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EMPLOYMENT LAW · EMPLOYMENT AGREEMENTS · DISPUTE / GRIEVANCE RESOLUTION · TRAINING

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Damages Awarded for Poor Workmanship

***Masonry Design Solutions Ltd v Bettany Employment Court,* Auckland, August 2009**

An employer who had to spend time correcting an employee's work after he was dismissed has been awarded damages in the sum of $12,000.00 by the Employment Court.

The employee was a computer-aided draughtsperson. He was employed on a three month fixed term contract. If his work met the employer's standards and if there was still sufficient prospective work at the end of this period it was understood he might expect to be engaged as a permanent employee. The following is an outline of some of the obligations provided for in the employment agreement:

- Comply with all reasonable and lawful instructions provided by the Employer;
- Perform duties with all reasonable skill and diligence;
- During normal working hours devote the whole of their time, attention and abilities in carrying out their duties
- To carry out their duties well, faithfully and diligently, providing the Employer the full benefit of the Employee's experience and knowledge

The employment agreement also stated that serious misconduct included *'serious or repeated failure to follow a reasonable instruction'.*

The employee was dismissed towards the end of the three month term of employment. The reasons for his dismissal included being continually late for work, unauthorised absence from work and extensive personal use of the employer's email and internet systems.

The Employment Relations Authority found that the process for dismissing the employee was flawed for not warning him that failing to improve would put his job at risk. The company's counterclaim for damages for breach of contract for the cost to the employer for fixing the mistakes the employee had made in his work was rejected by the Authority. It was not satisfied that the employee had any knowledge that his work was so bad it would need to be redone completely. The company appealed.

The Employment Court found in the employer's favour and determined that the employee's dismissal was justified for the following reasons:

- A fair and reasonable employer would have significant concerns about the employee's failure to comply with his employment agreement with no prospect of real improvement;
- The company had made the employee aware that his employment would be extended only if he met the employer's reasonable conditions;
- The employee's serious and repeated failure to follow reasonable instructions to begin work on time amounted to serious misconduct under his employment agreement;
- The employee admitted that his personal use of the internet was unreasonable and excessive.

With regard to the counterclaim for financial loss from poor workmanship the Court held that it was reasonable and foreseeable that his work would have to be substantially amended due to the number and important nature of the mistakes, and that this would be at the cost of the employer.

The Court stated that:

"these errors were attributable not to lack of knowledge or other innocent explanation. Rather, they are attributable to carelessness, inattention to detail, and otherwise for reasons that amounted to breaches by Mr Bettany of his contractual requirements to perform his duty with all reasonable skill and diligence....and to devote during his normal working hours the whole of his time, attention, and abilities in carrying out his duties. The carelessness of this work was also in breach of clause 11.4 which required Mr Bettany to carry out his duties well and diligently including providing his employer with the full benefit of his experience and knowledge"

The Court found that the employer had met the legal requirements for a claim for damages due to breach of contract. It stated that the employee had breached his employment agreement and that the employer had suffered financial loss which was attributable to the breaches. It was also reasonably foreseeable that inadequate performance of his employment agreement to the required standard would result in loss to the employer.

The employee was ordered to reimburse the company $12,000.00. This sum was made up of 100 hours of work at a charge out rate of $120.00 per hour, for the company's senior architectural draughtsman to bring his drawings up to standard.

New Question of Law regarding Collective Bargaining considered by the Employment Court

***The New Zealand Public Service Association Inc v Secretary for Justice*, Employment Court, February 2010**

This matter was removed from the Employment Authority to the Employment Court. It was an issue that had not previously arisen and concerned the entitlement of the defendant employer to determine unilaterally that the bargaining for a collective agreement was at an end.

In May 2009 the union served notice initiating collective bargaining for two separate collective agreements with the defendant. Bargaining had taken place on a number of occasions over the following months. Although some issues had been agreed remuneration had been a barrier to settlement. The defendant wished to retain the individualised performance pay system that had been in place for several years for Ministry employees. The Union was seeking both an increase in pay and a new collective system for its members.

Bargaining that had taken place included:

- Four meetings to bargain over six days;
- Mediator assistance on one occasion for separate bargaining;
- Mediator assistance on two occasions for joint bargaining;
- Ten miscellaneous meetings;
- Seven telephone calls between parties representatives;
- Since October 2009 intermittent and short notice strike action by PSA members in courts had disrupted their operations.

The employer then reached the stage where it claimed nothing further would be gained by meeting in bargaining while the stalemate existed regarding remuneration. The employer announced that she regarded bargaining at an end, in reliance on clauses in the parties Bargaining Process Arrangement (BPA).

The Court stated that the frequency and duration of bargaining in this case when compared to other negotiations for collective bargaining generally, was not excessive or unusual in its proportions. It went on to say:

"*the legislative scheme for bargaining encourages continuation, even in difficult circumstances, and emphasises that in all but exceptional circumstances collective bargaining should result in the settlement of a collective agreement between the parties".*

The Court concluded that what had occurred between the parties fell under the definition of "*bargaining*" for a collective agreement and further that the parties had not considered all options available to assist in concluding a collective agreement. Although the Court accepted the defendants conclusion that bargaining was "*deadlocked*", that did not satisfy the test under s 33(1) of the Act which requires that a union and employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to. The Court found that if the defendant believed that the deadlock was a genuine reason not to conclude a collective agreement "*this was not based on reasonable grounds in all the particular circumstances of this case*". The Court ruled that bargaining had not concluded.

This position of the Court not to make any "*coercive* " ruling, but rather to be "*declaratory and facilitative*" underlines the statutory intent that encourages and requires parties involved in collective bargaining to fully exhaust all statutory requirements and provisions contained in any BPA to resolve impasses in bargaining.

Personal Grievance Update

The Government has concerns about how the current system is working and will consider submissions in a Labour Department discussion paper. Proposed areas for change include extending the 90-day probation period for employees at small companies and applying it to companies with up to 50 employees, instead of the current 20 employees; changing the rules around when it is fair to dismiss; setting a period of time an employee has to be at a company before they can make a complaint; and measures, including regulation, to ensure better standards of employment advocates.

Employment Minister Kate Wilkinson said she intended introducing legislation to make changes around May-June.

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