

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 589
3143347

BETWEEN MAXX McBETH
 Applicant

AND EXPERT MOVING GROUP
 LIMITED
 First Respondent

AND MICHAEL JOHN WOOD
 Second Respondent

Member of Authority: Peter Fuiava

Representatives: Tony Stevens and Matariki Roche, advocates for the
 Applicant
 No appearance by the respondents

Investigation Meeting: 31 October 2022 in Hamilton

Determination: 10 November 2022

DETERMINATION OF THE AUTHORITY

This determination is a written record of an oral preliminary indication given on 31 October 2022.

- A. Michael John Wood to pay Maxx McBeth the following sums no later than 5 pm Wednesday 7 December 2022:**
- (i) Wage arrears of \$500 (gross);**
 - (ii) Interest on the sum of \$500 from 8 December 2020 to the date of payment using the Ministry of Justice civil debt interest calculator¹;**

¹ www.justice.govt.nz/fines/civil-debt-interest-calculator.

- (iii) Compensation of \$12,000 for loss of dignity and injury to feelings for unjustified dismissal under s 123(1)(c) of the Employment Relations Act 2000 (the Act);**
- (iv) The filing fee of \$71.56 to bring the present application to the Authority;**
- (v) Expenses of \$32 for postage; and**
- (vi) Costs of \$750 as a contribution to Mr McBeth's advocates' costs.**

B. The claim against Expert Moving Group Ltd (EMG) is dismissed.

Employment Relationship Problem

[1] This is a claim by Maxx McBeth for unjustified disadvantage (alleged wage arrears) and unjustified dismissal. Maxx is almost 18 years of age but at the material time was only 16. If the claims are established, Maxx seeks recovery of his wages under s 131 of the Act and compensation for humiliation, loss of dignity, and injury to feelings for unjustified dismissal.

[2] There has been no statement in reply filed in response to Maxx's statement of problem which was lodged with the Authority on 15 June 2021. Although Michael John Wood answered a telephone call from the Authority for a case management conference (CMC), he disconnected the call and has not engaged with the process since then.

The Authority's investigation

[3] The Authority has held three CMCs for this matter the first of which was attended by Ms Roche on 3 March 2022. When the Authority Officer contacted Mr Wood, EMG's sole company director, he stated that he was too busy and hung up. Consequently, the teleconference continued in the company's absence. It should be noted that Mr Wood was later joined as a second respondent to this employment relationship problem.

[4] On 7 April 2022, the Authority held a second CMC to clarify the identity of Maxx's employer. On that occasion, Ilene Wood, Mr Wood's sister attended the teleconference and stated that he was now living in Australia. Upon closer examination of the date of EMG's incorporation (11 January 2021) and the period of Maxx's employment (9 November 2020 to 8 December 2020) it became apparent that EMG could not have been his employer.

[5] In its second minute of 7 April 2022, the Authority gave Maxx the opportunity to file an amended statement of problem (ASOP) which was lodged with the Authority on 14 April 2022 and joined Mr Wood as a second respondent. In serving Mr Wood with the ASOP, Maxx's advocates sent a copy to Mr Wood's last known address in New Zealand. An additional copy was sent via Australia Post to his parents' address in Australia. The Authority was provided with a copy of the consignment note for that delivery which was signed by someone by the name of Michela Wood who is understood to be Mr Wood's sister.

[6] While the consignment note does not establish that the ASOP was received by Mr Wood himself, I am satisfied that he has been served with a copy of the document. While the Authority sent a second copy of the ASOP as well as a copy of the notice of investigation meeting form and the required form 10 notice to an overseas party,² this was later returned to the Authority "return sender."

[7] There has been no statement in reply filed in response to the ASOP and there was no appearance by the respondents at the investigation meeting which was delayed for 15 minutes in the event that they were running late. There being no appearance following the adjournment, the investigation meeting proceeded pursuant to clause 12 of the Second Schedule to the Act as if the respondents had attended or been represented.

[8] For the investigation meeting, Maxx provided a written statement which he affirmed was true and correct. He was questioned about his evidence by the Authority and by his representatives Mr Stevens and Ms Roche. As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on

² Employment Relations Authority Regulations 2000, r 19A.

issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[9] The issues requiring investigation and determination are:

- (a) Was Maxx unjustifiably dismissed by the respondents and had he been unjustifiably disadvantaged as well?
- (b) Is Maxx owed wages and if so, how much is he owed?
- (c) Was the deduction of \$70 from Maxx's wages for the cost of transporting him to a worksite a breach of s 5 of the Wages Protection Act 1983?
- (d) By paying Maxx \$270 for 33 hours' work, has there been a breach of the Minimum Wage Act 1983 (MWA)?
- (e) If the respondents actions were not justified in respect of disadvantage and/or dismissal, how much should Maxx be compensated for under s123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to feelings.
- (f) If any remedies are awarded, should they be reduced under s124 for any blameworthy conduct by Maxx that contributed to his grievance?
- (g) Should either party contribute to the costs of representation of the other party.

Relevant facts

[10] In October 2020, Maxx and Mr Wood were work colleagues at Torpedo7 where they devanned containers. Maxx was 16 at the time and Mr Wood was 28 years of age approximately. Mr Wood had gone to primary school with Maxx's cousin and was good friends with him. Mr Wood offered to employ Maxx in his furniture removal business. Maxx accepted largely because he felt that he could trust Mr Wood who was known to his family.

[11] Maxx was not provided with an employment agreement by Mr Wood who he considers was his employer.

[12] Maxx commenced working for Mr Wood on 9 November 2020 and worked five days for him for a total of 33 hours in mid-November 2020. Maxx stated that on 14 November 2020 Mr Wood offered him three different pay rates to choose from. He chose the third option of being paid \$150 per day plus a bonus if he worked for over eight consecutive hours.

[13] On 19 November 2020, Maxx was paid \$270 into his bank account. Given that he agreed to be pay \$150 per day and had worked for five days already, Maxx says that he should have been paid \$750 (gross) (\$150 x 5 days) by Mr Wood. There is a shortfall of \$480 (gross) owing with Maxx's wages.

[14] In addition to this amount, Maxx seeks recovery of \$20 that he loaned to Mr Wood as petrol money on 16 November 2020. There was also a \$70 deduction from Maxx's wages which Mr Wood deducted as transport costs for driving Maxx to a worksite in Auckland.

[15] Maxx's last day of work for Mr Wood was 16 November 2020. Mr Wood did not provide him with any more work for the next two weeks that followed. Screen shots of text messages from Maxx to Mr Wood were provided to the Authority which show that Maxx had inquired when he could expect to work. Despite indicating to Maxx that there would be work for him, that did not manifest.

[16] On 8 December 2020, prompted by his mother-in-law with whom Maxx and his partner were living, he texted Mr Wood seeking clarification about his work hours per week, his pay rate, and what day in the week he could expect to be paid. Mr Wood texted back stating that he had done a lot to get Maxx onto a worksite because he was not 18 and that he (Mr Wood) no longer wished to bother with the "drama and bullshit" of providing him with the requested information. He then proceeded to dismiss Maxx stating that "this is what happens when a know-it-all questions me."

Discussion

Michael James Wood the employer

[17] Although EMG is the first respondent in the ASOP, the company could not have been the employer as it was incorporated on 11 January 2021, one month after Maxx was dismissed by text message on 8 December 2020. As the company did not exist at the material time of this employment relationship problem, the claim against Expert Moving Group Limited is dismissed.

[18] I acknowledge that Maxx's evidence went unchallenged but even so, I found him to be a reliable witness. Having worked alongside Mr Wood at Torpedo7 and knowing that he a longstanding friendship with an older cousin, Maxx genuinely believed that Mr Wood would do right by him. However, as it would turn out, that trust was misplaced.

[19] The Authority finds Mr Wood to be Maxx's employer with whom Maxx dealt with directly. The terms and conditions of the parties' purely verbal employment agreement was that Maxx would be paid \$150 per day plus a bonus for working over eight consecutive hours in a day. Maxx clarified he was not eligible for the bonus payment as he did not work for more than eight hours per day for Mr Wood.

Maxx was unjustifiably dismissed

[20] Section 103A of the Act requires the Authority to assess on an objective basis whether an employer's dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.³

[21] In applying the fair and reasonable employer test, s 103A requires the Authority to consider the following mandatory procedural factors:

103A Test of justification

...

(3) In applying the test in subsection (2), the Authority or the court must consider—

³ Employment Relations Act 2000, s 103A(2).

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[22] It should be noted that the four procedural factors above do not constitute an exhaustive list. The Authority may consider any other factors it thinks appropriate.⁴ Further, the Authority must not determine a dismissal to be unjustifiable because of a defect in the employer's process that was minor and did not result in the employee being treated unfairly.⁵

[23] Here Maxx was dismissed by text message by Mr Wood on 8 December 2020. The onus is on Mr Wood as the employer to show that, at the time of dismissing Maxx, his actions were what a fair and reasonable employer could have done in all the circumstances. Mr Wood has not participated with the Authority's investigation and consequently there is no information or evidence to show how he complied with the procedural factors of s 103A(3) above.

[24] The dismissal came immediately after Maxx had texted Mr Wood to provide him with greater clarity around his employment as he had not been provided with any work by Mr Wood for two weeks. The information Maxx sought concerned his expected hours of work per week, what his pay rate was, and what day he could expect to be paid. The request was neither onerous nor unreasonable and the context was that Maxx had been kept waiting for two weeks but had not been provided with any work.

[25] Mr Wood's texted response was that he had done a lot to get Maxx onto a site because he was not 18 years of age. Mr Stevens submits that Maxx's dismissal was on

⁴ Section 103(4).

⁵ Section 103(A)(5).

the basis of his age which is a prohibited ground of discrimination. However, while Mr Wood's text does reference the fact that Maxx was under 18 years of age, the text does not expressly attribute his dismissal on account of his age. Rather, the Authority finds that Mr Wood dismissed Maxx because he had the fortitude to question Mr Wood about his employment situation which Mr Wood interpreted as a sign of him being ungrateful for what he had done for Maxx.

[26] A fair and reasonable employer would have communicated any concerns to their employee and provided him or her an opportunity to respond to those concerns before the decision to dismiss. For example, if there was a shortage of work, Mr Wood could have had an open and frank discussion about this with Maxx. That did not occur. Instead, Maxx was unilaterally dismissed without any proper process being followed. The decision to dismiss fails the statutory test of justification. The claim of unjustified dismissal is made out.

Compensation

[27] Maxx is entitled to remedies. Despite being out of work for the next four months following his dismissal, he does not seek lost wages. He does however seek compensation under s 123(1)(c) for humiliation, loss of dignity and injury to feelings. Compensation is for the effects on the employee of the grievance. It is not intended to be a penalty imposed on the employer to indicate the Authority's disapproval of the employer's conduct.

[28] It was Maxx's evidence that when he was dismissed that he was stressed and worried about how he would pay his rent, bills and his other day-to-day living expenses. If he was not living with his mother-in-law but was living in an ordinary flatting situation, Maxx stated that he would have been "kicked out" of his accommodation a long time ago. He further stated that did not know what he was going to do for work and felt that his trust in working for others had been broken. He did not find alternative employment until March 2021. That job was as a car groomer and was casual in nature. Maxx currently works full-time for a fencing company and is content with his work.

[29] In quantifying compensation, I take into account Maxx's vulnerability on account of his young age and lack of life experience, matters that Mr Wood would have

appreciated. Mr Wood would have known that Maxx was dependent on him for ongoing work having left his previous job at Torpedo7 in order to work for him. Although Maxx worked for Mr Wood for only five days, he could have worked several more days had he not been kept waiting with no work for a period of two weeks.

[30] The impact of the dismissal on Maxx was not insignificant. It took him time to rebuild his trust in working for others. His dismissal without notice and just before Christmas left him in financial hardship resulting in unnecessary anxiety and stress for a young person. On the spectrum of harm suffered and compensation awarded, I consider that an award of \$12,000 for loss of dignity and injury to feelings is appropriate given the circumstances.

[31] Having awarded compensation to Maxx, the Authority is required under s 124 of the Act to consider the extent to which his actions may have contributed towards the personal grievance. The Authority finds that there are none. A reduction in remedies is not warranted.

Maxx was unjustifiably disadvantaged

[32] An unjustified disadvantage is a personal grievance where an employee's employment or one or more conditions of their employment is or has been affected to the employee's disadvantage by some action of the employer.⁶

[33] Here the unjustified disadvantage was the non-payment of Maxx's wages. It was Maxx's uncontested evidence that he had agreed to work at the rate of \$150 per day for Mr Wood. Having worked for five days for him for a total of 33 hours, it was submitted that he should have been paid a total of \$750 (gross). He was instead paid \$270 only. Recovery of \$480 (gross) in wage arrears are sought plus and an additional \$20 for petrol money that Maxx had loaned Mr Wood but was never repaid. The Authority is satisfied that wage arrears of \$500 (gross) is payable by Mr Wood and orders accordingly.

⁶ Employment Relations Act 2000, s 103(1)(b).

[34] It was submitted that Mr Wood had breached the MWA by paying Maxx only \$270 for 33 hours of work which translates to \$8.18 per hour (net). However, having awarded wage arrears of \$500 gross to Maxx, I find no breach of the MWA provided Mr Wood complies with the Authority's order.

[35] Finally with respect to a deduction of \$70 from Maxx's wages, the Authority confirms that the deduction was unlawful because it was made without Maxx's written consent or request as required by s 5 of the WPA. However, no penalty is warranted as the appropriate remedy is an order under s 131 of the Act for the recovery of wages as given above.

Expenses

[36] Maxx is to be reimbursed the filing fee of \$71.56 and postage expenses (in serving the ASOP) of \$32 which Mr Wood is to also pay by the due date given in the preamble to this determination.

Costs

[37] Mr Stevens seeks a contribution of \$1,000 towards Maxx's legal fees. I note that Maxx is represented by the Young Workers Resource Centre (YWRC) which is a not-for-profit organisation that advocates for the rights of young workers. Maxx could not have represented himself in the Authority on his own. YWRC have been involved with his case since the filing of the statement of problem and have previously tried to settle matters with Mr Wood but to not avail.

[38] As the successful party, I see no reason why Mr Wood should not be made to contribute towards YWRC's costs in representing Maxx's interests in the Authority. The investigation meeting took a little over an hour. The usual tariff for a full one-day investigation is \$4,500. On a pro-rata basis, Mr Wood is ordered to pay \$750 towards YWRC's costs.

Peter Fuiava
Member of the Employment Relations Authority