

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 525
3187919

BETWEEN	ABDUL FAREED KHAN Applicant
AND	HAZARA AUTO RECYCLERS LIMITED Respondent

Member of Authority:	Geoff O’Sullivan
Representatives:	Nicole Donaldson, counsel for the Applicant Glenn Jones, counsel for the Respondent
Investigation Meeting:	3 May 2023 at Wellington
Submissions Received:	12 May 2023 from the Applicant 19 May 2023 from the Respondent
Date of Determination:	14 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Abdul Fareed Khan claims he was unjustifiably disadvantaged in his employment and unjustifiably dismissed. He says he commenced full time employment with Hazara Auto Recyclers Limited (Hazara) as Business Operations Manager in September 2018. There was an employment agreement which he signed on 10 August 2019, and a further agreement which was signed on 20 September 2019. Mr Khan relied on a third agreement which was essentially the second agreement with some handwritten additions.

[2] Mr Khan says he was involved in a traffic accident in January 2021 and was advised by his doctor to stop work and go on to ACC. However, Mr Khan said he was pressured to

work but on 19 February 2021 provided a medical certificate stating he was unable to work from 19 February through to 4 March 2021. He says he was told he could take as much time off to recover as he wished, and his job would be waiting for him when he was ready to return.

[3] Mr Khan later forwarded Hazara a further medical certificate confirming he was unable to return to work prior to 25 May 2021. He says on 23 May, he received an email from Hazara stating that he had not attended work since 22 April 2021, and that Hazara had been advised by ACC that his medical certificate had expired on 13 April 2021, and that the employment agreement enabled Hazara to dismiss him as he had not attended work for three days.

[4] Mr Khan says his dismissal under these circumstances was unjustified. Further, he says it had been agreed between himself and Hazara that in February 2020 his hourly rate would increase to \$32 an hour, and this had not occurred.

[5] Hazara says that Mr Khan was not subjected to any unjustified disadvantage and although initially claiming the dismissal was justified, conceded during the investigation meeting that the dismissal was unjustified. However, it disputes the wages or other moneys claimed by Mr Khan because of the grievance. It accepts Mr Khan should receive compensation for hurt and humiliation and injury to feelings but at a sum of no more than \$10,000.

Issues

[6] The following are the issues for investigation and determination:

- (a) What hourly rate was provided for in the employment agreement between the parties?
- (b) What wage loss did Mr Khan suffer as a result of his dismissal?
- (c) As Hazara has conceded the dismissal was unjustified, what is the appropriate level of compensation for hurt, humiliation and injury to feelings?

The Authority's investigation

[7] As permitted by s 174E 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 orders made. It has not recorded all evidence and submissions received.

[8] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4), the Chief of the Authority has decided that exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[9] Essentially, the facts giving rise to the claim of unjustified dismissal are not in dispute. Mr Khan had been involved in a car accident in January 2021 which caused serious concussion and vertebrae issues. He gave his employer a medical certificate which stated he would be unfit to work from 19 February 2021 through to 4 March 2021. He continued to be monitored by his GP, and he gave his employer medical certificates which confirmed his unfitness to return to work.

[10] Oddly, he received emails from Hazara, including on 11 April 2021 when he received a letter attached to the email, signed and dated the day after, 12 April 2021. The letter purported to be a second warning regarding his absence from work. It referred to a disciplinary interview that was purported to be held a further day later on 13 April 2021. Finally, on 23 May 2021, Mr Khan received an email from Hazara stating that in reliance on the employment agreement, Hazara was dismissing him because he had not attended work for three days in a row. The email went on to say that the company did not wish to dismiss him under that clause, but wanted to have a face-to-face meeting to “*discuss completion of your employment agreement with us and ensure that you have funds to continue on until you are able to find a new job*”.

[11] On 25 May 2021, Mr Khan met with Hazara and was told that he was being dismissed in reliance on clause 14.2 of his employment agreement. He was made to leave the premises and was not given an opportunity to clear his desk of any personal items.

[12] Dismissal this way would always be difficult to justify. Because Hazara correctly concedes the dismissal was unjustified, I do not need to explain fully why Mr Khan could never have been held to abandon his employment under such circumstances and why the grounds relied on could not constitute serious misconduct entitling an employer to dismiss. Suffice it to say the reasons Hazara relied on for dismissal do not satisfy the requirements of s 103A of the Act and are not the actions of a fair and reasonable employer.

[13] As noted above, during the investigation, Hazara properly accepted that Mr Khan's dismissal was unjustified. As a result the submissions and evidence it gave, focused on remedies, namely:

- (i) The contractual provisions relating to Mr Khan's hourly rate and pay; and
- (ii) The level of compensation Mr Khan should be paid under s 123(1)(c)(i) of the Act.

Remedies

[14] Mr Khan says that he was to be paid a bonus of \$1,000 for every \$10,000 of parts he sold, and he claims he was not paid this. Further, he says that it was agreed between the parties that in February 2020 his hourly rate would increase to \$32 an hour and he says this did not happen. Mr Khan also claims that it was agreed he would receive a further \$250 per vehicle and after the first year, this was to increase to \$350 per vehicle. He estimates he sold between 250 to 280 cars and accordingly claims he is owed in the vicinity of some \$40,000.

[15] He says that coupled with the \$1,000 bonus due for each \$10,000 of parts sold means he is owed approximately \$100,000.

The provisions of the employment agreement

[16] As noted earlier in this determination, there are different versions of the employment agreement.

[17] Mohammad Amin Vakali is a General Manager for Hazara. He gave clear evidence in respect of the preparation and signing of employment agreements. He says he negotiated Mr Khan's terms when he commenced employment on 5 September 2018. He prepared the individual employment agreement and gave it to Mr Khan to look at.

[18] This is the agreement Mr Khan signed on 4 September 2018. Mr Khan took issue with the trial period and the parties agreed it would be taken out. There were changes also to the hours of work. The changes were initialled by both parties and although Mr Vakali signed on behalf of the company, the company was incorrectly shown as Taha Auto Recyclers Limited. The Authority was told this was an error and that the employer at all times was Hazara Auto Recyclers Limited. Mr Khan accepted this.

[19] In this first agreement the agreed wages were \$24 per hour. There was no provision for anything extra such as commission. There was an agreement that the agreement would be reviewed after 12 months. Indeed, it seems this is the origin of the employment agreement signed by Mr Khan on 20 September 2019 and indeed signed by Mr Vakali. This agreement showed \$28 per hour as remuneration and the wage records confirm that indeed Mr Khan's hourly rate increased.

[20] However, the agreement Mr Khan says was the agreement between the parties is a photocopy of the document he signed on 20 September 2019. This is obvious, because the original was signed by both sides in blue ink and does not contain the alterations, including an increase to \$32 per hour and bonus payments. The alterations in the photocopied agreement are signed only by Mr Khan. The amendments are original and not photocopied. It is clear they were added after the agreement was signed.

[21] Mr Vakali says he has not seen this further document and was only aware of the one he signed on 20 September 2019 in blue ink. He says he never discussed or agreed to any of these alterations with Mr Khan. He confirmed on oath he had never seen a copy of the amendments before his lawyer showed them to him in the days leading up to the investigation meeting.

[22] The matter was canvassed extensively at the investigation meeting. Mr Khan reluctantly agreed that Mr Vakali's evidence was likely correct, namely the original had been sent to him and he did not agree with it so added his changes, which he may not have sent back.

The wage loss

[23] The rate that Hazara agreed to pay Mr Khan was \$28 an hour. Having reviewed the evidence, there was no agreement to pay \$32 an hour and there was no agreement to pay \$350 per car sold or \$1,000 for every \$10,000 of parts sold. There was no agreement for a performance bonus and there was no agreement that a further \$12,000 was owed for previous sales. These provisions were added to the photocopied agreement by Mr Khan and were not agreed to by Hazara. Indeed, I accept Mr Vakali's evidence that these changes were never seen by the company.

[24] The employment agreement signed on 20 September 2019 by both parties, provided for four weeks' notice of termination of employment. Mr Khan therefore has a contractual right

to be paid for that notice period. Mr Khan clearly expected to work at least 40 hours a week in a normal week.

[25] I accept that awarding wage losses can raise the spectre of a duplication of payments for lost wages as Mr Khan was receiving ACC compensation payments. However, as the Court has noted, the liability to pay a contractual entitlement to wages falls on Hazara. The question of any repayment in respect of ACC payments also received by Mr Khan falls on the Corporation and Mr Khan to deal with.¹

Compensation for humiliation, loss of dignity and injury to feelings

[26] Mr Khan did not put a figure on this claim in his Statement of Problem. He did however give evidence as to the effect his dismissal had on him and that Lower Hutt was a small community. He says he was upset and at times unwell. He felt betrayed. I consider a sum of \$17,000 appropriate compensation.

Conclusion and orders

[27] Hazara Auto Recyclers Limited is ordered to make the following payments to Mr Khan within 28 days:

- (a) Four weeks wages in lieu of notice to be paid at a rate of \$28 per hour for a 40-hour week.
- (b) A sum of \$17,000 pursuant to s 123(1)(c)(i) of the Act.

Costs

[28] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[29] If they are not able to do so and an Authority determination of costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

¹ *Judea Tavern Limited v Patricia Jesson* [2017] NZEmpC 82.

[30] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Geoff O'Sullivan
Member of the Employment Relations Authority

² See www.era.govt.nz/determinations/awarding-costs-remedies.