

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 114
5588075

BETWEEN AARON VINCENT JOHN
 McNOE
 Applicant

A N D O'NEILL EARTHWORKS
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Tim Jackson and Kelly Beazley, Counsel for Applicant
 No appearance for Respondent

Investigation Meeting: 12 July 2016 at Timaru

Oral Indication: 12 July 2016

Submissions Received: At the investigation meeting from the applicant

Date of Determination: 14 July 2016

DETERMINATION OF THE AUTHORITY

- A Aaron McNoe was unjustifiably dismissed from his employment with O'Neill Earthworks Limited.**
- B O'Neill Earthworks Limited is ordered to pay Aaron McNoe:**
- (i) The sum of \$4500.08 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.**

- (ii) **Compensation for humiliation and loss of dignity in the sum of \$9000 without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000.**

C O’Neill Earthworks Limited is ordered to pay Aaron McNoe the sum of \$1200 costs together with reimbursement of the filing fee of \$71.56.

Employment relationship problem

[1] Aaron McNoe says that he was unjustifiably dismissed from his employment with O’Neill Earthworks Limited (O’Neill Earthworks) on 14 January 2015.

[2] By agreement Mr McNoe’s employment relationship problem was investigated by the Authority with that of his wife, Amanda McNoe, on 12 July 2016.

[3] O’Neill Earthworks has only participated in the Authority process in a limited way although the parties have attended mediation. The sole director of O’Neill Earthworks is Daniel O’Neill. His sister Anna Baker represented Mr O’Neill during a telephone conference with the Authority on 26 January 2016. Although statements of problem had been lodged on behalf of Mr and Mrs McNoe on 14 October 2015 no statement in reply had been received on behalf of O’Neill Earthworks. Statements in reply were scheduled by the Authority. The only documentation received was a brief half-page statement which was not in the standard form. This document provided that Mr McNoe simply left the company, having agreed to be paid out what he was owed in holiday pay and that Mr McNoe was not dismissed. No statements of evidence were provided by O’Neill Earthworks in accordance with the timetable set.

[4] The Authority was advised that an application by the Inland Revenue Department to place O’Neill Earthworks into liquidation was heard on 13 June 2016. The application for liquidation of O’Neill Earthworks was adjourned until 1 August 2016.

[5] An Authority officer advised Mr O’Neill on 1 July 2016 that the investigation meeting for 12 July 2016 would be proceeding as scheduled. The Authority officer noted that O’Neill Earthworks had not lodged statements of evidence but that would

not mean that the meeting would not proceed and Mr O'Neill could still present evidence on the day.

[6] On that same day, Ms Baker asked the Authority officer if the date for the meeting could be changed as Mr O'Neill had started a new job on a ski field. The Authority officer advised Ms Baker that the meeting would not be rescheduled.

[7] A subsequent request was received from Ms Baker that Mr Mr O'Neill be connected by telephone to the investigation meeting but before that matter could be considered the Authority was advised by Ms Baker on 8 July 2016 that their father was very unwell and she applied for an adjournment.

[8] The Authority heard from Ms Baker and Mr Jackson on 11 July 2016 on the adjournment application. The application for adjournment was opposed by Mr Jackson. The Authority had to weigh a number of different interests in considering the adjournment application. Ultimately the Authority advised Ms Baker that it was not minded to grant the adjournment. Ms Baker was advised that the process in the Authority was relatively informal and that Mr O'Neill's attendance would only be required for about two hours. There was also a concern that the company could be placed in liquidation on 1 August and it was unclear, if the matter was to be adjourned when another suitable date could be given.

[9] On 11 July 2016 Mr O'Neill advised the Authority that he would not be attending the investigation meeting. The Authority heard evidence from Mr McNoe.

The issues

[10] The issues for the Authority to determine in this matter are as follows:

- (a) Was Mr McNoe dismissed from his employment on 14 January 2015;
- (b) If Mr McNoe was dismissed from his employment on 14 January 2015, then was his dismissal justified;
- (c) If Mr McNoe was unjustifiably dismissed then what remedies is he entitled to?

Was Mr McNoe dismissed from his employment?

[11] Mr McNoe commenced employment with O'Neill Earthworks on 2 December 2013 after discussions with Mr O'Neill about the role from in or about August 2013. A written employment agreement was provided to Mr McNoe but he said it was never signed because he wanted some changes to the agreement which were never made. Mr McNoe's role was described in the employment agreement as Operations Manager but included all aspects of management.

[12] The initial salary paid to Mr McNoe was \$84,000 and he was provided with a company car, phone and laptop. At the time he says he was dismissed his salary had increased to \$102,000.

[13] O'Neill Earthworks did not have an office available at its workshop so Mr McNoe undertook the paperwork aspects of his role in his home office. His wife assisted him although was not initially paid for this work.

[14] Mr McNoe had a conversation with Mr O'Neill about employing an administrative assistant for him. He also raised with Mr O'Neill whether O'Neill Earthworks would be willing to employ Mrs McNoe as she was already assisting with the paperwork aspects of the role. Mr O'Neill agreed to employ Mrs McNoe. Mr McNoe recalls this agreement being finalised at a meeting on 28 September 2014 and from 13 October 2014 Mrs McNoe started working for O'Neill Earthworks part-time from the home office and sometimes she would undertake work from the yard of O'Neill Earthworks.

[15] Mr McNoe said that there was a discussion with Mr O'Neill in early November 2014 about leave that he would take with Mrs McNoe and their family over the Christmas period commencing from 14 January 2015 for two weeks.

[16] When Mr McNoe was considering the offer to work for O'Neill Earthworks, he was offered an opportunity to become a shareholder and take equity in the company. Mr McNoe further recalled that Mr O'Neill offered to gift him a 10% shareholding in O'Neill Earthworks but that matter did not come to fruition. Mr McNoe withdrew his claim for a 10% shareholding of the company during the investigation meeting.

[17] Mr and Mrs McNoe received some financial information from Mr O'Neill regarding the company in or about early December 2014 and they met with a financial adviser to discuss the records, the financial position of the company and how much money they could raise to purchase a share in the company.

[18] On 15 December 2014, Mr McNoe advised Mr O'Neill that they were in a position to borrow up to \$80,000 towards buying into the company. Mr McNoe had some issues around the expenditure shown in the financial records and asked Mr O'Neill about this. Mr O'Neill did not provide the further information requested before the employment relationship ended.

[19] On 12 January 2015, Mr O'Neill and Mr McNoe were on a jobsite discussing the job and day-to-day running of O'Neill Earthworks. Mr O'Neill advised Mr McNoe that O'Neill Earthworks could not afford to employ both Mr O'Neill and Mr McNoe and one of them would have to leave. He said it would be a good time for Mr McNoe to buy into the company. Mr McNoe said he was shocked by Mr O'Neill's statement as this was the first he had heard about the financial issues. Mr McNoe said he advised that he was taking his holidays and going home to discuss the options with Mrs McNoe. Mr O'Neill agreed that he should go home and talk to Mrs McNoe. Mr McNoe left the jobsite in the company vehicle and returned home. Mr McNoe said he talked to his wife when he returned home and advised her what had happened. Later that afternoon, Mr O'Neill sent Mr McNoe a text message and asked him to drop the site plans off to him.

[20] On 13 January 2015, Mr McNoe telephoned Mr O'Neill and arranged to drop the site plans off to him. When Mr McNoe talked to Mr O'Neill about the plans he asked him how he would receive his annual holiday pay. There was some discussion about whether payment would be in a lump sum or by way of weekly payments. Mr McNoe said that Mr O'Neill agreed to pay holiday pay in a weekly sum which was preferable to Mr McNoe for tax purposes but ultimately it was paid in a lump sum.

[21] Mr McNoe asked Mr O'Neill about his wife and what options she had with O'Neill Earthworks. Mr O'Neill replied that he could not afford to employ Mrs McNoe so she would have to go. Mr McNoe said he wanted Mr O'Neill to confirm that meant her employment was being terminated and Mr O'Neill duly confirmed that Mrs McNoe's employment was, as of 13 January 2015, terminated.

Mr McNoe asked Mr O'Neill for that to be put in writing and Mr O'Neill agreed to do so and asked that Mr McNoe tell his wife that her employment was terminated.

[22] The following day, 14 January 2015, Mr McNoe received a text message from Mr O'Neill asking why he had not returned any of O'Neill Earthworks' property. He stated in his text that he was *rather disappointed about this* and *I didn't want it to be like this, don't make it any harder*. Mr McNoe said he did not understand the text message from Mr O'Neill and telephoned him. Mr O'Neill advised Mr McNoe that until he returned the property and the work ute he would not be paying Mr or Mrs McNoe any money. Mr McNoe asked Mr O'Neill why he would need to do this when he was on holiday. Mr O'Neill advised *no as of yesterday you are finished*.

[23] Mr McNoe said that he responded by saying that he was on holiday and that there had been a previous discussion about how the holiday pay was going to be paid. Mr McNoe recalls that this seemed to upset Mr O'Neill who said *get f***ed you're not getting your money until I get my gear back* and then hung up on Mr McNoe.

[24] Mr McNoe said that he was taken by surprise by the tone of the conversation and telephoned a local Police officer who advised him to return all of the property and seek legal advice.

[25] On 15 January 2015, Mr McNoe sent Mr O'Neill an email requesting the reasons for the termination of both him and his wife. The email provided:

Afternoon Dan, as we are unable to communicate civilly by phone I am informing you by email that as my contract has been terminated by yourself as of Tuesday 13 January 2015 I am requesting that you will now oblige and put the reasoning of my termination in a letter form.

[26] Mr McNoe left the company property outside the yard.

[27] Mr O'Neill appears in the one document provided to the Authority to suggest that there was a mutual agreement to end the relationship. I have considered that and also a letter from Mr O'Neill's then solicitor, Bob Berry, after the personal grievance for unjustified dismissal was raised on behalf of Mr McNoe. Mr Berry referred to the Employment Court judgment in *Boobyer v Good Health Wanganui Ltd*¹ to suggest that Mr McNoe had passively stood by and not corrected an impression that he had resigned.

¹ WEC3/94, 24 February 1994, Wellington, Goddard CJ

[28] I am not satisfied, having heard the evidence, that the communication about the holidays could have been misunderstood as a resignation when it was already known when Mr McNoe was taking his holidays. In any event, on 15 January Mr McNoe made it very clear he considered Mr O'Neill had terminated his employment. I find that Mr O'Neill seized on what was said on 12 January 2015 because it suited him to do so and then when Mr McNoe made it very clear that he considered his employment was terminated, Mr O'Neill did not respond and advise that that was not in fact the case. There was no further communication received from Mr O'Neill about the matter except to advise that the property should be returned.

[29] I find that Mr McNoe was dismissed from his employment.

Was the dismissal unjustified?

[30] The justification put forward to Mr McNoe was the financial difficulties of continuing to pay him and Mr O'Neill. There was no information provided to Mr McNoe to verify the financial status of the company and my questions of Mr McNoe did not satisfy me that it was apparent from the financial records which Mr McNoe had perused with a financial adviser in December 2014 matters had got to a stage where redundancies may be likely. The evidence I heard from a witness for Mrs McNoe who attended under summons to give evidence, Michelle Cogger, was that the company continued to employ people until March or April 2016.

[31] Good faith obligations require the provision of information relevant to the continuation of an employee's employment. There was no information provided and Mr McNoe was given some options on 12 January but had no time or opportunity to discuss those further with Mr O'Neill.

[32] In all the circumstances, I am not satisfied that this dismissal was substantively justified under s 103A of the Employment Relations Act 2000 (the Act) and it did not satisfy the procedural fairness factors in s 103A of the Act.

[33] In accordance with my oral indication to Mr McNoe on 12 July 2016, I find that he was unjustifiably dismissed from his employment with O'Neill Earthworks Limited and is entitled to consideration of remedies.

Remedies

Lost wages

[34] Mr McNoe was able to obtain employment from 22 January 2015. He was paid in his new position \$84,000 and seeks the shortfall for a period of three months.

[35] Mr McNoe's salary at O'Neill Earthworks at the time of his dismissal was \$102,000 which was \$1,961.54 gross per week. In his new position, he receives \$84,000 or \$1,615.38 gross per week. The difference between \$1,961.54 and \$1,615.38 is the sum of \$346.16 which for a period of 13 weeks is a shortfall of \$4,500.08 gross.

[36] I order O'Neill Earthworks Limited to pay to Aaron McNoe the sum of \$4,500.08 being reimbursement of lost wages under s 123(1)(b) of the Act.

Compensation

[37] Mr McNoe said that the community in which he lives and works is a tight knit one and that people had an opinion about what was happening. He said it was humiliating not being able to speak out freely about his dismissal. Further, there was concern about some of the allegations Mr O'Neill had made. Mr McNoe also had to advise his wife that her employment was being terminated. He said that the impact on the family was significant.

[38] I accept in this case that the termination was completely unexpected. Mr McNoe thought he was taking some time to think over some options, including whether he would buy into the company but it was Mr O'Neill's intention that he leave the company immediately. The family was left without income. I have balanced that matter with the fact that Mr McNoe was able to find further employment within a comparatively short period of time.

[39] Taking all matters into consideration, I am of the view that an appropriate award for compensation is the sum of \$9,000.

[40] I order O'Neill Earthworks Limited to pay to Aaron McNoe the sum of \$9,000 without deduction being compensation under s 123(1)(c)(i) of the Act.

Contribution

[41] No issues arise as to contribution.

Costs

[42] This was not a complicated matter. The usual daily tariff in the Authority is \$3,500 but the matters involving Mr and Mrs McNoe were able to be concluded within a shorter timeframe of a little over two hours. A suitable award of costs in the matter I find is the sum of \$1200 together with reimbursement of the filing fee of \$71.56.

[43] I order O'Neill Earthworks Limited to pay to Aaron McNoe the sum of \$1200 together with reimbursement of the filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority