

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 320
5393790

BETWEEN MAURICE PAEWHENUA
Applicant
A N D I ENGINEERING LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Joanne Cairns, Advocate for Applicant
No appearance for Respondent
Investigation Meeting: 5 July 2013 at Auckland
Date of Determination: 26 July 2013

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By determination dated 4 February 2013, the Authority dealt with part only of the applicant's claims against the respondent. In the statement of problem originally filed in this matter, the applicant (Mr Paewhenua) alleged both unjustified dismissal and arrears of wages against his former employer the respondent (i Engineering).

[2] i Engineering failed to attend the first investigation meeting but subsequently agreed to address the arrears of wages claim. Mr Paewhenua very honourably undertook to withdraw his unjustified dismissal allegation if the arrears of wages claim was promptly satisfied.

[3] That was the footing on which the original determination of 4 February 2013 proceeded with a direction for i Engineering to pay the wages and costs by way of monthly instalments which were set out in the determination. i Engineering failed absolutely to make any payments in terms of that decision.

[4] In terms of the earlier determination of 4 February 2013, if the wages arrears were not paid in accordance with the Authority's determination, then the Authority undertook to deal with Mr Paewhenua's claim of unjustified dismissal and it indicated at para.[13] of the earlier determination that in that event, a further investigation meeting would be called and a second determination would issue. The second investigation meeting contemplated by that paragraph was on 5 July 2013 and this is the second determination on the matter.

[5] It follows from the foregoing observations that this determination concerns itself only with Mr Paewhenua's claim of unjustified dismissal.

[6] Mr Paewhenua commenced employment with i Engineering on 24 February 2012. In fact he was not paid on 24 or 25 February, providing his labour for nothing on those two days. His first day of paid employment was 27 February 2012.

[7] On 17 April 2012, Mr Paewhenua was called back to the workshop at 9.30pm from a work site where he had been doing a job at night on instructions. The principal of i Engineering, Mr Filipe Tau, told Mr Paewhenua that he needed to go overseas for a short period and that they would talk again shortly.

[8] There was no further contact from Mr Tau in relation to the proposed discussion and at about 5.45pm on 23 April 2012, Mr Paewhenua managed to contact Mr Tau by telephone only to be told that he was dismissed for "non-performance".

[9] Mr Paewhenua told the Authority in his evidence that Mr Tau had said during this conversation something to the effect:

*I think you know what is happening. I am paying you good money.
I'm not getting what I'm paying for.*

[10] Mr Paewhenua also told the Authority that Mr Tau alleged that there had been customer complaints about his work (although that had never been put to him previously), and that there was product being taken from one of the sites that i Engineering was working at.

[11] As to the theft allegation, Mr Paewhenua again made the point that this had never been put to him and he flatly denied wrongdoing; he identified a friend of Mr Tau as the culprit.

[12] Having received this information over the telephone, Mr Paewhenua immediately went to the workshop to further discuss the matter and to collect his tools together with a fridge and other furniture that he had supplied to the employer.

[13] There was a discussion between the two men about the amount of notice to be paid and the amount of holiday pay that was owing, there being no written employment agreement, and Mr Tau agreed that payment would be made by i Engineering prior to 1 May 2012.

[14] As the Authority has already issued a determination making orders for the payment of arrears of wages, it will be apparent that i Engineering failed to fulfil its obligations in terms of the payment of wages. Indeed, throughout the employment, i Engineering failed to pay wages on a regular basis.

[15] The whole purpose of the 5 July 2013 investigation meeting was to give i Engineering an opportunity to be heard on the allegation that it had been responsible for the unjustified dismissal of Mr Paewhenua. Mr Paewhenua has dutifully attended both investigation meetings of the Authority supported by his wife and his advocate, and i Engineering has failed to attend either. The Authority is clear that i Engineering knew about both meetings but simply chose not to attend. There is nothing before the Authority that would suggest any supervening cause which would have prevented i Engineering from attendance and indeed, in relation to the investigation meeting of 5 July 2013, the Authority's file contains an email from Mr Tau dated 22 May 2013 confirming that he was aware of the time and date for the investigation meeting and that those arrangements were "fine".

[16] The Authority's considered view is that Mr Tau simply chose not to attend the investigation meeting and on that footing the Authority is satisfied that it can and should proceed to determine this matter on the basis of the evidence before it.

[17] For the avoidance of doubt, the Authority observes that Mr Paewhenua gave consistent explicit and believable testimony in relation to the matters before the Authority. He appeared to the Authority to be an honourable and decent man and the Authority has no hesitation in relying on the evidence that he gave.

Determination

[18] Mr Paewhenua was dismissed over the telephone. There can be few if any circumstances in which such a dismissal can be found to be justified. Nothing in the present circumstances suggests that this example of a telephone dismissal could be conceived to be in any way justified.

[19] Furthermore, the fact that i Engineering seems to have relied upon complaints that it allegedly received from customers but has not ever put those complaints to Mr Paewhenua, simply adds to the conviction that the dismissal is unsafe.

[20] In the same general connection, the apparent reliance by i Engineering on the purported thefts from a client's premises is also a matter that was not put to Mr Paewhenua before he was told that he was dismissed. For the record, Mr Paewhenua hotly disputes either failings in workmanship or failings of honesty and integrity and the Authority believes Mr Paewhenua's evidence in those regards.

[21] But the important point is that Mr Paewhenua had no opportunity to offer an explanation in his own defence before he was told that he was dismissed from the employment; indeed, what happened was that he was told he was dismissed first and then told why. Given that Mr Paewhenua's evidence (which the Authority believes) is that he is blameless in both regards, the dismissal must be unfair because he had no opportunity whatever to speak in his own defence.

[22] The Authority having concluded that the dismissal was unjustified, Mr Paewhenua is entitled to have remedies considered by the Authority. Before that step is considered though it is necessary to have the Authority reflect on whether Mr Paewhenua has contributed in any way to the circumstances giving rise to his personal grievance. The Authority's considered view is that Mr Paewhenua is blameless in that regard: s.124 of the Employment Relations Act 2000 (the Act) considered.

[23] Moreover, the Authority is satisfied on the evidence that Mr Paewhenua suffered great distress as a consequence of the termination of his employment and the evidence that he provided of the dramatic effect of the loss of his job on his living circumstances was most graphic.

[24] Accordingly, to remedy the personal grievance for unjustified dismissal sustained by Mr Paewhenua, the Authority directs that i Engineering Limited is to pay to Mr Paewhenua the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Act in the sum of \$3,000;
- (b) A contribution to wages lost as a consequence of the dismissal in the sum of \$5,000 gross;
- (c) A contribution to the legal costs incurred by Mr Paewhenua in this further proceeding in the sum of \$460.

James Crichton
Member of the Employment Relations Authority