

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 2
3011231

BETWEEN NIGEL BROWN
Applicant

AND TE KOHU LOGGING
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Carleton Mateer for Applicant
No appearance for Respondent

Investigation Meeting: 2 November 2017

Determination: 4 January 2018

DETERMINATION OF THE AUTHORITY

- A. The Authority has jurisdiction to investigate Mr Brown's personal grievance.**
- B. Mr Brown was unjustifiably dismissed. Te Kohu Logging Limited is ordered to pay the following remedies within 28 days of the date of this determination:**
- lost wages and holiday pay of \$3,807 gross under s 123(1)(b) of the Employment Relations Act; and**
 - \$8,000 under s 123(1)(c)(i) of the Employment Relations Act**
- C. Te Kohu Logging Limited is ordered to pay to Mr Brown arrears of wages under s 131 of the Employment Relations Act in the**

amount of \$388.80 nett for unpaid wages and \$255.60 gross for outstanding holiday pay within 28 days of the date of this determination.

D. Te Kohu Logging Limited is ordered to pay a penalty of \$500 to the Employment Relations Authority within 28 days of the date of this determination.

E. Te Kohu Logging Limited is ordered to pay costs of \$500 to Mr Brown within 28 days of the date of this determination.

Employment relationship problem

[1] Mr Brown was engaged by Te Kohu Logging Limited from 20 February 2017 until he was dismissed on 21 March. Mr Brown challenges his dismissal and claims he is owed arrears of wages and holiday pay.

[2] In its statement in reply Te Kohu Logging says the Authority does not have jurisdiction to investigate Mr Brown's personal grievance because he was subject to a 90 day trial.

Issue

[3] In order to resolve this employment relationship problem I must determine the following issues:

- a) Is Mr Brown barred from bringing a personal grievance for unjustified dismissal?
- b) If the answer to a) is no, was Mr Brown unjustifiably dismissed and if so, what, if any, remedies should be awarded?
- c) Is Mr Brown owed any outstanding wages and/or holiday pay?
- d) Should a penalty be imposed on Te Kohu Logging for failure to pay wage arrears?

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Brown and Te Kohu Logging but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Procedural history

[5] Te Kohu Logging did not attend a case management call on 2 October 2017 despite emails being sent to it from the Authority. Accepting that the lack of response may have been caused by a number of factors, I proceeded to progress Mr Brown's application against Te Kohu Logging by setting down an investigation meeting date and making directions to the parties in preparation for the investigation meeting. These directions were set out in a Notice of Direction dated 2 October 2017.

[6] From 31 October to 1 November 2017 inclusive, the Authority unsuccessfully attempted to contact Te Kohu Logging's sole shareholder and director, Mr Ranginui by telephone and email to confirm that he had received the Notice of Investigation Meeting, a Notice of Direction issued on 2 October and that he intended to be present at the investigation meeting on 2 November.

[7] This unusual step was taken because the Authority had been unable to confirm that the Notice of Investigation Meeting and Notice of Direction have been properly served on Te Kohu Logging.

[8] Te Kohu Logging did not make an appearance at the investigation meeting on 2 November. Because I was not satisfied Te Kohu Logging had been properly served it was agreed that I would continue to hear Mr Brown's evidence. Mr Brown had travelled from Auckland for the investigation meeting and I was not inclined to delay the investigation into his claims or require him to expend further time and costs attending a second investigation meeting.

[9] It was agreed that after taking Mr Brown's evidence I would send a summary of the evidence together with questions I had for Te Kohu Logging, to both parties and provide them with an opportunity to comment and for Te Kohu Logging to answer my questions. Mr Brown would then be given a further opportunity to respond to anything raised by Te Kohu Logging.

[10] During the taking of Mr Brown's evidence a number of documents were identified that I determined would assist me to clarify disputed issues such as Mr Brown's start date. A timetable was set for the lodgement of these documents and those that were available have been provided.

[11] On 3 November I issued a further Notice of Direction requiring a response and further documents from Te Kohu Logging to be lodged on or before 17 November 2017. Nothing was received by the Authority and further issues with service of the second Notice of Direction were identified. A third Notice of Direction dated 20 November was drafted. The only differences between the second and third Notices of Direction were the timetabled dates for compliance. The third Notice of Direction was served on the registered addresss for service for Te Kohu Logging at 8.39am on 23 November 2017.

[12] Te Kohu Logging has not taken the opportunity which was provided to it to answer questions and to provide additional information. Apart from lodging a statement in reply Te Kohu Logging has not engaged in the Authority's process and as provided in clause 12 of schedule 2 of the Act I have proceeded to act fully in the matter as if the respondent had engaged.

Is Mr Brown barred from bringing a personal grievance claim for unjustified dismissal?

[13] Section 67A of the Act allows for written employment agreements to provide for a trial period of 90 days or less. The trial provision must be in writing and must state:

- a) That for a period not exceeding 90 days starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- b) During that period the employer may dismiss the employee; and
- c) If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[14] Section 67B of the Act applies where an employer terminates an employment agreement containing a trial provision by giving notice of the termination of employment prior to the end of the trial period.

[15] The obligations set out in ss 67A and 67B of the Act are to be interpreted strictly. This is because these provisions of the Act remove a right of access to justice.¹

[16] Te Kohu Logging has provided the Authority with a copy of an individual employment agreement it says was signed by both parties on 19 February 2017.

[17] Clause 1.3 of the employment agreement states (verbatim):

Start date: Your employment starts on20 February 2017

From the very start of their employment, the employee will be on a trial for a set period of 90 days; and during the trial, the employer can dismiss the employee, and the employee can't bring a personal grievance or other legal proceedings about their dismissal.

[18] Mr Brown says he never received a copy of an employment agreement and disputes the signature on the document provided to the Authority is his signature. In support of this assertion Mr Brown provided a copy of his driver's license which he has signed. At the investigation meeting Mr Brown provided a further example of his signature.

[19] I am not a forensic writing expert however, there are enough differences in the signatures provided by Mr Brown before and during the investigation meeting and the one on the employment agreement to cause me to doubt the authenticity of the signature on the employment agreement.

[20] I have concluded on balance that it is more likely than not, that the signature on the employment agreement is not Mr Brown's signature and the terms of the written document are not enforceable. Te Kohu Logging is not able to rely on s 67B of the Act and Mr Brown is entitled to have his personal grievance claim investigated by the Authority.

¹ Ibid at [82].

Unjustified dismissal

[21] Mr Brown was on a benefit and living in Tokoroa when he was offered a job with Te Kohu Logging. He told me Mr Ranginui picked him up from Tokoroa and moved him to live at the camping ground in Huntly. Mr Brown says he started work at about the same time as he moved to Huntly.

[22] There is a dispute over Mr Brown's start date. Mr Brown says he started work on or about 7 February 2017. In its statement in reply Te Kohu Logging says Mr Brown started on or about 20 February 2017.

[23] An Inland Revenue document setting out the names of Mr Brown's employers for the period 1 April 2016 to 31 March 2017 records Mr Brown's employer from 20 February to 17 March 2017 as Te Kohu Logging.

[24] Attempts to obtain records from the Huntly camping ground were unsuccessful. It was hoped those records would shed some light on the date Mr Brown starting living at the camping ground which would help to clarify the date he started working for Te Kohu Logging.

[25] I have concluded it is more likely than not that the IRD document reliably records Mr Brown's start date. The IRD record shows that Mr Brown was in receipt of a benefit until 20 February 2017 and the total amount of wages paid to Mr Brown and recorded in the document is consistent with the wages Mr Brown says he earned each day. For these reasons I have applied 20 February 2017 as the date Mr Brown started working for Te Kohu Logging.

[26] Mr Brown worked from February to March without incident. Approximately two weeks after he started working Mr Ranginui provided Mr Brown with a company vehicle so that he could pick up and drop off other employees on the days he was working.

[27] On 20 March Mr Ranginui employed a new employee and dropped him off at the Huntly camping ground. When Mr Ranginui arrived at the camping ground he saw Mr Brown sitting in the company vehicle having a cigarette and a beer. Mr Ranginui told Mr Brown off for smoking and drinking in the Ute.

[28] Mr Brown attended work as usual on 21 March 2017 and worked without incident. At the end of the day, as he was finishing up Mr Ranginui told him his employment was being terminated on the basis that he had been disrespectful.

[29] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Te Kohu Logging's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[30] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Te Kohu Logging sufficiently investigated allegations, raised the concerns with Mr Brown, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[31] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Brown being treated unfairly.² A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[32] The process leading to Mr Brown's dismissal was defective. There is no evidence Te Kohu Logging met any of the mandatory considerations set out in s 103A(3). Te Kohu Logging had not raised its concerns about Mr Brown's behaviour prior to making the decision to dismiss him. There was no opportunity for Mr Brown to respond to any concerns before dismissal and therefore no genuine consideration of any explanation. The dismissal was immediate and abrupt. These defects were not minor and resulted in Mr Brown being treated unfairly.³

[33] Mr Brown's dismissal was unjustified and he is entitled to a consideration of remedies.

² Employment Relations Act 2000 (the Act), s 103A(5).

³ The Act at s 103A(5).

Remedies

[34] Mr Brown seeks reimbursement of lost wages and compensation to remedy his personal grievance.

[35] Mr Brown was out of work from 21 March to 1 May 2017, a total of five weeks. Based on the IRD record provided by Mr Brown his average weekly gross earnings for the period of his employment was \$705.

[36] Te Kohu Logging Limited is ordered to pay to Mr Brown the sum of \$3,525 gross being lost wages under s 123(1)(b) of the Act plus 8% holiday pay which I have calculated as being \$282 within 28 days of the date of this determination.

[37] Mr Brown seeks compensation of \$8,000 under s 123(1)(c)(i) of the Act. Prior to being employed by Te Kohu Logging Mr Brown had been on a benefit. He was also on parole which required him to have a job and a place to live. Mr Ranginui was aware of Mr Brown's situation when he employed him.

[38] Mr Brown's evidence was compelling. He was overjoyed at being in paid employment and after his dismissal was extremely embarrassed. He has had to move to Auckland to gain alternative employment with all the incumbent expenses associated with that move. He told me he has struggled to raise a bond for his new accommodation.

[39] Mr Brown is trying hard to look after his children, keep his job and do nothing that would break his parole conditions. Being dismissed unfairly has made this more difficult for him.

[40] I consider an appropriate award of compensation to be \$8,000. Te Kohu Logging Limited is ordered to pay to Mr Brown the sum of \$8,000 for humiliation and distress under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

[41] Having determined Mr Brown has a personal grievance I must consider the extent to which his actions contributed towards the situation that gave rise to the

personal grievance. I must reduce the remedies if Mr Brown's actions contributed in some blameworthy way.⁴

[42] I am not satisfied Mr Brown contributed in any blameworthy way to the situation giving rise to his personal grievance. He denies being disrespectful and was not aware there were any rules about smoking or drinking while sitting in the company vehicle. The remedies will not be reduced.

Arrears of wages

[43] Mr Brown claims he is owed two day's pay for work completed on 20 and 21 March 2017 plus holiday pay on his gross earnings.

[44] Mr Brown was paid a daily rate of \$180 nett. For 20 and 21 March this amounts to a total of \$360 nett in unpaid wages.

[45] The IRD document records Mr Brown's last date of employment as being 17 March. In the absence of any evidence to the contrary I have accepted Mr Brown's sworn testimony that he worked on 20 and 21 March. Mr Brown is entitled to be paid for both days plus holiday pay equivalent to 8%. This amounts to \$388.80 nett.

[46] Mr Brown claims he is owed outstanding holiday pay for the period of his employment. The IRD document records Mr Brown's total earnings during the period of his employment as being \$2,820 gross. Mr Brown is entitled to 8% holiday pay on this amount which equates to \$225.60 gross.

[47] Te Kohu Logging Limited is ordered to pay to Mr Brown arrears of wages under s 131 of the Act amounting to \$388.80 nett being unpaid wages for 20 and 21 March 2017 plus outstanding holiday pay of \$225.60 gross. Payment is to be made within 28 days of the date of this determination.

Penalties

[48] Mr Brown has applied for the imposition of a penalty against Te Kohu Logging for its failure to pay wages when they were due. The failure to pay wages is a breach of s 4 of the Wages Protection Act 1983. Under s 13 of the WPA an employer

⁴ Employment Relations Act 2000 s 124.

who fails to comply with the requirement to pay wages when they are due is liable to a penalty. In the case of a corporation the maximum penalty for each breach is \$20,000.

[49] The Authority must impose a penalty at a level that signals its disapproval of the conduct of Te Kohu Logging in not meeting its minimum standards obligations and which acts as a deterrent to Te Kohu Logging and other employers who may not be minded to meet their obligations.

[50] The factors for determining whether to impose penalties for statutory breaches, and the level of each penalty, are drawn from s 133A of the Act, applying from 1 April 2016, and relevant case law.⁵

[51] I consider a failure to pay wages as serious but do not consider that the breach merits a significant penalty being imposed. I have no evidence on which to assess Te Kohu Logging's ability to pay penalties.

[52] The penalties imposed should be proportionate to the amount of money unlawfully withheld.⁶ The total amount unlawfully withheld by Te Kohu Logging was \$360.

[53] I consider an appropriate penalty to be \$500. Te Kohu Logging Limited is ordered to pay this penalty to the Employment Relations Authority within 28 days of the date of this determination. The Authority will then pay this sum into a Crown bank account.

Payment of the orders

[54] Te Kohu Logging is ordered to pay the amounts attributable to Mr Brown and set out in this determination directly to his bank account. The details of Mr Brown's bank account have been supplied by the Authority under cover of a separate Minute to protect Mr Brown's privacy.

Costs

[55] At the date of the investigation meeting Mr Brown had not incurred any costs associated with this matter. He entered into an agreement with his representative that

⁵ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [5]-[6].

⁶ *Ibid* at [190].

he would pay a fixed fee of \$300 and in addition to this he would pay 1/3rd of any monetary orders made in his favour by the Authority.

[56] The monetary orders in this determination amount to \$12,451.40. If Mr Brown is required to pay 1/3rd of this as well as the \$300 base fee, that will amount to costs in excess of \$4,000.

[57] I did not require Mr Brown to lodge a witness statement and neither was he required to provide written submissions. All I required from Mr Brown in preparation for the investigation meeting was that he advise me of the names of any witnesses. This was to avoid unnecessary costs for Mr Brown.

[58] Based on the quality of the statement of problem it is unlikely Mr Brown's representative has spent a great deal of time in preparation for this matter. While I acknowledge Mr Brown's representative provided a witness statement and written submissions, this work was not necessary. The submissions handed up by Mr Mateer at the investigation meeting were not drafted by him and he was unable to answer any questions about them.

[59] The reasonableness of the level of costs incurred must be proportionate to Mr Brown's success and weighed against a background where the matter was undefended and the investigation meeting took less than half a day. The usual practice of the Authority is to order a contribution to costs on a daily tariff basis.

[60] In this case that tariff would amount to \$2,250. The tariff has been set to recognise that a variety of representatives appear in the Authority including qualified, registered professionals who are required to adhere to a professional code of conduct and unregulated advocates who have no such obligations. Mr Brown's representative is an unregulated advocate and as such does not have the expenses and obligations of his qualified and registered counterparts.

[61] Taking all of the circumstances into account, I consider a reasonable contribution to Mr Brown's costs is \$500. This takes into account Mr Brown's obligation to pay a base fee, recognises the minimum work undertaken by his advocate in drafting the statement of problem and the payment of the filing fee.

[62] Te Kohu Logging Limited is ordered to pay costs of \$500 to Mr Brown within 28 days of the date of this determination.

Certificate of determination

[63] Pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 Mr Brown is to be provided with a certificate of determination, sealed with the seal of the Authority recording that within 28 days of the date of this determination, Te Kohu Logging Limited is to pay Mr Brown:

- lost wages and holiday pay of \$3,807 gross under s 123(1)(b) of the Employment Relations Act;
- \$8,000 under s 123(1)(c)(i) of the Employment Relations Act;
- arrears of wages in the amount of \$388.80 nett for unpaid wages and \$255.60 gross for outstanding holiday;
- costs of \$500.

Vicki Campbell
Member of the Employment Relations Authority