

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 201
5583167

BETWEEN GRAHAM HARMAN
Applicant

AND CANTERBURY HEAVY
HAULAGE LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Linda Ryder, counsel for the Applicant
Robert Thompson, Advocate for the Respondent

Investigation meeting: 18 and 19 August 2016

Submissions: At the investigation meeting

Further information received: 26 August and 20
September 2016

Determination: 7 November 2016

DETERMINATION OF THE AUTHORITY

- A. Canterbury Heavy Haulage Limited unjustifiably disadvantaged and unjustifiably dismissed Graham Harman.**
- B. Within 28 days of the date of this determination, Canterbury Heavy Haulage Limited must pay Graham Harman \$8,000.00 in compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Within 28 days of the date of this determination, Canterbury Heavy Haulage Limited must pay a penalty of \$1,000 to Mr Harman and \$5,000 to the Employment Relations Authority for transfer to the Crown Account.**

Employment relationship problem

[1] Graham Harman worked as a driver for Canterbury Heavy Haulage Limited (CHH). He was dismissed on 19 August 2015.

[2] Mr Harman says he was unjustifiably dismissed. He also claims that he was unjustifiably disadvantaged by his wages not being paid on 22 and 29 July 2015. He says that CHH failed in its duty to act in good faith towards him, which requires a penalty to be imposed. In addition, Mr Harman says that CHH repeatedly misled and deceived him by failing to provide him with time and wages and annual leave records.

[3] Mr Harman says CHH failed to pay him his final holiday pay and breached s 4 of the Wages Protection Act 1983 when it failed to pay his wages due on 22 and 29 July and from 27 July to 19 August 2015.

[4] CHH paid the wages and holiday pay amounts that were outstanding on the eve of the investigation meeting. Mr Harman withdrew his claims for these, his claim that he had not been given 40 hours work per week in breach of his individual employment agreement and his claim for payment for reimbursement for personal protective equipment at the investigation meeting

[5] By way of remedy, Mr Harman claims compensation for humiliation, loss of dignity and injury to his feelings as well as penalties for breaches of employment legislation. Mr Harman did not suffer any loss of wages as he found another job quite quickly.

[6] CHH says it justifiably dismissed Mr Harman after he pushed Natalie Sutherland, CHH's administration manager, on 28 July 2015. It denies that it acted other than in good faith and says it should not be penalised if it is found to have committed breaches of its obligations under employment law.

[7] CHH originally filed a number of counter-claims against Mr Harman but withdrew these three days before the investigation meeting.

[8] I held an investigation meeting on 18 August 2016. Mr Harman, Constable Andrew Davis and Rachel Cameron, Mr Harman's wife, gave oral sworn evidence. Kevin Nortman, CHH's director and owner/operator, Natalie Sutherland and Peter Adams also gave oral sworn or affirmed evidence.

[9] Constable Davis was summoned to the investigation meeting.

[10] After the meeting CHH was directed to provide "proof that it now keeps wages and time records and holiday and leave records that are compliant with its statutory obligations" by 26 August 2015.

[11] On that day, Ms Sutherland sent in a spreadsheet of the wages record for Mr Harman that was kept from January to March 2015.

[12] On 29 August 2016, the Authority officer asked Ms Sutherland to send in "ACE payroll screenshots of the current employment records" by 2 September 2016. On 20 September 2016, he sent her a reminder and later that day Ms Sutherland sent a screen shot of the front page of CHH's ACE weekly payroll for the period 18-21 September 2016.

Issues

[13] The issues I need to determine are:

- a) Was the decision to dismiss Mr Harman, and the way that decision was made, something a fair and reasonable employer could have done in all the circumstances?
- b) Was Mr Harman disadvantaged by CHH's failure to pay his wages on 22 July and from then until 19 August 2015, when he was dismissed?
- c) If so, what is Mr Harman entitled to by way of remedy, taking into account any contribution?
- d) Did CHH breach any of its statutory obligations?
- e) If so, should a penalty or penalties be imposed?

Factual background

[14] Mr Harman began working as a driver for CHH on 12 January 2015. On 17 July 2015, Mr Harman had an accident at work in which he cut his arm. He was off

work with a medical certificate that said he would be fit to return to work on 31 July 2015.

[15] On 18 July 2015, he went into work to deliver some ACC paperwork and fill in his timesheet.

[16] He was due to be paid on 22 or 23 July. However, he was not paid. He was advised that he had not filled in his timesheet correctly, as he was now required not only to fill in the hours worked but what work he had been doing.

[17] On Sunday, 26 July 2015, Mr Harman received a letter from CHH setting out allegations about aspects of his conduct at work and inviting him to a disciplinary meeting at 10 am, Tuesday, 28 July 2015. The letter had been written on 24 July 2015.

[18] On Monday, 27 July 2015, Mr Harman sought legal advice. Mr Harman did not attend the meeting at CHH's advocate's office on Tuesday, 28 July 2015, believing his lawyer had contacted Carren McDonald, CHH's advocate, to arrange a different time.

[19] However, the message did not get through on time, and Ms McDonald and Ms Sutherland waited for Mr Harman. Ms Sutherland returned to CHH's office. Shortly after this, Mr Harman came to the office to fill in a replacement timesheet so that he could be paid for the previous pay period.

[20] Peter Adams, who at the time ran another business from CHH's yard, and Ms Sutherland were in the office. Peter Adams is the son of Ms Sutherland's late partner.

[21] Mr Harman spent some minutes in the enclosed porch by the office door filling in a replacement timesheet. He then entered the office intending to take a photocopy of the timesheet before he submitted it.

[22] Ms Sutherland challenged Mr Harman and asked him what he was doing there, particularly since he did not attend the earlier meeting.

[23] Ms Sutherland was feeling annoyed and frustrated that she had attended the meeting and he had not. She also asked him if he intended to resign given the allegations that had been made against him. Ms Sutherland says he told her he was

going to resign. However, Mr Harman denies that and says that with Ms Ryder's help he thought the allegations could be worked through and resolved.

[24] Mr Harman told Ms Sutherland he was going to photocopy his timesheets. Ms Sutherland said he could not use the photocopier. He went to use the photocopier nonetheless.

[25] The parties agree that Ms Sutherland slammed the photocopier lid down when Mr Harman was standing in front of it. She did so in an effort to stop Mr Harman using the copier.

[26] However, they disagree where Ms Sutherland was when she slammed the lid down. Mr Harman says she did so from a seated position at her desk alongside the photocopier. Ms Sutherland says that she was standing up beside Mr Harman when she shut the lid.

[27] The next, and pivotal, event is contested. Ms Sutherland and Mr Adams say that Mr Harman pushed Ms Sutherland aside using his upper arm and side of his body so that he could use the copier.

[28] Mr Harman denies making any physical contact with Ms Sutherland.

[29] The parties agree that Mr Harman was told he needed to leave. They disagree about how many times he was told to do so before he moved outside. Mr Harman says he was only told once.

[30] Mr Harman stood outside facing the office, which had a hazards board in front of it. He was intending to take a photograph of the hazards board to gather evidence so he could respond to some of the allegations against him included in the 24 July letter.

[31] Ms Sutherland stood in front of the hazards board. Mr Adams came outside and stood beside Ms Sutherland. They both told him he needed to leave the premises. He was told three times. Then Ms Sutherland told Mr Harman she would call the police, which she did. Mr Harman also called the police.

[32] While they waited for the police to come, Mr Harman got in his vehicle, went outside the gate to the yard, and waited there.

[33] Constable Andrew Davis attended. He talked to Ms Sutherland and Mr Harman. Ms Sutherland told Constable Davis Mr Harman was an ex-employee. Constable Davis advised Ms Sutherland she could trespass Mr Harman from the site.

[34] Constable Davis explained to Mr Harman that he would issue a trespass notice. Mr Harman asked for his own personal goods out of the truck cab and Ms Sutherland asked for CHH's mobile phone and fuel card to be returned. Mr Harman went home. Constable Davis went to the police station, filled in a trespass notice and issued it on Mr Harman at Mr Harman's home.

[35] On 28 July 2015, CHH's advocate wrote to Mr Harman's lawyer with further allegations:

He insisted on taking photos of various company property. He was asked to leave at least three times and refused. He became aggressive and volatile and pushed an employee. Consequently, that employee became fearful for their own safety and the Police were required to attend. We understand that a discussion was held with the Police regarding a trespass order being given to your client from our client subsequently this has occurred. ...
Your client's behaviour may constitute serious misconduct causing our client to lose trust and confidence in him. ...

[36] CHH annexed a statement Ms Sutherland made about the events on 28 July. CHH invited Mr Harman to attend a meeting on 31 July 2015 to discuss the original allegations and the new allegation that Mr Harman pushed Ms Sutherland.

[37] A later date was set for the meeting. It took place on 5 August 2016. Mr Harman attended with his lawyer, Ms Ryder. Peter Adams attended on CHH's behalf, having been asked to do so by Mr Nortman. Carren McDonald attended as CHH's advocate and took notes.

[38] Ms Ryder and Mr Harman objected to Mr Adams being CHH's delegated decision-maker because he was a witness to the 28 July events, was Ms Sutherland's "step son" and was not an employee of CHH. Mr Harman made his explanations and denied having pushed Ms Sutherland.

[39] Mr Adams did not speak during the meeting. CHH did not tell Mr Harman that Mr Adams had seen Mr Harman push Ms Sutherland. The parties agreed Mr Adams would undertake further investigation by talking to Ms Sutherland.

[40] On 11 August 2015, Ms McDonald emailed Ms Ryder that:

... the decision maker, Peter, collapsed yesterday ... This will cause a delay to the re-investigation of the matter. Your client remains on paid leave as agreed at this time.

[41] On 13 August 2015, Ms McDonald wrote to Ms Ryder that Mr Adams had talked to Ms Sutherland but did not get any further information from Ms Sutherland. Ms McDonald advised that she provided notes she took at the meeting to Mr Nortman, who had taken over as the decision maker. She wrote that Mr Nortman also had Ms Sutherland's statement and information provided by Mr Harman.

[42] She advised that CHH had decided that Mr Harman did push Ms Sutherland because:

...our client has concluded that Ms Sutherland's recollection of events is consistent with her behaviour of contacting Police to attend, whilst your client's recollection is not consistent with requesting Police attendance.

Based on this finding, our client has concluded that your client has engaged in serious misconduct.

Subsequently, they have formed the preliminary view that your client's employment be terminated effective immediately. However, they would like to hear from you client any comments he has on the proposed sanction.

[43] Ms Ryder responded by letter dated 17 August 2015 and amongst other things wrote that Mr Harman was willing to meet with Mr Nortman in person to go over the events of 28 July "if that would assist Mr Nortman to better understand the situation." She reiterated that Mr Harman also called the police and believed he called them first, although after Ms Sutherland said she would call them:

... based on [that] sequence of events the conclusion reached by Mr Nortman that Ms Sutherland's claim to have been pushed is consistent with her behaviour of contacting the police to attend, is ill founded.

[44] On 19 August 2015, CHH confirmed its decision that Mr Harman had pushed Ms Sutherland, which amounted to serious misconduct. It confirmed that Ms Sutherland's actions in contacting the police and trespassing Mr Harman were more consistent with Mr Harman pushing Ms Sutherland. It dismissed Mr Harman.

Determination

Was Mr Harman unjustifiably dismissed?

[45] Section 103A(3) of the Employment Relations Act 2000 (the Act) sets out the minimum procedural requirements that I must consider in determining whether a dismissal was justified. Factors include:

- Whether having regard to the resources available to CHH, did it sufficiently investigate the allegations?
- Did it raise its concerns with Mr Harman before dismissal?
- Did it give him a reasonable opportunity to respond to its concerns before dismissal?
- Did CHH genuinely consider Mr Harman's explanation before dismissal?

[46] I can also consider any other factors I consider relevant. However, I must not decide that a dismissal was unjustified if there were minor defects in the process that did not result in the employee being treated unfairly.

[47] It is not entirely clear how CHH investigated the allegation that Mr Harman had pushed Ms Sutherland, beyond getting a statement from Ms Sutherland on the day of the altercation. I know that Ms Sutherland spoke to Mr Nortman. However, Mr Adams did not make a written statement. It is not clear when Mr Adams told Mr Nortman that he had seen the alleged push.

[48] CHH's main reason for believing Ms Sutherland over Mr Harman is that Ms Sutherland's call to the police was more consistent with her account of events being true. Despite CHH's small size, it had professional advice all the way through the process. I consider a fair investigation would have entailed CHH interviewing Constable Davis to check whether she or Mr Adams told him that one reason they wished Mr Harman to leave was that he had pushed Ms Sutherland. That did not happen.

[49] We now know that Constable Davis does not remember any mention of pushing or assault by Mr Harman. He recalls that Ms Sutherland told him Mr Harman was an ex-employee and it was on that basis he thought it reasonable to issue a trespass notice.

[50] I accept that CHH raised its new concern with Mr Harman and set a meeting at which he was given an opportunity to respond. However, I am concerned that it was not made clear to Mr Harman that Mr Adams had told Mr Nortman that he saw Mr Harman push Ms Sutherland. That meant that Mr Harman was not fully aware of the evidence CHH would rely on to make its decision.

[51] In addition, I am concerned that Mr Harman did not have an opportunity to make his explanations directly to Mr Nortman, who was the decision maker. It is a vital component of natural justice that an employee should be able to be heard directly by the decision maker, especially when the complainant has talked directly to the decision maker.

[52] Mr Nortman's evidence at the investigation meeting was that he always intended to be the one to make the decision. He said he asked Mr Adams to attend the meeting because for some reason that he could no longer recall he was not available himself. However, the fact that Mr Nortman considered himself the decision maker was not conveyed to Mr Harman until after Mr Adams became ill. Only then did Ms McDonald write, "Mr Nortman will therefore be assuming the role of decision maker." Whatever the situation was initially intended to be, it was unfair that Mr Harman was not able to speak directly to Mr Nortman.

[53] Mr Nortman had a copy of Ms McDonald's notes of the meeting as part of the information he relied on to make his decision. However, Mr Harman was not provided with those notes and did not have an opportunity to assess their accuracy and comment on them.

[54] Although there is not a close family relationship between Mr Adams and Ms Sutherland, I am also concerned that CHH did not take into account the possibility of a conflict of interest and possible bias in Ms Sutherland's favour by Mr Adams.

[55] When Mr Nortman gave his evidence in the investigation meeting, he was somewhat confused. He did not have a clear memory of his decision making process but agreed that he had spoken to Ms Sutherland more than once about her allegation that Mr Harman shoved her "when they were arguing".

[56] It was clear from Mr Nortman's evidence that he relies almost totally on Ms Sutherland in relation to all matters outside of driving, as he is entitled to do. Mr Nortman's heavy reliance on Ms Sutherland makes it more likely that no matter what process had been used he was more likely to believe her than almost anyone else.

[57] Mr Nortman was also of the view that Mr Harman "stepped up to Peter" and says he was thinking of that when he decided to dismiss Mr Harman. The problem with that is that Mr Adams and Mr Harman say that Mr Harman did not "step up to" or act threateningly to Mr Adams at all. In addition, that further allegation was never put to Mr Harman for his response.

[58] I do not consider the procedural defects to have been minor and I do consider they caused Mr Harman to be treated unfairly.

[59] A fair and reasonable employer could not have acted in the way CHH did in all the circumstances. Therefore, CHH unjustifiably dismissed Mr Harman.

Was Mr Harman unjustifiably disadvantaged by not being paid?

[60] CHH was not entitled to withhold Mr Harman's pay due on 22/23 July 2015 and then again for the period until his dismissal. Mr Nortman's evidence was that he believed that Mr Harman's pay and holiday pay had been paid to him last year. However, it is clear that it was not paid in its entirety until the eve of the investigation meeting.

[61] In addition, the trespass notice effectively meant that he was unable to return to work once his cut had healed sufficiently for him to return to normal work duties, which his medical certificate indicated would be 31 July 2015. CHH made two payments to Mr Harman's bank account on 5 and 13 August 2015. However, Mr Harman did not get payslips and so was unable to be sure whether he had been correctly paid. In addition, he was unable to draw on the payment made on 5 August for some time as it had been paid in by cheque.

[62] The late payments and the inability to draw on the cheque straight away disadvantaged Mr Harman financially. For example, his bank dishonoured certain automatic payments and he and his wife had to borrow money for their ongoing living costs.

[63] There was no justification for that and a fair and reasonable employer could not have acted as CHH did.

Remedies

Compensation

[64] Mr Harman is entitled to compensation for the effects of the unjustified disadvantage and unjustified dismissal on him.

[65] Mr Harman and Ms Cameron's evidence was that the dismissal, in particular, had a serious effect on Mr Harman. Mr Harman first suffered from depression about seven years earlier when his business failed. He was treated by his GP and, although at the time, he had been taking three anti-depressant tablets per day, by the time he was employed by CHH his need for medication had lessened and he was taking only one tablet per day.

[66] After his dismissal, his depression worsened significantly and he had to go back onto the higher dose of medication. Mr Harman says his confidence and self-esteem suffered greatly, he had sleepless nights and at times, "frankly I felt sick to the stomach."

[67] Despite getting another job quite quickly, with someone who he had worked for previously, Mr Harman still felt devastated and humiliated being dismissed for what he considers a false allegation. He also earns a lower hourly rate than he earned at CHH.

[68] Ms Cameron and Mr Harman's evidence was that Mr Harman had suicidal thoughts and that his depression had a negative impact on their relationship.

[69] I consider \$12,000 is reasonable compensation for Mr Harman's difficulties causing his family financial problems related to his late pay in July and August and for the hurt and humiliation he suffered consequent on his dismissal.

Contribution

[70] I need to consider the extent to which Mr Harman's actions contributed to the situation giving rise to his personal grievance. If there was a causal connection

between those actions and the situation that gave rise to the dismissal and if those actions so require, I must reduce the remedy that would otherwise be awarded.

[71] CHH says that Mr Harman's explanation of what happened on 28 July is so inherently implausible that Ms Sutherland's evidence must be correct. It says that because Mr Harman pushed Ms Sutherland aside his behaviour should reduce any remedy payable by 75%.

[72] If Mr Harman pushed Ms Sutherland, his dismissal would have been substantively justified.

[73] I considered Mr Harman's evidence to be credible. Mr Harman made a reasonable concession when he said he had forgotten that he had once before been issued with a trespass notice after he left a job only a few days into it.

[74] I was less certain that Ms Sutherland was a wholly reliable witness. She was very defensive and at times argumentative during questioning. Partly because of that and partly because there was an insufficient investigation, I cannot conclude that Mr Harman pushed Ms Sutherland.

[75] However, to a lesser extent Mr Harman's behaviour on 28 July 2015 did contribute to the situation leading to his dismissal. He must have realised upon his entry to the office that it was unwise for him to remain when Ms Sutherland was so clearly annoyed, if not angry, with him. It is more likely than not that she told him it was inappropriate for him to be there. Given that, Mr Harman should have left not just the office but also the premises immediately. He did not do so and it was his failure to leave the premises entirely when asked to more than once that caused Ms Sutherland to call the police.

[76] Mr Harman did not contribute in any blameworthy way to the situation leading to his unjustified disadvantage in not being paid, when he was due to be paid.

[77] I consider that reducing Mr Harman's remedy, making the compensation payable to him \$8,000.00, is appropriate in all the circumstances.

Penalties

[78] Ms Ryder submits any penalties should be paid to Mr Harman rather than to the Crown.

[79] Mr Harman also claims that CHH breached the Holidays Act 2003 by failing to pay him his holiday pay when his employment was terminated. There was a clear breach of the Holiday Act in that failure and in failing to keep adequate holiday and leave records.

[80] Ms Sutherland says it was her mistake that saw Mr Harman not fully paid what CHH owed him for almost a year.

[81] However, at the appropriate time, only a Labour Inspector could have brought penalty proceedings in the Authority for breaches of the Holidays Act. Therefore, I cannot consider any penalties for breaches of the Holidays Act.

Breaches of Wages Protection Act 1983?

[82] Ms Ryder submits CHH breached of s 4 of the Wages Protection Act 1983. The first breach it relies on were the failures to pay Mr Harman the pay due on 22 July because he had not filled in his timesheet correctly.

[83] I accept that CHH had warned its employees that if they did not fill in their timesheets in line with the new requirement they might not be paid. However, withholding pay for that reason was not justified and was in breach of s 4 of the Wages Protection Act.

[84] In addition, Mr Harman was not paid on time for the pay due on 29 July. This was the first week he had been off work on ACC and therefore CHH, as his employer, was required to pay him for that week. No clear reason has been given for this failure. It too was a breach of s 4 of the Wages Protection Act.

[85] Ms Ryder submits I should impose a penalty of \$6,000 on CHH for each breach of the Wages Protection Act.

Breaches of s 130 of the Employment Relations Act 2000?

[86] Ms Ryder also submits that CHH failed to keep an adequate wages and time record, in line with s 130, for Mr Harman and therefore also failed to provide him access to such a record when he asked for it.

[87] It now appears that at least for part of Mr Harman's' employment CHH kept his timesheets and provided pay slips. The combination of those records could satisfy the s 130 requirements. However, they were not available for the whole period of employment and CHH only supplied those records as part of these proceedings.

[88] Ms Sutherland's evidence is that as soon as she began work she began to keep better records and since Mr Harman's dismissal, CHH has purchased a payroll software system from ACE, which it now uses. I consider that shows a degree of remorse in that CHH has attempted to ensure it keeps adequate records now.

[89] Ms Ryder submits that a penalty of \$6,000 for each breach would be appropriate.

CHH's submissions on penalties

[90] Mr Thompson submits that I should not impose any penalty for any breach of the Employment Relations Act or the Wages Protection Act. However, if I do decide that a penalty or penalties is warranted I should impose one penalty overall for the totality of the breaches and it should be at the lower end of the scale, such as \$3,500.

Determination on penalties

[91] The purpose of a penalty is to punish wrongdoing and is not intended to compensate.

[92] In order to decide whether to impose a penalty and, if so, in what amount I need to consider a number of factors as set out in the Employment Court case of *Xu v McIntosh*.¹

[93] How much harm have the breaches of the Wages Protection Act occasioned? I have already considered this in assessing that Mr Harman suffered unjustified

¹ [2004] 2 ERNZ 488

disadvantage and in awarding compensation to Mr Harman. For that reason, if I consider a penalty is due, I would not order it paid to Mr Harman.

[94] Mr Harman sought to have me take into account evidence that two other former employees of CHH had not had their full pay and entitlements paid. The evidence adduced was not reliable enough for me to accord it any weight.

[95] The breaches were not technical or inadvertent, although CHH appears not to have knowledge that it was breaching its obligations at the time.

[96] There has been little remorse shown, although largely that is likely to be because Mr Nortman, and no doubt, Ms Sutherland, initially believed CHH was entitled to withhold the pay due on 22 July. In addition, after that Mr Nortman believed that Mr Harman had been paid what he was owed when it was owed.

[97] However, CHH has acknowledged that it did not have an adequate system for recording wages and time and holidays and leave. It appears to have remedied that failing by purchasing payroll software from ACE.

[98] Finally, I consider whether CHH and other employers should be deterred from making decisions to withhold employee's pay without regard to the law.

[99] In relation to the Employment Relations Act breaches, I find that the breaches were not technical or inadvertent and that the lack of records hampered Mr Harman's ability to work out whether he had been paid correctly for quite some months.

Conclusion on penalties

[100] Overall, I consider Mr Nortman was not fully aware of CHH's obligations as an employer, or if he was fully aware of its obligations, he was not vigilant about checking that the company's obligations were met and instead relied completely on Ms Sutherland. Ignorance of the law is not sufficient reason for failing to follow the law.

[101] I consider that a global penalty is appropriate to recognise CHH's breaches. I impose a penalty of \$6,000 on CHH, with \$1,000 to be paid to Mr Harman in

recognition of his disadvantage in not having access to correct time and wages records earlier. The balance of \$5,000 is to be paid to the Crown.

Costs

[102] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[103] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is \$3,500. The investigation meeting lasted two days.

[104] If the parties cannot reach an agreement, the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority