

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 50/09  
5135777 and 5148636

BETWEEN

TERRY TEREMOANA  
First Applicant

ANTON TALJAARD,  
LABOUR INSPECTOR  
Second Applicant

AND

COUNTIES MILK LIMITED  
First Respondent

ANDREW FENWICK FISHER  
Second Respondent

Member of Authority: Robin Arthur

Representatives: Rick Hargreaves for First Applicant  
Second Applicant in person  
Andrew Fisher for First Respondent and in person

Investigation Meeting: 12 February 2009

Determination: 16 February 2009

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**DETERMINATION OF THE AUTHORITY**

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[1] The Authority has jointly investigated two applications regarding the dismissal of Terry Teremoana from the position of milk deliverer for Counties Milk Limited (CML).

[2] The first is from Mr Teremoana alleging he was unjustifiably dismissed and seeking awards of lost wages and compensation for hurt and humiliation.

[3] The second application is by a Labour Inspector and seeks orders for the payment of holiday pay to Mr Teremoana, interest on the holiday pay said to be due, and several penalties for breaches of the Holidays Act.

[4] The Inspector also sought orders that Andrew Fisher, the sole shareholder and director of CML, be joined as a party and that any orders for payment of holiday pay be jointly against Mr Fisher in person and CML.

[5] CML did not lodge statements in reply to either application but Mr Fisher attended the investigation meeting and gave oral evidence under oath. I also heard evidence from Mr Teremoana, under affirmation, and Mr Taljaard, under oath.

### **Issues**

The issues for determination are:

- (i) whether Mr Teremoana's employment ended justifiably by way of properly notified redundancy or unjustifiably for redundancy and other reasons; and
- (ii) whether Mr Teremoana was unjustifiably disadvantaged by how CML dealt with other issues before the termination of his employment; and
- (iii) if Mr Teremoana were unjustifiably dismissed and/or disadvantaged, should remedies of lost wages and compensation for hurt and humiliation be awarded to him?
- (iv) Whether wages and holiday pay remain due to Mr Teremoana following the end of his employment on 23 July 2008?
- (v) Should the Labour Inspector be authorised to bring a recovery action against Mr Fisher personally for any holiday pay ordered to be paid to Mr Teremoana; and
- (vi) Whether any interest should be awarded on any holiday pay due to Mr Teremoana; and
- (vii) Should any penalties be awarded for breaches of the Holidays Act 2003 by CML; and
- (viii) Whether CML has acted in good faith in responding to Mr Teremoana's personal grievance and wage recovery claim?

### **Termination of employment**

[6] Mr Teremoana worked as a milk delivery driver for CML. He says there was no written employment agreement while Mr Fisher says there was but could not

produce a copy.

[7] Mr Teremoana says he was employed from April 2004 until he telephoned Mr Fisher on 23 July 2008 to ask why he had not been paid for the previous three weeks' work and was abruptly dismissed by Mr Fisher without any reasons being given.

[8] Mr Fisher says Mr Teremoana's employment began from June 2004 and ended by reason of redundancy for which he was given notice some weeks before July 2008.

[9] Mr Fisher says CML's manager Steve Mihaere gave the notification of redundancy but Mr Teremoana denies receiving any such information from Mr Mihaere.

[10] I find that Mr Teremoana was abruptly dismissed on 23 July 2008 by Mr Fisher and that the way this happened and the reasons for it made the dismissal unjustified. I do so for the following reasons:

- (i) CML has not produced any reliable evidence that it had notified Mr Teremoana of impending redundancy of his position due to a reduction of the company's milk rounds from one to two. Mr Teremoana acknowledges that he had heard "*rumours*" from other drivers but more is required of an employer in such a situation.
- (ii) Other incidents of alleged serious misconduct and poor performance by Mr Teremoana were clearly on Mr Fisher's mind as good reasons for terminating the employment at the time but Mr Teremoana had not been given a proper opportunity to comment on them. These incidents included:
  - (a) Mr Teremoana being accused of serious misconduct by wrongfully taking some milk from a supplier's depot; and
  - Mr Teremoana's refusal to pay the insurance excess on a claim for damage to the truck he drove for CML; and
  - (c) some alleged poor performance including two incidents that caused CML to lose two clients.

[11] A fair and reasonable employer would have followed the well-known process of notification and consultation about the prospect of redundancy of Mr Teremoana's

position, and have fairly investigated the alleged serious misconduct and poor performance. While I accept Mr Fisher's evidence on the genuine needs of the business at the time to reduce positions, the reason that Mr Teremoana and not another driver was laid off was clearly influenced by views of his performance and conduct that had not been fully and fairly investigated. The result is that Mr Teremoana's dismissal was substantively and procedurally unjustified.

**Was Mr Teremoana fairly treated before his employment was terminated?**

[12] I accept Mr Hargreaves' submission that Mr Teremoana was unjustifiably disadvantaged by specific actions of CML before the termination of his employment.

[13] Neither Mr Fisher nor Mr Mihaere appears to have properly investigated the incident that Mr Fisher later described as "*theft*" at the supplier's depot. Although Mr Fisher has not seen the video of the incident, he claims Mr Teremoana was "*caught on video*". Mr Teremoana – who has seen the video – denies it shows any illicit activity by him. Rather he explains that he and a milk vendor using the same loading area got into a dispute over who should take a particular load of milk. He says the other vendor shifted his milk and that he took it back. Mr Fisher accepted in his evidence that there was room for confusion because of a change to a previous 'cage' system at the depot and that vendors and delivery drivers sometimes "borrowed" loads from one another. However it appears neither he nor Mr Mihaere fully investigated this possible explanation before drawing a negative conclusion about Mr Teremoana's conduct. Mr Mihaere did not attend a meeting with depot management where Mr Teremoana viewed the video.

[14] Mr Fisher had demanded that Mr Teremoana pay the insurance excess on a claim for damage to the CML truck he drove. Mr Teremoana admitted that the damage resulted from inattention on his part but says he should have the benefit of his employer's insurance cover. I accept that he is correct because there was no express agreement that he would pay the costs of any damage caused by carelessness on his part.<sup>1</sup> Mr Fisher was not entitled to insist on such payment and how he treated Mr Teremoana as a result of that refusal was an unjustified disadvantage.

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<sup>1</sup> See *Mazengarb's Employment Law* at para 1026A.

[15] There is also no evidence that other complaints about Mr Teremoana's performance – including causing loss of two clients – were ever properly addressed with him by his manager Mr Mihaere or Mr Fisher.

### **Remedies for unjustified dismissal and disadvantage**

#### *Lost wages*

[16] I accept Mr Teremoana's evidence of his attempts to mitigate his losses by actively seeking work since his dismissal. After five months he began working part-time as a taxi-driver. However I do not award lost wages for that entire period as Mr Teremoana's evidence was that he no longer worked full-time due to a medical condition. This is one of the "*vicissitudes of life*" that must be allowed for in assessing the appropriate extent of compensation due to him for lost wages.<sup>2</sup>

[17] Under s123(1)(b) and s128(2) of the Employment Relations Act 2000 (the Act) I order CML to pay three months ordinary time remuneration to Mr Teremoana to reimburse him for wages lost as a result of the grievance. On the basis of his annual salary of \$39,600, the amount due under this award is \$9900.

#### *Humiliation*

[18] Under s123(1)(c)(i) of the Act I order CML to pay Mr Teremoana the further sum of \$4000 in compensation for the humiliation, loss of dignity and injury to feelings he suffered as a result of his abrupt, unjustified dismissal and the failure of CML to fully and fairly investigate allegations of serious misconduct and poor performance.

#### *Contribution*

[19] The evidence from CML – particularly in relation to its allegations of serious misconduct and poor performance – is insufficient for me to conclude that Mr Teremoana's actions contributed towards the situation giving rise to the personal grievance or were so blameworthy as to require reduction of these remedies: s 124 of

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<sup>2</sup> *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315, 329 at [73] (CA).

the Act considered.

### **Wages and holiday pay**

#### *Outstanding wages*

[20] Under s131 of the Act Mr Teremoana is entitled to recover wages not paid to him for the weeks of 12 July, 19 July and 26 July 2008. CML is ordered to pay those wages which I calculate as totalling \$2284.62.

#### *Holiday pay*

[21] Mr Teremoana's last available pay slip – dated 15 June 2008 – shows a holiday entitlement of 24 days. He believes it does not include leave accumulated before 2007, the date when CML changed to its present accountants and had those accountants keep its leave records.

[22] After many weeks and several requests to Mr Fisher, the Labour Inspector received some holiday records from CML's accountants. Those records list holiday pay of \$828.45 (for 5.42 days at a rate of \$152.85 a day) being paid to him on "termination". Mr Teremoana says he never received that payment and CML has no proof that it was.

[23] I am satisfied from the Labour Inspector's evidence that he made repeated attempts, including issuing a statutory notice under s229(1)(c) of the Act, to get Mr Teremoana's full holiday and leave records from CML.

[24] I find that CML's failure to produce full records hindered Mr Teremoana's ability – and the ability of the Labour Inspector in seeking to bring a claim on his behalf – to accurately calculate his claim. On that basis I accept Mr Teremoana's evidence, as summarised in a schedule prepared by the Inspector, of what leave he did take and what remains due to him: s83(3) and (4) of the Holidays Act 2003 applied.

[25] In the absence of full information from CML, and relying on the evidence of Mr Teremoana, the Inspector prepared an opinion on the holiday pay owed to Mr

Teremoana for the period from April 2004 to June 2008. It identified the amount due as \$8188.60 for 46 days leave accumulated but not taken between the years from April 2004 to 2008 and a further eight per cent on earnings for the part year to June 2008. CML was given adequate opportunity to rebut the conclusion of this opinion but failed to do so.

[26] I now rely on the Inspector's opinion as the best available evidence of arrears of holiday pay due to Mr Teremoana. I order CML to pay to Mr Teremoana \$8188.60 as arrears of holiday pay.

#### *Recovery against Mr Fisher*

[27] Under s234 of the Act the Labour Inspector seeks authorisation from the Authority to bring an action for recovery from Mr Fisher personally of any holiday pay that CML is ordered to pay Mr Teremoana.

[28] The Act allows such authorisation to be given where any order for holiday pay is unlikely to be paid in full because there are reasonable grounds for believing CML does not have sufficient assets to pay the ordered amount.

[29] I am satisfied, on the balance of probabilities, reasonable grounds exist for that belief in the present case. I do so on the basis of the sworn oral evidence of Mr Fisher at the investigation meeting. He says CML's milk delivery business was due to be "taken over" by the end of February by its milk supplier. He also gave evidence that CML's outstanding debts to the supply company, Inland Revenue and a truck rental company are more than the company presently has assets and funds to meet.

[30] I authorise the Labour Inspector to bring an action for recovery against Mr Fisher, as sole director of CML, if the company defaults in payment of the holiday pay as ordered.

#### *Interest*

[31] The holiday pay \$8188.60 should have been paid to Mr Teremoana on his last week of work in July 2008. He has been put out of the benefit of that money for more

than six months. He is entitled to interest on that sum. Exercising the discretion on amounts, period and rates available under clause 11 of Schedule 2 of the Act I award Mr Teremoana interest on that amount for a six month period to the date of this determination at the rate of 4 per cent per annum – which amounts to \$163.77 for the six month period.

[32] From the date of the first day after this determination until the holiday pay due is paid, CML is also ordered to pay additional interest of 89 cents a day on the total amount of holiday pay due. That daily amount is calculated only on the principal amount owed and is not ‘interest upon interest’.

### **Penalties**

[33] I am satisfied that the Labour Inspector has made out the case that penalties are warranted for CML’s breaches of the Holidays Act 2003 – specifically failure to pay holiday pay when due (s75(1)(b)), and failure to provide the Inspector with leave records (s72(2)).

[34] While I accept Mr Fisher’s evidence that he had difficulty attending to requests for information due to his own work commitments, the statutes on minimum employment rights must be obeyed by all employers in enterprises large and small. Evidence of Mr Fisher’s correspondence and telephone conversations with Mr Teremoana’s lawyer and the Inspector show Mr Fisher did not keep a number of commitments to provide information.

[35] CML is to pay to the Crown Account the sum of \$2000 in penalties for its breaches of the Holidays Act 2003.

### **Good faith actions**

[36] Mr Hargreaves submitted that a further penalty were warranted because of a lack of good faith in Mr Fisher’s actions on CML’s behalf – and specifically a failure to be active and constructive in communications with Mr Teremoana and those acting on his behalf.

[37] While I accept that argument has some merit, no further penalty is awarded as I consider the other remedies sufficiently resolve the employment relationship problems. For the same reason no penalty is awarded for what appears to have been a breach of the requirement of s65 of the Act to provide a written employment agreement.

### **Costs**

[38] As sought in Mr Hargreaves' submissions, costs are to be awarded to Mr Teremoana on a "tariff" basis. Costs of \$1500 are awarded for the half day hearing, along with reimbursement of Mr Teremoana's \$70 lodgement fee and the Inspector's lodgement fee.

### **Summary of determination**

[39] CML unjustifiably dismissed Mr Teremoana on 23 July 2008 and had unjustifiably disadvantaged him before that date.

[40] CML is ordered to pay the following sums directly to Mr Teremoana, through his solicitor:

- (i) \$9900 as reimbursement of lost wages following his unjustified dismissal: under s123(1)(b) and s128(2) of the Act;
- (ii) \$4000 in compensation for humiliation, loss of dignity and injury to feelings: under s123(1)(c)(i) of the Act;
- (iii) \$2284.62 as arrears of wages due for the weeks of 12 July, 19 July and 26 July 2008: under s131 of the Act;
- (iv) \$1500 as a contribution to Mr Teremoana's costs; and
- (v) \$70 in reimbursement of Mr Teremoana's fee for lodging this matter in the Authority.

[41] CML is ordered to pay the following sums to the Labour Inspector (for the benefit of Terry Teremoana):

- (i) \$8188.60 as arrears of holiday pay under s228 of the Act; and
- (ii) \$163.77 as interest on holiday pay due for a period of six months to the date of this determination: under s84(2) of the Holidays Act 2003; and

- (iii) 89 cents a day as interest on the holiday pay due from the date of the day after this determination until the arrears of holiday pay are paid: under s84(2) of the Holidays Act 2003

[42] CML is also to pay to the Labour Inspector the further sum of \$70 in reimbursement of the fee paid by the Inspector for lodging this matter in the Authority.

[43] The Labour Inspector is authorised to bring an action for recovery against Mr Fisher, as sole director of CML, if the company defaults in payment of the holiday pay as ordered: under s234 of the Act.

[44] CML is also to make the further sum of \$2000 to the Employment Relations Authority, to be transferred to the Crown Account as a penalty for breaches of the Holiday Act 2003.

Robin Arthur  
Member of the Employment Relations Authority