

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 372
5439591

BETWEEN AMOSA MIKA TA'ATEO
Applicant

A N D SHERYL FEWTRELL t/a
SHERYL'S CAR VALET
Respondent

Member of Authority: T G Tetitaha

Representatives: C Sagapolutele, Advocate for the Applicant
J Gandy, Counsel for the Respondent

Investigation Meeting: 18 July 2014 at Auckland

Submissions Received: 16 July and 4 August 2014 from the Applicant
11 July and 4 August 2014 from the Respondent

Date of Determination: 5 September 2014

DETERMINATION OF THE AUTHORITY

Orders

A. Amosa Mika Ta'ateo was unjustifiably dismissed by Sheryl Fewtrell.

B. An order Sheryl Fewtrell pay to Amosa Mika Ta'ateo compensation as follows:

- a) lost remuneration of \$600 including a reduction of 50% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000; and**
- b) compensation of \$500 including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**

- C. Sheryl Fewtrell is ordered to pay Amosa Mika Ta'ateo wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$3,587.24 less PAYE comprising \$3,491.24 of payments below the minimum wage and \$86 annual leave entitlements.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 7 days from the date of this determination. The other party shall have 7 days to file and serve a reply.**

Employment relationship problem

[1] The applicant, Amosa Mika Ta'ateo, was employed by the respondent, Sheryl Fewtrell, until his employment terminated on or about 16 September 2013. Mr Ta'ateo submits he was unjustifiably dismissed. He also alleges he is owed wages because at times he was paid below the applicable minimum wage and annual leave was owed.

Preliminary issues

[2] At a teleconference on 27 May 2014, the parties were made aware of the time limitation for wage arrears claims to be commenced in the Authority of six years after the date on which that cause of action arose in s.142 of the Employment Relations Act 2000 (the Act). This application was filed on 7 February 2014. Mr Ta'ateo's wage claims include a period more than 6 years prior to the date he commenced his action in the Authority. Six years prior to the date of filing is 7 February 2008. Therefore his wage arrears claims are limited to the period of 7 February 2008 to 16 September 2013.

[3] This file was set down for a one day hearing in Auckland. The majority of the hearing concerned the personal grievance of unjustified dismissal. At the end of the hearing on 18 July 2014 the parties were directed to file further evidence and submissions about the wages arrears claim and whether further hearing time was required.¹

¹ Second Minute of the Authority dated 18 July 2014

[4] Having considered the Counsel's submissions, I decline to allocate further hearing time. I have been assisted by Mr Gandy and Ms Sagapolutele's willingness to confer and resolve by agreement the amounts of wage arrears owed, payments made and to a large extent the annual leave taken with the exception of 13 days. I am also mindful of the costs to parties to prepare and attend a further hearing. Those costs may outweigh the total amount of wage arrears claimed.

[5] At the end of the hearing Ms Sagapolutele advised Mr Ta'ateo was not pursuing his claims about breaches of his employment agreement. Those claims relating to breaches of the employment agreement are dismissed.

Facts leading to dispute

[6] Mr Ta'ateo was employed as a car groomer on or about 31 August 2007. He was considered a good worker and had no disciplinary issues prior to September 2013.

[7] On 9 September 2013, Tim Fewtrell, the respondent's partner, was working in one of the wash bays. He gave an instruction for Mr Ta'ateo to clean up the wash bay and rubbish located there. Mr Ta'ateo refused. Mr Fewtrell complained to Mrs Fewtrell about his refusal to follow the instruction. She spoke to Mr Ta'ateo. He went and cleaned up the rubbish.

[8] On 13 September 2013, Mr Ta'ateo was cleaning various vehicles in the wash bay when Mrs Fewtrell approached him. A client had complained about a Ute not being cleaned properly. She allegedly asked him to re-clean the Ute which he refused. Ms Fewtrell did the re-cleaning work herself.

[9] The same day both Fewtrells checked another job Mr Ta'ateo had completed grooming a Toyota Prado. This had not been done properly. They spoke to Mr Ta'ateo. They all cleaned the car again.

[10] On 16 September 2013, Ms Fewtrell asked Mr Ta'ateo to clean the Toyota Prado interior which was dirty. There was an altercation and Mr Ta'ateo left the premises soon after.

[11] Mr Ta'ateo returned to work with his sister, Sina Fittock and his partner, Luaipou Ta'ateo. Ms Fittock and Mrs Fewtrell spoke about Mr Ta'ateo's employment and wages. Mr Ta'ateo and his family left shortly after.

[12] On 30 September 2013, the Services and Food Workers' Union sent a letter to Mrs Fewtrell raising a personal grievance of unjustified dismissal and sought payment of wage arrears.

[13] Mediation was unable to resolve the matter. It is now before me for determination.

Issues

[14] The issues have grown since this matter came before me at a teleconference on 27 May 2014. The issues are now:

- (a) Did Mr Ta'ateo orally terminate his contract on 16 September 2013?
- (b) If no, was Mr Ta'ateo's conduct what a fair and reasonable employer could have dismissed him for in all the circumstances?
- (c) Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?
- (d) What remedies (if any) for the personal grievance should be awarded?
- (e) Was Mr Ta'ateo paid below the minimum wage during the period 7 February 2008 until 16 September 2013?
- (f) What annual leave was owed to Mr Ta'ateo at the end of his employment?

Did Mr Ta'ateo orally terminate his contract on 16 September 2013?

[15] Mr Ta'ateo denies saying he quit on 16 September 2013. He alleges he was unjustifiably dismissed. The respondent alleges Mr Ta'ateo voluntarily terminated his employment on 16 September 2013 by saying "*I quit*" and leaving the premises. There was no obligation upon Ms Fewtrell to allow a "*cooling off*" period. Mr Ta'ateo's resignation was clear and unequivocal.

[16] The starting point is the employment agreement dated 31 August 2007. It is accepted a later employment agreement was handed to Mr Ta'ateo in January 2013 but there is a dispute about whether he signed it.

[17] There was an allegation Mr Ta'ateo removed his employment file including the signed copies of any employment agreements and the leave and wage records on or about 16 September. The respondent relies upon circumstantial evidence including a motive to assist his personal grievance and wage arrears claims by removing the records, opportunity to do so and the signed employment agreement produced by Mr Ta'ateo is alleged to have been in the respondent's possession only.

[18] I prefer Mr Ta'ateo's evidence that he did not take any of those records. During examination he had little awareness of where the leave and wages records were kept other than in the office. He was unclear what form the leave and wage records took. There also seemed little point in him removing the record. The wage record could be reproduced from the IRD records and bank statements which have been done. The leave record can and has been reproduced from the respondent's day books or work diaries. These records were kept in an unlocked office accessible to the public and often unmanned. Mr Ta'ateo says he was given the agreement alleged to have been in the possession of the respondent. This is not improbable.

[19] The 2007 agreement required any variation or new agreement to be in writing and signed by the parties (clause 14.1 2007 agreement). There is no evidence to support the second agreement applying to this relationship other than speculation about Mr Ta'ateo's possession of an unsigned copy of the second agreement. The evidence does not meet the balance of probabilities that the second agreement was signed. Accordingly, the signed employment agreement dated 31 August 2007 (2007 agreement) governs this relationship.

[20] In any event, both agreements had similar termination clauses. The 2007 agreement allows both parties to "*terminate this agreement upon giving the other notice in writing ... [of] no less than two (2) weeks*" (clause 12.1B).

[21] It is common ground that no notice in writing was given by Mr Ta'ateo of his resignation. An alleged oral termination of the contract is insufficient to constitute notice in writing.

[22] Mr Ta'ateo accepts he left the premises, but says he did so with Ms Fewtrell's permission. I do not accept Mr Ta'ateo's evidence that Ms Fewtrell gave him permission to leave. I also have some doubt due to his limited English language ability that he said "*I quit*" meaning he was terminating his employment, although his actions could have given that impression at the time. But Mrs Fewtrell could not hold to her belief he had quit having regard to subsequent events.

[23] There is corroborating evidence from subsequent events that supports Mr Ta'ateo's position he did not voluntarily resign. His sister, Sina Fittock, alleges she spoke to Ms Fewtrell later that day about what had happened. She says he was accused of damaging a car and when she asked Ms Fewtrell to "*reconsider her decision about letting [Mr Ta'ateo] go*" that she said "*no*".² Ms Fittock understood Mr Ta'ateo had been dismissed, possibly for damaging a car, not that he had resigned.

[24] There is also correspondence dated 30 September 2013 from the Service and Food Workers Union (Union) referring to a telephone call to Ms Fewtrell on 17 September. During that call the Union representative told Ms Fewtrell that Mr Ta'ateo did not resign at all and sought his job back. Ms Fewtrell accepted the phone call had occurred.

[25] While there may have been some belief Mr Ta'ateo had quit based upon his conduct at the time, this was clearly wrong having regard to the Union correspondence and Ms Fittock's discussion. At best there appeared to be a misunderstanding. Mrs Fewtrell could not ignore the evidence given it indicated Mr Ta'ateo had not quit at all or there was confusion about it. In the circumstances I find Mr Ta'ateo did not orally terminate his employment contract on 16 August 2013.

Was Mr Ta'ateo's conduct what a fair and reasonable employer could have dismissed him for in all the circumstances?

[26] Mr Ta'ateo denies there was any conduct justifying dismissal. The respondent alleges Mr Ta'ateo's misconduct started on 9 September 2013 escalating to 16 September 2013. This pattern of conduct was misconduct as defined by clauses 12.1B(iii) and (iv) of his employment agreement. The respondent alleges Mr Ta'ateo abandoned his employment by leaving the workplace on 16 September 2013 without permission.

² Witness Statement (WS) S Fittock para 7

[27] Clause 12.1B of the employment contract dated 31 August 2007 sets out the grounds for termination for serious misconduct below:

12.1B Termination for Serious Misconduct

Notwithstanding any other provision in this agreement, the Employer may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes, but is not limited to:

- (i) Theft;*
- (ii) Dishonesty;*
- (iii) Harassment of a work colleague or customer;*
- (iv) Serious or repeated failure to follow a reasonable instruction;*
- (v) Deliberate destruction of any property belonging to the Employer;*
- (vi) Actions which seriously damage the Employer's reputation.*

[28] I accept between 9 and 16 September Ms Fewtrell gave various instructions to Mr Ta'ateo to clean up rubbish and re-clean a Toyota Prado. Mr Ta'ateo confirmed this in his evidence at hearing.

[29] Both parties accept Mr Ta'ateo did clean up the rubbish when instructed by Mrs Fewtrell on 9 September. While he may have been less responsive to Mr Fewtrell, he was not Mr Ta'ateo's employer. Mrs Fewtrell was. There was no disobedience of a reasonable instruction on 9 September in the circumstances.

[30] Mr Ta'ateo denies being asked to re-clean a Ute on 13 September. Allegedly an altercation arose about cleaning the Ute where Mr Ta'ateo became abusive. This occurred prior to his being asked to re-clean the Toyota Prado. Despite allegedly being abusive earlier, the parties accept Mr Ta'ateo and the Fewtrell's re-cleaned the Toyota Prado together. There was no dispute Mr Ta'ateo remained at work on 13 September 2013 until the end of the day. If there had been abusive conduct that day, no-one did anything about it. Mr Ta'ateo was expected at work on Monday 16 September. Whatever his conduct was on 13 September, it was not viewed as concerning enough for action to be taken. I prefer Mr Ta'ateo's evidence that there was no conduct that was misconduct on 13 September 2013.

[31] It is the conduct on 16 September 2013 that appears the most serious. I accept Ms Fewtrell's evidence that there was an altercation on 16 September 2013.

Although he denied arguing with Ms Fewtrell, Mr Ta'ateo confirmed under examination he would refuse to re-clean cars if Ms Fewtrell had already checked them and delivered them to clients. He believed it was Ms Fewtrell's responsibility to re-clean given she had checked the car before it was released. Mr Ta'ateo felt aggrieved that he had to re-clean the vehicle in those circumstances. As he put it "*after I finish they check and whatever happens thereafter is their fault*". It would have taken him 3 hours to re-groom a car and he usually had other jobs to do.

[32] I accept Ms Fewtrell's evidence she did instruct Mr Ta'ateo re-clean the Toyota Prado on 16 September. Given his above views, it was probable he refused to do so. There was also an issue about annual leave. Mr Ta'ateo told me at hearing he had asked for annual leave and Ms Fewtrell had refused his request. He then left the premises to contact his Union.

[33] My impression from the parties' evidence is that there was an argument which may have become abusive. Mr Ta'ateo appeared to accept he did hit one of the cars although there was no evidence of damage. It would have created a loud noise. It would have appeared frightening to Mrs Fewtrell. There was evidence he was frustrated by her refusal of leave and repetitive re-cleaning of the Toyota Prado. I accept Mr Ta'ateo would have become argumentative.

[34] Harassment is not defined in the employment agreement. Section 3 of the Harassment Act 1997 defines criminal harassment as when "*a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.*"

[35] The type of harassment contemplated within the agreement must be more than a one off event. Mr Ta'ateo had never exhibited this behaviour before. His behaviour was argumentative and possibly became aggressive when his leave was refused. It is difficult to determine whether he called Mrs Fewtrell names or was referring to something else. English is not his first language. His evidence showed he was frustrated at the refusal of leave. He denied intending to harass Mrs Fewtrell. He accepts he may have hit a car with his hand in frustration. He ended the altercation by leaving and contacting his Union. This altercation took place within a short but intense period of time. Given the lack of any pattern or previously similar behaviour, I determine Mr Ta'ateo's conduct was not harassment within clause 12.1B(iii).

[36] The events between 9 and 16 September do not demonstrate repeated refusal to follow instruction as required by clause 12B above. At best there was one refusal to re-clean the Toyota Prado on 16 September. Having regard to Mr Ta'ateo's previous exemplary work history and lack of disciplinary action, this was out of character for him. If there was a refusal to follow instruction, it appeared to be a one off event. Clause 12.1B(iv) required serious and repeated failures to follow instruction. There was no conduct of this nature here.

[37] The evidence does not support the Respondent's submission the Applicant abandoned his employment. Mr Ta'ateo left the premises then returned the same day or shortly afterward with his sister, who asked for his job back. A Union representative informed Mrs Fewtrell the following day he did not abandon his employment but sought his job back.

[38] Despite the above requests for Mr Ta'ateo to return to work, Mrs Fewtrell refused. In the circumstances her refusal operated as the action of the employer dismissing Mr Ta'ateo.

[39] Standing back and considering the evidence, Mr Ta'ateo's conduct was not conduct that a fair and reasonable employer could have dismissed him for in all the circumstances.

Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

[40] The evidence shows there was no process followed leading up to the dismissal action. There was no investigation or raising of concerns, opportunity for Mr Ta'ateo to be heard and his responses considered. It may be because Ms Fewtrell believed he had terminated his employment. Unfortunately this was not the case based upon my above findings.

[41] In the circumstances, Mr Ta'ateo was unjustifiably dismissed.

What remedies (if any) for the personal grievance should be awarded?

[42] Mr Ta'ateo seeks lost wages pursuant to s123(b) of the Employment Relations Act 2000 (Act). Where lost wages are sought, the Authority must order lost remuneration equivalent to "... *the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*" s128(2).

[43] In considering an order for remuneration under s128, Mr Ta'ateo has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement.³ An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance (s128(1)(b)). If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.⁴

[44] His evidence about seeking alternative paid employment is sparse. Mr Ta'ateo told me he approached 5 to 6 places for jobs during September only. October and November he was on a WINZ course and stopped looking for work. He started a new job in February 2014. Given he was dismissed on or about 16 September, his lost remuneration is limited to the last two weeks of September 2013. At the time of his dismissal his wages were \$600.00 gross per week.⁵ His lost remuneration was therefore \$1,200.00 gross over two weeks.

[45] Mr Ta'ateo also seeks compensation for hurt and humiliation. My impression of Mr Ta'ateo was that he is a proud family man. The loss of his job would have inflicted some distress given the length of time he had been employed and the need to involve his family due to language difficulties. The evidence justifies a nominal award of \$1,000 to compensate his distress.

[46] The Authority must consider the extent to which Mr Ta'ateo'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.⁶

[47] There was contributory behaviour. He was argumentative and aggressive about the refusal of leave. He hit a car causing some fright for Mrs Fewtrell. He then left work without explanation. Although his frustration may have been understandable given his leave and wage arrears claims, his actions were causative of the personal grievance and blameworthy. It justifies a 50% reduction of the total compensation payable.

³ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

⁴ *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

⁵ The evidence showed he was earning 15.00 per hour and averaging 40 hours work per week totalling \$600.00 gross per week.

⁶ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

[48] Accordingly there is an order Sheryl Fewtrell pay to Amosa Mika Ta'ateo compensation as follows:

- a) lost remuneration of \$600 including a reduction of 50% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000; and
- b) compensation of \$500 including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

Was Mr Ta'ateo paid below the minimum wage during the period 7 February 2008 until 16 September 2013?

[49] There are no wage and time records. There were allegations Mr Ta'ateo had taken the records. I have determined there is insufficient evidence on the balance of probabilities to show this occurred.

[50] In any event the parties have conferred and a joint schedule of payments has been produced showing the amounts Mr Ta'ateo should have been paid and the actual amounts received. The parties agree the gross wages owed due to payment below the minimum wage totals \$4,491.24.⁷

[51] The respondent sought deduction of a loan of \$1,000 by Ms Fewtrell to Mr Ta'ateo during his employment. Mr Ta'ateo agreed there was a loan and it was to be repaid by \$100 deductions from his salary. He disputed it was \$1,000. He accepts there was a loan of \$300 only.

[52] There was little documentation of the loan other payslips showing deductions from wages of \$100 for four weeks⁸ and a summary compiled by Ms Fewtrell's accountant showing his net wages paid including deductions totalling \$1,000 for 13 November 2008 to 26 February 2009. Mr Ta'ateo evidence was he checked his accounts and was aware of any deductions.

[53] The evidence shows deductions of \$1,000 and an acceptance by the parties there was a loan to be repaid by \$100 deductions from wages. Given Mr Ta'ateo produced no evidence to support his submission the loan was \$300 nor an

⁷ Second Minute dated 18/07/14

⁸ Exhibit G Witness Statement AM Ta'ateo

explanation or evidence to show why he took no issue with \$1,000 being deducted, I determine there was a loan of \$1,000 and this is to be deducted from any wage arrears owed. This leaves wage arrears of \$3,491.24 owing.

What annual leave was owed to Mr Ta'ateo at the end of his employment?

[54] During his employment Mr Ta'ateo accrued 120 days annual leave for the period 31 August 2007 to 31 August 2013. He is also entitled to 8 % of his gross wages of \$1,200 for the two week period 1 to 16 September 2013 totalling \$96.00.

[55] Mr Ta'ateo accepts he took 14 annual leave days between Christmas and New Year's day in 2007 and 2010. He also confirms he took similar annual leave during Christmas 2011 and 2012 but it was not recorded by his employer.⁹ In 2011 the period excluding statutory holidays between Christmas and New Year's was 3 days (28 to 30 December). In 2012 the period excluding statutory holidays between Christmas and New Year's was 2 days (27 to 28 December). Therefore he accepts there was a total of 19 annual leave days taken during his employment.

[56] On 30 September 2013, the Services and Food Workers' Union sent a letter to the respondent stating he had taken 36 days annual leave and had a residual annual leave entitlement of 84 days to be paid out. Mr Ta'ateo now says the letter was wrong.

[57] The parties took the time to confer over the lunch break during which the applicant was given access to the respondent's diaries from which they had compiled Mr Ta'ateo's leave record. At the end of the hearing Mr Ta'ateo claimed 50 days of annual leave was owed. Ms Fewtrell claims 37 days of annual leave owed.

[58] The parties accept Mr Ta'ateo was paid \$2,345.06 on 26 March 2013 and \$1,224.60 on 18 September 2013 totalling \$3,569.66 net. Ms Fewtrell's evidence was this equated to 35 days holiday pay and 5% interest. The gross payment upon which tax was deducted must be \$4,410.

[59] Mr Ta'ateo position on the amount of leave taken and owed has changed, from owing 84 days annual leave to 101 to 50 days annual leave. I prefer Ms Fewtrell's evidence compiled with the assistance of her accountant and the diary/day books. I accept at the end of his employment he was owed 37 days @120 per day plus \$96

⁹ Email T Sagapolutele 10 July 2014

being 8% of his gross wages earned from 1 to 16 September 2013 totalling \$4,496 gross. He has received the above net payments of \$3,569.66 or \$4,410 gross. Accordingly he is only owed \$86.00 for his outstanding leave.

[60] Sheryl Fewtrell is ordered to pay Amosa Mika Ta'ateo wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$3,587.24 less PAYE comprising \$3,491.24 of payments below the minimum wage and \$86 annual leave entitlements.

[61] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 7 days from the date of this determination. The other party shall have 7 days to file and serve a reply. A party seeking to recover legal costs is expected to file copies of their actual invoices showing the breakdown of fees for mediation and preparation for hearing.

T G Tetitaha
Member of the Employment Relations Authority