

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 644
3219379

BETWEEN JAMES DARRYL REYNOLDS
Applicant

AND WILLOW TRANSPORT LIMITED (IN
LIQUIDATION)
First Respondent

AND VICTORIA LOUISE DUFF
Second Respondent

Member of Authority: Antoinette Baker

Representatives: The Applicant in person
No appearance for the First Respondent
No appearance for the Second Respondent

Investigation Meeting: 21 August 2023

Submissions Received: On the day from the Applicant
Further information received: 11 October 2023 from the Liquidator

Date of Determination: 1 November 2023

DETERMINATION OF THE AUTHORITY

[1] Mr Reynolds was employed to drive a long-haul truck for the First Respondent before it was liquidated. He was employed from November 2018 until his last day of employment on or about 31 December 2022 after which he says he was told by someone he knew was connected to Ms Duff but not his employer that the truck he drove had been ‘repossessed’ by

another company. He was then paid money by that person to ‘tide him over’ and offered a job by that person which he accepted. He says he drove the same truck for a week on the same long haul before going off work for scheduled hand surgery.

[2] The director of WT (LIQ) is the second respondent, Ms Duff.

[3] Mr Reynolds claims he is without his final pay and holiday entitlements from WT (LIQ), a shortfall in wages during his employment when Ms Duff unilaterally reduced his pay, and that he was unjustifiably dismissed.

[4] Mr Reynolds claims that Ms Duff should be personally liable for breaches of employment standards as a ‘person involved’ under s142Y and 142W of the Employment Relations Act 2000 (the Act).

[5] Remedies sought include compensation and wages lost as a result of the grievance, wage and holiday entitlement arrears, penalties and interest together with costs.

The Authority’s investigation

Liquidation of first respondent

[6] On 31 August 2023 WT (LIQ) was placed into liquidation. This was after this matter was heard in an investigation meeting on 21 August 2023 at which neither respondent appeared. The liquidation occurred before the matter had been determined. On 11 October 2023 the liquidator for WT (LIQ)¹ gave written approval for these proceedings to continue as required under s248(1)(c) of the Companies Act 1993. This has enabled me to complete this determination as it relates to the first respondent. The intituling has been amended to show WT (LIQ)’s liquidated status.

Participation of respondents

[7] I investigated this employment relationship problem by holding an initial phone conference call. Neither respondent appeared. Ms Duff then contacted the Authority by phone

¹ Email dated 11 October 2023 to the Authority on behalf of appointed co liquidator, Elizabeth Helen Keene.

to say she had received the Directions of the Authority that followed the phone conference call. Those Directions contained the timetable for evidence provision and the date for the investigation meeting. Ms Duff explained there had been no prior notification in relation to the proceedings. Ms Duff then gave the Authority her email address and a phone number. The Authority Officer used those contact details to send her the Statement of Problem and the Notice of the Investigation Meeting and resent the Directions she said she had already received. The Authority sent a further email to the email address she had provided reminding her that there was a 14-day timeframe to respond to the Statement in Reply.

[8] Nothing further was received from either respondent. In the above circumstances, I am satisfied that Ms Duff in her own capacity and by her connection as sole director and shareholder of WT (LIQ) received notice of the proceedings for both respondents and was given an opportunity to provide a Statement in Reply and information about the timetable for evidence provision.

[9] The Authority has the power to proceed if any party fails to attend an investigation meeting 'without good cause'². I considered the above circumstances and continued with the investigation meeting. After receiving the above permission from the liquidator in relation to the first respondent, I make this determination.

[10] As permitted by s 174E of the Act I have not recorded all the evidence and submissions in this determination. I have set out my findings of fact and law and based on this I have expressed conclusions on issues and made orders as necessary to dispose of the matter.

Issues

[11] The issues I need to determine are:

- a. Was Mr Reynolds unjustifiably dismissed by WT (LIQ)?
- b. If so, what remedies for compensation and lost earnings as a result of the grievance are to be awarded?

² Employment Relations Act 2000, Schedule 2, Clause 12.

- c. Did WT (LIQ) breach Mr Reynolds' agreed terms of employment by reducing his pay without his agreement and if so, how much in wage arrears is he owed?
- d. Did WT (LIQ) breach its obligations to pay Mr Reynolds for Holidays Act 2003 entitlements?
- e. Is WT (LIQ) liable for penalties and if so, should any part of a penalty awarded be paid to Mr Reynolds?
- f. Is there to be a reduction in any remedies due to employee contribution?
- g. Should interest be awarded on any unpaid employment standards entitlements?
- h. Does the Authority grant leave for Ms Duff to be a person involved under s 142W of the Act?
- i. Are costs to be awarded?

Was Mr Reynolds unjustifiably dismissed by WT (LIQ)?

[12] 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.

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

[14] Based on the uncontested evidence of Mr Reynolds who I found to be a straightforward witness I find it likely that the situation he found himself in on 1 January 2023 was that he suddenly had no employment with WT (LIQ).

[15] I find it likely that Mr Reynolds was met by someone at the yard where the truck he drove was. He says he knew this person to have a familial connection with Ms Duff. That person told him another company was 'repossessing' WT (LIQ)'s trucks, but that he would have work with the 'new' company. Mr Reynolds was a straightforward witness but appeared

to have little understanding of corporate entities and in his own words is very 'trusting.' He appears to have accepted the new situation offered him together with some money (he says \$1,500.00) to 'tide him over.' I understand he then continued to drive the same truck he had been driving previously for WT (LIQ).

[16] Mr Reynolds realised since about October 2022 that things were not going well for WT (LIQ) and there had been problems with his pay. This is supported by Mr Reynolds' evidence of messaging between him and Ms Duff. He had started chasing his pay when it did not go into his bank account. I am further satisfied that there was no discussion by WT (LIQ) with him about any form of restructuring or redundancy. If there was, I have no evidence to support this.

[17] Based on the above I find WT (LIQ) dismissed Mr Reynolds and that WT (LIQ) did not act as a fair and reasonable employer could have done in all the circumstances as Mr Reynolds has outlined. On this basis I find that Mr Reynolds was unjustifiably dismissed. I will now consider remedies.

If so, what remedies for compensation and lost earnings as a result of the grievance are to be awarded?

Compensation

[18] I am satisfied that Mr Reynolds has shown he has been unjustifiably dismissed. He is therefore entitled to compensation under s 123(1)(c)(i) of the Act. This is compensation for humiliation and injury to his feelings caused by his unjustified dismissal.

[19] Mr Reynolds and his wife gave consistent evidence about the effect on Mr Reynolds when his employment suddenly came to an end, and he remained unpaid his final holiday pay. Mr Reynolds is the only earner for his family with a heavily dependent young relative. I find it likely the greatest stressor was the continued lack of certainty when his final payments would be made. Messaging shows that Ms Duff made promises to pay and or likely avoided his calls. Eventually communication stopped. Mr Reynolds has provided evidence that she Ms

Duff also stopped engaging with the Early Resolution service of the Labour Inspectorate in about January 2023 when Mr Reynolds tried to resolve matters through that medium.

[20] Mr Reynolds describes ‘feeling stink’ and that he continues to do so. I understand this is large part due to him feeling badly let down by WT (LIQ) after what he saw was his hard work, loyalty and patience when he was not always paid on time. I accept Mr Reynold’s explanation that his hand surgery needed to be deferred a number of times because WT (LIQ) needed him to continue the long haul run he regularly completed for the company. When his final holiday pay was not forthcoming, he messaged Ms Duff to say he may have to cancel his surgery again. He was clearly frustrated by the tone of that messaging. I accept this was due to the concern Mr Reynolds had that he may not be able to rely on the extra funds from his holiday pay to tide him over. Ms Duff made continued promises to put things right as she initially did to the Early Resolution service. The messaging shows that she continued to ‘fob’ Mr Reynolds off when he continued to try to contact her, telling him to contact her later and then when he did, she would not be available. Mr Reynolds went ahead with the surgery and remained without his holiday pay.

[21] Mr Reynolds’ wife describes the financial uncertainty as a result of the sudden end of the employment and the adverse change in her husband’s demeanour. Mr Reynolds says he had sleepless nights and low mood. Mr Reynolds says he felt ashamed to have to borrow from their dependant relative’s savings after they had depleted their own planned savings across the six weeks after Mr Reynolds’ employment ended so suddenly. The depleted savings had been planned to tide the family over for when Mr Reynolds had his surgery and then would be supplemented by the holiday pay. I accept this occurred as supported by Mr Reynolds’ bank accounts.

[22] Standing back from the above I find that Mr Reynolds’ humiliation and distress at the way he felt treated by WT (LIQ) was centred on not just the lack of unpaid holiday pay which I will remedy below. WT (LIQ)’s lack of communication with Mr Reynolds’ caused him a high degree of uncertainty and humiliation. I accept he had been a hardworking and loyal employee. Ms Duff’s messaging supports this: “ ...you are a good guy and a great worker.”

[23] I find that \$10,000.00 is appropriate compensation under s 123(1)(c)(i) of the Act.

Lost earnings

[24] Mr Reynolds claims lost wages because of the grievance under s 123(1)(b) of the Act. His evidence includes that he immediately worked for the third party that offered him a job driving the same truck. His evidence includes that this entity or person was somehow related to Ms Duff.

[25] After working for about a week for what he says was his new employer Mr Reynolds then stopped work for his scheduled hand surgery (organised before he was dismissed). This is supported by medical information that Mr Reynolds have provided. He then did not work until late February or early March 2023 for either the same person or entity that he says offered him work around the 1 January 2023 or associated entities or people. IRD records for Mr Reynolds show a variety of entities making payments to Mr Reynolds. Having heard from Mr Reynolds and his explanation about his claim I am satisfied that I have insufficient evidence to support a claim for lost earnings because of the grievance.

Did WT (LIQ) breach Mr Reynolds' agreed terms of employment by reducing his pay without his agreement and if so, how much in wage arrears?

[26] Mr Reynolds claims he was underpaid wages and public holiday entitlements during his employment. He has not quantified these in his claim because there are no employer records. There is also no written employment agreement before me. Mr Reynolds says he signed one but did not keep a copy.

[27] I have considered Mr Reynolds' bank records and the summary table that has been put forward for Mr Reynolds in his Statement of Problem.³

[28] Mr Reynolds' bank records show that he sometimes received pay from "L Sharpe", or "VL Duff" or in the penultimate two weeks of his employment, from "L Sharpe." I accept that these people were then co-directors of WT (LIQ). I accept that Mr Reynolds regarded his employer as WT (LIQ) and that these payments constituted his wages from his employer.

³ Statement of Problem, attachment 4.4.

[29] Mr Reynolds alleges that while he was paid \$1,400.00 per week (net) he agreed to this because he was 'gullible'. Gullible or not, his messaging to Ms Duff shows me he is able to speak up for himself. I find he likely agreed to be paid this per week until his pay increased to \$1,500.00 (net) per week. I accept this as likely because from 11 October 2022 he is consistently paid this amount per week until the two weeks of 17 and 25 November 2022 when he is paid \$1,600.00 net per week after which payments to the end of his employment are \$1,400.00; \$1,400.00; \$1,500.00 and a final payment of \$1,800.00. The later and what turned out to be final payment is referenced in a message from Ms Duff to Mr Reynolds as including a \$200.00 'bonus' and a \$100.00 catch up payment (for an earlier \$1,400.00 paid) that he had reminded her about in a prior message. Mr Reynolds' reminder is consistent with him understanding he was receiving \$1,500.00 (net) per week.

[30] Mr Reynolds' claim for underpaid wages appears to rest on his contention that he received a wage increase to \$1,600.00 per week during his employment. I do not accept this. Mr Reynolds gave oral evidence that he did not know why he was paid \$1,600.00.

[31] Mr Reynolds also confirmed in his oral evidence that he was unclear about the unpaid public holiday entitlements referred to in his Statement of Problem but as I understood him, his focus was getting his holiday pay rectified.

[32] I have considered the above and relying on my ability to reach conclusions without technicalities in order to bring an employment relationship problem to a conclusion,⁴ I do not make any findings or orders in relation to wage arrears or non-payment of public holiday entitlements.

Did WT (LIQ) breach its obligation to pay Mr Reynolds his final holiday pay at termination?

[33] For Mr Reynolds it has been estimated that he is owed a final holiday payment of \$6,912.00 (net).⁵ This however is based on claiming he had a contractual entitlement to be paid \$1,600.00 per week which I have not found. That estimation also misses two narration

⁴ Employment Relations Act 2000, s 157(1).

⁵ Statement of Problem at attachment 4.4.

entries against a payment of \$1,400.00 on the bank records. These are recorded as ‘VL Duff’, ‘Willow Transport’ on 14 June 2022. I find it likely this is a transfer of wages to Mr Reynolds from WT (LIQ).

[34] Accordingly, I am satisfied Mr Reynolds worked one year and approximately four weeks for WT (LIQ). This means that at the end of his employment he became entitled to two types of payment for final holiday pay:

- a. Four weeks of paid annual holiday leave.⁶
- b. 8% of his total gross earnings from his one-year anniversary to the end of his employment, the total gross earnings figure to include the payment for the four weeks above at a.⁷

[35] I find it likely Mr Reynolds’ ordinary weekly pay by the time he ended his employment was an agreed \$1,500.00 (net) per week. Four times this amount is \$6,000.00 (net) which I approximate (based on the apparent tax deducted by WT (LIQ) according to Mr Reynolds’ IRD records in November 2022) as \$7,980.00 gross. I accept Mr Reynolds’ evidence that he had never taken paid annual holiday leave.

[36] In summary, WT (LIQ) is to pay the following unpaid Holidays Act 2003 entitlements to Mr Reynolds subject to appropriate taxation:

Section 24	4 x weeks				7,980.00 gross
Section 25	Total net of 6,100.00 ⁸	8,114.00 (approximated gross)			
Section 26	Annual holiday entitlement	7,980.00			
	Subtotal:	16,094.00	x 8%	1,287.00	1,287.00
	Total:				9,267.00 gross

⁶ Holidays Act 2003, s 24.

⁷ Holidays Act 2003, ss 25 and 26.

⁸ Based on the final period of payments in Mr Reynold’s bank account after his one year anniversary.

Is WT (LIQ) liable for penalties and if so, should any part of a penalty awarded be paid to Mr Reynolds?

[37] I find that WT (LIQ) has breached s 27 of the Holidays Act 2003 in not paying Mr Reynolds his due holiday pay at the end of his employment. WT (LIQ) is liable to a penalty for this breach.

[38] The Court has considered principles relating to the granting of penalties.⁹ Mr Reynolds has been compensated for his losses. The purpose of penalties is to deter, not to compensate. While I consider the importance of deterring other employers about the importance of complying with employment standards, I am not satisfied it is appropriate to award a penalty in the circumstances of this matter.

Is there to be a reduction in any remedies due to employee contribution?

[39] I do not find there any reason before me to support a reduction of remedies¹⁰ due to contribution by Mr Reynolds.

Should interest be awarded on unpaid holiday pay entitlements?

[40] The Authority has the power to award interest. I find this matter is appropriate to award interest on the final holiday pay Mr Reynolds has been deprived of since the end of his employment on 31 December 2022. WT (LIQ) is to pay interest on the outstanding *net* sum paid to him from \$9,267.00 gross from 1 January 2023 until the date of payment. The order is made pursuant to Schedule 2, clause 11 of the Act.

Does the Authority grant leave for Ms Duff to be a person involved under s 142W of the Act?

[41] An employee can recover wages or money owed from a 'person involved' if there has been a default of wages or money owed by the employer, the default is due to a breach of

⁹ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

¹⁰ Employment Relations Act 2000, section 124.

employment standards¹¹ and the person is a director and has been ‘involved’ in the breach in one of the following ways:

- a. Aided, abetted, counselled or procured the breach; or
- b. Induced, whether by threats or promises or otherwise, the breach; or
- c. Has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
- d. Conspired with others to effect the breach.¹²

[42] An employee cannot bring the above claim without the prior leave of the Authority and more importantly in this matter ‘to the extent that the employee’s employer is unable to pay the arrears in wages or other money.’¹³

[43] Mr Reynolds is in a difficult position with his claim against Ms Duff at this stage. While the Employment Court has confirmed that liability against an individual who may be a ‘person involved’ under s 142Y sits separately rather than as an accessory to the liability of the employer, it acknowledged the evidential problems a person may have when the employer is in liquidation.¹⁴ In short, I have no evidence to show me that WT (LIQ) cannot pay any orders here made. That information is dependent on the outcome of the liquidation process which according to the First Liquidators’ Report is not yet complete. I note also that the liquidator has communicated to the Authority that it will abide by any decision the Authority makes in this matter.

[44] Accordingly, I grant leave for Mr Reynolds to return to the Authority to continue a claim against Ms Duff personally under s142Y of the Act if WT (LIQ) is unable to pay the default and interest in the holiday pay orders I have made. To be clear, s142Y of the Act is not a vehicle that enables Mr Reynolds to claim against Ms Duff personally for the compensation ordered for his grievance of unjustified dismissal or the costs ordered in these proceedings. This situation is summarised below at the end of this determination.

¹¹ Defined under the Employment Relations Act 2000 section 5 as including entitlements under the Holidays Act 2003.

¹² Employment Relations Act 2000, s142W(1).

¹³ As above, s142Y(2)(a) and (b).

¹⁴ *Lawton v Pencil Holdings Ltd* [2021] NZEmpC 199 at [30] to [39].

Costs

[45] I accept that Mr Reynolds incurred costs in the preparation of his claim after which he represented himself in these proceedings. His invoice evidence satisfies me that his costs were \$1,081.58.

[46] The Authority generally applies its usual daily tariff rate for costs unless circumstances or factors require an upward or downward adjustment of that tariff.¹⁵ I note that Mr Reynold's invoice for advocacy services came just under the quarter day for a first day tariff¹⁶ and the investigation meeting lasted approximately 2 hours. Accordingly, I find it reasonable to award \$1,081.58 together with the filing fee of \$71.55.

Summary of Orders

[47] Willow Transport Limited (in liquidation) is ordered to pay James Darryl Reynolds the following:

- a. \$10,000.00 compensation under s 123(1)(c)(i) of the Act;
- b. The net amount of \$9,267.00 gross for unpaid entitlement to holiday pay under ss 24, 25, 26 and 27 of the Holidays Act 2003;
- c. Interest on the net figure paid to Mr Reynolds for the award at b. to be calculated from 1 January 2023 to the date of payment according to the calculation method at schedule 2, clause 11 of the Act;
- d. \$1,081.58 in costs together with the filing fee of \$71.55.

[48] Leave is granted to James Darryl Reynolds to return to the Authority with a claim for investigation under s 142Y of the Act against the second respondent, Victoria Louise Duff in

¹⁵ <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

¹⁶ The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 for the first day and \$3,500.00 for each additional day.

relation to the orders referred to at b. and c. above if Willow Transport Limited (in liquidation) is unable to pay these to him as an outcome of the current liquidation process.

Antoinette Baker
Member of the Employment Relations Authority