

[4] During a telephone conference call on 26 March, to discuss timetabling for the investigation meeting, Mr Lyons advised the Authority that he was no longer acting on behalf of the respondent. Mr Lyons provided 2 additional contact addresses for the respondent to enable the Authority to make contact with it.

[5] The Authority wrote to the respondent at all three addresses contained on the file including Mr Lyons. The Authority obtained written confirmation that Mr Lyons was no longer acting and sought a new contact for the respondent. Only two of the three letters were delivered. In the absence of a specific contact person the Authority, by Minute served on the parties, set the matter down for hearing on 22 May 2008.

[6] As at the scheduled commencement time for the 22 May 2008 investigation meeting, no representative of 123 Metals Limited was present. I am satisfied 123 Metals Limited received the notice of investigation meeting.

[7] 123 Metals Limited has not shown good cause for its failure to appear or be represented. After waiting for 30 minutes in the off chance that the respondent had been held up in traffic, I proceeded under clause 12 of Schedule 2 to the Employment Relations Act 2000 to hear and determine the matter as if 123 Metals Limited had attended or been represented.

Relevant terms and conditions of employment

[8] Mr David Ross was employed as a truck driver by 123 Metals Limited formerly Cash for Scrap Limited (Cash for Scrap) around the end of February 2006. He was required to pick up scrap steel and cars and return them to the Cash for Scrap yard.

[9] There is no written employment agreement setting out the terms and conditions of employment. Mr Ross's uncontested evidence at the investigation meeting was that he was to receive \$765.00 per week after tax. Mr Ross was in fact paid \$770.00 after tax. Mr Ross was employed to work from 7.30am to 5.00pm Monday to Friday inclusive.

Arrears of wages claim

[10] Mr Ross had a work related accident on 11 May 2006 which resulted in ligaments being torn in his knee which later resulted in surgery. Mr Ross was off work until 22 May 2006.

[11] On 25 August 2006 the knee became inflamed and as confirmed in the medical certificate provided to the Authority, Mr Ross was absent from work on Monday and Tuesday 28 and 29 August. Mr Ross has produced documents to support his contention that he was not paid his full wages for the pay period ended 1 September 2006. Mr Ross received \$510.00 instead of \$770.00. Mr Ross was of course on ACC for two of the days in that week. As it was a work related accident Mr Ross was entitled to be paid for the two days but only at 80%.

[12] Mr Ross ought to have received \$708.00 for that week. He only received \$510.00.

123 Metals Limited formerly Cash for Scrap Limited is ordered to reimburse Mr Ross \$198.00 pursuant to section 131 of the Employment Relations Act 2000.

Outstanding Holiday Pay

[13] Mr Ross says he never received any holiday pay after the termination of his employment. I have calculated that Mr Ross worked for 31 weeks. Based on his nett pay for that period Mr Ross is entitled to \$1,411.08 nett.

123 Metals Limited formerly Cash for Scrap Limited is ordered to pay Mr Ross outstanding holiday pay in the amount of \$1,411.08 nett.

Unjustified dismissal

[14] Mr Ross says on Thursday 21 September 2006 he was instructed to continue working outside his usual hours of work, which he refused. Mr Ross says, he was told to continue working or he would be dismissed.

[15] In its statement in reply Cash for Scrap says Mr Ross suffered from diabete's and that after a discussion with Mr Ross and his wife on 21 September 2006 it was agreed that Mr Ross would be better off obtaining alternative work. That discussion is denied by Mr Ross and his wife, who gave evidence at the investigation meeting.

[16] Having heard from Mr Ross at the investigation meeting I have concluded that Mr Ross following his return from Te Puke at 5.17pm, he was asked to return to Te Puke and pick up an additional 3 vehicles, before he finished for the day.

[17] Mr Ross refused on the basis that to do so would take him outside his usual finishing time and he understood he would not be remunerated for the extra hours worked. Mr Ross was told he would be dismissed if he did not return to Te Puke and pick up the vehicles. Mr Ross continued to refuse and left the workplace.

[18] Mr Ross returned the following morning to commence work as usual but was told he had been dismissed and his holiday pay would be made up by Head Office.

[19] Mr Ross raised his personal grievance with the respondent by letter dated 22 September 2006. There does not appear to have been a response to this letter.

[20] I find Mr Ross was dismissed with effect from 21 September 2006. The respondent was under an obligation to seek Mr Ross's response to the reasons why he could be dismissed before dismissing him. That never occurred.

[21] No fair or reasonable employer would dismiss an employee without seeking such explanations in circumstances such as this. His dismissal was unjustified.

Remedies

Lost Wages

[22] I accept that Mr Ross looked for a new job from the time it was clear he did not have a job with the respondent. He needed a job and the money that went with it. Mr Ross was successful in obtaining some work following his dismissal.

[23] Mr Ross is entitled to be reimbursed lost wages to the extent of 3 months following the termination of his employment. I have calculated his nett loss, as I do not know what his gross weekly earnings amount was. The calculation has taken into account the nett earnings received by Mr Ross following his termination. If he had stayed employed by the respondent Mr Ross would have earned \$10,010.00 nett over the 13 weeks following his dismissal. Making an

allowance for his earnings from Truckline of \$2189.17 nett and Repower Ltd of \$4935.42 nett this leaves an outstanding balance of \$2,885.41 nett.

123 Metals Limited formerly Cash for Scrap Limited is ordered to reimburse Mr Ross \$2,885.41 nett pursuant to section 123(1)(b) of the Employment Relations Act 2000.

Compensation

[24] I am satisfied Mr Ross suffered as a result of the unjustified actions of his employer. It was a distressing time for him. The evidence has disclosed no contributory conduct by Mr Ross and therefore no reduction in remedies is required.

[25] In all the circumstances I think it appropriate that Mr Ross be compensated for his unjustified dismissal and award him \$3,000.

123 Metals Limited formerly Cash for Scrap Limited is ordered to reimburse Mr Ross \$3,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

Penalty

[26] Mr Ross seeks the imposition of a penalty against the respondent for its failure to provide wage and time records and a written employment agreement.

[27] I am satisfied that the respondent did eventually meet its obligations with respect to the wage and time records, although those records are somewhat dubious. What is of more concern is the failure of the respondent to provide the applicant with a written employment agreement as required by s.65 of the Employment Relations Act 2000.

[28] During the investigation into this matter issues arose as to the correct payment of wages for Mr Ross. Had a written employment agreement been signed by the parties the issues as to the correct payment of wages would in all probability, not have arisen. The respondent needs to be put on notice of its obligations in respect of its compliance with Part 6 of the Employment Relations Act 2000.

[29] As I have already compensated the Mr Ross for his personal grievance the penalty shall be paid to the Crown.

123 Metals Limited formerly Cash for Scrap Limited is ordered to pay a penalty of \$1,000 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

[30] There is nothing in this case to derogate from the principle that costs follow the event. The total costs sought by the applicant are \$4,050.00 together with expenses and disbursements amounting to \$319.20. The matter was not complex and the costs incurred are reasonable given the preparation required and the length of the hearing.

123 Metals Limited formerly Cash for Scrap Limited is ordered to pay to Mr Ross, a contribution to his costs of \$1,000 plus disbursements of \$319.20 without deduction.

Summary of Orders

- Arrears of wages of \$198.00 after tax;
- Outstanding holiday pay of 1,411.08 after tax
- Reimbursement of lost wages \$2,885.41 after tax;
- Compensation of \$3,000;
- Penalty to be paid to the Crown of \$1,000;
- Costs to Mr Ross of \$1,319.20.

Vicki Campbell
Member of Employment Relations Authority