

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 250
3193039

BETWEEN

MATHEW WILLIAM
ALLAN HILL
Applicant

AND

DANIEL GIBSON AKA
DANIEL FARRELL
Respondent

Authority Member: Natasha Szeto

Representatives: Paul Mathews, for the Applicant
No appearance for the Respondent

Investigation Meeting: 28 March 2023

Submissions received: 28 March 2023 from the Applicant

Determination: 17 May 2023

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Mr Hill was employed by Mr Gibson to mow lawns in Mr Gibson's new business. Only three days after he started, the two men had a heated exchange while at a job, and Mr Gibson fired Mr Hill on the spot. The reason was not clear, and there was no fair process followed. Mr Gibson never paid Mr Hill for his work. Mr Hill brought a claim of unjustifiable dismissal to the Employment Relations Authority.

The Authority's investigation – procedural history

[2] An investigation meeting was held on 28 March 2023 with Mathew Hill and his mother Katrina Chapman attending in person, and Mr Hill's representative Paul

Mathews attending remotely via Teams. There was no appearance by – or for – Mr Gibson.

[3] The Authority has the power to proceed under clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act), if any party, without good cause, fails to attend, and may act fully in the matter before it, as if that party had duly attended or been represented.

[4] Authority records show the Notice of Investigation Meeting was sent to Mr Gibson's home address on 13 December 2022. It was signed for by a person identified as 'Daniel Robertson'.

[5] On 6 January 2023, the Applicant's witness statements and evidence were served at the same address by courier, and signed for by 'Daniel Gibson'.

[6] On 27 March 2023, I directed the Notice of Investigation Meeting to be sent to Daniel Gibson's work email address.

[7] I am satisfied that the Notice of Investigation Meeting was served on Daniel Gibson in December 2022, and that he received a reminder about the investigation meeting the day prior to it being held.

[8] Included in the notice that Mr Gibson received was advice that if the Respondent did not attend the investigation meeting, the Authority may, without hearing the evidence from the Respondent, issue a determination in favour of the Applicant.

[9] No reason was provided by Mr Gibson for his non-attendance at the investigation meeting on 28 March 2023, and the investigation meeting proceeded.

[10] Written witness statements were lodged from Mr Hill and Ms Chapman, and they both answered questions from me under affirmation. Mr Mathews made submissions on their behalf.

[11] As permitted by s174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received.

Discussion

Was Mr Hill employed by Mr Gibson?

[12] In order to determine whether there was an employment relationship, I need to consider whether there was a contract between Mr Gibson and Mr Hill, under which Mr Hill had agreed to work for Mr Gibson for an agreed amount of remuneration, and where Mr Hill (as the employee) was subject to Mr Gibson's instructions (as the employer) as to the work to be done, and how and when it was to be done.

[13] Mr Hill and Mr Gibson had become friends through 'boy racer' circles. Daniel Farrell is a name that Mr Gibson uses on Facebook, but Mr Hill always knew him as Daniel Gibson.

[14] Mr Hill would sometimes lend Mr Gibson a hand with jobs like helping Mr Gibson's sister move house. This was to help out a friend, and Mr Hill wasn't paid.

[15] In early January 2022, Mr Gibson contacted Mr Hill about some work as Mr Gibson was starting his own business. Mr Hill asked him what the job was, and Mr Gibson said that it was mowing lawns. Mr Gibson told Mr Hill he would need to be ready to go at seven o'clock in the morning of 10 January. Because Mr Gibson did not have any gardening equipment, Mr Hill arranged to borrow his grandparents' tools including a weed eater and broom.

[16] There was no written employment agreement between Mr Gibson and Mr Hill. Mr Hill asked Mr Gibson multiple times for a contract. Mr Gibson told Mr Hill that he would give him a contract, or that Mr Gibson's partner would, or that Mr Gibson's sister would, but none was provided.

[17] After the dismissal, Mr Gibson told Mr Hill's representative that Mr Hill was not offered a job, nor was he given a contract and that the job was to give Mr Gibson a hand "for a bit of pocket money".

[18] Mr Hill, however, says that Mr Gibson told him that he would be paid the minimum wage per hour, and he would be paid fortnightly. Mr Hill understood that his work hours started from the time he was picked up, until the time he was dropped home. Mr Hill also understood that the job was going to be from Monday to Friday, but that work would be required on the 'odd' Saturday and Sunday as Mr Gibson already had a

client that required Saturday and Sunday work fortnightly. Mr Hill would be working 40 to 50 hours per week.

[19] Mr Gibson told Mr Hill that he would handle his pay and taxes, and that all Mr Gibson had to be concerned with was waking up and getting the work done. This was fine with Mr Hill, as he did not know how to do his own taxes. Mr Gibson confirmed that the job was full-time and permanent. Mr Hill said that he specifically asked Mr Gibson whether he would be on a trial, and Mr Gibson told him that he would not be on a trial, and that he would simply be working for Mr Gibson.

[20] Mr Hill's first day of work was 10 January 2022.

[21] Mr Hill was up at 5:30 am and was dressed ready and waiting to be picked up Mr Gibson at 6:40 am.

[22] That day, Mr Hill worked at an address in Lower Hutt. Mr Gibson stayed in his ute while Mr Hill mowed lawns.

[23] Once the job was finished, Mr Gibson took him to the next job. Between the two men, they completed about four lawns on that first day of work, including a job in Porirua.

[24] At the end of his first day of work, after he had 'clocked off' Mr Hill said he realised they needed an extra hand, and it could not be just him doing the labour. Mr Hill suggested to Mr Gibson that he hire one of Mr Hill's friends, who would also mow lawns and operate the weed eater.

[25] On 11 January 2022, Mr Hill worked at an address in Upper Hutt by himself while Mr Gibson went to interview Mr Hill's friend as a potential worker. Mr Hill ended up working for the day essentially alone, and his understanding was that Mr Gibson had taken his friend to work at another property for the day.

[26] Mr Hill did not need much in the way of instruction or supervision, as he had several years' worth of prior experience mowing lawns. To Mr Hill, it seemed that Mr Gibson's main role was to pick Mr Hill and his friend up and take them to jobs, and to take 'before and after' photos of the properties they maintained. Occasionally Mr Gibson would monitor the work that Mr Hill and his friend were carrying out.

[27] Based on the evidence before the Authority, I find that Mr Hill was employed by Mr Gibson because there was an agreement between them that Mr Hill would work for Mr Gibson in exchange for an agreed rate of pay, being the minimum wage. I do not find Mr Gibson's statement that there was no job, or that the job was giving Mr Gibson "a hand for a bit of pocket money" to be convincing, or determinative of the true nature of the relationship. The evidence is consistent that there was no written agreement, and it is also consistent that tax would be deducted. The contract between Mr Hill and Mr Gibson was verbal, and it was brief, but I accept Mr Hill's evidence that it was specific in relation to certain essential terms such as the agreed rate and frequency of pay, and how tax would be handled.

[28] Mr Hill was subject to Mr Gibson's instructions as to the work to be done. Mr Gibson picked Mr Hill up in the morning and drove him to various job sites during the day. Although Mr Hill provided the majority of the labouring work and potentially had more practical experience mowing lawns than Mr Gibson did, he was working under Mr Gibson's direction because Mr Gibson controlled when and how the work was to be done.

[29] Mr Gibson had started to develop some branding for a mowing and landscaping business, but when he employed Mr Hill, he had not created a limited liability company. I therefore also find that Mr Gibson employed Mr Hill in his personal capacity, because there was no other entity that could have employed Mr Hill.

If Mr Hill was employed by Mr Gibson, was he unjustifiably dismissed?

[30] To determine whether Mr Hill was unjustifiably dismissed, I need to ask whether he was in fact dismissed, and if he was, whether the dismissal was substantively and procedurally justifiable. In other words, was there a good reason for Mr Hill's dismissal, and did Mr Gibson follow a fair procedure?

Was Mr Hill dismissed?

[31] Mr Hill's third day of work for Mr Gibson was 12 January 2022. Mr Gibson picked Mr Hill up in the morning in his ute, and they returned to the Upper Hutt address with Mr Hill's friend, to finish the job that Mr Hill had started the day before.

[32] Mr Gibson was sweeping while Mr Hill's friend was moving rubbish for a tip run. When Mr Hill went to move a drier, he realised he could not move it by himself as

it had plastic on it and was difficult to grip. According to Mr Hill, he politely asked Mr Gibson to give him a hand moving the drier.

[33] Mr Hill was consistent about the tenor of the exchange, even if the words used differed slightly. The exchange was:

Mr Hill: can you help me move the drier?

Mr Gibson: you need to remember who the boss is.

Mr Hill: you need to remember whose equipment / tools we're using.

Mr Gibson: fuck off, you're done, you're no longer working for me.

Mr Hill: fuck you, I'm taking my stuff, fuck you.

[34] Mr Hill was shocked at being fired. However, he decided that it was better to leave instead of "rarking up", as the exchange had happened in front of the client, and he did not want to jeopardise the reputation of the company.

[35] Mr Hill asked Mr Gibson's partner – who was sitting in Mr Gibson's ute at the Upper Hutt address - if he could use her phone to call his mother to collect him, as he did not have credit on his phone. Mr Hill retrieved his weed eater, broom and petrol cans from the ute and left the property.

[36] Mr Hill messaged Mr Gibson later that night saying that Mr Gibson owed him his pay for his work from 10 to 12 January. Mr Hill messaged Mr Gibson again on 13 January asking: "where's my pay".

[37] Two days later, on 15 January 2022, Mr Hill messaged Mr Gibson because he had heard Mr Gibson was saying that Mr Hill had stolen money from him. Mr Hill was upset about the allegation and emphatically denied that he had stolen from Mr Gibson. Mr Gibson did not deny saying this, and later repeated this allegation to Mr Hill's representative.

[38] There followed a stream of acrimonious messages from Mr Hill to Mr Gibson. Mr Gibson did not respond directly to Mr Hill other than one message sent on 15 January 2022: "That is why I fired you!! You're [sic] attitude is discussing [disgusting]".

[39] On 20 January 2022, Ms Chapman began messaging Mr Gibson to attempt to recover the wages that Mr Hill was owed. Mr Gibson confirmed with Ms Chapman in several messages, that Mr Hill would receive his pay:

- (a) “Matt will receive his pay once we all get paid by the end of the month no dealt [doubt] about that”.
- (b) “I’m not paying him for use of his own tools I will pay for the hours he worked deducting tax”.
- (c) “If matt keeps calling me I will take him to the police for harassment. We’ve settled that he will be paid I would like it if you’s [sic] just stop harassing us now. Cheers”.

[40] Around two weeks after his dismissal, Mr Hill went to Mr Gibson’s house. Mr Hill stood at the gutter and had an exchange with Mr Gibson’s parents who were inside the house. They told Mr Hill that he needed to leave. Mr Hill took a video on his cell phone of Mr Gibson’s house and Mr Gibson’s work-branded vehicles. Mr Gibson’s parents called the police and Mr Hill was later trespassed from Mr Gibson’s house.

[41] Following that visit, Mr Gibson called Mr Hill and asked Mr Hill for his IRD number, date of birth, full legal name, and email address. Mr Hill sent Mr Gibson these details but did not receive any payment.

[42] Based on the evidence before the Authority, I find that Mr Hill was dismissed from his employment with Mr Gibson on 12 January 2022. In the message exchanges that followed Mr Hill leaving the Upper Hutt property, Mr Gibson did not deny that Mr Hill had been dismissed, or sent away. To the contrary, Mr Gibson advised Ms Chapman in a text message on 20 January 2022 that Mr Hill was “on a trial” and therefore “legally I was able to let him go without reason”. In an email exchange with Mr Hill’s representative, Mr Gibson also later said that he had dismissed Mr Hill due to theft, as Mr Hill had stolen money out of his ute while at a client’s house.

[43] Mr Gibson did not contact Mr Hill to confirm he would be picking him up for work the next day. I find that there was a clear understanding between Mr Hill and Mr Gibson that Mr Hill had been dismissed.

Was there a good reason for Mr Hill’s dismissal?

[44] Mr Gibson was not entitled to rely on a trial period. Mr Hill was clear that Mr Gibson had told him that the role was permanent, and there was no trial period.

Irrespective, a trial provision is a written provision in an employment agreement. There was no written employment agreement, and no effective trial.

[45] I am unable to determine the exact reason for the dismissal because Mr Gibson did not attend the investigation meeting. In messages and emails, Mr Gibson has given two different reasons for the dismissal, being Mr Hill's 'attitude' or his 'dishonesty'.

[46] Mr Hill had asked Mr Gibson for his help to move a drier and Mr Gibson took exception to either the request itself, or the way that Mr Hill made it. Mr Gibson had told Mr Hill in a message that the reason he was fired was his 'disgusting' attitude. But I am also persuaded by Mr Hill's supposition that Mr Gibson may have been suffering from a degree of 'big headedness' from being the boss.

[47] Irrespective, Mr Hill's part in the exchange at the Upper Hutt property cannot be viewed as serious misconduct justifying summary dismissal. Even if Mr Gibson had been offended by Mr Hill's request or attitude, a reasonable employer could have considered other disciplinary options including issuing Mr Hill with a warning.

[48] Mr Hill categorically denies the theft allegation. He said he had no reason to steal from Mr Gibson, having received a WINZ payment that day. Mr Hill also consistently denied the stealing allegation in messages to Mr Gibson after his dismissal. Based on this, I accept that Mr Hill did not steal money from Mr Gibson's wallet.

[49] If Mr Gibson had genuinely believed that Mr Hill had stolen from him, he did not communicate that to Mr Hill, or Ms Chapman immediately following the dismissal. Mr Gibson was erratic in his reasoning for dismissing Mr Hill, veering from relying on being able to dismiss without cause under a trial period, to Mr Hill's 'disgusting' attitude, to the theft allegation. Mr Gibson's changing narrative undermined any credibility he may have had in terms of substantive justification for the dismissal.

[50] I find that there was no substantive justification for the dismissal, based on the evidence before the Authority.

Did Mr Gibson follow a fair procedure?

[51] On the evidence before the Authority about the events leading up to the dismissal, it is clear that Mr Gibson did not follow a fair procedure.

[52] Matters escalated quickly, and words were exchanged in the heat of the moment, which resulted in Mr Hill being summarily dismissed without cause.

[53] As there was no good reason for the dismissal, and no fair procedure, it follows that Mr Hill was unjustifiably dismissed.

If Mr Hill was unjustifiably dismissed, should he be awarded lost wages under s123(1)(b) from the time he was dismissed until he found new employment on 28 March 2022 (a period of 10 weeks)?

[54] If an employee has been unjustifiably dismissed and has lost remuneration as a result, I must order the employer to pay the lost remuneration or 3 months' ordinary time remuneration.¹

[55] An employee can be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.²

[56] Mr Hill claims lost wages from the time he was dismissed on 12 January 2022, until he found new employment. Mr Hill obtained a week's worth of packing work from 28 March 2022, and then a more permanent position doing demolition work around 11 weeks after he was dismissed. Mr Hill claims 10 weeks' worth of wages for the time he was out of work, at the applicable minimum wage of \$20 per hour, for a full-time role of 40 hours per week. This amounts to \$8,000 (gross).

[57] Mr Hill told the Authority that he tried finding work after being dismissed but was "constantly denied". He was really down for about two weeks following the dismissal, but around the third or fourth week he started looking for jobs and going to interviews. He looked at Facebook and Trade Me jobs and printed around fifty CVs, which he dropped off at businesses around town. He mowed lawns in his spare time for cash, collected scrap metal, and did car grooming.

[58] Mr Hill attempted to mitigate his loss by actively seeking employment and income after he was unjustifiably dismissed by Mr Gibson. Mr Hill should be reimbursed the full amount of wages that he lost as a result of the personal grievance, being \$8,000 (gross).

¹ Section 128(1) and (2) of the Employment Relations Act 2000.

² Section 123(1)(b) of the Employment Relations Act 2000.

If Mr Hill was unjustifiably dismissed, should he be awarded compensation under s123(1)(c) for humiliation, loss of dignity and injury to feelings?

[59] Ms Chapman described the impact on Mr Hill in the immediate aftermath of the dismissal. Ms Chapman said Mr Hill was so ‘hyped’ on the phone that she could not understand him. She thought he was going to blow a blood vessel.

[60] After being dismissed, Mr Hill said he felt “gutted for a bit”, wired and angry, and really down for about two weeks. Part of the reason was that he had not just lost a job, but a friend. Mr Hill described the time after the dismissal as “really confusing” because he had been under the impression that he and Mr Gibson were good mates. In hindsight Mr Hill is now suspicious that Mr Gibson used him for his equipment, and to source other workers for his new business.

[61] Ms Chapman described their home life as different after Mr Hill’s dismissal. She felt like she was walking on eggshells around him.

[62] Mr Hill also found it hard to think about working for another company as he was worried about dodgy businesses and potentially being “ripped off again”. While only employed by Mr Gibson for a short time, Mr Hill had a reason to get up and get ready in the morning. He would come home in the evening calmer for the fact that he had been out of the house, working and earning money. Prior to the job with Mr Gibson, Mr Hill had been on a WINZ job seeker benefit. He had planned to ring WINZ once he had secured the job and arrange to come off the benefit. The dismissal made Mr Hill feel like he had been kicked back down to the lower class.

[63] Mr Hill had started to give up on the idea of getting paid for the work he did for Mr Gibson, and after being served with a trespass notice, he questioned the point of pursuing his wages as he did not want to risk criminal charges over a few days’ work.

[64] On behalf of Mr Hill, it is submitted that compensation of \$15,000 would be appropriate for humiliation, loss of dignity and injury to feelings.³ This is based on:

- (a) Loss of friendship, and how bitter the situation between Mr Hill and Mr Gibson became.
- (b) The financial impact: financial issues were exacerbated.

³ Section 123(1)(c)(i) of the Employment Relations Act 2000.

- (c) The acrimonious actions including trespassing Mr Hill for pursuing his rightful pay.

[65] No doubt at the time of his dismissal, Mr Hill felt humiliated in front of a client as well as his friend. Following the dismissal, he struggled with feeling like he had been used by Mr Gibson. The theft allegation clearly angered and humiliated Mr Hill. There were also other adverse consequences for Mr Hill in his social circles, given that they overlap significantly with those of Mr Gibson. Based on the evidence given to the Authority by Ms Chapman, I also find that the dismissal caused Mr Hill to lose his sense of purpose and fulfilment in being gainfully employed, for a period.

[66] Given the impact on Mr Hill, and the general range of awards in similar cases, I agree that an appropriate award of compensation is \$15,000.

Did Mr Hill contribute to the situation giving rise to his personal grievance, such that remedies awarded should be reduced?

[67] The Authority may reduce remedies relating to a personal grievance, if it determines that the actions of the employee contributed towards the situation that gave rise to the personal grievance.⁴

[68] The dismissal was swift. In messages sent after the dismissal, Mr Gibson referred to Mr Hill's disgusting attitude, but there was no evidence before the Authority of any conflict between the two men in the lead up to the dismissal.

[69] I acknowledge that I have seen some unfortunate communications sent from Mr Hill to Mr Gibson following the dismissal, which included offensive language and threats by Mr Hill. While these communications may have contributed to Mr Gibson's unwillingness to pay Mr Hill for his work (despite multiple assurances by Mr Gibson that Mr Hill *would* be paid) these communications cannot have been relevant to the actual dismissal, given that they happened afterwards.

[70] I therefore find, based on the information before the Authority, that Mr Hill did not contribute to the situation giving rise to his dismissal and there should be no reduction in remedies.

⁴ Section 124 of the Employment Relations Act 2000.

Should Mr Hill be paid wage arrears (or part of s123(1)(b)(i)?)

[71] Following his dismissal, Mr Hill held out hope that Mr Gibson would do the right thing by him and pay him the money he was owed for his three days' work. That did not happen.

[72] Mr Hill recorded his work start and finish times on Snapchat. He worked for a total of 27.5 hours over the three days of his employment, consisting of 10 hours on Monday 10 January, 10 hours on Tuesday 11 January and 7.5 hours on Wednesday 12 January.

[73] Mr Hill was employed on the hourly minimum wage applicable at the time, which was \$20.00 (gross) per hour. The total pay that Mr Hill was entitled to for his 27.5 hours of work was \$550.00 (gross). Mr Hill confirmed that to date he still has not been paid anything by Mr Gibson for the work he did. Mr Hill is therefore owed wages of \$550 (gross).

Costs

[74] Mr Hill has applied for costs arising from this proceeding to be awarded.

[75] The power of the Authority to award costs is set out in Schedule 2, clause 15 of the Act.

[76] Costs are at the discretion of the Authority and must be reasonable.⁵ The approach to awarding costs, and the underlying principles, are well settled.⁶ Costs awarded in the Authority generally start from the daily tariff, with adjustments made as appropriate to the circumstances of the case.⁷ Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

[77] Mr Hill was the successful party, and so is entitled to a contribution towards his costs. Although this matter was set down for a full day, the matter took just under half a day. Accordingly, Mr Hill is to receive costs of \$2,250.

⁵ *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

⁶ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* EMC Auckland AC28/06, 12 May 2006.

⁷ Practice Note 2: Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi, 29 April 2022.

Orders

[78] Mr Hill's claim that he was unjustifiably dismissed has been successful and remedies are appropriate including reimbursement and compensation. Mr Hill is also owed wage arrears.

[79] I order that Mr Gibson is to pay Mr Hill:

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| (a) | Wages or other money lost as a result of his personal grievance under s123(1)(b) of the Act: | \$8,000. |
| (b) | Compensation under s123(1)(c)(i) of the Act: | \$15,000. |
| (c) | Wage arrears under s131 of the Act: | \$550. |
| (d) | Costs: | \$2,250. |

Natasha Szeto
Member of the Employment Relations Authority