

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 234
3030037

BETWEEN BRENDON JEFFS
 Applicant

AND ROBERT LUPMAN
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person
 Respondent in person

Investigation Meeting: 23 July 2018 in Gisborne

Additional documents
received: 24 July 2018 from the Applicant

Determination: 26 July 2018

DETERMINATION OF THE AUTHORITY

- A. Brandon Jeffs’ personal grievance for unjustified disadvantage was not raised within 90 days as required by s 114 of the Employment Relations Act 2000.**
- B. Robert Lupman did not consent to Mr Jeffs’ grievances being raised outside the 90 day period. Accordingly, the Authority does not have jurisdiction to investigate Mr Jeffs’ personal grievance claim for unjustified disadvantage.**
- C. Mr Jeffs was not unjustifiably dismissed,**
- D. Robert Lupman is ordered to pay to Mr Jeffs the following amounts within 14 days of the date of this determination:**
- a. The sum of \$304 under s 131 of the Employment Relations Act 2000;**
 - b. The sum of \$71.56 for costs.**

Employment Relationship Problem

[1] Robert Lupman operates a number of taxis in the Gisborne Region. On 11 July 2016 he employed Brandon Jeffs as a taxi driver. The terms of Mr Jeffs' employment were recorded in a written individual employment agreement (IEA).

[2] On 8 August 2017 Mr Lupman dismissed Mr Jeffs on the grounds of redundancy. Mr Jeffs claims that he was unjustifiably dismissed, he suffered an unjustified disadvantage when he was issued a written warning, and that he is owed wage arrears. He claims lost wages, wage arrears and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] Mr Lupman denies the claims made by Mr Jeffs. He maintains that he had genuine commercial reasons for making Mr Jeffs' position redundant. He further says that Mr Jeffs did not suffer an unjustified disadvantage and, in any case, did not raise a personal grievance within time in terms of his alleged disadvantage. He also disputes that any wage arrears are owing to Mr Jeffs.

[4] As permitted by 174E of the Employment Relations Act 2000 (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

[5] The issues requiring investigation and determination were:

- a) Did Mr Jeffs raise a personal grievance relating to his claim for unjustified disadvantage within 90 days of his grievance arising?
- b) If so, did Mr Jeffs suffer an unjustified disadvantage to his employment?
- c) Was Mr Jeffs unjustifiably dismissed?
- d) If Mr Jeffs suffered an unjustifiable disadvantage, or was unjustifiably dismissed, what remedies should be awarded?

- e) If any remedies are awarded, should they be reduced, under s124 of the Act, for blameworthy conduct by Mr Jeffs that contributed to the situation giving rise to his grievance?

Background against which issues are to be determined

[6] Mr Lupman operates a taxi business under the umbrella of the Gisborne Taxi Society (the Society). By agreement with its shareholders, the Society allocates taxi shifts to its shareholders on the basis of a weekly roster. This works on a slide system, alternating days and nights between each of its 24 shareholders. One shareholding equals one taxi.

[7] Mr Lupman owns three shareholdings. The first two shareholdings form part of the 24 shareholdings in the Society and operate under the Society's weekly roster. The third shareholding is known as the Total Mobility Shareholding. As owner of this shareholding Mr Lupman owns the right to provide all taxi van services to disabled members of the public when required. His hours are not restricted by the Society. At material times Mr Lupman also leased up to 5 shareholdings from other Members of the Society.

[8] Mr Jeffs employed by Mr Lupman to operate both taxis and mobility vehicles. Pursuant to his IEA his ordinary hours of work were 30 hours per week. These were to be worked in accordance with shifts allocated by agreement between the parties. He was paid \$16 gross per hour.

[9] From early 2017 Mr Lupman began to experience serious financial difficulties. I shall return to address these difficulties later in my determination. Mr Lupman decided that he needed to reduce his staff numbers to save money.

Initial discussions with Mr Jeffs about the businesses' financial difficulties

[10] On 26 April 2017 Mr Lupman drafted a letter of termination. However, before he had the opportunity to provide this to Mr Jeffs, Mr Jeffs was placed on ACC for a non-work related accident. Text messages I have viewed show that Mr Jeffs told Mr Lupman that he would be off work until 12 May 2017.

[11] Upon receipt of the text messages Mr Lupman responded asking to meet with Mr Jeffs. The parties met on 27 April 2017. At this meeting Mr Lupman told Mr

Jeffs that his business was struggling. He explained that the IRD had audited him and he had a substantial amount to pay. He said he couldn't afford to keep all of his staff and he may have to let Mr Jeffs go.

[12] Mr Lupman did not provide Mr Jeffs with the termination letter. He decided to hold-off issuing the letter of redundancy until Mr Jeffs returned to work in the hope that his business might improve and he might be able to retain Mr Jeffs.

[13] On 2 May 2017 Mr Lupman text Mr Jeffs advising

As of to day I can only offer you part time work. We can get together and have a chat later on this arvo..."

[14] Mr Jeffs did not reply. This prompted Mr Lupman to text him again on 5 May 2017 asking him to reply so they could have a talk. Mr Jeffs replied:

Morning. Oh yeah have a talk about hours, etc. I am curious about this part time you've thrown out there???

[15] Mr Lupman was unable to respond to Mr Jeffs' text message as his mother passed away.

Second conversation with Mr Jeffs about financial concerns

[16] Mr Jeffs returned to work in the week commencing 15 May 2017.

[17] At about 4 am on 20 May 2017, when dropping Mr Jeffs home after his shift, the parties spoke at length about their relationship and the business's financial position. Much of what was discussed during that conversation is in dispute. However, materially, the parties agree that during the conversation Mr Lupman again told Mr Jeffs that the business was struggling. He spoke again about his debt to IRD and his struggles to pay his GST. He told Mr Jeffs that he would have to get rid of people and as Mr Jeffs was the last one on he would be the first off. Mr Jeffs asked him if his work ethic would be taken into account and said that if Mr Lupman wanted him gone he would go. Mr Lupman responded that he didn't want him to go but he could not afford to keep him.

The written warning

[18] Sometime between late May and early June 2017 Mr Lupton discovered the side light on the taxi Mr Jeffs had been driving was smashed. He spoke to Mr Lupton

about this and Mr Jeffs explained he had driven into a bush. Then on 1 June 2017 Mr Lupton discovered that the RT on the vehicle Mr Jeffs had been driving had been left on resulting in the battery and camera light going flat. This meant the taxi was unable to stay on the road. He raised this with Mr Jeffs by text and asked him to ensure he turned the RT off at the end of his shift.

[19] On 3 June 2017 Mr Lupton noticed the nozzle of the driver's windscreen wiper on the taxi operated by Mr Jeffs had been removed. When he questioned Mr Jeffs about this damage he said an intoxicated individual had ripped the windscreen wiper nozzle off the night before.

[20] The foregoing damage followed accidents in taxis operated by Mr Jeffs in October 2016, late 2016, January and February 2017.

[21] On 4 June 2016 the parties had a heated discussion. Mr Jeffs believed Mr Lupman was speaking negatively about him while he was on ACC. Mr Lupman denied this.

[22] The following day Mr Lupman texted Mr Jeffs his hours of work for the week. The hours totalled 25 as opposed to Mr Jeffs' contracted hours of 30. When this was brought to Mr Lupman's attention he confirmed with Mr Jeffs that he would be paid for 30 hours.

[23] On 7 June 2017 Mr Jeffs text Mr Lupman that he was unwell and would need to take a couple of days off. Mr Lupman responded that he had a letter for him. He said that if he was not there he would leave it in the letterbox, which he did. The letter was a written warning. It stated:

This letter serves as an official written warning outlining the following concerns within the last 6 months.

1. Your careless driving habits regarding the following vehicles in my fleet

- K38 – Damage to right side of van when entering Gisborne Airport
- K09 – Damage to left front guard. Not yet repaired.
- K35 – Damage to rear bumper also resulting in \$400.00 damage to 3rd party vehicle
- K21 & K35 – Parked at depot, side swiping Car 21 with Van 35, resulting in scuffs to both vehicles
- K16 – Damage to left side light broken lens running into a bush in Pak N Save car park

2. Your disregard to protocols of checking vehicles before or during the use by you
 - Cab 21 – not checking or informing me of registration or due date
 - Cab 39 – not checking or informing me of C.O.F due following day
3. Failing to check that R.T. turned off at end of shift

A copy of this letter will be held on file.

[24] Mr Jeffs said he mentioned to Mr Lupman that they would need to talk about the demand letter. However, this never eventuated.

Further conversations with Mr Jeffs about financial concerns

[25] On 21 June 2017 Mr Jeffs returned to work. Mr Lupman told him it was good to have him back at work. He further mentioned that it was hard paying staff wages when he was not making any money. Another staff member had also been on paid sick leave during the period Mr Jeffs was away.

[26] On 2 August 2017, Mr Jeffs was only paid 25 of the 30 hours he had worked. He raised his concern by text message. Mr Lupman responded that that was the best he could do until his cheque cleared.

[27] On 3 August 2017 Mr Lupman spoke to Mr Jeffs about the underpayment. He explained that he didn't know he wouldn't have enough money to pay the staff. He told him he had a substantial GST bill to pay and his bank deposits were not clearing fast enough. He told him the loss of two of his leased shareholdings, combined with delays in his credit work being paid, meant that he did not have the money coming in to pay the staff. He said that this was the last week he could afford to pay Mr Jeffs his guaranteed 30 hours and the following week he would have to drop his hours to 20 or 25 hours. Mr Jeffs asked him how this would work on a 30 hour minimum contract and he replied that he would need to draft a new contract. In answer to Mr Jeffs' question as to what would happen if he refused to sign, Mr Lupman responded that he would have to make him redundant.

[28] Mr Jeffs did not agree to a reduction in his hours.

[29] On 8 August 2017 Mr Lupman provided Mr Jeffs with a letter of redundancy.

[30] Mr Jeffs' last day of employment was 22 August 2017.

Issue 1: Did Mr Jeffs raise a personal grievance relating to his claim for unjustified disadvantage within 90 days of his grievance arising?

Relevant Facts

[31] Mr Jeffs claims that the written warning that was issued to him for the damage incurred to vehicles he was driving unjustifiably disadvantaged him.

[32] Before assessing whether or not Mr Jeffs' claim is proven, I must first examine whether he raised a personal grievance relating to the alleged unjustified disadvantage within the statutory timeframe permitted by the Act.

Legal Position

[33] Every employee who wishes to raise a personal grievance must raise the grievance with his or her employer within 90 days of the date the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later.¹ This is unless the employer consents to the personal grievance being raised after the expiration of that period or, where the employer does not consent, the employee applies to the Authority for leave to raise the personal grievance after the expiration of 90 days.²

[34] A grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.³

Finding

[35] No issue was raised by Mr Jeffs about the written warning until 6 September 2017. At that time Mr Jeffs raised a personal grievance, through his solicitor for unjustified dismissal. While this letter did not say he was raising a personal grievance for unjustified disadvantage, I am satisfied the wording of the correspondence was sufficient to do so. No particular formula of words needs to be used to raise a

¹ Section 114(1).

² Section 114(3).

³ Section 114(2).

personal grievance. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.⁴

[36] By 6 September 2017, the 90 day timeframe to raise a personal grievance relating to the written warning had expired. Mr Lupman does not consent to Mr Jeffs' claim being raised out of time. In addition, no application was made by Mr Jeffs to raise his personal grievance out of time. Even if he had made an application, there were no exceptional circumstances or reasons why leave ought to have been granted to him.⁵

Finding on Issue one

[37] I confirm the preliminary indication provided to the parties, namely that the Authority does not have jurisdiction to hear Mr Jeffs' claim for unjustified disadvantage.

Issue 2: Unjustified Dismissal

[38] In order for Mr Jeffs' redundancy to be justified, Mr Lupman must satisfy the requirements set out in s 103A of the Act. This requires an objective assessment of whether his actions, and how he acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[39] Part of this assessment involves a consideration of Section 4(1)(A)(c) of the Act.⁶ Under s 4(1A)(c) the law requires an employer, who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to that employee access to information, relevant to the continuation of the employee's employment, about the decision. In addition, it is required to provide the employee with an opportunity to comment on the information to the employer before the decision is made.

[40] The key requirements of consultation were recently summarized by Judge Inglis (as she then was) in *Stormont v Peddle Thorp Aitken Limited*⁷.

⁴ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) (emphasis added). It should be noted that *Creedy* was overturned on appeal, but not on this point of law. See *Creedy v Commissioner of Police* [2007] NZCA 311; *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7. This case was cited with approval in *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 117 at [37].

⁵ Section 115 of the Employment Relations Act 2000.

⁶ *Simpson Farms v Aberhart* [2006] ERNZ 825.

⁷ [2017] NZEmpC 71 at [54].

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[41] The genuineness of the redundancy is an important aspect of the Authority's investigation. Once that is established, if an employer concludes that an employee is surplus to its needs, the Authority is not to substitute its business judgment for that of the employer.⁸

Was the decision to terminate genuine?

[42] I am satisfied, on balance, that there were genuine reasons for Mr Lupman making Mr Jeffs' position redundant. While his decision followed concerns being raised about Mr Jeffs' damaging his taxis, I accept the primary motivation for the termination of Mr Jeffs' employment was due to the business' financial position.

[43] Bank statements, credit card statements, text messages and other evidence I have viewed support Mr Lupman's evidence that his business was in a dire financial position at the time he made the decision to make Mr Jeffs' position redundant.

[44] Mr Lupman's bank statements show his bank accounts going into overdraft due to his business expenses exceeding his income. His credit card statements show he had to make cash withdrawals from his credit card to support his expenses. Text messages show he defaulted in payment of staff wages. He also produced evidence to show he had to withdraw monies from investments in late March 2017 to subsidise his business expenses. A receipt supported his evidence that he placed 5 of his vehicles up for sale in late June 2017.

[45] The decline in Mr Lupman's business was due to a number of factors.

IRD Debt

- a) In or about April 2017 Mr Lupman's expenditure increased due to debt owed to the Inland Revenue Department (IRD). An IRD audit found him liable for arrears and penalties totalling \$240,000. A payment arrangement

⁸ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [89]

was entered into which saw Mr Lupman having to take out a second mortgage on his home to repay a lump sum of \$95,000 to IRD. This meant his mortgage repayments increased. He was also required to repay IRD the remainder of the debt by way of weekly repayments of \$350.

Vehicle Upgrades

- b) In February 2017 the Gisborne Taxi Society resolved that Mr Lupman would be required to upgrade his 3 mobility vans if he wanted to continue to undertake school runs. Mr Lupman explained that this was because all vehicles undertaking school runs must be less than 15 years old and his mobility vans were older than this. The existing mobility vans were still able to be used for Total Mobility and general taxi work.
- c) Mr Lupman knew that it would take him time to upgrade the vehicles as the cost to upgrade the mobility vans was approximately \$25,000 per vehicle. Accordingly, at the Society's March meeting he moved for the Society to grant him until 1 May 2017 to upgrade the mobility vans. This motion was passed. In May 2017, the Society extended the time period for him to upgrade his vehicles to 1 August 2017.
- d) By 1 August 2017 Mr Lupman had not upgraded the mobility vans due to being unable to fund the costs. He knew that the removal of the school run mobility work was imminent. He subsequently lost this business which he said amounted to approximately \$800 per week.

Loss of Shareholdings

- e) In March 2017 the lease on one of shareholdings operated by Mr Lupman was terminated. This resulted in him losing the permanent day shift on this shareholding (40-45 hours per week), reducing his income by approximately \$1,000 per week. His evidence was supported by the purchaser of that shareholding who gave evidence to the Authority.
- f) Subsequently Mr Lupman lost another lease. He said this lease was also worth approximately \$1,000 per week to him based on a 40-45 hour week.

[46] The loss of the two leased shareholdings led to Mr Lupman having more staff than he needed and his income decreasing. The decline in his income, combined with the IRD debt and other business expenses, meant that he did not have the money to pay for the upgrade to his mobility vans. This ultimately led to further loss of business. Whilst this loss of business was after Mr Jeffs' employment ended, the loss was reasonably foreseeable at the time Mr Lupman made Mr Jeffs redundant based on the resolutions made by the Society and his inability to fund the upgrades.

Was a fair procedure followed?

[47] After hearing from the parties I am satisfied that a fair process was followed by Mr Lupman having regard to the small size of his business. Whilst there were some defects in the process followed by Mr Lupman, I consider these were minor and did not result in Mr Jeffs being treated unfairly.⁹

[48] Mr Lupman spoke to Mr Jeffs on at least 3 occasions over a 5 month period about the financial difficulties the business was experiencing and the reasons why. Mr Jeffs was made aware during these conversations that his position may be made redundant if the business' financial position did not improve.

[49] In the last of these conversations, on 3 August 2017, Mr Lupman proposed reducing Mr Jeffs' hours as an alternative to redundancy. Mr Jeffs was afforded with an opportunity to respond to Mr Lupman's concerns. He told him he did not agree to a reduction in his hours. In these circumstances, and faced with genuine financial concerns, Mr Lupman considered he had no option but to make Mr Jeffs' position redundant.

Finding on Issue Two

[50] I find that Mr Lupman's decision to make Mr Jeffs' position redundant was one that a fair and reasonable employer could have made. I therefore find Mr Jeffs' was not unjustifiably dismissed.

⁹ Section 103A(5) of the Employment Relations Act 2000

Issue 3: Are any wage arrears owing to Mr Jeffs under s131 of the Act?

[51] 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.¹⁰

[52] Mr Jeffs claims wage arrears for the difference between his contractual entitlement to 30 hours and the hours he was paid. He alleges he was not paid his contractual entitlement in the weeks ending 22 January 2017, 5 February 2017 and 30 July 2017. In addition, he claims that he was not paid his statutory entitlements for working over the Christmas and New Years' periods in 2016.

[53] As part of my investigation I have viewed Mr Jeffs' IEA and relevant text message instructions from Mr Lupman to Mr Jeffs advising him of the hours he was required to work at material times. I have also viewed the relevant logbook entries showing the hours worked by Mr Jeffs, the payroll records and handwritten notes of hours written by Mr Lupman.

Wage Arrears for the weeks ending 22 January 2017 and 5 February 2017

[54] The payroll summary shows:

- a) In the week ending 22 January 2017 Mr Jeffs was paid 25 hours of ordinary time and 7 hours of annual leave.
- b) In the week ending 5 February 2017 Mr Jeffs was paid 21 hours of ordinary time and 14 hours of annual leave.

[55] Mr Jeffs said he did not take annual leave in the weeks ending 22 January 2017 and 5 February 2017. Mr Lupman conceded during the investigation meeting that he "topped up" Mr Jeffs' weekly hours by using his annual leave. He said this was done of his own accord and not at Mr Jeffs' request.

[56] Mr Jeffs was contractually entitled to be paid for 30 hours per week. He is due wage arrears of 5 hours for the week ending 22 January 2017 and 9 hours for the week ending 5 February 2017. 14 hours multiplied by Mr Jeffs' hourly rate of \$16 gross per hour equals \$224 gross.

¹⁰ Section 131 Employment Relations Act 2000

Wage Arrears for the week ending 30 July 2017

[57] For the week ending 30 July 2017 the payroll summary shows Mr Jeffs was paid 25 hours of ordinary time. I have viewed a text message exchange between the parties where the shortfall is discussed.

[58] Mr Jeffs said Mr Lupman paid him for 4 of the 5 hours short-paid. Mr Lupman agreed with this evidence.

[59] I am satisfied in the circumstances that Mr Jeffs is owed wage arrears of 1 hour. At his hourly rate of \$16 gross per hour this equals \$16 gross.

Statutory entitlements

[60] If an employee works on any part of a public holiday then the employer must pay the employee the greater of –

- a) The portion of the employee's relevant daily pay or average daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or
- b) The portion of the employee's relevant daily pay that relates to the time actually worked on the day.¹¹

[61] Where the employee works on any part of a public holiday, and that day would otherwise have been a working day for the employee, then the employee is entitled to be provided with an alternative holiday.¹² Payment for the alternative holiday is to be made at not less than the employee's relevant daily pay or their average daily pay for the day which is taken as the alternative holiday.¹³ Where an employee has not taken the alternative holiday before the date on which his or her employment ends then they are to be paid at the rate of the employee's relevant daily pay or average daily pay for his or her last day of employment.¹⁴

¹¹ Section 50 of the Holiday Act 2003.

¹² Section 56 of the Holiday Act 2003.

¹³ Section 60 of the Holiday Act 2003.

¹⁴ Section 60(2) of the Holiday Act 2003.

Christmas Day

[62] Mr Jeffs was instructed by text message to work from 4 pm until midnight on 24 December 2016. His log books show that he worked until 1 am on 25 December 2016. He explained that he could not finish at midnight because he had a passenger in his taxi at midnight. He was then instructed by the dispatcher to attend to various other taxi fares. His log books show that he transported 5 separate passengers to various sites in Gisborne between midnight and 1 am for which Mr Lupman received payment.

[63] Mr Lupman said he did not pay Mr Jeffs for the hours he worked on Christmas Day. He said this was because he had specifically instructed him to only work until midnight. I find, in the circumstances, that it was reasonable for Mr Jeffs to work past midnight. He could not have finished at midnight given he had a passenger in his taxi.

[64] I find Mr Jeffs is entitled to be paid for the additional hour he worked at the rate of time and a half in accordance with s 50 of the Holidays Act. At his hourly rate of \$16 this equates to \$24 gross.

[65] Mr Jeffs said this day was not an ordinary day of work. He is not therefore entitled to be paid a day in lieu as claimed.

New Years' Day

[66] The documentation I have viewed shows Mr Jeffs was rostered to work from 4 pm on 31 December 2016 until 5 am on 1 January 2017. He was paid his ordinary hours for working this period but not half that time again for the period worked on 1 January 2017 (5 hours). Mr Jeffs is entitled to payment for this period which equals \$40 gross.

[67] The pay records show Mr Jeffs was paid an alternative holiday for working on New Years' day in accordance with s 60 of the Holidays Act 2003.

Findings on Issue Three

[68] Mr Lupton is ordered to pay to Mr Jeffs the combined sum of \$304 gross for wage arrears owing under s 131 of the Act. Payment of this sum must be made within 14 days of the date of this determination.

Issue 5: Costs

[69] Mr Jeffs has not incurred legal fees in pursuing his claim. However, he is entitled to be reimbursed the fee of \$71.56 which he paid to lodge his application in the Authority.

[70] Mr Lupman is ordered to pay to Mr Jeffs the sum of \$71.56. Payment of this sum must be made within 14 days of the date of this determination.



Jenni-Maree Trotman
Member of the Employment Relations Authority

