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## Sammons v TPC Group Ltd (Auckland) [2007] NZERA 100 (29 March 2007)

Determination Number AA 95/07 File Number: 5053319

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Craig Sammons (Applicant)

AND TPC Group Ltd (Respondent)

REPRESENTATIVES Hamish Russ (for Applicant)

No appearance (for Respondent)

MEMBER OF AUTHORITY Janet Scott

DATE OF DETERMINATION 29 March 2007

DETERMINATION Employment Relationship Problem

[1] The applicant submits that on 21 March 2006 he was unjustifiably dismissed by the respondent. To remedy his alleged grievance, he seeks lost remuneration and compensation pursuant to [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act](#). The applicant also seeks arrears of wages and holiday pay alleged to be owing to him.

[2] There was no appearance for the respondent who is in receivership. However, counsel for the receivers made contact with the Authority to advise:

- • The respondent is in receivership;
  - • The receivers' investigations make it clear there will be no funds available for non-preferential creditors;
  - • It is the receivers' view that the only aspect of applicant's claim that would rank as a preferential claim (if successful) is a claim in respect of outstanding holiday pay. That claim is currently being investigated by the receivers.
  - • As the balance of the applicant's claims would not be preferential payments, the receivers do not regard it as a responsible course to commit funds to defending the claim as it appears there is no prospect of there being any funds available to meet any such claim. The funds committed to defending the matter would lessen the pool available for preferential payments.
  - • As a result, counsel for the receivers advised the Authority that the receivers did not intend to participate further in defence of the personal grievance and no evidence would be filed. Neither, would there be an appearance for the receivers.

[3] Following consultation with Mr Sammons' representative and counsel for the respondent, the Authority decided it would proceed to investigate the matter by way of a telephone conference with the applicant and his representative.

### Background

[4] The applicant was employed as a property maintenance manager with the respondent. His employment commenced on 30 May 2005. Mr Sammons advised the Authority that he undertook quoting, estimating and operations management of the respondent's commercial coating business (painting). At the time he was dismissed, he was in receipt of a salary of \$55,000 per annum and had the use of a company car valued at \$10,000 per annum.

[5] It was the applicant's evidence that on 21 March 2006 he was requested to attend a meeting with Mark Sylvester, the general manager for TPC. He was not advised that the meeting was to be disciplinary in nature and it was his belief that he was attending a meeting to discuss the current work programme.

[6] It was the applicant's evidence that two things were discussed at that meeting with Mr Sylvester.

[7] The first issue discussed was the quote he had submitted for the Great Lakes Convention Centre. He was asked to explain how he had come to the amount quoted for that job. Mr Sammons said that he explained that he had quoted only on the materials as set out by the Taupo District Council's qualified quantity surveyor. It was Mr Sammons' evidence that he was instructed to quote on the job on that basis. Mr Sammons also said that he had run the quote past the TPC's director, Darrin Archer, prior to submitting the quote. (It was his evidence he did not make this latter point to Mark Sylvester on 21 March).

[8] The other matter discussed between himself and Mr Sylvester was his use of the company credit card for personal purchases. Mr Sammons stated that he had had an understanding with his previous manager (Scott Coventry) that he could use the company credit card for purchases such as lunch when he was out of town. He said that he and Mr Sylvester had a debate on 21 March over the understood rules and policies relating to personal and business expenses charged to the card and what the policy about personal usage was. It was clear from the discussion that he had a different understanding than that of Mr Sylvester.

[9] Mr Sammons said the meeting on 21 March was not a lengthy one and it concluded when, out of the blue, Mr Sylvester told him his employment was terminated for an apparent breach of trust and confidence. Mr Sammons said he was stunned as he had had no prior warning or caution that the meeting could result in his termination.

[10] Mr Sammons said that his final wages were calculated showing deductions for his credit card expenses. It was his evidence he never gave the employer authority to deduct this money from his wages.

[11] However, as I understand the evidence Mr Sammons' final wages were not paid to him because he declined to sign for the receipt of the final pay out as full and final payment of salary owed to him.

[12] The Authority is in possession of some information provided by the company as to the reason for Mr Sammons' dismissal. On 14 June 2006, the company's then representative, Mr Arnold, wrote to Mr Rush (Mr Sammons' representative) setting out the reasons for Mr Sammons' dismissal. He wrote:

*"As he was advised, Mr Craig Sammons was dismissed for the following reasons:*

*He had broken the employer/employee trust relationship and as his employer we could no longer trust him or have reasonable confidence that he would carry out his duties.*

*At an investigation meeting the day before his dismissal Mr Sammons lied as to where he had been that afternoon.*

*When directly asked about a job he had underquoted on (Great Lakes Convention Centre, Taupo) he refused to answer and just shrugged his shoulders, despite several attempts to discuss the matter with him.*

*When asked about another job in Whakatane (First Light Construction - Rest Home) he also refused to answer or explain when directly questioned why the job had never been invoiced.*

*Mr Sammons also refused to explain an email that was found on his computer.*

*Unauthorised personal spending on Mr Sammons' company credit card. Mr Sammons had been repeatedly requested not to use his company card for lunches and other personal expenses but had continued to do so. He had agreed to pay off the personal spending which was well in excess of \$1,000-00. He agreed to deductions to pay these expenses but continued to accrue personal expenses.*

*Mr Sammons also refused to comment when questioned about handing one of TPC Operations Limited's clients a second quote that was not from TPC Operations Limited.*

*After Mr Sammons commenced working for TPC, the Directors were made aware that Mr Sammons had been charged for fraudulent activity. This information was not disclosed at the time of employment".*

[13] I put these points to Mr Sammons and his responses were:

**Allegation that he had lied about where he had been on the afternoon of 20 March**

[14] Mr Sammons said he could not recall this issue being discussed with him at the meeting on 20 March. He did say he had been to Te Kuiti on the afternoon of 20 March on TPC business and he had returned to Tauranga via Hamilton where he had undertaken some private business. It was his evidence that he had the freedom to do this.

Lakes Convention Centre quote

Mr Sammons stated he did not refuse to answer questions about this job and he reiterated his evidence that he had quoted in accordance with the instructions from Taupo District Council and had run the quote past Darrin Archer before submitting it.

#### First Light Construction rest home job

[15] Mr Sammons' evidence was that no issue was raised about that job with him at the meeting on 21 March.

#### Email

Mr Sammons' evidence was he had no idea what email the company was talking about.

#### Unauthorised spending on the credit card

[16] It was Mr Sammons' evidence that he has repaid all personal expenses incurred by him on the company's credit card.

#### Provision of a second quote to one of TPC's clients

[17] It was Mr Sammons' evidence that he understood the company was alleging that he had provided two quotes to an unnamed client during his employment at TPC and that one of those two quotes was not from TPC and that quote was less than the TPC quote and that he would benefit from the second quote had the client accepted it. It was Mr Sammons' evidence that the allegation had absolutely no basis. He said he was yet to hear which client was involved or to be provided with any information to make any sense or understanding of the allegation and it most certainly was not discussed at the meeting on 21 March 2006.

#### Fraud charge

[18] Mr Sammons' evidence was that he had never been questioned by the company in relation to this allegation and he advised the Authority he had never been charged with fraud or found guilty of fraud and for the employer to rely on such a meritless claim as a justified reason to terminate is flawed.

[19] Mr Sammons said that the impact of his dismissal had been huge. He had had to shift on numerous occasions to find permanent work and this inflicted stress and anxiety on every occasion he had to move. He stated he is now earning less and working harder to earn what he earns and, almost a year later, is trying to work back to something close to what he had prior to his termination.

[20] It was his evidence that matters have only been made worse with the attitude and delays inflicted by TPC by not dealing with his grievance in a timely or professional manner. The anxiety and stress he had been under in not knowing if and what he had done wrong (if anything) and trying to get closure had greatly affected him.

[21] Mr Sammons was looking for three months' lost remuneration including the benefit of the use of a car. He provided evidence that he had earned the sum of \$2,145.63 gross in the 13 weeks following his termination. His evidence to the Authority was that he had only found permanent employment in November 2006.

[22] Mr Sammons' is also seeking arrears of holiday pay owing.

#### Issues for determination

- Does Mr Sammons have a personal grievance because he was unjustifiably dismissed from his employment with the respondent?
- If the answer to the above question is yes, what remedies should be awarded to Mr Sammons?
- What, if any, arrears of wages and holiday pay is owing to Mr Sammons?

[23] In determining the matter, I must make an objective assessment of the employer's actions and weigh those actions against the actions a fair and reasonable employer would have taken in all the circumstances at the time (s.103A test).

[24] The burden rests with the respondent to demonstrate that its actions were justified in all the circumstances at the time.

#### **Discussion**

[25] The respondent has elected not to participate in the investigation into the applicant's complaint. However, the Authority has been provided with the employer's statement of the reasons for Mr Sammons' dismissal. Some of the concerns stated would (if proven) give rise to findings that there had been serious misconduct on Mr Sammons' part. Unfortunately the Authority has no evidence from the respondent to support the concerns. Neither has the employer provided evidence as to the nature/quality of the investigation it conducted in relation to the concerns it had in regard to Mr Sammons performance/conduct nor any evidence to demonstrate that it treated Mr Sammons fairly in the process.

[26] As a result I must find that the respondent has failed to discharge the burden on it to show that its actions were those

that a fair and reasonable employer would have taken in all the circumstances at the time.

## **Determination**

[27] Mr Sammons was unjustifiably dismissed from his employment and he has a personal grievance against his former employer TPC Group Ltd.

## **Remedies**

### **Arrears of Wages and Holiday Pay**

[28] Under the IEA Mr Sammons was entitled to 2 weeks notice of the termination of his employment. The evidence before me discloses that when the respondent terminated Mr Sammons' employment it intended to pay him two weeks notice (Final Pay Calculation -dated 27 March 2006). In accordance with this and the evidence provided as to outstanding holiday pay, I direct the respondent to pay to the applicant the following sums as arrears of wages and holiday pay owed to him.

2 days pay (20 & 21 March 2006) \$423.08 gross

2 weeks notice 2115.40 gross

2.5 days holiday pay owed 1 528.85 gross

**Total \$3,067.33 gross**

### **Remedies ( Personal Grievance)**

#### Contribution -s.124

1 Showed as owing to Mr Sammons - payslip 12 March 2006

[29] While the Authority has information relating to the reasons for dismissal that suggest failings on Mr Sammons' part this has not been established by the respondent so no grounds exist for reducing remedies to reflect contribution by the worker.

#### Lost Remuneration - s. 123 (1)(b)

[30] The applicant is entitled to reimbursement of lost remuneration for a period of 3 months (13 weeks) post dismissal less earnings received by him over that period. I have awarded Mr Sammons 2 weeks wages as notice so he is entitled to a further 11 weeks wages (\$11,634.70 less earnings of \$2,145.63 = \$9,489.07).

[31] The respondent is directed to pay to the applicant the sum of \$9,489.07 gross to compensate him for remuneration lost as a result of his grievance.

#### **Lost benefit - s.123(1)(c)(ii)**

[32] Mr Sammons had the use of a company car during his employment. The evidence before me was that it was worth \$10,000 per annum to him. He is entitled to reimbursement for the loss of that benefit - equivalent to three months' worth of that benefit.

[33] The respondent is directed to pay to Mr Sammons the sum of \$2,500 gross to reimburse him for the loss of use of the company car.

#### **Compensation - s.123(1)(c)(i)**

[34] The respondent is directed to pay to the applicant the sum of \$5,000 to compensate him under this head.

#### Summary of orders

[35] The respondent is directed to pay to the applicant:

Arrears of wages and holiday pay owing \$3,067.33 gross

Lost remuneration pursuant to s. 123(1)(b) 9,489.07 gross

Lost benefit pursuant to s. 123(1)(c)(ii) being the use of the 2,500.00 gross company car

Hurt and humiliation pursuant to s. 123(1)(c)(i) 5,000.00 net

#### Costs

[36] Costs are reserved The representative for the applicant is invited to request the Authority to set costs in the matter and should provide submissions detailing the costs incurred in bringing this matter to the Authority.

Janet Scott

Member of the Employment Relations Authority

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