Employment Court of New Zealand

Jonas v Menefy Trucking Limited [2013] NZEmpC 200 (14 November 2013)

Last Updated: 18 November 2013

IN THE EMPLOYMENT COURT WELLINGTON

[2013] NZEmpC 200

WRC 10/13

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN DARREN JONAS Plaintiff

AND MENEFY TRUCKING LIMITED Defendant

Hearing: 3 and 4 September 2013 (heard at Wellington)

Appearances: Caroline Rieger, counsel for the plaintiff

Ray Parmenter, counsel for the defendant

Judgment: 14 November 2013

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Introduction

[1] The plaintiff, Mr Darren Jonas, is a truck driver by occupation. He had spent approximately twenty years in the industry before taking up employment with the defendant company, a line haul operator, on 14 November 2011. Just over five months later, on 5 April 2012, he was dismissed for alleged serious misconduct. Mr Jonas brought a claim in the Employment Relations Authority (the Authority) based on unjustified dismissal. His main complaint related to his treatment at the disciplinary meeting which resulted in his dismissal. It was alleged by Mr Jonas that the outcome of the disciplinary meeting was predetermined and that he was not

given the opportunity to put forward his explanation of the relevant events.

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[2] The Authority investigated Mr Jonas' claim and on 26 March 2013, it issued a determination1 rejecting the unjustified dismissal complaint. The Authority did, however, uphold certain other claims made by Mr Jonas and, in satisfaction of those claims, ordered the defendant to make the following payments:2

- $704 gross for lost remuneration during the period of suspension;
- $1,000 in compensation under s.123(1)(c)(i); and
- $875.95 net in unlawful deductions from his pay.

[3] In relation to the disciplinary meeting which was run by Mr Bryan Menefy, Director of Menefy Trucking Limited (Menefy Trucking), the Authority found that it had "degenerated into a shouting match" and involved "angry exchanges" but concluded:

[33] The procedure adopted by Menefy was not ideal. Certainly Mr Menefy's behaviour at the investigation meeting was unreasonable and was unlikely to enable him to properly assess the allegations against Mr Jonas. However, on the evidence,

particularly that of Mr Jonas' own representative, there was sufficient investigation of the allegations, and Mr Jonas clearly knew what was being investigated and had a reasonable opportunity to respond.

[4] Mr Jonas challenged the whole of the Authority's determination by way of a de novo hearing in this Court.

[5] The association between Mr Jonas and Mr Menefy goes back many years. Initially both men drove petrol tankers working for two different owner-drivers contracted to Mobil Oil New Zealand (Mobil). They developed a friendship and continued to keep in contact long after they finished driving Mobil tankers and went their own way. Mr Menefy began his own business as an owner-driver 17 years ago. He later sold that business and established the defendant company. Mr Jonas spent approximately 14 years driving Mobil tankers. He then drove logging trucks for a period and more recently worked as a driver for Monex Holdings Limited (Monex). Mr Jonas was employed by the defendant under an individual employment agreement dated 14 November 2011. Mr Menefy told the Court that the friendship between the two men would still be carrying on had it not been for facts giving rise

to the present case.

1 [2013] NZERA Wellington 38.

2 At [36].

[6] Menefy Trucking is based in Palmerston North. Mr Jonas had his home in Lower Hutt but he told the Court that he virtually lived in his truck from Mondays through to Saturdays. If he had a load to deliver through Wellington, he would take the truck to Lower Hutt overnight. Mr Menefy had arranged a park for the truck at Barnes Street. The Global Positioning System (GPS) records produced to the Court showed the dates on which the vehicle was parked overnight at Barnes Street as well as the dates when it was parked at Mr Jonas' home address in Hikurangi Street. The vehicle was described as a "comfortable" FM Volvo, 45 tonne unit.

The incident

[7] During the period Mr Jonas worked as a driver for Monex, one of the customers he was required to make deliveries to each week was Pacific Wallcoverings Limited (Pacific). He delivered chemicals to the company's premises at Porirua, just north of Wellington. No details were provided in evidence but it appears that in early 2012, Pacific became a customer of Menefy Trucking and Mr Jonas recommenced making deliveries to the Porirua premises. The incident in question occurred on Thursday, 22 March 2012. It was the second delivery Mr Jonas made to Pacific while working for Menefy Trucking.

[8] Photographs were produced in evidence showing the driveway access to Pacific. The driveway, which appears to be approximately 100 metres in length, is relatively level where it comes in off the road but then it steepens considerably over the last 50 metres or so before it runs into Pacific's yard. At the top of the driveway, at the point where it enters the Pacific yard, there is a tall cyclone wire netting security fence. The entrance gate is held up by gate-posts made of galvanised piping.

[9] The evidence was that on the occasion in question, Mr Jonas successfully entered Pacific's yard and made his delivery but while he was exiting the premises the end of his trailer unit struck the gate and virtually broke off the 75 millimetre galvanised gate-post. According to an email Mr Menefy later received from Pacific, the gate itself suffered little damage but the galvanised post had to be replaced. That was the incident resulting in Mr Jonas' dismissal.

[10] Prior to the incident Mr Jonas appears to have had concerns about congestion in Pacific's yard. The Court was not informed about the type of truck he drove while working for Monex but in evidence, which was unchallenged, Mr Jonas said that when he was making the deliveries for Menefy, he became concerned because, "the site was very tight for me to get into the property." He said that he "had repeatedly" told Mr Menefy, the company dispatcher, Mr Steven Thompson, and Pacific "about the tightness of the site access".

[11] Mr Jonas said that on the day of the incident he had asked for some containers and cars to be moved. He said that he had rung Mr Thompson, the dispatcher, and complained about the difficulties in getting out of the premises and Mr Thompson had suggested that he get the vehicles moved. In cross-examination, Mr Jonas explained that there was no reception area at Pacific and so he went and saw people on the factory floor and asked them to move the cars. The cars were moved but the containers remained in place.

[12] Mr Jonas did not report the incident to Pacific. In his words:

37. I hit the gate off its hinges and rang Steve to let him know what had happened. I said, "I've hit the gate and taken it off the hinges". Steve asked if I had stopped. I said, "No", and he asked, "Why not?" I explained because I was time pushed and I had just got onto the motorway. Steve asked if I could go back. I said no because I was time pushed. He said he would ring me back with my next job.

[13] Mr Thompson did not give evidence but a note which he made of Mr Jonas'

initial report of the incident was submitted by consent. It read:

I had a phone call from Darren. He told me that he hit the gate on the way out of the customers. I asked was he alright, yes Darren said.

I then asked about the damage. I've bent a pole and taken the gate off [its] hinges. I asked how he did that. Darren said he went inside to ask the staff to move their cars, four cars were moved. Darren said after hitting the gate/pole that they should have moved more cars.

I told Darren if he [needed] the extra cars moved he should have stopped and gone back in to the [reception] and asked. I asked what he did next. Darren said he drove off, the gate was near the fence. I asked him if he reported the damage to the customer, 'no' was the reply. I asked where he was and Darren replied on the motorway.

I said that he should have told the customer about the damage for safety reasons and that it also looks bad for Menefy's company. He replied 'oh yeah' what's my next job.

Steve

Menefy Dispatcher

The letter of 29 March 2012

[14] Mr Jonas told the Court that Mr Menefy called him later that same day,

22 March 2012, and asked him what had happened. He said that Mr Menefy "seemed fine about it". Mr Jonas said, "I told him I felt bad about the incident and he said, 'Good, means you learn (sic) from it.' This was a common thing for him to say."

[15] The next development was that Mr Jonas received a letter from Mr Menefy dated 29 March 2012 requiring him to attend a disciplinary meeting on Monday,

2 April 2012. The letter read:

Dear Darren

I require you to attend a meeting with me on Monday 2 April 2012 at 8am so that I can hear, and consider, your explanation for the incident that occurred on 22 March 2012, when you drove over a customer's gate and gate-post when exiting their site. I am concerned that this is your third significant event of damage when driving one of our trucks.

Prior to the event you advised me over the telephone that you would have trouble exiting the site due to the restricted access way. However you did manage to enter without any problem, through the same gate. I advised you to arrange for the exit to be cleared during the hour that it took to discharge your truck, something that you failed to do. The site supervisor was within speaking distance of you at that time. After discharging the load you then drove out of the site flattening the gate and the gate-post. You did not stop after this and instead continued driving and you did not report the damage to the customer.

Approximately 15 minutes later you spoke with Steve (our dispatcher). You informed Steve that you knew what you had done at the time. Steve said that you had a careless attitude. Steve has provided me with written description of the conversation. I have attached a copy of Steve's description for your reference.

I am also concerned that you did not stop and check the condition of the truck and whether it was safe to operate on the road.

This is an event that concerns me considerably, you have been reckless, careless and it would seem, have acted deliberately. The allegations that I put to you are:

- You have demonstrated a negligent approach to your driving.
- You have demonstrated a serious breach of your obligations as an employee to operate a truck safely.
- Your actions and conduct have potentially brought Menefy Trucking

Ltd into disrepute.

- Your actions appear to be deliberate and have caused significant

damage to a customer's property and to our truck.

I consider that these matters might constitute serious misconduct and, should they be established, destroy the trust and confidence I have in you to safely drive our truck, and to act in the best interests of Menefy Trucking. If, after hearing and considering your explanation, I determine that these matters do constitute serious misconduct then you might be subject to disciplinary action, up to and including summary dismissal.

You are welcome to bring a representative with you to this meeting, should the date and time of this meeting not suit you, please let me know as soon as possible so that we can arrange an alternate time.

Yours sincerely

Bryan Menefy

Menefy Trucking Ltd

[16] Mr Jonas retained Mr Joseph Richardson as his representative in relation to the dispute. Mr Richardson is an experienced industrial relations consultant and bargaining agent who represents clients in employment matters as an employment advocate. He told the Court that he has over 30 years' experience in employment matters. Mr Richardson was unable to attend the meeting called for 2 April 2012 and so it was rescheduled for 3 April 2012. He attended with Mr Jonas. Menefy Trucking was represented by Mr Menefy and Mr Thompson, the dispatcher.

The disciplinary meeting

[17] Mr Jonas said in evidence that he was met with aggression at the disciplinary meeting and his side of the story was not being heard. He claimed that Mr Menefy was trying to provoke him and he did not feel that he had a fair opportunity to explain his side of the story. He told how Mr Richardson called a halt to the meeting "when things got heated". For his part, Mr Menefy did not specifically deny Mr Jonas' allegation that he had not been given a fair opportunity to explain his side of the case but he claimed that Mr Jonas was the aggressor and that he (Mr Menefy) had responded accordingly because he "insisted on respect".

[18] Mr Richardson told the Court that he was concerned when he arrived and found that the meeting was to be held in the smoko room which was accessible to other people. He said that when he raised this matter at the start of the meeting, Mr Menefy "immediately became defensive and aggressive about this point". Mr Richardson said, "the meeting rapidly deteriorated by Mr Menefy being aggressive towards Mr Jonas, which Mr Jonas responded to in kind. Both parties were communicating with each other in raised voices in a non-conducive way." Tempers flared to such a point that Mr Richardson called the meeting to a halt in

order to talk with Mr Menefy outside.3 In his notes of the meeting, Mr Thompson

recorded: "11:47 - 12:07 MEETING STOPPED HEATED... BOTH SIDES."

[19] Mr Richardson said that when the meeting resumed, "Mr Menefy continued to bait Mr Jonas in a way to invoke aggression." In evidence, Mr Menefy denied that, at the time of the meeting, he wanted to get rid of Mr Jonas. He explained that he was being advised throughout by a human resources adviser and that "the risks of pre-determination" had been soundly explained to him.

[20] Mr Richardson further told the Court (in evidence which I accept) that at the end of the meeting Mr Menefy made it clear that he did not want Mr Jonas driving until he had made his enquiries but he said that he could come to work and sweep the yard. Mr Richardson responded that Mr Jonas had already been illegally suspended prior to the disciplinary meeting and it was an "unreasonable expectation" to expect him to come in and sweep the yard.

[21] Mr Menefy said that at the end of the disciplinary meeting he had reached the view that Mr Jonas "deserved to be dismissed and such was my intention", however, his employment adviser suggested that he should give Mr Jonas and his advocate "one last chance to have input." Mr Menefy contacted Mr Richardson on

4 April 2012 by both telephone and email suggesting a further meeting. Mr Richardson said in evidence that in the course of the telephone conversation he

had explained to Mr Menefy that he saw little point in attending a further meeting,

3 What was said between Mr Richardson and Mr Menefy outside the meeting room, and whether such alleged remarks were made on a 'without prejudice' basis, was the subject of dispute between the parties. Given that I do not find these alleged statements to be decisive of the plaintiff's claim, I do not intend to make any finding as to admissibility.

"when it was quite apparent that Mr Menefy had already made his decision in regards to Mr Jonas' future employment with his company." He added:

19. I also did not believe that a further discussion would be beneficial considering the initial discussion was less than constructive and was administered by the employer in an aggressive and inflammatory manner.

[22] No further meeting took place. Mr Menefy terminated Mr Jonas'

employment by email on 5 April 2012.

The disciplinary process

[23] Unfortunately, I did not find either Mr Menefy or Mr Jonas particularly impressive witnesses. It was easy to see how, in colloquial terms, they would have rubbed each other up the wrong way. Their evidence at times was frustratingly confusing and disjointed. On the other hand, I found Mr Richardson to be an impressive and credible witness. I accept his account of the disciplinary meeting and I accept his version of events wherever it conflicts with the evidence given by Mr Menefy. As noted above, the defendant's dispatcher, Mr Thompson, did not give evidence and so the Court was not able to reach any views about his credibility. Mr Thompson, however, did make some rough notes of the disciplinary meeting which were produced by consent although, unfortunately, not all of his handwriting could be deciphered.

[24] What was apparent from Mr Thompson's notes, however, was that early in the meeting Mr Menefy confronted Mr Jonas about certain other incidents which were canvassed in evidence. One of the accusations made was that Mr Jonas had been parking the truck at his home overnight on occasion without permission. Mr Jonas denied that he had ever been told that he could not take the vehicle home. As Mr Richardson explained in evidence, which I accept:

... the accusations were coming. Darren was trying to answer back and it was coming over the top of him and Darren had said to him well hang on the pipe for instance, he lost the pipe, Mr Menefy went into great detail that Darren lost the pipe at such and such an area and never found out until he got to the South Island or something and Darren was trying to explain what had happened and Mr Menefy wouldn't let him explain. He was over the top of him. And this is how it went on.

[25] Mr Richardson was asked by the Court about the explanation Mr Jonas had given in relation to the gate incident. He replied:

But every time he would give an explanation i.e. look hang on he would get so far with it and he iterated what had happened ... with the gate and halfway through it Mr Menefy was straight on to him and I would say to Mr Menefy let him explain and they were both getting angry with each other to the point that you just couldn't really keep up with the meeting. As I said to Mr Jonas Mr Menefy has the right to manage his business, he has the right to ask you the questions, listen to them and then answer. So we had a little lull, Mr Menefy said - Mr Jonas tries to get in and give him his explanation, Mr Menefy was over the top of him, accused him of something else, oh you should know better or you should do this. Reprimanding him in an angry tone. And I am saying to the two of them you have both got to stop this argument. You have got to explain - the employer has the right to manage his business, he has the right to ask you the question, you have got to say your version.

The law

[26] The defendant is required to establish justification for Mr Jonas' dismissal. The test for determining justification is that prescribed in ss 103A(1) and (2) of the Employment Relations Act 2000 (the Act). The Court is required to consider, on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Section 103A(3) sets out certain non-exhaustive factors which the Court must consider in applying the test of justification. Of particular relevance are factors (c) and (d) which provide:

103A Test of justification

...

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[27] Subsection (5) then provides that the Court:

(5) ... must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

(a) minor; and

(b) did not result in the employee being treated unfairly.

Discussion

[28] I am satisfied that the evidence established non-compliance by the defendant with both subss (3)(c) and (d). I also find that the defendant's defects in process were not minor and that they resulted in the plaintiff being treated unfairly, thus precluding the operation of subs (5). Although an employer conducting a disciplinary meeting cannot be expected to act with the same degree of detachment as a judicial officer, s 103A(3) nevertheless sets out minimum requirements for determining justification in respect of dismissals and disadvantage grievances which must be observed.

[29] I accept, as Mr Richardson explained it, that from the outset the disciplinary meeting degenerated into a shouting match with Mr Jonas vociferously endeavouring to defend himself against unfair allegations being put to him by Mr Menefy, such as taking the truck home without permission. That complaint was completely unrelated to the gate incident. The meeting then went from bad to worse with both men shouting at each other in anger. To his credit, Mr Menefy did not try to play down the seriousness of the situation. He likened the atmosphere to "World War III", stating to the Court: "It wasn't a nice place to be. Whether I'm supposed to say that to you or not but it wasn't a nice place to be that day for probably the pair of us." That is not the type of disciplinary meeting envisaged by subss (c) and (d) of s 103A(3) of the Act.

[30] One of the reasons why I do not find the defects minor is because it was clear from Mr Menefy's evidence that, for some reason or other, he had reached the conclusion prior to the disciplinary meeting that Mr Jonas' actions had been deliberate. In other words, he was firmly of the view that Mr Jonas had deliberately driven his truck in such a way that it collided with the gate or the gate-post. If that allegation had been substantiated then there could be no question that Mr Jonas would have been guilty of serious misconduct but the claim was not supported by the evidence, and nor was Mr Jonas given proper opportunity to respond to it.

[31] In his examination-in-chief, Mr Menefy said:

17. ... the incident seemed to be explicable only by Darren's getting angry with Steve or me and smashing up a customer's gates in revenge. I just couldn't see (and still can't see) how it could have been an accident but that was for Darren to explain.

[32] In this context, Mr Menefy referred to a report he had received from the customer about the damage to the gate-post. The report (an email) dated

3 April 2012 was produced in evidence but it contained nothing to support the theory that Mr Jonas' actions had been deliberate. The customer described the matter as an "incident".

[33] The point was then followed up by the Court at the end of Mr Menefy's

evidence. The following exchange is recorded:

Q. At the top of page 5 you were asked about this by Ms Rieger you say the gate incident seemed explicable only by Darren getting angry with Steve or you and smashing up the gate in revenge. Why do you think that? Why would he be so angry with you as to want to do that?

A. Well I suppose that anger that I suppose any person has inside them which was obvious again on the disciplinary meeting anyway so um -

Q. He was angry with you?

A. When? The gate incident you mean? I don't know how to answer that. Why would he be? It wasn't Steve or my fault. The guy made a stuff up if you like.

Q. You're saying that you thought he smashed up the gate in revenge and I'm just wondering revenge for what? What had you done wrong to upset him?

A. Gave him a job. I don't know.

[34] Mr Menefy did not resile at any point from his claim that Mr Jonas' actions had been deliberate but I did not find his explanation for this theory at all convincing and, as noted above, it was not supported by the evidence.

[35] For these reasons, I accept that the plaintiff has established his claim of unjustified dismissal.

Quantum

[36] Mr Jonas has claimed loss of wages under s 123(1)(b) of the Act in the sum of $7,200. He told the Court that following his dismissal he was out of work for four weeks and then he commenced a new job at a reduced rate of pay. His wage with the defendant had been $22 per hour ordinary time and $24 per hour overtime. He

regularly worked approximately 20 hours overtime per week. His new wage for both ordinary time and overtime was $19 per hour. There was no challenge to the figures presented by Mr Jonas in evidence. He seeks $5,440 in respect of the four-week period he was out of work and an additional $1,760 representing his reduced income "capped at 8 weeks".

[37] Under s 128(2) of the Act the Court is required to award the lesser of a sum equal to the employee's lost remuneration or three months' ordinary time remuneration. I am satisfied that the claim put forward has been established on the evidence and I therefore award lost remuneration in the sum of $7,200.

[38] Mr Jonas seeks $10,000 pursuant to s 123(1)(c)(i) of the Act for hurt and humiliation. He told the Court that he had been in the industry for 20 years and had never had problems before. He said that he could not understand "how a genuine accident

has led to me losing my job." There was evidence about the embarrassment and stress Mr Jonas had suffered through his inability to pay his mortgage for a period, and the hurt and humiliation that resulted from his dismissal. His claim under this head was not challenged. I award compensation for hurt and humiliation in the sum of $8,500.

Contribution

[39] Section 124 of the Act requires the Court, where it determines that an employee has a personal grievance, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded. Mr Parmenter, counsel for the defendant, submitted that the plaintiff's conduct was an "overarching contributory factor".

[40] I agree. Mr Jonas' conduct in driving away from the scene and not going back to report the accident to the customer was irresponsible and inexplicable. Mr Jonas did not try and excuse his conduct. He freely accepted in his evidence that he should have stopped the vehicle and returned to report the incident to someone at Pacific. He said that he regretted not having done so. It was his failure to take this

step that upset the customer. In the email to Mr Menefy referred to at [32] above, the customer stated in part:

...

Bryan, I must say that I can understand that things go wrong and people make mistakes, I have staff! What I find unacceptable in this situation is that the driver took no responsibility in his action by not coming back and reporting the incident. ...

[41] Having regard to all the relevant circumstances, I am of the view that

Mr Jonas' contribution in terms of s 124 of the Act can properly be assessed at

60 per cent. The amounts awarded under [37] and [38] above are to be reduced accordingly.

Other claims

[42] Mr Jonas has made additional claims for lost remuneration during a period of unjustified suspension, unpaid wages during Cook Strait ferry crossings, non-payment of final pay and unauthorised deductions from wages. I will need to deal with each claim in turn.

Suspension

[43] The basis of this claim was explained by Mr Richardson in [20] above. Mr Jonas told the Court that both in the lead up to the disciplinary meeting and after the meeting, Mr Menefy had made it clear to him that he was not to work as a driver until he (Mr Menefy) had made a decision. Mr Jonas claimed that this action effectively amounted to a suspension and that the defendant had no power to suspend under his employment agreement. In his statement of claim the plaintiff seeks a compensatory sum of $1,500 for "the illegal suspension".

[44] The evidence relating to this claim was not as clear as it might have been. The Authority accepted that Mr Jonas had established a disadvantage claim based on the unlawful suspension and it awarded him lost remuneration of 32 hours pay, namely $704 gross and $1,000 in compensation under s 123(1)(c)(i). In this Court, no claim is made for loss of wages under this head, which is consistent with a submission made by Mr Parmenter that as soon as he realised during the Authority investigation meeting that no payment had been made, he gave an undertaking to the

Authority that Mr Jonas would be paid immediately in respect of the period of suspension.

[45] I have made some allowance for this claim in the compensation award detailed in [38] above. I do not propose to make any separate award.

Cook Strait ferry crossings

[46] This claim seemed to occupy a disproportionate amount of the hearing time. A witness was called solely on the issue. The evidence established that during the period of Mr Jonas' employment he was required to make six return crossings on the vehicular ferry between Wellington and Picton. Mr Jonas was not paid for his time on the ferries. The defendant claimed that "sitting on the ferry is not work time and is a rest break." There was no dispute that each crossing took approximately three hours. The claim is for a total of $792 made up of 12 crossings (36 hours) at $22 per hour.

[47] In support of their respective arguments, counsel produced complete copies of the "General Conditions of Carriage for The Interisland Line and Tranz Metro Passenger Services of Tranz Rail Limited" and the Ministry of Transport's "Land Transport Rule Work Time and Logbooks 2007". I did not find either document particularly helpful or relevant to the issues I have to decide.

[48] There was no dispute that Mr Jonas was required to accompany his truck on all ferry crossings. His employment agreement contained no specific provision dealing with the situation but the defendant relies upon cl 9.0 which provides:

9.0 MEAL & REST INTERVALS:

Drivers are only permitted meal and rest intervals which are: (i) Required to comply with traffic regulations; or

(ii) At the request of the Employer; or

(iii) Needed to ensure health and safety, and the Employer has been advised. These meal and rest intervals are unpaid.

[49] The defendant also relies on cl 8.6 of the employment agreement ("Places and Hours of Work") which provides:

8.6 The Employee accepts that they may frequently be required to stay away from home. Off duty time while staying away shall be unpaid.

[50] With respect, I do not accept that either provision in the employment agreement can be relied upon by the defendant to support its contention that Mr Jonas was not entitled to be paid for time spent on ferry crossings. I am satisfied that he was required to accompany his vehicle on the ferry and, as such, at all material times he was performing his regular duties. I award the full amount claimed under this head.

Non-payment of final pay

[51] The claim under this head is set out in a paragraph of the statement of claim. It reads:

5.20 Following the termination of employment the final pay was not received by the Plaintiff until 13 July 2012;

[52] In final submissions, Ms Rieger, counsel for the plaintiff, explained the claim as follows:

36. MTL did not pay Mr Jonas his final pay until 9 July 2012, some three months following his dismissal. This payment was made only once Mr Jonas filed his Statement of Problem in the Employment Relations Authority. This is in breach of the [Wages] Protection Act 1983. It is also in breach of clause 10.0 of Mr Jonas' IEA which required payment [within] seven days of cessation of employment.

[53] It is not at all clear from the statement of claim what the plaintiff seeks by way of relief under this head. The Authority made no award and Mr Parmenter submitted that if a penalty was claimed it should have been mentioned in the pleadings or referred to in Ms Rieger's opening submissions. I agree. It is not up to the Court to speculate on such issues. No award is made in respect of this claim.

Unauthorised deduction from wages

[54] Although $1,680.95 is the amount claimed in the statement of claim under this head Mr Parmenter confirmed that the defendant did not dispute a wrongful deduction of $100 made in respect of improper use of the truck, and he told the Court in his closing submissions that this has subsequently been paid. The remaining two deductions which form the basis of the claim comprise:

1. Replacement of lost security keys: $775.95

2. Repair costs for the damage to the gate: $805.

[55] The defendant admits making the deductions but claims that they were made lawfully in terms of cl 10.4 of the employment agreement which provides:

10.4 It is agreed by the Employee that the Employer may make deductions from the salary of the Employee for:

- Traffic fines imposed against vehicles under the responsibility of the Employee;
- Damage to vehicles or other property caused by the Employee's

negligence;

- Other items which the Employee agrees that the Employer

should pay and then have deducted from the Employee's wages;

- The value of non-returned tools, equipment, clothing or other property of the Employer (at a fair value to be determined by the Employer) upon determination of employment.
- Any cell phone calls over and above the $50.00 limit referred to

in appendix “A” to this contract.

[56] The Authority concluded:

[25] ... Menefy is also not entitled to deduct $775.95 for the keys as Mr Jonas did not fail to return them. Menefy was entitled, however, to deduct $805 for the repairs to the gate, because Mr Jonas did agree that he was negligent in causing that damage and has never disputed the cost of the repairs.

[57] The relevant provisions of the Wages Protection Act 1983 provide:

4 No deductions from wages except in accordance with Act

Subject to sections 5(1) and 6(2) an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

5 Deductions with worker’s consent

(1) An employer may, for any lawful purpose,– (a) with the written consent of a worker; or (b) on the written request of a worker–

make deductions from wages payable to that worker.

...

[58] There was a dispute in the evidence about whether Mr Jonas’ security yard key had been returned. He claimed that it was returned in a package with his cell phone. Mr Menefy, on the other hand, maintained that the security key had never been returned to the company. The invoice from Chubb New Zealand Ltd for the amount claimed of $775.95 describes the work carried out as “Rekey existing JC118 security system & supply 26 keys.” The general repair details are described in the Chubb invoice as: “20.6.12 Rekeyed 11 security keyed locks Supplied 7X new MKB keys and 19X new S keys.”

[59] On the evidence, I have reached a similar view to that of the Authority Member. I am not satisfied that Mr Jonas failed to return his security key. In any event, quite apart from the fact that there had been no consultation about the invoice (a matter which I deal with below), I would take some persuading that Mr Jonas could be held responsible for the costs of all the work detailed in the Chubb invoice.

[60] Turning to the gate repair costs, Mr Jonas did not seek to deny that the damage had been caused through his negligence and he acknowledged that cl 10.4 of his employment agreement allowed his employer to make deductions from his salary for damage that he had caused. He contended, however, that the amount of the deduction should have first been discussed with him. Elaborating on this point, Ms Rieger submitted:

40. A general deductions clause in a contract does not provide free reign to an employer to make deductions. The duty of good faith under section 4 of the Employment Relations Act 2000 still applies and consultation as to the amounts of deductions should occur. If an employer becomes entitled to make deductions without consultation this enables the clause to become a tool of oppression.

[61] Mr Parmenter took exception to this submission and highlighted the fact that the third bullet point in para 10.4 of the employment agreement (see [55] above) contains specific requirements for consultation in respect of “other items” but there was no such requirement in respect of deductions for damage to property caused by the employee’s negligence.

[62] I agree with Ms Rieger on this issue. The provisions of the Wages Protection Act 1983 are mandatory. Under those provisions, an employer must pay the entire amount of wages payable to a worker without deduction unless the worker otherwise

consents or, in certain circumstances, where there has been an overpayment. In cases such as the present, however, where a general deductions clause in an employment agreement is relied upon rather than an individualised written consent then, consistently with its good faith obligations under the Act, an employer must, at a minimum, consult with the worker before making any deduction. Without such a safeguard, the protection intended to be afforded by the Wages Protection Act 1983 would be illusory. It may also be that no deduction can be made on the basis of a general clause without that worker’s express consent, although this was not submitted by the plaintiff and, therefore, does not fall to be decided. I uphold Mr Jonas’ claim for a refund of the improper deduction. In his statement of claim Mr Jonas also seeks “a compensatory sum for the breaches of the [Wages] Protection Act of $5,000.00” but the remedy for any such breach of that Act is a penalty rather than compensation.

Conclusions

[63] For the reasons explained, the plaintiff has succeeded in establishing his claim of unjustified dismissal. He is awarded loss of wages in the sum of $7,200 and compensation for hurt and humiliation in the sum of $8,500. Both awards are reduced

by 60 per cent on account of the plaintiff's contribution.

[64] Under his other heads of claim, the plaintiff is awarded $792 on account of wages in respect of the Cook Strait ferry crossings and $1,580.95 for unauthorised deductions from wages.

[65] The plaintiff is entitled to costs. If the parties cannot agree on this issue then Ms Rieger is to file submissions within 21 days and Mr Parmenter will have a like period of time in which to file submissions in response.

A D Ford

Judge

Judgment signed at 12.50 pm on 14 November 2013
