

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 75
5454005

BETWEEN JOSEPH JAMES DEWES
 Applicant

AND MAP UPPER HUTT LIMITED
 trading as AUTO SUPER SHOPPE
 MAIDSTONE
 Respondent

Member of Authority: Michele Ryan

Representatives: Anthony Lyons, Advocate for Applicant
 Philip Mitchell, Counsel for Respondent

Investigation Meeting: 12 March and 30 March 2015 at Wellington

Submissions 13 April 2015 for Applicant
 21 April 2015 for the Respondent

Determination: 10 August 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Joseph Dewes was employed by MAP Upper Hutt Limited trading as Auto Super Shoppe Maidstone (MAP) as an Automotive Technician (mechanic) between 18 July 2012 and 9 May 2014. He alleges he was underpaid throughout his employment. He says after he raised a personal grievance with respect to wages, he was made redundant. He claims that dismissal was both procedurally and substantially unfair.

[2] MAP refutes Mr Dewes' claims. It says wage arrears owed to Mr Dewes have been paid and the dispute has been resolved. MAP does not accept the allegation that Mr Dewes was dismissed in response to his personal grievance. It says there were

genuine commercial reasons for disestablishing his position and denies he was unjustifiably dismissed.

[3] Mr Dewes seeks substantial remedies including \$35,000 in compensation for his grievances including an alleged failure by MAP to contribute to KiwiSaver. His claims include recovery of wages, lost wages, and monies associated with an alleged unlawful deduction from his final wages, and interest. He requests further orders for penalties totalling \$35,000.

The Authority's investigation

[4] Mr Dewes and MAP's Managing Director, Mr Ruory Fairbrother both provided written and oral evidence to the Authority. Two additional employees, having been summonsed, attended the meeting as did Mr Christopher Fouhy, the owner of the business that previously employed Mr Dewes.

[5] I have carefully considered all the evidence received but as is permitted by s.174 of the Employment Relations Act I have not recorded all the information or the content of submissions received. I have confined this determination to stating findings of fact and law necessary to dispose of Mr Dewes' claims.

Summary of relevant background information

[6] Mr Fairbrother is the sole director of MAP. Prior to mid-2012 Mr Dewes had been employed by CS Fouhy Limited. That business was purchased by MAP on 17 June 2012. Mr Dewes and five other employees transferred to the new owner the following day. MAP adopted their written employment agreements altering only the name of employer.

[7] For a portion of his employment with CS Fouhy Limited and for the duration of employment with MAP Mr Dewes worked Tuesdays to Fridays, plus 4 hours every second Saturday. Neither engagement was recorded in the applicable employment agreement. Mr Dewes' employment for the first year with MAP appears to have been uneventful and he received a pay rise in September 2012. However difficulties in the employment relationship surfaced from mid to late 2013 onwards.

Wages

[8] In August 2013 Mr Fairbrother conducted annual performance reviews and advised staff of proposed salary increases. At the same time he updated staff

employment agreements to include KiwiSaver provisions where none had existed. The draft provisions provided for a total remuneration package whereby MAP's contribution to KiwiSaver was to be included within an employee's total remuneration.¹ Immediately prior to travelling abroad Mr Fairbrother implemented a 3% increase to staff wages with the expectation that staff would agree to the proposed KiwiSaver provisions and sign the new agreements.

[9] On his return, several individuals approached Mr Fairbrother and raised concerns about terms and conditions². There is a dispute about whether Mr Dewes asked to have KiwiSaver resumed having been on a contributions holiday. One of the mechanics informed Mr Fairbrother of an historical discrepancy (developed under CS Fouhy Ltd's management) between hours worked and the calculation of wages, which he said resulted in a shortfall in wages.

[10] Mr Fairbrother obtained HR advice. Although not entirely clear from the evidence, the miscalculation of wages affected Mr Dewes and at least one other mechanic. MAP came to an arrangement with the other affected mechanic, but Mr Dewes did not accept MAP's offer of altered terms of employment to resolve matters.

[11] Between February and mid-March 2014 the parties both obtained representation. Several meetings were held. Mr Dewes' representative was critical of MAP's time recording system which did not comply with statutory wage and time record requirements, and raised a concern about the absence of a 10 minute paid break in the afternoons.

[12] Soon after employee timesheets were introduced into MAP's workplace.³

[13] Mr Dewes contended he worked 9.5 hours per day inclusive of paid breaks. Mr Fairbrother regarded Mr Dewes' assessment as over-inflated. He considered Mr Dewes worked between 8 to 8.5 hours per day also inclusive of paid breaks.

[14] A statement of problem was lodged on Mr Dewes' behalf on 31 March 2014. The parties attended mediation in early May 2014 but were unable to resolve their differences.

¹ The approach is permitted pursuant to s101B(4) of the KiwiSaver Act 2006 subject to subsections (a) and (b)

² In November 2013

³ On 23 February 2014

Restructuring

[15] Separate to the issue of wages, on 6 May 2014 Mr Fairbrother met with staff to propose a restructuring of MAP. He says he had delayed initiating a restructure while he sought to resolve Mr Dewes' dispute but by May 2014 he needed to address MAP's financial sustainability. Staff were given documents setting out a proposed structure going forward. Mr Dewes was informed that his position and that of another employee had been identified as potentially affected and that one of the four mechanics positions was likely to be disestablished.

[16] On 7 May 2014 Mr Fairbrother met with the two mechanics regarded as unaffected by the restructure. He met separately with Mr Dewes and the other affected employee on 8 May 2014.⁴ Mr Fairbrother undertook to provide Mr Dewes with industry data to demonstrate that changes to warrant of fitness (WoF) inspections would result in an increasingly downturn in work.⁵ Mr Dewes told Mr Fairbrother that he was willing to work Mondays and asked him to consider his length of service, training, and knowledge when making a decision.

[17] The referred to documentation was supplied to Mr Dewes at midday (or thereabouts) on 9 May 2014. He says he was given no opportunity to consider or discuss that material, but rather, he was simply given a letter at 3.45pm later that day advising of the disestablishment of his position. In contrast Mr Fairbrother says the parties met in the afternoon to discuss the information but that Mr Dewes made no additional comment beyond what had already been discussed.

[18] Mr Dewes' was not required to work out his notice period and his employment finished that day.

[19] On 12 May 2014 MAP supplied Mr Dewes with payslips recording final wages, holiday pay and 3 weeks' notice. An attached spreadsheet reflected MAP's acceptance that Mr Dewes was owed arrears of wages equal to 0.5 hours per day between 18 July 2012 and 30 March 2014. The calculations also catered for a 'top-up' to previously paid out entitlements of annual and sick leave based on the increase to Mr Dewes' average daily pay. The spreadsheet recorded the total amount owed was \$11,494.59 (gross).

⁴ Typed notes recording the content of the meeting between Mr Fairbrother and Mr Dewes were supplied to the Authority.

⁵ compiled by the Motor Vehicle Association

[20] Mr Fairbrother advised the payment caused some immediate difficulty for the business and proposed it be paid over 4 weeks. The spread sheet also indicated a deduction had been made from Mr Dewes wages for overpayments related to Saturday work.

The issues

[21] The Authority is required to determine:

- whether Mr Dewes raised a personal grievance in regard to concerns about KiwiSaver;
- whether Mr Dewes was underpaid and if so was he unjustifiably disadvantaged by the failure. An examination of this matter requires the Authority to determine:
 - (i) Mr Dewes' hours of attendance, and
 - (ii) the duration of paid and unpaid breaks
- whether termination of Mr Dewes' employment was an action open to a fair and reasonable employer in all the circumstances. To resolve this matter I will need to make findings on the following issues:
 - (i) was the restructuring of the respondent's business based on genuine grounds;
 - (ii) was the selection process fair;
- if Mr Dewes was underpaid, what arrears of wages is he owed;
- in the event Mr Dewes has personal grievance claims, what remedies is he entitled to;
- did MAP unlawfully deduct monies from Mr Dewes final wages;
and
- should penalties be awarded

Did Mr Dewes raise a personal grievance alleging that MAP had not restored contributions to his KiwiSaver when requested

[22] Mr Dewes seeks compensation for MAP's alleged failure to commence KiwiSaver contributions. He alleges that during a staff meeting in June 2013 he asked Mr Fairbrother to reactivate his KiwiSaver scheme. Mr Fairbrother denies the request was ever made and says Mr Dewes told him he was on a KiwiSaver contributions holiday. He says when he returned from holiday in November 2013 Mr Dewes communicated his dissatisfaction with the total remuneration KiwiSaver provisions Mr Fairbrother had drafted and told him he thought that approach was unfair.

[23] I am not persuaded that Mr Dewes raised a personal grievance with respect to KiwiSaver. Had he done so I consider it likely that this matter would have been referred to by his representative in the meeting held with MAP on 19 February 2014. There is nothing recorded in those notes to suggest KiwiSaver was discussed and no alternative information was produced to establish a personal grievance had been raised or when. This aspect of Mr Dewes' claim is dismissed.

The wages claim

[24] Mr Dewes says that although he has now been remunerated for 8.5 hours per working day he claims outstanding arrears remain as follows;

- 1 hour for each day worked from when his employment began to 31 December 2013; and
- half an hour from January to 28 March 2014.⁶

[25] He also says he is further owed the sum of \$847.50 which was unlawfully deducted from his final wages.

[26] MAP accepts it did not keep wage and time records. A significant portion of evidence before the Authority was furnished by both parties to establish Mr Dewes' hours of work. In the absence of MAP proving Mr Dewes' wage claim is incorrect, the Authority is not obliged to accept Mr Dewes claims but may do so.⁷

⁶ Saturdays not included

⁷ *Rainbow Falls Organic Farm Ltd v Rockwell* [2014] NZEmpC 136

Attendance hours

[27] Dealing firstly with the hours Mr Dewes was present at work. The employment agreement states:

HOURS OF WORK

6. *Ordinary hours is 40 hours per week and are between 7.30am-5.30pm Monday to Friday. Overtime being paid after 8 hours per day.*

[28] Five witnesses provided evidence as to Mr Dewes' hours of attendance. Each witness, including Mr Dewes, acknowledged there was a level of flexibility as to hours of work at MAP. Testimonies as to Mr Dewes' start and finish times were varied.

[29] On balance I have preferred the evidence of Mr Lindsay Williams. His position as MAP's foreman afforded him the best independent oversight of Mr Dewes' working hours. He is no longer employed by MAP and has no personal interest in Mr Dewes' claims. I regard his account, objectively, as the most reliable.

[30] Mr Williams agreed that Mr Dewes' start time began between 7.30 and 7.40am but that no action was taken by MAP with respect to Mr Dewes' start time. Mr Williams' evidence is that Mr Dewes would finish work sometime between 5pm and 5.15pm but agreed 5.10pm was his usual finishing time (until the end of 2013). From January 2014 until the end of March 2014 he says Mr Dewes would finish work at 5pm. I accept that evidence.

The duration of paid and unpaid breaks

[31] The parties dispute the length of meal and rest breaks and what portion of these were paid. Meal and tea breaks were set out in at cl.6 of the employment agreement as follows:

*Two breaks per day, the first at approximately 10am of 20 minutes.
The second at approximately 12pm of 40 minutes.*

[32] There was consensus amongst all witnesses that the timing of breaks (both prior to and following the creation of the material provision) operated conversely to that described in the employment agreement - with the longer break occurring at 10am and the shorter at 12pm.

[33] Although the employment agreement requires any variation to terms must be in writing there are occasions where parties to an agreement do not follow the form. I accept in the circumstances of this matter that the meal and tea break provisions were in reverse to that stated in the written agreement. I do not consider that finding disadvantages Mr Dewes.

[34] The first break at 10am was accepted by all witnesses as the meal break of the day and not paid. I accept that evidence and that time is not included as paid working time. The second break at 12pm was viewed as an amalgamation of the requirement for two 10 minute paid breaks.⁸ There is an argument as to whether an employer, even with the consent of an employee, was lawfully able to consolidate rest breaks under the then relevant provisions at s69ZD(4)⁹, which I shall return to.

[35] The 12pm break generally expanded beyond 20 minutes and would often last 30 minutes although it was unclear from the evidence when this practice began. On balance I am not satisfied that there was ever an agreement that payment for the midday break would extend beyond 20 minutes and find the midday break was a 20 minute paid break.

[36] Of the 70 minutes allocated to meal or rest breaks I find 20 minutes of that time is required to be paid.

[37] Finally, there was some dispute about whether time spent at the end of the day putting away tools and cleaning up should be regarded as paid work time. I consider those duties were part and parcel of activities that mechanics needed to perform and correspondingly remunerated.

Findings

[38] Mr Dewes was underpaid over the course of his employment with MAP although not to the extent he has claimed. At the conclusion of his employment he was reimbursed wages equalling 8½ hours of work per day.

[39] I have reached findings as to the hours Mr Dewes was present in the workplace. Subtracting the duration of the unpaid meal and the extended break period from hours of attendance at work I find Mr Dewes was entitled to be paid for 8 hours

⁸ Section 69ZD (this section came into force on 1 April 2009)

⁹ Section 69ZD was replaced, as from 6 March 2015, by s 50 Employment Relations Amendment Act 2014

& 50 minutes per day for the first portion of his claim and 8 hours & 40 minutes for the second.¹⁰ I accept Mr Dewes was unjustifiably disadvantaged by MAP's failure to pay full wages when due.

Was the decision to terminate Mr Dewes' position on the basis of redundancy the action of a fair and reasonable employer

[40] As with any allegation of an unjustified dismissal, the onus is on the employer to demonstrate that its decision to terminate employment - in this matter, that Mr Dewes was superfluous to MAP's needs¹¹ - was fair and reasonable in all the circumstances.¹²

[41] When assessing the justifiability of an employer's decision to make an employee redundant, the Authority must consider whether there are genuine grounds on which to make an employee's position redundant and whether the redundancy was carried out in a procedurally fair way.

Were there grounds to undertake a restructuring?

[42] Mr Fairbrother's evidence is that there had been a 9% overall drop in gross turnover since purchasing MAP. Declining profitability was further exacerbated by changes to WoF requirements, which, coupled with the age of vehicles that generally presented at MAP, led to a decrease in the inspection work stream and corresponding remedial work.¹³ I have no doubt that there were genuine grounds for MAP's proposal to reduce its workforce and it was fair and reasonable for it to initiate a restructuring as a consequence.

Did MAP follow a fair and proper process?

[43] Having assessed that the restructuring was based on genuine reasons, I must evaluate whether the process by which Mr Dewes was selected for redundancy was fair and reasonable.

[44] Mr Dewes' employment agreement stated:

¹⁰ Mr Dewes was present in the work place for 9hrs 40 minutes for the first portion of his claim and 9hrs 30 minutes for the second. A total of fifty minutes per work day was unpaid to allow for meal and break time.

¹¹ As defined in Mr Dewes' employment agreement

¹² Section 103A Employment Relations Act 2000

¹³ Graduated changes to the WoF inspection scheme commenced on 1 January 2014 .

“Redundancy occurs when employment is terminated by [the employer], the termination being attributable, wholly or mainly, to the fact that the position held by you is, or will become, superfluous to the needs of [the employer].”

[45] Mr Fairbrother says Mr Dewes and one other employee did not work the full complement of hours required; Monday to Friday plus fortnightly weekend work. He identified these two individuals as potentially affected by the restructuring. Mr Dewes says he was more experienced and efficient than the other mechanic who was an apprentice, and was unfairly selected for redundancy. Mr Fairbrother says the junior mechanic was amenable to engaging in less palatable work and his rate of pay was considerably lower than Mr Dewes.

[46] An employer is entitled to select which employees are to be made redundant however the selection must be undertaken fairly and in good faith.

[47] I am unwilling to conclude that the process by which Mr Dewes was selected for redundancy was one that was open to a fair and reasonable employer in all the circumstances.

[48] Firstly, when identifying who may be potentially affected by the restructure Mr Fairbrother excluded the two full time mechanics on grounds that each worked a full pattern of hours. The difficulty with Mr Fairbrother’s approach is that during his initial consultation with both Mr Dewes and the junior mechanic, each advised of his willingness to adopt MAP’s preferred hours so as to avoid redundancy¹⁴. Having indicated their agreement to work full hours I consider all four mechanics were then on equal footing and MAP was obliged to assess each mechanic for redundancy. Mr Fairbrother does not appear to have taken Mr Dewes and the other mechanic’s undertaking into account. The decision to select an employee from a limited pool based on hours of work when that distinguishing feature was no longer a point of difference between the mechanics was unfair. The effect of MAP’s approach increased the probability of redundancy for both Mr Dewes and the apprentice without good cause, and Mr Dewes and the junior mechanic were each precluded from fair measurement against their peers.

[49] I consider it more likely that Mr Dewes’ previous work pattern was a convenient impediment on which MAP was able to attribute a reason for redundancy

¹⁴ As noted Mr Dewes did not work on Mondays and the junior mechanic did not work in the weekend

selection. There was no evidence to support the proposition that Mr Dewes was dismissed for raising a personal grievance however I am unwilling to ignore a clear impression that by May 2014 Mr Fairbrother was exasperated by Mr Dewes' approach to the wages dispute between them. He was candid in his evidence on the matter and said Mr Dewes had not demonstrated any interest in resolving the matter in good faith. He further advised that Mr Dewes' attitude, towards colleagues and to himself, was difficult. He conceded that these matters, as well as performance concerns, were not put to Mr Dewes for comment, but were factors that influenced his decision about who should be selected for redundancy.

[50] An employer may assess an employee's attitude but that assessment, if relied on when selecting for redundancy, must be communicated to an employee so assessed.¹⁵ Mr Fairbrother was obliged to disclose to Mr Dewes his views on attitude and performance and allow Mr Dewes an opportunity to respond to those matters before making a final decision. He did not and this failure resulted in a selection process that disadvantaged Mr Dewes and was unfair.

[51] Finally, I note that although Mr Fairbrother provided Mr Dewes with requested data on the likely effect of changes to the WoF regime, this information was furnished 2-3 hours before Mr Dewes was informed of his redundancy. The parties dispute whether Mr Dewes was given an opportunity to discuss that data but in any event I find MAP did not allow sufficient time for Mr Dewes to meaningfully consider the information and make comment on it. This was not an action of a fair and reasonable employer in all the circumstances.

[52] I find there were genuine grounds for MAP to seek to reduce its workforce. However MAP's use of Mr Dewes' hours of work as grounds to conclude he was potentially affected by the restructure was unfair given his willingness to work full time. MAP then assessed him against criteria that he was not informed of, nor had an opportunity to respond to.

[53] I do not regard the procedural defects as minor. The decision to terminate was biased against Mr Dewes.

¹⁵ *Apiata v Telecom NZ Limited* [1998] 2 ERNZ 130

[54] There is no evidence to support an argument that had a fair selection process been undertaken Mr Dewes would have been chosen for redundancy in any event, and I can give no weight to that proposition.

[55] I find Mr Dewes' dismissal unjustifiable in all the circumstances.

Remedies

Loss of remuneration associated with the unjustified disadvantage in respect to wage arrears

[56] Pursuant to s123(1)(b) for the period from 18 June 2012 to 31 December 2014 Mr Dewes is owed the balance between payment for an 8 ½ hour working day and the hours he was entitled to be paid as set out in my findings at [39].

[57] Section 5 of the Wages Protection Act 1983 requires that any deduction from wages needs to be authorised in writing by the employee from whose wages money is being taken. During the Authority's investigation Mr Fairbrother agreed that \$847.50 was deducted from final wages (12 May 2014) without Mr Dewes' written authorisation to do so. He accepted this sum must be repaid.

[58] Mr Dewes was deprived from the use of money he was entitled to be paid as wages during his employment. I order MAP to pay 5% interest per annum, beginning 31 March 2014, on the sum corresponding to arrears of wages at [39] and [56]. I also order interest at the same rate be paid on the amount deducted from final wages commencing from that date. Interest accrues on each of these sums until paid in full.¹⁶

Loss of remuneration associated with the unjustified dismissal

[59] Section 123(1)(b) provides that where the Authority determines an employee has a personal grievance, s/he may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee "*as a result of the grievance*". Mr Dewes obtained new employment 7 weeks following the conclusion of his notice period. He is entitled to be reimbursed a sum equal to 7 weeks' wages.

¹⁶ Pursuant to s87(3) of the Judicature Act 1908

Humiliation and distress

[60] Scant evidence was furnished by Mr Dewes on the effect of his unjustified disadvantage claim but he described his humiliation as a result of the process adopted by MAP when he was selected for redundancy.

[61] I was not provided with any evidence to lead me to conclude that his dismissal was a direct response to Mr Dewes raising a personal grievance about his wages. However I have found that the dispute over wages negatively impacted on his relationship with the employer and was a factor leading to his dismissal. I have taken a global approach to my assessment as to compensation for Mr Dewes' personal grievance claims.

[62] I order MAP to compensate Mr Dewes \$7,000 for the distress that flowed from the actions which gave rise to his personal grievance claims.

Contribution

[63] Mr Dewes did not contribute to either of the situations that led to his personal grievance claims. Section 124 of the Act does not apply in these circumstances.

Should penalties be ordered?

[64] Mr Dewes requests penalties totalling \$35,000 be ordered against MAP and paid directly to him for its failure to: keep wage and time records, provide paid afternoon tea breaks, pay wages when due, and for its deduction from final wages.

[65] In determining whether a penalty is appropriate the Authority must assess what level of harm has been caused by the breach. In *Xu v McIntosh* the Employment Court noted that not all breaches will be equally reprehensible¹⁷. Consideration must be given to whether the breach was deliberate or merely inadvertent. In *Tan v Yang* Judge Inglis observed:

*It is however generally accepted that a penalty should only be imposed for the purpose of punishment and should not be used as an alternative route for increasing compensation.*¹⁸

[66] This is not a matter that warrants punishment. Mr Fairbrother had not managed employees prior to the purchase of MAP and he emulated the previous

¹⁷ [2004] 2 ERNZ 488

¹⁸ [2014] NZEmpC 65 at [31]

owner's management practices. While ignorance is no defence for non-compliance of legal obligations, the problems underpinning Mr Dewes' claims originated during the term of CS Foughy Ltd's management of the business. When MAP became aware of Mr Dewes' concerns it attempted to resolve matters but a genuine dispute about entitlements ensued between the parties. Orders have now been made to reimburse and compensate Mr Dewes appropriately. Finally, I do not consider Mr Dewes was disadvantaged by MAP's amalgamation of rest breaks in circumstances where he received payment for those breaks. I am unwilling to order penalties as an additional means by which Mr Dewes receives further compensation.

Summary of orders

[67] MAP Upper Hutt Limited trading as Auto Super Shoppe Maidstone must:

- (a) reimburse Mr Dewes the sum equal to 20 minutes per day for the period 18 June 2012 to 31 December 2013 calculated at the overtime rate.
- (b) reimburse the sum equal to 10 minutes per day for the period from 1 January 2014 to 28 March 2014 calculated at the overtime rate.
- (c) re-calculate applicable holiday and sick leave entitlements to accommodate the increase to average daily pay and paid accordingly.
- (d) pay 5% interest per annum beginning 31 March 2014 on the total sum at (a), (b) and (c) above until paid in full is also ordered.
- (e) reimburse Mr Dewes the sum \$847.50 deducted from final wages. Payment of 5% interest per annum beginning 12 May 2014 on this sum is ordered until paid in full.
- (f) reimburse Mr Dewes the sum equal to 7 weeks' wages calculated on the hours of work Mr Dewes was engaged at the time of his dismissal pursuant to s123(1)(b).
- (g) compensate Mr Dewes the sum of \$7,000 as compensation for his personal grievances pursuant to s.123(1)(c)(i).

Costs

[68] Costs are reserved.

Michele Ryan
Employment Relations Authority Member