

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 495  
3137113

BETWEEN

A J COULTER  
Applicant

AND

WHOLESALE MOTORS  
CHRISTCHURCH LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Alex Kersjes, advocate for the Applicant  
No appearance for the Respondent

Investigation Meeting: 5 November 2021 at Christchurch by Zoom

Submissions Received: On the day from the Applicant  
Date of Determination: 9 November 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Adrian Coulter (known as AJ) says that he was unjustifiably dismissed from his employment with Wholesale Motors Christchurch Limited by text message on 19 November 2020. He seeks reimbursement of lost wages, compensation, holiday pay and a penalty for the failure to provide an employment agreement.

[2] Wholesale Motors Christchurch Limited (Wholesale Motors) was incorporated on 26 February 2018 and has its registered office in Christchurch. It carries on the business of car sales. Wholesale Motors has not lodged a statement in reply, participated in a case management conference with the Authority and there was no appearance on its behalf at the investigation meeting.

[3] I have considered the administration file in this matter. I am satisfied that Wholesale Motors was served at its registered office which is the same as its address for service with the statement of problem, advice of a case management conference, notice of direction and notice of investigation meeting. Copies of the documents were also emailed to the sole director of Wholesale Motors Tyson Adams. As there was no good reason provided for there being no attendance on behalf of the company, the Authority proceeded to hear evidence from Mr Coulter.

[4] The Authority needs to resolve the following issues in this matter:

- (a) How did Mr Coulter's employment with Wholesale Motors end?
- (b) If Mr Coulter was dismissed then was his dismissal unjustified?
- (c) If the dismissal was unjustified then what remedies is Mr Coulter entitled to and are there issues of contribution and mitigation?
- (d) Is Mr Coulter owed holiday pay and if so, in what amount?
- (e) Was there a failure to provide Mr Coulter with an employment agreement and if so, should a penalty be awarded.
- (f) If a penalty is awarded should the Authority order any part of the penalty be paid to Mr Coulter?

#### **How did the relationship end?**

[5] Mr Coulter commenced employment with Wholesale Motors on 2 October 2020. He was not provided with a written employment agreement. Mr Coulter in his evidence said that Mr Adams told him that he would be working on Monday, Wednesday and Friday each week between the hours of 8.30am and 5.30pm. Mr Coulter understood he would be paid \$21 an hour but in fact the payments he received were based on \$19 an hour. Mr Kersjes confirmed there was no claim on the basis that Mr Coulter should have been paid a higher rate than \$19. Mr Coulter said that he was advised his wages would be paid into his bank account each Thursday. He provided Wholesale Motors with his bank account and tax number so that he could be paid by way of automatic payment.

[6] The Authority has been provided with the relevant Inland Revenue Department (IRD) record of earnings and Mr Coulter's bank statements showing automatic payments. An

assessment of the IRD records confirm that Mr Coulter was paid \$484.50 gross for most of the period of his employment which is equivalent to three 8.5 hour days at \$19 per hour each week. Mr Coulter's bank records show that his pay was deposited into his bank account for most of the period of his employment on a Wednesday however he may not have been able to access those funds until the Thursday.

[7] An issue arose for Mr Coulter when on 22 October and 5 November 2020 he was paid the day after he was usually paid. He found this stressful as he and his partner relied on his pay cheque to pay the bills and he has a young child.

[8] He decided to go into work when the late payment occurred a second time to talk to Mr Adams. His partner attended the meeting with him. Mr Coulter recalled the discussion became quite heated as his partner was upset and he had to physically take her home. Mr Coulter said that Mr Adams did not agree that he had told Mr Coulter that pay would be in Mr Coulter's bank and available each Thursday.

[9] After that meeting which was more likely after 5 November 2020 Mr Coulter said that he was given a hard time by his colleagues about his partner's behaviour. He said that he just ignored that feedback and carried on his work as normal.

[10] On 19 November 2020 Mr Coulter noticed that his pay had not been put through that day and sent a text message to Mr Adams:

Good morning tyson. Just noticed you didn't put my pay through last night. R u able to do that when u can please. Much appreciated. Cheers.

[11] The response to that was as follows:

Last pay will go through tomorrow afternoon. We do not require you back AJ, Cheers.

[12] Mr Coulter sent two text messages in response to that. The first was:

Ok. Can I inquire as to y? Thank you for giving me a chance to work with you guys.

[13] The second text message was:

Morning tyson still a bit shocked you fired me through text. Definitely didn't see it coming. With no employment agreement in place I guess u can do what you like which leaves me jobless. I wish things could've been different. I felt as though things were going great. Wasn't told otherwise.

[14] There was no response from Wholesale Motors to either of the two text messages. Two further amounts were paid by Wholesale Motors according to the records on 20 and 27 November 2020. There was a gross payment of \$218.88 and a further gross payment of \$313.50.

### **How did the relationship end?**

[15] The relationship ended when Mr Adams advised Mr Coulter by text message on 19 November 2020 that he was not required back at work. I find that amounted to a sending away. When Mr Coulter attempted to obtain information about why he had been dismissed there was no response. Mr Coulter was dismissed from his employment.

### **Was the dismissal justified?**

[16] The Authority determines justification in accordance with the justification test in s 103A of the Employment Relations Act 2000 (the Act). The Authority does not determine justification by considering what it may have done in the circumstances but is required to consider on an objective basis the actions of Wholesale Motors and whether they were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[17] The Authority must consider whether there was substantive justification for the dismissal. That means it must consider whether any conduct of Mr Coulter's could be fairly and reasonably concluded by Wholesale Motors to be misconduct of a sufficiently serious nature that could justify summary dismissal in all the circumstances.

[18] The Authority must also consider the procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Mr Coulter were sufficiently investigated, whether concerns were raised with him and he had a reasonable opportunity to respond to them and whether his response was considered genuinely before dismissal. The Authority may take into account other factors as appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were minor and didn't result in the employee being treated unfairly. Wholesale Motors could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

[19] The evidence did not support that the conduct of Mr Coulter's partner or any other matter was formally raised with him as a concern. The text messages confirm that he was not clear about the reason of his dismissal. He did not have an opportunity to respond to concerns in the knowledge that his employment could be at risk.

[20] I am not satisfied that the dismissal was procedurally fair and in accordance with the procedural fairness factors in s103A (3) of the Act. The lack of process overlaps with any substantive justification. The dismissal was unjustified.

[21] Mr Coulter has established his personal grievance of unjustified dismissal.

## **Remedies**

### *Unpaid wages*

[22] Mr Coulter said that he applied for painting and decorating, labouring and car groomer roles through Seek and Trade Me however remained unemployed until August 2021. He seeks reimbursement for 13 weeks lost wages. I am satisfied that Mr Coulter attempted to mitigate his loss.

[23] The amount claimed in his statement of evidence needs to be adjusted to reflect his hourly pay rate of \$19 multiplied by 25.5 hours which is \$484.50 gross per week. \$484.50 then needs to be multiplied by 13 weeks.

[24] Mr Coulter is entitled to be reimbursement of lost wages \$6,298.50 gross.

### *Compensation*

[25] The evidence supported that there were financial impacts on Mr Coulter as he lost wages from his work. He said that he also felt stressed, disappointed and humiliated. His confidence deteriorated. Mr Coulter said that he considered his employment was going to be permanent relying in the main on the fact that he was advised Wholesale Motors would assist him with finance for a car after he had worked there for six months. In his written evidence he said that he had to work hard to get back to the financial position he was in before his dismissal. Mr Kersjes submitted that \$15,000 was an appropriate award under this head.

[26] The employment was of short duration. Whilst the income from the job at Wholesale Motors improved Mr Coulter's financial position and provided additional support to his family

which included a young child it was not of a long enough period to have a significant impact on finances. Mr Coulter was living wage payment to wage payment as evidenced by the extent of his concern when his pay was a day late. His income was topped up by payments from the Ministry of Social Development (MSD). There was limited financial cushion for Mr Coulter and his family when his wages from Wholesale Motors stopped. Mr Coulter quickly became unable to meet rental payments without assistance and pay for nappies and formula although he did have continuation of some income from MSD.

[27] The dismissal by text message caused hurt and a loss of confidence to Mr Coulter. Mr Coulter was excited and happy to be working at Wholesale Motors and could only speculate about what had brought the relationship to an end. Whilst it took Mr Coulter a considerable period of time to find alternative employment the responsibility for that cannot lie entirely with Wholesale Motors.

[28] Weighing all these matters I conclude an appropriate award is the sum of \$10,000 for compensation.

#### *Contribution*

[29] The Authority is required under s 124 of the Act to consider where it has determined Mr Coulter has a personal grievance the extent to which his actions contributed towards the situation that gave rise to the personal grievance. If the actions require then the Authority must reduce the remedies awarded.

[30] There is a possibility that the dismissal occurred because Mr Coulter inquired about his wages being paid late and the meeting that became heated with Mr Coulter's partner becoming upset. I am not satisfied in all the circumstances that was contributing conduct for which there should be a reduction to remedies. Mr Coulter is not responsible for his partner's actions, he genuinely considered his pay was late and the distress at the meeting was in all likelihood reflective of the difficult financial position Mr Coulter and his family was in. Wholesale Motors should have met with Mr Coulter to discuss any concerns it had.

[31] I do not reduce the above awards for contribution in the circumstances.

#### **Holiday pay**

[32] The evidence supports that Mr Coulter worked 21 days for Wholesale Motors. His daily rate was \$161.50 being 8.5 hours multiplied by \$19 per hour. On the basis that there were 21 days of work Mr Coulter should have received \$3,391.50 gross. IRD records show that he received \$2,954.88 gross. The IRD records include the gross payments received in November 2020 of \$484.50, \$313.50 and \$218.88.

[33] It appears there was a shortfall so I am not satisfied that there was an overpayment to be credited to holiday pay as Mr Kersjes submitted. I reserve leave for Mr Kersjes to return to the Authority within five days if he remains of that view and holiday pay can if necessary be adjusted. I note for completeness that there is no claim in the statement of problem for recovery of unpaid wages.

[34] I am satisfied that there was no paid leave taken by Mr Coulter during his employment. He is entitled to 8% of his gross earnings for holiday pay. On the basis that he should have received \$3,391.50 gross he is owed holiday pay in the sum of \$271.32 gross.

#### **Penalty for failing to provide an employment agreement**

[35] A penalty has been sought under s 64 of the Act because Mr Coulter was not been provided with a written employment agreement. Section 64 contains the requirement for an employer to retain a copy of an employment agreement. The more appropriate section under which to claim a penalty for the failure to provide an employment agreement is s 65 which requires an individual employment agreement be in writing and sets out certain matters that the individual employment agreement must include.

[36] Mr Coulter was not provided with a written employment agreement. Section 65(4) of the Act provides that an employer is liable in an action brought by the employee to a penalty imposed by the Authority in these circumstances.

[37] The provision of a written employment agreement has been a long standing and fundamental requirement of employers. There is assistance available to employers about suitable employment agreements. Some of the difficulties in this case could have been resolved with a written agreement. I conclude that this is a case where it is appropriate to consider the imposition of a penalty for the failure to provide a written employment agreement.

[38] The maximum penalty for this breach is \$20,000 because Wholesale Motors is a company. I have considered in arriving at an appropriate penalty the matters in s 133A of the Act including the object of the Act. It is not good faith behaviour to fail to comply with the statutory requirement to provide a written employment agreement. Such failure does not address the inherent inequality of power in the employment relationship. I conclude that it would be more likely than not that Wholesale Motors knew a written employment agreement should be provided as it is a long standing statutory requirement. The decision not to provide an agreement was likely not inadvertent but rather intentional.

[39] Mr Coulter was unsure if he asked for an employment agreement to be provided. A written employment agreement would have made it clear what Mr Coulter was being paid each hour and when he was to be paid each week. In his text message sent after his dismissal Mr Coulter wrote to the effect that he thought the absence of an employment agreement meant Wholesale Motors could do what they wanted. This demonstrated a sense of powerlessness on his part. There is no evidence to suggest that Wholesale Motors has previously been before the Authority or Court for similar conduct.

[40] An appropriate penalty in line with similar cases and taking the circumstances into account is \$3000.

#### **Who should receive the penalty?**

[41] Mr Kersjes asks that half of the penalty be awarded to Mr Coulter. I accept that there are aspects of non-compensable loss with the failure to provide an employment agreement and to reflect that Mr Coulter should receive \$1000 of the penalty.

[42] The balance of \$2000 is payable to the Crown.

#### **Orders made**

[43] Wholesale Motors is ordered to pay AJ Coulter for his personal grievance and statutory entitlement to holiday pay within 28 days from the date of this determination:

- (a) The sum of \$6,298.50 gross being reimbursement of lost wages under s 123(1)(b) of the Act.
- (b) The sum of \$10,000 without deduction being compensation under s 123(1)(c)(i) of the Act.

- (c) The sum of \$271.32 gross being holiday pay calculated in accordance with s 23 of the Holidays Act 2003.

[44] Wholesale Motors is ordered to pay a penalty of \$3000 for a breach of s 65 of the Act within 28 days from the date of this determination as follows:

- (a) The sum of \$1000 to AJ Coulter.
- (b) The sum of \$2000 to the Crown.

**Costs**

[45] The meeting occupied under half a day. Mr Coulter is therefore entitled to costs on the basis of one quarter of the daily tariff of \$4,500 and reimbursement of the filing fee of \$71.56.

[46] I order Wholesale Motors to pay to AJ Coulter the sum of \$1125 being costs and the sum of \$71.56 being reimbursement of the filing fee.

Helen Doyle  
Member of the Employment Relations Authority