

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number:

WA 140/07

File Number: 5078462

BETWEEN

Nathan Taylor  
Applicant

AND

Mastfix Maintenance Limited  
Respondent

Member of Authority: Denis Asher

Representatives: Graeme Gowland for Mr Taylor  
No appearance by or for the Company other than by  
way of memorandum dated 20 September 2007 from  
Philip Drummond

Investigation Meeting Wellington, 18 October 2007

Determination: 19 October 2007

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In his statement of problem filed in the Authority on 17 May 2007 Mr Taylor said he had been unjustifiably dismissed and was owed arrears of income. He sought a determination to that effect, compensation of \$10,000 for humiliation, etc, lost remuneration, a penalty for the Company's failure to

provide an employment agreement and wage and time records and a breach of good faith and any other relief as the Authority saw fit.

- [2] In its statement in reply filed in the Authority on 12 June the Company, amongst other things, denied the allegations and said, by agreement, Mr Taylor was employed as a casual labourer and that his hourly rate incorporated his holiday pay. The Company also claimed there were performance issues with Mr Taylor. Attached to the statement in reply was a letter dated 18 January 2007 purporting to dismiss Mr Taylor for non-performance issues.
- [3] The parties underwent mediation but were unable to settle their employment relationship problem.
- [4] The parties subsequently agreed to a one day investigation in Wellington and a timetable for the exchange of witness statements. The Company then failed to adhere to the agreed timetable and it did not attend the investigation.
- [5] By memorandum dated 20 September, Mr Philip Drummond advised that he had recently been instructed as counsel for the Company. He confirmed it would not be taking any steps in relation to the investigation meeting. No reasons were given for his client's changed stance. He also conveyed the Company's request that the Authority require Mr Taylor to formally prove his claim in the investigation. In particular, Mr Drummond requested, on his client's behalf, that the Authority investigate three matters in determining the level of loss in the event of a finding of liability. They are: that Mr Taylor elected not to work his final day of employment, 2 February 2007; that the applicant commenced fresh employment from 21 February; and that the Authority seek evidence that Mr Taylor in fact is the owner of a dwelling in support of his claim he was unable to pay his mortgage following the termination of his employment.
- [6] At the conclusion of the investigation, counsel for the applicant, Mr Graeme Gowland sought exemplary or full solicitor/client costs, of \$5,000.00 + GST and disbursements totalling \$100.00.

**Background**

- [7] Mr Taylor's evidence and the statement in reply confirm he was employed by the Company for 11 months, to 2 February 2007. The Company says Mr Taylor was engaged as a casual labourer. Mr Taylor says he started his employment in that capacity but quickly began working regular hours as a hammer hand.
- [8] Attached to the statement in reply are copies of an individual employment agreement which names Mr Taylor and the Company as the parties to it: it is unsigned. Mr Taylor says the first time he saw this document was when he received the statement in reply.
- [9] Also attached to the statement in reply are copies of a warning record summary, three warning records, a letter of termination dated 18 January signed off by the Company's director, Mr Daniel Thomson, a payroll history and a payslip for 7 March 2006. Mr Taylor says he saw these documents for the first time when he received the statement in reply. He says he was never subjected to any oral or written warnings and knows nothing of the detail set out in them in respect of alleged performance shortcomings. He also does not accept the accuracy of the payroll history.
- [10] Mr Taylor says he was given two weeks notice of the termination of his employment on the morning of 18 January 2007 when Mr Thomson approached him and said, *"I've got two more weeks for you, mate. I've totally run out of money"* (oral evidence). The applicant says Mr Thomson also advised him that another employee, Sam, would be going to work for his brother when in fact Sam remains employed with the Company.
- [11] Mr Taylor says that he is entitled to be paid for 10 statutory holidays that occurred during his 11 months employment, for which he was not paid, i.e. a total of \$1004 gross.
- [12] Mr Taylor says he is owed holiday pay in addition to the wages he received, and calculates that amount – in the absence of agreed wage and time records – as \$1,100 gross.

- [13] Mr Taylor agrees he commenced employment with his current employer on 21 February 2007 and therefore claims from the respondent 3 weeks lost wages, i.e. \$1,506 gross.
- [14] Mr Taylor agrees he did not work his last day of employment, 2 February, and says that was by prior agreement with Mr Thomson, so that he – the applicant – could attend the international rugby sevens.
- [15] Mr Taylor agrees he does not own a property but says that it is his grandfather who owns the applicant and his family's current residence, that it is his grandfather who has a mortgage, and that his grandfather is dependant on payment from the applicant to service his mortgage.
- [16] In oral submission on his client's behalf, counsel for the applicant, Mr Graeme Gowland, sought exemplary costs on the grounds of the respondent's conduct, in particular its manufacturing of evidence (which would have amounted to perjury had it been sworn or affirmed), and the respondent's telling absence from the investigation, which he described as tacit admission of Mr Taylor's grievance.

### **Discussion and Findings**

- [17] As I made clear to the applicant and his counsel by way of an oral determination at the conclusion of the investigation, and for the following reasons, I was satisfied that Mr Taylor had been unjustifiably dismissed and that he was entitled to almost all of the remedies sought.
- [18] I have no reason to doubt the credibility of the applicant's affirmed evidence. In particular I accept Mr Taylor's version of his termination, that it was without warning and involved no consultation (and therefore amounted to a significant breach of s. 4 (1A) of the Act).
- [19] I do not accept the respondent's claim that Mr Taylor was employed on a casual labourer basis. That is because the employment agreement advanced by the respondent in support of its claim is not dated nor is it signed by either party. The payroll history provided by the Company, which Mr Taylor disputes, any way supports his claim of regular and consistent

working hours for the 11 month employment period: it is evidence, I find, that Mr Taylor was not a casual employee.

[20] As it happens, the Company does not rely on the applicant's employment status in effecting his termination. Instead, it claims Mr Taylor was dismissed because of performance issues (refer to its letter dated 18 January 2007 attached to the statement in reply). None of the alleged warning records are counter-signed by the applicant. Mr Taylor disputes the claims about his performance. He also disputes the respondent's claim, as set out in the letter of 18 January, that there was a meeting that day.

[21] My credibility finding in favour of the applicant is strengthened by the failure of the respondent's other representatives, Mr Thomson in particular, to appear today to give evidence in support of the Company's position. No reason has been given for that failure, or why – having originally agreed, as long ago as the 18 July telephone conference, to provide witness statements and to participate in today's investigation – the respondent now resiles from those agreements.

### **Remedies**

[22] I am satisfied, from Mr Taylor's evidence, in particular that in respect of the impact on him and his family of his sudden and unexpected termination, that he is entitled to the following remedies:

- a. 10 public holidays = \$ 1,004.00 gross;
- b. Holiday pay = \$1,100.00 gross
- c. 3 weeks lost wages = \$1,506.00 gross
- d. Compensation for humiliation, etc = \$10,000.00

### **Contributory Fault**

[23] I have no evidence of any behaviour by Mr Taylor that contributed to the situation that gave rise to his personal grievance: s. 124 of the Act applied.

**Good Faith Report**

[24] In the event of this determination being challenged the Employment Court may be assisted by the provision of a good faith report per s. 181 of the Act.

**Determination**

[25] For the reasons set out above I find Mr Taylor was unjustifiably dismissed and that he is to be paid the following monies by the Company:

- a. 10 public holidays = \$ 1,004.00 (one thousand and four dollars) gross;
- b. Holiday pay = \$1,100.00 (one thousand and one hundred dollars) gross;
- c. 3 weeks lost wages = \$1,506.00 (one thousand and five hundred and six dollars) gross; and
- d. Compensation for humiliation, etc = \$10,000.00 (ten thousand dollars).

[26] In all the circumstances I am satisfied that the Company should contribute to Mr Taylor's fair and reasonable costs by paying him \$3,000 (three thousand dollars) and \$100 (one hundred dollars) disbursements.

**Denis Asher**

**Member of the Employment Relations Authority**