

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 5  
3019236

BETWEEN            KOTAEMAI CONNELL-DAVEY  
Applicant

AND                 JUST ROOF IT LIMITED  
Respondent

Member of Authority:    M B Loftus  
Representatives:         Greg Lloyd, Counsel for Applicant  
                                      No appearance for Respondent  
Investigation Meeting:    25 January 2018 at Wellington  
Submissions Received:    At the investigation meeting  
Determination:            25 January 2018

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**ORAL DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Kotaemai Connell-Davey, says he was unjustifiably dismissed by the respondent, Just Roof It Limited (JRIL), on 6 December 2016. He also claims JRIL improperly withheld his final pay.

[2]     JRIL's position is unknown given its failure to participate in the Authority's process. There is no statement in reply despite reminders of the need to provide one which included a telephone conversation with one of the Authority's support officers. Nor did JRIL participate in a telephone conference held to discuss the claim on 20 October 2017. E-mails sent to an address know to be that of Mr Hynes, JRIL's sole director and shareholder, have gone unanswered and one, containing a copy of the notice of investigation meeting, was simply deleted unread. Finally I note mediation

was scheduled three times with the first two being cancelled at short notice by JRIL and the third being abandoned when it failed to attend.

[3] JRIL's failure to attend the investigation meeting does, however, pose the question of whether or not to proceed.

[4] Receipt of the Notice of Investigation Meeting was acknowledged by signature at JRIL's premises at 9.43am on 26 October 2017. The notice of meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.<sup>1</sup> I am satisfied JRIL is, or at least should be, aware of the consequences of non-attendance.

[5] Finally JRIL failed to respond to attempts to contact it by telephone this morning. Given the absence of either notice of, or an explanation for, JRIL's absence I consider it appropriate to continue.

## **Background**

[6] JRIL is, as its name suggests, a roofing contractor. It employed Mr Connell-Davey to perform various related tasks. There is no written employment agreement.

[7] On or about 24 November 2016 Mr Hynes accused Mr Connell-Davey and two colleagues of falsifying their timesheets and claiming more hours than actually worked. It appears he based his accusations on data from a GPS tracking device attached to the vehicle they normally used. A week's data was provided to the three employees.

[8] The employees analysed it and concluded Mr Hynes' accusation was based on incorrect assumptions. If nothing else there was an assumption they could not have been working when the vehicle was in use. They denied the accusation and Mr Connell-Davey still does.

[9] On 30 November Mr Hynes told the three to recalculate their work claims for the preceding three months by using the GPS data as their source. Mr Connell-Davey says they were told to do so on the basis travel to and from jobs or to collect supplies was not work time. They were also to deduct an hour for lunch though in their view this had already occurred and compliance with the instruction would see two hours

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<sup>1</sup> Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

deducted for each break. Further deduction was also to be made for time lost due to inclement weather.

[10] Mr Connell-Davey also takes exception to the instruction on the basis he sometimes used another vehicle which had no GPS tracking. Doing as instructed would see no recognition of the resulting work.

[11] It is Mr Connell-Davey's view the instruction was designed to improperly attain the return of wages earned and was never couched as a disciplinary action. In any event it became irrelevant as he was dismissed shortly thereafter and before he had taken any action in respect to the instruction.

[12] Mr Connell-Davey says he was not picked up for work as usual on 5 December 2016. He tried to ring both Mr Hynes and his colleagues. He eventually spoke to a colleague who said they had been told not to pick him up as he was sick. Knowing that was wrong he continued to try and contact Mr Hynes. He eventually did so by telephone and was told he had been sacked.

[13] Written confirmation followed by letter dated 6 December 2016. It advises Mr Connell-Davey had been dismissed for serious misconduct as he had dishonestly recorded incorrect hours on his timesheets for the period 1 September to 24 November 2016. 11 of the 13 sheets completed during this period were said to be wrong and it was alleged Mr Connell-Davey had claimed 77.75 hours he had not worked.

[14] The dismissal letter also refers to a previous written warning which Mr Connell-Davey says is fabricated. While accepting he did receive a warning for selling scrap material on 9 May he says the document now purporting to be that warning is a cut and paste with the addition of further allegations about which he knows nothing.

[15] A further letter explaining the dismissal followed. It attributes the dismissal to a culmination of events which includes all of those canvassed in both the original dismissal letter and what he says is the rewritten warning.

[16] Mr Connell-Davey says at the time of termination he also received a pay slip. It advised he was due \$1,683.53 which was being withheld as a result of the excessive time sheet claims. That is the money to which the wage claim relates.

## Determination

[17] Mr Connell-Davey claims he was unjustifiably dismissed. Once the fact of dismissal is established the onus falls on the employer to provide a justification which, according to s 103A of the Employment Relations Act 2000 (the Act) is:

*... determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.*

[18] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and procedural perspective. While issues of substance and process overlap and there is no firm delineation separation provides a useful means of analysis, especially as some of the requirements of s 103A have a procedural focus as they ask the Authority consider whether, having regard to the resources available, the employer sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[19] Here there can be no doubt there was a dismissal with confirmation coming from both Mr Connell-Davey's evidence and JRIL's two letters.

[20] JRIL's absence then means there is no justification though I note that having had a chance to question Mr Connell-Davey I accept his assertion the accusation he falsified his timesheet is groundless. I also note any justification that might have been offered would be undermined to some extent by inconsistencies in the rationale recorded in the two letters explaining the dismissal.

[21] Turning to procedure. Again JRIL's absence means it has failed to offer evidence that anything which vaguely complies with the requirements of s 103A occurred. Again Mr Connell-Davey's evidence, which I accept, says there wasn't. The only possible defence JRIL might have, a lack of resources, offers no respite. There is no evidence of such an issue but I also note the Courts comment in *The Salad Bowl Ltd v Howe-Thornley*.<sup>2</sup> All-encompassing procedural failure, as Mr Connell-Davey's evidence suggests occurred here, is neither excusable nor minor.<sup>3</sup>

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<sup>2</sup> [2013] NZEmpC 152 at [94] and [95]

<sup>3</sup> The possible exemption under s 103A(5) of the Employment Relations Act 2000

[22] The dismissal is unjustified. That raises the question of remedies. Mr Connell-Davey seeks lost wages as a result of the grievance and \$10,000 as compensation for hurt and humiliation pursuant to s 123(1)(c)(i) of the Act.

[23] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. There is then discretion to award a greater sum though that is not necessary as Mr Connell-Davey started a new job on 27 February 2016. He was without work for twelve week and his wage loss totals \$8,880. That is payable.

[24] Mr Connell-Davey also seeks \$10,000 as compensation pursuant to s123(1)(c)(i). He supports his claim with evidence the hurt necessitated counselling and strained family relationships. Mr Connell-Davey also refers to career aspirations and the damage resulting from word getting around in what is a relatively small industry. I accept that.

[25] Mr Connell-Davey's evidence supports a claim of the magnitude sought and he should not have that reduced by reason of having tabled a realistic claim. Payment of the \$10,000 sought shall be ordered.

[26] These conclusions mean I must, in accordance with s 124 of the Act, address whether or not Mr Connell-Davey contributed to his dismissal in a way that warrants a reduction in remedies. JRIL absence means there is no such evidence.

[27] Having seen the timesheet in question I accept JRIL has, as alleged, withheld Mr Connell-Davey's final pay of \$1,683.53. JRIL's absence means there is no justification for that action and the money remains payable.

[28] There is then the issue of costs. Normally the Authority will use a daily tariff approach when addressing a costs claim.<sup>4</sup> The tariff currently applying is \$4,500 per day and that might then be adjusted depending on the circumstances.

[29] Despite the fact the investigation, including delivery of the decision, only lasted a couple of hours Mr Connell-Davey seeks a full day's recompense.

[30] Having considered Mr Lloyd's submission I conclude, notwithstanding the fact the investigation was truncated by virtue of JRIL's absence, the amount sought

should be granted. The investigation had to be prepared for as if the claim would be defended and it would have taken longer had that occurred. Furthermore I note JRIL's behaviour and the manner in which it responded to the claim necessitated additional meetings between Mr Connell-Davey and Mr Lloyd and increased costs unreasonably.

### **Conclusion and orders**

[31] For the above reasons I conclude Mr Connell-Davey has a personal grievance in that he was unjustifiably dismissed. Unpaid wages also require payment.

[32] As a result I order the respondent, Just Roof It Limited, pay the applicant, Kotaemai Connell-Davey;

- a. \$8,880.00 (eight thousand, eight hundred and eighty dollars) gross as recompense for wages lost as a result of the dismissal; and
- b. A further \$10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i);
- c. A further \$1,683.53 (one thousand, six hundred and eighty three dollars and fifty three cents) being wages unpaid as at termination; and
- d. A further \$4,500.00 (four thousand, five hundred dollars) as a contribution toward the costs Mr Connell-Davey incurred in pursuing his claim.

M B Loftus  
Member of the Employment Relations Authority

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<sup>4</sup> refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135