New Zealand Employment Relations Authority Decisions

Stock v Tamanui Construction Limited (Auckland) [2018] NZERA 145; [2018] NZERA Auckland 145 (4 May 2018)

Last Updated: 2 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 145
3022744

BETWEEN HAMISH STOCK

Applicant

AND TAMANUI CONSTRUCTION LIMITED

Respondent Member of Authority: Jenni-Maree Trotman

Representatives: Alex Kersjes, Advocate for the Applicant

Alison Bendall, Counsel for the Respondent

Investigation Meeting:

Additional documents received:

11 April 2018

21 March 2018 and 05 April 2018

Determination: 04 May 2018

DETERMINATION OF THE AUTHORITY

A. **Mr Stock was unjustifiably dismissed by Tamanui Construction Limited.**
B. **Tamanui Construction Limited is ordered to pay to Mr Stock the following amounts within 14 days of the date of this determination:**
    i. **The sum of $1,131 gross, for monies lost as a result of his personal grievance;**

ii. **The sum of $5,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.**
iii. **The sum of $71.56 being the filing fee on the Statement of Problem.**

C. **Tamanui Construction Limited must pay $1,000 by way of penalty for breach of s 65 of the Employment Relations Act 2000. This sum must be paid to the Employment Relations Authority who will then pay this sum into a Crown Bank Account.**

D. **Payment of the penalty must be paid within 28 days of the date of this determination.**

Employment Relationship Problem

[1] Tamanui Construction Limited (Tamanui) provides building services in and around the Gisborne area. Mr Stock was employed by Tamanui on 30 June 2017 as a carpenter and leading hand.

[2] Mr Stock's employment with Tamanui came to an end on 20 September 2017. He claims that he was unjustifiably dismissed. He claims lost wages and compensation. He also applies for penalties under s 64A(3) of the Employment Relations Act 2000 (the Act).

[3] Tamanui denies it unjustifiably dismissed Mr Stock. It says Mr Stock's employment was terminated on two weeks' notice on the ground of redundancy. It says its decision was both procedurally and substantively justified.

[4] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

a. Was Mr Stock unjustifiably dismissed from his employment?
b. If Mr Stock was unjustifiably dismissed what remedies should be awarded?
c. If any remedies are awarded, should they be reduced, under s124 of the Act, for blameworthy conduct by Mr Stock that contributed to the situation giving rise to his grievance?
d. Did Tamanui breach s 65 of the Employment Relations Act 2000? If so, should a penalty be imposed?
e. Should either party contribute to the costs of representation of the other party?

[6] At the commencement of the investigation meeting Mr Stock withdrew his claim for outstanding holiday pay.

[7] Before I turn to these issues, it is necessary to review the facts in more detail and to provide an overview of the legislative scheme behind which these issues must be determined.

Background against which issues are to be determined

[8] Tamanui primarily supplies labourers and carpenters to construction companies in and around the Gisborne area. At the time of Mr Stock's appointment, Tamanui had two main contracts. These were with Watts and Hughes, a construction management company. One was for the supply of labour for the first stage of building the District Council Chambers in Fitzherbert Street in Gisborne (the Council Project). The second was for the supply of labour on the new Gisborne Library (the Library Project).

[9] Mr Stock had approached Watts and Hughes for work on the Council Project. They in turn introduced him to Eru Tamanui, Tamanui's director. The parties met and Mr Stock was employed by Tamanui as a carpenter and leading hand. The terms of his employment were not recorded in writing. However, the parties agree:

a. Mr Stock's hourly rate was $26.
b. His hours of work were Monday to Thursday 7.30 am to 6 pm, Friday 7.30 am to 4 pm and Saturday from 7.30 am to 1 pm.
c. He received a 30 minute unpaid meal break.

[10] Within a few days of starting with Tamanui, Mr Stock commenced work on the Council project. However, due to concerns about his ability to perform the role of leading hand, and at the request of Watts and Hughes, he was removed from this project.

[11] Thereafter Mr Stock commenced work on the Library Project. It was at this time that Mr Tamanui told Mr Stock that he was being demoted to the role of carpenter. He told him that as he was no longer a leading hand he intended to pay him a carpenter rate of $24 per hour instead of $26. Mr Tamanui explained that leading hands were paid an extra $2 per hour for this role.

[12] Mr Stock said that he did not have an issue with the demotion but he did have an issue with his pay being reduced. He said there was no discussion about him being paid $2 extra per hour to work as a leading hand at the

time he was taken on. He said he told Mr Tamanui that he did not agree to a reduction. His rate of pay was not reduced.

[13] In or about the middle to late August 2017, Mr Tamanui met with the staff working on the Council Project. He advised them that Tamanui had been unsuccessful in securing the labour contract for the second stage of the Council Project. As a result, any ongoing work undertaken by Tamanui on the Council Project would be through the successful tenderer, Tyton Construction (Tyton). The hourly rate to be paid by Tyton was less than Tamanui had previously been paid for the Council Project which meant it would need to make pay cuts and/or staff redundancies.

[14] About this time Mr Tamanui also met with Daryl Goldsmith. Mr Goldsmith is the Foreman at the Library Project and gave evidence. Mr Tamanui reiterated to Mr Goldsmith what he had told the Council Project staff and also told him he may need to lay off three to four people. He did not tell Mr Goldsmith whether those people would be carpenters or labourers, what site they would be selected from, or what criteria he would be using.

[15] Following this meeting Mr Goldsmith said he spoke individually with the carpenters and labourers on the Library Project. He told them that Tamanui was downsizing as it had lost a contract. He said he didn't provide any other details at that time as he did not know anything more.

[16] Two weeks later Mr Tamanui met individually with the carpenters on the Council Project. He said he told them that because Tamanui had not secured the contract for the Library Project they would not be getting a promised pay rise. He said he told them they either accepted the current rate they were on, $24 per hour, or

he may need to make them redundant. He said they all agreed to remain on their current rates of pay. He did not meet with them again.

[17] Two days later, on 5 September 2017, Mr Tamanui said he went to the Library Project site and asked Mr Stock to speak with him. He told Mr Stock that he could not afford to pay him $26 per hour and could only afford to pay $22 per hour. He told him he either accepted this amount or he would be let go. Mr Stock told him he wouldn't accept a pay cut. Mr Tamanui then offered him $24 per hour and told him to think about it.

[18] The following day Mr Tamanui spoke again with Mr Stock. He asked him if he had thought about his offer. Mr Stock told him he had and would not accept this. Mr Tamanui then presented him with a letter of termination. This letter stated:

It is with regret that I inform you that I am unable to provide enough work to sustain your employment and need to make your current position redundant.

You will be paid up to 06th September 2017.

Please do not hesitate to contact me on mobile ... if you need any information regarding your employment.

[19] Mr Tamanui said he had already decided to "get rid of him" before this meeting. He said this is why he had the letter prepared before the meeting with Mr Stock.

[20] After the meeting Mr Stock phoned Mr Tamanui. He expressed his unhappiness at being terminated and asked about notice. Mr Tamanui told him he could have two weeks' notice. This was confirmed in an amended termination letter sent to Mr Stock the next day. A text message confirmed Mr Stock was required to work out this notice period which he did.

[21] Mr Stock's last day of employment was 20 September 2017.

[22] On 28 September 2017 Mr Stock commenced employment with Watts and Hughes on the Library Project undertaking the same work but being paid $28 an hour.

Overview of Applicable Law

[23] In order for Mr Stock's redundancy to be justified, Tamanui must satisfy the requirements set out in s 103A of the Act. This requires an objective assessment of

whether its actions, and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[24] Part of this assessment involves a consideration of Section 4(1)(A)(c) of the Act. 1 Under s 4(1A)(c) the law 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 that employee access to information, relevant to the continuation of the employee's employment, about the decision. In addition, it is required to provide the employee with an opportunity to comment on the information to the employer before the decision is made.

[25] The key requirements of consultation were recently summarised by Judge Inglis, as she then was, in *Stormont v Peddle Thorp Aitken Limited*2.

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[26] The genuineness of the redundancy is an important aspect of the Authority's investigation. Once that is established, if an employer concludes that an employee is surplus to its needs, the Authority is not to substitute its business judgment for that of the employer.3

Issue One: Was the Applicant unjustifiably dismissed from his employment?

Was the decision to terminate genuine?

[27] The reason stated in Tamanui's letter for making Mr Stock's position redundant was that it was unable to provide enough work to sustain Mr Stock's employment. For reasons that will become apparent I am satisfied, on balance, that Tamanui's decision to make Mr Stock's position redundant on this ground was not

1 *Simpson Farms v Aberhart* [2006] NZEmpC 92; [2006] ERNZ 825 (Emp

2 [2017] NZEmpC 71 at [54]

3 *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [89]

what a fair and reasonable employer could have done in the circumstances, based on the business' requirements.

[28] Firstly, Tamanui's failure to obtain the contract with Watts and Hughes for the second stage of the Council Project did not, on balance, have an effect on the business.

a. Tamanui was aware that it had been unsuccessful in securing the labour contract for the second stage of the Council project in June 2017. It was aware at this time that the hourly rate it would receive for the labour it supplied on this project was going to be less than what it was previously paid. This is supported by email correspondence I have viewed and the Aconcessions made by Mr Tamanui during the investigation meeting.
b. Rather than make staff reductions, Tamanui took on three new carpenters including Mr Stock. This was because, as Mr Tamanui said, he was confident that Tamanui would continue to supply labour on the Council Project notwithstanding the loss of the contract to do so. He said he was confident because he knew Tyton did not have enough staff to meet the contract requirements for Stage 2. He said they needed him to stay to "get the job done" because 70% of the staff used on the Council Project must be sourced from local labour.

c. Mr Tamanui's expectations proved correct. When Tytan commenced the Council Project in August 2017 it could not source sufficient labour. This resulted in Tamanui continuing to supply labour to Tytan and, at times, directly to Watts and Hughes. Mr Tamanui said he took on more staff to finish the Council Project. In addition he continued to supply labour on the Library project.

d. Tamanui's cash flow statement shows more staff and/or more hours of work were paid by Tamanui to its

staff. The statement shows the amount it paid to Tamanui's staff steadily increased despite the loss of the Council project. In July 2017 the amount it paid to labourers was $37,005, August 2017 it was $51,281, September 2017 $65,824**,** October 2017 $71,258 and in November 2017 it was $95,887.

[29] Secondly, Mr Stock was working on the Library Project. Mr Tamanui said he worked with Watts and Hughes to determine how many workers were needed for each site. I heard no evidence that staff numbers on the Library Project needed to be reduced. Mr Stock was clearly still needed on the Library Project because when he was dismissed he was re-engaged by Watts and Hughes to carry out the same work as he previously undertook. In addition, Mr Tamanui said that if Mr Stock had accepted a pay cut then he would still be working for the company.

[30] For completeness, I did consider Tamanui's claim that it could not afford to pay Mr Stock $26 per hour. However, I am satisfied a fair and reasonable employer could not have reached this conclusion in the circumstances.

[31] Mr Stock was working on the Library Project and was not able to return to the Council Project. The hourly rate paid by Watts and Hughes on the Library project remained unchanged. Tamanui was paid $35 per hour for carpenters. Mr Tamanui said the Company needed a margin of $6.50 per hour per worker to cover its costs. Mr Stock was paid $26 per hour. A margin of $9 per hour. In these circumstances the Company was not suffering any economic loss as a result of Mr Stock being retained on this hourly rate.

[32] I acknowledge that in November 2017 there was a difference of approximately

$20,000 between the cash revenue received by Tamanui Construction and the labour costs it incurred that month. The reason for this drop has not explained. However, viewing the cash flow statement, it is likely that this difference was due to a delay in payment for services rendered rather than due to the hourly rate difference being paid to Tamanui on the Council Project. This is supported by a substantial increase in revenue in the month of December 2017. In addition, Mr Tamanui said he negotiated with Watts and Hughes to top up the $5 hourly difference between what Tyton was paying him and what he had previously been receiving. He said they started paying this top up from about October 2017.

Was a fair procedure followed?

[33] I am satisfied the procedure that was followed by Tamanui was flawed, even having regard to the small size of the company. The Company failed to follow the requirements prescribed by the Act.

[34] There was no consultation with Mr Stock prior to the decision being made to terminate his employment. Whilst Mr Stock knew the company may downsize he did not know the reason for the downsizing, other than that it had lost a contract, or that his refusal to accept a pay reduction would result in his position being terminated.

[35] Mr Stock was not informed of the selection criteria that would be used to decide who would be made redundant. During the investigation Mr Tamanui said the criteria he used to select who would be made redundant was their capability, whether they were registered building practitioners and who he could trust. There was no opportunity for Mr Stock to provide any response to these criteria or to provide any input into the decision made by the Company.

[36] There was no exploration of alternatives to redundancy. Mr Tamanui said he had already made up his mind to terminate Mr Stock before the meeting on 6 September where he provided Mr Stock with a pre-prepared letter terminating his employment.

[37] The Company's failure to comply with the statutory requirements was not minor and did result in Mr Stock being treated unfairly.[4] The procedural failings undermined the justification for the dismissal. A decision to dismiss in all the circumstances known at the time was not one that a fair and reasonable employer could have made. I find therefore that Mr Stock was unjustifiably dismissed from his employment with the Company and is entitled to remedies.

Issue two: Remedies

Lost wages

[38] Mr Stock claims lost wages for the period between when he was terminated by Tamanui and when he was

employed by Watts and Hughes.

[39] Section 123(1)(b) of the Act provides for the reimbursement by Tamanui of the whole or any part of wages lost by Mr Stock as a result of his grievance. Section 128(2) provides that I must order Tamanui to pay Mr Stock the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I

4 Section 103A(5) of the Employment Relations Act 2000

have discretion to award greater compensation for remuneration lost than three months' equivalent.5

[40] In *Xtreme Dining v Dewar*6 the full Court confirmed that where an employer puts mitigation in issue, an employee must provide relevant information as to the steps taken to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

> [100] It has long been the position in this jurisdiction that the common law tests as to onus are applicable to claims for statutory remedies. Given that onus, it is incumbent on the employer as the defaulting party to raise the issue, usually in the relevant pleading. Having raised the issue, the employer continues to carry the ultimate onus, or as it has sometimes been described, the "legal burden".
> [101] But there is an "evidential burden" on the employee to provide relevant information. This is what the Court referred to in Transpacific. It is necessary for the employee to provide this information, if called on, because it is information of which he or she has knowledge. This obligation is a manifestation of the famous statement made by Lord Mansfield in 1774 in Blatch v Archer that "it is certainly a maxim that all evidence is to be weighed according to the proof of which it was in the power of one side to have produced, and in the power of the other to have contradicted."
> [102] That does not preclude the employer from leading its own evidence on the topic, for instance as to employment options which were reasonably available but not pursued; or to challenge the accuracy or adequacy of the evidence given by the employee.
> [103] But when considering all the evidence, this issue of fact must be assessed on the basis that the employee is the victim of a wrong. The Authority or Court cannot be too stringent in its expectations of a dismissed employee. Further, what has to be proved – by the employer – is that the employee acted unreasonably; the employee does not have to show that what he did was reasonable.
> [104] In summary, where the employer puts mitigation in issue, the employee must provide relevant information as to the steps he took to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[41] Mr Stock said that on 21 September 2017, being the first working day following his termination, he returned to the Library Project. He said he continued to work in the hope that Watts and Hughes would employ him. His novel attempt to mitigate his loss was successful and he was offered employment. He was paid for the day he worked and commenced working for Watts and Hughes the following week. I am satisfied, in those circumstances that Mr Stock acted reasonably in mitigating his loss.

5 S 128(3).

6 [2016]NZEmpC 136

[42] The wages lost as a result of Mr Stock's grievance amount to $1,131 gross. This sum is calculated by multiplying Mr Stock's agreed normal hours of work on 22 September 2017 (8 hours), 23 September 2017 (5.5 hours) and 25-27 September (10 hours each day) by his hourly rate of $26. 43.5 hours multiplied by $26 per hour equals $1,131 gross.

[43] Tamanui is ordered to pay Mr Stock the sum $1,131 gross for monies lost as a result of his personal grievance. Payment must be made within 14 days of this determination.

Compensation under s 123(1)(c)(i)

[44] Mr Stock claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) in the sum of $20,000.

[45] Mr Stock did not appear to be greatly affected by his dismissal. This is not surprising given the short period he worked for Tamanui and the fact he was only out of work for a week.

[46] He was able to return to his workplace immediately following his dismissal, albeit working for Watts and Hughes. He said it felt a bit strange but he got over that within a few days. Whilst he and his wife said he suffered stress, and drunk more than normal following notification of his termination, from the evidence I heard I am satisfied this was more likely than not primarily due to reasons other than his dismissal.

[47] I acknowledge Mr Stock's evidence that he attended counselling. However, I was not convinced this was attributable to his dismissal. He could not tell me when he started counselling and a letter I viewed from his counsellor spoke of issues that were unrelated to this grievance.

[48] Whilst I accept a level of distress was suffered by Mr Stock, this was at a low level. In all of the circumstances I am satisfied an award of $5,000 adequately compensates Mr Stock for the loss of dignity and injury to his feelings that he suffered resulting from his dismissal and how it was carried out.

Issue Three: Contribution

[49] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded. 7
[50] I am satisfied that Mr Stock did not contribute to his personal grievance and for this reason I make no deduction to the remedies I have awarded.

Issue Four: Has the Respondent breached s 65 of the Employment Relations Act? If so, should a penalty be imposed?

[51] Section 65 of the Act requires that an individual employment agreement must be in writing. It must also contain six pieces of information, as set out in that section. Sub-section 65(4) provides that an employer who fails to comply with that section is liable to a penalty imposed by the Authority.

[52] There is no dispute that Tamanui Construction failed to provide Mr Stock with an employment agreement. Therefore, on the face of it, it is liable for a penalty.

[53] The quantum of any penalty is to be determined using the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*.8

Step 1: Nature and number of breaches

[54] Step one is to identify the number of breaches and the maximum penalty applicable. In this case here was one breach of section 65. The maximum penalty that may be imposed upon a company or other corporation is $20,000 per breach. The starting point is, therefore, a penalty of $20,000.

7 s 124.

8 *[2016] NZEmpC 143*

Step 2: Severity of the Breach

[55] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

[56] The requirement to provide an employment agreement has been in place for more than a decade. Ample assistance is available to help employers, small and large, to ensure they comply. In the present case, Tamanui knew that it was required to provide an individual employment agreement yet did not provide one.

[57] This can be explained however, in part, by Mr Tamanui suffering from dyslexia. He said he struggled to read lengthy documents. This meant that he had to have his employment agreements prepared externally. As Tamanui was only incorporated in April 2017 he said they had not been prepared by the time Mr Stock started working.

[58] It is agreed that Mr Tamanui advised Mr Stock, at the time that he was employed, that an employment agreement was being prepared. He told him that this would be provided to him when it was prepared by Tamanui's financial advisors. However, by the time Mr Stock was dismissed, Tamanui had not provided him with the agreement. It acknowledges this failure but in mitigation points to the provision of employment agreements shortly thereafter to its entire staff.

[59] I assess the degree of severity at 30%, a potential penalty of $6,000.

Step Three: Ability to pay a penalty

[60] Step three requires the Authority to consider the means and ability of the Company to pay the penalty reached under step 2. Mr Tamanui said his company will not suffer any financial or other hardship by the imposition of a penalty. I conclude that this stage has a neutral effect on my calculation.

Step 4: Proportionality of penalty

[61] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty I have arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just

in all of the circumstances. Looking at recent Authority and Court imposed penalties I conclude an appropriate penalty is $1,000.00.

[62] A penalty of $1000 is sufficient to act as a deterrent to other employers who might fail to properly complete the mandatory requirement to provide workers with a written employment agreement covering at least all the elements required by s 63A and s 65 of the Act. It is a penalty within the range imposed in comparable cases but still very much at the lower end of the levels of penalty that may be awarded against a company.

[63] Tamanui is ordered to pay $1,000.00 by way of penalty for its breach of s 65 of the Act. This sum is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[64] Payment of the penalty is to be paid within 28 days of the date of this determination.

Costs

[65] Mr Stock said he has not incurred any legal costs. He said he did not sign a retainer letter with his Advocate agreeing to pay legal costs and he was not provided with an estimate of costs. He said he has not received an invoice for costs and has not been told that he will have to pay any costs.

[66] In the foregoing circumstances, I make no award of costs other than payment of the Authority's filing fee of $71.56. This fee is an amount reasonably recoverable from Tamanui. I order Tamanui to pay the sum of $71.56 within 14 days of the date of this determination.

Jenni-Maree Trotman

Member of the Employment Relations Authority