

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 527
3172304

BETWEEN

CALIB WAITOKIA
Applicant

AND

PRESTIGIOUS ENTERPRISE
LIMITED
First Respondent

FUNOLUWA
MAGBAGBEOLA
Second Respondent

Member of Authority: Antoinette Baker

Representatives: Paul Mathews, advocate for the Applicant
Funoluwa Magbagbeola for the First Respondent
Second Respondent in person

Investigation Meeting: 7 October 2022

Submissions received: On the day

Determination: 12 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Waitokia was employed for just over two weeks as a car groomer after the position was advertised on Facebook by the second respondent, Mr Magbagbeola,

who is the director of the first respondent (PE Ltd). Mr Waitokia was invited to attend the workplace and started work almost immediately with an interview occurring sometime on his first day. It was verbally agreed that the hourly rate would be \$20.00 per hour for at least three days per week.

[2] Mr Waitokia says that he was unjustifiably dismissed when Mr Magbagbeola told him to leave the work premises after a heated argument about pay rates and paid breaks.

[3] Mr Waitokia claims lost wages and compensation together with a penalty for the lack of a written individual employment agreement. He claims costs and the filing fee.

[4] Mr Magbagbeola for himself and for the first respondent filed a statement in reply saying no individual employment agreement was provided because the business was failing. He says that Mr Waitokia did not “show up” and at the time of the heated argument he was not in a good frame of mind worrying about the failing business that he had recently bought from a friend.

The Authority’s investigation

[5] For the Authority’s investigation Mr Waitokia lodged a witness statement. Mr Magbagbeola only lodged a statement in reply. At the investigation meeting I heard from Mr Waitokia and Mr Magbagbeola. Mr Waitokia’s representative gave oral submissions. Mr Magbagbeola declined the opportunity to do so.

[6] 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.

The issues

[7] The issues are:

- (a) Who was Mr Waitokia's employer?
- (b) Was Mr Waitokia unjustifiably dismissed?
- (c) If so, is he entitled to remedies for:
 - a. Compensation under s 123(c)(i) of the Act
 - b. Lost wages under s 123(c)(ii) of the Act?
- (d) Is a penalty to be ordered against the employer for not providing a written employment agreement?
- (e) Is there to be an order for costs and the filing fee?

Who was Mr Waitokia's employer?

[8] PE Ltd was incorporated in January 2021. It existed during Mr Waitokia's employment and is still on the New Zealand Companies Office register showing Mr Magbagbeola as sole director and shareholder.

[9] Mr Magbagbeola acknowledges that at the time of his employment Mr Waitokia could not have known that PE Ltd ran the business. Mr Waitokia says he first became aware of PE Ltd after he sought advice about his grievance. I understand both respondents have been named due to a lack of clarity about the employer, due in part to there being little or no documentation regarding the employment, including the lack of a written individual employment agreement.

[10] The Employment Court has described the law as "straightforward" in this area. Not only does a company have to actually exist but an employee would have to

know or ought to have known he or she was employed by that company for a finding that it was the employer.¹

[11] I find that Mr Magbagbeola was the employer and not PE Ltd for the following reasons:

- a. Mr Waitokia knew nothing of PE Ltd until after his employment ended
- b. There is a complete lack of documentation showing PE Ltd as the employer such that Mr Waitokia ought to have known this
- c. Mr Magbagbeola was the only person directing Mr Waitokia in his day-to-day work
- d. Mr Magbagbeola appears as the payer of the wages on Mr Waitokia's bank records, and he confirms he paid Mr Waitokia out of his own money
- e. Mr Magbagbeola is the person with whom Mr Waitokia raised his employment concerns.

[12] I will now consider the claim of unjustified dismissal against Mr Magbagbeola.

Was Mr Waitokia unjustifiably dismissed?

[13] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[14] It is not for the Authority to re-run the case and decide what it thinks the outcome should have been, but rather to examine whether the decision was one that

¹ *Xu v McIntosh* [2004] 2ERNZ 488 at [30] to [33].

was within the range of what a reasonable employer could have done in the circumstances.

Was there a dismissal?

[15] Mr Magbagbeola does not deny he told Mr Waitokia something like “bugger off” in the heat of an argument with Mr Waitokia. Mr Waitokia says that when Mr Magbagbeola dismissed him in this way he objected to the legitimacy of this action and said he would get a lawyer. Mr Waitokia recalls Mr Magbagbeola responding that there was no contract. Mr Waitokia did not return to work after this argument.

[16] A reasonable way to deal with the fallout from telling an employee to leave work in the heat of an exchange could be to then contact him or her afterwards to try to repair the situation. This would be consistent with the duty of good faith under s 4(1A) of the Act which includes being:

...active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;

[17] Mr Magbagbeola did not engage further with Mr Waitokia after telling him to leave the workplace. Inconsistently, Mr Magbagbeola tells me he just wanted Mr Waitokia to continue to groom cars and that he “didn’t show up”. Mr Magbagbeola’s evidence about this was vague. I prefer the evidence of Mr Waitokia that he understood he was asked to leave the workplace rather than that he “didn’t show up”.

[18] In these circumstances I find that Mr Magbagbeola dismissed Mr Waitokia.

Was the dismissal unjustified?

[19] Mr Waitokia had been raising what I accept were reasonable issues about his employment both during the heated argument when he was dismissed and before this.

[20] The dismissal also arose in the context of an informal discussion in the first week of employment when I find it likely that Mr Magbagbeola offered to pay Mr Waitokia per car groomed and this spurred Mr Waitokia to work hard on grooming the cars during his second week of employment. When Mr Waitokia was paid for that week, he says the pay continued to be at the hourly rate. Both men now dispute what the commission rate ought to have been, a dispute hampered by nothing written down about any agreement and a lack of time and wage records. Mr Magbagbeola confirmed to me that in ‘casually’ mentioning a commission he wanted to get Mr Waitokia to work harder.

[21] Mr Magbagbeola says at the time of Mr Waitokia’s employment he had financial pressures and was not in a good frame of mind. While he says the business was failing at the time, this seems inconsistent with him having just employed Mr Waitokia. He says he just wanted Mr Waitokia to get the cars groomed. Mr Waitokia on the other hand wanted to clarify his pay rate, the provision of paid breaks and get a written employment agreement, none of which are unreasonable things for an employee to expect an employer to communicate about.

[22] Mr Magbagbeola in his oral evidence raised issues with the quality of Mr Waitokia’s work. I am satisfied this could not have been part of any reason to dismiss and had not been raised previously with Mr Waitokia.

[23] Mr Magbagbeola denies what he refers to as “playing” Mr Waitokia. He says that “If I was trying to play [Calib] I would have paid cash etc and not pay him via account to account.” I find Mr Magbagbeola’s position lacks insight (though not necessarily knowledge) into employer responsibilities and the importance of these.

[24] Overall, standing back from what has been largely recall evidence from just Mr Waitokia and Mr Magbagbeola about what happened over a very short time in May 2021, I find that the following likely happened:

- a. Mr Waitokia raised genuine issues about his short-lived employment in the context of no written individual employment agreement.
- b. Mr Waitokia's concerns were fobbed off by Mr Magbagbeola whose primary focus was to get cars groomed and get his business going.
- c. Mr Waitokia became frustrated with the situation and an argument erupted during which Mr Magbagbeola in the heat of the moment (but doing nothing to later try to rectify) dismissed Mr Waitokia by telling him something to the effect of "bugger off" if he didn't like it.

[25] Based on the above, I find that Mr Magbagbeola's dismissal of Mr Waitokia was not what a reasonable employer could have done in all the circumstances at the time of the dismissal and as such I find the dismissal was unjustified.

If unjustifiably dismissed, is Mr Waitokia entitled to remedies for:

a. Compensation under s 123(c)(i) of the Act

[26] Mr Waitokia describes in his written evidence the effect of being dismissed as "I left that day feeling humiliated, frustrated, angry and hurt." He says that the situation impacted on him afterwards and that he "became depressed." He describes things that adversely changed in his personal life and relationships due to the way the employment situation impacted on him. He gave oral evidence that the situation *added to* issues he was having in his personal life.

[27] I find that the dismissal likely had an adverse effect on Mr Waitokia. I accept that a sense of hurt and humiliation lingers for him. I could see that he was upset talking about the May 2021 situation again. However, I find it likely that Mr

Waitokia's situation in life and his wellbeing, including how he currently finds himself was not totally caused by the unjustified dismissal. As such I have not ordered the compensation of \$15,000.00 sought, but a more modest \$8,000.00.

b. Lost wages under s 123(c)(ii) of the Act?

[28] I accept that Mr Waitokia lost the opportunity to have continued in a permanent job after having worked "odd jobs" and doing some "street performing." He explains he went back to this type of income after the employment ended. While the employment was short lived, the loss I need to consider is the loss to Mr Waitokia of regular employment which after odd jobs and irregular income must have been an uplift to his life.

[29] I have no evidence of what Mr Waitokia's post-employment earnings were. Mr Waitokia had provided confirmation from New Zealand Inland Revenue that confirms there were no earnings recorded during or after the period of employment with Mr Magbagbeola.

[30] Accordingly, I find it reasonable to order Mr Magbagbeola to pay Mr Waitokia three months wages under s 128 of the Act less 10% to take into account some likely form of earnings during that time. I calculate this as a week's notice and 12 weeks at \$420.00 gross being \$5,460.00 gross less 10% which is \$4,914.00 gross.

[31] Section 124 of the Act requires me to consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance. I am not satisfied based on the evidence before me that Mr Waitokia contributed to the situation that gave rise to his grievance.

Is a penalty to be ordered against the employer for not providing a written employment agreement?

[32] An employer who fails to comply with the requirement to provide an employee with a written individual employment agreement may be subject to a penalty². Mr Magbagbeola did not provide Mr Waitokia with a written employment agreement. He is therefore liable for a penalty.

[33] The Employment Court has set out guidance when considering whether a penalty is to be awarded in the context of statutory breaches. This includes the number and nature of the breaches; the severity of each breach; the ability of the person in breach to pay; and proportionality to ensure that any final penalties awarded are ‘just in all the circumstances.’³

[34] While Mr Magbagbeola says he inherited systems that were in place for the business and did not know what he was doing as an employer, I find he is not without ability. He described having attained a tertiary qualification in structural engineering. He describes working towards a ‘Project Management’ qualification after his tertiary qualification. These achievements show me he has the likely ability to consider rules surrounding employment obligations for employers when setting up and running a business.

[35] It is submitted for Mr Waitokia that not having a written individual employment agreement has caused a lack clarity about his terms and conditions and has contributed to the heated argument that resulted in the dismissal as well as Mr Waitokia’s inability to then resolve this matter. I agree.

² Section 65(4) of the Employment Relations Act 2000.

³ *Borsboom v Preet PVT Limited* [2016] NZEmpC43 at [151].

[36] I have no evidence that Mr Magbagbeola has breached employment standards before, and a single breach is claimed for a penalty. While I find that Mr Magbagbeola is not without ability to have accessed information about his employer obligations, it seems likely this was his first experience as an employer and my observation is that he is relatively young. I have no evidence to support Mr Magbagbeola's financial situation other than his explanations about this. While I accept his evidence that the business lasted only a short time and that he was propping it up with his own resources, he had the opportunity to provide evidence in support of this or get assistance to do this. I am therefore not able to conclude one way or the other about Mr Magbagbeola's financial situation.

[37] Weighing all the above I do not find this is a matter that is appropriate for a penalty. The existence of this determination and the orders made will, for Mr Magbagbeola at least, be a lesson for him if he considers employing people in the future.

Is there to be an order for costs and the filing fee?

[38] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Mr Waitokia has been successful in his claim.

[39] The current tariff of costs generally applied for a one-day Authority investigation meeting is \$4,500.00 unless there are reasons to increase or decrease this amount or even to let costs lie where they fall.

[40] As already noted above, I have little evidence to support Mr Magbagbeola's own description of his poor financial situation. The company PE Ltd of which he remains the sole director and shareholder remains registered and filed a recent return in March 2022. Mr Magbagbeola is currently working as a courier driver, so is not without income. In these circumstances I accept the reasonable submission on behalf

of Mr Waitokia that Mr Magbagbeola pay costs that reflect half of the first day daily tariff for the almost half day investigation meeting held.

[41] Accordingly, Mr Magbagbeola is ordered to pay \$2,250.00 as a contribution to Mr Waitokia's costs together with the filing fee of \$71.56.

Summary of Orders

[42] The claim against Prestige Enterprise Limited is dismissed.

[43] Funoluwa Magbagbeola is ordered to pay Calib Waitokia within 28 days:

- a. \$4,914.00 gross for lost earnings under s 128 of the Act
- b. \$8,000.00 compensation under s 123(1)(c) of the Act
- c. \$2,250.00 costs
- d. \$71.56 Authority filing fee.

Antoinette Baker
Member of the Employment Relations Authority