

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 89
3023851

BETWEEN

CHARLES JUNIOR
BRONSON HAWKINS
Applicant

AND

PATUTAHI ENTERPRISES
LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: P T Harman, Counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 16 March 2018 in Gisborne

Additional documents received: 19 March from Applicant

Determination: 20 March 2018

DETERMINATION OF THE AUTHORITY

A. Mr Hawkins was unjustifiably dismissed by Patutahi Enterprises Limited.

B. Patutahi Enterprises Limited is ordered to pay the following amounts to Mr Hawkins within 14 days of the date of this determination:

- a. The sum of \$2,210 gross for wages lost as a result of Mr Hawkins' personal grievance.**
- b. The sum of \$5,000 under s 123(1)(c) of the Employment Relations Act 2000.**

c. The sum of \$5,843.69 gross for wage and holiday pay arrears

C. Costs are reserved.

Employment Relationship Problem

[1] Patutahi Enterprises Limited (Patutahi) is a timber and logging company operating in Wairoa. Mr Hawkins was employed by Patutahi as a machinery operator and onsite mechanic.

[2] On 20 December 2017 Patutahi dismissed Mr Hawkins. Mr Hawkins claims this dismissal was unjustified. He claims wage arrears, outstanding holiday pay, lost wages and compensation under s 123(1)(c) of the Employment Relations Act 2000 (the Act).

[3] No Statement in Reply was filed by Patutahi. In addition, there was no appearance for or on behalf of Patutahi at the investigation meeting.

[4] Prior to the investigation meeting a minute setting out, inter alia, the date of the investigation meeting was personally served on Patutahi. In addition Patutahi was served with the notice of investigation meeting. This occurred on 9 March 2018 at its registered office at Coates & Associates Limited, 300 Childers Road, Gisborne.

[5] No good reason has been provided for Patutahi's failure to attend the investigation meeting or be represented. As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Patutahi had duly attended or been represented.

[6] As permitted by 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 but has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination are:

- a) Was Mr Hawkins unjustifiably dismissed?

- b) If Mr Hawkins was unjustifiably dismissed, what remedies should be awarded?
- c) Should these remedies be reduced for contributory behaviour?
- d) Are any wage arrears and holiday pay owing to Mr Hawkins? If so, in what amount?

Background against which issues are to be determined

[8] Mr Hawkins was employed by Patutahi on 9 July 2016. He says the terms of his employment were recorded in an individual employment agreement. However, he was unable to produce a copy of the IEA and Patutahi failed to comply with my direction to produce a copy of this.

[9] Having heard from Mr Hawkins, I am satisfied the material terms of the IEA were these:

- a. Mr Hawkins' ordinary hours of work were Monday to Friday
- b. His normal hours of work on each of these days was 8.5 hours
- c. He was paid an hourly rate of \$26
- d. He was to provide his own chainsaw. In return it was agreed he would be paid a non-taxable chainsaw allowance of \$60 for each day worked.

[10] The relationship between the parties was relatively harmonious until 19 December 2017. On this day Mr Hawkins was involved in a head-on collision with another vehicle driven by the site foreman. No one suffered serious injury and both men returned to work.

[11] After returning home that day, Mr Hawkins was contacted by Bruce Stewart, a co-worker who attended the investigation meeting and provided evidence. Mr Stewart told Mr Hawkins there was going to be a meeting the following day. He asked if Mr Hawkins knew about it to which he replied he did not. No information as to what the meeting was to be about was conveyed to Mr Hawkins.

[12] A phone conversation then took place between Mr Hawkins and Beverley Hancox. Ms Hancox is the sole director of Patutahi. Mr Hawkins said Ms Hancox told him there was no need for him to come into work the following day or to attend the meeting. He said that he asked her why but she provided him with no explanation. After challenging her on this, he said she agreed he could come to work and attend the meeting. He said there was no discussion about what the meeting was to be about.

[13] The meeting took place on 20 December 2017. All staff members working that day attended. In total 7 people. At the meeting Ms Hancox accused Mr Hawkins of causing the accident the previous day. She said he was speeding and had GPS evidence to prove this. Mr Hawkins disputed this and said it was the site foreman, Ms Hancox's son, who was speeding. He also referred to his truck having no fixed radio transmitter. He said this prevented him from notifying on-coming vehicles that he was going around the blind corner. It also prevented him from hearing notifications from on-coming vehicles.

[14] The conversation became heated. Mr Hawkins said words to the effect that he might as well hand in his notice and get two weeks' pay. Ms Hancox replied that he didn't need to bother resigning. He could leave then and she would pay him two weeks' notice. The meeting then came to an end. Mr Hawkins was asked to stay behind.

[15] A meeting then took place between Mr Hawkins, Ms Hancox and the site supervisor. At this meeting the site supervisor alleged that Mr Hawkins had purposely been wrecking equipment. No particulars were provided and Mr Hawkins denied this. The conversation then turned to the completion of an incident report for the accident and when Mr Hawkins could sign this. Mr Hawkins said the meeting ended with Ms Hancox advising him that she was laying him off work as of that day. She told him she would pay him two weeks' wages and his annual leave.

Issue One: Unjustified Dismissal

[16] There is no dispute that Mr Hawkins was dismissed from his employment with Patutahi on 20 December 2017. The onus falls upon Patutahi to justify whether its actions were justified.

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

[18] In applying this test, the Authority must consider the matters set out in s 103A(3)(a)-(d). These matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[19] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.¹ A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

[20] The process leading to Mr Hawkins' dismissal was defective. Patutahi failed to meet the mandatory considerations set out in s 103A(3). I am satisfied there was no investigation before dismissal. Patutahi did not raise its concerns with Mr Hawkins prior to the meetings, or indeed provide him with particulars or any information upon which it was relying to make its decision. Patutahi did not afford Mr Hawkins with a reasonable opportunity to respond to the concerns before dismissal. There was no genuine consideration of the explanation before dismissal. In effect the dismissal was immediate and abrupt. These defects were not minor and did result in Mr Hawkins being treated unfairly.

[21] A decision to dismiss in all the circumstances known at the time was not one that a fair and reasonable employer could have made. Mr Hawkins was unjustifiably dismissed from his employment with Patutahi and is entitled to remedies.

Issue Two: Remedies

Lost wages

[22] Mr Hawkins claims two weeks' lost wages.

¹ s 103A(5)

[23] Section 123(1)(b) of the Act provides for the reimbursement by Patutahi of the whole or any part of wages lost by Mr Hawkins as a result of his grievance. Section 128(2) provides that I must order Patutahi to pay Mr Hawkins the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.²

[24] Mr Hawkins gave evidence as to the steps he took to find alternative employment in the months following his dismissal. Considering this evidence, I am satisfied Mr Hawkins acted reasonably in trying to mitigate his loss. He has lost at least the two weeks lost wages claimed as a consequence of his dismissal.

[25] By Minute dated 6 March 2018 I directed Patutahi to provide Mr Hawkins' wage and time records, leave and holiday records, payslips and final pay details. Patutahi has failed to provide this information.

[26] Following request, Mr Hawkins produced his bank statements showing payments made by Patutahi during his employment. He also produced the majority of his payslips for the duration of his employment. The bank statements and payslips show Mr Hawkins received varying wage payments from Patutahi. This generally occurred where he worked overtime. I am satisfied that he worked at least 42.5 hours per week.

[27] Multiplying 42.5 hours by Mr Hawkins' hourly rate of \$26 I reach a weekly wage of \$1,105 gross. Multiplied by two weeks equals \$2,210 gross.

[28] Mr Hawkins has lost the sum of \$2,210 gross as a result of his personal grievance. Patutahi is ordered to make payment of this sum within 14 days of the date of this determination.

Section 123(1)(c)(i) Compensation

[29] Mr Hawkins claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) in the sum of \$5,000.

² s 128(3).

[30] Mr Hawkins and his partner gave compelling evidence of the effects his dismissal had on him. Mr Hawkins explained how he had “almost been driven to a place of no return”. He said he couldn’t pay the bills which led to the family going into debt. He said his marriage suffered, as did his relationship with his children. His partner talked about Mr Hawkins being unable to sleep and becoming very emotional. This emotion was evident during the investigation meeting.

[31] Mr Hawkins explained how his distress was accentuated by false accusations made against him by Ms Hancox. He said she used these false accusations to justify his termination to others. Mr Stewart confirmed this evidence. He said that throughout the months that followed Mr Hawkins’ dismissal, Ms Hancox repeatedly made negative comments about Mr Hawkins to him and his co-workers. Mr Hawkins said this damaged his relationship with his former co-workers/friends who he now has no contact with. In addition, he said the comments reached the wider community embarrassing him further and leading to him fearing what others thought of him. This affected his mana.

[32] I am satisfied in these circumstances that Mr Hawkins suffered humiliation, loss of dignity and injury to his feelings. I award the amount claimed for compensation under s 123(1)(c)(i) of the Act in the sum of \$5,000.

[33] Patutahi is ordered to make payment to Mr Hawkins the sum of \$5,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Issue three: Contribution

[34] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.³

³ s 124.

[35] I am satisfied that Mr Hawkins did not contribute to his personal grievance and for this reason I make no deduction to the remedies I have awarded.

Issue four: Wage arrears and holiday pay

Wage Arrears

[36] The statement of problem claims payment of outstanding wages.

[37] Where there has been default in payment to an employee of any wages or other money payable under an IEA, those monies may be recovered by the employee.⁴

[38] Having heard from Mr Hawkins, and having reviewed the last payslip Mr Hawkins received, I am satisfied Mr Hawkins was not paid for the final three days he worked, namely on 18, 19 and 20 December 2017.

[39] Mr Hawkins normal hours of work on each of these days was 8.5 hours. Multiplying the total hours (25.5) by his hourly rate of \$26 I reach a figure of \$663 gross.

[40] Mr Hawkins is owed \$663 gross for wage arrears. Patutahi is ordered to make payment of this sum within 14 days of the date of this determination.

Payment for annual leave due on termination

[41] Calculation of Mr Hawkins' annual leave entitlements must be made in accordance with s 24 of the Holidays Act 2003.

[42] Mr Hawkins was employed by Patutahi on 9 July 2016. For the period 9 July 2016 to 9 July 2017, Mr Hawkins was entitled to receive four weeks' annual leave. To calculate the sum payable to Mr Hawkins I must use the greater of his ordinary weekly pay at the end of his employment or his average weekly earnings during the 12 months immediately before the termination of his employment.⁵ The greater of these two options is Mr Hawkins' ordinary weekly pay.

⁴ Section 131 Employment Relations Act 2000

⁵ Section 24(2) Holidays Act 2003

[43] Ordinary weekly pay is calculated in accordance with s 8 of the Holidays Act. Mr Hawkins said his ordinary working week was from 7 am to 4 pm Monday to Friday. He had a half hour lunch. His evidence is supported by the payslips. 42.5 hours multiplied by his hourly rate of \$26 is \$1,105. Multiplied by 4 weeks is \$4,420.00 gross. Deducting the annual leave taken by Mr Hawkins during this period, \$1,232.88 gross, I reach a figure of \$3,187.12.

[44] For the period 10 July 2017 to 20 December 2017 it is appropriate that holiday pay is calculated at the rate of 8%. Mr Hawkins has provided the majority of his payslips during this period. However, 2 payslips were missing. Mr Hawkins has been unable to locate these. In the absence of the missing payslips I have used Mr Hawkins' bank statements, which show the net figure paid, and his other payslips to ascertain a gross earnings figure on the missing dates. I reach a gross earnings figure of \$24,919.60 for the period 10 July 2017 to 20 December 2017. 8% of this sum is \$1,993.57.

[45] Patutahi is ordered to pay Mr Hawkins the combined sum of \$5,180.69 gross for outstanding holiday pay. Payment of this sum must be made within 14 days of the date of this determination.

Costs

[46] Costs are reserved.

[47] Mr Hawkins is encouraged to resolve any issue of costs with Patutahi. If he is unable to do so, and an Authority determination on costs is needed, an application for costs can be made within 14 days. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[48] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence such as invoices. In addition, a copy of Mr Hawkins' retainer letter must be provided.

[49] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Certificate of Determination

[50] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 that Mr Hawkins be provided with a certificate of determination, sealed with the seal of the Authority recording that within 14 days of the date of this determination, Patutahi Enterprises Limited is ordered to pay the following amounts to Mr Hawkins:

- a. The sum of \$2,210 gross for wages lost as a result of Mr Hawkins' personal grievance.
- b. The sum of \$5,000 under s 123(1)(c) of the Employment Relations Act 2000.
- c. The sum of \$5,843.68 gross for wage and holiday pay arrears

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].