

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 163
3115615

BETWEEN THOMAS BRANSCOMBE
Applicant

AND ULTIMATE CLEAN
LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Dave Cain, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 26 April 2022 virtual by internet video conference

Submissions: 26 April 2022

Determination: 26 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Thomas Branscombe (Mr Branscombe) claims that he was unjustifiably dismissed by Ultimate Clean Limited (UCL) when his manager Mr Jasbir Singh (Mr Singh) sent him a text message on 10 September 2019 advising that UCL no longer required his services.

[2] Mr Branscombe also says UCL failed to provide him with a written employment agreement, paid his wages late, owes him holiday pay and failed to pay him for the contractual notice period he was entitled to when it terminated his employment.

[3] By a statement of problem lodged in the Authority on 13 August 2020, Mr Branscombe seeks to have his personal grievance for unjustifiable dismissal resolved by the Authority. He also applies for orders to recover arrears of wages and asks the

Authority to impose penalties on UCL in respect of various breaches of employment law.

[4] I am satisfied that the statement of problem was served on UCL via email on 23 November 2020. UCL's statement in reply was required to be lodged by 7 December 2020. I am further satisfied that UCL failed to lodge a statement in reply in the time permitted for it to do so. Having taken no steps, UCL could only reply or respond to the application with the Authority's leave. UCL has not at any stage asked the Authority for permission to respond to Mr Branscombe's application. Mr Branscombe's application continues to remain unchallenged.

The Authority's investigation

[5] I had earlier directed that the notice of the investigation meeting today was to be served on UCL and emailed to Mr Singh. UCL failed to appear today. At the commencement of the investigation meeting today I telephoned Mr Singh. I asked him whether UCL was in a position to respond to Mr Branscombe's application. Mr Singh replied he had been waiting to do so. I then invited Mr Singh to dial into the Zoom meeting. He said he would. Mr Singh did not dial into the Zoom meeting. UCL having taken no steps to respond to the application, having not sought leave and there being no good cause shown for its non-attendance today, I proceeded to act as fully in the matter as if it had attended or been represented.

[6] Mr Branscombe lodged a written statement of his evidence. He answered questions under affirmation from me and his representative Mr Cain. Mr Cain also provided written submissions.

[7] 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

[8] The issues for investigation and determination are these:

- (a) was Mr Branscombe dismissed on 10 September 2019? & if he was;
- (b) was the dismissal what a fair and reasonable employer could have done in all the circumstances at the time as prescribed by the test of

justification set out at section 103A of the Employment Relations Act 2000 (the Act)?

- (c) if UCL is found to have acted unjustifiably what remedies should be provided to Mr Branscombe:-
 - (i) reimbursement of lost wages (subject to evidence of reasonable endeavours to mitigate loss)?;
 - (ii) compensation under s123(i)(c)(i) of the Act?;
- (d) did UCL fail to act in good faith towards Mr Branscombe in breach of section 4 of the Act?
- (e) has there been a default in the payment of wages by UCL entitling Mr Branscombe to recover arrears of wages for accrued annual leave and contractual notice?
- (f) should a penalty be imposed on UCL for failing to provide Mr Branscombe with an employment agreement under section 64 of the Act?
- (g) should a penalty be imposed on UCL for default in payment of wages under section 10 of the Minimum Wages Act 1983?
- (h) did UCL make deductions from wages in breach of section 4 of the Minimum Wages Act 1983?
- (i) should a penalty be imposed on UCL for deductions from wages under section 13 Minimum Wages Act 1983?
- (j) should a penalty be imposed on UCL for failing to provide Mr Branscombe minimum entitlements to annual leave under sections 24 and 27 of the Holidays Act 2003?
- (k) should either party contribute to the costs of representation of the other party?

The facts

[9] UCL is a limited liability company incorporated on 21 March 2011. Its previous names were Sidhu Commercial Services Limited and CJ Singh Limited. Its two directors and shareholders are Mr Singh and Mr Sandeep Kaur Singh. Based in Hamilton and with a Dunedin office it provides commercial and private residential cleaning services.

[10] Mr Branscombe began working for UCL on the 12 August 2019 after UCL acquired the cleaning contract for Pak'nSave Thames from OCS for whom Mr

Branscombe had worked since 2017. He worked 21 hours per week Monday to Friday for OCS.

[11] Mr Branscombe gives evidence UCL never presented him with a new employment agreement however he says that it was understood that the terms and conditions of his employment would remain the same he being entitled to the employment protections as a vulnerable worker under the Act. Mr Branscombe says that OCL was a very good employer and he enjoyed his employment with it.

[12] He says that at the beginning UCL seemed like a great company to work for however it made significant changes to the terms of his employment very early on in the relationship. He says his hours were significantly reduced from 21 hours each week (Monday through Friday) to just 15 hours per week. He says he was confused because his previous employer had assured him that the terms of his employment would not change.

[13] When he raised the matter with Mr Singh, he says he was told that the change was due to UCL's contract with Pak'nSave and there were no more hours available. While there were initially four cleaners, two left shortly after UCL took over. Mr Branscombe says although it was a challenge to complete the work he was pleased to pick up more hours.

[14] UCL committed to continuing to pay employees every second Wednesday. However, Mr Branscombe says that he began to experience issues when UCL began paying his wages late. His rent and other bills were paid each fortnight by automatic payment leaving his account on the Thursday morning. He recalls that on or about 7 September 2019 his landlord called him to ask why his rent had not been paid. When he enquired, he found automatic payment for his rent had failed due to insufficient funds. His wages had not been paid on time. He had other automatic payments that had failed too. Mr Branscombe says that he found the situation quite upsetting because he does not like to let others down.

[15] He says that when he tried ringing Mr Singh to raise the issue Mr Singh was seemingly ignoring his calls so he texted him instead. He says Mr Singh would not respond to his texts either.

[16] Mr Branscombe was unhappy that his employer didn't seem to care that his wages were paid late and that he was under a lot of stress as a result. He says that

regrettably he did send some nasty text messages to Mr Singh which he apologised for. He says that in retrospect he could have handled the situation a lot better and the text messages came from a place of anger and frustration. When I asked him for the detail of some of those nasty text messages Mr Branscombe could not recall but he affirmed they were not offensive or threatening. He said they were more like “*come on I wanna get paid, I’m hungry*”. I would not characterise that type of message as nasty. But Mr Branscombe does admit to sending nasty text messages.

[17] Mr Branscombe says that it was extremely upsetting to be treated the way he was especially because he had always been a dedicated and hardworking employee. According to Mr Branscombe his colleague also experienced the same issues with the late payment of wages.

[18] At about 11:11am on the 10 September 2019 Mr Singh sent a text message to Mr Branscombe as follows:-

Good morning Thomas in regards to your recent behaviour towards the company we will no longer require your services. As a contract has not yet been signed off, this will be effective immediately. An employer will not tolerate the comments and behaviour which has come across from and we regard this as serious misconduct. Your final pay will be paid out within the next week.

[19] Mr Branscombe confirmed that he had no further contact with UCL or Mr Singh after that text communication.

Unjustifiable dismissal?

[20] I find that UCL through Mr Singh terminated Mr Branscombe’s employment by text message on 10 September 2019. The advice that his services were no longer required was a sending away that amounted to a dismissal. Was that dismissal and how that decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time?

[21] An employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of an employee is required to provide to the employee access to information about the decision and an opportunity to comment about the decision before the decision is made.

[22] I accept Mr Branscombe’s unchallenged evidence and find that the first he knew of his dismissal was the notification to him his services were no longer required by text message. I find that there was nothing that preceded it. There was no notification to

him that his employer was considering dismissing him because of an allegation of serious misconduct. There was no opportunity provided to him to comment on his employer's conclusion that his behaviour amounted to serious misconduct. There was no consideration of any input from Mr Branscombe or any consideration of any mitigating factors. There was no opportunity for Mr Branscombe to be heard in his own defence, to please for his employer's mercy to save his employment. The decision was perfunctory, peremptory and unfair.

Breach of the duty of good faith?

[23] I find that UCL failed to provide information to Mr Branscombe and it failed to allow him an opportunity to provide input into the decision to dismiss before it made that decision.

Arrears of wages

[24] I accept Mr Branscombe's unchallenged evidence that he was not paid outstanding holiday pay at the termination of his employment. On the basis of the total gross pay Mr Branscombe was paid that outstanding entitlement is in the gross sum of \$89.93.

Paid by direct credit to his bank account on 21 August 2019	452.44
Paid by direct credit to his bank account on 5 September 2019	640.94
Paid by direct credit to his bank account on 26 September 2019	405.50
Total gross wages	<u>\$1,498.88</u>
6% of total gross wages	<u>\$89.93</u>

[25] However, I accept that Mr Branscombe's hours of work were unilaterally reduced by UCL without his consent and so I accept the sum Mr Branscombe calculates as owing to him on the basis of a 21-hour week. I find that Mr Branscombe is owed arrears of wages in the gross sum of \$135.00 as outstanding holiday pay at termination.

[26] I further find that Mr Branscombe was entitled to be paid for 21 hours work per week. I find that from weeks 2 – 4 of his employment he was underpaid by six hours each week. I find that Mr Branscombe is owed arrears of wages in the sum of 18 hours x \$21.54 per hour in the total gross sum of \$387.72.

[27] Mr Branscombe also claims that he is owed contractual notice upon his dismissal. His employer would have his dismissal characterised as one for summary

dismissal and therefore disentitling Mr Branscombe from notice. I decline to make an award for contractual notice because I have decided Mr Branscombe should not have been dismissed. As well, I have provided Mr Branscombe with remedies to resolve that personal grievance.

[28] Mr Branscombe makes application for and I consider it appropriate to impose a penalty on UCL for its failure to pay outstanding holiday pay in breach of sections 24 and 27 of the Holidays Act 2003.

[29] While I would have considered it appropriate to impose a penalty on UCL for failing to provide Mr Branscombe with an employment agreement in breach of section 64 of the Act, I decline to do so because I conclude such an action is out of time.

The result

[30] For the foregoing reasons I conclude that UCL's decision to terminate Mr Branscombe's employment and how that decision was made and carried out, was not what a fair and reasonable employer could have done in all the circumstances at the time. I find that Mr Branscombe has a personal grievance for unjustifiable dismissal.

[31] I impose penalties on UCL for its breach of its duty of good faith owed to Mr Branscombe, breach of sections 24 and 27 of the Holidays Act 2003 and for breaches of the employment agreement it had with Mr Branscombe in respect of its failures to pay the wages due to him as per the contracted hours.

The resolution

[32] Mr Branscombe is entitled to formal orders to resolve the personal grievance I have found.

[33] I must first consider whether there was any blameworthy conduct on Mr Branscombe's part which contributed to the situation that led to the personal grievance I have found.

[34] Mr Branscombe gives evidence that he was unhappy that his employer didn't seem to care that his wages were paid late and that it did not care that he was under a lot of stress as a result. He admits that regrettably he did send some nasty text messages to Mr Singh which he apologised for.

[35] Mr Branscombe cannot remember but he says out of anger he did say some horrible things in his text messages to Mr Singh.

[36] He says that in retrospect he could have handled the situation a lot better and the text messages came from a place of anger and frustration.

[37] I find that Mr Branscombe's retaliatory behaviour in sending nasty texts to his employer constitutes blameworthy conduct on his part. But I bear in mind Mr Branscombe was responding to his employer's blameworthy conduct. It had failed to pay his wages on time. Having made that finding I must reduce either the nature or the extent of the remedies to be provided to him. In the circumstances I consider that a reduction in remedies of 25% to be appropriate.

Reimbursement

[38] To his credit, Mr Branscombe secured alternative employment almost immediately on 16 September 2019 with Pak'nSave Thames. He still works at Pak'nSave Thames and says he genuinely loves his work. He says he has come a long way since he began there and it has been a great company to work for.

[39] I am satisfied that he lost remuneration in the sum of \$371.70 (Three hundred and seventy-one dollars and seventy cents). I consider Mr Branscombe is entitled to be reimbursed the remuneration he would otherwise have earned had he not been unjustifiably dismissed. I am satisfied that he acted to mitigate his losses. I consider the sum of \$371.70 reduced by 25% for contribution is appropriate. I order Ultimate Clean Limited to pay the gross sum of \$278.78 (Two hundred and seventy-eight dollars and seventy-eight cents) to Thomas Branscombe as reimbursement and to do so within 28 days of the date of this determination.

Compensation

[40] Mr Branscombe gives evidence that the text came as a complete shock to him and he never expected UCL to terminate his employment over the text messages that he regrets sending. He says he still really loved his job as a cleaner and the dismissal was very upsetting for him.

[41] He says too he was also extremely embarrassed about the way his employment ended. He describes losing confidence after his employment ended and he found himself in financial difficulty. He expected to receive his final pay on 18 September 2019 but did not receive it until 26 September 2019. He is grateful that his mother was able to send him a small sum of money to help with some of his expenses and says that without her, he would not have been able to afford basic necessities.

[42] He tells the Authority he lost a lot of sleep worrying about his finances and it was an incredibly stressful time not knowing how he was going to support himself. The termination of his employment coincided with the breakdown of his relationship, and he particularly recalls it was a dark time and he was filled with a lot of self-doubt.

[43] I am satisfied that Mr Branscombe has suffered hurt and humiliation, embarrassment, loss of dignity and injury to his feelings as a result of his unjustifiable dismissal. Having regard to the nature of the personal grievance, his particular evidence and the tenure of the employment, I consider compensation in the amount of \$10,000.00 reduced by 25% in the sum of \$7,500.00 to be appropriate. I order Ultimate Clean Limited to pay to Thomas Branscombe the sum of \$7,500.00 (Seven thousand five hundred dollars) as compensation and to do so within 28 days of the date of this determination.

[44] Having regard to the totality of the breaches of employment laws I have found committed by UCL, I impose a global penalty of \$5,000.00. I order Ultimate Clean Limited to pay a penalty of \$5,000.00 (Five thousand dollars) and to do so within 28 days of the date of this determination. I further order that half of that penalty sum shall be paid to Mr Branscombe personally and the balance payable to a Crown bank account for the use of the Crown.

Costs

[45] I encourage the parties to resolve any issue of costs between them but if UCL does not engage or if agreement cannot be reached, Mr Cain may lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Mr Singh will have 14 days to lodge any reply memorandum. I will not consider any memorandum lodged out of time without prior leave being granted.

Leon Robinson
Member of the Employment Relations Authority

Summary of orders

- (i) Ultimate Clean Limited is ordered to pay to Thomas Branscombe the gross sum of \$135.00 (One hundred and thirty-five dollars) being arrears of wages for outstanding holiday pay at termination and to do so within 28 days of the date of this determination.
- (ii) Ultimate Clean Limited is ordered to pay to Thomas Branscombe the gross sum of \$387.72 (Three hundred and eighty-seven dollars and seventy-two cents) being arrears of wages for outstanding wages at termination and to do so within 28 days of the date of this determination.
- (iii) Ultimate Clean Limited is ordered to pay to Thomas Branscombe the gross sum of \$278.78 (Two hundred and seventy-eight dollars and seventy-eight cents) as reimbursement and to do so within 28 days of the date of this determination.
- (ii) Ultimate Clean Limited is ordered to pay to Thomas Branscombe the sum of \$7,500.00 as compensation and to do so within 28 days of the date of this determination.
- (iii) Ultimate Clean Limited is ordered to pay the sum of global sum of \$5,000.00 as a penalty (in respect of breaches of sections 24 and 27 of the *Holidays Act 2003* and the employment agreement it entered into with Thomas Branscombe) being \$2,500.00 (Two thousand five hundred dollars) payable to Thomas Branscombe within 28 days of the date of this determination and \$2,500.00 (Two thousand five hundred dollars) payable to the Employment Relations Authority for the use of the Crown within 28 days of the date of this determination.