

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 835
3314880

BETWEEN	JIMMY NELSON Applicant
AND	THE DIGGER MAN LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Hayley Johnson, advocate for the Applicant Callum Reid for the Respondent
Investigation Meeting:	1 August 2025 in Wellington
Submissions received:	Up to 10 November 2025 from Applicant 15 August 2025 from Respondent
Determination:	19 December 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Jimmy Nelson, signed an employment agreement with the respondent The Digger Man Limited (TDM) on 26 September 2023. He worked for TDM for a short time until his employment came to an end on 1 November 2023. Mr Nelson says that his employment came to an end under a 90-day trial period, but that the trial period was invalid because he had actually started working for TDM on 4 September 2023, and as this went well, he was then offered an employment contract on 26 September 2023.

[2] Mr Callum Reid, director of TDM, says that Mr Nelson was not dismissed under a 90-day trial period, but because he was often absent without notice from work. Mr

Reid says that Mr Nelson was an unreliable worker who often turned up late, even though he (Mr Reid) had spoken to Mr Nelson about this on many occasions, and this should be taken into account.

[3] Mr Nelson raises a claim of unjustified dismissal. He also raises a claim that monies were unlawfully deducted from his final pay in breach of the Wages Protection Act 1983, because he was not advised in advance what the amount of deductions would be or what they were for.

[4] He raises further claims that he was not provided rest and meal breaks in accordance with the Employment Relations Act 2000, and that TDM did not provide wage and time records. He seeks compensation and penalties, with a request that at least half of any penalties awarded are paid to him.

[5] TDM resists these claims, and says that Mr Nelson was told on many occasions to take lunch breaks, and was well aware of the deductions to be made from his pay as this was in repayment of short-term loans made to him at his request.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Mr Nelson on his own behalf. For TDM, witness statements were lodged by Mr Reid, and Mr Shane Foxley and Mr John Howse who knew Mr Nelson. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[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.

The issues

[8] The issues requiring investigation and determination were:

- (a) Was Mr Nelson unjustifiably dismissed?
- (b) If so, what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and

- Compensation under s123(1)(c)(i) of the Act?
- (c) Is Mr Nelson owed outstanding notice of 2.5 days amounting to \$531.25 in addition to this?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Nelson that contributed to the situation giving rise to his grievance?
- (e) Did TDM breach the requirements of the Act in relation to the provision of rest and meal breaks?
- (f) If so, should Mr Nelson be awarded reimbursement as claimed being:
- loss of 10 minute paid rest break for 35 days - \$145.95
 - reimbursement of 30 minute unpaid lunch break for 35 days - \$437.50
- (g) Should penalties be awarded for any breaches of the rest and meal break provisions, as well as for any breaches of the Wages Protection Act 1983, and any failure to provide wage and time records?
- (h) If so, should any part of the penalties be paid to Mr Nelson?
- (i) Should either party contribute to the costs of representation of the other party?

Background

[9] Mr Nelson began work for TDM on 4 September 2023. TDM is a construction/landscaping company, and Mr Nelson performed a variety of duties including constructing walls, driveways and footpaths, working on gardens, and operating diggers and associated earthmoving/digging.

[10] He says his employment was initially on an informal basis, but that it soon became regular. He says he very quickly started working Monday to Friday, from 7.00 or 7.30 am through to finish at any time between 4.00 pm and 5.30 pm each day.

[11] He says the work started each morning with a meeting at 7.00 am in the yard, where work was assigned for the day before going out to the relevant site. He says that he was required to wear a branded hoody, and although he brought his own toolbelt, the primary tools including drills and diggers, were owned and provided by Mr Nelson.

[12] Mr Nelson also says that a 30-minute break was deducted from his pay for each day, regardless of whether he actually took a break or not, and he never had any paid breaks during the day.

[13] Mr Nelson said he was a good worker, and Mr Reid, and his two supporting witnesses, Mr Foxley and Mr Howse agreed. Mr Nelson said that he was not often late to work, and when he was it was only a matter of 5 to 10 minutes as he had a long drive. Mr Nelson said there were maybe two occasions when he didn't attend work, but either he or his partner texted or called Mr Reid to let him know. Mr Nelson said that Mr Reid hadn't spoken to him about the importance of being on time, but he also complained that Mr Reid had often had "a go" at him about things. He did not specify what things Mr Reid often raised with him.

[14] Mr Nelson initially said that he had not been away from work for three days as alleged without any contact with Mr Reid. After questioning, Mr Nelson then accepted that there had been a period of 2 to 3 days, he could not remember when, when he had not been at work because he had been taken into custody by the police. He accepted that he had not spoken to or notified Mr Reid about this.

[15] Mr Nelson said that he had spoken to Mr Reid after this, and performed some work on the Saturday of that week, and his partner had also performed work on that same day. Then there was a public holiday (it appears from the dates this was a reference to Labour Day Monday 23 October 2023, however, both parties were unclear as to the exact dates).

[16] Mr Reid sent Mr Nelson a text message (the version I was provided with is undated) which stated:

Morning Jimmy after a lot of consideration Bananalama have decided to terminate your contract as from today reasons for this is constantly late for work with no real explanation, not showing up to work at all without any communication, we need people that will turn up to work every day. Money that is borrowed from Bananalama will be deducted from your wages this week this text will be followed up by a more detailed email. good luck in your future...Callum [sic]

[17] On 1 November 2023, Mr Nelson's partner was sent an email terminating Mr Nelson's employment. Mr Reid explained that his Office Manager had sent the email, as he himself was dyslexic and did not use email much. However, Mr Reid was clear that he had authorised the email that was sent.

[18] The email stated that TDM had decided to terminate Mr Nelsons' contract, and giving "the required notice of 1 week". The email confirmed that Mr Nelson's last day of work would be Wednesday 8 November 2023.

[19] The email then stated that money owed would be deducted from Mr Nelson's final pay, being a \$400 loan, and the sum of \$185.10 for petrol. Mr Nelson has raised a claim that TDM breached the provisions of the Wages Protection Act by not telling him in advance what deductions would be made from his final pay or what for. In his in-person evidence, he acknowledged the details set out in this email. He went further and said that TDM routinely paid him \$400 in advance of his wages (I note that this was supported by bank statements provided by Mr Nelson, and these advances were also clearly set out in the relevant payslips). Mr Nelson also said that TDM had loaned him \$185.10 for petrol, and this was not the first time this had happened as Mr Reid knew he had difficulty paying for petrol. Again, both Mr Nelson's acknowledgement of these sums and the reason for it is supported by text messages sent at the time.

[20] On the evening of 2 November 2023 after receiving the dismissal email, Mr Nelson and his partner visited Mr Reid at his house which was on the work premises. They asked for Mr Nelson's final pay. Mr Reid reminded them that Mr Nelson needed to return the branded work hoodies and the work phone. Mr Nelson said that either he or his partner left a pair of work boots for Mr Reid on top of the work ute. Mr Nelson then drove back to his home in Shannon to fetch the hoodies and phone, and returned to the work premises some 2 to 3 hours later to return these items late into the evening. Mr Nelson's final pay was put through the following day on 2 November, minus the stated deductions.

[21] Mr Nelson says that he should have been paid for 2 and a half days notice. Mr Reid says that Mr Nelson was paid for all the hours that he worked.

[22] Mr Nelson's evidence on this point was vague. He indicated that he had not committed to working for TDM after 1 November, and he had returned his work property on 2 November. I find that there was no agreement or requirement that TDM should pay Mr Nelson for work he had not done. In any event, Mr Nelson is also advancing a claim for lost wages that would cover this period.

[23] Following the investigation meeting, TDM provided copies of diary notes from 3 October 2023 through to 1 November 2023. These diary notes contained records of hours worked, and showed as follows:

- a. Tuesday 3 October – Mr Nelson was late to work
- b. Wednesday 4 October – Mr Nelson worked for 1 hour
- c. Thursday 5 October – there was a “catch up” about Mr Nelson “not coming to work coming late and disappearing”
- d. Monday 9 October – Mr Nelson was absent
- e. Tuesday 10 October – Mr Nelson was absent
- f. Wednesday 18 October – Mr Nelson was absent
- g. Wednesday 25 October – Mr Nelson was absent
- h. Thursday 26 October – Mr Nelson worked for 2 hours
- i. Friday 27 October – Mr Nelson “left for 2 hours”
- j. Saturday 28 October – Mr Nelson worked from 8 am to 4.00 pm
- k. Tuesday 31 October – Mr Nelson was absent
- l. Wednesday 1 November – Mr Nelson was absent

When was Mr Nelson dismissed?

[24] It is submitted for Mr Nelson that the text message terminating his employment was sent on 18 October, but was then withdrawn, and that the termination email of 1 November was a surprise to him and unjustified. The copy of this text message that I have been provided with is undated. The text message does state that it will be followed by an email.

[25] Considering both the text message and the dated email both of which state that Mr Nelson’s employment is being terminated, I find that Mr Nelson’s employment came to an end on 1 November 2023, when he was dismissed for failing to turn up to work. In reaching this finding, I note that he performed no work after this date, and returned his work property the following day.

[26] Having found that Mr Nelson was dismissed from his employment on 1 November, I must therefore consider whether his dismissal was unjustified.

Was Mr Nelson’s dismissal unjustified?

Preliminary Issue - Is there any issue as to a 90-day trial period?

[27] It was submitted for Mr Nelson that he was dismissed on the basis of a 90-day trial period, and that TDM was not entitled to the protections against an unjustified dismissal claim because Mr Nelson had been employed for more than 90 days as at the date of his dismissal.

[28] After considering the documents, it is not clear to me why this argument has been raised. Neither the termination text nor the termination email refer to a 90 day-trial period. Mr Reid's evidence at the investigation meeting was that he had ended Mr Nelson's employment due to his persistent failure to turn up to work, and the termination text and email supports his evidence. Accordingly, I take this argument no further. My view is that the evidence establishes that Mr Nelson was dismissed because of concerns with his attendance at work, and no issues around a 90-day trial period or its applicability in fact apply.

Preliminary Issue – was Mr Nelson employed by a different company?

[29] Immediately prior to the investigation meeting, it was suggested on behalf of Mr Nelson that he was employed by a company named Bananalama Limited, and that the investigation meeting should proceed with any orders made being made against that company, rather than against the named respondent, TDM.

[30] I declined to make such orders, and clarified at the investigation meeting that the named respondent as set out in the statement of problem was TDM and the investigation meeting would proceed on that basis. The file shows that Mr Nelson had a signed individual employment agreement with TDM. In addition, Mr Nelson's personal grievance claim was raised against TDM, and the statement of problem was filed against TDM. TDM through its director Mr Reid and in its correspondence and pleadings has acknowledged it was his employer at relevant times. In these circumstances, I again confirm that I can see no reason to suddenly substitute another company as the respondent as of the day of the investigation meeting, especially as Mr Nelson has filed no proceedings against that company. The evidence before me is that TDM was Mr Nelson's employer at all relevant times. All findings are made on that basis.

The test of justification

[31] I must now consider if TDM's dismissal of Mr Nelson was unjustified. The test of justification is set out in s 103A of the Act, and is whether TDM's actions were what

a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In considering this, I must take into account whether TDM:

- a. Sufficiently investigated the allegations against Mr Nelson before taking action;
- b. Raised the concerns it had with Mr Nelson before dismissing him;
- c. Gave Mr Nelson a reasonable opportunity to respond to those concerns; and
- d. Genuinely considered any explanation in relation to the allegations against him before deciding to dismiss.

[32] I find that the evidence establishes that TDM, though its director Mr Reid, had sufficiently investigated the matters of concern, that being Mr Nelson's repeated and unexplained absences. Mr Reid's contemporaneous diary notes record Mr Nelson's hours of work and related matters. These records show that in his second month of work, Mr Nelson was absent for 6 full working days without explanation, and worked short hours without explanation for 4 more days. This is a high level of absenteeism especially when unexplained. I find that Mr Nelson's evidence that he was not absent from work very often to be unconvincing in the face of these diary notes, and considering that Mr Nelson when pressed, admitted being absent from work and late to work but was unable to be precise about the dates and times of his absences.

[33] Mr Nelson also took the position that he had never been spoken to about his attendance at work. Mr Reid says that he raised this with Mr Nelson on multiple occasions leading up to his dismissal. I find that Mr Nelson's suggestion that he was never spoken to cannot stand in the face of the diary notes indicating he was spoken to about his attendance on 5 October, and how that same matter was again raised in the undated text message which Mr Nelson says was sent to him on 18 October. In addition, Mr Nelson also stated that Mr Reid often remonstrated with him (although Mr Nelson was for some reason not able to recall the topic). All these points indicate that TDM through Mr Reid repeatedly raised the topic of Mr Nelson's attendance with him. The diary notes and Mr Nelson's own evidence also show that despite this, Mr Nelson continued to be absent from work on a regular basis.

[34] When considering when and how Mr Nelson's dismissal occurred, the evidence shows that Mr Nelson, was absent without notice on Tuesday and Wednesday, and then

was sent notice of his dismissal via email. Mr Reid has stated that Mr Nelson was absent on the Monday of that week also, eg was absent for three full days without contact, although he was not able to provide me with a copy of his diary for the Monday. This was longer than he had been absent without contact before. It followed on from Mr Reid indicating by text in mid-October that he would be dismissed for absenteeism, but Mr Reid was then persuaded to give Mr Nelson a “second chance”.

[35] He was dismissed without knowing that Mr Reid considered his latest absences so serious that, unlike on previous occasions, they would lead to dismissal.

[36] On balance, I find that Mr Nelson’s dismissal was unjustified. This is because he was denied a final opportunity to know and understand how seriously Mr Reid was concerned, and because he was denied a final opportunity to explain to Mr Reid why he was absent and what his reasons for absenteeism were, before Mr Reid made the final decision to end his employment.

[37] Having said this, it is clear from the evidence before me that Mr Nelson’s own behaviour contributed significantly to his dismissal. He had been spoken to on multiple occasions about his absenteeism. He knew, from the text message talking about termination, that Mr Reid considered this to be a serious issue and was considering ending his employment because of it. In the face of this, Mr Nelson had an opportunity to change and to commit to performing the work he had contractually agreed to do. However he continued to be absent from work without notice. He cannot be surprised that his employment then came to an end. On balance, I consider that Mr Nelson contributed greatly to his own situation, and his remedies should be reduced by 50% to properly reflect this.

Remedies

Reimbursement for lost wages

[38] Having found, on balance, that Mr Nelson was unjustifiably dismissed, I must now consider remedies. First, I will consider his claim for lost wages. Mr Nelson claims the sum of \$1,300.00 gross in lost wages, being the equivalent of 1 week’s pay, plus a further \$140.00 gross as holiday pay on this sum calculated at the rate of 8%. I award this to him, subject to the reduction for contribution previously made.

[39] Mr Nelson has also claimed further sums of \$145.95 for unpaid rest breaks, and plus \$437.50 for improper meal break deductions. Mr Nelson’s evidence on these

points was vague. It was directly contradicted by the more specific evidence of Mr Reid, and the contemporaneous diary notes of hours worked kept by Mr Reid suggest that Mr Nelson had (or took) time off work during the working day. I find that these claims are not made out. No orders are made.

Compensation for Hurt and Humiliation

[40] Mr Nelson seeks a payment of \$20,000 as compensation for the hurt and humiliation resulting from his dismissal. It is submitted on his behalf that the dismissal caused him “significant personal harm” in circumstances where he “committed himself fully to his role, arriving on time, working hard” and that “he never understood there were issues”. It was also submitted that there was a “public” nature to his dismissal although this was not clearly explained.

[41] I have found, for the reasons set out above, that these factors are not made out. Mr Nelson understood that TDM and Mr Reid expected him to turn up for work on time, and that he was not to be absent from work without prior leave, and yet he consistently failed to meet these expectations. I have also found that Mr Nelson was told that his repeated absenteeism was not acceptable. The failure for which he now seeks compensation is essentially a procedural failure on the part of TDM, that is, dismissing him without providing a final opportunity for discussion and explanation. I further do not accept that the sending of the termination email can reasonably be said to be a “public” termination of employment.

[42] I find that a reasonable amount of compensation for such a failure would be in the region of \$10,000. Taking into account the reduction for contribution, this amounts to a compensatory sum of \$5,000.00. Orders are made accordingly.

Unauthorised Deductions from Wages

[43] Mr Nelson claims that deductions were made from his wages, and in particular from his final pay, that were unauthorised and he does not know the reason why. This claim was not supported by his own in-person evidence at the investigation meeting. Mr Nelson acknowledged that throughout his employment, he had repeatedly asked Mr Reid for advances on his wages (or loans) to cover petrol and other costs. These loans were repeatedly given, then deducted from his next pay. Both the payslips and Mr Nelson’s own bank records recorded this in a clear and unambiguous way, as did

various text messages between the parties. In addition, Mr Nelson also acknowledged when questioned by me that the termination email also set out these details.

[44] For completeness, I also note Mr Nelson's signed employment agreement contained clear provisions allowing deductions to be made from his wages for monies owed, and from his final pay. There is no evidential basis for a claim of improper deductions from wages. Mr Nelson knew what the deductions were for at all times, had accepted that the money needed to be repaid and consented to this in his employment agreement, and the sums were fully accounted for. No orders are made.

[45] Mr Nelson makes a further claim that TDM failed to comply with a request for wage and time records. As a result of this and what are said to be other statutory breaches of the Wages Protection Act 1983 and the requirement for rest and meal breaks, Mr Nelson requests that penalties are awarded against TDM.

[46] During the Authority's process, time and wage records in the form of copies of payslips and diary notes were provided. It is unexplained why these records were not provided sooner. I have considered whether a penalty might be appropriate in all the circumstances. However, it has not been explained why or how the Mr Nelson has been prevented or hindered from pursuing his claims, which are not made in reliance on such records. On balance, I decline to award a penalty. No orders are made.

Orders

[47] Mr Jimmy Nelson has a personal grievance in that he was unjustifiably dismissed.

[48] The Digger Man Limited is ordered to pay to Mr Jimmy Nelson within 28 days of the date of this determination:

- a. The sum of \$720 gross (being \$650.00 gross in wages plus a further \$70.00 gross in associated holiday pay) as compensation for lost remuneration; and
- b. The sum of \$5,000.00 without deduction as compensation for hurt and humiliation taking into account the reduction for contribution.

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. I note that the investigation meeting lasted for somewhat less than half a day.

[50] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party who believes they are entitled to costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[51] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹

Claire English
Member of the Employment Relations Authority

¹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1