

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 577  
5417905

BETWEEN                      BARRY PHILPOT  
   Applicant  
  
A N D                              GREEN WASTE RECYCLING  
   LIMITED  
   Respondent

Member of Authority:      T G Tetitaha  
  
Representatives:              M Penny, Advocate for Applicant  
   No Appearance by Respondent  
  
Investigation Meeting:      5 December 2013 at Auckland  
  
Submissions Received:      23 September 2013 from Applicant  
   23 September 2013 from Respondent  
  
Date of Determination:      17 December 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Barry Philpot was unjustifiably dismissed by Green Waste Recycling Limited.**
- B. Green Waste Recycling Limited shall pay Barry Philpot compensation of \$204.00 being \$5,000 nominal compensation reduced by \$3,112.50 for contributory behaviour and an overpayment of \$1,683.50 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- C. Green Waste Recycling Limited is ordered to pay Barry Philpot wage arrears totalling \$1,023.50 comprising holiday pay \$865.21 and Kiwisaver employee and employer contributions \$158.29 pursuant to s.131 of the Employment Relations Act 2000.**

**D. Green Waste Recycling is ordered to pay Barry Philpot \$1,750 as a contribution towards costs.**

**Employment relationship problem**

[1] Barry Philpot was employed by Green Waste Recycling Limited (Green Waste) as a truck driver. Following damage to his truck and a traffic infringement notice on 27 February 2013, Mr Philpot was asked to a meeting where it was agreed he would be stood down without pay until his truck was repaired. He was dismissed on 28 March 2013. Mr Philpot alleges the dismissal was substantively and procedurally unjustified. He further alleges he was unjustifiably disadvantaged by the non-provision of work from 28 February to 28 March 2013. He seeks wage arrears of holiday pay and Kiwisaver contributions and a penalty for breach of good faith.

[2] On 4 December 2013 Green Waste advised it would not be appearing at the hearing despite filing a statement of reply and counterclaim, briefs, documents and submissions. It advised it was seeking voluntary liquidation.

[3] The release of this determination has been delayed due to Mr Philpot's advice at hearing he was an undischarged bankrupt. Advice was sought from the Official Assignee regarding its position on this proceeding. The Official Assignee confirmed it had no objection to payment being made to Mr Philpot or his legal representatives. A copy of the decision shall be forwarded to the Official Assignee.

**Facts leading to dismissal**

[4] Mr Philpot was employed as a truck driver on 15 January 2013. A copy of an unsigned employment agreement had been filed. Mr Philpot denied seeing it.

[5] During his employment he accepts he damaged a cross brace and drawbar on his truck. Mr Philpot says it was unintentional. He accepted the costs of repairs set out in Green Wastes invoices totalling \$2,587.50.<sup>1</sup> He had believed these repairs had been already been done by in-house employees.

[6] He accepts he was driving the truck on 27 February 2013 when the traffic infringements for insufficiently covered load and exceeding maximum reading on

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<sup>1</sup> Respondent's bundle of documents (RBD) Document A41 to A42

distance licence occurred.<sup>2</sup> He says he had requested a cover for the load but this was refused by Green Waste. He was aware the responsibility for covering loads fell on the driver. He says he told Green Waste road user charges were required to be paid for his truck. The Operations Manager told him the paperwork 'was in the mail.' When he drove the truck, he was aware the maximum distance on the road user licence had been exceeded.

[7] He denies any other alleged behaviour such as loading, tipping and speeding.

[8] Following the traffic matters Mr Philpot was asked to attend a meeting at Green Wastes office. He had been given no warning what it was about. He accepts Green Waste raised some concerns about the damage, the traffic infringement and his candid conversation with the Police when stopped that day. He believed Green Waste was unhappy with what he said. The Police had inspected the truck damage and required it to be properly repaired by Green Waste. The truck was off the road until the repair work could be properly done. It was agreed he would be stood down without pay unpaid until his truck was repaired. This was completed on 14 March 2013.

[9] During his stand down period, Mr Philpot found part time paid work. He produced a schedule showing earnings for 16 days work in March 2013 of \$2,271.00.<sup>3</sup> No further work was offered to Mr Philpot. There was a conversation around this time where it was alleged termination was raised and a request for return of company property.

[10] Mr Philpot then raised a personal grievance with his employer on 13 March 2013 alleging termination of employment.<sup>4</sup>

## **Issues**

[11] There is a preliminary issue regarding the absence of the respondent at the investigation hearing. The Authority has the power to proceed if a party fails to attend a hearing if without good cause any party fails to attend (clause 12 of Schedule 2). No good cause has been shown for the failure to attend by Green Waste. It refuses to attend because it is seeking voluntary liquidation.

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<sup>2</sup> RBD Document A40

<sup>3</sup> Applicant Exhibit A produced B Philpot 05/12/13

<sup>4</sup> Statement of Problem Letter 13/05/13 B Philpot to Green Waste

[12] Green Waste has filed a statement in reply, evidence and submissions. Notices for the investigation meeting were served on the respondent. The Authority's support officer contacted the respondent on 4 December seeking advice on their attendance. Green Waste's solicitor confirmed it would not be attending. After discussions with Mr Philpot's lawyer it was determined the matter could be dealt with in Auckland more efficiently. The hearing venue was moved to Auckland and both parties advised.

[13] In view of the above efforts, the Authority is satisfied it may continue to hear this matter today.

[14] The following issues arise:

- (a) Was Mr Philpot's alleged behaviour misconduct justifying dismissal?
  - Damage to a cross brace (\$431.25) and drawbar (\$2,156.25);
  - Traffic infringement notice for insufficiently covered load and exceeding maximum reading on distance licence;
  - Not following loading instructions and having disregard for what was happening around him;
- (b) Was the process leading to dismissal how a fair and reasonable employer could have acted in the circumstances?
- (c) Was Mr Philpot unjustifiably disadvantaged by the non-provision of work between 28 February and 28 March 2013?
- (d) Was there a breach of good faith by the non-provision of an employment agreement?
- (e) What wage arrears are owed (if any)?
- (f) What remedies (if any) should be awarded?

***Was Mr Philpot's alleged behaviour misconduct justifying dismissal?***

[15] Serious misconduct "... will generally involve deliberate action inimitable to the employer's interests ... [it] will not generally consist of mere inadvertence,

*oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.*"<sup>5</sup> It is conduct which "deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."<sup>6</sup>

[16] The damage was caused by carelessness. The repairs involved were not insignificant. The damage to the cross brace was not a one off incident. More significant damage occurred to the drawbar within weeks. This would be serious misconduct given damage occurred, the cost of repairs, the fact it was repeated and to a more significant extent. It cannot be viewed as mere inadvertence, oversight or negligence.

[17] The traffic infringement notice arise from offences which place the onus upon the truck driver to ensure these matters are addressed prior to driving. Mr Phipot was aware of his obligations despite the advice he may have received from his employer. His explanation of his employers refusal to provide a cover and that he had been told the excess distance licence had been paid for but not received negates this being serious misconduct capable of dismissal.

[18] The Authority determines the damage was serious misconduct capable of leading to dismissal in the circumstances.

***Was Mr Philpot unjustifiably disadvantaged by the non-provision of work between 28 February and 28 March 2013?***

[19] Mr Philpot gave evidence at hearing of an agreement for him to stand down unpaid until his truck was fixed from 28 February. He sought other work with various contractors during this period. He knew he had been dismissed on 13 March 2013. His truck was fixed by 14 March 2013. He cannot have expected to have had work given these circumstances.

[20] The personal grievance of unjustifiable disadvantage by the non-provision of work is dismissed.

***Was there a breach of good faith by the non-provision of an employment agreement?***

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<sup>5</sup> *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

<sup>6</sup> *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

[21] Mr Philpot submits the failure to provide a written employment agreement was a breach of good faith under s4(1A)(c). The information required under s4(1A)(c) must be *about the decision*. Mr Philpot had all the information about the alleged behaviour, some of which he accepted. He had never seen the employment agreement. Green Waste did not rely upon the agreement in making the decision to dismiss. Therefore it was irrelevant to the decision to dismiss. Its non-provision cannot found any breach under s4(1A)(c).

[22] The application for penalty for breach of good faith is dismissed.

***Was the process leading to dismissal how a fair and reasonable employer could have acted in the circumstances?***

[23] The process was defective. Mr Philpot's evidence was he had no idea the meeting was a disciplinary meeting and the concerns raised therein may lead to dismissal. He believed he still had a job to return to once his truck was ready. By 13 March 2013 he knew termination had occurred and presented Green Waste with a personal grievance.

[24] The onus falls upon an employer to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A.

[25] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.<sup>7</sup>

[26] The process leading to dismissal was defective. There is no evidence Green Waste met any of the mandatory considerations set out in s.103A(3). The dismissal was immediate and abrupt. These defects were not minor and did result in Mr Philpot being treated unfairly.

[27] The Authority determines Barry Philpot was unjustifiably dismissed by Green Waste Recycling Limited.

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<sup>7</sup> *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

***What remedies (if any) should be awarded?***

[28] Mr Philpot seeks remedies of three months lost wages (s123(1)(b) and \$5,000 hurt and humiliation compensation (s123(1)(c)(i).

[29] An award under s123(1)(b) is for lost remuneration. This is capped at “... *the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*” (s128(2). He was aware of his termination from employment on 13 March 2013. He commenced full time work on 15 May 2013. His losses must be confined to this period. His average daily pay was \$237.69. His timesheets show he worked on average 5 days per week. Taken over the eight week period of 13 March to 15 May 2013 this equates to lost remuneration of \$9,507.60.

[30] Mr Philpot produced a schedule showing mitigation of his losses by obtaining part time work and earnings of \$9,741.94.<sup>8</sup> This exceeds the calculated lost remuneration above. Accordingly he has not lost remuneration for which he shall be compensated under s123(1)(b).

[31] He received an overpayment of \$1,683.50. Although Mr Philpot attests to an the Operating Manager telling him on 28 March 2013 that he had been *paid in lieu for terminating his employment*, this does not prevent the Authority from taking it into account. The payment appears intended to settle matters arising from termination, which did not occur.

[32] Given the brevity of evidence, an appropriate award for hurt and humiliation compensation is \$5,000 subject to any contributory behaviour. Mr Philpot experienced temporary shock at the loss of the job but otherwise went ahead and found alternative employment quickly.

[33] The Authority must consider the extent to which Mr Philpot's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded (s.124). Contributing behaviour is behaviour which is causative of the outcome and blameworthy.<sup>9</sup>

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<sup>8</sup> Applicant Exhibit A produced B Philpot 05/12/13

<sup>9</sup> *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82

[34] There was contributory behaviour in the form of the damages and the traffic infringement notice. A reduction in the remedies payable of \$3,112.50 comprising repairs cross brace and drawbar<sup>10</sup> and 25 % of the traffic infringement notice fee<sup>11</sup> to reflect his partial responsibility is appropriate in the circumstances.

[35] Accordingly Green Waste Recycling Limited shall pay Barry Philpot compensation of \$204.00 being \$5,000 nominal compensation reduced by \$3,112.50 for contributory behaviour and an overpayment of \$1,683.50 pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

***What wage arrears are owed (if any)?***

[36] Mr Philpot accepted he had received gross earnings to 24 February 2013 of \$6,863.50 as set out in the payslip.<sup>12</sup> His timesheets show his gross earnings for this relevant period should have included a further 21 hours for the week ended 24 February 2013 and a further 32 hours for the week ended 3 March 2013.<sup>13</sup>

[37] Mr Philpot's gross hourly rate paid was 18.50 per hour. He was due payment of a further 53 hours at 18.50 per hour totalling \$980.50. His gross earnings for the period would have been \$7,844.00.

[38] As noted above the receipt of the overpayment of \$1,683.50 was for settlement of his grievances against Green Waste and not for wages. It shall not be taken into account in calculating holiday pay.

[39] Mr Philpot is entitled to holidays at 8 percent of his gross earnings of \$7,844.00 totalling \$627.52.

[40] Mr Philpot identified he had worked for two hours on Auckland Anniversary day (28 January 2013) but was not provided with a day in lieu. His average daily pay would have been \$237.69<sup>14</sup> which he is entitled to recover.

[41] Mr Philpot had also opted into Kiwisaver. Kiwisaver employee and employer contributions for the relevant period were \$158.29.<sup>15</sup> He produced a document

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<sup>10</sup> RBD Document A41 Invoice \$304.75 and A42 Invoice \$2,282.75 totalling \$2,587.50

<sup>11</sup> RBD Document A40 total fee \$2,100, 25% is \$525

<sup>12</sup> RBD Document R10.

<sup>13</sup> RBD Document R9 and R15

<sup>14</sup> S9A Holidays Act 2003 calculating average daily pay gross earnings for period \$7,844.00 divided by total number of days worked 33 days equates to \$237.69

<sup>15</sup> RBD Document R12 to R14

showing no contributions had been received by IRD. He is entitled to be compensated for these lost contributions.<sup>16</sup>

[42] Green Waste Recycling Limited is ordered to pay Barry Philpot wage arrears totalling \$1,023.50 comprising holiday pay \$865.21 and Kiwisaver employee and employer contributions \$158.29 pursuant to s.131 of the Employment Relations Act 2000.

### **Costs**

[43] Mr Philpot sought a contribution towards his costs. He produced his legal fees invoice for \$5,505 plus GST. The fees appear reasonable.

[44] The starting point for costs in the Authority is its notional daily tariff of \$3,500. This case does not warrant indemnity costs being awarded.

[45] There are no factors for increasing the costs. Mr Philpot was only partially successful. Accordingly the starting point for costs shall be reduced by 50% to reflect his partial success. Green Waste Recycling is ordered to pay Barry Philpot \$1,750 as a contribution towards costs.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>16</sup> *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [69] ff