

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 95  
3109317

BETWEEN	BOB THANABABU Applicant
AND	KEIGHTLEY MOTORS LIMITED First Respondent
AND	MALCOLM KEIGHTLEY Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Emma Moss, advocate for the Applicant Greg Denholm, counsel for the Respondent
Investigation Meeting:	11 February 2021
Submissions and/or further evidence	19 February 2021 from Applicant and from Respondent
Determination:	09 March 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Bob Thanababu, claims that he was unjustifiably dismissed by the Respondent, Keightley Motors Limited (KML).

[2] Mr Thanababu also claims that he was unjustifiably disadvantaged in his employment by KML's failure to pay his notice period, to pay him for additional hours worked or for sick leave taken, its failure to provide him with a written employment agreement, or to keep and produce accurate time and wage records.

[3] Mr Thanababu further claims that KML failed to act in good faith, and that the failure by KML to record the hours he worked disadvantaged him in his ability to make an accurate claim.

[4] KML denies that Mr Thanababu was unjustifiably dismissed and claims that he failed to return to work following an incident on 11 December 2019.

[5] KML denies that Mr Thanababu is owed monies in respect of sick leave entitlement on the basis that he had exhausted his entitlement.

#### **Note**

[6] Mr Denholm representing KML was unable to attend the Investigation Meeting in person, but agreed to be joined by telephone in order not to further delay the investigation.

#### **The Authority's investigation**

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

#### **Issues**

[8] The issues requiring investigation are whether or not Mr Thanababu was unjustifiably:

- dismissed by KML
- disadvantaged by KML failing to:
  - pay him in respect of a notice period
  - pay him for all the hours worked
  - provide him with a written employment agreement
  - keep and produce accurate time and wage records
  - act in good faith

#### **Background**

[9] KML is an automotive repairs and servicing business, Mr Malcolm Keightley is the sole director and he and his wife are shareholders.

[10] Mr Thanababu commenced employment at KML in May 2007. He said at that time KML employed five people. Mr Thanababu commenced employment as a Mechanic.

[11] Mr Thanababu said his commencement rate of pay was \$23.00 per hour which increased shortly afterwards to \$25.00 an hour. During Mr Thanababu's employment he

received a number of salary increases and his rate of pay at termination of employment was \$36.00 per hour.

[12] Mr Thanababu was not provided with an individual employment agreement upon commencement, and he did not request one. However an unsigned written employment agreement was provided to the Authority by KML which was drafted with a commencement date of 21 December 2016. Mr Thanababu said the employment agreement had been initiated by Mr Keightley but it had not been provided to him.

[13] This individual employment agreement was not signed by the parties but stated that Mr Thanababu's position was that of Mechanic, and provided in Schedule 2 that Mr Thanababu's rate of pay was \$32.00 per hour, and his hours of work were 40 per week to be worked between the hours of 8.00 a.m. to 5.00 p.m.

[14] Mr Thanababu said his position changed after he started employment and following the departure of a member of staff, so that in addition to his duties as Mechanic he took over issuing customer bills and the duties of a service manager.

[15] He said that he and Mr Keightley enjoyed a good working relationship, which over some years developed into a friendship in which they enjoyed social activities together and supported each other during their respective marital breakdowns.

[16] When cross-examined during the Investigation Meeting Mr Keightley confirmed that after his marriage had ended, he had been invited to live with Mr and Mrs Keightley and did so for a period of approximately two weeks.

[17] Mr Thanababu said that he worked hours in excess to his contractual hours of 40 per week, regularly working an additional half an hour a day.

[18] Mr Thanababu had no evidence in support of this assertion, he had not kept a record of the times he worked, either in the form of timesheets or diary notes. Mr Thanababu said he had not kept a record because he had not anticipated having to make any claim in the Authority.

[19] Mr Thanababu said that during the first five years of his employment he had not taken many holidays. As the only person qualified to sign off vehicle warrant of fitness certifications, he said it became more difficult to take time off from work. His responsibility gradually increased so that he was opening KML in the mornings and sending off invoices in the afternoons.

[20] Mr Thanababu said he would send text messages to Mrs Keightley at the close of business informing her of the amount of payments made that day, and make requests in that manner. In one email dated 10 October 2018 Mr Thanababu texted: "Hey Sharon. Day end \$3417,77. Cheque deposit in the bank \$1712.26. Tomorrow is my birthday is it possible to have a day off on Friday please."

[21] Mr Thanababu said in 2016 Mr Keightley had decided that he wished to reduce his days of work at KML and he suggested that Mr Thanababu become a partner in KML. Mr Thanababu declined, but told Mr Keightley that he would consider buying a share of KML, however he said there were difficulties in his obtaining full financial information about KML from Mr Keightley.

[22] By 2018 Mr Thanababu had suffered some health problems, and following an operation, was no longer in a position to pursue the option of buying a share in KML.

[23] From that time onwards Mr Thanababu said his personal relationship with Mr Keightley changed. He said Mr Keightley criticised his work and spoke harshly to him.

[24] In September 2018 Mr Thanababu's rate of pay was increased to \$34.00 per hour, and in March 2019 it was increased to \$36.00 per hour.

[25] Mr Thanababu said he took sick leave in November 2019 because he was feeling pressurised by Mr Keightley who expected him to do more work for the same pay. He said he was not paid for the period of sick leave.

[26] On or about that time he said Mr Keightley recruited an additional employee who was qualified to do WOF check work.

[27] Mr Thanababu said he returned to work on 27 November 2019 and from that point onwards Mr Keightley was in KML at the start of the business day.

[28] Mr Thanababu said he had considered Mr Keightley was becoming more hostile and aggressive towards him and it became an unpleasant working environment.

#### *Incident 12 December 2019*

[29] On 12 December 2019 Mr Thanababu said he had been working on a customer's vehicle when Mr Keightley spoke to him at approximately 4.55 p.m. and informed him that the work on the vehicle needed to be completed that day. Mr Thanababu said he told Mr Keightley that he had spoken to the customer who was happy to leave the vehicle at KML overnight.

[30] Mr Thanababu said Mr Keightley had told him he wanted the vehicle finished that day, however Mr Thanababu had responded that Mr Keightley did not pay him overtime and he was not going to stay to do the work that evening.

[31] At that point Mr Keightley had told him: “if you can’t finish it, f... off, I will finish it”. Mr Thanababu said he replied: “Sweet as” and picked up his mobile telephone, took photographs of his tools and told Mr Keightley he was recording the conversation of Mr Keightley ‘firing him’.

[32] Mr Thanababu said Mr Keightley told him to ‘go home’ so he asked if Mr Keightley was dismissing him at which point Mr Keightley knocked the telephone from his hand and tried to step on it. He said Mr Keightley told him to; “f... off” and to “watch your back” and pushed him towards the door.

[33] Mr Thanababu said he noticed that his telephone screen had been broken, and informed Mr Keightley. Mr Thanababu said he had telephoned the police station after he left, but decided that he was not going to report the incident.

[34] Mr Thanababu said Mr Keightley did not contact him following the incident on 12 December 2019.

[35] He returned to KML in late February – early March 2020 to organise the collection of his tools with Mr Keightley. During their conversation Mr Thanababu said Mr Keightley did not ask him why he had not attended for work or when he intended to return.

#### **Was Mr Thanababu unjustifiably dismissed by KML?**

[36] Mr Thanababu considered that his employment at KML had been terminated by Mr Keightley during their heated altercation on 12 December 2019.

[37] During the majority of the period in which Mr Thanababu worked at KML his evidence was that he and Mr Keightley enjoyed a close relationship which went far beyond that of employer/employee and was that of friendship. They socialised together and supported each other emotionally during their respective marriage breakdowns and Mr Thanababu’s evidence was that Mr Keightley invited him to stay at his home after Mr Thanababu’s marriage breakup.

[38] Mr Thanababu’s evidence was that the relationship between him and Mr Keightley became unpleasant following his being unable to proceed with buying a share of KML, however I find this alleged change in the nature of their relationship is not supported by the fact that Mr Thanababu received salary increases in September 2018 and again in March 2019.

[39] Following Mr Thanababu's period of absence in November 2019 his evidence was that the relationship between him and Mr Keightley cooled, and Mr Keightley refused to pay him for some period of his sickness absence.

[40] Following the incident on 12 December 2019 during which Mr Keightley swore at him and told him that he would finish the work on the customer's vehicle himself. Mr Thanababu regarded this as a sending away.

[41] Mr Thanababu did not return to the KML workplace until approximately late February 2020. The unsigned employment agreement states in the clause headed: "Abandonment of Employment":

Where the employee is absent from work for a period of 3 continuous working days without notification to the employer, and the employer has taken steps to contact the employee, the employee shall be deemed to have abandoned their employment, and termination shall occur on the third day without the need for notice.

[42] Mr Thanababu's evidence was that KML did not contact him following 12 December 2019 to ascertain the reason for his absence.

[43] Following the incident on 12 December 2019 and KML's lack of contact, Mr Thanababu concluded that he had been dismissed.

[44] Both men had become heated during their exchanges. It was in this emotionally charged situation that Mr Keightley asked Mr Thanababu to leave the KML premises. In *Boobyer v Good Health Wanganui Ltd*, a case which was concerned with a resignation, the Employment Court said of that in this type of case that the employer cannot safely insist on what the employee may have said:

This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this issue or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties"<sup>1</sup>

[45] In that situation, it is reasonable to examine the actions taken after the parties have had the opportunity for a 'cooling down' period.

[46] Following the incident on 12 December 2019, there is no evidence that Mr Keightley attempted to contact Mr Thanababu to ascertain the reason for his absence which I consider to be the action of a fair and reasonable employer after a cooling down period.

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<sup>1</sup>*Boobyer v Good Health Wanganui Ltd* (unreported) WEC 3/94 at pg 3

[47] Moreover the draft employment agreement provided by KML states that if the employee is absent from work for three continuous days without notification, “and the employer has taken steps to contact the employee ..”. However Mr Thanababu’s evidence was that no steps were taken by KML to contact him following 12 December 2019 to find out the reason for his continued absence

[48] I determine that Mr Thanababu was unjustifiably dismissed by KML.

**Was Mr Thanababu unjustifiably disadvantaged by KML failing to pay him a notice period?**

[49] The unsigned employment agreement set out that: “No less than four (4 weeks’) notice shall be required by either party to terminate this agreement.”

[50] No notice was provided to Mr Thanababu following his dismissal on 12 December 2019 and I determine that he was unjustifiably disadvantaged by KML failing to pay him a notice period.

**Was Mr Thanababu unjustifiably disadvantaged by KML failing to pay him for all the hours he worked?**

[51] Mr Thanababu ‘s evidence was he consistently worked an additional 30 minutes throughout the duration of his employment, but he was unable to provide any evidence of this apart from a few text messages to Mrs Keightley which do not establish a consistent manner of working additional hours to his contractual hours..

[52] A document provided to the Authority on KML letterhead states:

In 2016 we upgraded to an electronic time clocking system which interlinks with the workshop invoicing system. Bob refused to use our time clocking system.

[53] Mr Thanababu’s evidence was that he did refuse to use the electronic time clocking system, the purpose of which was to provide information for customer invoicing purposes. Mr Thanababu said that it was too difficult for him to use because his time was split between mechanical work and administration work.

[54] I consider that if Mr Thanababu had utilised the time clocking system at least for that part of his working day which was spent on mechanical work that would have provided a helpful indication of some of the hours he worked and have provided evidence in support of his claim.

[55] Whilst there is an onus on the employer to keep a wage and time record under S 130 of the Act, and the Authority may accept as proven all claims made by the employee as regards

his time worked by him or her, the claim made by the employee must be proven to the Authority's satisfaction in order for that discretion to be exercised.

[56] In this case, there is no evidence provided by Mr Thanababu in support of his claim, and I find the lack of evidence undermines the reliability of his claim to unpaid hours worked by him.

[57] I determine that Mr Thanababu has failed to substantiate his claim.

**Was Mr Thanababu unjustifiably disadvantaged by KML failing to provide him with a written employment agreement?**

[58] Mr Thanababu's evidence was that the employment agreement with a commencement date of 21 December 2016 was initiated by Mr Keightley, however it had not been provided to him.

[59] I consider that an employer who initiates an employment agreement would be more likely than not to provide it to the employee named as a party to it. The employee name on the written employment agreement is "T Thiyaralingham" which Mr Thanababu confirmed was him. The terms of employment were set out on Schedule 2 to the employment agreement.

[60] However the employment agreement has not been signed by either party and therefore I accept Mr Thanababu's evidence that it was not provided to him and find that this omission disadvantaged him because he was not aware of his contractual rights.

[61] I determine that Mr Thanababu was unjustifiably disadvantaged by KML failing to provide him with a written employment agreement

**Was Mr Thanababu unjustifiably disadvantaged by KML failing to keep and produce accurate time and wage records?**

[62] Mr Thanababu's evidence was that he had taken few holidays during the first few years of his employment with KML, and that he was not paid for sickness absence, although his evidence included evidence of annual leave and sick leave being taken, but without accurate dates being provided.

[63] The failure to provide Mr Thanababu with wage and time records affected his ability to provide detailed information to the Authority, and he did not provide evidence in the form of diary notes or medical certificates provided to the Authority.

[64] The records provided by KML indicate that Mr Thanababu was paid 8.5 days in excess of his holiday entitlement, with a breakdown of the dates when leave was taken. The records

also indicate that Mr Thanababu was paid an additional 6 days sick leave in excess of his statutory entitlement.

[65] However an employer is mandated to keep accurate wage and time records in accordance with s 130 of the Act and these records are not in form of wage and time records in the format mandated by statute and I find that this failure affected Mr Thanababu's ability to bring an accurate claim under s 131 of the Act.

[66] I determine that Mr Thanababu was unjustifiably disadvantaged by KML failing to keep and produce accurate wage and time records.

**Was Mr Thanababu unjustifiably disadvantaged by KML failing to act in good faith?**

[67] The parties to an employment relationship are under a duty to deal with each other in good faith pursuant to s 4 of the Act. This duty :

Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative<sup>2</sup>

[68] I find that KML failed in this duty of good faith towards Mr Thanababu by not being responsive and communicative to him following the incident on 12 December 2019.

[69] I determine that KML breached the duty of good faith which it owed to Mr Thanababu.

**Remedies**

[70] Mr Thanababu was unjustifiably dismissed and unjustifiably disadvantaged and he is entitled to remedies.

*Notice Period*

[71] Mr Thanababu was not provided with a notice period. In accordance with the unsigned employment agreement the notice period was four weeks' notice, and I accept that as an appropriate period of notice.

[72] I order KML to pay Mr Thanababu the sum of \$5,760.00 gross (calculated as \$36.00 per hour x 40 hours x 4 weeks) as lost wages.

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<sup>2</sup> S 4(1A)(b) Employment Relations Act 2000

[73] Mr Thanababu is also entitled to holiday pay on that sum

[74] I order KML to pay Mr Thanababu the sum of \$ \$460.80 (calculated as \$5,760.00 gross x 8%) pursuant to s 23 of the Holidays Act 2003.

*Lost wages*

[75] Employees are under a duty to mitigate their loss. Mr Thanababu obtained alternative employment in July 2020.

[76] Mr Thanababu did not attempt to obtain employment immediately following the termination of his employment, his evidence being that initially he felt distressed, and subsequently that he preferred to concentrate on retrieving his tools from KML. There is no explanation as to why this required almost two months.

[77] The initial period following the termination of his employment has been addressed by the notice period payment. In respect of the subsequent period I do not accept that the collection of tools is an acceptable reason for Mr Thanababu not to have actively sought alternative employment sooner than he did.

[78] In these circumstances I make no award for lost wages beyond the four week notice period.

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[79] I have found that Mr Thanababu was unjustifiably dismissed by KML and unjustifiably disadvantaged in respect of the non-payment of a notice period, not being provided with a written employment agreement, and by KML not keeping accurate wage and time records.

[80] This situation caused Mr Thanababu uncertainty and distress.

[81] I order KML to pay Mr Thanababu the sum of \$15,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

*Contribution*

[82] I have considered the matter of contribution as I am required to do under s124 of the Act. Mr Thanababu did not contribute to the situation which resulted in his dismissal and disadvantage and there is to be no reduction in the remedies awarded.

### *Penalty*

[83] KML failed to produce wage and time records in accordance with s 130 of the Act. KML also failed to provide Mr Thanababu with a written employment agreement in accordance with s 65 of the Act. I have also found that KML breached the duty of good faith which it owed to Mr Thanababu pursuant to s 4 of the Act.

[84] Having considered the principles which should govern the imposition of a penalty, I note that the factors the Court must have regard to in determining the appropriate penalty under s.133A of the Act.<sup>3</sup>

[85] In this case, the failure to produce wage and time records in accordance with the Act was intentional, although I note that KML did keep some form of records of holiday and sick leave taken by Mr Thanababu. This had the effect of hindering Mr Thanababu in bringing an accurate claim to the Authority.

[86] The failure to provide a written employment agreement at the commencement of employment was deliberate, although I note that in 2016 KML drafted a written employment agreement for Mr Thanababu in compliance with the statutory requirements. However this is unsigned and Mr Thanababu said he had not seen it.

[87] The lack of a written employment agreement disadvantaged Mr Thanababu in his employment because he did not know his contractual rights, although initially this was not so important to him because the relationship between Mr Thanababu and Mr Keightley had been good and a partnership or part-ownership of the business had been contemplated by him.

[88] This may have lessened any perception on Mr Thanababu's part that he was being treated unfairly, however the omission assumed greater importance once the relationship between him and Mr Keightley had worsened.

[89] Both areas of omission noted above are statutory requirements in New Zealand, which should be well known to all employers and it is not in the public interest that they are ignored to the detriment of employees, although I note that KML is a small family operated business and I take that into consideration.

[90] In regard to the duty to act in good faith, the Act requires employers and employees to act in good will towards each other.

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<sup>3</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

[91] The failure of KML to act in a responsive and communicative manner towards Mr Thanababu, notably as a result of the incident on 12 December 2019, resulted in the dismissal of Mr Thanababu which has already been addressed in the remedies awarded. I accordingly make no penalty award.

[92] **I order that KML is to pay a penalty of \$500.00, 75% (\$375.00) of which is to be paid to the MBIE Trust Account, and 25% (\$125.00) of which is to be paid to Mr Thanababu. Payment is to be made within 14 days of the date of this Determination.**

### **Costs**

[93] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[94] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[95] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[96] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>4</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>4</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].