

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 454  
3238399

BETWEEN                      TERRENCE HAKARAIA  
Applicant

AND                              THE TRUCK COMPANY  
LIMITED  
Respondent

Member of Authority:        Sarah Kennedy-Martin

Representatives:              Viv d'Or and Kath Pedrealba, counsel for the Applicant  
No appearance for the Respondent

Investigation Meeting:        14 May 2024 in Wellington

Submissions Received:        Up to and including 27 May 2024 from the Applicant

Determination:                26 July 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Hakaraia was employed by The Truck Company Limited (TTCL) as a Tyre Technician. Mr Hakaraia says he was unjustifiably dismissed on 8 May 2023 when he received a letter from Shachil Shalvin Naidu, the sole director and shareholder of The Truck Company. The letter advised Mr Hakaraia he was dismissed without notice, following an investigation into conduct concerns.

[2] Mr Hakaraia also claims he was unjustifiably disadvantaged by the way TTCL commenced a restructure process, suspended him from work without notice, commenced an employment investigation into his conduct and then made unfounded allegations of theft of tools against him with no evidence. A deduction of \$3000.00 was made from Mr Hakaraia's final pay for the missing tools he was allegedly responsible for. He seeks compensation for hurt and humiliation in the amount of \$34,000.00, lost wages, reimbursement of the deduction from his wages and costs.

[3] The statement in reply set out TTCL's position the dismissal was justified. However, no evidence was lodged in the Authority and Alwyn O'Connor, counsel for TTCL, withdrew his representation several days before the first investigation meeting. TTCL did not lodge any evidence or attend the second investigation meeting (see paragraphs 5 and 6 below). The Authority received a last-minute request from Mr Naidu to adjourn the second investigation meeting but for the reasons set out below, the Authority proceeded to determine the matter in the absence of TTCL.

### **The Authority's investigation**

[4] The investigation meeting proceeded in the absence of TTCL. I was satisfied there was no good cause for TTCL's absence and the investigation meeting proceeded on that basis. In reaching this conclusion I took into account the timeline set out below including the adjournments and allowances made for Mr O'Connor's withdrawal as counsel and Mr Naidu's health, the failure to provide evidence or names of witnesses, timing of the request for an adjournment and the time already provided to TTCL to seek further representation and for Mr Naidu's health. Noting Mr O'Connor's email two days before the investigation meeting was not received by the Authority, arrangements were made on the day for Mr O'Connor to attend by AVL to represent TTCL in his personal capacity but he did not.

#### *First investigation meeting - 1 March 2024*

[5] In the lead up to the first investigation meeting, Mr O'Connor failed to attend the first case management conference (CMC) on 6 October 2023. At the rescheduled CMC on 9 October 2023, TTCL's witnesses were not able to be confirmed. TTCL was to provide the name and occupation of those five witnesses by 6 November 2023 and lodge its evidence by 9 February 2024.

[6] TTCL lodged no witness statements or evidence and did not provide the names or the number of witnesses it intended to bring to the investigation meeting. On 26 February 2024 (three days before the scheduled investigation meeting) Mr O'Connor advised the Authority by email he was unable to continue with his retainer due to his company (Six Foot Two Limited) going into liquidation. He sought an adjournment on behalf of TTCL. While it was unclear from the information provided why Mr O'Connor could no longer represent TTCL, an adjournment was granted because Mr

Naidu provided a medical certificate saying he was medically unfit from 26 February and would not be fit to resume work until 18 March 2024.

[7] After 18 March steps were taken to schedule another investigation meeting. Mr Naidu did not respond to the Authority. On 12 April, Mr Naidu advised TTCL had a new representative who would be in touch with the Authority. He added it was taking time to get his files from Mr O'Connor to the new representative. There were no further communications from Mr Naidu or his new representative about rescheduling the investigation meeting. A new investigation meeting date of 14 May 2024 was set down.

*Second investigation meeting – 14 May 2024*

[8] On 9 May Mr Naidu informed the Authority he was still trying to find someone to represent him and applied to appear with his witnesses by AVL at the investigation meeting the following week. That application was declined noting no statements or evidence had been lodged and there was no indication as to how many witnesses or the identity of those witnesses. Mr Naidu had also previously informed the Authority he had representation and the new representative would contact the Authority. A further CMC was scheduled for 13 May, the day before the investigation meeting. Mr Naidu did not attend. Ms D'Or attended and confirmed Mr Hakaraia was ready to proceed the next day.

[9] On 14 May, at 8.37am, on the day of the investigation meeting, Mr Naidu emailed the Authority stating he was disappointed an email from Mr O'Connor had not been responded to and sought another adjournment. I will return to the email from Mr O'Connor below. Mr Naidu sought the adjournment on the basis he was unwell and tired from preparing all day on Sunday with Mr O'Connor and with English as his second language and no legal expertise, proceeding with the scheduled investigation meeting was unfair and a breach of his natural justice.

[10] Mr Naidu said the email from Mr O'Connor contained a plan to put information before the parties and the Authority Member ahead of the hearing with the intention of avoiding delaying the investigation. That email, Mr Naidu said, was unfortunately ignored and that was also unfair in the circumstances.

[11] Mr Naidu also stated:

Mr O'Connor, my witnesses and I will make ourselves available at short notice if the Authority does the right thing and adjourns today's hearing. Proceeding in my represented [sic] absence (something that would be contrary to all purposive ionstatements [sic] and considerations under the Act) should be done so at your peril. Any decision made as a result of a ex parte investigation will be the subject of an appeal on that basis.

*Email from Mr O'Connor*

[12] Mr Naidu had copied the text of an email from Mr O'Connor to the Authority into the body of Mr Naidu's 14 May email. The text of Mr O'Connor's email recorded that Mr O'Connor was seeking to act in his personal capacity to assist Mr Naidu at the investigation meeting but due to a stomach bug, he wished to attend by AVL. No evidence or witness names were provided to the Authority or Mr Hakaraia's lawyer. I was later advised Mr O'Connor's email was not received by the Authority. It was dated 12 May which was the Sunday before the scheduled investigation meeting.

[13] Mr Naidu's application on 14 May to adjourn the investigation meeting was declined due to the timing of the application. A link was sent to allow Mr O'Connor to appear by AVL and Mr Naidu was advised the Authority was proceeding with the investigation meeting. The start time was delayed allowing Mr Naidu time to attend, given the adjournment application was declined.

[14] I am satisfied the relevant documents setting out Mr Hakaraia's claim and the relevant documents setting out the Authority's process have been properly received by Mr Naidu, TTCL's director. I am also satisfied TTCL has been made aware of these proceedings and has been provided with opportunities to participate in the process.

[15] I was concerned that any further adjournments were without good cause when TTCL was given opportunities to participate and be represented. The Authority has no record of receiving the email from Mr O'Connor seeking to represent TTCL in his personal capacity. In any event, a link was sent to enable him to attend by AVL on the day of the investigation meeting.

[16] The Authority has the power to proceed if any party fails to attend without good cause.<sup>1</sup> The Authority may, without hearing evidence from the respondent, issue a

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<sup>1</sup> Employment Relations Act 2000, sch 2, cl 12.

determination in favour of the applicant.<sup>2</sup> The investigation meeting proceeded on that basis.

[17] A written witness statement was lodged from Mr Hakaraia and he answered questions under oath from me. His representatives gave written and oral closing submissions.

[18] As permitted by s 174E of 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**

[19] The issues requiring investigation and determination were:

- (a) Was the dismissal of Mr Hakaraia and how it was carried out, what a fair and reasonable employer could have done in all the circumstances at the time;
- (b) Was Mr Hakaraia disadvantaged by the actions of TTCL when it proposed redundancy but took no further steps, placed him on suspension and made deductions to his final pay based on an allegation of theft;
- (c) If TTCL is found to have acted unjustifiably (by disadvantaging and/or unjustifiably dismissing Mr Hakaraia), what remedies should be awarded to him, considering:
  - Lost wages (subject to evidence to be provided); and
  - Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act);
- (d) Is Mr Hakaraia due wage arrears under s 131 of the Act;
- (e) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Hakaraia that contributed to the situation giving rise to his grievance;

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<sup>2</sup> Employment Relations Authority Regulations 2000, sch 1, form 8.

- (f) Should either party contribute to the costs of representation of the other party.

### **Mr Hakaraia's employment with TTCL**

[20] Mr Hakaraia was a tyre technician employed by TTCL from August 2021 until his dismissal on 8 May 2023. Mr Hakaraia says in the days leading up to being informed there was to be a restructure, a complaint was made by another employee about Mr Hakaraia. Mr Naidu met with Mr Hakaraia to discuss that complaint. Mr Hakaraia denied the complaint he was presented with was an accurate account of what transpired between the two employees and requested a copy of the email so he could respond.

[21] On Monday 24 April, while that complaint remained unresolved, Mr Naidu gave Mr Hakaraia a letter dated 20 April inviting him to a meeting to discuss a restructure proposal. That letter recorded TTCL was considering making changes to accommodate the economic downturn and a proposal to change the organisational structure had been developed. Mr Hakaraia was invited to meet Mr Naidu two days later on Wednesday 26 April to discuss the proposal, and how feedback was to be received. Tuesday 25 April was a public holiday.

[22] On 26 April, Mr Hakaraia was at work waiting for the meeting with Mr Naidu about the restructure when he received a phone call from Mr O'Connor at 8.36am telling him to go home and further information would be provided. At the same time he received a text from Mr O'Connor stating "Dear Terry please leave the workshop at once Alwyn". At 11.44am Mr O'Connor sent the following email to Mr Hakaraia:

Dear Terry, I am a lawyer who has been instructed to carry out an employment investigation into your conduct in recent times. All correspondence on all matters relating to your employment should be directed to me.

[23] Three allegations of serious misconduct were set out in the email. It was alleged Mr Hakaraia had attempted to procure customers of TTCL to a new venture, his behaviour had disrupted the workplace; and he had discussed with others the proposed restructure.

[24] The email said these three allegations if proven were considered to be serious misconduct. Mr O'Connor was to write to Mr Hakaraia the next day to set the allegations out in more detail. It was also proposed Mr Hakaraia be suspended from work on full pay until Friday at 10.00am when TTCL intended to meet to discuss its

findings with Mr Hakaraia. If he wished to make a submission about his suspension, Mr Hakaraia was to reply by 9.00pm that night otherwise it was assumed he agreed with the proposed suspension.

[25] Ms d'Or, Mr Hakaraia's lawyer, emailed Mr O'Connor at 7.00pm that night requesting further details of the allegations and pointing out the flaws with the suspension process. Mr Hakaraia had been instructed to leave the premises before the suspension proposal was sent by email and Mr Hakaraia was now expected to respond to a restructure proposal and an investigation for serious misconduct. She requested further time to allow Mr Hakaraia to receive all the information he would need to respond to the various processes TTCL had put in motion. Ms d'Or conveyed she was available the following week. She asked for the redundancy proposal to be emailed directly to her so she could assist Mr Hakaraia with a response to that.

[26] Ms d'Or's email went to the wrong email address but once Mr O'Connor and Ms d'Or started email communication on Friday 28 April, Mr O'Connor said the disciplinary meeting was proceeding without Ms d'Or and asked that Mr Hakaraia return the company truck and tools. Ms d'Or pointed out there was insufficient evidence to respond to the allegations, the restructure proposal had not been sent and the process was rushed with only two days between notifying Mr Hakaraia of serious misconduct allegations and holding the disciplinary meeting.

[27] That evening Mr O'Connor sent a further email as follows:

My instructions are that Terry did not appear for the investigation meeting. Further and perhaps more problematic, the company property (the tools) have not been returned as requested. An inventory has been performed. I will have this provided to you as soon as it comes to hand. You should be aware though that my client intends to report the matter of the tools to Police as a matter of urgency.

[28] Ms d'Or responded:

The employer gave insufficient notice period of the meeting. Tuesday was a public holiday. The employee believes he was unjustifiably suspended. The employer failed to provide the employee with the evidence they were relying on to support their allegations. They refused to provide the proposal to support the proposed redundancy. Your employer's threat to phone the Police to report tools as not returned is noted.

[29] Mr O'Connor responded straight away in relation to the tools stating "its not a threat it's a promise" and that without Mr Hakaraia's input the allegations will be found proven with the outcome to be considered the following week. The following Monday

(1 May) he emailed an inventory of tools allegedly missing. On Thursday 4 May, Mr O'Connor conveyed by email to Ms d'Or that Mr Hakaraia had committed theft and this was considered to be serious misconduct. Together with failing to engage promptly in the investigation this was the basis for a proposal that Mr Hakaraia be summarily dismissed. Feedback was requested by 5.00pm that day or at the latest first thing the next day.

[30] A letter was emailed to Mr Hakaraia the following Monday 8 May setting out the four allegations were found to be proven, the investigation meeting was held in Mr Hakaraia's absence, and a summary of findings had been shared with no response. The failure to respond was said to be a breach of good faith by Mr Hakaraia and given the failure to account for the alleged missing tools amounted to serious misconduct, Mr Hakaraia was dismissed without notice.

[31] Mr Hakaraia was also informed \$3000.00 would be deducted from his final pay until TTCL could confirm the replacement cost of the missing tools. Once the tools were replaced TTCL would account to Mr Hakaraia less 10 per-cent for "betterment". Mr Hakaraia's final pay calculation was set out. His final pay slip recorded a deduction of \$3,000.00 for "tools payback deduction".

### **Mr Hakaraia's evidence**

[32] Mr Hakaraia gave evidence about the incident with the other employee. He was shown an email by Mr Naidu that he says overstated what happened. As a consequence Mr Hakaraia requested the email and intended to respond because he felt it was unfair but wanted a copy of the email before he responded. He asked for the email more than once. He denied the events took place in the manner set out in the email he was shown, but accepts words were had with the other employee. He had already communicated that to Mr Naidu.

[33] Then Mr Hakaraia received the invite to discuss the restructure proposal. What happened next is consistent with Mr O'Connor's written correspondence. TTCL moved from wanting to meet with Mr Hakaraia about a restructure proposal, to a sudden suspension without notice from work, with three allegations of serious misconduct and then an additional serious allegation of theft in that Mr Hakaraia had taken all the tools from the work truck.

[34] Mr Hakaraia denies he took the tools. The truck was left at work with the tools in it. He accepts he talked to one employee of TTCL, who was also a relative, about the restructure proposal. He said the letter did not make it clear it was not to be discussed other than being marked “private and confidential” at the top. He assumed everyone was getting a letter. Mr Hakaraia’s relative informed him he had not had a letter.

[35] With regard to the allegation about a new venture, the employment agreement did not contain non-solicitation clauses.

[36] Mr Hakaraia said while waiting in the office to speak to Mr Naidu about the restructure proposal, he followed the instruction from Mr O’Connor to remove himself from work in good faith until he understood he was suspended but with no idea what that suspension was about. He says the whole process felt contrived and TTCL just wanted to get rid of him. Mr Hakaraia says he was unable to attend the first scheduled meeting because his lawyer advised him they needed further information before responding and he understood she was communicating on his behalf.

[37] The theft allegation came out of the blue and things moved so fast, Mr Hakaraia says he was left shocked and distressed. He says the theft allegation was unsubstantiated. He last saw the tools in the truck which he left parked at work. He says other people had access to the truck and the tools and if the tools were missing, this would need to be taken into account.

[38] A statement in reply was lodged by Mr O’Connor. It restates the allegations and I note it provides more information than what Mr Hakaraia was provided during the employment investigation and disciplinary process TTCL went through with him. It overlooks the communications between Mr O’Connor and Ms d’Or and refers to Mr Hakaraia refusing to attend a disciplinary meeting. The communications between counsel show TTCL went ahead with the disciplinary meeting without responding to the requests for further information, or to make any attempt to find a mutually convenient time to hold the meeting within a reasonable timeframe. Ms d’Or was available the following week.

### **Unjustified dismissal**

[39] When I compare the test in s 103A of the Act and how the employer acted towards Mr Hakaraia, if TTCL had genuine concerns at that time a fair and reasonable

employer could be expected to provide the further information requested. There was no detail about the allegations provided to Mr Hakaraia including no information about how it had established there were concerns. The email complaint had been requested and was never provided. A fair and reasonable employer could also be expected to have given Mr Hakaraia an opportunity to respond to its concerns and to have considered his responses before making a decision.

[40] The process was rushed. Mr O'Connor communicated a proposal to dismiss Mr Hakaraia on 4 May and this was within seven days of Mr Hakaraia being told about the conduct concerns. Two days prior Mr Hakaraia was made aware of a restructure and invited to a meeting to discuss that, followed in quick succession by a series of communications from Mr O'Connor on behalf of TTCL sending Mr Hakaraia away from the workplace and then proceeding through a disciplinary process ending in summary dismissal in the absence of any input from Mr Hakaraia or his lawyer and all within seven days. The communications between counsel are evidence there was no genuine opportunity given to Mr Hakaraia to respond. Information and an opportunity to provide feedback about the restructure proposal said to affect Mr Hakaraia should also have formed part of the process.

[41] Mr Hakaraia's statement about the tools was never taken into account before a finding was made that he took them. There was both insufficient information provided to Mr Hakaraia to hold Mr Hakaraia accountable for the missing tools and no opportunity for Mr Hakaraia to respond to that serious allegation.

[42] Finalisation of the employment investigation process, in the face of Ms d'Or asking for further details about both the restructure and misconduct allegations and seeking to arrange a mutually convenient time to meet, leads to a conclusion TTCL's actions were a significant departure from what could be expected of a fair and reasonable employer in the circumstances at the time. The dismissal was both substantively and procedurally flawed and the flaws in the process were significant and resulted in Mr Hakaraia being treated unfairly. He had no genuine opportunity to respond before the decision was made to dismiss him.

### **Deduction from Mr Hakaraia's wages**

[43] Mr Hakaraia claims the deduction from his wages of \$3000.00 was unlawful and he was disadvantaged by that. The Wages Protection Act 1983 provides in s 5A

that an employer must not make unreasonable deductions from employees wages. Deductions are not permitted without an employee's consent and consent can be withdrawn.

[44] The individual employment agreement (IEA) between the parties has two clauses authorising TTCL to make deductions from employee's wages for monies owed by the employee to the employer. In light of the finding above, that TTCL's actions were unjustified both substantively and procedurally, because there was insufficient evidence provided to attribute the missing tools to Mr Hakaraia, it cannot be said there were monies owing to TTCL. Deducting \$3000.00 from Mr Hakaraia's final pay was unreasonable.

[45] Even if it could be said monies were owing, Ms d'Or communicated to Mr O'Connor the deduction was not consented to so to the extent the IEA provided consent for a deduction, consent was removed.

## **Conclusion**

[46] Mr Hakaraia's suspension and dismissal are unjustified and he was disadvantaged in the work place by TTCL making a deduction from his wages. Mr Hakaraia is entitled to consideration of remedies.

[47] A further disadvantage regarding the restructure and separate a breach of good faith were claimed arising from the process TTCL followed. I have considered those aspects of TTCL's actions as part of the same factual matrix to reach the conclusion about the unjustified dismissal and disadvantage. I have not considered these as separate claims.

## **Remedies**

### *Lost wages*

[48] Mr Hakaraia seeks lost wages. The Act permits reimbursement to the employee of lost wages in an amount that is the lesser of the sum equal to lost remuneration or to three months ordinary time remuneration. Mr Hakaraia's employment ended on 8 May 2023. His evidence is that he already had additional employment and he increased his hours straight away. His final payslip from TTCL shows he was paid \$27.50 per hour

and the IEA records his hours of work as a minimum of 45 hours per week. This equals \$4,950.00 per month (before tax).

[49] I was provided with Mr Hakaraia's Inland Revenue (IR) income breakdown from January 2023 to August 2023. Thirteen weeks from 8 May to 7 August 2023. Comparing an average of Mr Hakaraia's combined income in the two months prior to his dismissal<sup>3</sup> with his income in the 13 weeks after dismissal, he received less after his employment at TTCL ended. In August his income was no less than what it had been at TTCL. I find Mr Hakaraia's loss was caused by TTCL's actions and he took steps to mitigate his loss. It is appropriate to make an order for 12 weeks lost wages (to the end of July) calculated on the basis of Mr Hakaraia's actual loss which amounts to \$2,789.36.<sup>4</sup>

### *Compensation*

[50] Mr Hakaraia seeks compensation for humiliation, loss of dignity and injury to feelings caused by the grievances in the total amount of \$34,000.00. This is made up of \$18,000.00 for the unjustified dismissal, \$4,000.00 for unjustified actions connected with the proposed redundancy, \$5,000.00 for the unjustified suspension and \$7,000.00 for the unlawful wage deduction.

[51] Mr Hakaraia gave evidence of the humiliating impact and distress caused to him by the summary dismissal and the effect on his health and wellbeing. His financial situation was impacted and although he was able to increase his hours at his other job, the hourly rate was less so he needed to work extra hours to ensure he met his mortgage payments.

[52] Mr Hakaraia also explained he had been a trustworthy and loyal employee, who had worked hard to be in a position to buy his own home and he was impacted significantly by the way in which his employment was ended. Being ordered to leave the workplace with no warning or reason given and then his employer indicating he would likely be dismissed within seven days left him shocked and humiliated. He feels aggrieved he was accused of a theft which he says he did not commit and has suffered a loss of dignity because of that.

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<sup>3</sup> Mr Hakaraia's average monthly combined income in two months prior to dismissal was \$8962.50

<sup>4</sup> Difference between combined income and single income was \$877.90 in May, \$292.00 in June and \$1619.46 in July.

[53] Given the suddenness of the employer's actions with no warning, the change from a redundancy to a misconduct investigation and a flawed process, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act to be \$22,000.00 for the dismissal (which includes the redundancy) and unjustified suspension and \$1,000.00 for the unlawful wage deduction.

#### *Contribution*

[54] Under s 124 of the Act, Mr Hakaraia's contribution to the situation that gave rise to the personal grievance must be considered. Mr Hakaraia accepts there was an incident with another employee and his employer had started to deal with it. What happened next was a series of steps taken by his employer, with legal advice, that amount to unjustified actions culminating in an unjustified dismissal. The redundancy proposal was a unilateral act by the TTCL and Mr Hakaraia did not contribute to the substantive and procedural flaws in TTCL's employment investigation process. Mr Hakaraia has not contributed to his personal grievance.

#### **Orders**

[55] The Truck Company Limited is ordered to pay Terrence Hakaraia the following amounts within 28 days of this determination:

- (a) Reimbursement of an unlawful wage deduction in the amount of \$3,000.00
- (b) Compensation in the amount of \$23,000.00
- (c) Lost wages in the amount of 2,789.36

#### **Costs**

[56] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[57] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Hakaraia may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum The Truck Company Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[58] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>5</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>5</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)