

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 123
3172482

BETWEEN	PAUL HARRIS Applicant
AND	EFS LIMITED T/A Engineering Full Stop Respondent

Member of Authority:	Claire English
Representatives:	Kristen Westwood, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	25 January 2023 at Palmerston North
Submissions received:	2 February 2023 from Applicant No submissions from Respondent
Determination:	9 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Paul Harris, worked as a fabricator for the respondent from April 2018 through to 16 April 2021. He was hired by Mr Jackson Smith, the sole director and shareholder of the respondent (EFS).

[2] On 6 April 2021, Mr Smith told Mr Harris that his two work mates would be “let go” as of Friday that week, and that the following Friday, Mr Harris would likewise be “gone”. Mr Smith said that he intended to shut the business and work solo.

[3] Mr Harris was paid up until 16 April 2021. He asked Mr Smith repeatedly for confirmation in writing that his job was at an end, so that he could provide this information to WINZ and future employers, however, Mr Smith failed to respond to Mr Harris in any way.

[4] Approximately one week after his dismissal, Mr Harris learned that Mr Smith had employed a friend of his to perform the same job.

[5] Mr Harris raises a claim of unjustified dismissal. He seeks remedies of lost wages, unpaid sick leave, compensation for hurt and humiliation; penalties for breaches of the Employment Relations Act 2000; and costs.

[6] EFS has not responded to the claims, and did not attend the investigation meeting as scheduled.

[7] This raises the question of whether or not to proceed with the investigation. The answer is “yes” as I am satisfied that EFS was made aware of the claims against it and was also made aware of the investigation meeting.

[8] EFS is registered on the companies register, and has a registered office for the service of documents¹. Copies of all relevant documents have been sent to EFS’s registered address. Copies of the statement of problem and attachments were signed for by “J Smith” on 18 May 2022. On 20 May 2022, EFS changed its registered address to the residential address of Mr Smith. Copies of the Authority’s timetabling directions were signed for by “Megan Smith”. Mr Harris advised at the investigation meeting that Megan Smith is Mr Smith’s mother, and during his employment with EFS, Megan Smith assisted Mr Smith with administrative tasks. A copy of the Notice of Hearing was signed for by “Jackson Smith”.

[9] Included in the Notice of Hearing was advice that, should EFS fail to attend the investigation meeting, the Authority may proceed and issue a determination in favour of the applicant².

¹ This is also the same as the residential address provided for Mr Smith.

² Note 2 to Form 8 of the Employment Relations Authority Regulations 2000.

[10] I am satisfied that EFS was made aware of these proceedings and the consequences of non-attendance, and that it is appropriate to proceed.

The Authority's investigation

[11] For the Authority's investigation written witness statements were lodged from Mr Harris, and his friend Mr Bede Tokue, who was subsequently employed by Mr Smith. All witnesses answered questions under affirmation from me. The representative for the applicant also gave closing submissions.

[12] 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

[13] The issues requiring investigation and determination were:

- (a) Was Mr Harris unjustifiably dismissed?
- (b) If EFS's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Harris that contributed to the situation giving rise to the grievance?
- (d) Is Mr Harris owed outstanding sick leave, and if so, what should be awarded?
- (e) Should penalties be awarded for failures to comply with the provisions of the Employment Relations Act 2000 (failure to provide wage and time records, and breach of good faith) and if so, quantum?
- (f) Should either party contribute to the costs of representation of the other party?

Background

[14] Mr Harris was employed as a fabricator by Mr Smith on behalf of EFS. He was experienced in his field, and as Mr Smith hired more staff, Mr Harris provided supervision to them as needed.

[15] Mr Harris was not provided with an employment agreement, until some 2 years into his employment. At that point, a new staff member was hired, and Mr Harris recalls that the new staff member required a written employment agreement be provided to him, and as a result, Mr Smith then belatedly provided a written employment agreement to Mr Harris.

[16] Mr Harris' employment proceeded without incident for some years.

[17] In early April 2021, Mr Harris was ill with food poisoning. He was admitted to hospital, and in the event, needed to take a week off work as sick leave. He advised Mr Smith of this, including providing updates as needed.

[18] Mr Harris reports that at the time, Mr Smith accepted his absence, and indicated via telephone that Mr Harris would receive either sick pay or annual leave, or a combination of both. Mr Harris was not paid for his time off.

[19] When he asked Mr Smith about this, Mr Smith told Mr Harris to meet his (Mr Smith's) father in the carpark, so he could receive \$400 in cash. Mr Harris did so, and was given \$350 by Mr Smith's father in cash. His usual weekly pay was \$1,200 gross³. Mr Harris never received payment for the remainder of that week.

[20] Mr Harris then returned to work on the Monday morning. He went to speak with Mr Smith to obtain his daily assignment.

[21] Mr Smith told him that he was letting two employees go as of Friday that week, and that Mr Harris would likewise be "gone" as of the following Friday. At this point I note that Mr Smith's brother was also an employee of EFS, and he was not mentioned as a staff member who would be made redundant. Mr Harris was shocked by this announcement. Mr Smith then explained that he was effectively shutting the business, and that he himself would be working as a solo welder from then onwards.

³ Mr Harris gave evidence that he was paid for 40 hours per week at the rate of \$30 per hour gross.

[22] As of Friday that week, the two other staff left the business. Mr Harris then continued working on his own for the following week. When he arrived at work on his final Friday, the premises was shut. Mr Harris called Mr Smith. Mr Smith told Mr Harris that he should just go home, and that he would be paid for the Friday anyway.

[23] Mr Harris was greatly affected by his dismissal. As a result of the sudden lack of wages, he ended up first living at a camp site, and then having to move back in with his elderly parents, which he experienced as debilitating and humiliating.

[24] Shortly after the ending of his employment, Mr Harris learned that his friend, Mr Tokue, had been hired by EFS to perform the same work as Mr Harris had previously been performing. Mr Tokue attended the investigation meeting, and gave evidence of this, and that EFS continued operating with new staff after Mr Harris' dismissal. He also gave evidence as to the emotional impact that the dismissal had on Mr Harris.

[25] Mr Harris sought advice, and his representative helped him to raise a personal grievance with EFS, including making a request for time and wage records.

[26] No response was received, and the matter has proceeded to the Authority.

Findings

[27] I must first consider if Mr Harris was unjustifiably dismissed. In doing so, I must consider whether:

- a. EFS sufficiently investigated the situation before dismissing Mr Harris;
and
- b. EFS raised any concerns it had with Mr Harris before dismissing him;
and
- c. EFS gave Mr Harris a reasonable opportunity to respond to the concerns before dismissing him; and
- d. EFS genuinely considered Mr Harris' explanation or response (if any) before dismissing him.

[28] In addition to these factors, I may consider any other factors I think appropriate⁴.

[29] Although this situation was presented to Mr Harris by Mr Smith as a redundancy type situation, with the rationale that the business was being shut down, there is no evidence that Mr Smith took any particular steps to consult about the situation before telling Mr Harris that he would be “gone” or “let go” in two weeks’ time. Mr Harris was unaware that there had been any changes to the way the business was run, or to the type or volume of work available. Until he was told by Mr Smith that Mr Smith was going to go out working on his own, Mr Harris was unaware that this had been contemplated by Mr Harris. In short, there is no evidence that Mr Smith had investigated the situation before presenting Mr Harris with his final decision to end his employment.

[30] Mr Harris gave clear evidence that there was no consultation with him. The only conversation he had with Mr Smith was when Mr Smith told him his employment was at an end. Mr Harris queried this decision after being informed of it, and gave evidence that Mr Smith remained firm. There was no opportunity for a discussion or consideration of Mr Harris’s viewpoint. Mr Smith had already arrived at his decision before communicating the outcome to Mr Harris.

[31] Merely advising an employee that a decision has been made to end their employment, falls far short of meeting an employer’s statutory obligations under section 103A of the Act. There was no point in the process where Mr Smith gave Mr Harris an opportunity to respond to the idea that the business might be shut down or fundamentally changed before arriving at the firm decision to dismiss. And there was no indication that Mr Smith took Mr Harris’ position, needs, or concerns into account, either before or indeed after arriving at that decision.

[32] This lack of consultation means that EFS cannot meet the test of justification as set out in section 103A of the Act, and Mr Harris’ dismissal is unjustified. Further, the subsequent employment of Mr Tokue and other staff casts doubt on the genuineness of any redundancy situation.

[33] Having found that Mr Harris’s dismissal was unjustified, I must now consider remedies.

⁴ The test of justification as set out at section 103A of the Employment Relations Act 2000.

[34] Mr Harris gave evidence that he was out of work for 1 month, before finding a new job with the assistance of his personal contacts. He gave evidence of his active search for work, and how he had made himself available for any job, including ones that did not use his skills such as cleaning and sweeping jobs.

[35] Mr Harris was not assisted in his job search, by the fact that Mr Smith did not communicate with him after his last day of work. Mr Harris asked Mr Smith on multiple occasions to confirm the ending of his employment in writing, so that Mr Harris could supply this information to both WINZ and to any future employers. Mr Smith initially said to Mr Harris that he would do so, but he never provided anything to Mr Harris in writing. When Mr Harris attempted to contact Mr Smith by text message following his last day of work, he received no response.

[36] Mr Harris remained upset by this. He pointed out that this made it impossible for him to “move on” and it made it very difficult for him to satisfactorily explain himself to potential new employers and WINZ, who naturally asked him for details of his previous employment.

[37] Mr Harris obtained new employment on 17 May 2021. He has claimed for 4 week’s lost wages, in accordance with section 123 of the Act. Section 123(1) of the Act provides that where an employee has a personal grievance, the Authority may award various remedies, including “reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance”⁵.

[38] As a result of his unjustifiable dismissal, Mr Harris has lost the equivalent of 4 weeks wages. He calculates that this amounts to \$4,800 gross, being calculated at his usual rate of 40 hours per week at \$30 per hour, over 4 weeks. Mr Harris is entitled to be reimbursed for his actual loss, and orders for the payment of \$4,800 gross to him are made accordingly.

[39] Mr Harris also seeks payment of \$1,200 gross for the week that he was on sick leave, but was only paid \$350 in cash.

⁵ Section 123(1)(b) of the Employment Relations Act 2000.

[40] In considering this claim, I take into account that Mr Harris, through a letter from his representative on 25 May 2021, made a formal request for wage and time records in accordance with section 130 of the Act. I am advised that this request was never responded to.

[41] Where an employer fails to keep or produce wage and time records, section 132 of the Act provides that, where this failure prejudices the employee's ability to bring an accurate claim for arrears, the Authority may accept as proven all claims made by the employee.

[42] The absence of wage and time records makes it impossible for Mr Harris to particularise his claim further than he has already done. It is to his credit that he has given evidence of the partial cash payment that was made to him. Mr Harris further says that he believes he should have had paid sick leave available, as he only ever took a day of sick leave "here and there", and had not been absent with any significant illness or injury prior to this point.

[43] I accept Mr Harris' evidence that he was away from work for a week due to sickness, and that he was only paid \$350 for that week. I also accept his evidence that paid sick leave should have been available to him, as I am entitled to do in accordance with section 132 of the Act. Accordingly, I award Mr Harris the sum of \$850 gross in respect of sick leave that should have been paid to him in respect of this week.

[44] Mr Harris has also claimed for compensation for hurt and humiliation caused by his dismissal, in the sum of \$20,000.

[45] I have already recorded Mr Harris' distress at the abrupt ending of his employment. He gave thoughtful evidence about the impact on him at the time, and also about the on-going impact to his life and confidence. His evidence was supported in a clear and direct way by Mr Tokue, who explained the impacts he had witnessed in his friend.

[46] In addition, Mr Harris had to contend with not only the effects on him of his dismissal, but the subsequent on-going repercussions, namely that Mr Smith made matters more difficult for him by failing to confirm his dismissal (or indeed anything about his employment) in writing. He was then confronted with the fact that the business had continued in contrast to what Mr Smith had told him about the reason his

employment needed to end, and that Mr Smith had promptly employed Mr Harris' friend, and two other staff, to perform the same duties.

[47] It is not surprising that Mr Harris found these matters distressing, as he was treated with disrespect by Mr Smith throughout, including untruths about the reason for the ending of Mr Harris' employment.

[48] In considering what compensation should be awarded to Mr Harris, my view is that the sum of \$20,000 is appropriate, as his treatment and the effects on him were serious. It would have been a simple matter for Mr Smith to provide Mr Harris with the written confirmations that he required to approach other employers and WINZ. In addition, the immediate employment of other staff, and what appears to be the uninterrupted continuation of the business is an aggravating factor.

[49] I have considered whether there were contributing factors leading to Mr Harris' dismissal. I can find none. Mr Harris gave evidence of taking a week of sick leave when he was hospitalised, but he advises that he kept Mr Smith informed of this, and Mr Smith accepted this at the time. I can discern no causal link to Mr Harris' dismissal, let alone any blameworthy conduct.

[50] Mr Harris also gave evidence that some time prior to his dismissal, he was aware that EFS had supplied metal beams for a particular building project that upon installation, were too short for the required purpose. Mr Harris explained that EFS had been given a contract setting out the length of the beams as signed off by the engineer responsible for that project. EFS had constructed the beams to the length set out in the contract, and it had turned out that the length EFS had been given was incorrect. Mr Smith had then stepped in to handle the matter. This occurred some time prior to Mr Harris's dismissal. Again, there appears to be no causal link between this situation and Mr Harris' dismissal, and Mr Harris' actions in following the contractual requirements he was given are not blameworthy.

[51] I find on the facts before me that there is no reason to make any deduction from the amounts awarded.

[52] In addition, Mr Harris claims that penalties should be awarded, for the following breaches:

- a. A breach of good faith, stemming from the employer's unilateral decision to dismiss without following fair process; and
- b. The failure of the respondent to provide wage and time records, in breach of section 130 of the Act⁶.

[53] I must first consider if the relevant breaches of statute are made out. Turning first to the claim of breach of good faith, this claim is based on EFS's failure to follow "any sort of fair and reasonable process" leading to Mr Harris' dismissal. In other words, it is the same conduct that Mr Harris relies on for his personal grievance claim. I have found that Mr Harris has a personal grievance claim of unjustified dismissal based on the lack of fair process in how the dismissal was carried out, and I have awarded reimbursement and compensation in respect of this failure. I note that the court has found that this type of "doubling up" may be wrong in principle, and that where a remedy has been sought and granted in respect of a personal grievance, it will be unusual for a penalty to be imposed in respect of that same conduct⁷. In my view, it is not appropriate to also then award penalties in respect of this same conduct. Accordingly, my view is that it is not appropriate to consider penalties in respect of any breach of good faith.

[54] I must also consider whether there is any breach of section 130 of the Act, which requires all employers to keep a wages and time record showing specific information in relation to each employee, and to provide that record to the employee or their representative "immediately" upon request. Mr Harris, via his representative, requested a copy of his wages and time record in accordance with section 130 of the Act, by letter dated 25 May 2021. He advises that no response has ever been received, despite EFS having had more than 18 months to comply with this straight-forward request.

[55] Accordingly, a breach of section 130 of the Act is made out. The requirements of section 130 are employment standards, meaning that they form part of the minimum requirements that all employers must meet. The requirement to provide wages and time records on request is both well-established, and well known.

[56] As a company, EFS is liable for a penalty of up to \$20,000, as set out in section 135(2)(b) of the Act.

⁶ As set out in the applicant's submissions of 1 February 2023, at paragraph 48.

⁷ See the discussion at paragraph [124] of *Salt v Fell*, [2006] NZEmpC 49.

[57] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,⁸ *A Labour Inspector v Prabh*⁹ and *A Labour Inspector v Daleson Investment*.¹⁰ Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[58] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arise in circumstances *involving a distinct power imbalance*.¹¹ That would appear the case here. Mr Harris has done what the law required of him in asking for access to his records, and has been ignored with no explanation.

[59] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question¹², or failed to take reasonable steps to fulfil their legal obligations.¹³ Here the evidence leads to a conclusion the failure is deliberate given the evidence of Mr Harris that he repeatedly asked for his employment records, including a written employment agreement, payslips, and leave details, throughout his employment (as well as via his representative as set out above) and was ignored.

[60] With respect to the breaches' severity, I note the judgement of the Court in *Preet* suggests failures to keep required records should be assessed at 50%.¹⁴ I note that the loss in this case cannot be quantified in money – as I have already indicated, the failure to provide records has essentially meant that Mr Harris has not been in a position to make any claims other than those already discussed (for example, he is not able to be certain about his annual leave entitlements). However, he has been able to properly progress some claims, for example, a claim for sick leave, albeit on the basis of the

⁸ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

⁹ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

¹⁰ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

¹¹ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

¹² *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

¹³ *El-Agez v Comprede Limited*, TT 4121553, at para 18

¹⁴ See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

information available to him alone. This suggests that the breach is of moderate severity, and a moderate discount should be applied.

[61] There is no evidence of similar previous conduct by the respondent and finally I have to be cognisant of issue such as consistency and proportionality. That, when combined with a perusal of recent penalties would also suggest a moderate discount.

[62] Having weighed these factors I conclude the respondent should be required to pay a penalty of \$7,000. The final issue is then to whom the penalty should be paid and here I note Mr Harris has, by the inaction of the respondent, been forced to initiate proceedings, and has still not received any response from his employer. He should therefore share in the penalty and I consider it appropriate that the sum of \$5,000 be paid to him, and \$2,000 to the Crown.

Orders

[63] EFT Limited (T/A Engineering Fullstop) is ordered to pay to Paul Harris within 28 days of the date of this determination:

- a. The sum of \$4,800 gross, being 4 week's lost remuneration;
- b. The sum of \$850 gross, being unpaid sick leave;
- c. The sum of \$20,000 without deduction, as compensation for hurt and humiliation;
- d. The sum of \$7,000 to be paid to the Crown account, with \$5,000 of this to be paid to Mr Harris, and \$2,000 to the Crown.

Costs

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

[65] If they are not able to do so and an Authority determination on costs is needed Mr Harris 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, EFS 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.

[66] 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.¹⁵

Claire English
Member of the Employment Relations Authority

¹⁵ Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>