

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2019] NZERA 387  
3041592

BETWEEN	SAILI FISO Applicant
AND	JOHN IBRAHIM t/a KINGS CUTS BARBER SHOP Respondent

Member of Authority:	Michael Loftus
Representatives:	Adrian Plunket, advocate for Applicant Respondent in person
Investigation Meeting:	20 May 2019 in Napier
Submissions Received:	At the investigation
Determination:	1 July 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Saili Fiso, claims he was unjustifiably dismissed from his employment with Mr Ibrahim on or about 29 August 2018.

[2] Mr Ibrahim denies he dismissed Mr Fiso saying the later advised he was leaving during a telephone conversation which occurred on the evening of 29 August. He also claimed the job remained available had Mr Fiso chosen to return.

**Background**

[3] Mr Fiso commenced working for Mr Ibrahim at his Hastings barbers shop in September 2017.

[4] Mr Ibrahim now says he had some concerns about Mr Fiso's attendance and performance. Mr Ibrahim says he frequently raised various issues but concedes such conversations never progressed to formal disciplinary discussions. One of the key issues was Mr Fiso's interest in boxing. He has had considerable competitive success but this requires effort and training. Mr Ibrahim is of the view that impacted on Mr Fiso's attendance at work and affected his performance.

[5] Mr Fiso denies that is so and asserts his training is conducted out of work time. Mr Fiso acknowledges one instance where he accepts he was less than diligent and to which I shall return but denies Mr Ibrahim raised other concerns except in passing and then there as very little.

[6] For his own part Mr Fiso is of the view Mr Ibrahim was treating him unfairly by having chosen to relocate to Auckland and leaving Mr Fiso to run the Hastings business without recompense. He claims Mr Ibrahim wanted him to work extended hours and it was his refusal to do as that would conflict with his boxing training which led to Mr Ibrahim forming a view the two interests, work and boxing, conflicted.

[7] The event to which I referred in [5] above and which Mr Fiso accepts was problematic involved some leave he took to assist a friend paint a house in Levin. Ms Fiso accepts some confusion led to his not returning to work on the day Mr Ibrahim thought he would.

[8] That led to phone calls from Mr Ibrahim though these were not answered by Mr Fiso and messages were left. When the two eventually spoke by phone on the evening of 29 August a long conversation ensued. Mr Fiso says it essentially came down to advise from Mr Ibrahim that he was to make a choice – work or boxing but not both. Mr Fiso says he asked if he was being fired but did not receive a direct answer instead being told he had to make a choice and being pushed to give an answer as to what his choice might be. Mr Fiso says no conclusion was reached and the call left him confused and uncertain.

[9] Mr Ibrahim accepts the call was reasonably long. He accepts he told Mr Fiso the current situation could not continue and he, Mr Fiso, had to commit to either boxing or working the hours required of him at the shop. He says he pushed for an answer more than once though one was not forthcoming. Instead, according to Mr Ibrahim, Mr Fiso said he needed a break but also needed his wages. Mr Ibrahim says

he replied that was not acceptable and Mr Fiso was damaging the business before advising that if Mr Fiso wanted a break he, Mr Ibrahim, could no longer help. Mr Ibrahim agrees Mr Fiso asked if he was being sacked and sounded confused. Mr Ibrahim also agrees there was no authoritative conclusion and no agreement about a way forward.

[10] Mr Fiso denies saying he needed a break.

[11] A friend of Mr Fiso's was present at his home when the call occurred. He says he heard a fair portion of it. He says he clearly heard Mr Ibrahim telling Mr Fiso he had to make a choice – work or boxing and Mr Fiso asked if he was being sacked. He also agrees the call left matters unresolved and says that as it ended he and Mr Fiso decided to go and get some food. He says while doing so they discussed the call and it was clear Mr Fiso was confused as to what had happened and the outcome.

[12] Shortly after the call discussion Mr Ibrahim sent Mr Fiso the following message:

Sup uce you don't need to go into work for the rest of the week and I'll do your final pay maybe one day you can work full time for me use sorry uce no hard feelings. And can you please give the key to Mataio

[13] The parties tell me Uce is a greeting equivalent to brother or mate.

[14] The conversation continued as follows (SF = Mr Fiso and JI = Mr Ibrahim):

SF – Ok so sacked yeah uce?

SF - ?

Ji – Just a break for both of us uce it's for the best straight up

SF - A break uce or sacked?

Ji – Uce we can't go on like this when work comes before boxing give me a call and I got you for now yea it's not working sorry uce

SF – What mean give u a call u got me for now? Tru alguds uce do like that a. Sweet

Ji – Sorry uce I mean I got you in future when your ready even in Auckland. Have a mean night uce no hard feelings we can work together in future when the times right

## **Discussion**

[15] As already said Mr Fiso claims he was unjustifiably dismissed. Mr Ibrahim relies on an assertion there was no dismissal. He says he concluded that by not answering the work or boxing question and by not committing to the hours required Mr Fiso was choosing boxing. It is this and the purported request for a break Mr Ibrahim relies on when saying Mr Fiso chose to leave.

[16] I have to conclude Mr Ibrahim's assertion there was no dismissal and Mr Fiso chose to leave by asking for a break is untenable. First Mr Fiso denies he made the request and that is supported by the semi-independent witness who gave evidence. Putting aside Mr Fiso's denial I conclude Mr Ibrahim cannot say, as he now tries to do, that Mr Fiso's cessation was the result of his choosing to take a break (ie: leave temporarily) during the phone call. As Mr Ibrahim frequently said when giving evidence the telephone call was inconclusive and he could get no undertaking or answer from Mr Fiso about his priorities and intentions.

[17] I also conclude the subsequent messages do not support a conclusion a break was agreed with Mr Fiso still asking if he has been sacked and Mr Ibrahim asserting *we can't go on like this*.

[18] It is also the content of those exchanges and particularly the first of those which, in my view, determines this claim. At its simplest employment comprises an arrangement under which the employee provides labour in exchange for remuneration. The first express advice Mr Fiso need no longer provide labour is contained in Mr Ibrahim's message sent following the telephone call. That message also contains advise remuneration would cease and a final pay would be forthcoming. The decision to discontinue the provision of both labour and remuneration was made by Mr Ibrahim. I can only conclude this is a dismissal.

[19] Finally there is Mr Ibrahim's assertion the job remained open but that is not what the exchanges between Messrs Fiso and Ibrahim say. There is no express assertion to that effect with the exchanges suggesting no more than they might be able to work together in the future when the time is right. That is a case of how long is a piece of string. Furthermore I have to say the fact this application has proceeded appears to have poisoned the relationship between the two. Comments made by Mr Ibrahim during the investigation make it clear there is no longer any prospect he would really want Mr Fiso back.

[20] Once the fact of dismissal is established it falls to the employer to justify it. Mr Ibrahim's prime defense was to deny a dismissal had occurred. Such an approach implies there is nothing to justify and that was reflected in the fact Mr Ibrahim tendered no evidence which would come close to suggesting he did anything which might meet the requirements of s103A.

[21] What he did do was suggest Mr Fiso had somehow brought the cessation upon himself by failing to comply with his employers requirements. Those assertions fail given little supporting evidence and are further undermined by Mr Ibrahim's acceptance he took no formal action. All that exists are some inconclusive facebook messages in which Mr Ibrahim neither sets standards nor seems to take significant issue with what he now says was unacceptable conduct by Mr Fiso. Indeed there was evidence from both Mr Ibrahim and one of Mr Fiso's witnesses that Mr Ibrahim avoids any suggestion of conflict and will not raise issues. It is for this reason I also conclude there is no basis upon which I can consider applying s 124 and reducing the remedies which are about to be discussed.

[22] There is simply no justification, or at least one that comes close to complying with the duty placed upon the employer by s 103A. There was no express raising of concerns, no ability to answer clear accusation and therefore no consideration of those answers. There was nothing more than an assertion things were not working out and a demand Mr Fiso decide to drop either work or boxing in favour of the other. Even then no answer was actually given with Mr Ibrahim finally imposing a resolution.

[23] The only thing that might help Mr Ibrahim is the issue of resources<sup>1</sup>. That does not, I conclude, excuse what occurred here and in so saying rely on the Court's conclusion in *The Salad Bowl Ltd v Howe-Thornley* that all-encompassing failures are neither excusable nor minor (s 103A(5) of the Act).<sup>2</sup>

[24] The dismissal is unjustified.

[25] The conclusion Mr Fiso has a grievance in that he was unjustifiably dismissed raises the question of remedies. He seeks lost wages and \$25,000 as compensation pursuant to s 103(1)(c)(i) of the Act.

[26] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Mr Fiso quantifies his claim in a memo dated 14 May. He only seeks to recoup money for the

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<sup>1</sup> Section 103A(3)(a) of the Employment Relations Act 2000

three month period provided for in s128 and deducts earning from other endeavours from the amount he would have earned at Kings Cuts. The result is claim for \$3,900 which is payable.

[27] Turning to compensation. Ms Fiso supported his claim with evidence of the hurt he felt with most emanating from confusion as to why he had been dismissed. He also talks of being less certain of himself and withdrawing from social activity along with issues emanating from the resulting financial constraints. That said it should be noted he both chose to establish his own business as opposed to seeking paid employment and difficulties encountered as a result cannot be directly attributable to Mr Ibrahim.

[28] Mr Fiso's claims were also supported by evidence from two witnesses which suggests Mr Fiso withdrew from some of his previous endeavours as a result of indecision engendered by these events. That said he was not so hurt he could not get on with endeavours such as attempting to establish his own business.

[29] Opposing that there is a strong intimation Mr Ibrahim is of limited means and will struggle to meet any award. Those claims, while not supported with any evidence which might indicate the extent of the problem, went unchallenged. Indeed, comments made by one of Mr Fiso's witnesses would suggest they have validity and financial capacity appears an issue I have to consider.<sup>3</sup>

[30] Having considered the evidence and current precedents I conclude an award of \$5,000 appropriate.

### **Conclusion**

[31] For the above reasons I conclude Mr Fiso has a personal grievance in that he was unjustifiably dismissed.

[32] As a result I order the respondent, John Ibrahim, pay the applicant, Saili Fiso:

- a. \$3,900.00 (three thousand, nine hundred dollars) gross being recompense of wages lost as a result of the dismissal; and

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<sup>2</sup> [2013] NZEmpC 152 at [94] and [95]

<sup>3</sup> *Richora Group Limited v Wai Ying Cheng* [2018] NZEmpC 113 at [69]

- b. \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i).

[33] Costs are reserved. The parties are encouraged to see if they can resolve the issue between themselves and in doing so should consider as a guideline the Authority's standard tariff of \$4,500 per day applied to what was a half day investigation.

Michael Loftus  
Member of the Employment Relations Authority