

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 347
3030595

BETWEEN PALON LEE
 Applicant

A N D RS MOTORING LIMITED t/a
 TYRE CREW
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Kylie Hudson, counsel for the Applicant
 Manek Singh, advocate for the Respondent

Investigation Meeting: 24 October 2018 at Auckland

Submissions Received: 31 October 2018 from the Applicant
 None received from the Respondent

Date of Determination: 12 November 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Palon Lee was unjustifiably dismissed by RS Motoring Limited t/a Tyre Crew (Tyre Crew).**
- B. Tyre Crew must settle Mr Lee's personal grievance by paying him the following amounts within 21 days of the date of this determination:**
- a. \$15,000 as compensation for hurt, humiliation and injury to feelings; and**
 - b. Three months lost wages totalling \$10,275.66 gross.**

C. Tyre Crew must pay Mr Lee within 21 days of the date of this determination outstanding wages for the period from 1 November 2017 to 21 March 2018 totalling \$5,500 gross.

D. Tyre Crew must pay Mr Lee within 21 days of the date of this determination outstanding holiday pay totalling \$3,917.16 gross.

E. Costs are reserved.

Employment Relationship Problem

[1] Tyre Crew is in the business of providing vehicle and tyre servicing. The applicant, Mr Palon Lee, was employed by Tyre Crew in June 2016. Mr Lee was employed as a full time tyre technician. He was dismissed on 21 March 2018 following an argument with Tyre Crew's owner, Mr Jonny Zhang.

[2] Mr Lee says his dismissal was unjustified and seeks distress compensation. He further claims that during the course of his employment he was not provided with payslips despite requesting them, and was not paid in accordance with his employment agreement. Mr Lee seeks arrears of wages from 1 November 2017 to 21 March 2018 and outstanding holiday pay.

[3] Tyre Crew's response is that Mr Lee was not dismissed, he left his employment voluntarily and did not return following an argument with Mr Zhang. Even if Mr Lee did not leave his employment voluntarily, he would have been dismissed for serious misconduct. Mr Zhang says Mr Lee purchased a vehicle part for his own personal use by using a fake purchase order number. Mr Zhang says Mr Lee did not inform him that he had purchased the part and this amounted to serious misconduct for which Mr Lee would have been dismissed if he had returned to work.

The investigation meeting

[4] The investigation meeting took almost one full day in the Authority. Mr Lee and Mr Zhang both filed witness statements.

[5] Mr Lee and Mr Zhang confirmed under oath that their evidence was true and correct. Both witnesses had the opportunity to provide any additional information and comments and did so.

[6] As permitted under s.174E of the Employment Relations Act 2000 (the Act), this determination has not set out all the evidence. The determination states findings, relevant facts and legal issues and makes conclusions on issues necessary to dispose of the matters.

The issues

[7] The issues requiring investigation and determination are:

- (a) Was Mr Lee dismissed and, if so, was it unjustified?
- (b) If Mr Lee was unjustifiably dismissed, what remedies should be awarded?
- (c) If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Lee that contributed to the situation giving rise to the grievance pursuant to s124 of the Act?
- (d) Is Mr Lee owed arrears of wages and holiday pay by Tyre Crew and if so, the amounts owing?
- (e) Should costs be awarded?

Relevant Facts

[8] Mr Lee has more than 20 years' experience working as a mechanic in mechanical workshops. On 25 June 2016, Mr Lee commenced employment at Tyre Crew as a fulltime tyre technician.

Employment agreement between Tyre Crew and Mr Lee

[9] Mr Lee's employment was subject to a written employment agreement dated 25 June 2016. The employment agreement included a three month probationary period to allow Tyre Crew to consider Mr Lee's suitability for the position. Mr Lee's rate of pay was \$18 gross an hour and his hours of work were from Monday to Friday, 9am to 5:30pm and Saturday 9am to 2:30pm.

[10] Mr Lee says that he regularly worked 9am to 5pm from Monday to Friday and from 9am to 2pm on Saturdays as required. Mr Lee says he was required on a number

of Saturdays. Mr Zhang was pleased with Mr Lee's work and his employment continued after the expiry of the three month probationary period.

[11] Mr Lee's hourly rate was increased, firstly by \$2 an hour to \$20 an hour, and subsequently to \$22 an hour.

Recall to prison on 29 May 2017

[12] On 29 May 2017, Mr Lee was recalled to prison for breaching a bail condition that he not drink alcohol. Mr Lee says that he arranged for his ex-partner to immediately contact Mr Zhang to explain the situation and to ask if he would provide a letter of support for Mr Lee to the Parole Board. He understood that she had done so.

[13] Mr Zhang says he was not aware of Mr Lee's criminal record when he employed him and did not know that Mr Lee had been recalled to prison on 29 May 2017. He says he found out about the recall a week later.

[14] Mr Lee was imprisoned from 29 May 2017 to 31 October 2017.

Letters of support from Tyre Crew

[15] On 29 May 2017, Mr Zhang wrote a letter in support of Mr Lee as follows:

Tyre Crew is engaged in the business activities of tyres and mechanic shop based in East Tamaki, Auckland.

Palon Lee has been employed by Tyre Crew as a Tyre Technician and Mechanic from 25 July 2016. Palon has performed at the highest professional level with integrity, honesty, hard working, reliable and a very loyalty [sic] employee of Tyre Crew. He is a wonderful and positive team player and is liked by all of our staff, suppliers and customers. This letter is to prove Palon Lee have [sic] current job position and support from Tyre Crew.

Please do not hesitate to contact the writer should you have any questions.

Kind regards
Jonny Zhang
Director

[16] Mr Lee was keen to return to his position at Tyre Crew as he was aware he would find it difficult to get a job because of his criminal conviction. When he was

due for another review by the Parole Board, Mr Lee requested a further letter of support from Mr Zhang. This was provided on 28 August 2017. The letter states:

This letter is a continuation from last letter to prove Palon Lee still have support from Tyre Crew and position still available for him if he is released at next parole. His expertise and experiences in this industry are hard to come by and very sought after.

Please do not hesitate to contact the writer if you have any questions.

Jonny Zhang
Director

Mr Lee's return to work – November 2017

[17] Mr Lee was released from prison at the end of October 2017 and returned to work on 1 November 2017. Mr Lee says he felt some tension with Mr Zhang upon his return. Mr Zhang says that when Mr Lee returned to work, he noticed a deterioration in his work ethic, professionalism, focus and his ability to get along with his colleagues. Mr Zhang says Mr Lee was spoken to and given verbal warnings regarding these matters. Mr Zhang says that Mr Lee worked erratic hours and in the week of 11 December 2017, failed to come to work for a week. Mr Zhang says he called him on a daily basis and was given “nothing but various excuses without any evidence or medical certificates”¹. Mr Zhang says following that period of absence, he gave Mr Lee a further verbal warning.

Final day of work, 21 March 2018

[18] Mr Zhang and Mr Lee agree that on 21 March 2018 they had a heated verbal exchange. This was about Mr Lee's use of a tool on a heavy vehicle. Mr Lee says he was attempting to remove a brake calliper with a brake calliper tool. The tool was a light tool valued, in Mr Lee's view, at approximately \$20 or \$50. The tool handle bent and at this point, Mr Zhang confronted him angrily, telling him he had used the wrong tool for the job. Mr Lee says this happened in front of customers and workers in the workshop and he felt disrespected and embarrassed.

[19] Mr Zhang says he did not yell at Mr Lee. Rather, he mentioned to Mr Lee that he was going to damage the tool as he had done previously. Mr Zhang says Mr Lee ignored him and “within minutes the tool was damaged beyond repair ...”. When

¹ Zhang witness statement.

Mr Zhang mentioned the damage to Mr Lee, he says Mr Lee became angry and defensive, threw the tool in the tool tray and yelled that he should stop telling him how to do his job.

[20] Mr Zhang says he did not want to escalate the matter any further so went into the office to focus on some administration work.

Irregular invoice

[21] While doing the administration work, Mr Zhang came across an irregular invoice. The invoice was for a vehicle part that he had no record of, nor any requirement for, and he says it was purchased by Mr Lee using Tyre Crew's account. He says Mr Lee provided the supplier with a fake purchase order number. This purchase was never authorised by Mr Zhang and he was shocked. He raised this matter with Mr Lee, who Mr Zhang says become aggressive and defensive, and began talking about how staff at Tyre Crew had destroyed his tools. Mr Zhang said to him that if he felt that way then he was more than welcome to take his tools with him to take better care of them. Mr Zhang says that at that point, Mr Lee began packing his tools and asking him about when he was going to get his final pay.

[22] Mr Zhang says Mr Lee left and never returned to the workshop other than in an intoxicated state on 31 March 2018, asking for his final accrued holiday pay.

[23] Mr Lee's version of events differs. He says that after being yelled at by Mr Zhang in front of staff and customers, he wanted to leave the workshop to cool off. As he was about to wash his hands, Mr Zhang pointed at the ground and told him to "Come back here" in an intimidating manner.² Mr Lee told Mr Zhang not to speak to him as if he was an animal and told him that he was going to take a drive. Mr Lee says Mr Zhang's response was "If you're going, then take your tools with you." Mr Lee took this response to mean that he had been dismissed. Mr Zhang watched him as he packed up his tools and when Mr Lee asked Mr Zhang when he would receive his final pay, he was told "Tuesday". Mr Zhang then went into the office and came back with an invoice, showed Mr Lee and said "This is theft". Mr Zhang refused to listen to Mr Lee's explanation.

² Lee witness statement.

Events following 21 March 2018

[24] Mr Lee says Mr Zhang did not contact him following the events of 21 March 2018. Mr Lee sent two text messages to Mr Zhang, the first on 29 March 2018, asking Mr Zhang to email all his payslips to him and to pay him his 8% gross earnings final pay. Mr Lee did not receive a reply.

[25] Mr Zhang accepts that he received the text message but did not reply as he was busy at the time.

[26] On 4 April 2018, Mr Lee sent a further text message to Mr Zhang as follows:

Hey Jonny just want to say that I feel very mistreated and overwhelmed about how you treated me the other week. No one has ever spoken and treated me the way you did, and then to dismiss me from Tyre Crew without having any reason and still no explanation as to why. This has now left me jobless, very stressed and financially stuffed. No holiday, annual leave or leave pay that's owing to me has been paid so now I will be taking this to another level. Thanks.

[27] Mr Zhang did not reply to that text either. Mr Zhang's explanation was that he was going through a very difficult divorce at the time and did not reply.

First Issue**Was Mr Lee dismissed and, if so, was it unjustified?**

[28] Mr Zhang and Mr Lee had differing views about the events of 21 March 2018. I prefer Mr Lee's version of events. Mr Zhang's evidence was unreliable and inconsistent. His evidence differed in material parts from that contained in his statement in reply, from that given in his brief of evidence, and from his evidence at the investigation meeting. The statement in reply was prepared by Mr Zhang and was filed in the Authority on 18 June 2018. This was the earliest version of the events. In the statement in reply, Mr Zhang accepted that he began yelling at Mr Lee following the argument about the damaged tool on 21 March 2018. This evidence differed from that given in his witness statement and to the Authority at the investigation meeting when he denied yelling. Mr Zhang's explanation for the difference in his evidence was not convincing. This was one example of many inconsistencies in Mr Zhang's evidence.

[29] I find that Mr Lee was dismissed by Mr Zhang. On 21 March 2018, following the heated exchange with Mr Lee about his use of the tool, Mr Lee asked to leave to go for a drive, so he could “cool off”. The response from Mr Zhang was that if he was going to go, then he could take his tools with him. In the circumstances, Mr Lee took that to mean that he had been dismissed. Mr Lee’s view that he had been dismissed was confirmed when he slowly packed up his tools but Mr Zhang did not try and stop him. Also, when he asked Mr Zhang when he was to receive his final pay, the response was “Tuesday”.

[30] Mr Zhang went into his office. He found an invoice which he considered amounted to evidence of serious misconduct by Mr Lee. He confronted Mr Lee and accused him of theft. Mr Lee attempted to explain the situation with ordering the vehicle part and when this was not possible, he left the premises.

[31] Mr Zhang told the Authority that he would have dismissed Mr Lee for serious misconduct regarding the “fake invoice”.

[32] In my view Mr Zhang’s actions amounted to a summary dismissal of Mr Lee. My view is confirmed by Mr Zhang’s actions. He failed to make any contact with Mr Lee after 21 March 2018 to confirm whether or not Mr Lee was going to return to work, he ignored two text messages from Mr Lee asking for his holiday pay and informing Mr Zhang that he was of the view that he had been dismissed.

Test of justification

[33] It is for Tyre Crew to establish that Mr Lee’s dismissal was justified. Section 103A of the Act sets out the test for justification. Under the test, the question of whether Mr Lee’s dismissal was justifiable must be determined, on an objective basis, by considering whether Tyre Crew’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.

[34] In applying s.103A of the Act, the Authority must also consider four particular factors set out at s.103A(3), as well as any others it thinks appropriate. The test is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly.

[35] In my view, dismissing Mr Lee by telling him that he could take his tools with him, by accusing him of theft, by failing to make contact to clarify that Mr Lee had not been dismissed, and by failing to respond to Mr Lee's text messages about his employment situation, were not the actions of a fair and reasonable employer. Mr Zhang told the Authority that he believed the invoice that he presented to Mr Lee was evidence of serious misconduct. However, Mr Zhang followed no process whatsoever in relation to that matter.

“Fake” Invoice

[36] Mr Lee's explanation to the Authority about the invoice was credible in my view. He informed the Authority that he had a personal order number which had been agreed with Mr Zhang. His number identified him because it contained the first 3 letters of his surname, “PAL”.

[37] Mr Lee was given the personal number so that he could order parts for Tyre Crew as and when required. Mr Lee says he used his personal order number on a number of occasions when Mr Zhang was not at the workshop in order to order parts which were needed urgently.

[38] On the occasion which led to the invoice which Mr Zhang considered was “fake” and amounted to serious misconduct, Mr Lee says he was sick. His ex-partner's car had broken down. His ex-partner is the mother of his young son. They were both stranded. Mr Lee's ex-partner contacted him to see whether he would be able to fix the vehicle. Mr Lee went and looked at the vehicle and then went to BNT, a supplier of automotive parts used by Tyre Crew. Mr Lee ordered a belt for the vehicle using his personal order number.

[39] Mr Lee says he has ordered vehicle parts for his own use previously using his personal number. On these previous occasions, he informs Mr Zhang and the amount of the purchase is deducted from his wages at the end of the month. The payslips provided by Mr Zhang to the Authority do show that on a number of occasions there have been deductions from Mr Lee's wages for parts ordered by him.

[40] Mr Lee was not given the opportunity to provide an explanation about the invoice by Mr Zhang. Rather, Mr Zhang pointed to the invoice and told Mr Lee it was

“theft”. Mr Zhang told the Authority he considered Mr Lee’s actions amounted to serious misconduct.

[41] If Mr Zhang had let Mr Lee explain he may not have considered that Mr Lee’s actions amounted to serious misconduct. Further, Mr Zhang identified the invoice to be one of Mr Lee’s as it had his personal ID number starting with the letters PAL who he knew to be Mr Lee. If Mr Lee was trying to steal from the company why would he use his personal order number clearly identifying himself? Mr Lee informed Mr Zhang that he thought he had told him about the purchase and that he expected it to be deducted from his wages as was normal.

[42] I consider that Mr Zhang failed to give Mr Lee the opportunity to provide an explanation in relation to the purchase by him of a part using his personal order number and accused Mr Lee of theft. This failure to provide Mr Lee with an opportunity to explain was a fundamental failure by Tyre Crew to comply with the principles of good faith and procedural fairness. Tyre Crew failed to comply with the obligations imposed on it by s103A(3) of the Act to investigate allegations and provide a fair opportunity to respond.

[43] Mr Lee’s dismissal by Tyre Crew was unjustified.

Second Issue

If Mr Lee was unjustifiably dismissed, what remedies should be awarded?

[44] Mr Lee gave evidence of his distress at being dismissed. He had no job and had extreme difficulty obtaining another one because of his criminal history. His job applications through Work and Income New Zealand (WINZ) had failed because of his criminal history. He had a sick mother who he had been supporting and no income. He also had a young child. He gave evidence of feeling “really down” and not knowing what to do. He visited his doctor as he was highly stressed about money. Finally, he managed to get another job with the assistance of his brother.

Compensation under s.123(1)(c)(i) of the Act

[45] Mr Lee seeks compensation for humiliation, loss of dignity and injury to feelings in respect of his unjustifiable dismissal.

[46] I consider \$15,000 to be an appropriate award in all the circumstances. I order Tyre Crew to pay Mr Lee the sum of \$15,000 compensation within 21 days of the date of this determination.

Loss of remuneration under s.128(2) of the Act

[47] Mr Lee was unable to obtain another job until July 2018. The only income Mr Lee received in the more than three months he was unemployed, was from WINZ. This income totalled just over \$500 net. Mr Lee seeks three months lost earnings being 40 hours per week at \$22 an hour less the amount from WINZ. This amounts to \$10,275.66 gross.

[48] I order Tyre Crew to pay Mr Lee the sum of \$10,275.66 gross within 21 days of the date of this determination.

Third Issue

If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Lee that contributed to the situation giving rise to the grievance, pursuant to s.124 of the Act?

[49] I do not consider Mr Lee contributed to his dismissal. Therefore, remedies awarded will not be reduced.

Fourth Issue

Is Mr Lee owed arrears of wages and holiday pay by Tyre Crew and if so, the amounts owing?

Arrears of wages

[50] Mr Lee says he regularly worked more than 40 hours a week. Mr Lee's hours of work were set out in his employment agreement and were from 9am to 5:30pm, Monday to Friday and on Saturdays from 9am to 2:30pm. Mr Lee says his hours were generally 9am to 5pm, Monday to Friday and the occasional Saturday.

[51] Tyre Crew's employment records were entirely inadequate. Tyre Crew did not appear to have wages and time records. Mr Zhang produced weekly timesheets. However, the weekly timesheets recorded what Mr Zhang says were the hours worked

by each individual. There is space on the timesheet for staff to sign and for a manager to also sign. None of the timesheets provided were signed by Mr Lee or Mr Zhang or anyone else in a supervisory position at Tyre Crew.

[52] Mr Lee challenged the timesheets, saying that they did not adequately record the hours he worked. Further, the weekly timesheets have spaces to record sick leave, annual leave and public holidays for the individual employee. None of the timesheets provided included details of those entitlements for Mr Lee. Mr Zhang says that Mr Lee took sick leave and took holidays and statutory holidays, but he was unable to confirm when or what Mr Lee's entitlements were.

[53] Mr Lee accepts that he took sick leave from time to time as he had a young child and his mother was ill, following a stroke. Mr Zhang appears to have simply reduced the hours that Mr Lee was paid on days he understood sick leave or holidays were taken.

[54] It is the employer's obligation to keep proper wages and time records. Indeed, this is a statutory obligation with a liability for penalties for those who do not comply. Penalties have not been sought on this occasion. However, Mr Zhang has been warned by the Authority that Tyre Crew's practices are not compliant with employment legislation.

[55] Mr Lee has calculated his wage arrears for the period from 1 November 2017 to 21 March 2018. His calculation is based on an average of 40 hours per week less the amounts he was actually paid, according to the weekly timesheets provided by Tyre Crew. The wage arrears amount to \$5,500 gross.

[56] I order Tyre Crew to pay Mr Lee the sum of \$5,500 gross in arrears of wages within 21 days of the date of this determination.

Holiday pay

[57] Tyre Crew accepts that it owes Mr Lee holiday pay. Despite this concession, no holiday has been paid by it to Mr Lee.

[58] According to Mr Lee's IRD records provided to the Authority his recorded earnings amounted to \$50,963.16 for the financial years ending 31 March 2017 and 31 March 2018. Holiday pay calculated at 8% of gross earnings amounts to \$4,077.05.

[59] Mr Lee is owed arrears of wages totalling \$5,500 gross as set out in para [54] of this determination. Mr Lee is owed holiday pay calculated at the rate of 8% of the arrears of wages owing. This sum amounts to \$440 gross.

[60] Further Mr Lee is owed holiday pay based on hours worked during February and March 2018. This amounts to \$265.76 gross.

[61] Mr Lee was paid the sum of \$865.65 gross in holiday pay.

[62] Mr Lee is owed holiday pay totalling \$3,917.16 gross. This is the sum after deduction of holiday pay of \$865.65 paid to him.

[63] I order Tyre Crew to pay Mr Lee outstanding holiday pay of \$3,917.16 gross within 21 days of the date of this determination.

Costs

[64] Costs are reserved. Mr Lee has 14 days from the date of this determination to file a memorandum as to costs. Tyre Crew has from 14 days of receipt, to file a memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority