

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Bevan Kyle Musson (Applicant)  
**AND** Abilities Incorporated (Respondent)  
**REPRESENTATIVES** Bevan Kyle Musson In person  
Mark Langdon, Advocate for Respondent  
**MEMBER OF AUTHORITY** Vicki Campbell  
**INVESTIGATION MEETING** 6 May 2005  
**FURTHER INFORMATION RECEIVED** 9 May 2005  
19 May 2005  
20 May 2005  
**DATE OF DETERMINATION** 15 June 2005

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

[1] Mr Bevan Musson claims he was promised a pay rise from \$9.00 per hour to \$12.50 per hour which was to take effect after successful completion of a trial period. Mr Musson also alleges he was disadvantaged in his employment after he raised his claim for arrears of wages with his employer.

[2] Abilities Incorporated (“Abilities Inc”) is an incorporated society. It is a not-for-profit organisation which primarily provides employment for people with disabilities. Abilities Inc denies Mr Musson’s claims.

[3] The issues for this determination are:

- Is Mr Musson entitled to receive a rate of \$12.50 per hour?
- Was Mr Musson disadvantaged in his employment after raising his claims with his employer?

**Is Mr Musson entitled to receive a rate of \$12.50 per hour?**

[4] Mr Musson was employed by Abilities Inc, through Pasifika, an organisation specialising in placing long-term unemployed people into work.

[5] In early September 2004, 8 potential employees were referred by Pasifika to Abilities Inc. A meeting took place with all 8, including Mr Musson and a Mr Henry Lee (who was also successful in gaining employment), where the workings of the technical department and an outline of the job were explained. Mr Musson and Mr Lee were selected from the group to undertake a work assessment. The work assessment is to assess the ability of the applicants for appointment to full-time positions. That work assessment took place over a period of 3 days.

[6] As a result of the work assessment Mr Lee and Mr Musson were offered employment agreements with Abilities Inc. Mr Musson signed a WINZ Employment Confirmation Sheet on 10 September 2004. That document specifies the type of work to be undertaken and the hourly rate of pay offered for the job. It is common ground that 10 September 2004 was Mr Musson's first day of employment.

[7] Mr Musson says that on or about 14 or 15 September 2004 he signed a form entitled *Statement of Trial Period*. A blank copy of the form was provided by Mr Musson to the Authority. Mr Musson says that it was on a form identical to the one provided, the promise to increase his wages to \$12.50 was made. Abilities Inc deny they have ever used such a form. In answer to questions at the investigation meeting Mr Musson told me the blank form was not one he obtained from Abilities Inc, but was instead a form he had put together from his memory of the one he had been asked to sign.

[8] I am not satisfied that the proforma produced by Mr Musson is one used by Abilities Inc. The respondent was emphatic in its denial of the use of such a form. The Employment Agreement signed by Mr Musson, on 29 September 2004, was comprehensive and included a clause entitled "*Probationary Period*". The length of the probationary period is said to be dealt with by Schedule One of Mr Musson's Letter of Offer. Abilities Inc and Mr Musson confirmed that no such document existed in Mr Musson's case. Mr Lee was subject to an individual employment agreement identical to Mr Musson's. He also did not have a Schedule One and he also confirmed that he was never asked to sign any form such as the one produced by Mr Musson.

[9] Abilities Inc told the Authority that they never did a letter of offer or schedule one for these two employees as they were employed under the Job Plus scheme and Abilites Inc used the WINZ Employment Confirmation Sheet signed by the two employees, as the offer of employment.

[10] The company says Mr Musson signed a WINZ Job Plus Subsidy Agreement form on 11 October 2004 and that this form was sent to WINZ to enable the company to receive the Job Plus subsidy for Mr Musson's employment. WINZ contacted Mr Langdon near the end of October and advised that the form had not been received and requested another form be signed. When asked to re-sign the form Mr Musson refused. He says he refused to sign the replacement form because it specified his rate of pay as being \$9.00 per hour. Mr Musson says that by the time he was asked to sign the second form, his rate of pay should have been \$12.50 per hour.

[11] Mr Musson says that when he refused to sign the form Mr Langdon threatened Mr Musson with the termination of his employment if he did not sign the form. Mr Langdon denies he threatened Mr Musson. Mr Langdon says he was very surprised that Mr Musson was claiming \$12.50 per hour as he never made any promise to pay him that amount of money.

[12] A meeting took place on 4 November 2004. Present at the meeting were Mr Musson, Adrian Tusha and another representative from Pasifika, Peter Fraher, managing director of the respondent company and Ms Linda Gardner from WINZ. During this meeting Ms Gardner confirmed that she was satisfied that Mr Musson was employed and that the requirement for him to sign the job subsidy form would be waived. Mr Tusha told the Authority that during this meeting and in response to a statement from Mr Musson that he was thinking of leaving the job, Ms Gardner advised Mr Musson that if he left the job he would have a stand-down period.

[13] As events transpired, Ms Gardner found the form originally signed by Mr Musson on 11 October 2004, and so the need for the second form no longer existed. Mr Musson says the form dated 11 October 2004 is a forgery. After reviewing Mr Musson's signatures on all the other documents produced for the Authority I am satisfied that it is more likely than not, that the form dated 11 October 2004 was signed by Mr Musson.

[14] I found Mr Musson's evidence to be confused and contradictory. Mr Musson claims he was promised \$12.50 per hour to be effective after one month's employment. During the investigation meeting Mr Musson changed the amount several times until he told the Authority that it could have been \$12.04.

[15] I am not satisfied that Mr Musson has made out his claim to be paid \$12.50 per hour. I am supported in this view by the evidence of Mr Tusha who told the Authority that he had asked Mr Fraher to look into an increase in Mr Musson's rate of pay. Mr Tusha told the Authority that Mr Fraher had advised that he would look at it, but no figures were mentioned. Also, Mr Musson told the Authority that other employees could confirm that Mr Langdon promised him \$12.50 per hour. All those present at the investigation meeting, including Mr Lee, who was employed at the same time as Mr Musson were adamant in their evidence that they did not hear Mr Langdon make such a promise to Mr Musson. Mr Lee confirmed that he did hear of the promise, but that it came from Mr Musson, not Mr Langdon.

**I find that on the balance of probabilities Mr Musson was not offered a pay increase to \$12.50 per hour after a trial period and therefore his claim has not been successful.**

[16] Mr Musson has also claimed two days pay he says was withheld from him. I have reviewed the clock cards and wages record for the period relating to this claim.

[17] Abilities Inc told me Mr Musson did not turn up for work on the days claimed and as he was not entitled to any leave, he was not paid.

**I find that Mr Musson has been paid correctly for all hours he has worked for Abilities Inc.**

**Was Mr Musson disadvantaged in his employment after raising his claims with his employer?**

[18] Mr Musson was issued with two warnings relating to absenteeism. The first verbal warning was followed on 15 February 2005 with a written warning.

[19] Mr Langdon told the Authority that Mr Musson is competent and that his work is of acceptable quality and quantity, but that his timekeeping is less than desirable. Mr Langdon told the Authority that Mr Musson has received two warnings on his time keeping. At the investigation meeting it was conceded by Mr Langdon that no procedure was followed when issuing these warnings.

[20] Mr Musson says he received the warnings at the same time as he made his claims against the company. He says the warnings would not have been issued if he hadn't made his claims.

[21] Mr Musson was not provided with any opportunity to explain his absences, nor was he asked to provide any input into the decision to issue him with warnings. In the absence of any procedural fairness in issuing the warnings, they can not be relied upon by Abilities Inc.

[22] A warning exposes an employee to a greater risk of dismissal. Where a warning is issued in the absence of any procedural fairness it can constitute a disadvantage for which remedies are available. There was scant evidence from Mr Musson as to the hurt and humiliation suffered as a result of receiving the warnings. In the absence of any supporting evidence of hurt and humiliation, any award under this head must be minimal. I set the award at \$1,000.

[23] The Authority is bound by section 124 of the Act to consider the extent to which the actions of Mr Musson contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies.

[24] Mr Musson was aware of the requirement to communicate with his employer when he was to be absent. I accept that Mr Musson spent the morning of 14 February 2005 at home, with the agreement of his employer, to take a conference call with the Authority in relation to this matter, however, he failed to return to work in the afternoon. Mr Musson did not advise his employer he would be absent, nor did he provide any reasons for the absence. Mr Musson must take responsibility for that omission. Mr Musson's award will be reduced by 50% to recognise his contribution.

**I find Mr Musson suffered a disadvantage in his employment as a result of the warnings issued to him. Abilities Incorporated is ordered to pay Mr Musson \$500 pursuant to section 123(c)(i) of the Employment Relations Act 2000.**

**Costs**

[25] Mr Musson has been partially successful in his claims. Although he was not legally represented Mr Musson is entitled to recover the cost of filing his application with the Authority.

**Abilities Incorporated is ordered to pay Mr Musson \$70.00 being the reimbursement of his filing fee.**

Vicki Campbell  
Member of Employment Relations Authority