

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 254  
5328754

BETWEEN MATEWAI PAENGA  
Applicant  
AND TE HAUMI LOGGING  
LIMITED  
Respondent

Member of Authority: Rachel Larmer  
Representatives: Leonard Hemi, Counsel for Applicant  
Jennifer Hooper, Advocate for Respondent  
Investigation Meeting: 20 May 2011 at Gisborne  
Submissions Received 27 May 2011 from Applicant  
No submissions received from Respondent  
Determination: 13 June 2011

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**DETERMINATION OF THE AUTHORITY**

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- A. Matewai Paenga was unjustifiably dismissed by Te Haumi Logging Limited (Te Haumi).**
- B. Ms Paenga's wage arrears claim is upheld.**
- C. Te Haumi is ordered to pay Ms Paenga:**
- (i) \$5,867 for lost remuneration;**
  - (ii) \$4,800 for injury to her feelings; and**
  - (iii) \$3,047.20 for unpaid wages.**

**Employment relationship problem**

[1] Ms Paenga claimed she was unjustifiably dismissed by Te Haumi on 2 August 2010. She also brought a wage arrears claim relating to:

- (i) Unpaid expenses to reimburse her for the diesel she put in a work vehicle for a trip from New Plymouth to Gisborne in July 2010;
- (ii) Unpaid chainsaw allowance;
- (iii) Unpaid travel allowances;
- (iv) Unpaid food allowance;
- (v) Unpaid public holiday pay;
- (vi) Unpaid annual holiday pay.

[2] Te Haumi denied that Ms Paenga had been dismissed. It said she verbally resigned on 14 July 2010 and that her employment ended on 2 August 2010 because her notice period had expired.

[3] There was no written employment agreement between the parties, contrary to s.65 of the Employment Relations Act 2000 (the Act).

#### **Pre investigation issues**

[4] The parties did not attend mediation. Mr Shane Hooper, Te Haumi Foreman, refused to attend mediation in Gisborne because he was working in Auckland. Mediation Services did not consider this an appropriate matter for telephone mediation.

[5] Te Haumi did not file a Statement in Reply within time. After the deadline for filing its Statement in Reply had expired and after prompting from the Authority, Mr Hooper sent the Authority an email which responded to Ms Paenga's claim. The Authority subsequently treated this email as if it were a Statement in Reply, and granted leave for it to be filed out of time.

[6] Te Haumi did not provide a copy of Ms Paenga's wage and time records in accordance with the Authority's timetable directions. Mrs Hooper did however bring Ms Paenga's pay records to the investigation meeting.

[7] Te Haumi did not comply with the Authority's timetable directions regarding the provision of witness statements and documents, including the direction to provide full details of what Mrs Hooper alleged she had overheard Ms Paenga say. Mr Hooper provided a written statement prior to the investigation meeting, and the Authority subsequently granted leave for it to be filed late.

[8] At the investigation meeting Mrs Hooper wanted to give evidence about what she had overheard Ms Paenga say in the background whilst she (Mrs Hooper) was on the phone to her husband on 14 July 2010. Mr Hemi objected on the grounds Ms Paenga would be prejudiced because no written statement had been provided by Mrs Hooper, contrary to the Authority's direction for her to provide one.

[9] Leave to call evidence from Mrs Hooper at such a late stage, when she was also acting as Te Haumi's representative, and in circumstances when the Authority's timetable directions had not been complied with, was declined.

## **Relevant facts**

### *Background*

[10] Ms Paenga was employed by Te Haumi as a logmaker. Her employment commenced on 22 January 2010 and Ms Paenga said it was ended on 2 August 2010 by Mr Shane Hooper. Ms Paenga said she other employees reported to Mr Hooper, who was the site foreman and who effectively ran Te Haumi.

[11] Mr Hooper's family own Te Haumi. Mrs Jennifer Hooper is a director of the company. Mr Hooper said he had no authority to hire and fire people because he was not a director of the company. I do not accept that. The evidence satisfied me Mr Hooper did in fact make decisions regarding employees, which included hiring and firing decisions. I consider Mr Hooper was viewed and treated by, Te Haumi employees as the boss. He was in practice effectively the General Manager.

[12] Ms Paenga said that over the course of her employment she had a number of arguments with Mr Hooper, most of which were related to health and safety concerns.

Ms Paenga was the health and safety representative and she brought a number of health and safety issues to Mr Hooper's attention to be remedied. When these matters were not addressed, arguments ensued.

[13] The evidence established that there were two main arguments, neither of which were related to health and safety, which contributed to the ending of Ms Paenga's employment.

*14 July 2010 argument*

[14] The first main argument occurred on 14 July 2010. A problem arose because a number of logs had been incorrectly marked up. Ms Paenga had overall responsibility for the marking of logs, so Mr Hooper considered the problem was her fault. When Mr Hooper discovered the problem with the logs he announced over the RT, which could be heard by other employees, "*some fuckwit has fucked up the log making*".

[15] This caused Ms Paenga to become defensive because she had been told the previous day to leave the logs which had been incorrectly marked and to finish for the day, so someone other than her had marked the logs. Ms Paenga immediately investigated how the problem had occurred and she was given information which suggested Mr Hooper may have had something to do with it.

[16] After making her inquiries, Ms Paenga approached Mr Hooper to explain that she had had nothing to do with the incorrectly marked logs and to remonstrate with him about making adverse comments, which could only have been directed at her, over the RT.

[17] This exchange developed into a rowdy argument between Ms Paenga and Mr Hooper. Because Ms Paenga was the logmaker, Mr Hooper insisted the incorrectly marked logs were her fault, so he did not want to hear what she had to say about how the problem had occurred, or why it was not her responsibility. That approach caused Ms Paenga to become angry and frustrated, particularly because she felt Mr Hooper had a hand in the incorrectly marked logs.

[18] There was a shouting match then Ms Paenga stormed off angrily. She got into a company car and drove away. Mr Hooper believed she had driven off in an angry manner so he got into his truck and followed her. Ms Paenga then turned the vehicle she was driving around and drove back towards him. They both stopped their vehicles

alongside each other but facing in opposite directions. Mr Hooper got out of his truck and leant in the window of Ms Paenga's vehicle and removed the keys from the ignition. Mr Hooper said at was at this time Ms Paenga resigned, but she denied that.

#### *Alleged resignation*

[19] Mr Hooper alleged Ms Paenga told him to "*shove his fucken job*". Ms Paenga denied she said that. Mr Hooper told Ms Paenga to get out of the work vehicle, he removed her keys from the ignition, and then drove off to a designated point in the road where he knew there was cellphone coverage. He said he called his wife to tell her he had another run in with Ms Paenga which was "*more serious this time*".

[20] Mr Hooper said that while he was on the mobile phone to his wife, Ms Paenga turned up in his Nissan truck and wound the window down and yelled "*finished*". Mr Hooper said "*Aye, what's that*", and Ms Paenga responded "*I'm finished*". He said Mrs Hooper heard that exchange which had occurred around 8.30am.

[21] Mr Hooper said he viewed this exchange as Ms Paenga's resignation. He admitted he did not discuss her purported resignation with her or attempt to clarify what she had meant or when she would be leaving.

[22] Ms Paenga denied this exchange.

[23] Mr Hooper accepted there was no written employment agreement and there had been no previous agreement about how much notice she had to give if she left or whether she had to resign in writing.

#### *Apologies*

[24] Ms Paenga said that after a cooling off period she decided to find Mr Hooper so she could apologise. She was concerned their argument had created a bad atmosphere so she wanted to clear the air.

[25] Ms Paenga contacted Mr Hooper on the RT around 9.30am as he was travelling to Ruatoria. They agreed to meet and Ms Paenga drove out to meet him. They each parked their vehicles and had a normal pleasant conversation.

[26] Ms Paenga apologised and said they should talk about what had happened because she did not want to keep arguing with him. Mr Hooper accepted her apology

and apologised to her, although he told me he only apologised to be polite because he did not regret anything. Mr Hooper said they did not discuss Ms Paenga's purported verbal resignation earlier that morning "*because the matter was resolved*".

[27] The argument and subsequent exchange of apologies occurred before the morning smoko, and Ms Paenga returned to work and continued as normal after the mutual apologies.

*Notice issues*

[28] When I asked Mr Hooper how Ms Paenga would know how much notice she had to give, he said "*I didn't know how much notice. I didn't care. I would still give her two weeks' notice to work out*". When I asked Mr Hooper if he had told Ms Paenga that she was going to be required to work out two weeks' notice, he said "*no, because I was not obliged to*".

[29] When asked to explain how he knew when Ms Paenga's employment would end, Mr Hooper said "*because I made sure it wouldn't go over the two week threshold*". When asked to explain how, Mr Hooper replied:

*"By stopping her, by phoning her on Thursday saying she need not return to work on Friday because there was no work for her. She then phoned me on Sunday and I told her I wanted to talk to her. When I met her I told her it was not working out. I told her I had had enough and I didn't want to work with her any more. I had placed an advertisement in the newspaper prior to Matewai phoning me and I believe she phoned me because she saw the advertisement."*

[30] When Mr Hooper was asked if he had a discussion with Ms Paenga on 2 August 2010 about her purported resignation or about the apparent end of her notice period, he said:

*"No, Ms Paenga said she had seen someone as in she had taken advice. As far as I was concerned her employment was over. She hadn't asked for her job back and I had finally had enough and didn't want to work with her any longer."*

*28 July 2010 argument*

[31] On 28 July 2010 another argument occurred between Mr Hooper and Ms Paenga. The catalyst for this argument was Ms Paenga's request to Mr Hooper to bring her a chainsaw chain which she needed so she could continue working on the

skid. Mr Hooper turned up without the chainsaw chain and a rowdy argument developed which involved lots of mutual swearing and shouting.

[32] The argument ranged over a number of topics and included Mr Hooper telling Ms Paenga none of the crew wanted to work with her, so she suggested they had a crew meeting to air any issues. Ms Paenga said Mr Hooper became even more angry and was shouting he was the boss and he was paying the wages so there was not going to be a meeting.

[33] Ms Paenga also raised a health and safety issue about the crew working too close to where one of the crew was felling. They were supposed to be two tree lengths (about 60m) apart but the crew was working a lot closer than that, which worried Ms Paenga because of the safety issues that created.

[34] Mr Hooper alleged Ms Paenga told him to “*shove my fucking job up my arse*” and had called him a “*twofaced cunt*” which he had responded to by telling her to “*get the fuck off the worksite*”.

[35] I heard from former Te Haumi employees, Mr Chris Law and Mr Lal Tuhura, who both overheard this argument. Mr Low said he was keeping a close eye on Mr Hooper because he looked and sounded as if he may hit Ms Paenga. He described Mr Hooper looming over Ms Paenga in a menacing way whilst shouting abuse and swearing at her. Mr Law said he was ready to step in if Mr Hooper got physical with Ms Paenga.

[36] Mr Low and Mr Tuhura did not hear Ms Paenga say what Mr Hooper alleged she had. Ms Paenga denied telling Mr Hooper where he could shove his job and said she would not have said that. Whilst she did not recall calling Mr Hooper a “*twofaced cunt*”, she accepted she may have done so because she thought he was one.

[37] The witnesses all agreed the language Mr Hooper attributed to Ms Paenga was normal everyday language used among logging crew, so it was not seen as offensive or objectionable within that work environment. Ms Paenga noted Mr Hooper had previously called her a “*fucking cunt*” more than once. She said she had not taken exception to such comments because that was how people spoke to each other in the forest and her view was if she couldn't take it she should get out of the industry. Ms Paenga's perspective was that type of language was not an issue for her.

*Termination of employment*

[38] Ms Paenga attended work on Thursday, 29 July 2010 as normal and no issues arose. After work on Thursday she received a text from Mr Hooper which told her there was no work for her the following day, Friday, 30 July 2010. This surprised her, so she phoned Mr Hooper to find out why she was not required.

[39] Ms Paenga said Mr Hooper told her there was enough work on the skid so she was not required to make any logs. At that point, Ms Paenga asked Mr Hooper to bring her logging gear into town so she could wash it, which she told me she did every weekend.

[40] They arranged to meet at a service station, but Mr Hooper got there before Ms Paenga so he just left her logging gear sitting on a pile of wood while he went off to the bottle store. Ms Paenga tracked him down and exchanged cross words because her gear, which she had paid for, could have been stolen.

[41] At about 4.45pm on Sunday, 1 August 2010, Ms Paenga received a text from Mr Hooper telling her not to come to work the next day. Ms Paenga was already in Gisborne so she phoned Mr Hooper and asked to meet to find out what was going on.

[42] Ms Paenga and Mr Hooper met in Gisborne outside a friend's place on Monday, 2 August 2010. Ms Paenga said Mr Hooper told her he had to let her go and that she was finished because he could not have the bad atmosphere any longer because it was not good for the crew. Ms Paenga said Mr Hooper told her *"we can't continue to have you working for us because of all the arguments"*.

[43] Ms Paenga said she was very annoyed by this. She also said Mr Hooper never mentioned she had resigned.

[44] Mr Hooper's statement describing his meeting with Ms Paenga on 2 August 2010 said:

*"I had explained that I did not (sic) to work with her any longer and had said only that she should now move on as I felt she was now a liability and a disruption to myself and the entire crew with her manipulations.*

*At this point time, Matewai jumped out of the work truck and said that she had already been to see a lawyer.”*

[45] In his *viva voce* evidence, Mr Hooper said he told Ms Paenga she had resigned and he didn't have to employ her because her notice had ended.

#### *Conflict of evidence*

[46] There were three conflicts of evidence which I had to resolve on the balance of probabilities (i.e. what is most likely to have occurred). These include whether;

- a. Ms Paenga told Mr Hooper where to shove his job on 14 and 28 July 2010;
- b. On 14 July 2010 Ms Paenga told Mr Hooper she was finished;
- c. Mr Hooper told Ms Paenga, when they met on 2 August 2010, her employment had ended because she had resigned.

#### **Issues**

[47] The first issue is whether Ms Paenga resigned. If she resigned freely and in circumstances which require no investigation, that is the end of the matter. If not, the next question must be whether Ms Paenga was dismissed.

[48] If Ms Paenga was dismissed, the broad issue is whether dismissal was justified in light of the s.103A justification test in the Act. That in turn requires an examination of the employer's actions, and how it acted, which are to be objectively assessed against what a fair and reasonable employer would have done in all of the circumstances.

[49] If I conclude that Ms Paenga was unjustifiably dismissed, then I need to consider:

- (i) What remedies are appropriate; and
- (ii) Whether Ms Paenga contributed to the situation which gave rise to her personal grievance.

[50] The wages arrears claim required me to identify;

- a. what payments she was contractually entitled to; and

- b. whether she had been paid all of her entitlements;
- c. If not, any arrears had to be quantified.

### **Credibility and reliability**

[51] There conflicts of evidence required me to assess the credibility and reliability of the witnesses.

[52] I have resolved credibility issues in Ms Paenga's favour. She gave her evidence freely and in a manner which appeared to be genuine. She did not appear to attempt to self-censor herself and readily gave responses which were not necessarily favourable to her position or which did not paint her in a positive light. I also consider Ms Paenga's evidence was supported by Mr Low and Mr Tuhura.

[53] In terms of the conflicts in the evidence, I make the following findings, on the balance of probabilities:

- (i) I consider it unlikely that Ms Paenga told Mr Hooper to "*shove my fucking job*" on 14 July 2010;
- (ii) I consider it unlikely that Ms Paenga yelled out to Mr Hooper that she was "*finished*" on 14 July 2010;
- (iii) I consider it unlikely that Ms Paenga told Mr Hooper "*shove my fucking job up my arse*" on 28 July 2010;
- (iv) I consider it unlikely Mr Hooper told Ms Paenga he believed she had resigned when they met on 2 August 2010.

[54] I am satisfied Ms Paenga had no intention of resigning, so consider it unlikely she would have said the words Mr Hooper attributed to her. Mr Hooper presented as someone with a dominant and confrontational personality so I consider it unlikely he would have accepted Ms Paenga telling him where to stick his job without him immediately responding to such comments. Mr Low and Mr Tuhura had overheard the arguments between Ms Paenga but neither of them heard her tell Mr Hooper where to stick his job.

[55] Mr Low and Mr Tuhura both told me that in the two weeks before Ms Paenga's employment ended Mr Hopper had made comments that he thought Ms Paenga she was a problem and he was going to sack her.

[56] Mr Hooper's written statement did not refer to him telling Ms Paenga on 2 August 2010 she had resigned. This came up for the first time in response to my question about whether he had or not discussed her resignation with her. Initially Mr Hooper did not answer the question directly and had to be pressed to do so. The response Mr Hooper subsequently gave was not convincing because the focus of his answer was on the fact that Ms Paenga had taken advice, which he had taken exception to, rather than explaining what he had said to her about her supposed resignation.

[57] Mr Hooper's version of events was not logical. If Mr Hooper's evidence that he had told Ms Paenga her employment had ended because she had resigned was correct, then it did not make sense for him to have told her he was letting her go. If he genuinely believed she had resigned on two weeks' notice, why did he not tell her on 28 July 2010 her notice period had ended?

## **Outcome**

### *Did Ms Paenga resign?*

[58] I find Ms Paenga did not resign. I consider it unlikely she told Mr Hooper to shove his job to that she said she was finished.

[59] Even if I had concluded that Ms Paenga had made the comments that Mr Hooper attributed to her on 14 July 2010, I would not have found they amounted to an unequivocal resignation. Any such comments were clearly made in the heat of an emotional and angry exchange, where both parties had been swearing and shouting at each other. It was unfair and unreasonable in all the circumstances for Mr Hooper to take such comments to be a resignation without first clarifying with Ms Paenga whether she had intended to resign.

[60] I consider a fair and reasonable employer would have made further inquiries with Ms Paenga, when both parties had calmed down, to determine what she had meant by the words Mr Hooper attributed to her.

[61] Because there was no employment agreement containing the process and notice period an employee had to follow if they wanted to resign those were matters Mr Hooper needed to discuss before he relied on words he accepted were said in the course of a heated argument to amount to a resignation.

[62] It was not open to Mr Hooper to unilaterally select a notice period without any prior discussion with Ms Paenga and without ever telling her what period of notice he believed applied. As far as Ms Paenga was concerned there was nothing to alert her to the fact Mr Hooper considered that from 14 July 2010 onwards she was working out a notice period.

[63] If Ms Paenga had indeed said the words which were attributed to her, then I consider a fair and reasonable employer would have seen that as part of an emotional reaction or an outburst of frustration which was directly related to the issues which had arisen earlier that morning. A fair and reasonable employer would have realised that further inquiries needed to be made to determine the true position. I find that in this case, Ms Paenga's words (if said) were not intended to amount to a resignation and could not reasonably be capable of amounting to a resignation.

[64] I also find that Ms Paenga's actions were inconsistent with an employee who intended to resign. She apologised to Mr Hooper and returned to work and she continued working as per normal for the next fortnight. No mention was made by Mr Hooper of Ms Paenga's supposed resignation.

[65] Mr Hooper's actions were inconsistent with an employer who believed it had obtained a genuine resignation from an employee. He did not discuss the notice period with her. He appeared to have arbitrarily picked a 14 day notice period, although he did that unilaterally. If Mr Hooper's evidence was correct and he assumed Ms Paenga was working a 14 day notice period, then it does not make sense for him not to have discussed the end of her resignation period with her on 28 July 2010 when they had a second big argument.

[66] It is unusual and could not be explained to my satisfaction as to why Mr Hooper left it until 2 August 2010 to end Ms Paenga's employment. On his version of events, her employment would have automatically ended anyway on 28 July 2010, had she given a genuine resignation and had she provided 14 days' notice.

[67] I find that Ms Paenga did not resign and that she was dismissed by Mr Hooper on 2 August 2010.

*Was Ms Paenga dismissed?*

[68] Ms Paenga was dismissed. The initiative for the ending of her employment ending came from Mr Hooper.

[69] Mr Hooper failed to give Ms Paenga work on 30 July and 2 August 2010. On 2 August 2010 Mr Hooper told her Ms Paenga he no longer wanted to work with her and he was letting her go.

[70] I find Mr Hooper dismissed Ms Paenga when he met her on 2 August 2010 and informed her he no longer wanted to work with her because she was a liability and a disruption to him and the crew. It was quite clear that the initiative for the ending of Ms Paenga's employment came from Mr Hooper. I find that up until that point Ms Paenga believed that she had full time permanent employment and she was expecting to return to work.

*Was Ms Paenga's dismissal justified?*

[71] Ms Paenga's dismissal was substantively and procedurally unjustified.

[72] Te Haumi's actions and how it acted were not what a fair and reasonable employer would have done in all of the circumstances at the time Ms Paenga was dismissed.

[73] Te Haumi did not have a good reason for ending Ms Paenga's employment. She had not resigned and Mr Hooper was not entitled to treat her as if she had. I find Mr Hooper's failure to discuss Ms Paenga's alleged resignation with her when both parties apologised was not the action of a fair and reasonable employer.

[74] Mr Hooper unilaterally summarily dismissed Ms Paenga. He did so without having followed any process. Ms Paenga was not aware her continued employment was in jeopardy, so she had not opportunity to influence that decision before she was dismissed.

[75] Mr Hooper dismissed Ms Paenga without a good reason and before he had followed any kind of fair or reasonable process which involved communicating to her

that her employment was in jeopardy and giving her an opportunity to be heard before a decision was made to terminate her employment.

*What remedies are appropriate?*

[76] Ms Paenga gave evidence about the steps she had taken to mitigate her loss. I find she took appropriate steps to mitigate her loss.

#### Lost remuneration

[77] Ms Paenga was out of work for five weeks and claimed lost remuneration of \$5,867, based on her average weekly earnings of \$1,173.40.

[78] Te Haumi is order to pay Ms Paenga \$5,867 as lost remuneration pursuant to s.128(2) of the Act.

#### Injury to feelings

[79] Ms Paenga also gave evidence about her hurt, humiliation and injury to feelings. It was clear she is a very proud person, particularly about her ability to do what she said “*many people mistakenly believe is a man’s job*”. I accept Ms Paenga was distressed because she believed “*many people would see [her] dismissal as evidence [she] could not cut it in a man’s world*”.

[80] Ms Paenga has 15 years’ experience working in the bush and she has never been fired from a job or disciplined previously.

[81] I consider an award of \$6,000 for hurt, humiliation and injury to feelings pursuant to s.123(1)(c)(i) of the Act is appropriate.

*Should remedies be reduced for contribution?*

[82] I consider Ms Paenga did contribute to the circumstances which gave rise to her personal grievance because she became involved in two heated arguments with her employer which involved offensive language and shouting. I consider her compensation for injury to feelings should be reduced by 20% to reflect her contribution.

[83] Accordingly, the amount of hurt and humiliation Ms Paenga is to be paid is to be reduced from \$6,000 to \$4,800 under s.124 of the Act to reflect her contribution to the situation which gave rise to her dismissal grievance.

### **Wage arrears**

[84] Te Haumi agreed Ms Paenga was still owed \$110 of the reimbursement it should have made to her for the diesel she put in a work truck before she drove the vehicle back from New Plymouth in July 2010.

[85] Te Haumi is ordered to reimburse Ms Paenga \$110 for diesel.

### *Chainsaw allowance*

[86] The parties agreed Ms Paenga would be paid wages of \$25 per hour plus a \$3 per hour chainsaw allowance for every hour she used her own chainsaw. Ms Paenga said she always used her own chainsaw on the job and she had another chainsaw available to her at all times for parts. Ms Paenga claimed a chainsaw allowance for all hours she worked.

[87] Te Haumi said Ms Paenga did not use her chainsaw for all the hours she worked but accepted it did not have a record of the hours Ms Paenga did or did not use her chainsaw. Mr Hooper described an ad hoc arrangement whereby if he saw her using her chainsaw he would report it to his wife but he accepted he was not always in the vicinity of where Ms Paenga was working.

[88] I find that Ms Paenga is entitled to a chainsaw allowance for all of the hours that she worked, but not for her half hour lunch break per day during which she was obviously not actually using her chainsaw.

[89] The applicant in her statement of problem and witness statement did not quantify her chainsaw allowance claim. However, in *viva voce* evidence, she stated that it was \$217. I find that claim was established.

[90] Te Haumi is ordered to pay Ms Paenga \$217 as her unpaid chainsaw allowance.

*Travel allowance*Travel to pick up point

[91] Ms Paenga claimed a travel allowance of \$20 per day for her travel from Ruatoria to the pick up point out of town for the two week period from 23 January – 6 March 2010 and for the eight week period from 19 March – 22 April 2010.

[92] The evidence Ms Paenga produced in support of this claim did not satisfy me that she was owed this money or that it had not been paid. Accordingly, no order is made.

Warkworth travel

[93] Ms Paenga also claimed an unpaid travel allowance of 80c per kilometre for the period 6-19 March 2010 when she said she did four return trips from Ruatoria to Warkworth.

[94] In *viva voce* evidence, Ms Paenga clarified that her claim was now for one return trip from 6-19 March 2010 when she took her own car from Ruatoria to Warkworth. She said she got the message she had to go to Warkworth for work the evening before she had to go. She said she was in Waihou Bay so there was no opportunity for her to take a work vehicle. She had no option but to use her own vehicle to get to Warkworth.

[95] Mr Hooper said there was no agreement to pay Ms Paenga an 80c per kilometre travel allowance. He said Te Haumi agreed to pay Ms Paenga's fuel costs but that was it.

[96] I consider it unlikely that Ms Paenga would have agreed to take her own vehicle up to Warkworth and back. Ms Paenga's evidence was she was cost conscious and a good saver so she would not have incurred the cost of taking her own vehicle if she was not going to be reimbursed for doing so. I accept her evidence about that.

[97] I order Te Haumi to pay Ms Paenga \$439.20 (549kms @ 80c per km) for her trip to Warkworth in March 2010.

*Food allowance*

[98] Ms Paenga said that when she arrived in Warkworth Mr Hooper said he would put \$200 into her bank account for food. Mr Hooper denied that. I find it unlikely that Mr Hooper would have agreed to pay her food allowance, because Ms Paenga would have incurred food costs wherever she was. It also was not something they had discussed prior to her trip. Even if Mr Hooper had made that offer, then I find it was not a term or condition of her employment, so no reimbursement is appropriate.

*Unpaid public holiday*

[99] Te Haumi accepted that it had not paid Ms Paenga for the public holiday on 7 June 2010 and that she was entitled to be paid for it.

[100] Te Haumi is ordered to pay Ms Paenga \$200 for her unpaid public holiday pay.

Unpaid holiday pay

[101] Ms Paenga said she was not paid any annual holiday pay upon termination. Te Haumi did not present evidence to prove it had paid Ms Paenga her annual holiday pay upon termination.

[102] The parties agreed Ms Paenga's total gross earnings as per Te Haumi's pay records were \$25,790. However, her unpaid chainsaw allowance of \$217.50 plus \$200 for the public holiday pay on 7 June 2010 have to be added to that amount in order to give her total gross earnings of \$26,007.50.

[103] Te Haumi is ordered to pay Ms Paenga \$2,080.50 (being 8% of her total gross earnings of \$26,007.50) as holiday pay.

**Summary**

[104] Te Haumi is ordered to pay Ms Paenga:

- a. \$5,867 for lost remuneration;
- b. \$4,800 for injury to her feelings;
- c. \$110 as unpaid diesel reimbursement;

- d. \$217.50 unpaid chainsaw allowance;
- e. \$439.20 as unpaid travel reimbursement;
- f. \$200 as unpaid public holiday pay;
- g. \$2,080.50 unpaid annual holiday pay.

**Costs**

[105] Ms Paenga as the successful party is entitled to a contribution towards her legal costs. The parties are encouraged to agree costs themselves. If that is not possible then the applicant has 14 days within which to file a costs memorandum, with the respondent having 14 days to respond, and the applicant having a further seven days to reply.

[106] This timetable will be strictly enforced and departure from it requires the prior leave of the Authority.

Rachel Larmer  
Member of the Employment Relations Authority