

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 519  
3084772

BETWEEN	BRETT WEBLEY Applicant
AND	BISH AUTOMOTIVE (SOUTH ISLAND) LIMITED First Respondent
AND	PETER RAYMOND BLACK Second Respondent

Member of Authority: Helen Doyle

Representatives: Chrissy Gordon, advocate for the Applicant  
Jeff Goldstein and Lynda Ryder, advocates for the  
Respondent

Investigation Meeting: 6 August 2020 at Christchurch  
4 December 2020 at Christchurch

Submissions and further information received: 6 August and 4 December 2020 from the Applicant and  
Respondent  
28 August 2020 from the Respondent

Date of Determination: 16 December 2020

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**DETERMINATION OF THE AUTHORITY**

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- A Brett Webley was employed by Bish Automotive (South Island) Limited (Bish Automotive).**
- B He was unjustifiably dismissed from his employment.**
- C Bish Automotive is ordered to pay to Brett Webley the sum of \$14,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- D The claim for holiday pay is not made out.**

- E Bish Automotive is ordered to pay a penalty for breaches of s 81 of the Holidays Act 2003 and s 65 of the Employment Relations Act 2000 in the sum of \$5,500.**
- F The penalty award is to be paid to Brett Webley within 21 days of the date of this determination.**
- G Costs are reserved and failing agreement a timetable has been set for an exchange of submissions.**

### **Employment Relationship Problem**

[1] Brett Webley was re-employed on 26 July 2011 after an earlier period of employment of about 16 years working as an auto dismantler for either Bish Automotive (South Island) Limited (Bish Automotive) or its sole director Peter Black. Mr Webley was not provided with an employment agreement for his second period of employment however there was an understanding that he would undertake the running of the business and look after the staff. He received about \$1,019 net each week. Mr Black took control of the banking, PAYE, KiwiSaver and payments through XERO.

[2] Mr Webley wants the Authority to resolve a number of employment relationship problems as set out in the statement of problem.

[3] Mr Webley wants the Authority to resolve an issue about the identity of his employer.

[4] He says that he was either unjustifiably dismissed or, alternatively on the same facts, unjustifiably disadvantaged. He also alleges breaches of good faith.

[5] Mr Webley says that he is owed holiday pay and seeks a penalty for a failure to keep a holiday records.

[6] Mr Webley also claims a penalty for the failure to provide an employment agreement.

[7] The statement of problem provides that if Bish Automotive is found to be the employer then Mr Black should be penalised for aiding and abetting the breach of good faith. The second claim against Mr Black if he is not found to be the employer is that he should be personally liable for any holiday pay owing under s 142Y of the Employment Relations Act 2000 (the Act).

[8] There is no express provision in the Act for liability for aiding and abetting a breach of the Act unlike for a breach of an employment agreement. The Authority was not asked to consider in the event good faith breaches by Bish Automotive are established whether a penalty would be available under s 4A of the Act. That impacts on the basis for any claim against Mr Black for a penalty for aiding and abetting a breach of good faith. I do not conclude in those circumstances a claim for an aiding and abetting penalty is available.

[9] Mr Webley does not claim reimbursement of wages as he remains on ACC, however he seeks a payment of compensation, reimbursement of any outstanding holiday pay and penalties for failure to maintain holiday records and provide an individual employment agreement.

[10] It was confirmed at the investigation meeting that there is no longer a penalty claim for a failure to keep wage and time records.

[11] Bish Automotive in the statement in reply says that it employed Mr Webley. It denies that Mr Webley was unjustifiably dismissed or disadvantaged in his employment and denies that it breached the Holidays Act 2003 or the Act.

### **The issues**

[12] The Authority needs to determine the following issues in this matter:

- (a) Who employed Mr Webley?
- (b) How did the employment relationship end?
- (c) If Mr Webley was dismissed or there were actions taken that were disadvantageous, were the dismissal or actions justified?
- (d) If the dismissal was not, then what remedies should be awarded and are there issues of mitigation and contribution?
- (e) Was there a failure to keep a holiday record in accordance with s 81 of the Holidays Act 2003?
- (f) Is Mr Webley owed holiday pay?
- (g) If there was a failure to keep holiday records under s 81 and provide an employment agreement, should a penalty be awarded?

**Who employed Mr Webley?**

[13] During the investigation meeting Mr Webley agreed under questioning that there was not a “major dispute” about his employer. He did not strenuously maintain in his evidence that his employer was any other than Bish Automotive.

[14] Bish Automotive was incorporated in 1988 before the employment commenced. Mr Webley agreed that Bish Automotive usually paid his wages and that was evident from his bank records recording deposits of wages. There were some occasions when Mr Black would make wage payments when there were insufficient funds in the company account. Mr Webley’s knowledge that he was employed by Bish Automotive is consistent with advice he had given ACC on earlier occasions when he was injured during the material period of employment.

[15] Mr Webley denied that he ever saw payslips until they were provided as part of the Authority process. He said that he recalled asking for payslips but they were never provided. The payslips provided to the Authority were headed Bish Automotive.

[16] Taking all matters into account I am satisfied that Mr Webley was employed at the material time by Bish Automotive.

**How did the relationship end?**

[17] On 30 December 2018 Mr Webley had an accident on his motorbike. The following day it was established he had broken some ribs although he was not clear how many. Mr Webley rested at home for a few days.

[18] On 14 January 2019 Mr Webley returned to work and as he was stepping off some racking, he heard a click in his back and suffered extensive pain. He was subsequently advised when he sought medical assistance that eight out of nine ribs were broken and one was dislodged from his spine. Mr Webley was placed on ACC and was not able to work. He never returned to work at Bish Automotive.

[19] Text exchanges between Mr Webley and Mr Black are material.

*11 March 2019*

[20] On 11 March 2019 Mr Black sent a text message to Mr Webley that they needed to have “a bit of a yarn sooner rather than later when it suits.”

*12 March 2019*

[21] Mr Webley responded on 12 March 2019 that he was in Australia and his mother was not well but that he was back on the 20<sup>th</sup> to see a specialist. Mr Black then advised that he had sold the business and “I’m done from 1st April 19.” Mr Webley responded “To lance? Before there was a reply Mr Webley sent another text message as set out below:

So can you tell me what this means for me and my employment? Thanks

Mr Black responded:

You tell me I’m being told by lots of people round town your over the place and not interested.

*19 March 2019*

[22] On 19 March 2019 Mr Black sent Mr Webley a text asking about his intentions going forward. Mr Webley responded by text and advised that he had asked where the sale of the business left him and the question was not answered. He wrote that he had been given the impression that he had been dismissed and that if that was not the case Mr Black needed to respond as soon as possible.

[23] Mr Black responded as below

I haven’t dismissed you Brett the business will not be under my control from 1st April 2019 you will have to speak to the new owner re future employment with him thanks Peter.

*Further text messages 1 to 8 May 2019*

[24] The next text message was one sent by Mr Black on 1 May 2019. It provided that Mr Black had been asked to ask Mr Webley to return the keys for a car, the employment site and the containers. Mr Webley confirmed to Mr Black he had done this in a text dated 7 May 2019 and asked for his final pay. Final pay was confirmed by Mr Black as having been “sorted” in a text dated 8 May 2019.

*Conclusion as to how the relationship ended*

[25] Mr Goldstein submits that there was no dismissal because there was no sending away of Mr Webley and Mr Webley could not say when he was dismissed. He submits that Mr Webley had not been dismissed but rather resigned from his employment when he had asked for his final pay. Mr Goldstein referred to the letter raising the grievance and the statement of problem and the absence in these of an actual date of dismissal.

[26] Dismissal has been defined as the termination of employment at the initiative of the employer.<sup>1</sup> In a recent Employment Court judgment the test as to whether an employee has been dismissed was described as an objective one.<sup>2</sup> The test in that judgment is whether it was reasonable for somebody in the employee's position to have considered their employment was at an end.

[27] In assessing whether it was reasonable for Mr Webley to conclude that his employment relationship with Bish Automotive had ended I have had regard to the advice from Mr Black on 12 March 2019 that the business had been sold and Mr Black was "done" from 1 April 2019. There was then the advice that the business would not be under Mr Black's control from 1<sup>st</sup> April and Mr Webley should contact the new owner about future employment.<sup>3</sup> The word future is significant. It supports that there is a step that needs to be taken for future employment but does not provide reassurance about the security of continued employment. Mr Webley was not advised who the new owner was and he had very limited information about what had taken place with the sale and what opportunities remained for continued employment.

[28] Mr Black maintained in his oral evidence that Bish Automotive was still Mr Webley's employer after 1 April 2019. There was no communication with Mr Webley however about the next procedural step if he did not approach the new owner and/or was unsuccessful having done so in securing new employment. The fact that Mr Webley's employment had come to an end with the sale of the business is reinforced by the absence of anything concrete to reassure him that was not in fact the case when he asked. After 1 April 2019 came and went there was no suggestion that the employment relationship was still ongoing with Bish

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<sup>1</sup> *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC) at 974.

<sup>2</sup> *Cornish Trucks & Van Limited v Gildenhuis* [2019] NZEmpC 6 at [45].

<sup>3</sup> Text messages on 12 and 19 March 2019

Automotive. Consistent with a change of ownership Mr Webley was asked by Mr Black on behalf of the new owner to return keys. Mr Webley asked for his final pay.

[29] I find that a reasonable person having received the communications that Mr Webley did would have considered their employment was at an end. I accept Ms Gordon's submission that the dismissal in all likelihood occurred about the time the business was sold on 1 April 2019 although in Mr Webley's mind the dismissal was finalised when he was asked to return the keys in May.

[30] Mr Webley was dismissed from his employment.

### **If Mr Webley was dismissed was the dismissal justified?**

#### *The test of justification*

[31] The Authority in assessing justification is required to apply the test in s 103A of the Act. In determining justification the Authority consider on an objection basis whether the actions of Bish Automotive and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. There are also the procedural fairness factors set out in s 103A(3) of the Act that the Authority must take into account and overarching good faith obligations.

[32] There were breaches of the statutory duty of good faith. There was a failure to properly consult with Mr Webley about the proposed sale of the business and his continued employment. There was a failure to provide sufficient information including the identity of the new owner of the business particularly in circumstances where Mr Webley was to discuss any future employment with the new owner.

[33] There was no employment agreement and therefore no employee protection provision as required in s 69OJ of the Act. There was a failure by Bish Automotive to take steps to protect Mr Webley's continued employment by negotiating with the new owner about whether his employment could be transferred on the same terms and conditions of employment.<sup>4</sup>

[34] The dismissal was unjustified. The process was not that of a fair and reasonable employer and that overlaps with substantive justification. Mr Webley had made out his

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<sup>4</sup> Subpart 3 of Part 6A of the Act.

personal grievance for unjustified dismissal and is entitled to consideration of remedies. Objectively assessed it was not what a fair and reasonable employer could have done in all the circumstances. This finding absorbs the alternative claim of unjustified disadvantage based on the same facts.

## **Remedies**

### *Compensation*

[35] There is no claim for lost wages and the sole claim is for compensation. Mr Webley in support of this claim said in his oral evidence said that he was hurt and humiliated by the way in which his employment ended after working for Bish Automotive for seven years. He was hurt that he was “not party” to what was happening to the business and simply advised of the sale. Mr Webley referred to his hard work over the period he worked for Bish Automotive and his work ethic. He referred to rumours getting about and referred to a text message from Mr Black in or about May that there had been a theft on his part. He considered that Mr Black had discredited him in the industry and that impacted on his humiliation and loss of dignity. His evidence was that he now had to retrain in a new career and that was challenging.

[36] Mrs Webley confirmed that there had been a significant impact on her husband. She said that he was shocked by the text message that the business had been sold and that he invested a lot in the company. She described Mr Webley not sleeping and that the events that led to termination were unexpected.

[37] I accept the dismissal had a reasonably significant impact on Mr Webley. He had a longstanding relationship with Bish Automotive and the evidence supported that he worked hard and his role was a significant part of his life.

[38] Parts of the ACC information referred to during the investigation meeting could support that there was some dissatisfaction with the employment relationship before the events leading to dismissal from both sides. I cannot however conclude with certainty that it would have meant that the relationship would not have continued.

[39] Mr Webley in his evidence spoke of a wider attempt by Mr Black to discredit him within the industry. If there were such actions then the extent of them is not clear from the

evidence. There is a text message from Mr Black to Mr Webley following the dismissal that Mr Webley had broken into and entered into premises. I accept that was hurtful for Mr Webley to receive. It does support a significant deterioration and change in the relationship that had previously been a constructive one.

[40] Weighing all matters, including the length of the relationship and any finding of contribution, a suitable award for compensation is the sum of \$14,000.

#### *Contribution*

[41] The Authority is required under s 124 of the Employment Relations Act 2000 where it determines an employee has a personal grievance to consider whether the actions of the employee contributed to the situation that gave rise to the personal grievance. If it is required then remedies that would otherwise be awarded should be reduced.

[42] Mr Goldstein submits that Mr Webley contributed towards the situation that gave rise to his dismissal by failing to communicate properly. Even if there were earlier communication difficulties I could not be satisfied that the nature of Mr Webley's communications after he was advised of the sale of the business were culpable or blameworthy. It could not be said that any of his actions created or contributed towards the situation that gave rise to the dismissal including the fact that he did not approach the new owner. I could not be satisfied that he was absolutely clear who the new owner was.

[43] I accept that the obligations of good faith require both parties to be responsive and communicative. There is a suggestion that Mr Webley should have asked for further clarification or communicated more with Mr Black about his employment and in not doing so contributed to the situation that gave rise to his dismissal. I do not accept that. It is clear that Mr Webley in his text message of 19 March 2019 believed he had been dismissed. The response from Mr Black that he had not dismissed Mr Webley confirmed future employment needed to be discussed with another person. It was insufficient to correct the genuine belief on the part of Mr Webley that his employment had been terminated. I also weigh that Mr Black should have taken steps to negotiate with the new owner about any possible transfer of Mr Webley's employment.

[44] In the circumstances considered as a whole I do not find that Mr Webley's actions contributed to the situation giving rise to his personal grievance.

[45] The above award is not reduced for contribution.

[46] I order Bish Automotive (South Island) Limited to pay to Brett Webley the sum of \$14,000 being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

**Was there a failure to keep holiday records in accordance with s 81 of the Holidays Act 2003?**

[47] Mr Webley claimed in the statement of problem that he was owed \$12,237.60 net for holiday pay calculated on the basis of 10 days per year from his anniversary date on 26 July 2012 after the initial 12 months period of his employment to the end of his employment.

[48] At the time of the first investigation meeting the respondent had provided the Authority with an annual leave calculation based on the payslips and pay records. Those records on their face supported payment had been made for annual leave for the anniversary periods and for the part period between the anniversary date and termination.

[49] At the investigation meeting the focus was on whether annual leave was taken and the dates of that leave. The Authority heard evidence that Mr Webley recorded annual leave dates on a calendar and leave taken and payments made were based on those entries.

[50] Following the investigation meeting Mr Goldstein and Ms Ryder provided a spreadsheet about leave taken compiled from the calendars for the years 2013-2019 on which Mr Webley had made entries for leave. The spreadsheet compared the entries on the calendars with leave shown as paid from 2013 for the anniversary periods. Photocopies of the calendars were attached and the originals were available for viewing if required. For some years there was some discrepancy between the dates of leave shown in the calendar and the annual leave paid however for other years the dates reconciled with the number of days for which payment was made.

[51] The Authority held a further short investigation meeting to discuss this additional material and Mr Webley's claim. Ms Gordon said that it was prohibitive cost-wise for Mr Webley to undertake an analysis of the material provided as to whether that in turn impacted on his claim. She said that Mr Webley agreed to amend his claim for unpaid holiday pay to

five days per annum instead of ten. Ms Gordon referred to an Employment Court case that she said had some similarities with respect to Mr Webley's holiday claim.<sup>5</sup>

[52] It was confirmed by the Employment Court that it is not a breach of s 81(4) of the Holidays Act 2003 (HA) if an employer does not keep the information required to be entered into the holiday and leave records beyond six years from the date on which the information is entered into the records.<sup>6</sup> The calendar records provided go back to 2013 which satisfies the six year requirement.

[53] Mr Goldstein and Ms Ryder submit taking into account all the different information provided that there is a holiday and leave record that complies with s 81 of the HA. Mr Black said in his evidence that the documents that constitute holiday leave records are the payslips and the MYOB records.

[54] Having considered this submission and the different pieces of information I do not find that the holiday and leave records are in a form or in a manner that allows the information in the records to be easily accessed and converted into written form as required under s 81 (3)(b) of the HA. The pay records and the calendar are at times inconsistent as to annual leave days and payments. There is no clear record that can be relied on for the dates on which annual leave were taken and payment for those dates. I could not be satisfied of a clear record of Mr Webley's entitlement to annual holidays at any particular time. That information is not included as it sometimes is on the payslips provided to the Authority. There was a document presented for the period ending 14 May 2019 that was headed "employee accrued leave report" however that only showed annual leave due at 26/07/18 less leave taken thereafter. The amount showing as due for total gross annual leave seemed inconsistent with the amount shown as having been paid in the final payslip.

[55] Ms Gordon correctly submits that provision of information about holiday and leave records was delayed and then provided in a somewhat piecemeal manner. Mr Black in his evidence said that the delay when the records were requested by Ms Gordon was because of issues with MYOB and updates. He said that when he went to get the data all ex-employees' data had gone and needed to be retrieved. Although it was suggested that Mr Webley was

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<sup>5</sup> *O'Boyle v O'Boyle Law Limited and McCue* [2020] NZEmpC 175

<sup>6</sup> *Shane Hatcher v Burgess Crowley Civil Limited* [2019] NZEmpC 117

responsible for recording holidays, it is the employer's responsibility under the HA to always keep a compliant holiday and leave record.

[56] I do not find that in this case there are records that comply with s 81 of the HA. I accept that prevents Mr Webley bringing an accurate claim. This allows the Authority to accept as proved in the absence of evidence to the contrary statements made by Mr Webley about holidays and other leave have been taken. Bish Automotive can counter those statements and present evidence about the claim.<sup>7</sup>

### **Is Mr Webley owed holiday pay?**

[57] Mr Webley's claim is that he did not take all his annual leave. He said initially that he only took about ten days per annum and is entitled to payment for the balance. This claim has now been amended to five days per annum. Mr Webley worked an average of 45 hours per week. He was therefore entitled to 180 hours of annual leave per annum after his first 12 months of employment.

[58] The pay records show that for his first year of employment before his entitlement to annual holidays he had been paid for 190.50 hours for annual leave. He was therefore in advance of his entitlement and that would impact therefore on entitlements and accrual of annual leave for subsequent years. That has to be considered with some inconsistencies with the calendar entries provided since January 2013 and the pay records.

[59] An example of an inconsistency is leave taken from the calendar entries to 26 July 2013. 9 days are shown on calendar entries but only 7 days were paid. It is the other way around to 26 July 2014 where leave is shown on the calendar entries as 9 days with payment from pay records reflecting 12 days. It appeared however that Mr Webley agreed that there were three days leave probably taken in mid-January that could account for some of the difference. There was also reference to a Christmas closedown that was not reflected on the calendar for that and the other periods of entitlement that could also account for that difference. In considering these entries with the pay records I am unable to be satisfied to the required standard that there are five days owing to Mr Webley per annum for annual leave from 2012. The evidence about the holiday pay and days in dispute from Mr Webley was limited and pay records supported payments were made for annual leave.

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<sup>7</sup> Above n 6 at [21]

[60] The claim for holiday pay is not made out.

[61] There was some discussion about the final pay for the final part year of employment. The final payslip appears to reflect the correct payment for holiday pay for the part year. I will reserve leave for Mr Webley to return to the Authority if he was not paid an amount that accords with that final payslip.

### **Penalties**

[62] I have found a breach of s 81 of the HA in that there was no compliant holiday and leave record. There is a penalty sought. Section 75 of the HA provides that an employee may bring an action to recover a penalty if there has not been compliance with s 81. The claim satisfied the time requirement to bring a penalty.

[63] There is also a claim for a penalty for the failure to provide to Mr Webley a written employment agreement. It was expressed in the statement of problem to be a breach of s 64 of the Act. It is more appropriately viewed as a breach of s 65 which section deals with the form and content of an individual employment agreement including that it must be in writing. A penalty may be imposed for a breach of that section.

[64] I am satisfied that the way the breach was described in the statement of problem was clear. It was accepted that an earlier document referred to in the statement in reply did not constitute an employment agreement. The claim for a penalty is within the required time frames. I have simply considered a penalty under a different section to that set out in the statement of problem.

[65] The total maximum penalties that could be awarded for the two breaches are \$40,000. The circumstances are such that I am satisfied there should be consideration of imposition of a penalty for the breaches.

[66] In determining the amount of the penalty I have had regard to the matters in s 133A of the Act. I have had regard to the object of the Act in s 3 including the need to address the inherent inequality of power in employment relationships. I do consider it more likely that the breaches were negligent rather than deliberate. Mr Webley was impacted by the absence of compliant holidays and pay record because he cannot be completely satisfied that he has taken and been paid his holiday entitlement. An employee should be able to be satisfied about

this without the need for extensive and costly assessment and examination. I do weigh that there is no clear evidence that Mr Webley is owed holiday pay and that information was provided by Bish Automotive to attempt to establish what leave was taken and what payments were made.

[67] The provision of an employment agreement would have better informed Mr Webley about protections when the business was restructured at a time when he was on ACC and more vulnerable. I weigh that this did not appear to him to be a major issue before issues arose in the employment relationship. Nevertheless it is a statutory requirement that one be provided in writing. I am not satisfied that Bish Automotive has been previously found by either the Court of the Authority to have engaged in any similar conduct in respect of either breach.

[68] Considering all of these matters and similar awards I find an appropriate award for the breaches is a penalty of \$5,500. This sum should be paid to Mr Webley in all the circumstances.

[69] I order that Bish Automotive (South Island) Limited pay a penalty of \$5,500 and that the whole of the penalty is paid to Brett Webley within 21 days from the date of this determination.

**Costs**

[70] I reserve the issue of costs. Costs are usually assessed in line with the daily tariff and may be able to be agreed. There was a second investigation meeting of about an hour in duration whilst the first meeting concluded about 4.15pm. Failing agreement being reached and taking the holiday period into account Ms Gordon has until 20 January 2021 to lodge and serve submission as to costs and Mr Goldstein has until 3 February 2021 to lodge and serve submission in reply.

**Helen Doyle**  
**Member of the Employment Relations Authority**