

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 505  
3154425

BETWEEN	KARL YOUNG Applicant
AND	ECO PILE LIMITED Respondent

Member of Authority: Andrew Gane

Representatives: Daniel Church, counsel for the Applicant  
No appearance for the Respondent

Investigation Meeting: 14 June 2022 at Auckland

Submissions and other: 14 June 2022  
material received:

Determination: 5 October 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Karl Young claims he was unjustifiably dismissed from his employment with Eco Pile Limited (Eco Pile) on 30 August 2021. He seeks wage arrears, compensation and a penalty, as well as reimbursement of legal costs. Mr Young also had a claim for work related expenses which was withdrawn.

[2] Eco Pile did not lodge a statement in reply and failed to actively participate in these proceedings or investigation meeting.

**The Authority's Investigation**

[3] During my investigation, the following gave evidence; Mr Young, Eco Pile former director Mathew Ashton and Mr Young's mother Nancy Young. Witnesses

answered questions from myself and Mr Young's representative. Eco Pile was not represented in the proceeding.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination does not record all the evidence and submissions received and fully considered during the Authority's investigation, but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[5] This determination has been issued outside the timeframe set out in s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

### **Issues**

[6] The following are the issues for investigation and determination:

- (i) Was Mr Young unjustifiably dismissed by Eco Pile?
- (ii) If Eco Pile's actions were not justified what remedies should be awarded, considering:
  - (a) compensation for lost wages under s 123(1)(b) of the Act?
  - (b) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act; and
- (iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Young that contributed to the situation giving rise to his grievances;
- (iv) Should penalties be imposed on Eco Pile for its breaches of good faith and the Wages Protection Act 1983:
- (v) Should either party contribute the cost of representation of the other?

### **Background**

[7] Eco Pile was a start-up business in 2020 involved in the installation of "Surefoot" product, a concrete free-footing pile system. The two directors were Matthew Ashton and Graeme Hanna. Mr Ashton had known Mr Young for about 20 years and employed him because of his prior business experience.

[8] Mr Young was initially employed by Eco Pile on a part-time basis in October 2020. On 10 December 2020 he signed an individual employment agreement (IEA) as

Business Manager working full time from 11 December 2020. He was summarily dismissed without notice on 30 August 2021. Mr Young's salary was \$65,000 a year. The IEA contained a redundancy provision which included an obligation for Eco Pile to consult with Mr Young regarding any restructuring, a provision offering a suitable alternative position, and if a suitable alternative position could not be found, required Eco Pile to provide written notice of not less than four weeks prior to the date of termination.

[9] During his employment as Business Manager Mr Young secured several installation jobs for Eco Pile and also engaged several subcontractor engineers to lay foundations to enable Eco Pile to complete the installation jobs.

[10] Initially the directors had a good business relationship and the company worked well. However, tensions later arose between the directors about how the business should be run and the relationship soured. On 30 August 2021, Mr Ashton was abruptly removed by the majority shareholders as a director of Eco Pile.

[11] That same day the remaining director, Mr Hanna, sent an email to all staff advising "we do not have any future business booked in Eco Pile. Therefore cannot justify keeping staff on board with no foreseeable income as we would be trading insolvently". The email also instructed Mr Young to cease all work for Eco Pile immediately and to provide Mr Hanna with his email login details.

[12] On 31 August 2021 Mr Young spoke to Mr Hanna and asked whether he had been dismissed. Mr Hanna advised he was not needed by the company anymore. Mr Young took this as confirmation he had been dismissed on grounds of redundancy without notice and with immediate effect on 30 August 2021.

#### *Personal grievance raised*

[13] Mr Young's legal representative wrote to Eco Pile on 4 October 2021 raising a personal grievance and which sought arrears.

[14] Eco Pile initially argued that it thought Mr Young was a contractor however this was refuted by Mr Young's and Mr Ashton's evidence, including the IEA signed by Mr Young and Eco Pile dated 10 December 2010.

## **The Authority's view of the employment relationship problem**

### *Unjustified dismissal*

[15] Mr Young was summarily dismissed when Mr Hanna emailed him on 30 August 2021 advising him to cease all work for Eco Pile immediately and confirmed his dismissal the following day, when Mr Hanna advised him that he was not needed anymore. Mr Young was summarily dismissed without notice.

[16] Although Eco Pile suggested the lack of work caused a redundancy situation, there was no evidence Eco Pile has followed a fair and reasonable process in dismissing Mr Young. There was no evidence Eco Pile:

- investigated the circumstances surrounding the alleged redundancy; and
- consulted Mr Young prior to Mr Hanna's email of 30 August 2021 advising Mr Young that Eco Pile would not be continuing his employment; and
- looked into possible redeployment within the company; and
- took Mr Young's feedback into account prior to making the decision to dismiss him.

[17] Mr Ashton also gave evidence that Eco Pile continued to employ other employees through to October 2021. The lack of process, as well as the lack of good cause, are both sufficient to make Mr Young's dismissal, when viewed objectively, unjustifiable.

### *Wage Arrears*

[18] Mr Young had previously agreed to change his salary payments from fortnightly to monthly payments in order to help Eco Pile's cash flow. He also consented for his salary payments for the months of January 2021 and April 2021 to be deferred, on the understanding that he would be paid at a later date, once the business was in a better financial position.

[19] Mr Young did receive a payment from Eco Pile for the sum of \$4,137.76 on 27 September 2021. The Authority was advised this was salary in lieu of notice. This does not affect the outstanding arrears of \$10,833 for two months deferred salary payment. Mr Young also accepted a further payment of \$1,200 had been paid to him on 15 September 2021 leaving an outstanding balance of \$9,633 arrears.

[20] Eco Pile's continued withholding of the deferred salary owing to Mr Young amounts to a technical breach of the Wages Protection Act 1983. However, since Mr Young had earlier consented to the deferred payment of the salary I do not find the breach is serious enough to warrant a penalty under the Wages Protection Act.

#### *Breach of Good Faith*

[21] Eco Pile suggested the downturn of work caused a redundancy situation. However, Mr Young expected that he would be consulted on a fair and transparent selection process and the possibility of redeployment. This did not occur and in the circumstances no genuine consultation took place.<sup>1</sup> There was no evidence that Eco Pile had considered other options of redeployment for Mr Young.

[22] Mr Young says Eco Pile breached the trust and confidence in the employment relationship. Further, he suggests its failure to provide any relevant information pertaining to their decision purporting to make him redundant amounts to a clear breach of their statutory duty of good faith.

### **Remedies**

#### *Reimbursement of wages*

[23] Where the Authority finds that the employee has a personal grievance; and that the employee has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration being \$16,250. Here the latter is the lesser amount. Eco Pile is ordered to pay Mr Young \$16,250 in reimbursement of lost wages.<sup>2</sup>

#### *Compensation for humiliation, loss of dignity and injury to feelings*

[24] Mr Young is entitled to remedies because of the unjustified dismissal. Both Mr Young and his mother gave compelling evidence of the profound and devastating impact the dismissal had on Mr Young. Since his dismissal from Eco Pile Mr Young stated that he felt dejected, demoralised, and anxious about how he was going to finance himself and pay his bills, including on his house. Mr Young has been unable to find work since his dismissal, however he is currently in training.

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<sup>1</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

<sup>2</sup> Employment Relations Act 2000, s123(1)(b)

[25] Mr Young is entitled to compensation of \$15,000 for hurt and humiliation. He is also entitled to unpaid holiday pay and costs. I do not consider Mr Young's behaviour in any way contributed towards the situation that gave rise to his personal grievance.<sup>3</sup> Eco Pile is ordered to pay Mr Young compensation of \$15,000.

#### *Breach of good faith*

[26] I find that Eco Piles summary dismissal of Mr Young breached the trust and confidence in the employment relationship. Further its lack of communication and failure to provide any relevant information, and consultation pertaining to its decision to make Mr Young redundant amounts to a clear breach of its statutory duty of good faith.<sup>4</sup>

[27] This breach of good faith was serious and deliberate, and undermined the employment relationship.<sup>5</sup> This is immediately evident from the fact that this breach of good faith resulted in Mr Young's dismissal. Mr Young seeks a penalty against Eco Pile for this breach.

#### *Arrears*

[28] Mr Young is owed for two months' salary being \$10,833, however this is lessened by the amount \$1,200 Mr Young accepts he received on 15 September 2021. Eco Pile is ordered to pay Mr Young \$9,633 and 8% holiday pay being \$771.

#### *Interest*

[29] Mr Young can recover interest on the arrears and Eco Pile is liable for payment of that interest calculated from the date stipulated in the letter of 4 October 2021 raising a personal grievance, being 12 October 2021, until the arrears are paid in full. Eco Pile is ordered to pay interest, using the civil debt interest calculator, from 12 October 2021.<sup>6</sup>

#### **Penalties**

[30] Having found that Eco Pile has breached statutory duties owed to Mr Young at paragraph [22] and [26] above, I must next consider whether an award of a penalty (or penalties) is warranted as sought. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act.

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<sup>3</sup> Employment Relations Act 2000, s124

<sup>4</sup> Employment Relations Act 2000, s 4(1A)(c).

<sup>5</sup> Employment Relations Act 2000, s4A.

<sup>6</sup> <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

[31] The failure by Eco Pile to openly address redundancy in communications with Mr Young regarding the restructuring was a breach of section 4 of the Act (duty of good faith), because they undermined Mr Young's confidence in the employment relationship and breached his employment agreement. However, the factual matrix of the good faith breach and breach of the employment agreement is the same as the personal grievances for which the remedies have been awarded in Mr Young's favour. In the circumstances I decline to exercise my discretion to award a penalty.

### **Summary of orders**

[32] Mr Young was unjustifiably dismissed for which remedies have been awarded. His claims for wage reimbursement have been upheld. The following orders are made:

- (a) Within 28 days of the date of determination Eco Pile is ordered to pay Mr Young the following sum:
  - (i) reimbursement of 3 months' salary being \$16,250 (gross); and
  - (ii) wage arrears of \$9,633 (gross) and 8% holiday pay being \$771 (gross); and
  - (iii) compensation for hurt, humiliation and injury to feelings under s123 being \$15,000.
- (b) Within 28 days of the date of determination Eco Pile is to calculate and pay Mr Young interest on the arrears as awarded in paragraph [29] above.

### **Costs**

[33] Costs are reserved. If a determination of the Authority is required on costs, Mr Young may lodge a memorandum within 14 days of the date of this determination and Eco Pile would then have 14 days from the date of service to lodge a memorandum in reply. No submissions on costs will be considered outside this timetable, unless prior leave has been sought.

Andrew Gane  
Member of the Employment Relations Authority