

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 69  
3071852

BETWEEN

ROBERT PASK  
Applicant

AND

WHITEHALL  
FRUITPACKERS LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: David Balfour, advocate for Applicant  
Mark Gardiner for Respondent

Investigation Meeting: 17 February 2020

Oral Determination: 17 February 2020

Written Record Issued: 18 February 2020

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**ORAL DETERMINATION OF THE AUTHORITY**

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- A. Mr Pask was unjustifiably dismissed by Whitehall Fruitpackers Limited.**
- B. Whitehall Fruitpackers Limited must settle Mr Pask's personal grievance by paying him the following amounts:**
- (i) \$1,498.50 gross lost wages; and**
  - (ii) \$8,000 as compensation for hurt, humiliation and injury to feelings.**

- C. Mr Pask's claim for arrears of wages is declined.**
- D. Whitehall Fruitpackers Limited breached its statutory duty of good faith.**
- E. Costs are reserved.**

### **Employment relationship problem**

[1] Whitehall Fruitpackers Limited packs about 25% of New Zealand's organic kiwifruit, 90% of which is exported. It is a shareholder in Zespri Limited and its work is integrated into the Zespri system. Its systems are largely automated including some of the box filler work. The grading of kiwifruit for packing is done manually.

[2] Mr Pask worked for Whitehall Fruitpackers as a temporary Packer working Monday to Friday inclusive from 6 pm to 11 pm each night and on a Sunday from 3 pm to 9 pm. The terms of Mr Pask's employment were set out in a written fixed term employment agreement. The purpose of the fixed term agreement was to cover the 2019 kiwifruit packing season which ended on 31 May 2019.

[3] Mr Pask worked from 4 April until 11 May 2019 when his employment ended. Mr Pask claims he was dismissed during a telephone call from Mr Mark Gardiner, Chief Executive Officer, and he challenges that dismissal. He also claims arrears of wages for unpaid overtime and shortened breaks and that Whitehall Fruitpackers breached its statutory obligations of good faith.

[4] Whitehall Fruitpackers denies the claims.

[5] At the investigation meeting, and after all evidence had been heard, Mr Pask withdrew a claim of unjustified disadvantage.

### **Issues**

- [6] In order to resolve Mr Pask's application I must determine:
- a) Whether Mr Pask was unjustifiably dismissed and if so what if any remedies should be awarded;
  - b) Whether Mr Pask is owed arrears of wages;

- c) Whether Whitehall Fruitpackers breached its statutory duty of good faith by not addressing Mr Pask's shortcomings during his employment.

[7] As permitted by s 174E of 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 as a result. While I have not referred in this determination to all the evidence received I have carefully considered everything.

### **Unjustified dismissal**

[8] Mr Pask's employment ended after he received a telephone call from Mr Gardiner on 11 May 2019.

[9] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Whitehall Fruitpackers' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[10] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Whitehall Fruitpackers' sufficiently investigated allegations, raised the concerns with Mr Pask, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[11] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Pask being treated unfairly.<sup>1</sup> A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[12] I am required to assess whether Whitehall Fruitpackers had, on the balance of probabilities, convincing evidence to show it had a reasonable basis at the time of the dismissal for believing misconduct had occurred.<sup>2</sup>

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<sup>1</sup> Employment Relations Act 2000 (the Act), s 103A(5).

<sup>2</sup> *Honda New Zealand Ltd v NZ Boilermakers Union* [1991] 1 NZLR 392 (CA) at 394.

[13] On 10 May Mr Pask had an interaction with the HR Manager. Mr Langlands, Packhouse Shift Manager, witnessed the interaction. His evidence was that Mr Pask got loud during the interaction and told the HR Manager that it was a “fucking shit job”, that he “did not need to fucking be there’ and that it was slave labour.

[14] Mr Gardiner came into the conversation as it was ending and heard Mr Pask’s remark about the company being like a sweatshop. Both managers told Mr Gardiner what had had happened from their perspective.

[15] Mr Gardiner says Mr Pask had to be shown many times how to do his job and resented being helped. He told me he had received a lot of feedback from employees about Mr Pask behaving in a manner that was not conducive to a positive working environment and that the incident with the HR Manager was the final straw.

[16] Mr Gardiner rang Mr Pask the following morning, on 11 May and told him he was clearly unhappy in his work and he should quit and look for something elsewhere. Mr Gardiner told me he believed Mr Pask agreed that he was unhappy in his job and that the decision to end the employment relationship was amicable.

[17] I am satisfied there was no agreement that the relationship should end before the end of the season. Mr Gardiner acknowledged that his intention when he rang Mr Pask was that Mr Pask would not return to work and he would pay him two nights pay in lieu of notice.

[18] Mr Pask was unjustifiably dismissed. Whitehall Fruitpackers actions in terminating the employment relationship suddenly by telephone in the absence of any process were not the actions an employer acting fairly and reasonably could take.

### **Remedies**

[19] In resolution of his employment relationship problem Mr Pask seeks reimbursement of three weeks lost wages and \$8,000 for humiliation, loss of dignity and injury to feelings.

[20] Mr Pask is entitled to reimbursement of his lost wages for the period 11 May to 31 May 2019. I am satisfied Mr Pask took reasonable steps to find alternative employment.

[21] If Mr Pask had remained in employment he would have worked 30.5 hours each week until the final week when he would have worked 25 hours. Taking into account the two nights' pay he received for 12 and 13 May (a payment made in lieu) Mr Pask's lost wages equates to a total of 81 hours at \$18.50 per hour making a total of \$1,498.50 gross.

[22] There has been very little evidence of hurt and humiliation. Mr Pask told me he was shocked to have been dismissed and it was the first time he had ever been dismissed from a job. Further to that evidence there will be some inherent hurt and humiliation where, as here, no process led up to Mr Pask's dismissal, which was undertaken by telephone.

[23] I have considered where in the spectrum of cases his situation sits and what a fair and just award would be. I consider in all the circumstances of this case that Mr Pask should receive the sum requested as being a fair and just award.

[24] Where the Authority determines that an employee has a personal grievance the Authority must, in deciding both the nature and extent of the remedies to be provided in respect of that personal grievance, consider the extent to which Mr Pask's actions contributed towards the situation giving rise to the personal grievance. The Authority must reduce the remedies that would otherwise have been awarded if the actions require it.

[25] I heard evidence from Whitehall Fruitpackers of Mr Pask's conduct during his employment. I have accepted that shortcomings in his performance were addressed with Mr Pask during his employment. However, there were no disciplinary processes and nor was he ever formally told to modify his behaviour in the workplace.

[26] There was no investigation in to the 10 May incident and at the investigation meeting Mr Pask denied he swore as contended by Whitehall Fruitpackers. Mr Gardiner made the decision to dismiss Mr Pask based on what he had been told by the HR Manager and Mr Langlands. He did not seek Mr Pask's view of the discussion and did not provide Mr Pask with any information

[27] In all the circumstances of this case it has not been established to my satisfaction that Mr Pask contributed in any blameworthy way to his unjustified dismissal and there will be no reduction to the remedies to be awarded.

[28] Whitehall Fruitpackers Limited is ordered to pay to Mr Pask the following sums within 28 days of the date of this determination:

a) \$1,498.50 gross under s 123(1)(b) of the Act; and

b) \$8,000 under s 123(1)(c)(i) of the Act.

**Arrears of wages**

[29] Mr Pask claims payment for time lost on breaks and due to extended finishing times which he was required to work. Mr Pask says he worked extra time every day that was not compensated.

[30] Employees completed their timesheets personally at the end of each shift. The timesheet was the final action taken by them as they left the premises. Mr Pask completed at least one timesheet during his employment where he worked in excess of his usual hours or work. On 21 April he claimed for working 10 minutes over his normal 11pm finish time and was paid for all time claimed.

[31] Whitehall Fruitpackers operates an automated system for signalling break times and the end of the shift.

[32] Mr Pask attended an induction meeting on 25 March 2019 prior to accepting employment with Whitehall Fruitpackers. Mr Pask has signed an acknowledgement that on 25 March he received information about key jobs, tasks and responsibilities, working times and breaks. At that meeting he was told that breaks were 15 minutes from 8.15pm to 8.30pm.

[33] At 8.15 pm and 11 pm a bell rings which immediately shuts off the infeed system. When that happens graders can leave their work stations immediately, however, for between 30 and 60 seconds packers can continue to have kiwifruit coming through the line.

[34] At the end of the rest break the bell is set to ring at 8.27 pm each night. At 8.30 pm the graders must be at their work station because at that time the infeed system automatically resumes. Packers have an additional 60 seconds before they need to be at their work stations as it can take this long for the kiwifruit to be feed through to the packing line.

[35] Mr Pask says it seemed to him that kiwifruit would be fed through to the line on purpose so that he could not leave his work station on time because he had to complete packing the fruit.

[36] I have preferred Whitehall Fruitpackers's evidence on this point. Both Mr Gardiner and Mr Langlands told me they regularly told Mr Pask not to keep working after the bell. Mr Gardiner told me, and I accept, that employees, including Mr Pask, were encouraged to set up their trays so that the kiwifruit could pack automatically after the bell rang.

[37] The onus is on an applicant in the first instance to establish a claim for unpaid wages. I am not satisfied Mr Pask has met that onus of proof and his claim for overtime and truncated breaks is declined.

### **Breaches of good faith**

[38] Mr Pask claims Whitehall Fruitpackers breached its statutory obligations of good faith when it failed to address conduct issues during his employment. Whitehall Fruitpackers acknowledges no formal or other processes were implemented to address Mr Pask's behaviours during his employment.

[39] Mr Gardiner told me he had never had an employee who complained so much and so regularly. Even if that is the case s 4 of the Act requires employers to be active and constructive in maintaining productive employment relationships. Whitehall Fruitpackers has failed to comply with this obligation.

[40] No penalty has been sought by Mr Pask for this failure and none will be imposed.

### **Costs**

[41] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Pask shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Whitehall Fruitpackers shall have a further 14 days in which to file and serve a memorandum in reply. All

submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[42] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority