

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 490
3172148

BETWEEN

MARK BAREHAM
Applicant

AND

METRO ADMIN PAY
SERVICES LIMITED (IN
LIQUIDATION)
Respondent

Member of Authority: Sarah Blick

Representatives: Mark Bareham, in person
Rob Towner and Talia Powell, counsel for the
respondent

Investigation meeting: 9 March 2023 in Auckland

Submissions and
information received: 23 March 2023 from the applicant
10 and 27 March 2023, 13 July 2023 from the
respondent

Determination: 30 August 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Mark Bareham was employed as a project supervisor by Metro Admin Pay Services Limited (Metro) which provided general building and property maintenance services, including in response to adverse weather events.

[2] This employment relationship problem arises from circumstances of the COVID-19 pandemic, with the imposition of lockdown periods greatly affecting Metro's ability to carry out large parts of its work, especially site visits. Just before and during the first Alert Level 4 national lockdown period which began in March 2020, Metro made a proposal to its office and administrative staff to pay them 80 percent of

their salaries for the first two weeks of the lockdown. The staff agreed to this, including Mr Bareham.

[3] Mr Bareham began to receive the Government wage subsidy, topped up by Metro to 80 percent of his salary in April 2020. Mr Bareham and other staff continued to work at 80 percent of their salaries after the lockdown was lifted and the wage subsidy stopped, all the way through to August 2021.

[4] Shortly into the national lockdown in August 2021, Metro applied for and received the wage subsidy for staff again, and staff pay was reduced to \$600 per week. Metro indicated to the staff they would be able to move back to 80 percent salary once site visits recommenced under Alert Level 3. This did not happen despite site visits recommencing. Mr Bareham's position was then disestablished in November 2021.¹

[5] Mr Bareham wishes to recover the difference in wages between what he received and the salary rate in his employment agreement, for the period April 2020 to November 2021. That period includes the notice period at the end of Mr Bareham's employment.

[6] Metro says Mr Bareham expressly agreed to be paid 80 percent of his salary for the first two weeks of the March 2020 lockdown. It says Mr Bareham by his conduct then accepted or acquiesced to the variation, or waived his entitlement to his full hours and pay, having made no objection over the relevant period. Metro's position is that Mr Bareham was paid the correct amount in lieu of notice, and that he is not owed any arrears.

[7] In the alternative, Metro says it has a set off against Mr Bareham. It lodged a counterclaim saying Mr Bareham breached his contractual obligations by not maintaining a company vehicle in good condition and repair and/or returning the vehicle in very poor condition at the end of his employment. This resulted in Metro incurring costs in having to pay refurbishment costs to the owner of the vehicle. It seeks reimbursement of the costs by way of damages and interest on the costs incurred.

¹ Mr Bareham did not challenge his dismissal and it has not been put before the Authority to investigate.

What has the Authority's process been?

[8] I heard evidence from Mr Bareham, along with the following witnesses from Metro:

- a. David Earl, managing director and shareholder of Metro;
- b. Paula Milne, administrator;
- c. Dale Jury, builder and supervisor.

[9] Metro also called a witness from Turners Cars who gave evidence in relation to Metro's counterclaim.

[10] After the Authority's investigation meeting, a petition to the High Court of the Commissioner of Inland Revenue resulted in Metro being placed in liquidation on 12 May 2023. The Authority subsequently made inquiries with the parties and the liquidator. The liquidators have given approval for the Authority application to continue.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination will not record all the evidence and submissions received during the Authority's investigation but it does state findings of fact and law, and expresses conclusions on issues necessary to dispose of the matter.

What are the issues?

[12] The issues for investigation and determination are as follows:

- a. Does Metro owe Mr Bareham arrears of wages for the period April 2020 to November 2021?
- b. Did Mr Bareham breach the parties' employment agreement and company policy by not maintaining a company vehicle, and if so, should he pay damages for the costs of its refurbishment?
- c. If any arrears of wages are owing, should costs incurred by Metro in relation to the vehicle be offset against those arrears?
- d. Should interest be ordered on any amounts owing?
- e. Should either party pay the other parties' costs?

What is the background?

Parties

[13] Prior to a downturn in work in 2019 and 2020 and restructuring in November 2021, Metro employed approximately 20 people in three broad job categories - administrative, supervisory and trade staff. Mr Bareham started work for Metro in 2015, remaining a project supervisor throughout his employment. Mr Bareham was responsible for visiting sites, providing quotes and actioning jobs once quotes were accepted.

The parties' employment agreement

[14] Mr Bareham signed an individual employment agreement with Metro on 13 January 2015 (the agreement). The hours were stated to be 40 hours per week with additional hours as necessary to meet business demands. Payment was by way of a salary.

[15] The agreement did not contain a clause stating variations to terms and conditions of the agreement could only be made in writing.

[16] The agreement stated Mr Bareham was entitled to the use of a motor vehicle in accordance with the company motor vehicle terms listed with Metro's code of conduct.

[17] Clause 20 of the agreement provided:

On termination of your employment, you must return all of the company's equipment and property in a satisfactory condition before receiving your final pay. You agree that any money owed to the company at termination or the value of any property not returned may be deducted from your final pay, including holiday pay.

[18] The employment agreement provided Metro must give one months' notice of termination in writing, including in a redundancy situation.

March 2019 to July 2019 – pre-COVID financial issues

[19] Metro's director and owner Mr Earl says the start of 2019 was hard for the business with limited work coming in. He says it became obvious steps needed to be taken to protect the viability of business and avoid redundancies. Mr Earl says the staff were consulted over the course of several meetings and a consensus was reached – that they would decrease their hours from 40 to 32 hours a week, resulting in a pay reduction

to 80 percent of salary. This variation lasted between March 2019 and July 2019. Mr Bareham says that variation is not relevant here, but submitted at the time he insisted on a four day working week to match his 80 percent pay, and the length of the period including end date was agreed to during structured meetings. Mr Earl says by July 2019 business picked up and work flow improved. Hours increased again to 40 a week.

March 2020 lockdown

[20] New Zealand went into its first national Alert Level 4 lockdown 25 March 2020. Mr Earl says Metro's work was very practical and hands-on, and as a result of the lockdown, staff were completely unable to perform large parts of the services the company offered. The main issue faced was the inability to perform site visits essential for the completion of building works and preparing quotes for work.

[21] Mr Earl says a decision to decrease to 80 percent or 32 hours was made in consultation with staff, who were content to decrease hours if it meant there would not have to be any redundancies. Just prior to the Level 4 lockdown, Mr Earl called a meeting with staff at Metro's offices with supervisors including Mr Bareham, and administrative staff. Mr Jury says Mr Earl asked if any staff had any suggestions on how to help the business survive the uncertain times. Ms Milne gave evidence that Mr Earl proposed a reduction in hours and a return to 80 percent salary. Metro's witnesses say the proposal was collectively agreed to. Mr Bareham did not object to the proposal.

[22] In an email to staff on 23 March 2020, Mr Earl advised that Metro's office would shut and that by 25 March 2020 all site work would cease. He stated that week's pay run would go through as normal and he would be applying for the wage subsidy. Mr Earl said he would do everything he could to support staff during the unprecedented times.

[23] Mr Earl states that at the very start of the lockdown supervisors were able to complete paperwork for existing jobs where necessary, but that was the extent of the work they were able to perform. This would have included finalising quotes for earlier site visits and corresponding with clients and insurers. Mr Earl says no new work was coming in so once the existing work was completed to the extent possible, Metro could not provide Mr Bareham or the other supervisors with work.

[24] On 7 April 2020 Mr Earl sent an email to Mr Bareham, Ms Milne, Mr Jury and another supervisor. The email stated:

- a. workloads had greatly reduced, productivity and invoicing had stopped, however the company still had rent, leases and insurance to pay;
- b. he had increased the company's overdraft;
- c. the insurance companies did not know when Metro would be able to return to work.

[25] Mr Earl then stated:

I am suggesting we reduce to 80% of current salaries, with the government subsidy and the company topping up the rest, for the next 2 weeks, and we would then need to reevaluate where we stand after that period.

We are all in this together, so please feel free to be open and frank, about any of the above.

If you can come back to me as soon as possible.

[26] The evidence shows staff members agreed, including Mr Bareham who replied the same day, saying "Yep, happy to go with the 80% proposal".

[27] It is common ground that shortly into the 2020 lockdown there was very little work to do, with little to no new work flow coming in and therefore few or no hours needed to be worked.

[28] Mr Earl gave evidence that he sent an email update to staff saying Metro remained in the same situation after the first two weeks of lockdown. He says he asked staff if they had any questions but he never heard anything back from them. Metro has not provided the Authority with any email corroborating this.

[29] Mr Earl says in August 2020 work resumed, but workflow was slow and staff remained at 32 hours per week. He says this was with the continued consent of all staff members, including Mr Bareham. The 80 percent salary arrangement continued until August 2021, although there were a few exceptions. In five pay periods between January 2021 and June 2021 Mr Bareham received his full salary. Metro says Mr Bareham worked 40 hour weeks in these pay periods because there was sufficient work available, whereas Mr Bareham says he received his full salary due to public holidays falling during the relevant pay periods which topped up his salary.

[30] Mr Bareham did not raise concerns about his salary remaining at 80 percent beyond the two-week period. He says the variation continued without any explanation or his consent. When asked by the Authority why he did not raise continuing to be paid at 80 percent of his salary as an issue at any point, he said he supposed the arrangement was being pushed out and he just “went with it”. While in closing submissions Mr Bareham suggested he “felt under duress to continue with things the way they were”, at the investigation meeting he gave clear evidence that he had the option of either “going along with it or leaving”.

August 2021 lockdown

[31] Another nationwide Alert Level 4 lockdown began on 17 August 2021. On 23 August 2021 Mr Earl emailed Mr Bareham and others relevantly advising:

...I can only assume that the announcement today, at 4pm, will confirm the continued lock down for 2 more weeks, in Auckland...

So, I applied for the Covid Wage Subsidy Friday as the current situation is extremely tight, as we all know and are aware.

This weeks wages/salaries will be paid in the form of the Subsidy, to get us threw [sic]. The Government advised they will pay 2 weeks first and I am guessing if the lock down continues they will extend that further.

...

Once we know the outcome of the 4pm Announcement, we can start planning as to what we can do going forward

If any one has any problems, please let me know.

[32] As foreshadowed by the email, Metro paid Mr Bareham only the wage subsidy amount of \$600 in his next pay on 29 August 2021.

[33] On 30 August 2021 Mr Earl emailed Mr Bareham and others advising:

As you know we are locked down, for a further 2 weeks at level 4, and I am assuming further lock down at Level 3 with the wage subsidy they have paid \$600 per employee less Tax for the first two weeks, and I will apply on the 3rd for the next 2 weeks.

As we are not able to generate income, the company will not be able to top up to the 80% we have been currently. Its going to put a huge strain on us all, but it will mean at the end of this, we will still have employment.

We still over [sic] the normal overheads and fixed commitments, which we have to cover regardless, with no Government support to the company.

Guys if you have any suggestions, questions, queries, just let me know and I will do my best to answer...

Sorry its not better news, if there is any hardship issues, again, let me know, as I know Work & Income do have the ability to help with short term Hardship grants

[34] In September 2021 Metro was included in an exemption to Alert Level requirements in relation to a significant flooding event in West Auckland August 2021.² This meant Metro was able to provide staff with work during this period and in some cases site visits could be carried out.

[35] On 29 September 2021 Metro advised by email:

If you guys are on the road and carrying out inspections, we are then able to go back to the 80% salary for the time being, the Subsidy has run out now, so we need to be really on the ball and doing what is required

[36] On 30 September 2021 Mr Bareham advised Metro of the site visits he attended the previous week, as well as the proposed site visits for the following week. He believed this confirmed he was back “on the road” and was therefore expecting to receive 80 percent of his normal salary.

[37] Between 29 August 2021 through to the end of his employment, Mr Bareham’s pay fluctuated between 40 percent (wage subsidy level) and 60 percent of his full salary. There is no clear evidence before the Authority that Mr Bareham followed up about the intended increase to 80 percent or objected to his fluctuating pay. Mr Bareham acknowledges he did not respond to emails advising of the “various salary changes” but says this was to indicate he did not agree to the reduction in his hours or salary.

[38] Metro says during the lockdown between August 2021 and November 2021 Mr Bareham did not complete tasks given to him, would not respond to customers or insurers, was difficult to contact and would take days “offline”. Mr Earl says after Mr Bareham “was made redundant”, he picked up Mr Bareham’s files. He believes Mr Bareham’s updates were inaccurate; the majority of his files had not been progressed and still required preliminary site visits and quotes, in addition to carrying out the required repair works. For his part, Mr Bareham points to a number of factors making his job harder which led to delays, and says performance concerns were not raised with him at any point.

² Granted under the COVID-19 Public Health Response (Alert Level Requirements) Order (no 10) 2021.

[39] Mr Earl says by November 2021 it was clear Mr Bareham was not willing to perform any more work for Metro. His role was made redundant on 28 November 2021. He was paid only the wage subsidy of \$600 for each week in lieu of his notice period.

[40] Mr Earl believes Metro acted as a good employer throughout the period in question and he tried his best to find solutions which meant staff would not need to be made redundant, and to ensure the company stayed liquid. He says he consulted and advised employees of all the decisions made regarding hours and payments, and they consented to the changes. He says he followed advice issued by the Government as best he could when making decisions.

Does Metro owe Mr Bareham any arrears of wages for the period April 2020 to November 2021?

[41] The provisions of an employment agreement can be varied by agreement of the parties. The Authority must examine all of the circumstances to determine, as a matter of fact and degree, whether by Mr Bareham's conduct in not raising any objections and by receiving a reduced salary over the relevant pay periods, he assented to the change to the terms of his employment agreement.³

Mr Bareham is not entitled to arrears for April 2020 to August 2021 period

[42] Viewed objectively, I consider Mr Bareham did give his assent to a variation of his employment agreement with Metro, whereby his hours and pay were reduced to 32 hours and 80 percent salary, respectively. That agreement continued beyond the initial two weeks expressly agreed on 7 April 2020, through to August 2021, for the reasons that follow.

[43] The evidence establishes Metro was communicative and consulted in good faith with staff at the meeting shortly prior to the March 2020 lockdown, which Mr Bareham attended. At that meeting Metro floated the proposal to reduce hours and pay due to its loss of work and concomitant loss of income for the foreseeable future in the lockdown period. Mr Earl made staff aware of the rationale for the proposal – to avoid job losses.

[44] Metro further consulted on the proposal to reduce wages to 80 percent through Mr Earl's email on 7 April 2020, proposing 80 percent wages "for the next 2 weeks".

³ See, for example, *Edwards v Two Degrees Mobile Ltd* [2012] NZERA Auckland 342.

He also stated “we would then need to reevaluate where we stand after that period”. Metro in essence sought Mr Bareham’s consent to the reductions, which he gave in writing by email.

[45] There is no evidence Mr Earl directly sought Mr Bareham’s continued agreement (nor the agreement of other staff members like Ms Milne or Mr Jury for that matter) beyond the two-week period. Both Metro and Mr Bareham could be equally guilty of not being more responsive and communicative about the ongoing agreement. Both had good faith obligations to each other. While the parties’ employment agreement did not require variations to be in writing, Metro ought to have recorded the continued varied terms in writing with Mr Bareham.⁴ However, in all of the circumstances, I find this did not affect the validity of the agreement reached.

[46] This is because a reasonable person observing Mr Bareham’s behaviour would consider he continued to assent to the 32 hour a week/80 percent salary arrangement. Mr Bareham had ample opportunity to raise his reduced salary as an issue over a period of around 16 months between April 2020 through to August 2021. However, he did not. Despite receiving his full salary for five weeks between January and June 2021, Mr Bareham did not raise an objection to his salary reverting back to 80 percent following each of these pay periods. His claim that he did not respond to Metro’s email correspondence because he wanted to indicate he did not agree to the reduction is not at all compelling. The Authority has not been made aware of him expressing any dissatisfaction with the arrangement in the intervening period. This clearly indicated he continued to assent to the arrangement.

[47] Mr Bareham’s evidence in his witness statement and at the investigation meeting was telling in that after the August 2021 West Auckland flooding, he says he expected to return to 80 percent of his salary upon resumption of site visits. This also indicates he continued to accept the by-then longstanding arrangement.

[48] In making this finding the Authority also takes into account the background that the parties had recently, pre-pandemic, utilised a very similar arrangement, on a temporary basis. Despite the unusual circumstance of the pandemic and the uncertainty around the length of the lockdown, the arrangement was familiar and understood between Metro and its staff, including Mr Bareham.

⁴ Employment Relations Act 2000, section 63A.

[49] Finally, at the investigation meeting and in closing submissions Mr Bareham impressed as a capable and strong advocate for his own rights. I am satisfied he was very well equipped to raise his remuneration as an issue both verbally and in writing.

[50] For these reasons, particularly given the very lengthy period during which Mr Bareham acquiesced to the arrangement, I am satisfied the parties initial agreement in April 2020 endured through to 23 August 2021. The Authority is not satisfied Mr Bareham is owed any arrears of wages for this period.

Mr Bareham entitled to arrears for 23 August 2021 to November 2021 period

[51] The reduction in pay Mr Bareham experienced between 29 August 2021 through to the end of his employment is of a different character.

[52] Mr Earl emailed staff on 23 and 30 August 2021 regarding the drop to the wage subsidy of \$600. In the latter email, he advised to let him know of “suggestions, questions, queries”, and he would do his “best to answer”. This variation was presented as a fait accompli. Although Mr Bareham ought to have been more responsive and communicative if he objected to the change, I am not satisfied his silence could be regarded as acceptance or acquiescence in the circumstances at that point. Metro did not seek Mr Bareham’s consent to this drastic reduction in pay, which equated to around \$584 per week on the weeks he only received the wage subsidy. These were deductions imposed unilaterally, with his pay varying between 40 and 60 percent from 29 August to 28 November 2021.

[53] When asked by the Authority why Mr Bareham’s pay was no longer topped up to 80 percent after August 2021, Mr Earl gave evidence that he made the decision to pay only the wage subsidy because “there was no work being done basically”. Metro has submitted Mr Bareham was not ready, willing and able to perform his contracted work between August 2021 and the termination of his employment in November 2021. I am not willing to countenance Metro’s submission on this point. Although the long lockdown period in Auckland would likely have made the management of Metro’s staff more difficult, it is clear Metro did not raise performance concerns with Mr Bareham. Rather than addressing performance in any direct or mature way, it appears Metro instead chose to reduce his pay and then to make his position redundant. Metro was

not entitled to vary or deduct from Mr Bareham's pay like this despite the difficult times.

[54] Mr Bareham is entitled to receive the shortfall between 80 percent of his salary and the payments he received between 29 August 2021 up to and including 28 November 2021. This covers 13 pay periods and Mr Bareham's four-week notice period, with the shortfall in arrears of wages totalling \$8,207.78.

Did Mr Bareham breach the parties' employment agreement and company policy by not maintaining a company vehicle, and if so, should he pay damages for the costs of its refurbishment?

Background to counterclaim

[55] By way of counterclaim, Metro claimed Mr Bareham breached his contractual obligations by not maintaining the vehicle in good condition and repair and/or returning the vehicle in poor condition. Metro submits it has a claim for damages for its loss incurred in paying the invoice resulting from the breach of obligations.

[56] At the investigation meeting, Mr Bareham provided the Authority with a copy of Metro's Company Vehicle Policy, signed by him on 13 January 2015.

[57] When Mr Bareham's employment was terminated his company vehicle was returned to Metro in around early December 2021. The vehicle was a 2016 SUV, owned by another company and leased to Metro. Mr Varghese inspected it on behalf of the owner on 30 January 2022. He produced an inspection report which set out damage to the vehicle, and the costs of repair works. Metro says it incurred costs of \$4,969.61 for "chargeable refurbishment items" for "unfair wear and tear" to the vehicle, charged by the owner pursuant to the report.

[58] Mr Jury gave evidence that he and another Metro supervisor had the same vehicles, and all three were returned to Turners at the same time as they were subject to the same lease arrangement. Mr Jury says while their vehicles were returned clean and had some minor wear and tear, the inside of Mr Bareham's vehicle was "dirty like a tractor" and the outside "barely [had] a straight panel on it".

Counterclaim is not made out

[59] Taking the following matters into account, I am not satisfied on the evidence Mr Bareham should be held responsible for the costs Metro has incurred.

[60] It appears the vehicle may have been allocated to Mr Bareham in 2016, although the evidence was equivocal on this. However, it is clear he was allocated the vehicle after a previous employee left Metro's employ. While Mr Bareham acknowledged responsibility for some damage, he says the vehicle was unsuitable and said he transported tools and a ladder to sites which may have caused some internal damage. Metro disputed the need for these items in Mr Bareham's role. Mr Bareham also gave evidence that some of the damage identified in the report was pre-existing and caused by the previous employee, who was more on the tools than he was. He did acknowledge an incident in Metro's office car park involving a bollard in which he caused damage to the vehicle's bumper, which was subject to repairs in the report. Mr Earl acknowledged he was aware of the incident, but took no action in relation to it at the time.

[61] Mr Earl gave evidence that there was no formal procedure when a vehicle was allocated to a new staff member, and he was not aware of an inventory taken before the vehicle was first given to Mr Bareham. There is therefore no objective way of assessing which damage Mr Bareham caused.

[62] Under Metro's vehicle policy, which Mr Bareham had agreed to in writing, it was his responsibility to ensure that the vehicle was "maintained to the manufacturer's recommended guidelines" to notify Metro's director one month prior to routine service and maintenance becoming due. It provided he was keeping the vehicle "clean, tidy and in good repair at all times". However, the policy also stated Metro would operate and maintain the vehicle at its expense, and "Vehicle Inspection sheets will be completed on a monthly basis by yourself and the Company Director". Despite Metro's obligation under the policy to do monthly inspections, Mr Earl says they did not take place, and checks were generally not done unless the "bumper had fallen off". Even taking into account the interruption of the lockdowns, Metro had ample opportunity but failed to conduct the checks and monitor how the vehicle was being maintained.

[63] Finally, the Authority notes the policy stated Mr Bareham may be held responsible for the insurance excess or the costs of repairs to a vehicle arising out of accidents in certain circumstances, none of which had any relevance to the circumstances arising in this matter.

[64] For all of these reasons, Mr Bareham should not be held responsible for the refurbishment items claimed. The counterclaim is declined. Because of this, the issue of offset against arrears of wages owing does not arise.

Should interest be ordered on any amounts owing?

[65] Mr Bareham is entitled to an award of interest on the arrears of wages awarded. Metro is required to pay interest from the date Mr Bareham's employment ended on 28 November 2021 until the date payment is made in full, calculated in accordance with the Civil Debt Interest Calculator.⁵

Outcome

[66] Metro Admin Pay Services Limited (in liquidation) is ordered to pay Mark Bareham arrears of wages of \$8,207.78, together with interest on that amount from 28 November 2021 until the date payment is made in full. These amounts must be paid within 21 days of the date of this determination.

[67] Additional annual holiday pay may be owed to Mr Bareham as a result of the Authority's orders. The parties should liaise regarding any further amount owing.

Costs and expenses

[68] Metro is to pay Mr Bareham the Authority application fee he paid of \$71.56 within 21 days of the date of this determination.

[69] As Mr Bareham had legal representation at an earlier stage in the Authority process, costs are reserved.

[70] The parties are encouraged to resolve any issue of legal costs between themselves. If the parties are unable to resolve costs between them and an Authority determination on costs is needed Mr Bareham may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum Metro would then have 14 days to lodge any reply memorandum.

⁵ www.justice.govt.nz/fines/civil-debt-interest-calculator.

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

Sarah Blick
Member of the Employment Relations Authority