

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 157
5347589

BETWEEN PETERA HOANI
 Applicant

AND RANGITIKEI ENTERPRISES
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Steve Emslie, Advocate for Applicant
 Wiremu Abraham, on behalf of the Respondent

Investigation Meeting: 25 September 2012 at Whanganui

Determination: 10 December 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Petera Hoani was dismissed on one week's notice by his employer, Rangitikei Enterprises Limited (Rangitikei) on 13 April 2011. He claims he was made redundant without consultation and unjustifiably dismissed.

[2] Rangitikei denies Mr Hoani was made redundant. Rangitikei says Mr Hoani was dismissed for serious misconduct after he caused \$12,000 worth of damage to a company truck, threatened another employee and commandeered his truck without authorisation.

[3] After his dismissal Mr Hoani, through his advocate, sought information from Rangitikei including wages and time records. Rangitikei provided Mr Hoani with copies of weekly payslips associated with his employment. Mr Hoani subsequently

raised three separate claims for recovery of wages which he estimates as \$4,273.92 (gross) in total.

Issues

[4] The Authority is required to investigate and determine:

- why was Mr Hoani dismissed?
- was Mr Hoani dismissed unjustifiably?
- is Mr Hoani owed wages?

Why was Mr Hoani dismissed?

[5] Mr Hoani was employed as a truck driver for Rangitikei Enterprises Ltd, a small family run business based in Marton.

[6] On 13 April 2011 at approximately 2.45am, Mr Hoani was inside the cab of a truck at Rangitikei's yard. The truck was stationary. Mr Hoani accepts that he had the driver's side door open while he was warming up the engine. Another employee, Mr Kingi, was manoeuvring his truck out of the yard and hit the side of the open door of Mr Hoani's truck. Mr Hoani says that following the incident he asked Mr Kingi if he could take his truck and Mr Kingi agreed. Mr Hoani did not contact Rangitikei's manager, Mr Wiremu Abraham, to report the damage to the door of his truck because he says it was Mr Kingi's fault. He agreed it was unusual for drivers to swap trucks.

[7] Mr Hoani left the yard in Mr Kingi's truck at approximately 2.55am to commence his haul to Wellington.

[8] When he returned to Marton later that afternoon, Mr Hoani went to the Rangitikei's office to discuss taking holidays in the near future. He says Mr Abraham told him that Rangitikei would be restructuring and that there may be a reduction in the hours of work available to him. He says the conversation moved to a heated discussion between him and Mrs Abraham, the director of Rangitikei Enterprises, as to what, if any, holidays he was entitled to take. He says at the end of this conversation Mr Abraham told him "*there is nothing here for you*" and drafted a letter which told him that he was dismissed on one week's notice.

[9] Mr Abraham has a significantly different view of the events on 13 April 2012. He says he received a phone call at or about 3am from Mr Kingi who reported the accident and told him that Mr Hoani had threatened and bullied him to such an extent that he had allowed Mr Hoani to take his truck.

[10] Mr Kingi did not give evidence to the Authority however Mr Abraham described Mr Kingi as humble and a person who avoided conflict. He says Mr Kingi was significantly distressed both by the accident and by Mr Hoani's behaviour towards him. Following Mr Kingi's phone call Mr Abraham immediately went to Rangitikei's yard to assess the truck. He says Mr Kingi gave him a detailed verbal account of the accident and filled in an incident report. Mr Abraham said he tried to contact Mr Hoani several times by phone during the day but received no answer.

[11] Mr Abraham's evidence is that when Mr Hoani arrived at Rangitikei's office in the afternoon he asked Mr Hoani "*what happened*". He says Mr Hoani "*just went quiet*" and did not reply. Mr Abraham says he asked Mr Hoani again what had happened but that Mr Hoani again did not answer or engage with him and continued to remain silent and would not speak or respond to his repeated question.

[12] Mr Abraham says that as Mr Hoani did not provide "*any explanation, excuse, or an incident report*" he could only proceed on the information he had received from Mr Kingi. He decided to dismiss Mr Hoani. He typed out a brief letter advising Mr Hoani of his dismissal on one week's notice and gave it to him.

[13] Mr Hoani worked out his notice and says he was not paid for 27 hours of work undertaken during this period.

[14] During the Authority's investigation Mr Hoani initially denied that Mr Abraham had asked him what had happened to the truck, or that he had raised any aspect of the incident with him at all. On questioning by the Authority Mr Hoani conceded that Mr Abraham "*may*" have asked him about the incident, but said he "*can't remember anything*" about what Mr Abraham said.

[15] Mr Hoani does not deny that the incident involving the truck occurred but he provided no other evidence to the Authority about his discussions with Mr Abraham

in respect to incident involving the truck and was unresponsive to the Authority's questions on the matter other than to state that he did not consider the incident was relevant to his dismissal.

Determination as to the reason for Mr Hoani's dismissal

[16] Having assessed the evidence as it relates to the reasons for which Mr Hoani was dismissed, I do not accept Mr Hoani's assertion that he was unjustifiably dismissed as a consequence of a procedurally unfair restructuring or that his actions on 13 April 2011 did not lead to his dismissal.

[17] I conclude that an accident causing significant damage to the employer's property would likely to have been a subject of discussion between the parties when they met later in the day and I regard Mr Hoani's version as regards the contents of the discussion with Mr Abraham on the afternoon of 13 April 2011 as thoroughly unconvincing.

[18] I find that Mr Hoani was dismissed for serious misconduct.

Was Mr Hoani unjustifiably dismissed?

The law as it relates to claims for unjustified dismissal

[19] The legal test as to whether a dismissal is justified is set out at s.103A(2) of the Employment Relations Act 2000. The Act requires the Authority to consider and determine, objectively, whether Rangitikei's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The test requires two considerations, first, what the employer did (the substantive dismissal and the grounds for it) and, second, how the employer acted (the process leading to those outcomes)¹. These considerations often overlap.

What the employer did

[20] It is clear that when Mr Abraham became aware of incident involving Mr Hoani's truck he undertook an inquiry into the events prior to taking any action. He obtained a detailed oral and written account of the events from Mr Kingi and he

¹ *X v Auckland District Health Board* [2007] ERNZ 66

attempted to contact Mr Hoani by phone, albeit without success. He then sought a response from Mr Hoani when they met later in the day. Although Rangitikei's investigation was brief I consider its inquiries were satisfactory when measured against its resources.

[21] I accept Mr Abraham's evidence that Mr Hoani did not engage with or respond to his inquiries as to the morning's events at all. I also consider that it was reasonable for Mr Abraham to assume that Mr Hoani did not want to tell him about what had happened because he did not have a plausible explanation for the damage to the truck, or the interaction which resulted in his taking of Mr Kingi's truck, which would avoid blame being attributed to him.

[22] Mr Abraham's evidence was that in a situation where Mr Hoani did not provide any information as to the matters and simply refused to engage, he considered he could only proceed on the information he had obtained. I do not consider it was unreasonable of Rangitikei to rely on the information obtained from Mr Kingi which indicated serious misconduct by Mr Hoani. In these circumstances and in the absence of any response from Mr Hoani, I find that it was open for Rangitikei to form a view that Mr Hoani had caused the truck's damage, threatened Mr Kingi, and taken his truck without authorisation. I find Rangitikei had substantive justification for dismissing Mr Hoani.

How the employer acted

[23] The Act requires the Authority to consider whether the process Rangitikei undertook before it dismissed Mr Hoani complied with the minimum standards of procedural fairness set out in s103A(3).

[24] Section 103A(4) of the Act also allows the Authority to consider any other factors it thinks are relevant to its assessment as to whether the employer acted fairly before it dismissed the employee.

[25] I have accepted that Mr Abraham asked Mr Hoani "*what happened*". However I find that Mr Abraham did not raise with Mr Hoani his specific concerns that he may have (a) taken Mr Kingi's truck without authorisation, (b) bullied or threatened Mr Kingi, and (c) caused damage to the truck.

[26] Given that Mr Hoani's dismissal was based on these concerns I consider they should have been properly and fully put to him. I note also that Mr Abraham did not tell Mr Hoani that his failure to respond to Mr Abraham's questions may result in Rangitikei proceeding to a decision to dismiss without his input. There is also no evidence that Mr Hoani was advised that he could have a representative to assist him to provide a response or that he may be dismissed depending on his responses.

[27] I find that the process Rangitikei undertook before it dismissed Mr Hoani was below the minimum standards of procedural fairness required by an employer. I recognise that Mr Abraham may have felt considerably frustrated by Mr Hoani's lack of engagement, however without warning Mr Hoani of the possible consequences of his continued silence or allowing Mr Hoani an opportunity to obtain assistance before providing an explanation I consider Rangitikei did not act as a fair and reasonable employer.

[28] There is an inference contained in Mr Abraham's evidence that it would be unfair to criticise Rangitikei for its procedural failings when Mr Hoani was unwilling to comply with Rangitikei's process in any circumstance. I shall return to what, if any, contribution Mr Hoani's actions had on Rangitikei's process. However I do not accept that Mr Hoani's actions absolved Rangitikei for its departure from the minimum legal standards of procedural fairness which are required by an employer. In this respect I find Rangitikei did not follow a fair and reasonable procedure before it dismissed Mr Hoani and he has a personal grievance for unjustified dismissal.

Is Mr Hoani owed wages?

[29] Mr Hoani made three separate claims with regards to the way he was paid by Rangitikei and seeks recovery of \$4,273.92 (gross) in total.

Claim relating to unpaid wages between April 2010 and April 2011

[30] Mr Hoani says he is owed \$976.20 (gross) for wages in respect of 60.45 hours of work undertaken between April 2010 and April 2011 but does not a separate claim related to his notice period.

[31] I have carefully reviewed Mr Hoani's log books against pay slips over the material time claimed. For the period between 3 April 2010 and 17 July 2010 the

hours recorded in Mr Hoani's NZ Transport Authority approved Work Time Log Books did not uniformly reflect the hours recorded in Mr Hoani's corresponding payslips. There is a suggestion contained in Rangitikei's evidence that Mr Hoani was over generous in his recording of hours in the log book, however without evidence to support this contention, or evidence that Rangitikei raised the matter with Mr Hoani I regard the hours recorded in the log books reflect the hours he worked and the hours he was entitled to be paid. My assessment is that over Mr Hoani was not paid for 48.5 hours in total over the following periods:

For the week ending:	10 April 2010	3 hours not paid
	1 May 2010	3.5 hours not paid
	8 May 2010	4.25 hours not paid
	15 May 2010	5.25 hours not paid
	22 May 2010	3.75 hours not paid
	29 May 2010	4.5 hours not paid
	5 June 2010	4.5 hours not paid
	26 June 2010	4.5 hours not paid
	3 July 2010	4.5 hours not paid
	10 July 2010	6.5 hours not paid
	17 July 2010	4.25 hours not paid

[32] Mr Abraham acknowledges that Rangitikei's payroll system had technical and virus problems between April 2010 until July 2010 inclusive, as a result to changes in its payroll system. Mr Abraham says he had discussions with Mr Hoani on 26 and 28 July 2010 as to difficulties with payroll and produced diary notes as evidence of those discussions. The diary note of 28 July 2010 records:

Had met with Petera and told him had problem with pay calculations and computer programme. Told had overpaid him we will have to work out over time. Petera understood this and was fine to work out. Re \$16.00 Hr including holiday pay.

[33] The focus of the discussion on 28 July 2011 appears to have been on Rangitikei's concern that it had overpaid Mr Hoani's holiday entitlements. This concern was illustrated in Mr Abraham's evidence although it was unclear whether Mr Hoani had correspondingly been advised that he had been underpaid for hours worked and the diary note makes no reference to underpayment for hours worked by Mr Hoani. Mr Hoani denies that he was ever approached by Mr Abraham on matters relating to overpayment of holiday pay or that he agreed to pay back any holiday entitlement overpayments to Rangitikei.

[34] Mr Abraham advised the Authority that Rangitikei had over paid Mr Hoani's holiday pay entitlement by \$1,127.36 during the period of April 2010-July 2010 inclusive. Mr Abraham acknowledged that \$510.18 had been deducted from Mr Hoani's pay. Mr Abraham referred to clauses 5(f) in the employment agreement which states:

The employer shall be able to recover by deduction overpayments from the employee after having duly notified the employee at least one week prior to any deduction taking place.

[35] I understand from the body of Mr Abraham's evidence that Rangitikei considered it was able to deduct and/or off-set the overpayment of holiday entitlement against the underpayment of hours worked by Mr Hoani.

Determination of claim for recovery of wages between April 2010 and April 2011

[36] It is clear that Rangitikei became aware of payroll problems in late July 2010. There is a dispute as to what, if anything, was discussed between Mr Hoani and Mr Abraham on 26 and 28 July as to the matter.

[37] However, even if I accept that there were conversations held late July 2010 between the parties as to concerns about over-payments, those discussions did not allow Rangitikei to recover overpayments in the way it did. Clause 5(j) provides that deductions for overpayment can only occur *after* one week's notice that the deduction will occur. It is apparent that the underpayment commenced in or around the week ending 10 April 2010, some significant time prior to the discussions Mr Abraham claims to have occurred. Whilst I recognise that Rangitikei may have mistakenly overpaid Mr Hoani his holiday entitlement, it was not contractually entitled to make 'deductions' for those overpayments (by way of set-off) from Mr Hoani's pay as a matter of course or without prior discussion with him.

[38] Further, the Wages Protection Act 1983 at s. 4 provides that "*an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction*".

[39] The Employment Court has stated: “*Wages have to be paid in money and not partly in money and partly by discharging a debt which seemed valid to the employer...²*”.

[40] Section 6 of the Wages Protection Act does allow an employee to recover overpayment of wages in one pay period by making a deduction in a subsequent pay period in limited situations. None of those circumstances apply to Rangitikei and Mr Hoani at the time the deductions were made.

[41] I order Rangitikei to pay \$776.00 minus PAYE which is the sum equal to 48.5 hours of work at \$16.00 per hour.

Claim relating to hourly rate

[42] Mr Hoani states that from 25 July 2010 to 16 April 2011 Rangitikei reduced his hourly rate of pay from \$16.00 per hour to \$14.72. Mr Hoani claims that he never agreed to a pay rate of \$14.72 and he seeks payment of \$2,558.08 (gross) as the difference between the rate paid by his employer and the hourly rate he says he should have been paid.

[43] Rangitikei says Mr Hoani’s terms of employment provide that his hourly rate of pay was \$16.00 which included payment of holiday pay which Mr Hoani had agreed.

[44] To determine whether Mr Hoani’s agreed to an hourly rate of pay which included payment of holiday pay, the Authority was required to ascertain what employment agreement(s) Mr Hoani was employed under and when.

Over what periods of time was Mr Hoani employed and what were the terms of his employment?

[45] Mr Hoani says he was employed by Rangitikei pursuant to a permanent employment. He produced a copy of a permanent employment agreement in support of this aspect of his claim. The agreement makes no provision for an hourly rate to include holiday pay. Mr Hoani’s evidence was that although the permanent employment agreement does not contain personalised information such as his name, commencement date or minimum hours, he regards this agreement as containing the

² *Amatal Fishing Co Ltd v Morunga* [2002] 1 ERNZ 692

terms and conditions on which he was employed. The agreement was not signed by him or by anyone on behalf of Rangitikei.

[46] Mr Hoani says that in September 2010 he was given another employment agreement titled “Casual Employment Agreement” and that Rangitikei told him that it was the same as his previous agreement and urged him to sign the document, which he did. He says the new agreement included a back-dated commencement date of 30 November 2009. Mr Hoani does not accept that the terms contained in this agreement, including provisions that his hourly rate included holiday pay, were terms he had agreed to. Mr Hoani was unable to adequately explain why he signed and initialled the agreement.

[47] In contrast, Rangitikei provided a copy of a casual employment agreement, signed and initialled by Mr Hoani and dated 30 November 2009. Mr Abraham says Mr Hoani was employed pursuant to this agreement from 30 November 2009 until 22 September 2010 when Mr Hoani was dismissed, having returned a positive test for cannabis use. Mr Hoani accepts that he returned a positive drug test but says Rangitikei allowed him to stand down from his employment for two weeks and that he returned to work 2-3 weeks later when he produced a negative drug test. He denies that he was dismissed by Rangitikei on 22 September 2010.

[48] Mr Abraham says that after Mr Hoani’s dismissal in September 2010, he was re-employed following a discussion on 7 October 2010 when Mr Hoani approached him and asked if he could have his job back. Mr Abraham said he felt aroha for Mr Hoani’s family who were financially dependent on him, and Mr Abraham decided to give Mr Hoani “another chance”. Mr Abraham says Mr Hoani was given a new casual employment agreement and although Mr Hoani did not sign and return the document he commenced working for Rangitikei again on 11 October 2011. The Authority was provided with a copy of the casual employment agreement which Rangitikei says governed the employment relationship from 11 October 2010. This agreement replicates the terms and conditions of employment contained in the 30 November 2009 agreement with the exception of Mr Hoani’s signature. Each of the casual employment agreements contains the following provisions:

5. Remuneration

- (a) The employer will pay the employee \$x gross per hour for each hour worked by the employee under this agreement. The payment of \$x gross per hour is

inclusive of the employee's annual leave entitlement, that is, the employee receives \$y per hour as wages and \$z gross per hour as annual leave.

6. Annual Leave

- (a) The employee acknowledges and agrees that as a consequence of the employment being casual, the employee's hourly rate includes the employee's entitlement to annual leave.

[49] It is evident from the employment agreement that Mr Hoani's hourly rate of pay was not recorded in the body of the employment agreement however it is not disputed by either of the parties that the agreed hourly rate material to Mr Hoani's claim was \$16.00 per hour.

Determination of terms of employment

[50] Having considered the evidence I do not accept Mr Hoani's view that he was employed pursuant to a permanent employment agreement on 30 November 2009 and that his employment continued in accordance with those terms until his dismissal on 13 April 2011. I am unable to accept that an unsigned template form of a permanent employment agreement without personalised information should be preferred against the dated and executed casual employment agreement of 30 November 2009.

[51] I do not accept Mr Hoani's explanation that in September 2010 he was required to sign a casual employment agreement which recorded his employment as commencing on November 2009. In this respect I consider it more likely that Mr Hoani is referring to the agreement that was given to him in October 2010 when he asked Mr Abraham if he could return to work.

[52] I consider Mr Abraham's evidence is more cogent with regards to the terms of employment Mr Hoani was employed pursuant. I find at all material times Mr Hoani was employed pursuant to a casual employment agreement.

Over which periods in time was Mr Hoani employed?

[53] I do not find Mr Hoani's version of events with regards to an agreed stand down following a positive drug test in mid-September 2010 as credible. The Authority was provided with a copy of letter dated 21 September 2010 given to Mr Hoani by Rangitikei to support Mr Hoani's application to WINZ for a benefit following his dismissal. I do not consider that this type of correspondence would

have been drafted by Rangitikei if Mr Hoani's employment was not about to be concluded on 22 September 2010.

[54] I find that Mr Hoani was employed on two occasions within the period relevant to Mr Hoani's claims. Mr Hoani was employed on 30 November 2009 until 22 September 2010 when he was dismissed. He was re-employed on 11 October 2010 and his employment continued until he concluded his notice period on 20 April 2011.

Determination as to whether Mr Hoani's hourly rate of pay included holiday pay

[55] I have already found that over the time span in which Mr Hoani's claims for recovery of wages he was employed on two separate occasions and on each occasion pursuant to a casual employment agreement.

[56] Both casual employment agreements provided that the hourly rate of pay included holiday pay. Although the first agreement was signed and initialled by Mr Hoani he disputes that he agreed to an hourly rate that was inclusive of holiday pay. The second agreement replicates the first agreement as it relates to remuneration and was given to Mr Hoani when he was re-employed in October 2011 but not signed by him.

[57] Having assessed the evidence I find that Mr Hoani had agreed and/or accepted that his hourly rate of \$16.00 per hour and this rate included payment of holiday pay as evidenced in each of the relevant employment agreements.

[58] However on careful examination of Mr Hoani's payslips relevant to this aspect of Mr Hoani's claim I found that his hourly rate was \$15.90 per hour instead of the agreed \$16.00 per hour³. Rangitikei says the wages were calculated by its accountant. I find that Mr Hoani was underpaid his agreed hourly rate by 10 cents per hour between week ending 31 July until 16 April 2011. Based on the number of hours recorded in his Log Book during that period he is owed \$185.55 (gross) minus PAYE.

Claim relating to payment of notice period.

[59] Mr Hoani further says he is owed \$432.00 (gross) plus holiday pay for 27 hours of work performed during his notice period and this claim was accepted by

³ Review of weekly payslips from weekending 31 July 2010 until 16 April 2011. Calculations made by adding the sum of ordinary wages plus the sum of holiday pay and dividing by hours recorded.

Rangitikei during the Authority's investigation. Rangitikei is ordered to pay this sum \$466.56 (wages and holiday pay) minus PAYE to Mr Hoani.

Remedies for Mr Hoani's unjustified dismissal

[60] In respect of the unjustifiable dismissal claim and in considering the question of remedies, the Authority has to consider the extent to which the employee contributed towards the situation which gave rise to the personal grievance pursuant to s 124 of the Act.

[61] I have found that Mr Hoani was unjustifiably dismissed because of the process undertaken by Rangitikei. However I consider that Mr Hoani overwhelmingly contributed to the situation that led to his dismissal. I have accepted that his failure to provide a response to his employer's inquiries was because he was unable to provide an explanation that would avoid blame attributed to him and have found on the balance of probability that he caused significant damage to Rangitikei's truck, threatened Mr Kingi and took his truck without authorisation. I also find Mr Hoani's refusal to respond to Mr Abraham's inquiries significantly and substantially contributed to the procedural defects in Rangitikei's process. I assess Mr Hoani's contribution to the situation that led to his dismissal as 90%.

Reimbursement for lost wages

[62] Section 128(2) of the Act stipulates that the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months' ordinary time remuneration. However where an employee claims he or she has been unjustifiably dismissed the employee should make attempts to reduce any losses as a result of the dismissal⁴. In practical terms this means an employee should attempt to find alternative employment to mitigate the loss of wages or salary.

[63] Mr Hoani told the Authority that he applied for and has received a Work and Income benefit after his dismissal and was waiting to see if that organisation could find him work. He acknowledges that he has not undertaken any alternative methods to find employment since his dismissal. I find that Mr Hoani's failure to make any

⁴ Argosy Imports Ltd v Lineham [1998] 3 ERNZ 976

effort to mitigate his losses disentitles him from reimbursement of wages and I decline to award reimbursement of lost wages.

Compensation

[64] Mr Hoani gave very limited supporting evidence of the effect his dismissal had on him, although I accept his evidence that he felt humiliated and that it caused him embarrassment within a small rural community.

[65] On the basis of the evidence available I award \$5,000 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000. However this sum is reduced by 90% to \$500.00 to reflect Mr Hoani's significant contribution to the situation that gave rise to his personal grievance.

Costs

[66] Costs are reserved.

Summary of orders

[67] Rangitikei is ordered to pay Mr Hoani the following:

- i.* Compensation of \$500.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act, (without deduction);
- ii.* Recovery of wages totalling \$1,393.55 minus PAYE.

Michele Ryan
Member of the Employment Relations Authority