

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 269/08
5107495

BETWEEN DUNCAN WALLBANK
 Applicant

AND LEWTHWAITE
 ENGINEERING LTD
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Vanessa White for Respondent

Investigation Meeting: 25 June 2008 at Taupo

Additional Information: 14 and 28 July 2008

Determination: 30 July 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Wallbank claims he was unjustifiably dismissed from his employment at Lewthwaite Engineering Ltd and claims that he is owed wages for hours worked plus holiday pay. Mr Lewthwaite denies the claims and says Mr Wallbank was never employed by the company.

[2] The issues for this determination are whether Mr Wallbank was an employee of Lewthwaite Engineering Ltd. If I find Mr Wallbank was offered and accepted employment at Lewthwaite Engineering Ltd then I will consider and determine whether Mr Wallbank was paid for all the hours he worked for the Respondent and then, whether Mr Wallbank was unjustifiably dismissed.

Was there an employment relationship?

[3] In 2007, Mr Wallbank was working at Works Infrastructure as a project Manager. He met Mr Lewthwaite and they and their wives became friends.

[4] On or about 23 April 2007 Mr Wallbank resigned from his employment at Works Infrastructure giving four weeks notice. Mr Wallbank worked out his notice period and says he commenced working for the Respondent on or about 21 May 2007.

[5] During the Christmas/New Year period 2006/2007 while working for Works Infrastructure Mr Wallbank undertook some casual work to help Mr Lewthwaite out. Mr Lewthwaite says that as far as he was aware Mr Wallbank continued to work at Works Infrastructure up to and including the time he was undertaking work for him after 21 May 2008.

[6] Mr Wallbank says Mr Lewthwaite offered him a job with a salary of \$45,000 per annum, the use of a company vehicle and the possibility of bonuses. There was no written employment agreement.

[7] Mr Lewthwaite denies he offered Mr Wallbank a job. He says if he had done so the offer would have been in writing as it was for all of his staff. To support his contention, Mr Lewthwaite provided the Authority with a copy of a written employment agreement between Lewthwaite Engineering Ltd and another employee.

[8] Mr Wallbank was adamant he had a discussion with Mr Lewthwaite in April 2007 in Mr Lewthwaite's office. Mr Wallbank says they discussed at length what the job would be – which was to supervise some of the Lewthwaite Engineering work sites, order materials, and make deliveries.

[9] In his statement in reply Mr Lewthwaite says it would be ridiculous to offer Mr Wallbank a salary of \$45,000 given that the company was only making about \$65,000 per year. Further, Mr Lewthwaite says he would not pay that much to an employee who did not have any qualifications in steel framed construction.

[10] The employment agreement proffered by Mr Lewthwaite to the Authority to support his contention that he had written employment agreements with all of his staff expresses the salary for the employee named in the employment agreement as being \$47,000 per annum.

[11] Mr Wallbank's tasks were of a general nature and to supervise various work sites. Those are similar duties as those set out in the written employment agreement

for which the specified salary was \$47,000. It is therefore conceivable that Mr Wallbank was offered a salary of \$45,000 per annum.

[12] Mr Wallbank picked up a vehicle the weekend before he started. This was something he had not done during the Christmas/New Year period when he had helped Mr Lewthwaite out. While the vehicle was a pool vehicle which could be used by all staff, I am satisfied Mr Wallbank would more often than not, take it home at night time.

[13] The first job Mr Wallbank worked on after 21 May 2007 was to supervise the building of an extension to a shed on the Contact Energy site in Taupo. In order to do that work Mr Wallbank had to undertake a safety competency course. Documents provided to the Authority confirm Mr Wallbank undertook the safety course on 21 May 2007. Mr Lewthwaite confirmed at the investigation meeting that it was organised and paid for by Lewthwaite Engineering Ltd. The document produced to the Authority showed that Mr Wallbank was attending the course as a representative of Lewthwaite Engineering Ltd.

[14] Mr Lewthwaite says that Mr Wallbank did not work for him every day of the five week period he is claiming. At the investigation meeting Mr Lewthwaite told me that there were about 10 days during that period when Mr Wallbank did not work. I have taken from that evidence that Mr Lewthwaite has conceded that Mr Wallbank did undertake work for him during the five weeks in dispute.

[15] Mr Wallbank says he supervised the extension on the Contact Energy site throughout the month following 21 May 2007. He told me he had to sign in and out of the site each time he attended, and went to the site most days during the month. Mr Wallbank says he signed in as a representative of Lewthwaite Engineering Ltd.

[16] The Authority, in undertaking its investigation has made enquiries of Contact Energy to ascertain whether the sign in sheets for May and June 2007 were still available for scrutiny. However, the sign in sheets are not kept for long periods of time and those for May and June 2007 were not available.

[17] I am satisfied that Mr Wallbank did not attend the Contact Energy site every day during the month following 21 May 2007. It was generally accepted at the

investigation meeting that Mr Wallbank undertook other work during that period. For example he worked at Mokai on a steel framed shed which took about 5 days. Mr Wallbank also made a delivery to Hawkes Bay which took a day plus other deliveries.

[18] Mr Lewthwaite says Mr Wallbank was not on the payroll for Lewthwaite Engineering Ltd. Instead Mr Wallbank was paid by cheque for the work he undertook. Mr Lewthwaite produced copies of two cheque stubbs to support his contention that Mr Wallbank worked and was paid on a casual basis. Mr Wallbank accepts he received two cheques from Mr Lewthwaite. In closing submissions Mr Lewthwaite argued that the cheque dated 11 June 2007 in the amount of \$1,429.54 did not amount to a salary of \$45,000. Contrary to that submission I am satisfied that a fortnightly salary payment, nett of PAYE for a salary of \$45,000 would equate to \$1,429.54.

[19] Having considered all the evidence I have concluded it is more likely than not that Mr Wallbank was offered and accepted a position with the Respondent on the basis of a salary of \$45,000 per annum together with the use of a company vehicle. Mr Wallbank was an employee and therefore the Authority has the jurisdiction to investigate his complaints that he has not been paid for all the hours he worked, and that he was unjustifiably dismissed.

Arrears of wages claim

[20] Mr Wallbank worked for Lewthwaite Engineering Ltd from 21 May to 21 June 2007. This is a total of four and a half weeks. I am satisfied Mr Wallbank received two payments during his employment. The first in the amount of \$726.50 and the second in the amount of \$1,429.54. These are nett figures. The equivalent gross figures are \$937.50 and \$1875.00. Based on weekly payments of \$937.50 gross, Mr Wallbank should have received \$4,218.75 gross for the period of his employment.

[21] There is a shortfall in what Mr Wallbank received and what he ought to have received of \$1,406.25 gross.

[22] Mr Wallbank also seeks payment of Holiday Pay for the period of his employment, which he says continues to be outstanding. I am satisfied Mr Wallbank has not been paid his holiday pay.

Lewthwaite Engineering Limited is ordered to pay to Mr Wallbank \$1,406.25 gross and Holiday pay of \$375.00 as arrears of wages and to do so within 28 days of the date of this determination.

The dismissal

[23] Under this heading I am required to examine the actions of the respondent in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[24] The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[25] Mr Lewthwaite travelled to Australia on business from 7-9 June. While he was away his domestic situation changed dramatically. Following his return and on or about 13 July Mr Lewthwaite discovered information he had passed on to Mr Wallbank had been relayed to his now ex-wife. Mr Wallbank says Mr Lewthwaite rang him and told him in no uncertain terms that he was sacked.

[26] Mr Lewthwaite denies he sacked Mr Wallbank. Rather, he says he told Mr Wallbank off for discussing his personal business in a way that got back to his ex-wife and Mr Wallbank has not returned to work since then.

[27] Having considered all the evidence I am satisfied that Mr Lewthwaite rang Mr Wallbank and dismissed him over the phone believing that Mr Wallbank had passed information onto Mrs Wallbank who had in turn passed that information onto Mrs Lewthwaite.

[28] The dismissal was carried out in the absence of any procedural fairness and with no basis for justification. An employer acting fairly and reasonably would not have acted in such a way. It follows the dismissal is unjustified.

Remedies

Lost Wages

[29] Mr Wallbank commenced employment with a new company on 16 July 2008. He seeks reimbursement of lost wages of the three weeks he was out of work. Mr Wallbank is entitled to be reimbursed his lost wages for the period 22 June to 13 July 2007.

Lewthwaite Engineering Limited is ordered to pay to Mr Wallbank \$2,812.50 gross pursuant to section 123(1)(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Compensation

[30] Mr Wallbank seeks \$2,000 for distress and humiliation. Mr Wallbank provided little evidence of hurt and humiliation.

[31] Having regard to the particular circumstances of this case and the general level of award of compensation in cases of this type, and for the injury to feelings inherent in being subject to a dismissal found to be unjustified, Mr Wallbank is awarded \$1,500.

[32] As required under s.124 of the Act I have considered whether any remedies should be reduced because of the actions of Mr Wallbank contributing towards the situation giving rise to the personal grievance. I am satisfied there was no blameworthy conduct of a level requiring a reduction for contribution.

Lewthwaite Engineering Limited is ordered to pay to Mr Wallbank \$1,500.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Penalties

[33] Mr Wallbank claims penalties for breaches of the employment agreement and the Employment Relations Act in that the Respondent withheld wages and

holiday pay and did not provide Mr Wallbank with a copy of an employment agreement.

[34] With regard to the failure to pay wages and holiday pay, I have taken into account s.4 of the Wages Protection Act 1983 which requires employers to pay employees the entire amount of wages as they become payable. In failing to pay Mr Wallbank his wages and holiday pay, Lewthwaite Engineering Ltd has acted unlawfully. In these circumstances the Authority would ordinarily order a penalty against the employer. In the present case, I decline to do so having regard to all the circumstances and being of the view that it would not be in the interests of justice to impose such a penalty.

[35] With regard to the lack of a written employment agreement, Mr Lewthwaite denied he employed Mr Wallbank on the one hand, but argued that he employed Mr Wallbank on a casual basis on the other. Even if I had found Mr Wallbank was a casual employee, Mr Lewthwaite was obligated to provide a written employment agreement in accordance with s.65 of the Employment Relations Act.

[36] Mr Lewthwaite was clearly aware of his obligation to provide a written agreement. It is highly likely that had Mr Lewthwaite committed his understanding of the relationship between Lewthwaite Engineering Ltd and Mr Wallbank to writing, this employment relationship problem may not have occurred.

[37] I think it appropriate that a penalty be paid by Lewthwaite Engineering for its failure to comply with the law and in all the circumstances of this case, I direct that the penalty, which I fix at \$250 be paid to the Crown.

Lewthwaite Engineering Limited is ordered to pay a penalty of \$250 without deduction for failing to provide the applicant with an individual employment agreement. I direct that the respondent pay the penalty to the Crown.

Costs

[38] Costs are reserved and the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties

may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority