

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 274
3035391

BETWEEN FAAFETAI TUTAGALEVAO
Applicant

AND STEPHEN WILDERMOTH
TRADING AS STEPHEN
WILDERMOTH TRANSPORT
Respondent

Member of Authority: Vicki Campbell

Representatives: Dean O’Leary for Applicant
Raymond Huang for Respondent

Investigation Meeting: 6 May 2019

Oral Determination: 6 May 2019

Record of Oral
Determination: 7 May 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. Mr Tutagalevao was unjustifiably dismissed.**
- B. Stephen Wildermoth trading as Stephen Wildermoth Transport
is ordered to pay to Mr Tutagalevao the following sums within 28
days of the date of this determination:**
- a) Lost wages of \$13,440 gross under s 123(1)(b) of the
Employment Relations Act 2000;**

b) Compensation of \$15,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.

C. Stephen Wildermoth trading as Stephen Wildermoth Transport is ordered to pay to Mr Tutagalevao the sum of \$7,402.98 net in arrears of wages under s 131 of the Employment Relations Act 2000 within 28 days of the date of this determination.

D. Costs are reserved.

Employment relationship problem

[1] Mr Stephen Wildermoth owns and operates a business as a heavy vehicle transport operator. Mr Tutagalevao was employed by Mr Wildermoth as a driver from September 2013 until his employment terminated on 21 March 2018.

[2] Mr Tutagalevao challenges the ending of his employment and says he was unjustifiably dismissed. In addition he claims he is owed arrears of wages and seeks recovery of those arrears.

[3] Mr Wildermoth denies the claims.

Issues

[4] In order to resolve Mr Tutagalevao's employment relationship problem I must determine the following issues:

a) Was Mr Tutagalevao unjustifiably dismissed and if so, what if any remedies should be awarded?

b) Is Mr Tutagalevao owed arrears of wages?

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Dismissal

[6] Mr Tutagalevao was absent on 19 and 20 March 2018. Mr Wildermoth contacted Mr Tutagalevao by telephone and advised him that he had abandoned his employment and his employment would terminate if he did not attend work on Wednesday 21 March. The notification was confirmed in writing on 28 March. Mr Tutagalevao denies he abandoned his employment. He says he was on pre-approved annual leave.

[7] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Mr Wildermoth's actions, and how he acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[8] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d). These matters include whether, having regard to the resources available, Mr Wildermoth sufficiently investigated allegations, raised the concerns with Mr Tutagalevao, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[9] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Tutagalevao being treated unfairly.¹ A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

Events giving rise to the dismissal

[10] In February 2018 Mr Tutagalevao asked Mr Wildermoth if he could take four weeks leave. Mr Wildermoth told Mr Tutagalevao to complete a Toll leave form. At the investigation meeting Mr Wildermoth told me this had been a requirement for the last two years, however it was never enforced.

¹ Employment Relations Act 2000 (the Act), s 103A(5).

[11] On 22 February Mr Tutagalevao made an application in writing to take leave from 18 March to 18 April 2018. Mr Tutagalevao told me that when he handed the letter to Mr Wildermoth he read the letter and indicated the leave was approved.

[12] Mr Wildermoth says he then checked Mr Tutagalevao's leave records and says Mr Tutagalevao did not have any leave outstanding. Mr Wildermoth says he told Mr Tutagalevao that he had no leave. There is a dispute about when this information was given to Mr Tutagalevao. Mr Tutagalevao told me Mr Wildermoth raised the issue of him having no leave for the first time during the telephone call that took place when he was already on leave. Mr Wildermoth told me he told Mr Tutagalevao before he went on the leave.

[13] I have preferred the evidence of Mr Tutagalevao. Mr Wildermoth's evidence is not consistent with the letter he wrote on 1 May in response to Mr Tutagalevao raising a personal grievance. In that letter Mr Wildermoth records that Mr Tutagalevao applied for leave and was told he [Mr Wildermoth] would check the records to see if he had any annual leave due and Mr Tutagalevao left before he could respond to him.

[14] Mr Wildermoth says that on Monday 19 March he rang Mr Tutagalevao and asked him why he was not at work. When Mr Tutagalevao told him he was on leave Mr Wildermoth says he told Mr Tutagalevao he was to report for work by Wednesday or he would be considered as having left his employment. Mr Wildermoth says Mr Tutagalevao did not turn up for work on the Wednesday and therefore he had abandoned his employment.

[15] Mr Tutagalevao told me the phone discussion happened on Tuesday not Monday. He told me that at about 2 pm he noticed a missed call from Mr Wildermoth and so rang him back. At the beginning of the call Mr Wildermoth asked him where he was and Mr Tutagalevao told him he was on leave. Mr Tutagalevao told me Mr Wildermoth told him he had just checked his holiday records and he had no leave available and asked him when he was returning to work. Mr Tutagalevao explained he was coaching a team and could not leave. He was in Palmerston North at the time coaching the Naenae College Senior volleyball team at the National Championships.

[16] The conversation then became heated and Mr Wildermoth told Mr Tutagalevao he should not to come back to work at all.

Abandonment

[17] Mr Wildermoth dismissed Mr Tutagalevao because he believed he had abandoned his employment. This means Mr Wildermoth considered Mr Tutagalevao to have given up his employment.²

[18] The employment agreement provides for abandonment in the following terms:

If the Employee is absent from work for more than two (2) consecutive working days, without notification to the Employer, this contract shall be terminated by the Employer without notice.

[19] If an employer believes a worker has walked away from the job, abandoning the employment, but has not clearly indicated an intention to finally end his or her employment, the employer should be cautious in drawing that inference and make further inquiries of the worker.³

[20] An employer acting fairly and reasonably in these circumstances would have acted promptly in February to confirm in writing that Mr Tutagalevao had no leave and would put his employment in jeopardy if he took the leave.

[21] The Act recognises the inherent imbalance of power between an employer and an employee.⁴ In his letter dated 1 May Mr Wildermoth stated if Mr Tutagalevao considered his application for leave was approved he should provide documentary evidence of it. No documentary evidence has been produced by Mr Wildermoth showing the leave was not approved and the consequences if Mr Tutagalevao was to take the leave.

[22] Mr Wildermoth was responsible for ending the employment relationship in a way that a fair employer acting reasonably could not have done in all the circumstances. At law that is treated as a dismissal. As a result Mr Tutagalevao has established his personal grievance and is entitled to an assessment of remedies.

² *EM Ramsbottom Limited v Chambers* [2000] 2 ERNZ 97 at [21].

³ *Ibid* at [26].

⁴ Employment Relations Act 2000, s 3.

Remedies

[23] To resolve his employment relationship problem Mr Tutagalevao seeks reimbursement of lost wages and compensation of \$20,000.

[24] Mr Tutagalevao started new employment on 14 June 2018. He was out of work for 12 weeks and is entitled to be reimbursed this lost income which equates to \$13,440 gross.

[25] Mr Tutagalevao told me losing his job was very difficult. He faced a three month stand down from WINZ and could not get a benefit. Mr Tutagalevao has four dependent children and told me he got behind on the rent all of which caused a lot of stress. I consider an award of \$15,000 to be appropriate in all the circumstances of this case.

Contribtuion

[26] Having determined Mr Tutagalevao has a personal grievance I must consider the extent to which his actions contributed towards the situation that gave rise to the personal grievance. I must reduce the remedies if his actions contributed in some blameworthy way.⁵

[27] I am satisfied Mr Tutagalevao's actions were not blameworthy. I have accepted his evidence that he understood his leave had been approved. There was no indication from Mr Wildermoth that if Mr Tutagalevao did take the time off he could be dismissed.

Conclusion

[28] Stephen Wildermoth trading as Stephen Wildermoth Transport is ordered to pay to Mr Tutagalevao the following sums within 28 days of the date of this determination:

- c) Lost wages of \$13,440 gross under s 123(1)(b) of the Act;
- d) Compensation of \$15,000 under s 123(1)(c)(i) of the Act.

⁵ Ibid at s 124.

Arrears of wages

[29] Mr Tutagalevao claims arrears of wages for unpaid wages and holiday pay.

Unpaid wages

[30] Mr Tutagalevao claims that during his employment he was underpaid \$7,402.98 net as follows:

- 25 September 2013 – 25 September 2014 \$5,983.98 net;
- 2017 – 2018 \$1,419.00 net.

[31] Mr Tutagalevao was paid weekly by direct payment into his bank account. Mr Wildermoth has provided documents that he says are the wages and time records relevant to Mr Tutagalevao's employment. Mr Tutagalevao has provided me with copies of his bank statements that show a number of discrepancies between the payments the wage and time records indicate were paid to Mr Tutagalevao and the actual amounts deposited into his bank account.

[32] I have preferred to rely on the records provided by Mr Tutagalevao as being an accurate record of the money he received each week as net wages.

[33] I am satisfied Mr Tutagalevao has established he is owed the amounts set out. Accordingly Stephen Wildermoth trading as Stephen Wildermoth Transport is ordered to pay to Mr Tutagalevao the sum of \$7,402.98 net in arrears of wages under s 131 of the Act within 28 days of the date of this determination.

Holiday pay

[34] Mr Tutagalevao says he took very little leave during the course of his employment with Mr Wildermoth and seeks recovery of his unpaid holiday pay. Mr Wildermoth has provided the Authority with records which he says are the accurate holiday and leave records for Mr Tutagalevao.

[35] The process of recording leave was for Mr Wildermoth to contact his accountant by phone each week and advise who was working and who was on leave. The accountant would then record this information.

[36] As with the wages and time records I have found discrepancies in the some dates recorded as leave in the holiday and leave record which are not consistent with the work time logbook completed each day by Mr Tutagalevao. Mr Tutagalevao's evidence was that the only leave he took during his employment was two weeks leave in 2014 and three days leave in 2018.

[37] Mr Wildermoth told me he paid annual leave at times when Mr Tutagalevao was sick but had no sick leave entitlement. Under s 39 of the Holidays Act such an action first requires a request from an employee. There is no evidence Mr Tutagalevao requested annual leave when he was sick and Mr Wildermoth's evidence is not consistent with the holiday and leave record he provided. That record shows Mr Tutagalevao had a positive balance of sick leave available to him throughout his employment.

[38] I am satisfied Mr Tutagalevao has established he has a claim to unpaid holiday pay. However, I am not satisfied his claim equates to the 18 weeks he seeks. Adding to this at the time of delivering this oral determination Mr Wildermoth advised me he had found text messages which dispute the amount of leave Mr Tutagalevao says he took during his employment.

[39] In order to resolve this issue the parties are to calculate and agree on the amount of holiday pay due. Leave is reserved for Mr Tutagalevao to return to the Authority if they are unable to agree.

[40] To assist the parties I have set out below some factors the parties should take into account when calculating the holiday pay owing:

- a) For the period 4 September 2014 (his first entitlement falls due after 12 months employment) to 4 September 2017 Mr Tutagalevao had an entitlement to 14 weeks leave after using two weeks in 2014 in advance of his entitlement.
- b) There is no dispute he received payment of three days annual leave in March of \$672.
- c) Mr Tutagalevao is entitled to payment of 8 percent of his gross earnings for the period 4 September 2017 to 21 March 2018.

- d) There was at least one payment of \$1,600 paid to Mr Tutagalevao on 28 July 2014 which appears to be payment for leave taken in advance.

Costs

[41] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Tutagalevao shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Wildermoth shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[42] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority