

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 96
5392450

BETWEEN JEFFREY CANTWELL
 Applicant

AND UNITED TAXIS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
 Rachel Brazil, Counsel for Respondent

Investigation Meeting: 18 April 2013 at Dunedin

Submissions received: 26 April and 20 May 2013 for Applicant
 13 May 2013 for Respondent

Determination: 31 May 2013

DETERMINATION OF THE AUTHORITY

- **Jeffrey Cantwell did not raise his personal grievance of unjustified disadvantage and dismissal within 90 days. Although the delay was occasioned by an exceptional circumstance leave was not granted to raise the personal grievances outside of the 90 day period, because it would not be just to do so in circumstances where I found it would be unlikely that either grievance would succeed.**
- **United Taxis is to pay Mr Cantwell the sum of \$297.95 gross for unpaid wages and holiday pay.**
- **I have reserved costs noting that this is the sort of case where the Authority may determine costs and disbursements should lie where they fall.**

Employment relationship problem

[1] Jeffrey Cantwell was employed as a taxi driver by United Taxis Limited (United Taxis) from 29 June 2012. His last day of work for United Taxis was 8 July 2012. Mr Cantwell says that the following employment problems arise from his relationship with United Taxis:

- That there was a breach of good faith obligations in negotiations for an employment agreement;
- That United Taxis did not supply him with a written employment agreement;
- That he was not paid the minimum wage of \$13.50 per hour;
- That he was dismissed either actually or constructively and/or disadvantaged; and
- That he is owed the sum of \$367.00 being the balance of unpaid wages and holiday pay for the period he worked.

[2] Mr Cantwell seeks reimbursement of the sum of \$300.67 unpaid wages and holiday pay together with three months lost wages in the sum of \$6,998.40 gross and \$5,000 for compensation. Mr Cantwell also seeks to be reinstated to his position with United Taxis as a taxi driver.

[3] United Taxis deny allegations that it acted in breach of good faith provisions or that it did not pay Mr Cantwell the minimum wage. It denies that it dismissed Mr Cantwell actually or constructively or disadvantaged him in any way and says that Mr Cantwell did not raise his personal grievances within 90 days and that the respondent does not consent to a late submission of the grievance.

Issues

[4] The Authority is required to determine the following issues:

- Was there a breach of the good faith obligations in negotiations with the individual employment agreement and the failure to provide a written employment agreement?

- What was the arrangement for pay and did that breach the Minimum Wage Act 1983?
- Was a personal grievance for dismissal and unjustified disadvantage raised within 90 days from 8 July 2012; or are there exceptional circumstances for which leave should be granted to raise a grievance outside of that period.
- If the personal grievance was raised within the statutory timeframe or leave is granted, does Mr Cantwell have a personal grievance that he was unjustifiably disadvantaged or dismissed?
- Is Mr Cantwell owed any further money for working the shifts that he worked?

Background to the issues

[5] Mr Cantwell saw the vacancy for a taxi driver when he checked the WINZ job site in late May 2012. The position was advertised at \$13.50 per hour and Mr Cantwell was qualified to be a taxi driver as he had a “P” endorsement on his licence and had previously driven taxis. Mr Cantwell was at that stage on a sickness benefit for a shoulder injury.

[6] Mr Cantwell was able to ascertain that the vacancy was with United Taxis, a company he had driven for some years previously. Mr Cantwell telephoned and spoke to one of the directors of the company, William Overton, about the vacancy. The conversation turned to the availability of an employment agreement and Mr Overton advised Mr Cantwell that the employment agreements for drivers were *at the lawyers* and that the company was waiting for them to be returned. Mr Overton explained in his evidence that the company was in the process of converting employee drivers across to owner/operator drivers although Mr Cantwell did not accept that he was advised by Mr Overton about that.

[7] I find Mr Cantwell was persistent in his approaches to United Taxis for a job. Mr Overton recalls and I have no reason not to accept his evidence on this point that Mr Cantwell said he would even work without pay. Mr Overton explained that he was very unwell at the time and felt *hounded by Mr Cantwell*. Eventually there was agreement for Mr Cantwell to commence employment on 29 June 2012.

[8] Mr Cantwell said that he explained to Mr Overton his shoulder was still a bit tender and he needed a little bit of time to get back into the role. Mr Cantwell's wish was to drive for 3-4 days a week initially until he got a feel for the job. He anticipated these reduced hours lasting for about a month.

[9] There was discussion that Mr Cantwell would be remunerated on the basis of the usual arrangement United Taxis had with its drivers. That was that Mr Cantwell would get 40% of the takings and the company would get the remaining 60%. Mr Overton was quite adamant in his evidence that his drivers were never paid the minimum wage because they got a greater sum by virtue of the above formula. He said in the event that a driver did not make minimum wage then it would be made up by the company. The evidence supported that the induction process for Mr Cantwell was unsatisfactory. Mr Overton explained that he had left the employment of Mr Cantwell to the person managing the business.

[10] Mr Cantwell commenced work as a driver on Friday 29 June 2012. Both parties arrived at a slightly different calculation of hours worked thereafter, but only in relation to Thursday 5 July 2012. I shall therefore set out the other days as agreed upon and just note the different calculation for Thursday 5 July 2012.

Hours worked by Mr Cantwell @ \$13.50

29 June 2012 Friday	8.30am-1800 hours (9 hours)	\$121.50
30 June 2012 Saturday	10-1730 (7 hours)	\$94.50
1 July 2012 Sunday	10.30-2145 (10.75 hours)	\$145.13
5 July 2012 Thursday	8-1800 (9½ hours) (Mr Cantwell says 11.5 hours)	
6 July 2012 Friday	8-1630 (8 hours)	\$108.00
7 July 2012 Saturday	8-1600 (7.5 hours)	\$101.25

8 July 2012
Sunday

9.30-2130
(11.5 hours)

\$155.25

[11] On 8 July Mr Cantwell left work at United Taxis and did not return to taxi driving for the company. Mr Overton said in evidence that he tried to telephone Mr Cantwell on two occasions but accepted that he did not leave a message. Mr Cantwell did not make further contact with Untied Taxis.

[12] Mr Cantwell accepts that he took cash takings on the basis that he was entitled to 40% of the takings. United Taxis say they only received limited and unsatisfactory evidence about takings for two days following Mr Cantwell's brief period of work so they were unable to ascertain whether he had been paid correctly. Mr Cantwell does not agree and says that he made a total of three deposits of his takings. He says that one was made to Mr Overton in person and that he made two other deposits into the drop cash box which the drivers used to deliver the appropriate documentation and takings.

[13] In August 2012 Mr Cantwell was advised by the police that Mr Overton had laid a compliant with them for theft of United Taxi company property. As I understand the charges have been the subject of a hearing in the District Court and Mr Cantwell was found not guilty.

[14] Mr Cantwell says that he raised a personal grievance when he requested through the Labour Department on or about 24 August 2012 mediation between him and United Taxis. Mr Overton accepts that he was telephoned by the Mediation Service but says that he had no idea what any grievance was about.

[15] Mr Cantwell says that he was prevented from making any direct contact with United Taxis because of the police bail bond signed on 19 August 2012.

[16] Mr Cantwell then lodged a statement of problem with the Employment Relations Authority on 19 November 2012.

Was there a breach of the good faith obligations in negotiations for the individual employment agreement and the failure to provide a written employment agreement?

[17] The duty of good faith in s.4 (1) of the Employment Relations Act 2000 applies to bargaining for an individual employment agreement or for a variation of an individual employment agreement (s.4(4)(ba)).

[18] There were two main issues for Mr Cantwell I find arising because of the failure to provide him with an employment agreement. The first was that he wanted a written agreement recording his entitlement to \$13.50 per hour. As Mr Cantwell said in his first submission amongst other matters; *I believed that he was trying to undercut the minimum wage offer from his original advertisement.* The second issue was that Mr Cantwell wanted an employment agreement for security of employment if he was to advise WINZ that he would no longer be receiving a benefit. Otherwise he would have suffered no doubt a stand-down period.

[19] There was no negotiation as such between the parties because Mr Cantwell was not provided with an intended individual employment agreement. Section 63A of the Employment Relations Act 2000 provides that an employer must provide an employee with a copy of the intended agreement under discussion and advise that the employee is entitled to seek independent advice about the intended agreement and give the employee a reasonable opportunity to seek that advice. I find that Mr Cantwell did have knowledge that the reason for any delay in providing the employment agreement was because they were with United Taxis lawyers.

[20] Ms Brazil on behalf of United Taxis accepts that Mr Cantwell should have been provided with an individual employment agreement. The failure to do so was a breach of s.63 of the Employment Relations Act 2000.

[21] There was no claim by Mr Cantwell for a penalty for a failure to comply with s.63A or under s.4A of the Act. I shall return to consider the matter under the personal grievance claims after I have determined whether they were raised within 90 days and/or there were exceptional circumstances so that there should be an extension of the period within which to raise a grievance.

What was the arrangement for pay and did that breach the Minimum Wages Act 1983?

[22] Mr Cantwell retained most of the cash takings received as a taxi driver on the basis that he was retaining 40% of takings until he was paid and/or received an employment agreement. Objectively assessed that is unusual and the evidence did not support that was what usually happened at United Taxis.

[23] In determining the dispute as to whether the takings and cash retained were properly accounted for to United Taxis, I found the evidence of Dana Ronford, who manages the United Taxis office to be credible. Ms Ronford said that the only contact that she had with Mr Cantwell was after his final day of work on 8 July 2012. She could not recall the exact day. Ms Ronford explained that there had been nothing prior to this time in the cash lock box from Mr Cantwell. She said there was no documentation including log books or cash to enable her to process the wages. Ms Ronford said that she was the only person with the key to the cash box and that everything in the cash box was fully accounted for. I accept her evidence about the cash box.

[24] She said that when Mr Cantwell came in he said *Mr Overton wants you to have this*. I find that there must have been an earlier conversation between Mr Overton and Mr Cantwell about the need to give documentation about the takings to Ms Ronford so that proper payment could be made. Ms Ronford said that she was given a white paper napkin with some calculations on. She did not retain this. She was also given two log sheets, in all likelihood I find for 7 and 8 July and an amount of cash and two dockets. Ms Ronford said that as best she could, she calculated what the takings were for those two days and found they were \$217 short. There was a dispute as to whether Mr Cantwell returned the \$120 float to United Taxis. Mr Cantwell says that he did and both Ms Ronford and Mr Overton say that the cash float was never returned to them and neither was the coin dispenser or log books.

[25] Mr Overton did not accept Mr Cantwell's evidence that he was given documentation and cash by Mr Cantwell which he simply left on his desk or crammed into a drawer. I find if Mr Cantwell had approached Mr Overton with takings and documentation then he would have in all likelihood been directed immediately to Ms Ronford. I have carefully considered the evidence and could not be satisfied on

the balance of probabilities that the monies withheld by Mr Cantwell from the takings had been properly accounted for to United Taxis.

[26] I could not be satisfied in those circumstances that United Taxis had a fair opportunity with the correct paperwork and a record of what had been retained by Mr Cantwell, to calculate properly what was owed to him. I am not satisfied that there was an intention in those circumstances to breach the Minimum Wages Act 1983. If 40 % of the takings for the period Mr Cantwell was driving were less than the minimum wage at that time then Mr Overton said in evidence the difference would have been made up.

[27] It may be that Mr Cantwell is owed something additional over and above the takings that he retained. The Authority was provided with some paperwork by Mr Cantwell although Ms Brazil said that it was insufficient for United Taxis to calculate whether anything further is owed and advised that the company was happy to leave that matter for the Authority. That is a matter that I will return to.

Was a personal grievance raised with 90 days from 8 July 2012 or are there exceptional circumstances so that leave should be granted?

[28] It is common ground that after 8 July 2012 and the interaction with Ms Ronford, Mr Cantwell made no further contact with United Taxis. Mr Overton said that he tried to ring Mr Cantwell to ascertain the whereabouts of the coin dispenser, cash float, log books and docketts. He agreed though that he did not leave a message.

[29] A Police bail bond provided amongst other conditions of bail that Mr Cantwell was not to attempt to contact or associate with any person employed by United Taxis and not to go to United Taxis. This bail bond was signed on 19 August 2012.

[30] Mr Cantwell says that his personal grievance was raised on or about 22 - 24 August 2012 when he made a complaint with the then Department of Labour about underpayment. Mr Overton recalls being telephoned at or about that time to attend mediation but says that there was no information on what if any grievance Mr Cantwell had against the company. I accept that evidence. Simply being asked to attend mediation is insufficient in these circumstances to raise a personal grievance. I find that the first time United Taxis were aware that Mr Cantwell had raised a

personal grievance was when they were served with a copy of the statement of problem after 19 November 2012. That was outside of the 90 day period.

[31] I do not find that personal grievances were properly raised that Mr Cantwell was dismissed from and/or disadvantaged in his employment within 90 days.

[32] Mr Cantwell says that he was not able to raise his grievance directly with United Taxis within 90 days because of his bail bond. I have treated the reference to the bail bond as a matter advanced as an exceptional circumstance under s.114(3) of the Act. Ms Brazil addressed the bail bond in her submission and said that there was a period of time before the bail bond to raise a personal grievance. Ms Brazil is correct that there was some weeks to raise a personal grievance before the bail bond but objectively assessed looking at the whole 90 day, period it seems that the police involvement was likely to be the catalyst for desire to address matters with United Taxis. I do not place as much weight on that initial period as the Authority would do in the event of medical/trauma evidence.

[33] I find that Mr Cantwell considered the bail bond to be an impediment to him raising a personal grievance with his employer. Mr Cantwell made reference to the fact he was not permitted to make any contact under bail conditions with United Taxis in his statement of problem.

[34] I find that the delay in raising the personal grievance within 90 days was occasioned by the *no contact* condition of bail and that was an exceptional circumstance.

[35] I also have to consider under s.114(4) of the Act whether it would be just to grant leave to raise the personal grievance after the expiration of 90 days. The Employment Court in *Paul McMillan v Waikanae Holdings (Gisborne) Limited* (2005) NZELR 402 and *Lynette Melville v Air New Zealand Ltd* [2010] NZEmpc 87 considered the merits of the case in determining whether it would be just to allow the grievance to be pursued out of time.

[36] The Authority is in a good position to address the merits because I heard the evidence about the substantive claims.

[37] The claim that the failure to provide a written employment agreement was an unjustified action that caused disadvantage I find is unlikely to succeed. Whilst the

omission to provide an employment agreement may well be found to be unjustified, it is very unlikely that any disadvantage could be established when Mr Cantwell took matters into his own hands to protect against an anticipated breach of a failure to pay \$13.50 per hour and/or provide a written employment agreement containing that hourly rate by retaining cash takings.

[38] The claim that Mr Cantwell was actually unjustifiably dismissed is also I find unlikely to succeed. There was no evidence of an actual dismissal.

[39] Although there was a breach on the part of United Taxis by the failure to provide a written employment agreement it is unlikely that it would be found to be of a sufficiently serious nature so that a reasonable employee could conclude United Taxis did not intend to be bound by the terms of the agreement and/or could not be relied on to perform it in the future. Mr Cantwell had asked for a written employment agreement when he was seeking employment with United Taxis but I do not find that the evidence supports that Mr Cantwell raised any issues or concerns about the employment agreement or rate of pay during his brief period of employment with Mr Overton.

[40] Mr Cantwell took matters into his own hands about any anticipated breach by retaining cash takings and did not I have found properly account for what he had taken by the provision of appropriate documentation to United Taxis. It is more likely to be found that the relationship ended by Mr Cantwell in effect abandoning his employment and making no further contact with his employer than that he was unjustifiably constructively dismissed.

[41] Mr Cantwell in submissions questioned whether United Taxis took sufficient steps after he left his employment to resolve matters in the event that it was considered he abandoned his employment. There are a number of cases that refer to the steps that should be taken before an employer draws an inference that an employee has abandoned his/her employment. Any action by the employer also has to be assessed against the good faith obligations in s.4 of the Act. Mr Overton tried to telephone Mr Cantwell but did not leave a message. His main concern was that Mr Cantwell had retained company property and he then took the step of involving the police. The circumstances of this case are different I find to other cases. It is likely that they would be found to be such that a fair and reasonable employer could conclude that Mr Cantwell had abandoned his employment.

[42] In conclusion therefore it would not be just to grant Mr Cantwell leave to pursue personal grievances against United Taxis that are unlikely to succeed. Leave to raise a personal grievance outside of the 90 day period is declined.

Is Mr Cantwell owed any money?

[43] I prefer Ms Brazil's calculation of hours worked on 5 July 2012 to be nine and a half allowing for a half hour break. On that basis therefore the total hours worked by Mr Cantwell over his working period with United Taxis were 63.25. On the basis of \$13.50 per hour that is a total amount of \$853.88 gross. Mr Cantwell is also entitled to be paid 8% holiday pay on that sum which is \$68.31 gross.

[44] I then take from the amount of \$853.88 gross the cash takings that Mr Cantwell retained. Mr Cantwell says that he retained the sum of \$624.24 cash. I am not in a position of being able to determine otherwise. If I was able to conclude that the cash float had not been returned I would have reduced that sum further. It is a serious allegation that Mr Cantwell retained the cash float and I could simply not be satisfied that the float of \$120 was not returned as cash to Ms Ronford after 8 July 2012 when Mr Cantwell handed her some documentation and the napkin. I will not therefore make any further reduction. There is a balance of \$229.64 gross together with holiday pay of \$68.31 due and owing to Mr Cantwell of \$297.95 gross.

[45] I order United Taxis Limited to pay to Jeffrey Cantwell the sum of \$297.95 gross being unpaid wages and holiday pay.

Costs

[46] Mr Cantwell was unrepresented so he is not entitled to claim legal fees other than a filing fee of \$71.56. Ordinarily the Authority may order reimbursement of that but Mr Cantwell has had only very limited success and United Taxis have also been successful. Looking at the matter in the round this is the sort of case where the Authority may well order costs and the filing fee lie where they fall. I do however reserve costs.

Helen Doyle

Member of the Employment Relations Authority