

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 56
3090453

BETWEEN KEVIN BARRETT
Applicant

AND NRS REFRIGERATION LTD
Respondent

3123575

BETWEEN NRS REFRIGERATION LTD
Applicant

AND KEVIN BARRETT
Respondent

Member of Authority: Philip Cheyne

Representatives: Paul Mathews, advocate for Kevin Barrett
Leanne Smith, advocate for NRS Refrigeration Ltd

Investigation Meeting: 24 November 2020

Information Received: 3 December 2020 from the Applicant
2 December 2020 from the Respondent

Date of Determination: 16 February 2021

DETERMINATION OF THE AUTHORITY

A. NRS Refrigeration Limited is to pay Kevin Barrett \$15,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

B. NRS Refrigeration Limited is to pay Kevin Barrett \$12,740.00, pursuant to s 123(1)(b) of the Employment Relations Act 2000.

C. The claims by NRS Refrigeration Limited are dismissed.

D. Costs are reserved, in accordance with the timetable indicated below.

Employment relationship problem 3090453

[1] Leanne Smith and Nigel Smith are the directors of NRS Refrigeration Limited. Kevin Barrett worked for that company as a refrigeration engineer from March 2017 until the employment ended about September 2019. Mr Barrett says he was dismissed at or following a meeting he had with Mr & Mrs Smith on 17 September.

[2] Mr Barrett engaged an advocate who sent an email on 25 September to Mrs Smith raising Mr Barrett's personal grievance claim of unjustified dismissal. In February 2020, Mr Barrett applied to the Authority to investigate and determine his personal grievance claim.¹ Compensation of \$13,000.00 was sought initially but in an amended statement of problem \$23,000.00 was claimed. Reimbursement of lost remuneration was also sought.

[3] I set out later the company's reply to the personal grievance claim.

Employment relationship problem 3123575

[4] NRS Refrigeration Limited commenced an action in the Authority in October 2020. It had been foreshadowed earlier. The company claims various amounts against Mr Barrett. It claims the cost of damage to a company van caused in four separate incidents, a total of \$1,754.34. There is a claim of \$399.00 for the loss of a Samsung Tablet which the company supplied to Mr Barrett for work purposes. There is a claim of \$645.00 for the cost of twice repairing the screen of the company mobile phone supplied to Mr Barrett for work purposes. After it was returned, the back of the phone was found to be damaged and there is a claim of \$310.00 for that. I refer to these claims together as claims for damages for breach of contract.

¹ In submissions, Mrs Smith queried whether the grievance had been raised in time. Mr Barrett's grievance was properly raised on 25 September 2019 and the action was commenced in the Authority in February 2020. These steps are within the statutory time limits.

[5] The company also claims repayment of wages it paid to Mr Barrett during the employment on two grounds. First, Mr Barrett's timesheets never showed him taking a lunch break. Throughout the employment, the company paid Mr Barrett for all the hours recorded on the timesheet, without accounting for a lunch break. The company now seeks to recover half an hour's pay for 282 days when it says Mr Barrett took a lunch break and should not have been paid (\$4,935.00). Second, the company seeks to recover wage payments it made in excess of the contracted 28 hours per week. The company says that client invoices (Mr Barrett's chargeable work time) never exceeded 12 hours, so Mr Barrett was never entitled to more than 28 hours wages in any week. There is a claim for \$34,726.19. I refer to these claims together as claims for the recovery of wages.

[6] NRS Refrigeration paid for work done on Mr Barrett's personal vehicle in 2017. The company says this was a loan and claims repayment of \$1,057.54. I refer to this claim as the loan recovery claim.

[7] Mr & Mrs Smith withdrew a claim for \$180.00 to clean the van seats.

[8] To the extent necessary, I set out later Mr Barrett's reply to these claims.

Issues to be determined

[9] Despite mediation, the problems were not resolved.

[10] To an extent the problems overlap. The respective claims were investigated together, without objection. NRS Refrigeration included in material it placed before the Authority some information which appears to relate to without prejudice exchanges. I take it that Mr & Mrs Smith did not understand that without prejudice exchanges are not able to be produced in evidence. Mr Barrett's representative sought leave to introduce additional without prejudice correspondence. Determination of the problems would not be assisted by including further without prejudice material. On the issues to be determined, I give no weight to the apparently without prejudice information provided by NRS Refrigeration.

[11] I will first determine the personal grievance claim as it was lodged first in time. I will then turn to the claims by NRS Refrigeration. Adopting that order, the following issues arise:

- (a) Was Mr Barrett dismissed on or after 17 September?
- (b) If yes, was the dismissal justified?
- (c) If not justified, what remedies should be awarded for the personal grievance?
- (d) Can NRS Refrigeration claim damages for breach of contract?
- (e) If yes, what sum has NRS Refrigeration established a right to claim against Mr Barrett?
- (f) Can NRS Refrigeration recover wages it paid to Mr Barrett?
- (g) If yes, what sum has NRS established a right to recover against Mr Barrett?
- (h) Was the cost of the car repairs a loan or a gift by NRS Refrigeration to Mr Barrett?

[12] Evidence, information and submissions that are not relevant to these issues will not be set out or assessed.

Was Mr Barret dismissed on or after 17 September?

[13] More should be said about NRS Refrigeration's reply to the grievance claim. A lawyer filed a statement in reply for the company on 2 March 2020. He advised that he was not acting for the company but had been asked and authorised to file the reply. He stated that Mrs Smith would deliver "voluminous" hard copy attachments in person. The lawyer's email was copied to Mrs Smith. Within several days, Mrs Smith delivered these attachments to the Authority office.

[14] The reply stated that Mr Barrett was made redundant because the company could not afford to keep employing him. The reply raised the loan issue and the lunchbreak part of the wages recovery issue, now part of the claim by NRS Refrigeration. The Authority served the reply and attachments on the applicant as usual. The matter was directed to mediation.

[15] Much later, NRS Refrigeration filed a different response to the personal grievance claim. I make no comment or findings about Mrs Smith's comments to explain why she did this. I treat the later response and further material as an amended statement in reply. The

company's amended response to the grievance can be summarised as follows. At the 17 September meeting it was agreed that Mr Barrett would go on a period of annual leave and the company would discuss the terms on which the employment would continue on his return. The company denies that Mr Barrett was dismissed or made redundant on 17 September or later. At the investigation meeting, Mrs Smith said Mr Barrett brought the employment to an end by abandonment.

[16] The employment agreement dated 14 May 2018² describes NRS Refrigeration's normal hours of business as Monday to Sunday, 8.00am to 4.30pm. Mr Barrett was required to work 28 hours per week during those business hours. NRS Refrigeration was able to offer additional hours from time to time. In practice, days and starting times were set by Mr Smith, usually the day before.

[17] Mr Barrett was not at work on Monday 16 September 2019. He received a call from Mr Smith that day and was asked to come into the office for a meeting at midday the following day. Although the request was unusual, Mr Barrett did not ask and was not told the purpose of the meeting.

[18] Only Mr & Mrs Smith and Mr Barrett were present at the meeting on 17 September so there are no witnesses to what was said.³ No-one made notes during the meeting, although there is some material from about then, which I deal with below.

[19] It is common ground that at the start of the meeting, Mr Smith told Mr Barrett that the company could not or could no longer afford him. There was some mention about the company's difficult financial situation. It is not necessary to canvass the details. Mrs Smith says that she spoke about the annual leave which Mr Barrett had not taken. Mrs Smith says she then asked Mr Barrett to take the leave, they would see how the company performed over that period and could "adjust" his contract when he returned. During the investigation meeting, Mr Barrett confirmed that "it was said about being on annual leave". He also gave evidence that Mrs Smith did say they would "adjust your contract when you come back". In earlier exchanges, Mr Barrett had denied that going on annual leave had been discussed that

² There may have been an earlier signed agreement, but it was not produced in evidence. It is not necessary to canvass the terms of employment which operated before the May 2018 agreement.

³ There is hearsay evidence from Mr Barrett's partner (Ms Marris) and from an employee (Mr Birnie), supporting the versions given by the applicant and the respondent respectively. I place no weight on the hearsay evidence, so it need not be set out.

day. However, in light of his evidence, I find that there was discussion about Mr Barrett taking annual leave with the changes to his employment agreement to be implemented on his return.

[20] At some point prior to the May 2018 agreement, the arrangement had been casual with weekly hours and payment often being less than the standard 28 hours fixed in the May 2018 agreement. With that background, I find that it was understood on 17 September that NRS Refrigeration would continue Mr Barrett's employment on a casual or less regular basis once his holiday pay had been depleted. Mr Barrett's evidence is that he said he needed to go home and have a think about matters. Mrs Smith's evidence is that Mr Barrett said that he needed to have a think about things, she and Mr Smith agreed with that and the meeting ended. I accept that this is how the meeting ended.

[21] Mr Barrett's evidence is that he was shocked and upset. He says he now cannot recall all that was said. Mrs Smith's evidence is that they are unsure how much Mr Barrett acknowledged during the meeting because of his demeanour. Her evidence is that Mr Barrett may have misinterpreted, misheard or not comprehended what they were saying. I find that it was apparent to Mr & Mrs Smith that Mr Barrett was shocked and upset. However, Mr Barrett's reaction and lack of recall now is not sufficient for me to prefer Mr Smith's and Mrs Smith's evidence of the meeting. Events following the meeting help me to make findings about what happened on 17 September.

[22] In evidence is an undated draft letter, provided by Mrs Smith as part of the amended reply. I accept Mrs Smith's evidence that it was drafted by her. Mrs Smith's evidence was that she sent it to a business mentor for review. However, in later submissions Mrs Smith says the draft was mentioned (not sent⁴) to the mentor on 16 September. The mentor apparently proposed a disciplinary approach. NRS Refrigeration did not act on that proposal. Either the letter was drafted shortly before or shortly after the 17 September meeting. It either reflects what Mrs Smith planned to say to Mr Barrett or what had been said to him. Either way, it is relevant to resolving the present evidential dispute. In substance it says:

⁴ During the investigation meeting, Mrs Smith was asked to provide a copy of the email where she sent the draft letter to the mentor. No email was located.

NRS Refrigeration Ltd

Notice to terminate employment agreement between NRS Refrigeration Ltd & Kevin Barrett

[Attendees listed]

Today 17-09-19 due to current financial position of NRS Refrigeration it is with regret termination of employment effective immediately...

Conclusion of meeting:

All Property of NRS Refrigeration Ltd to be returned by 18-09-19

Holiday Pay will be paid out weekly at contracted hours of 28 hours per week until all holiday pay has been dispersed.

NRS would require Kevin Barrett to re-apply for a position if a position becomes available after completion of the above termination period and holiday pay exhausted.

Signed...

[23] Mr Barrett kept his personal hand-tools which he used for work in a company van. He was entitled⁵ to reasonable personal use and he travelled to and went home from the meeting in the van. On 18 September, Mrs Smith sent a txt message to Mr Barrett asking when he was going to return the van. Mr Barrett returned it later on 18 September. It is common ground that Mr Barrett as he was leaving shook Mr Smith's hand and thanked him but described Mrs Smith as a "cow". In evidence when asked to explain his different reaction to the two directors who had dismissed him the previous day, Mr Barrett said that he had respect for Mr Smith but not for Mrs Smith. That reflected Mr Barrett's unspoken attitude before the 17 September meeting, but it was reinforced by Mrs Smith taking the lead role during the meeting.

[24] On 18 September Mr Barrett did not return a hand-grinder which was company property. He did not return his company uniforms or the company mobile phone and charger. Items were returned later.

[25] The pay period ran weekly ending on a Tuesday. Wages were paid weekly on a Wednesday by direct credit. Mr Barrett filled in a timesheet for time worked on three days between Wednesday 11 September and Tuesday 17 September. It is dated 18 September. The same day, Mrs Smith sent Mr Barrett an email with the subject "Holiday Pay". In the email Mrs Smith mentions figures for holiday pay and annual leave. She says that the total owed is around \$5,000.00. Holiday pay of \$1,944.78 would be paid as annual leave for now

⁵ Clause 16.2 of the employment agreement.

until it is all gone. Mrs Smith says that Mr Barrett went on annual leave from 17 September while Mr Barrett says he was told that his holiday pay would be paid weekly as they could not afford to pay the full amount. The text of the email does not assist with resolving the dispute between Mrs Smith and Mr Barrett over what was said at the meeting. I note also a computerised payslip for the period ending 17 September is marked “Final Pay”.⁶ Mrs Smith explains the payslip by her needing to generate a final pay so she could see the total owed. There is no reason to doubt that evidence. The “Final Pay” payslip does not assist with the dispute over what was said on 17 September.

[26] NRS Refrigeration made no arrangement with Mr Barrett about when he was expected to return to work.

[27] After these exchanges on 18 September, there were no further exchanges until 25 September at 10.04am when Mr Barrett’s representative by email raised the personal grievance of unjustified dismissal. The representative advises he acts for Mr Barrett pursuant to the Employment Relations Act 2000 and requests all future correspondence be directed to him. The email goes on to state:

Facts (in Kevin’s words)

I was called to a meeting on Tuesday 17 September at 12pm, all I was told was I was made redundant because “I can’t afford you”. I asked when did this take effect from. I was told immediately. They told me that they couldn’t afford to pay out my holiday pay and it would be paid week by week until paid out.

[28] Mrs Smith phoned Mr Barrett’s representative. The amended statement of problem states that Mrs Smith said that the company was insolvent, trading at a loss, considering voluntary liquidation and acknowledged no redundancy process had been followed when Mr Barrett was dismissed. The exchange was not documented, Mr Barrett was not party to it and Mr Mathews did not give evidence. Mrs Smith’s evidence is that she told Mr Mathews that Mr Barrett had not been dismissed.

[29] Mrs Smith messaged Mr Barrett directly at 10.47am on 25 September:

Hi Kevin, just to advise both companies are trading insolvent and have been all year. We could not afford to keep you end of story. All our accounts are now in the hands of a bookkeeper/accountant. ...

⁶ Another payslip for the same pay period is not marked “Final Pay”.

[30] The message continued with Mrs Smith setting out issues which now form part of the claim by NRS Refrigeration against Mr Barrett. If Mr Barrett had not been dismissed, as Mrs Smith claims to have told Mr Mathews, one would expect her to say that in this message directly to Mr Barrett. Mrs Smith's evidence now, to explain "We could not afford to keep you end of story", is that the message was wrongly worded. I do not accept that evidence. It is much more likely that the words in the message accurately convey what had happened at the 17 September meeting.

[31] On 3 October there was an exchange between Mrs Smith and Mr Barrett's representative. It appears to have followed Mr Barrett advising the representative that he had not received any payment that week. Mrs Smith's evidence is that NRS Refrigeration requested that Mr Barrett return uniforms, some access fobs, the grinder and phone charger. There is no evidence about any relevant exchanges following the request.

[32] Mrs Smith produced in evidence emails dated 17-21 October between her and Ms Gibson, who is engaged by the company's accountancy firm, in order to establish that Mr Barrett was still regarded as an employee then. Mrs Smith asked Ms Gibson to check Mr Barrett's holiday pay status as she wanted to know if she still needed to be paying him. Ms Gibson responded pointing out that Mrs Smith since 17 September had been "treating him as an employee". I accept that for payroll purposes Mrs Smith continued to treat Mr Barrett as a current employee, at least until mid-October. However, the payroll treatment does not conclusively answer whether or not Mr Barrett's employment had ended as a result of the 17 September meeting. It is common ground that Mr Barrett was periodically paid accrued holiday pay but did not work after the meeting. The payroll treatment could have been to accommodate payment of the holiday pay in several tranches after the end of the employment.

[33] I find that by its exchanges with Mr Barrett on and following 17 September, NRS Refrigeration ended his part-time employment for 28 hours per week. In substance, Mr Barrett's account of the meeting conveyed in the 25 September email reflects the substance recorded by Mrs Smith in the draft letter. On receipt of the grievance, Mrs Smith promptly confirmed directly to Mr Barrett that his part-time employment had ended, explaining "We could not afford to keep you end of story". Given Mrs Smith's message to Mr Barrett and her draft letter, I do not accept her evidence that she told Mr Mathews that Mr Barrett had not been dismissed.

[34] On 17 September, NRS Refrigeration did not expressly tell Mr Barrett that he was dismissed and did not refer to redundancy. I also accept that NRS Refrigeration anticipated it might have an ongoing need for a refrigeration engineer, skills which were in short supply. NRS Refrigeration on 17 September indicated the possibility of continued employment once it had paid all Mr Barrett's accumulated leave and holiday pay. However, continued employment would only have been on different terms of employment. NRS Refrigeration communicated that clearly on 17 September.

[35] I find that NRS Refrigeration's words and actions constituted a termination of the existing terms of employment, amounting to a dismissal of Mr Barrett.

Was the dismissal justified?

[36] The question of whether the dismissal was justified must be assessed objectively, by considering whether NRS Refrigeration's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. I must consider whether NRS Refrigeration sufficiently investigated any allegations, whether it raised its concerns with Mr Barrett, whether it gave him a reasonable opportunity to respond and whether it genuinely considered any explanation before it dismissed Mr Barrett. I may consider other appropriate factors.⁷ If an employer is proposing to make a decision that will or is likely to have an adverse effect on the continuation of an employee's employment, they must provide access to information relevant to the continuation of the employment and an opportunity to comment on it before the decision is made.⁸ The test for justification includes consideration of good faith obligations.

[37] I accept that Mr & Mrs Smith had concerns before 17 September regarding at least some of the issues on which the company's claim is based. Mrs Smith's evidence, which I accept, is that they did not raise those matters with Mr Barrett but only raised the company's inability to afford his wages. It follows that the company could not justify the dismissal of Mr Barrett by reference to the issues in its claim.

[38] Regarding the dismissal based on an inability to afford Mr Barrett's wages, I find that NRS Refrigeration's action and how it acted were not what a fair and reasonable employer

⁷ Employment Relations Act 2000 s 103A.

⁸ Employment Relations Act 2000 s 4(1A).

could have done at the time. I accept that NRS Refrigeration experienced significant financial difficulties before 17 September 2019. Some detail of those difficulties was produced during the Authority's investigation but it is not necessary to canvass the details. While financial circumstances prompted NRS Refrigeration's meeting with Mr Barrett on 17 September, its actions and how it acted are still subject to the statutory test of justification and the application of good faith obligations.⁹

[39] Circumstances were not such that a fair and reasonable employer could meet with the employer to tell them that they could no longer afford them and that they would later adjust the contract, without first giving the affected employee notice of the intended purpose of the meeting and an opportunity to seek advice or support.

[40] Mr Barrett had an untaken entitlement to annual leave. He had a further entitlement to proportionate holiday pay. Mrs Smith intended Mr Barrett to take his untaken leave and to pay him the proportionate holiday pay to satisfy the company's financial liability to Mr Barrett, instead of complying with the obligation under the contract to pay a weekly wage for Mr Barrett's services. The Holidays Act 2003 sets respective rights and obligations regarding the granting and taking of leave entitlements which are due or accruing. Circumstances were not such that a fair and reasonable employer could obtain the employee's consent to take all accrued leave and accept payment of the proportionate holiday pay, without first allowing the employee an opportunity to get advice.

[41] I find that Mr Barrett was unjustifiably dismissed and he has a personal grievance.

[42] Mr Barrett directly or through his representative did not raise his issues or concerns with the company before raising the personal grievance of unjustified dismissal on 25 September. NRS Refrigeration argues that Mr Barrett did not comply with the company policies and procedures set out in the company handbook aimed at informal resolution of grievances.

[43] Mr Barrett exercised a statutory right to raise a grievance by instructing his representative to write to Mrs Smith. That right is not compromised by the procedures in the handbook. Mr Barrett's decision to raise his grievance in that way did not prevent Mr & Mrs Smith from trying to discuss matters through the representative. Mr Barrett not utilising

⁹ *Grace Team Accounting Ltd v Brake* [2014] ERNZ 129.

the “Informal resolution procedure” in the handbook does not affect the outcome of his personal grievance claim.

What remedies should be awarded?

[44] There is a claim under s 123(1)(b) of the Act for reimbursement of lost wages. The claim is subject to s 128 of the Act. That provision requires me to order NRS Refrigeration to pay the lesser of the sum lost or 3 month’s ordinary time remuneration. Here, 3 months’ ordinary time remuneration is the lesser sum.

[45] Medical reports establish that the dismissal caused a recurrence of a pre-existing illness which resulted in Mr Barrett being placed on a sickness benefit in November 2020 once his annual leave payments had been exhausted. Mr Barrett’s incapacity to work was caused by the unjustified dismissal. I find that Mr Barrett lost remuneration as a result of his personal grievance. Despite his incapacity, Mr Barrett did look for replacement employment.

[46] Ordinary time remuneration for Mr Barrett is assessed by reference to his employment agreement. His normal hours were 28 per week at \$35.00 per hour. Three months’ ordinary time remuneration comes to \$12,740.00. The only income Mr Barrett received in the period 3 months after the date his holiday pay was exhausted was the benefit payment from the Ministry of Social Development. Mr Barrett may have an obligation for the lost remuneration now ordered to be accounted for under benefit arrangements. NRS Refrigeration must bear liability for the loss of remuneration it caused without any allowance for this benefit payment.

[47] Section 128(3) permits me to exercise a discretion to order NRS Refrigeration to pay a greater sum than is provided under s 128(2). However, I decline to exercise this discretion in the present case. NRS Refrigeration might have justifiably dismissed Mr Barrett for redundancy, given its financial situation. It would have needed to comply with its contractual and statutory obligations to Mr Barrett, which would have taken some time. However, that is unlikely to have meant that Mr Barrett’s employment would have continued beyond 3 months from the date he was unjustifiably dismissed.

[48] When the grievance was raised on 25 September Mr Barrett sought \$13,000.00 compensation under s 123(1)(c)(i) of the Act. That amount was claimed when the problem

was first filed with the Authority. The claim increased to \$23,000.00 in the amended problem.

[49] There is no reason to doubt the medical information¹⁰ which is that the dismissal caused a recurrence of a pre-existing condition. It is unclear whether the medication mentioned in the reports were existing prescriptions which were adjusted, were a resumption of prior prescriptions or were new prescriptions, in response to the recurrence. Whichever, NRS Refrigeration caused the harm which resulted in the medical circumstances described in the medical reports.

[50] Mr Barrett said that the matter having been ongoing for more than a year had caused him to lose confidence in myself. He says that he often spends long periods at home by himself not wanting to go out. He has had sleepless nights, periods of anxiety and depression, lack of drive and motivation. There has been a lot of severe stress and weight loss through not eating. He has suffered a difficult financial position, having to withdraw money from his KiwiSaver account. There is no reason to doubt any of this evidence.

[51] Taking the medical information and Mr Barrett's evidence together, the effects caused by the unjustified dismissal are significant. I assess \$15,000.00 as the amount of compensation to remedy these effects.

[52] I am required to consider the extent to which Mr Barrett contributed in a blameworthy way to the situation giving rise to the grievance, and reduce remedies accordingly.¹¹

[53] NRS Refrigeration says in its amended reply that it had "many grounds" to dismiss Mr Barrett, but it did not. It says it was hopeful that work would pick up and it would need an engineer. The company says that Mr Barrett's contract "needed to be corrected for us to re-evaluate correct and change his contract on his return". I refer to the earlier findings about what was said on 17 September. The situation giving rise to Mr Barrett's grievance was unrelated to the "many grounds". The situation giving rise to the grievance was the way in which NRS Refrigeration ended Mr Barrett's employment, in order to manage its financial

¹⁰ It is not necessary to set out the details. NRS Refrigeration makes an issue of not being advised during the employment about Mr Barrett's pre-existing condition and prescriptions. Mr Barrett owed no duty to his employer to disclose these matters.

¹¹ Employment Relations Act 2000, s 124.

circumstances. Mr Barrett did not contribute in a blameworthy way to that. The application of s 124 of the Act does not cause me to reduce remedies.

[54] To summarise, Mr Barrett is entitled to reimbursement of \$12,740.00 in lost remuneration and \$15,000.00 in compensation. There will be orders for these amounts.

Can NRS Refrigeration claim damages for breach of contract?

[55] The signed employment agreement says¹² that Mr Barrett will comply with NRS Refrigeration's policies and procedures. It then states¹³ "the specific detail of the Employer's policies do not form a term of your agreement". Agreement is defined as the employment agreement. Failure to comply with company policies renders the employee liable to disciplinary action, including dismissal.¹⁴

[56] Clause 8.1 of the handbook provides:

any damage to vehicles, stock or property ... that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement

...

in the event of an at fault accident whilst driving one of the Employer's vehicles you may be required to pay the cost of the insurance excess

[57] In support of its claim for damages, NRS Refrigeration is relying on the provision in the handbook, even though the employment agreement expressly excludes the handbook provision from having effect as a contractual term. I also note that clause 33 of the employment agreement provides that its contents constitute the entire agreement between Mr Barrett and NRS Refrigeration. I find that the effect of clause 5(b) of the employment agreement is that clause 8.1 of the handbook cannot be advanced by NRS Refrigeration to claim damages for breach of an employment agreement.

[58] Under clause 5(c), NRS Refrigeration was entitled to initiate disciplinary investigations at the time issues arose, but did not. Its claims now for damages for breach of contract must be dismissed.

¹² Clause 5(a).

¹³ Clause 5(b).

¹⁴ Clause 5(c).

[59] It is not necessary to canvass the circumstances in which the damage to the company vehicle arose, whether Mr Barrett was at fault, the effect of the provision about the insurance excess, whether Mr Barrett lost the Samsung Tablet or the circumstances in which the phone was damaged. It is not necessary to assess the value of any losses.

Can NRS Refrigeration recover wages it paid to Mr Barrett?

[60] The claim by NRS Refrigeration is to recover wages paid under a mistake. It paid Mr Barrett wages based on his timesheets. It says Mr Barrett was paid for lunch breaks but it was not required to pay for that time.

[61] Section 74B of the Property Law Act 2007 can apply as a defence to a claim for payments under a mistake.¹⁵ To paraphrase, relief shall be denied (wholly or in part) if the recipient of the payment received it in good faith and has so altered their position in reliance on its validity so that it is inequitable (considering the implications for both parties) to grant relief (fully or partly).

[62] The employment agreement does not specify an entitlement to or the timing of a lunch break. The handbook includes clause 2.4 headed “Rest and Meal Breaks”. Employees will be given breaks to ensure adequate time to rest. Generally full time employees will be provided with two paid breaks and one unpaid meal break each day. The meal break should be no longer than half an hour in duration. The employee acknowledges that flexibility is required “in relation to the taking of meal and other breaks in order to meet the requirements of the Employer’s business”.

[63] The handbook provision reflects the more permissive statutory regulation of meal breaks that applied before the Employment Relations Amendment Act 2018 took effect on 6 May 2019.

[64] Blank printed timesheets were provided by NRS Refrigeration. The first form had columns for date, start time, end time, regular hours, overtime hours and total hours. Mr Barrett generally filled in the date, his start time, his end time, the regular hours and total hours. From about November 2018, a different form was provided. It included additional columns headed “Start time of unpaid break”, “Restart time” and “Other times/Breaks”.

¹⁵ *Foai v Air New Zealand Limited* [2012] NZEmpC 57. At the time of that case, the provision was enacted as s 94B of the Judicature Act 1908.

There were also columns for the type and number of hours leave. In the second form, the hours and the leave hours columns included the words “hours minus unpaid breaks” in brackets. Mr Barrett generally filled in the date, the start time, the finish time and his daily hours as before. He also entered his daily hours, usually in the correct column. Mr Barrett did not record the start time or end time of any unpaid breaks. Mr Barrett continued to provide the same information, despite the second form’s space for greater detail. Mr Barrett provided his signed time sheets each week to NRS Refrigeration. Mrs Smith or Mr Smith checked the timesheets and arranged for Mr Barrett to be paid his claimed hours, or 28 hours if the weekly hours worked were lower.

[65] The claim by NRS Refrigeration is speculative. There is an assumption that NRS Refrigeration provided Mr Barrett with a meal break to which he was entitled, taken at a time as agreed or as directed by the company, to adopt the language of the Employment Relations Act applicable when Mr Barrett was first employed. The assumption is that NRS Refrigeration gave Mr Barrett an unpaid meal break each day, to adopt the words used in the handbook dated April 2018. The assumption can be expressed as NRS Refrigeration providing the 30 minute meal break to which Mr Barrett was entitled, which was unpaid, to adopt the language used in the Employment Relations Act as amended. However one expresses the assumption, there is no evidence to establish that NRS Refrigeration provided Mr Barrett with a 30 minute meal break during his work on any day. Equally, there is no evidence to establish that Mr Barrett took an unpaid meal break on any day.

[66] Mr Smith and Mr Barrett often worked together, attending to clients’ requirements. Travelling to clients’ premises, then attending to and completing their work was given priority. The timing and duration of a meal break worked around that. Mr Barrett’s evidence is that he “very rarely” took lunch breaks, “very rarely” stopped for smoko breaks and normally ate in between jobs or travelling. There is no reason to doubt this evidence, which I accept. NRS Refrigeration was always aware of this pattern of working.

[67] NRS Refrigeration needs to show that Mr Barrett has been enriched, that enrichment was gained at the company’s expense and that Mr Barrett’s enrichment at its expense was unjust.¹⁶ The evidence does not show that Mr Barrett was enriched.

¹⁶ *Commissioner of Inland Revenue v Stiassny* 920120 10 NZBLC 99,704 (CA).

[68] Even if NRS Refrigeration could show that Mr Barrett was enriched, it could not show that any enrichment was unjust. Mr Barrett simply wrote his starting and finishing times and totalled up the hours. NRS Refrigeration checked the timesheets and authorised payment for these hours, in full knowledge that Mr Barrett might have had a meal at some point when he worked longer than half a day.

[69] As NRS Refrigeration has shown grounds for recovery, it is not necessary to consider whether the statutory defence arises. This part of the claim will be dismissed.

[70] NRS Refrigeration claims a right to recover \$34,726.19 from Mr Barrett, as he was a “Time Thief”. NRS Refrigeration has reconciled Mr Barrett’s paid time against the time recorded and invoiced to its clients. The company says that Mr Barrett’s client chargeable time never exceeded 12 hours per week. The claim now is to recover the wages paid in excess of 28 hours per week, the minimum under the employment agreement. The claimed amount is broken down into the year to 31 March 2019¹⁷ and the period from 1 April 2019 to 17 September 2019.

[71] The hours charged to clients by a supplier of services reflect many factors apart from the time actually expended by an employee who provides the service. It is unsurprising that an employer pays its employee for more hours than it charges its clients. On the assumption that the reconciliation correctly identifies all work performed and recorded by Mr Barrett which was chargeable to the client, NRS Refrigeration had grounds to consider the efficiency of its business operation. It does not establish any default by Mr Barrett entitling NRS Refrigeration to recover wages it paid to him during the employment.

[72] This part of the claim will be dismissed.

Was the cost of the car repairs a loan or a gift by NRS Refrigeration to Mr Barrett?

[73] Work was done on Mr Barrett’s personal vehicle, charged to and paid by NRS Refrigeration with the company’s agreement. This was in about September 2017. The claim for \$1,057.54 was first raised as a response to Mr Barrett’s personal grievance claim. It is supported by an invoice dated 3 October 2019.

¹⁷ I take the reference to “YTD March 2020” in the company’s statement of problem as a typographical error.

[74] Mr Barrett's evidence is that he asked Mr Smith in either October or November 2017 about how much he owed for the cost of repairs. Mr Barrett says that Mr Smith told him not to worry as it was an early Christmas present. Mr Smith denies saying anything about an "early Christmas present". He says that he thought they would always work out a repayment scheme. Nothing was ever documented. NRS Refrigeration says "Under no circumstances would we write off such an invoice". It says that in light of Mr Barrett's financial situation it did not "push the issue" but it expected it to be repaid.

[75] One would expect that some arrangement would have been made sometime in late 2017, 2018 or before 17 September 2019 about repayments or to document the arrangement, if the company paid the repair invoice by way of a loan. The absence of any repayments or arrangement supports Mr Barrett's evidence that it was a gift. If it had been a loan, one might expect NRS Refrigeration to have brought it up on 17 September or in Mrs Smith's draft letter. The shortage of staff with Mr Barrett's qualifications makes it not unlikely that an employer might make a gratuitous offer. That possibility is reinforced by the good relationship between Mr Barrett and Mr Smith throughout the employment.

[76] On balance, I find that NRS Refrigeration did treat the cost of the work on Mr Barrett's personal vehicle in 2017 as a gift. Something to that effect was said by Mr Smith to Mr Barrett in 2017. NRS Refrigeration cannot now treat it as a loan. This part of the claim by NRS Refrigeration will be dismissed.

Summary

[77] Mr Barrett was unjustifiably dismissed so has a personal grievance against NRS Refrigeration. To remedy the grievance, NRS Refrigeration must pay Mr Barrett \$12,740.00 as reimbursement for lost remuneration and \$15,000.00 as compensation.

[78] The claims against Mr Barrett by NRS Refrigeration all fail.

[79] I am asked to reserve costs and will do so. If costs are not agreed between the parties, Mr Barrett may lodge and serve submissions within 14 days setting out any claim for costs. NRS Refrigeration may lodge and serve submissions in response within a further 14 days. A written determination on costs will follow.

Philip Cheyne
Member of the Employment Relations Authority