

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 113
5561058

BETWEEN AMANDA 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 applicant

Date of Determination: 14 July 2016

DETERMINATION OF THE AUTHORITY

- A Amanda McNoe was employed by O'Neill Earthworks Limited.**
- B Amanda McNoe was unjustifiably dismissed from her employment on 13 January 2015.**
- C O'Neill Earthworks Limited is ordered to pay the following amounts:**
- (i) The sum of \$798 gross being reimbursement of unpaid wages.**
- (ii) The sum of \$343.04 gross being holiday pay.**

(iii) Lost wages in the sum of \$4160 gross under s 123(1)(b) of the Employment Relations Act 2000.

(iv) Compensation in the sum of \$6000 without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000.

C O'Neill Earthworks Limited is to pay to Amanda McNoe costs in the sum of \$1200 together with the filing fee of \$71.56.

Employment relationship problem

[1] Amanda McNoe says that she was employed by O'Neill Earthworks Limited (O'Neill Earthworks) from 13 October 2014 to 13 January 2015 as an administration assistant. Mrs McNoe says that she was unjustifiably dismissed on 13 January 2015.

[2] Mrs McNoe's husband, Aaron McNoe, was employed by O'Neill Earthworks since 2 December 2013. He also says that he was unjustifiably dismissed. By agreement, the Authority investigated both employment relationship problems together 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.

[4] 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 by O'Neill Limited to either matter.

[5] During the telephone conference, the Authority scheduled for a statement in reply to be lodged and served and also set the matter down for an investigation meeting on 12 July 2016 in Timaru. The Authority scheduled the lodging of statements of evidence and relevant documents.

[6] A document which was not in the prescribed form of a statement in reply was received from Mr O'Neill but only in relation to Mr McNoe's claim. There has never

been any written response to Mrs McNoe's claim. No statements of evidence were received for either matter.

[7] 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 was adjourned until 1 August 2016.

[8] An Authority officer advised Mr O'Neill on 1 July 2016 that the investigation meeting for 12 July would be proceeding as scheduled. The Authority officer noted that O'Neill Earthworks had not lodged statements of evidence but that did not mean that the meeting would not proceed and Mr O'Neill could still present evidence on the day.

[9] On 1 July 2016, Ms Baker asked the Authority officer if the date for the meeting could be changed as Mr O'Neill had just started a new job on a ski field which was not close to Timaru. The Authority officer advised Ms Baker that the investigation meeting would not be rescheduled.

[10] A subsequent request was received that Mr O'Neill be connected by telephone but before the Authority could deal with that request, Ms Baker advised on 8 July that their father was very unwell and applied for an adjournment.

[11] 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. Ultimately, the Authority 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 into liquidation on 1 August and that it was unclear, if the matter was to be adjourned, when another suitable date could be given.

[12] On 11 July 2016, Mr O'Neill advised the Authority that he would not be attending the investigation meeting. The Authority therefore heard from Mrs McNoe and from a witness who had been served with a witness summons, Michelle Cogger. Mr McNoe's evidence was also relevant to the employment relationship problem the Authority was investigating for Mrs McNoe.

The issues

[13] The Authority needs to determine the following issues:

- (a) Was Mrs McNoe an employee of O'Neill Earthworks?
- (b) If Mrs McNoe was an employee of O'Neill Earthworks, was she dismissed?
- (c) If Mrs McNoe was dismissed then was her dismissal unjustified?
- (d) If Mrs McNoe was unjustifiably dismissed, what remedies is she entitled to?

Was Mrs McNoe an employee of O'Neill Earthworks?

[14] There was no written record of Mrs McNoe's employment. She did not have an employment agreement and said she was paid in cash. Ms Cogger's evidence was therefore important because she had been contracted by O'Neill Earthworks to undertake its accounts, GST, PAYE and payment of wages.

[15] Ms Cogger said that she was unaware that Mrs McNoe was an employee of the company. She said that she did see some timesheets from Mrs McNoe although not a great number. Ms Cogger said that she questioned Mr O'Neill about Mrs McNoe when she saw her timesheets and he responded *don't worry about it*. Ms Cogger said that there was no notice of Mrs McNoe on the payroll and PAYE had not been deducted on her behalf from any payments made to the best of her knowledge.

[16] Mrs McNoe's evidence as to how she came to work for O'Neill Earthworks was supported by Mr McNoe's evidence. Mr McNoe said that he was undertaking a considerable amount of administrative work at home and was working into the night. He was preparing quotes for jobs and undertaking other paperwork. Mrs McNoe started assisting Mr McNoe with the paperwork at a time when she was working part time in another role.

[17] Mr McNoe said that he talked to Mr O'Neill about employing an administration assistant for him and the company or employing Mrs McNoe. On 28 September 2014 Mrs McNoe went with her husband to see Mr O'Neill about employment as an administration assistant. Mrs McNoe was willing to take the role

on but only if she could work between the hours of 9am and 1pm Monday to Friday. Mrs McNoe said that Mr O'Neill agreed to employ her on a part-time basis and she was to work for 20 hours a week at \$16 an hour gross which was the hourly rate she was receiving at her other employment. Mrs McNoe said that it was agreed that she would resign from her current employment with ProLife Foods Pty (Prolife) and there was discussion about the two week notice period that company required. Mrs McNoe said that her final day at Prolife was 10 October 2014. Mrs McNoe had been employed by Prolife since 19 November 2012.

[18] It was agreed Mrs McNoe said that she would work from her home address as O'Neill Earthworks did not have an office in its yard and Ms Cogger and Mr O'Neill both worked from their respective homes.

[19] On 13 October 2014, Mrs McNoe said that she officially commenced working for O'Neill Earthworks and her duties were generally administrative. Mrs McNoe said that she would receive calls from Mr O'Neill and Mr McNoe wanting information. Ms McNoe gave me examples of the type of work that she undertook from the general list set out below:

- (a) Creating a health and safety manual;
- (b) Creating spreadsheets for job costings;
- (c) Preparation and typing of quotes for clients;
- (d) Creating a quality assurance manual;
- (e) Tidying and organising of the workshop, staff rooms and toilets;
- (f) Typing memos to staff members;
- (g) Erecting signs on different job sites;
- (h) Photocopying daily timesheets for employees;
- (i) Maintenance records; and
- (j) Pilot vehicle occasionally.

[20] Mrs McNoe said that she gave Mr O'Neill a copy of her personal information including bank account details, IRD number, tax code form, KiwiSaver form and a copy of her driver's licence on 20 October 2014. Ms Cogger said that she never saw these documents. Mr O'Neill advised Mrs McNoe when she raised a concern about being paid in cash that she had missed the cut off point for Ms Cogger as pay clerk and that he would pay her in cash for that fortnight.

[21] On 24 October 2014, Mr O'Neill paid Mrs McNoe by way of Mr McNoe \$640 cash for the weeks ending 19 and 26 October. Mrs McNoe said that she never received a payslip and continued to be paid in cash. Mrs McNoe said she would complete a timesheet every day and would send them together with the other employees' timesheets to Mr O'Neill on the understanding they would be forwarded on to Ms Cogger.

[22] Mr and Mrs McNoe said that they discussed with Mr O'Neill working the non-statutory holidays to 5 January 2015 when Mr O'Neill would be away and then taking two weeks' annual leave from 14 January 2015.

[23] On the balance of probabilities I find it is more likely than not that Mrs McNoe undertook work for O'Neill Earthworks. I am unclear why Mr O'Neill did not treat Mrs McNoe in the same way as he did his other employees. I accept Mrs McNoe expected to be treated like other O'Neill Earthworks employees. I have considered whether it was possible that Mrs McNoe was engaged as a contractor. Although no tax was deducted from payments made to her in cash, I think that is less likely. Ms Cogger invoiced the company for her work and also undertook other work as a contractor or an employee. Mrs McNoe completed timesheets as did other employees and had resigned her other employment to work for O'Neill Earthworks. She also worked 20 hours per week as set hours. Mrs McNoe considered herself under the supervision of her husband but undertook direction from Mr O'Neill as well.

Was Mrs McNoe dismissed?

[24] On 12 January 2015, Mrs McNoe was told by her husband that Mr O'Neill had told him he had two choices; either leave the company as it could not afford to pay both him and Mr O'Neill or to buy into the company.

[25] The following day, 13 January 2015, Mr McNoe met with Mr O'Neill to drop some plans off. Mrs McNoe said she continued to work on some job costings that she wished to finish before the planned annual leave was taken.

[26] Mr McNoe returned home and told Mrs McNoe that they needed to talk. Mr McNoe advised Mrs McNoe that her employment had been terminated and that Mr O'Neill had asked him to tell her.

[27] I find that Mrs McNoe was dismissed from her employment with O'Neill Earthworks on 13 January 2015. A personal grievance of unjustified dismissal was raised on 20 March 2015 with Mr O'Neill within the statutory timeframe.

Was the dismissal unjustified?

[28] Section 103A of the Act refers to the test of justification. The question of whether a dismissal was justifiable must be determined on an objective basis by the Authority. In considering whether the dismissal was justifiable, the Authority must determine whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[29] There are factors contained in s 103A(3) with respect to procedural fairness that the Authority must consider. A fair and reasonable employer will be expected to act in accordance with good faith.

[30] The dismissal was not what a fair and reasonable employer could have done in the circumstances at the time the dismissal occurred and was without any procedural fairness. There was no direct communication between Mr O'Neill and Mrs McNoe about her continued employment. She was never given any reason for her termination but understood that it may have been because of financial concerns. Mrs McNoe was not consulted about these concerns, no documentation was provided to her and she was not heard at all before the decision to dismiss was made..

[31] As I indicated orally I find that Mrs McNoe was unjustifiably dismissed from her employment with O'Neill Earthworks Limited and she has a personal grievance. Mrs McNoe is entitled to a consideration of remedies.

What remedies should be awarded?

[32] Mrs McNoe clarified that she is seeking unpaid wages for the period from 28 December 2014 to 13 January 2015 including reimbursement of a \$30 shortfall in wages paid. The claim for lost Kiwisaver benefits is not pursued. Mrs McNoe also seeks holiday pay, three months' lost earnings and compensation for loss of dignity and humiliation.

Unpaid wages

[33] Mrs McNoe was short paid the sum of \$30 for the fortnightly pay period ending 28 December 2014. Mrs McNoe said that she received nothing for the week ending 2 January 2015 or for the week ending 9 January 2015. There were two further days on 12 and 13 January 2015 which were unpaid. 13 January 2015 was the date of dismissal.

[34] I find that Mrs McNoe is entitled to reimbursement for the sum short paid of \$30 and for two weeks and two days wages worked but not paid. I have assessed the daily rate of payment on the basis of wages of \$320 gross per week divided by five which is \$64.00.

[35] I have added together the sum of \$30 plus \$640 plus \$128 which is the sum of \$798 gross.

[36] I order O'Neill Earthworks Limited to pay to Amanda McNoe the sum of \$798 gross being reimbursement of unpaid wages.

Holiday pay

[37] Mrs McNoe has not received holiday pay and did not take any holidays. She was employed for 13 weeks and 2 days. Her gross earnings over that period should have been \$320 x 13 plus 2 days which equals \$4288. Eight percent of gross earnings equals \$343.04.

[38] I order O'Neill Earthworks Limited to pay to Amanda McNoe the sum of \$343.04 gross being holiday pay.

Lost earnings

[39] Mrs McNoe gave evidence that she looked for new positions on Trade Me and job seekers and in newspapers and on supermarket noticeboards. Mrs McNoe was unable to obtain alternative employment for the part-time hours that would enable her to continue to look after her four children.

[40] I am satisfied from Mrs McNoe's evidence that she did attempt to find other employment but was unsuccessful. I am not minded to award more than three months' lost wages in the circumstances although her unemployment continued beyond that period. I find that Mrs McNoe is entitled to reimbursement of lost wages for a period of three months from 13 January to 14 April 2015 in the sum of \$4160 gross.

[41] I order O'Neill Earthworks Limited to pay to Amanda McNoe the sum of \$4160 gross being reimbursement of lost wages pursuant to s 123(1)(b) of the Act.

Compensation

[42] I accept that Mrs McNoe was humiliated by the manner of her dismissal and that she struggled to find other suitable employment. She also had to establish that she was an employee. Mrs McNoe also spoke of the humiliation of having to endure people in the community questioning her about what had happened.

[43] As a result of the termination of both her and Mr McNoe before the planned holiday, Mrs McNoe had to advise the children that there would not be a holiday that year. Mrs McNoe also expressed the concern about having her employment being like a *joke* to Mr O'Neill in the manner of her employment and the way she was dismissed.

[44] A suitable award in all the circumstances I find is the sum of \$6,000.

[45] I order O'Neill Earthworks Limited to pay to Amanda McNoe the sum of \$6,000 without deduction being compensation under s 123(1)(c)(i) of the Act.

Contribution

[46] No issues of contribution arise.

Costs

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

[48] I order O'Neill Earthworks Limited to pay to Amanda McNoe costs in the sum of \$1,200 together with the filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority