

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 135
5383989

BETWEEN	BYRON MORRIS JAMES WATT Applicant
AND	G & L BUILDING AND MAINTENANCE LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	G W Calver Counsel for Applicant No appearance for Respondent
Investigation Meeting:	2 October 2012 at Napier
Determination:	31 October 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Watt's employment relationship problem is about whether there were reasons to justify redundancy in his employment, and a claim for the balance of his fixed term employment agreement.

Issues

[2] What was the reason for Mr Watt's employment ending? What is Mr Watt entitled to, to resolve his employment relationship problem?

The facts

[3] Mr Watt was employed by G & L Building and Maintenance Limited from July 2009. He has produced an unsigned and incomplete individual employment

agreement (dated 20 July 2009). He told me that he did sign 3 copies of an agreement but his employer kept them all. The purpose of the agreement was for a fixed term while Mr Watt trained as an apprentice, and the reasons as to how it would end were in writing.

[4] Mr Watt claims his pay was \$20 per hour. This was supported by his bank statements, based on what he had been paid. He claims he was required to work 8 hours per day, 40 hours per week. He says his employment was a full time apprentice builder and supported by the Industry Training Association's building scheme. This was supported by a separate Industry Training Association Building training agreement signed off on 20 July 2009.

[5] There was an underlying issue about his pay being reduced during his employment and another individual employment agreement was offered to him with reduced pay (\$14.50 per hour) and for an indefinite term. That agreement was never signed off and Mr Watt would not accept a pay cut. Mr Watt's employment with G & L Building and Maintenance Limited came to a sudden end when Mr Watt received a letter from one of the directors dated 10 September 2010 advising him that his employment had ended for some "*unforeseen event*".

[6] After his employment ended he attempted to get work and to continue his apprenticeship, but without success. He obtained some part time work with a construction company and got paid twice. He went on the unemployment benefit. He did some car grooming. He has not been able to obtain permanent work in the building industry since then. He has abandoned his ambition to become an apprentice. He obtained work full time as a truck driver for two months in February 2012. Since then he has had a medical misadventure resulting in him receiving accident compensation.

The respondent's failure to appear at the Authority's investigation meeting

[7] The start of the Authority's investigation meeting in Napier was delayed because there was nobody present for the respondent. Attempts were made by a support officer to contact the respondent, but she failed because no one answered the phone and one number was diverted. There was no help from the contact at the

registered address which was a firm of accountants. The respondent had no good cause for not appearing at the Authority's investigation. There has been no statement in reply and no response from the respondent.

[8] The statement of problem was initially served on the post office box number provided by the applicant in the statement of problem, but without any success. The courier mail was returned to the Authority. The applicant was required to arrange service of a notice of investigation meeting, and the documents were served on the respondent at the company's registered address. This has been done and supported with proof of an affidavit from a legal secretary who explains service. I accept it as proof of service since the company is still registered at the address given on its registration details (dated 13 September 2012).

[9] I decided to proceed fully in the matter as if the respondent was present and/or represented (Clause 12 Schedule 2 of the Employment Relations Act).

[10] I decided not to direct the matter to mediation because it would not contribute constructively to resolve the problem when the respondent had not replied and even made any attempt to contact the Authority. Thus there has been no mediation in the matter.

Determination

[11] I am satisfied that the fixed term employment agreement applied. The agreement purportedly applied between both parties because the employer has never challenged it, the employer has provided no other document that would apply, the employer failed to appear at the Authority's investigation meeting, and that there is a training scheme and an agreement that applied and which are consistent with the employment agreement and the evidence from Mr Watt. There was no fixed date for the agreement to end, and the ending of the agreement was based on the event of the apprenticeship training ending in four years' time from the date it started. The agreements envisaged that there would be circumstances where the employer may not be able to offer work, and in such cases wages would not be payable. It is most unfortunate that I do not have a full copy of the employment agreement to check off

all the provisions and in particular to see if there was anything for redundancy and what the pay arrangements were.

[12] There was a dismissal. This occurred on 10 September 2010 when Mr Watt's employer ended the employment with effect on 8 October 2010. Pay ceased immediately, and the last pay in the bank account would appear to be 13 October 2010. The proof of dismissal exists with the employer's letter dated 10 September, and according to the bank statements from Mr Watt no other payment was made after 13 September. He says he never received any calculations for his final pay, and never was given pay slips when he asked for them during his employment.

[13] The employer's purported reasons for dismissal were conveyed first in the respondent's letter dated 10 September 2010 for an "*unforeseen event*". Second the letter dated 5 October 2010 from the employer's lawyers denied there had been a dismissal and relied on redundancy for a down turn in the employer's work. This reply was provided only after a request for the reasons had been made by Mr Watt's first representative.

[14] That there had not been a dismissal is hardly the case as there was the letter ending the employment and the reason put forward involving redundancy is consistent with a dismissal. The employer claims that the matter was discussed with Mr Watt as early as July 2010, and at a meeting on 20 August 2010. The respondent may be relying on this to explain the reductions in Mr Watt's pay at various times and as proposed in the new employment agreement. The respondent claimed that there was no further work available for Mr Watt and he agreed to take holidays. Mr Watt denied the claim, and instead says the employer wanted him to take a pay cut and sign another document to which he would not agree. He says he had no notice that this was behind any redundancy.

[15] There has been no proof provided as to the reasons for the need for a redundancy and any input from the employer on the reasons for the proposed pay cut. There have been no details provided for the reference in the respondent's lawyer's letter of some financial circumstances existing. Nothing has been provided to indicate what if anything this and an "*unforeseen event*" mean. As such the directors of the company are the authors of their own misfortune if the information that has been put

before me is incomplete and if there is more information available that could have helped them.

[16] Furthermore there is nothing to support the employer's claim that Mr Watt agreed to use his holidays. The pay ended on 13 September and does not explain what happened to holidays. He says he had not taken any leave before his employment ended.

[17] Mr Watt's evidence supports his claims. In particular:

- a. That he says the employer at the same time gave a substantial pay rise to a couple of his co-workers (statement of evidence).
- b. That he says the respondent at the same time took on two other builders who had been employed by another builder (statement of evidence).
- c. That there was a building contract that continued being worked on after his employment ceased (statement of evidence).
- d. That there was no process followed by the employer for consultation before the letter dated 10 September and if there were any discussions that they enabled Mr Watt a fair opportunity to suggest alternative to redundancy.
- e. That the employer did not reply in the first instance to Mr Watt's first representative's letter and a further request for reasons for the dismissal had to be sent before a reply was provided.
- f. That the respondent's lawyer's reply was inconsistent with the employer's letter dated 10 September, and it ignored the obvious that there had been a dismissal.
- g. That the employer's letters were completely devoid of any detail and information supporting its position.

[18] I am also supported in my conclusion because the respondent has failed to provide a statement in reply and/or even respond to the information available in regard to Mr Watt's claims filed in the Authority. The directors have done nothing at all in regard to the statement of problem filed in the Authority. The respondent's failure to attend the Authority's investigation has not assisted me conduct my investigation. I am left to conclude that they have simply hoped that the matter would go away and or accepted the claims. In any event without responding and providing a reply they have obstructed my investigation where there is an absence of full information. Although the company is still registered there is no information available in regard to its solvency and current financial circumstances.

[19] Mr Watt has claimed the period of his unexpired fixed term employment agreement based on a four year apprenticeship or a lesser period. Mr Watt has relied on the employer breaching the fixed term nature of the employment agreement for bringing the claim before the Authority and claims that the breach put an end to his employment early without relying on any thing under the terms of the agreement. Mr Watt says that he has lost wages and estimated his losses reoccurring until 20 July 2013. He says he was paid until 13 September 2010. Consequently he has claimed the sum of \$122,400 gross wages. There is an impact on this, however.

[20] The principles surrounding fixed term employment and the rights and obligations that go with it are applied in *Williams v AG in respect of the Secretary of Justice* [1999] 2ERNZ 470. *Williams* can be distinguished in that it applied under the *Employment Contracts Act* and it related to a *wrongful dismissal* claim. The latter is now prohibited and the only redress exists under a personal grievance claim and/or breach under the *Employment Relations Act*. However, the principles remain applicable based on the causes of action and to resolve the employment relationship problem. The statement of problem filed by Mr Watt clearly put the employer on notice of Mr Watt's claim for his fixed term entitlement to all his wages. Mr Watt is required to mitigate his losses even to claim for the losses as a breach of his employment agreement. He has demonstrated that he has attempted to mitigate his lost wages by getting some alternative work during the period of the claim. In addition to any claim for lost earnings his claim has been brought for a period that would involve future lost earnings until 20 July 2013 if the matter had been treated as

a personal grievance. The employer remains liable for the remuneration under the agreement until the date of expiry where there has been no evidence of an early termination required or on particular grounds and because there has been a fundamental breach of an employment agreement. The employer's letters do not meet the required proof to rebut the claims from Mr Watt, I hold, especially as there has been no evidence to support the letters and there is every reason to doubt their reliability. However, *Williams* also requires that earnings from other sources (\$5,669.29) be deducted from any entitlement. The sums that Mr Watt has received from a benefit since his employment ended with G & L Building Maintenance Limited is a matter between him and the appropriate agency if he can enforce this determination. Furthermore his entitlement has been brought about entirely by his employer who has failed to take appropriate steps under the agreements to find other work in an apprenticeship for Mr Watt and has failed to justify the early termination of the fixed term arrangement and an absence of detail on particular grounds. This is a serious breach of the employment obligations especially having regard to it being a training arrangement and there being no apparent release from the agreement. As such Mr Watt's claim must be reduced by his earnings received during the period. No other deduction has been made because there was no contributory fault on his part. Indeed I am satisfied that Mr Watt's circumstances are such that he probably will have difficulties in obtaining employment before 20 July 2013 given he is unemployed, has only been able to get a small amount of work and that includes part time arrangements and a full time job truck driving for two months, and he has been on a benefit. In addition, he applied for ACC and waited five months for payments from ACC to commence because of an accident. His accident occurred in February 2012. The ACC payments started from 16 August 2012 but I have no indication of the period he has been paid for. However, his ACC for serious medical misadventure means that his entitlement to any wages should be limited to the date of the accident occurring because he would not be able to work for an entirely unrelated reason to his employment ending with the respondent. There is an absence of any actuarial assessment for future lost employment from Mr Watt so all I have been able to assess is what he has said to support his claim. Thus his claim should start from 13 September 2010 (the date he was paid up until) to at least the end of February 2012. He would be entitled to \$60,800 less (\$5,669.29).

[21] Mr Watt is also entitled to his holiday pay. In the absence of any details and the claim not being challenged I can only assume that the respondent has accepted the amount claimed. Mr Watt was not paid for 5 weeks he claims he is owed. This is \$4,000 gross.

[22] Mr Watt has also claimed \$600 owed for apprenticeship fees for training. This has not been paid. The claim is supported by a provision for payment under the employment agreement and the training agreement. I hold that Mr Watt is owed the \$600 to be paid as a reimbursement as claimed.

[23] I hold that Mr Watt has a personal grievance because the employer has failed to support any genuine reason for a redundancy and because there has been no procedure followed that enabled Mr Watt to have a fair opportunity to have some input and comment on whatever the reason was for his employment ending. As such Mr Watt is entitled to compensation for hurt and humiliation and injury to feelings. Mr Watt did not contribute to the situation giving rise to the personal grievance for any reduction. He can not be blamed for the personal grievance, I hold.

[24] Mr Watt has claimed compensation that relates to the following: that the loss of his apprenticeship hit him hard, that he got depressed, that had to give up his ambitions about his apprenticeship and work in the industry because of failing to get alternative work as an apprentice, that there has been a strain in his life due to the financial impact on him of losing his job that includes paying his way and keeping household payments up. He says he has been emotionally affected that has been caused by financial worries and that these have also contributed to the break up of a relationship. I accept that all these may have been related to the loss of his job and have had an impact on his feelings. I assess a sum of \$8,000 nett compensation to apply.

[25] This is a matter for costs. The respondent has put Mr Watt to some expense to bring the matter before the Authority. Mr Watt has been successful if only because the matter has proceeded on formal proof. For this reason I am satisfied costs follow the event, but there is nothing unusual about the matter to increase the notional tariff applied by the Authority. The tariff is \$3,500 for a full day. The hearing started late and only lasted one hour, and required preparation and the applicant arranging

service. The latter was an extra cost. I am satisfied Mr Watt has incurred costs. He was represented at the hearing. There was a statement of evidence prepared for Mr Watt's use and a bundle of documents assembled. I award Mr Watt the sum of \$2,000 costs plus the \$71.56 filing fee.

Orders of the Authority

[26] I order G & L Building and Maintenance Limited to pay Byron Watt the following

- i. \$55,130.71 gross entitlement under his fixed term employment agreement for lost wages under the fixed term arrangement.
- ii. \$4,000 gross holiday pay.
- iii. \$600 reimbursement of training fees.
- iv. \$8,000 nett compensation under s 123 (1) (c) (i) of the Employment Relations Act.
- v. \$2,000 costs plus \$71.56 filing fee.

P R Stapp

Member of the Employment Relations Authority