

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 338
5629762

BETWEEN

CHRISTOPHER BOYD
Applicant

A N D

TFC LOGGING LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: R Tretheway, Counsel for Applicant
No appearance by or on behalf of Respondent

Investigation Meeting: 4 October 2016 at Gisborne

Date of Oral
Determination: 4 October 2016

Date of Written
Determination: 5 October 2016

ORAL DETERMINATION OF THE AUTHORITY

- A. Christopher Boyd was unjustifiably dismissed by TFC Logging Limited.**
- B. TFC Logging Limited is to pay Christopher Boyd lost remuneration of \$648.00 pursuant to s.123(b) of the Employment Relations Act 2000.**
- C. TFC Logging Limited is to pay Christopher Boyd compensation of \$5,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.**
- D. TFC Logging Limited is to pay Christopher Boyd wage arrears of \$7,536.08 pursuant to s.132 of the Employment Relations Act 2000.**
- E. TFC Logging Limited is to pay to Christopher Boyd interest on the wage arrears order above at the rate of 5% per annum starting from 15 February 2016 to the date of payment pursuant to Clause 11 of Schedule Two of the Employment Relations Act 2000.**
- F. TFC Logging Limited is to pay \$71.56 towards Mr Boyd's legal costs.**

Employment relationship problem

[1] Christopher Boyd alleges he was unjustifiably dismissed by TFC Logging Limited. He also seeks payment of gross wages of \$7,536.08.

Relevant Facts

[2] TFC Logging Limited (TFC) is a logging transportation company based in Gisborne. Mr Boyd was employed by TFC as a truck driver on or about 1 December 2015.

[3] Sonny Wainui was a respondent director. He had been the sole driver but had been injured. Mr Wainui told Mr Boyd his tasks for the day. Mr Boyd was the only employee. TFC owned one truck. The intention was for Mr Wainui to recover then both men to drive the truck 24/7.

[4] Mr Wainui gave Mr Boyd an employment agreement. Mr Boyd signed the agreement. He asked Mr Wainui for a copy but never received one. The agreement included the following terms and conditions:

- (a) Payment of \$18 per hour gross;
- (b) Hours of work Monday to Friday, 12 to 14 hours per day.

[5] During his employment, Mr Boyd was paid \$2,590 total - \$300 cash received on 6 December 2015 and a further payment of \$2,290 in cash on 24 December 2015. This did not fully recompense the number of hours Mr Boyd had worked.

[6] On 15 January 2016, Mr Boyd sought payment of his outstanding wages. Mr Wainui promised he would pay \$3,000 by 24 January 2016. No further payments were ever made. On 10 February Mr Boyd was asked to train a new driver.

[7] By 15 February 2016, Mr Boyd had had no contact for work from Mr Wainui. He then saw the trainee driver driving the TFC truck. He had also received a telephone call from a third party and friend of Mr Wainui. He was offered a new job. He was told that he no longer worked for TFC. He was never offered any further work by TFC.

[8] By then Mr Boyd was owed for 377 hours work or \$6,786 gross unpaid wages. Mr Boyd sent several text messages seeking payment to Mr Wainui. He got little reply. Finally he received a text message telling him to take the company to Court.

[9] Mr Boyd instructed a solicitor at Tai Rawhiti Community Law Centre. His lawyer raised a personal grievance of unjustified dismissal and non-payment of wages by letter emailed to TFC on 13 April 2016. The matter was unable to be resolved and is now before me for determination.

Issues

[10] The issues for determination are:

- (a) Was Mr Boyd unjustifiably dismissed on 15 February 2016;
- (b) What wage arrears are owed, if any?

Non-appearance of the respondent

[11] TFC declined to attend mediation, took no steps in this proceeding and failed to appear before me today. The Authority served notice of the hearing upon the company. It was aware of this hearing today. I have the power to proceed if any party fails to attend without good cause.¹ No good cause has been shown by TFC. I now intend to continue to determine this matter today in the absence of the respondent.

Was Mr Boyd dismissed?

[12] It is accepted Mr Boyd was employed. There were sufficient acts by the employer to justify Mr Boyd concluding he had been dismissed. These were as follows:

- (a) The non-payment of Mr Boyd's wages since 24 December 2015;
- (b) Mr Wainui's refusal to pay those wages;
- (c) The new truck driver seen driving the truck during the hours of Mr Boyd's work;

¹ Clause 12, Schedule 2 Employment Relations Act 2000.

- (d) The advice he received from a third party that it was understood he was looking for a new job; and
- (e) The failure to offer Mr Boyd any further work from 15 February 2016.

[13] A reasonable observer in my view could have taken the above acts to be a sending away of Mr Boyd by TFC. Mr Boyd had been dismissed by 15 February 2016.

Was that dismissal unjustified?

[14] Mr Boyd was dismissed. Therefore the onus falls upon TFC to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[15] In applying this test I must consider whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised any concern with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.² Failure to meet any of those considerations is likely to result in a dismissal being found to be unjustified.³ A dismissal is not unjustifiable if the procedural defects were minor or did not result in an employee being treated unfairly.⁴

[16] There is no doubt that the process leading to Mr Boyd's dismissal was defective. There is no evidence TFC met any of the mandatory considerations set out above. There was no investigation, no raising of concerns and no opportunity for Mr Boyd to respond to any concerns before dismissal. In effect, the dismissal was immediate and abrupt. None of those defects were minor and they resulted in unfairness to Mr Boyd.

[17] Christopher Boyd was unjustifiably dismissed by TFC Logging Limited.

² Section 103A(3) of the Employment Relations Act 2000.

³ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26].

⁴ Section 103A(5) Employment Relations Act 2000.

Remedies

Lost remuneration

[18] If Mr Boyd has a personal grievance of unjustified dismissal and he has lost remuneration as a result of that grievance, he is entitled to seek up to 3 months' ordinary time remuneration.⁵

[19] In considering an order for remuneration, the employee has an obligation to mitigate loss by seeking alternative paid employment.⁶

[20] Mr Boyd has given evidence today that he lost three days' work before finding a new job with comparable pay. Three days' work at 12 hours per day at \$18 per hour is \$648.00 lost remuneration.

Hurt and humiliation

[21] I have heard compelling evidence from Mr Boyd of the humiliating circumstances he had to face both leading up to and after he was dismissed. He had a partner and sons to support but had no money. He was made false promises of payment then had to file proceedings in the Authority. He tells me that it was an absolutely "*crap time*" for his family. He had unpaid bills and an extremely stressed family. He tells me it got to the point where he started smoking as well.

[22] Throughout his employment Mr Boyd thought he had to keep working to benefit the company so that he could get paid but this never happened. He felt lied to and misled by Mr Wainui. He never received any explanation why he was dismissed and not paid his wages.

[23] There is sufficient evidence for an award of \$5,000 compensation for Mr Boyd's hurt and humiliation.

[24] There was no contributory conduct requiring any reduction in remedies.

Wage arrears

[25] As the respondent failed to take any steps in this proceeding, no wage or holiday leave records have been able to be produced. I am satisfied this failure has

⁵ Sections 123(1)(b) and 128 Employment Relations Act 2000.

⁶ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05).

prevented Mr Boyd from bringing an accurate wages and leave claim.⁷ I may in the absence of any contrary evidence accept as proved by Mr Boyd all claims in respect of wages paid and hours, days and times worked and leave taken.⁸

[26] I accept Mr Boyd's evidence he worked 377 hours and is owed \$6,786 gross wages. I also accept he has taken no leave nor received any holiday pay. He is entitled to holiday pay of 8% on the total gross wages of \$9,376.⁹ The holiday pay owed is \$750.08. The total wage arrears he is owed is \$7,536.08.

Interest

[27] This is also an appropriate case in which interest ought to be awarded. It is appropriate because Mr Boyd has continued to be unable to access that money. The rate and date for interest to accrue is 5% from 15 February 2016 until the date of payment.

Orders

[28] The following findings and orders are made:

- a) Christopher Boyd was unjustifiably dismissed by TFC Logging Limited;
- b) TFC Logging Limited is to pay Christopher Boyd lost remuneration of \$648.00 pursuant to s.123(b) of the Employment Relations Act 2000;
- c) TFC Logging Limited is to pay Christopher Boyd compensation of \$5,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000;
- d) TFC Logging Limited is to pay Christopher Boyd wage arrears of \$7,536.08 pursuant to s.132 of the Employment Relations Act 2000;
- e) TFC Logging Limited is to pay to Christopher Boyd interest on the wage arrears order above at the rate of 5% per annum starting from 15 February 2016 to the date of payment pursuant to Clause 11 of Schedule Two of the Employment Relations Act 2000.

⁷ Section 132(1) Employment Relations Act 2000; s83(3) Holidays Act 2003.

⁸ Section 132(2) Employment Relations Act 2000; s83(4) Holidays Act 2003.

⁹ Section 23 Holidays Act 2003.

Costs

[29] TFC Logging Limited is to pay \$71.56 towards Mr Boyd's legal costs. There are no legal costs for his representation today because he was fortunate enough to be ably represented by Tai Rawhiti Community Law Centre.

T G Tetitaha
Member of the Employment Relations Authority