown says Mr O'Donnell showed him a document relating to the work he had been offered with the contractor, that he appeared pleased and told Mr Brown he would end work with Waahi Paraone on 30 July and start with the contractor on 4 August. Mr and Mrs Brown were about to go away for two weeks and left pleased that Mr O'Donnell had organised a new job.

[11] I find Mr Brown gave Mr O'Donnell tentative notice that his employment with Waahi Paraone was likely to end. Mr O'Donnell secured another job and then gave notice to Mr and Mrs Brown that his last day of employment with Waahi Paraone would be 30 July.

[12] Mr Steele has submitted that Mr O'Donnell was (unjustifiably) constructively dismissed because Mr Brown *sent people to the site where the applicant worked and got him to sign documents that he did not want to sign. He was told by the respondent that he had to leave and so he said he would finish on the Friday.*

[13] I do not accept that Mr Brown made Mr O'Donnell sign documents he did not want to sign; there is no evidence Mr Brown was present when Mr O'Donnell meet with the contractors. There is no evidence Mr Brown told Mr O'Donnell he had to accept a job with the contractor. Mr O'Donnell took up an opportunity to secure a new job before he received actual notice that his employment with Waahi Paraone would end. Mr Brown arranged the opportunity but there is no evidence that Mr

Brown forced Mr O'Donnell to relinquish his job with Waahi Paraone and take the job with the contractor.

[14] For the above reasons I find Waahi Paraone did not dismiss Mr O'Donnell. There is no need to consider the question of justifiability.

Statutory obligations

[15] Mr O'Donnell says Waahi Paraone has breached a number of statutory obligations owed to him. He seeks findings to that effect and asks the Authority to award penalties against Waahi Paraone consequent to those breaches.

[16] The principles applicable to a consideration of whether the award of a penalty is warranted are *...how much harm has the breach occasioned?...Was the breach technical and inadvertent or was it flagrant and deliberate?*².

[17] An action for recovery of a penalty must be commenced within 12 months of the cause of action coming to the attention of the affected person³.

(i) Written employment agreement

[18] There is no dispute that Waahi Paraone did not provide Mr O'Donnell with a written employment agreement. An employer has a statutory obligation to provide a written employment agreement⁴.

[19] Waahi Paraone says there was no disadvantage to Mr O'Donnell in not having a written employment agreement. It says written employment agreements are now in place for employees and it has used the Department of Labour's online employment agreement building tool to this end.

[20] Mr Steele submits that the failure to provide a written employment agreement caused a great deal of confusion as to what Mr O'Donnell's terms of employment were and he has been disadvantaged. The basis for the confusion claim is unclear.

² *Xu v McIntosh* [2004] 2 ERNZ 448, at 464

³ Section 135(5) Employment Relations Act 2000

⁴ Section 63A(2) Employment Relations Act 2000

Mr O'Donnell has made no specific claim that he has been disadvantaged by lack of certainty as to the terms of his employment.

[21] Waahi Paraone gave no reasonable explanation as to why no written employment agreement was provided to Mr O'Donnell. The statutory requirement to do so has been in place since October 2000. **A penalty is warranted which I set at \$100 to be paid into the Authority for the Crown. This order is made pursuant to section 135 Employment Relations Act 2000.**

(ii) Wage and time records

[22] Employer's are obliged to provide wage and time records immediately upon request⁵. An employer who fails to comply with such a request is liable to a penalty imposed by the Authority⁶.

[23] In March 2009 Mr O'Donnell lodged his application in the Authority. A penalty for failure to provide wage and time records was sought. All wage and time records relating to Mr O'Donnell's employment with Waahi Paraone had been requested in August and September 2008 for the purpose of calculating holiday pay entitlement. This issue was settled between the parties in late 2008.

[24] Subsequent to the lodging of the application in the Authority Mr Steel sought the wage and time records in the event they disclosed some other basis for claim. Following discussion with the parties the Authority requested the assistance of the Labour Inspectorate to enable Mr O'Donnell to access his wage and time records. The Labour Inspector uplifted the documents and carried out a detailed analysis which was provided to Mr O'Donnell, Waahi Paraone and the Authority. The assistance of the Labour Inspector has greatly assisted the Authority's investigation of this employment relationship problem. Mr O'Donnell has not raised any claim subsequent to receiving the wage and time records.

[25] The wage and time records took some time to compile. This is reasonable given the majority of those records were archived (given they include Mr O'Donnell's

⁵ Section 130(2) Employment Relations Act 2000

⁶ Section 130(4) Employment Relations Act 2000

employment prior to his re-engagement in early 2008). The August and September requests would have taken some time to compile if that request had not been overtaken by the settlement of this issue between the parties.

[26] There is no evidence of any prejudice occasioned by the failure to immediately provide wage and time records upon request between August and late 2008 and subsequent to the filing of the application in the Authority. The parties were able to settle Mr O'Donnell's holiday pay entitlement without the wage and time records and no claim arose when the wage and time records were provided. No penalty is warranted.

(iii) Reasons for dismissal

[27] Mr O'Donnell seeks a penalty for Waahi Paraone's failure to provide the written reasons for dismissal as requested in Mr Steele's correspondence of 4 August and 10 September. Waahi Paraone says it did not provide reasons for dismissal because Mr O'Donnell was not dismissed.

[28] An employee who is dismissed may request the reasons for dismissal within 60 days of that event and the employer must provide a statement of reasons within 14 days of receipt of such⁷. There is no express penalty provision in the event the reasons for dismissal are not provided.

[29] I have found there was no dismissal. The first hurdle in establishing a breach of section 120 has not been met.

(iv) Deductions from wages

[30] In late 2007 Mr and Mrs Brown paid for the repairs to a blown head gasket in Mr O'Donnell's car. The repairs totalled \$2800. Mr O'Donnell told me at the investigation meeting that the arrangement entered with the Browns was \$100 would be deducted from his wages every week to repay this sum. This is what occurred – Mr O'Donnell received his usual wages less \$100 per week. There is no dispute that

⁷ Section 120 Employment Relations Act 2000

this arrangement was not recorded in writing. How the debt was recorded in Waahi Paraone's accounts is not a matter for the Authority to consider.

[31] Deductions can only be made from a worker's pay with the written consent or request of the worker⁸. It is clear from the evidence that Mr O'Donnell consented to the deductions from his wages. However, this consent was not recorded in writing. In failing to secure Mr O'Donnell's written consent to the deductions Waahi Paraone has breached its statutory obligations.

[32] There is no evidence that Mr O'Donnell was unclear as to the terms of the repayment arrangement or had sought to vary those terms without success. He has not suffered any prejudice. The award of a penalty is not warranted.

Costs

[33] Costs are reserved. Costs relate to legal costs incurred in relation to this application before the Authority. If there is any claim as to costs written memoranda should be filed in the Authority within 14 days of the date of this determination. Reply memoranda should be filed within a further 7 days.

Marija Urlich

Member of the Employment Relations Authority

⁸ Section 5 Wages Protection Act 1983