

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 89
5458730

BETWEEN MICHAEL CULL
 Applicant

AND ANGLA HOLDINGS LIMITED
 t/a ANGLA AUTOMOTIVE
 Respondent

Member of Authority: Michael Loftus

Representatives: Alan Knowsley, Counsel for Applicant
 Graeme Gowland, Counsel for Respondent

Investigation Meeting: 30 September 2015 at Wellington

Submissions Received: 6 and 19 October 2015 from Applicant
 13 October 2015 from Respondent

Determination: 27 July 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Michael Cull, claims to have been unjustifiably dismissed (albeit constructively) by the respondent, Angsla Holdings Limited trading as Woodman Automotive (Angsla) on either 12 January or 3 February 2014.

[2] Mr Cull also seeks to recover unpaid wages, holiday and sick pay. He says the underpayments were the result of various unauthorised alterations Angsla made to his timesheets. It was these changes which led to his resignation as, in his view, they constituted a significant breach of trust, especially when coupled with Angsla's refusal to address the changes when Mr Cull raised them.

[3] Angsla accepts it changed the timesheets but claims its action were justified by Mr Cull's tardy and inaccurate timekeeping. It does not, however, accept it was responsible for all the alterations and says Mr Cull's claim he was constructively dismissed lacks foundation.

Background

[4] Mr Cull was employed by Angsla as a mechanic from 26 March 2002.

[5] Mr Cull says he was initially engaged to work 14 hours over four days of the week. His terms of employment were not recorded in a written employment agreement but Angsla agrees. A written agreement was introduced on 1 September 2003 and Mr Cull's weekly hours increased to 32 late 2005. The employment agreement was not amended.

[6] On 6 December 2007, the parties concluded a new agreement. It saw the introduction of an arrangement whereby Mr Cull was entitled to take a shortened lunch break and claim 30 minutes overtime per day. The agreement was silent as to the rate payable for overtime but payslips record time and a half.

[7] Mr Cull claims the parties would often agree to vary the hours to suit both his personal circumstances and those of the business. In particular he says that between 1 June 2012 and 8 September 2013, his hours were reduced and it was agreed he would only be paid for those actually worked. He says during this period he worked an average of 24.7 hours a week. Angsla agrees the reduction occurred but is not sure when. It also asserts this was to suit Mr Cull's family commitments and had nothing to do with work volumes.

[8] Mr Cull says the parties agreed his hours would increase to 40 per week on 9 September 2013 although when these hours would be worked was still dependent on childcare arrangements and Angsla work volumes. He says notwithstanding this agreement he worked an average of 33.5 hours a week between then and his cessation. Angsla denies it agreed Mr Cull would work 40 hours a week. It also denies his claim he averaged 33.5 hours per week.

[9] Mr Cull adds mechanics were required to record the actual time spent working on each vehicle to the nearest 15 minutes. Angsla agrees. Mr Cull does, however,

add mechanics could also record up to 30 minutes non-chargeable time. Angsla simply says all work time was to be recorded; both chargeable and non-chargeable.

[10] Mr Cull says he first discovered anomalies in his timesheets when he viewed a folder of them on 31 December 2013. He says it contained seven years' of timesheets and on looking at them he discovered various *unauthorised and unreported* changes which led to what he considered an underpayment. He says the errors extended to holiday and sick pay.

[11] Angsla denies there was ever seven years' of timesheets in the folder and while it accepts there were changes in the hours recorded this was due to fact Mr Cull never worked the hours claimed.

[12] Mr Cull then requested copies of his timesheets and payslips for the previous seven years. He says he was told Angsla did not retain the records beyond one year but notes he was then provided almost two years' worth of timesheets. Angsla denies it said it only had one year of timesheets and attributes its inability to provide more than it initially did to the fact it had misplaced those for the period 2007 to 2011. They were found later.

[13] Mr Cull says he analysed the timesheets he was given and concluded they had been consistently altered with the changes inevitably reducing his pay. He says he was never approached about the changes.

[14] Angsla accepts alterations were made but again asserts this was to reflect time actually worked. It initially denied the issues were never raised with Mr Cull and states he was frequently reminded to keep his timesheets up to date and errors were pointed out when discovered.

[15] On discovering the issue on 31 December 2013 Mr Cull raised it with his foreman who, he says, advised he speak to Ms Woodman who managed the office manager when she returned on 3 January 2014.

[16] On 3 January 2014 Mr Cull approached Mr Woodman and asked he accompany Mr Cull to the office and look at the timesheets. Mr Cull says he showed Mr Woodman the timesheet for the period ending 29 December 2013 which had unexplained adjustments. Mr Cull claims Mr Woodman simply shrugged and suggested it was probably just a problem with the pay rate. Mr Cull says he turned

the pages to show other adjustments but it appeared the original timesheets had been removed and replaced with photocopies. He says Mr Woodman then turned around and went back to the workshop.

[17] Mr Cull says he remembered seeing adjustments made in pen on an earlier timesheet (3 November 2013) and called Mr Woodman back to show him. Mr Cull claims Mr Woodman said *I don't know what she's doing* (a reference to Ms Woodman) and went back to the workshop.

[18] Mr Cull says the photocopied timesheets and Mr Woodman's reaction suggested he did not want to talk about the matter. Mr Cull says he felt Woodman was hiding the fact changes had been made and was not willing to discuss it. He says he felt betrayed and told Mr Woodman he was taking his tools and leaving. Mr Woodman replied *ok*.

[19] Mr Cull says he then backed his ute into the workshop and took some 35 minutes to clear out his locker and load his tools. He says at no stage did Mr Angsla come and talk to him during this time. He does however claim the foreman, Mr Wimpory, spoke to him and said while he thought what was occurring was wrong it was not worth leaving over.

[20] Angsla denies this portrayal of events. It claims it made it clear it wanted to address Mr Cull's concerns but says he refused to stay and do so. It alleges Mr Cull *stormed off the premises*.

[21] The following day, Mr Angsla sent Mr Cull a text message. It reads:

Hi Mike. I'm sorry over yesterday. I have to say that it has never been a deliberate ploy to disadvantage you. I have gone back over the timesheets for the last 12 months, yes, there are some errors but on both sides of the ledger. Can we perhaps meet with Graeme Gowland as an adviser? Please consider, I will be in touch.

[22] Mr Cull accepted the invitation to meet but did not return to work as he was by then on sick leave due to the stress Angsla actions had caused. There are medical certificates supporting this assertion but Mr Cull received no sick leave after 12 January 2014. Angsla says it never saw the medical certificate.

[23] A meeting occurred on either 7 or 10 January 2014. There is some confusion as to which day and while it is more likely it was the 10th the confusion need not be resolved. The meeting was attended by Mr Cull supported by Dino Toscano and Mr Woodman accompanied by Mr Gowland. Angsla brought a year's worth of timesheets.

[24] Mr Cull states he was advised at the meeting that Angsla had examined the timesheets and concluded there were underpayments totalling 17.75 hours and with a further 17 hours holiday pay due. Mr Cull says that was addressed by a cheque he received on 3 February 2014 and there was a further cheque on 18 March 2014 though he has no idea what it was for.

[25] Mr Cull says he became highly stressed which led to Mr Toscano calling an adjournment so he could cool down. This was due to what he saw as Angsla's refusal to properly address his claims and a view Mr Gowland seemed more concerned about who was going to fix his Porsche (which Mr Cull worked on) than dealing with the matter in hand. He says he felt belittled by this.

[26] Mr Cull says his growing dissatisfaction led to inquiries about working at two other garages during the week of 13 January 2014. He says the initial responses were positive but that quickly changed. He concludes this was due to Mr Woodman approaching the prospective employers and making negative comment.

[27] On 14 January 2014, Mr Cull went to Mr Gowland's offices to pick up what he thought were to be more timesheets but he got a series of payslips covering the period from 30 December 2007. Mr Cull says he asked where the timesheets were but was told he was not entitled to them. This caused further upset and when he said *f*** this*, Mr Gowland simply yelled out *who's going to fix my f**ing Porsche?* In was soon after this the second tranche of timesheets dating back to 1 April 2012 were provided and a further four years' worth were provided in August 2014.

[28] There then followed some communications in which Angsla suggest Mr Cull had abandoned his employment but correspondence from his then advocate made it clear he had not left and was still trying to resolve the pay issue.

[29] Ultimately, and having considered the situation over the following couple of weeks, Mr Cull decided he had had enough. On 3 February 2014, he sent Angsla a resignation. It reads:

I am giving my resignation for my job at Angsla Auto from 3/2/14 because off wage and time sheet problems causing anxiety and depression ...

Determination

[30] As already said Mr Cull claims to have been constructively dismissed. He also seeks to recover unpaid wages and asks that two penalties be imposed on Angsla.

[31] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[32] In *Wellington etc Clerical Workers etc IUOW v Greenwich*² the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[33] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Mr Cull to establish the breach and there must be a causal link between the employer's conduct and the tendering of the resignation.³

[34] Mr Cull is of the view Angsla's actions were *a breach of trust and confidence and a breach of good faith to such an extent that the employment relationship could not reasonably continue.*⁴

[35] In asserting this he refers to Angsla's decision to alter his timesheets without his knowledge and its reluctance to address this when he raised the issue.

¹ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

² (1983) ERNZ Sel Cas 95; [1983] ACJ 965

³ *Z v A* [1993] 2 ERNZ 469

⁴ Closing submissions at [41]

[36] Angsla accepts it altered the time sheets but not as often as alleged. That said Mr Cull claims that since 15 September 2013 94% of his timesheets were altered and Angsla agrees with that figure. Angsla also accepts the alterations did, on occasion, lead to underpayments that should not have occurred. That said it claims its actions were justified by reason of Mr Cull's tardy timekeeping and says this was often discussed with him.

[37] Mr Cull denies anything other than the casual advice he should take more care with his timesheets and complete them contemporaneously. That I accept. I do so for two reasons. First there is no evidence supporting Angsla's claims the matters were discussed and definitely no documentary or other evidence of formal action. Indeed Ms Woodman was asked what was done about Mr Cull's inaccuracies. Her answer was *nothing*. There is then the evidence of Mr Wimpory, who appeared for Angsla, that Mr Cull was surprised by what he saw on the 31 December.

[38] As Mr Knowsley submitted it was incumbent on Angsla, if it truly believed Mr Cull was falsifying his timesheets, to raise the issue and allow a response. It did not but instead simply altered the sheets as it thought fit. That is not an appropriate response.

[39] It then compounded this by not properly engaging when Mr Cull raised the issue on 3 January. That leads to consideration of Mr Cull's agitated departure that day. This does not preclude the claim he was constructively dismissed for two reasons. First the evidence suggests he had a tendency to overreact at times and indeed this was Mr Woodman's rationale for not intervening when Mr Cull took his tools – his evidence was he said *ok* and intended waiting for things to cool down. Second Mr Cull continued with attempt to follow up the changes and resolve the issue.

[40] It was these attempts which further damaged the relationship with Angsla failing to provide records despite promises it would do so. These issues spiralled into something approaching farcical and some of the explanations tendered by Angsla are confusing and contradictory. For example Mr Woodman claimed he could not provide the wage records as he had no copies yet copies were made of numerous paysheets and the records he could not copy were present at the meeting of 10 January.

[41] Similarly Angsla cannot disturb Mr Cull's claim he had seen numerous timesheets going back to 2006 on 31 December yet Angsla could not produce them soon thereafter. The fact a folder containing a number of Mr Cull's timesheets was present on 31 December was again supported by Mr Wimpory.

[42] There were then further contradictions with Angsla accepting it at least had the timesheets for 2012 and 2013 yet Ms Angsla claimed they were *cleared out* each year and put in storage. Despite that Angsla could not then explain why it failed to locate them till after proceedings had been filed.

[43] In summary the evidence shows at least a tardy attitude to Mr Cull's concerns and an almost total failure to address them in a manner which complies with its duty to be active and constructive in maintaining the employment relationship.⁵ Given the evidence I potentially could, as Mr Cull has done, attribute a sinister rationale to what occurred but I refrain from doing so. Suffice to say I consider Mr Cull was entitled to conclude he could no longer trust his employer and the relationship was no longer tenable given its failure to comply with its statutory duties and to address his concerns in a timely manner. He was constructively dismissed.

[44] Turning to the arrears claim. Mr Cull seeks \$1,790.81 in respect to underpaid wages along with a further \$950.90 for holidays and sick leave.⁶

[45] Despite considerable evidence about numerous entries and their accuracy along with a detailed analysis by one of Mr Cull's witnesses it is, in my view, relatively simply to reach a conclusion on this claim.

[46] An employer is required to keep a time and wage record for each employee.⁷ Where there is a claim for the recovery of money the employee may call evidence to show the failure to comply with that requirement and that prejudiced his or her ability to accurately quantify the claim.⁸ Section 132 goes on to say where such evidence is tendered I may accept the claim as valid unless the respondent can prove otherwise.

[47] Mr Gowland conceded his clients wage and time records did not comply with the requirements of s 130. When answering questions Mr Woodman conceded compliant records would have prevented this dispute. There is then evidence Mr

⁵ Section 4(1A)(b) of the Employment Relations Act 2000

⁶ Paragraphs 43(ii) and (iii) of the Applicant's closing submissions

⁷ Section 130 of the Employment Relations Act 2000

⁸ Section 132(1) of the Employment Relations Act 2000

Cull's original advocate requested the records and Angsla were tardy in responding. Indeed unaltered records have never been available and that led to difficulties in quantifying Mr Cull's claim and considerable evidential dispute.

[48] Having considered the evidence I conclude this is a situation in which s 132 should be applied and the claim accepted.

[49] There are then the penalty claims. Two were sought. The first is for the failure to maintain records which comply with the requirements of s 130(1). The second is for the failure to produce the records it had though this is characterised as *Angsla behaviour in hiding its records in an attempt to avoid detection of its fraudulent behaviour.*⁹

[50] While both breaches occurred penalties are discretionary and in this instance I am not persuaded they should be imposed. I reach this conclusion for two reasons. First the claims were not pursued with vigour with each only warranting a paragraph in what were comprehensive closing submissions. Second I conclude penalties would effectively constitute a double jeopardy. The failure to maintain compliant records is essentially why the arrears claim succeeds in full. The failure to produce the records in a timely manner is also a significant factor in the conclusion Mr Cull was constructively dismissed.

[51] The conclusion Mr Cull was unjustifiably dismissed leads to a consideration of remedies. He seeks lost wages (\$10,710) and compensation in the sum of \$15,000.

[52] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[53] Mr Cull obtained replacement employment after twelve weeks and limits his claim to that period. Twelve weeks is less than the thirteen prescribed as payable under s 128(2) so his claim shall be awarded in full.

[54] Turning to compensation. As already said Mr Cull seeks \$15,000 and he supported his claim with evidence of the angst he felt. This was largely attributable to a feeling of betrayal by an employer to whom he had been loyal for some twelve years with the feeling being enhanced by the way Angsla responded to his claims. That said

⁹ Paragraph 3(f) of the amended Statement of Problem dated 18 September 2014

there is also evidence of other issues in Mr Cull's life which could have influenced the hurt he felt and for which Angsla cannot be held accountable. Having considered the evidence I conclude an award of \$7,500 appropriate.

[55] The conclusion remedies accrue means I must, in accordance with s 124 of the Act, address whether or not Mr Cull contributed to his dismissal in a way that warrants a reduction in remedies. Here I note Mr Cull's alleged wrongdoings were, if they occurred, issues Angsla should have raised and addressed formally. It did not do so and I conclude the evidence does not support a finding of contribution which would reduce the remedies awarded.

Conclusion and orders

[56] For the above reasons I conclude Mr Cull has a personal grievance in that he was unjustifiably dismissed. He is also owed unpaid wages, holidays and sick leave.

[57] As a result I order the respondent, Angsla Holdings Limited, make the following payments to the applicant, Michael Cull:

- i. \$10,710.00 (ten thousand, seven hundred and ten dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. \$7,500.00 (seven thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further \$2,741.71 (two thousand, seven hundred and forty one dollars and seventy one cents) being payment of unpaid wages, holiday pay and sick leave.

[58] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority