

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 569  
3153725

BETWEEN	JOHN PECK Applicant
AND	WARRIOR NZ LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Mary Robertson, counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	11 August 2022 at Napier
Submissions received:	18 August 2022 from Applicant No submissions from Respondent
Determination:	2 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] John Peck was employed by Warrior NZ Limited (Warrior NZ) as an apprentice builder, commencing work on 7 October 2019. Mr Peck was dismissed from his employment on 31 July 2020. Mr Peck claims that he was unjustifiably dismissed during an exchange of text messages with John Gemmell, the sole director of Warrior NZ.

[2] Mr Gemmell had sought an explanation as to why Mr Peck was absent from work on 31 July 2021. Mr Peck maintains that he was absent on account of his sister being rushed to hospital, and that he had communicated with a colleague to ensure his foreperson was advised.

[3] Mr Peck also claims unjustified disadvantage in that his wage rate was unilaterally decreased on a number of occasions. He claims that deductions were inappropriately made from his wages during his employment, and that he was not correctly paid holiday pay when his employment ended. The deductions made from Mr Peck's wages related primarily to the purchase of a vehicle (a Suzuki Swift) and tools by Warrior NZ for Mr Peck's use at work.

[4] A personal grievance was raised by Mr Peck on 28 October 2020 when Mr Peck's counsel wrote to Warrior NZ. Warrior NZ responded to the personal grievance by way of letter dated 19 November 2020, and additionally in a statement in reply lodged in the Authority.

[5] Mr Peck seeks compensation and lost wages relating to the disadvantage and dismissal claims. He also seeks payment for an arrears of wages owing on account of the unilateral wage rate reductions, reimbursement for deductions made from his pay by Warrior NZ, and payment for annual holidays.

### **The issues**

[6] The issues requiring investigation and determination were:

- (a) Was Mr Peck unjustifiably dismissed?
- (b) Was Mr Peck unjustifiably disadvantaged in his employment?
- (c) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
  - (i) Lost wages; and
  - (ii) Compensation under section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Peck that contributed to the situation giving rise to his grievance?
- (e) Is Mr Peck entitled to reimbursement of wages relating to deductions made from his pay by the respondent?
- (f) Is Mr Peck entitled to payment for unpaid holiday pay?
- (g) Has Warrior NZ failed to retain a copy of Mr Peck's individual employment agreement?
- (h) Is Warrior NZ entitled to reimbursement of money owed on tools supplied to Mr Peck?

## **The Authority's investigation**

[7] There was no appearance for Warrior NZ at the investigation meeting. However, Warrior NZ was represented at a case management conference held on 16 May 2022 at which timetable directions were issued.

[8] On 18 July 2022 the Authority received a memorandum from Warrior NZ's representative, Mr Michael McAleer. That memorandum stated that Warrior NZ was no longer trading, that it would be removed from the Companies Register, and that there would be no appearance by Warrior NZ at the scheduled investigation meeting.

[9] On 19 July 2022 I directed the relevant Authority Officer to send correspondence to the parties regarding the memorandum received from Warrior NZ. The parties were advised of my view that, given Warrior NZ was not in liquidation at that time, that the investigation meeting should proceed as scheduled. Mr Peck's counsel was afforded the opportunity to provide a response to Warrior NZ's memorandum, and duly advised they intended to proceed with the application.

[10] On 21 July 2022 the Authority received a further memorandum from Warrior NZ's representative. That memorandum repeated Warrior NZ's position as stated in its memorandum of 18 July 2022 and confirmed that Warrior NZ would not be attending the investigation meeting.

[11] On 22 July 2022 I directed the relevant Authority Officer to email the parties confirming that the investigation meeting would proceed as scheduled and in accordance with the notice previously issued. Warrior NZ were on notice that the investigation meeting would proceed regardless of their non-attendance.

[12] A written witness statement from Mr Peck was lodged prior to the investigation meeting. Mr Peck was the only witnesses and he answered questions under affirmation. I had the opportunity to ask him relevant questions and to test the veracity and credibility of his evidence. Ms Peck's evidence was unchallenged by Warrior NZ, and I accept his evidence.

[13] 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.

### **Was Mr Peck unjustifiably dismissed?**

[14] Mr Peck gave evidence that he was dismissed from his employment by Mr Gemmell via text message, on 31 July 2020. Mr Peck was unable to produce the actual text messages in question and he explained that the text messages were made and received on a mobile phone belonging to Warrior NZ, which he had returned to Mr Gemmell following the dismissal.

[15] Mr Peck's account of the text message exchanges was that Mr Gemmell initially messaged him to ask why he was not at work. Mr Peck explained that he was at the hospital and had arranged for one of his colleagues to advise his foreperson that he would not be at work that day. Mr Peck then raised an issue with Mr Gemmell as to his not receiving payment relating to a period of bereavement leave taken from 21 to 25 July 2020. Ultimately, Mr Gemmell dismissed Mr Peck by text message stating words to the effect of "I've had enough of you", "you are no longer employed", and "your final instructions are to drop off the car and gear".

[16] Warrior NZ did not contest the fact that there was a dismissal, nor that it was communicated to Mr Peck by way of text message on 31 July 2020.<sup>1</sup> Mr Peck was dismissed from his employment on 31 July 2020.

[17] Given it is established that Mr Peck was dismissed from his employment, the onus then turns to Warrior NZ to justify its actions. I must consider, on an objective basis, whether Warrior NZ's actions, and how Warrior NZ acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred.<sup>2</sup>

[18] The statement in reply lodged by Warrior NZ, together with its initial response to the personal grievance<sup>3</sup>, refer to a pawnbroker's pledge and his absence from work on 31 July 2020. Warrior NZ asserts that Mr Peck pawned tools for which he still owed

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<sup>1</sup> Statement in reply dated 3 December 2021, at 2.4.

<sup>2</sup> Employment Relations Act 2000, s 103A.

<sup>3</sup> Letter dated 19 November 2020.

money to Warrior NZ for, and that that amounted to a repudiation of contract by Mr Peck.

[19] Mr Peck accepted that he pawned some tools but said that he did so only following the dismissal, and only after Mr Gemmell had refused to pay him for the period of bereavement leave that he claimed.

[20] In applying the test of justification, I must consider the factors set out at s 103A(3) of the Act. Such that Warrior NZ might claim Mr Peck's actions to have amounted to a justification for dismissal, that position is unsustainable. A fair and reasonable employer could not have taken the action that Warrior NZ did in dismissing Mr Peck.

[21] There is no evidence that Warrior NZ conducted an appropriate investigation into the allegations made, no allegations were raised with Mr Peck prior to the dismissal other than during the text message exchange on 31 July 2020, and no reasonable opportunity was provided to Mr Peck to respond. Significantly, the evidence establishes that Mr Peck appropriately notified Warrior NZ of his absence on 31 July 2020 due to the medical emergency involving his sister.

[22] The dismissal was both substantively and procedurally unjustifiable, including in its method of delivery. I do not consider any justification to be available on the evidence before the Authority. I find that Mr Peck has been unjustifiably dismissed in his employment.

### **Was Mr Peck unjustifiably disadvantaged in his employment?**

[23] Mr Peck also claims that he was unjustifiably disadvantaged in his employment in that his wage rate was unilaterally reduced on a number of occasions without his agreement or any consultation. Mr Peck's evidence, which is supported by payslips provided by Warrior NZ, is that Warrior NZ reduced his wage rate without his agreement as follows:

- (a) Mr Peck was initially paid \$25.93 per hour from approximately 7 October 2019, when he first commenced work;
- (b) His wage rate was reduced to \$23.15 per hour from early 2020; and

(c) His wage rate was further reduced to \$20.37 per hour from 13 July 2020.

[24] The statement in reply lodged by Warrior NZ contained reference to a purportedly attached individual employment agreement. Following enquiries, Warrior NZ's representative informed the Authority that there was never a signed individual employment agreement between Warrior NZ and Mr Peck.<sup>4</sup>

[25] Mr Peck gave evidence that an individual employment agreement was signed, that he was to be paid approximately \$26.00 per hour, that he was not provided a copy of it after providing it to Mr Gemmell, and that at the time Mr Gemmell had said words to the effect of "we won't see that again". I accept Mr Peck's evidence.

[26] I also accept Mr Peck's evidence as to the wage rate reductions. Except for the reduction in early 2020, Mr Peck's evidence is supported by the payslips provided by Warrior NZ. That exception is explainable in that no payslips were provided to him by Warrior NZ for January 2020. What is apparent from the payslips is that Mr Peck's wage rate had been reduced by at least the pay day of 3 February 2020.

[27] Mr Peck gave evidence that the reductions to his wage rate were not made by agreement and that Mr Gemmell did not consult or advise him of them before they were made. On at least one occasion Mr Peck queried a wage rate reduction and was told by Mr Gemmell that it related to other deductions being made from his pay. In the statement of reply, Warrior NZ maintained that Mr Peck was paid correctly. However, no explanation has been provided by Warrior NZ for the reductions in wage rate.

[28] The wage rate reductions were entirely unilateral. Mr Peck did not agree to the changes, there was no consultation, Mr Peck did not receive any fresh consideration for the variation, nor were reasons provided to him justifying the reductions. Mr Peck's rate of pay was a fundamental term of his employment agreement. Mr Peck's employment was, and conditions thereof as to his rate of pay were, affected to his disadvantage by the actions of Warrior NZ.

[29] Once it is established that Mr Peck was disadvantaged, the onus then turns to Warrior NZ to justify its actions. Warrior NZ, aside from lodging a statement in reply,

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<sup>4</sup> Letter dated 1 February 2022.

has not provided evidence or offered a justification for its actions. I do not consider any justification to be available on the evidence before the Authority.

[30] The actions of Warrior NZ were not those that a reasonable employer could have taken. I find that Mr Peck has been unjustifiably disadvantaged in his employment and that conditions of Mr Peck's employment were affected to his disadvantage by Warrior NZ's unjustifiable actions.

## **Remedies**

### *Lost Wages*

[31] Mr Peck seeks payment for lost wages pursuant to s 123(1)(b) of the Act. Mr Peck confirmed at the investigation that he had not worked since the time of his dismissal, despite attempts to upskill and to seek alternative work.

[32] I am satisfied that Mr Peck has lost remuneration as a result of his personal grievance. I order that Warrior NZ pay Mr Peck \$7,642.90 for lost wages, that being 3 months' ordinary time remuneration in terms of s 128(3) of the Act.

### *Compensation*

[33] Mr Peck also seeks compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act.

[34] Mr Peck gave evidence that he struggled to deal with what was a traumatic time for him and family. Mr Peck had no job to go to once his employment ended and he struggled to find alternate work. Mr Peck was, for a period of time, reliant on food grants. The impact on Mr Peck, particularly of the dismissal, was no doubt compounded by the callous and highly inappropriate method of dismissal used by Mr Gemmell.

[35] I am satisfied that Mr Peck suffered humiliation, loss of dignity and injury to his feelings, and that the dismissal and other unjustified actions of Warrior NZ had an impact on him for which he should be compensated. However, Mr Peck was the only witness and the evidence in terms of the impact on Mr Peck was otherwise insufficient to establish a basis for more than a modest award of compensation.

[36] Counsel for Mr Peck sought a total of \$10,000 in compensation. Having regard to generally comparable cases and the impacts on Mr Peck, I consider that is an appropriate level of compensation and order that Warrior NZ make payment to Mr Peck of that sum.

#### *Arrears of wages*

[37] Mr Peck submitted that he should be reimbursed \$2,090.78 for wages not paid because of the unilateral wage rate reductions. That sum is calculated using the initial wage rate of \$25.93 and the hours worked by Mr Peck at the different wage rates as evidenced on the payslips. I accept that those calculations are accurate, and I order that Warrior NZ make payment of \$2,090.78 to Mr Peck.

#### *Contribution*

[38] I must consider, given I have determined that Mr Peck has a personal grievance, to what extent Mr Peck's actions contributed towards the situation giving rise to the grievance.<sup>5</sup>

[39] Warrior NZ, in their statement of reply, asserted that Mr Peck had repudiated his contract of employment by failing to attend work at the agreed hours, had acted in bad faith, and additionally that Mr Peck was unable to carry out his duties on the basis that he had pawned tools required to perform his role. The statement in reply asserted that the applicant's contributory behaviour "...is extremely high and any award should be reduced to reflect that the Applicant was the author of his own misfortune".<sup>6</sup>

[40] The assertions made by Warrior NZ in its statement in reply are not supported by the evidence. Mr Peck gave evidence that he appropriately notified of any absences from work, including on 31 July 2020 when Mr Peck did not attend work as one of his sisters had been rushed to hospital.

[41] Mr Peck's unchallenged evidence was that he was at the hospital at the time he was advised of his dismissal and that he attended the pawn shop only after Mr Gemmell had dismissed him. I accept that evidence.

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<sup>5</sup> Employment Relations Act 2000, s 124.

<sup>6</sup> Statement in reply dated 3 December 2021, at 1.4.

[42] I have considered the extent to which any actions of Mr Peck may have contributed towards the situation that gave rise to the personal grievance. I find that there is no basis for a reduction in remedies in terms of s 124 of the ER Act.

### **Deductions from wages**

[43] Mr Peck claims that deductions were made from his wages inappropriately and that Warrior NZ should be required to reimburse him for those deductions. Warrior NZ appears to have kept an account of various deductions made from Mr Peck's wages.

[44] Warrior NZ and/or Mr Gemmell purchased a vehicle and tools for Mr Peck in order that he could carry out his work. Mr Peck agreed for Warrior NZ to make deductions from his wages. However, no agreement was recorded in writing and Mr Peck's agreement was on the basis that he would be transferred ownership of the vehicle. That never occurred.

[45] Warrior NZ also made several other deductions from Mr Peck's wages that were not agreed at all, including for vehicle insurance and an 'administration fee'.

[46] Section 5 of the Wages Protection Act 1983 provides that an employer can only make deductions from wages with the employees written consent. Here, there is no record of a written agreement or request. Mr Peck denies that there was any written agreement and Warrior NZ has not asserted the existence of any written agreement.

[47] Mr Peck gave evidence as to the sums deducted from his wages, including by reference to a document entitled "Warrior 2018 Employee Reimbursements" that was provided to him by Warrior NZ. I find that, having regard to the evidence of Mr Peck, he is entitled to payment of the following sums that were non-compliantly deducted from his wages:

- (a) \$5,250 in deductions made between 13 October 2019 and 24 August 2020 attributable to repayment of the purchase price of the vehicle;
- (b) \$880 deducted on 6 April 2020 attributable to vehicle insurance charges;
- (c) \$835.84 deducted on 17 February 2020 attributable to an administration fee;
- (d) \$250 deducted on 24 August 2020 attributable to 'damages' for 'slandering Warrior: company/employees'; and

(e) \$1,117.31 in other deductions made on or after 24 August 2020 attributable to tools and vehicle related expenses for which there was no agreement (excluding a Stanley charger for which Mr Peck agreed to pay).

[48] The deductions recorded above were made by Warrior NZ from wages that, but for the deductions, would have been paid to Mr Peck. The deductions were not consented to, or requested by, Mr Peck in writing. They are recoverable by Mr Peck pursuant to s 11 of the Wages Protection Act 1983 and s 131 of the Act.

[49] Following his dismissal, as demanded by Mr Gemmell, Mr Peck arranged for the return of the vehicle and other items to Mr Gemmell. This was despite the significant deductions made from Mr Peck's wages that were purportedly to pay for those items. In relation to the vehicle, Warrior NZ not only kept the significant amounts deducted from Mr Peck's wages, but also the vehicle itself.

[50] I order that Warrior NZ make payment to Mr Peck of \$8,333.15 as recovery of deductions made from his wages.

### **Is Mr Peck entitled to payment for unpaid holiday pay?**

[51] Mr Peck's uncontested evidence was that he was employed on a full-time basis. However, the payslips produced by Warrior NZ reflect that Mr Peck was paid holiday pay at a rate of 8 per cent as a 'casual'. Mr Peck submits that as he was employed on a full-time basis he could only receive pay for annual holidays upon request or upon termination of his employment in accordance with s 23 of the Holiday's Act 2003.

[52] Section 28 of the Holidays Act 2003 permits an employer to regularly pay annual holiday pay in certain circumstances. Warrior NZ has not asserted that those circumstances apply, other than by generally stating that Mr Peck was paid his holiday pay correctly.<sup>7</sup>

[53] I find that in terms of s 28(4) of the Holidays Act 2003 Warrior NZ, albeit incorrectly, paid Mr Peck an identifiable 8 per cent annual holiday pay with his regular wages. Mr Peck was not employed by Warrior NZ for 12 months or more<sup>8</sup> and so s

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<sup>7</sup> Statement in reply dated 3 December 2021, at 2.9.

<sup>8</sup> Mr Peck was employed between 7 October 2019 and 31 July 2020.

28(4) Holidays Act 2003 does not provide that Mr Peck is not due any additional entitlement in terms of s 16 of the Holidays Act.<sup>9</sup> As such, I decline to make the order sought.

[54] It is however apparent that Mr Peck is owed payment for annual holidays on account of his wage rate being unilaterally reduced without consent. I have ordered Warrior NZ to make payment for arrears of wages in the amount of \$2,090.78. I further order that Warrior NZ make payment to Mr Peck of 8 per cent of that sum for unpaid annual holiday pay, that being \$167.26.

**Has Warrior NZ failed to retain a copy of Mr Peck's individual employment agreement – s 64 of the Act?**

[55] Mr Peck claims that Warrior NZ has breached a minimum employment standard in that it failed to provide and retain a copy of Mr Peck's individual employment agreement.

[56] On 1 February 2022 Warrior NZ's representative wrote to the Authority confirming that no individual employment agreement had ever been signed. That conflicts with the evidence in this matter of Mr Peck. I accept Mr Peck's evidence that an individual employment agreement was signed. I find that Warrior NZ breached s 64 of the Act by failing to retain a signed copy of Mr Peck's individual employment agreement.

**Is Warrior NZ entitled to reimbursement of money owed on tools supplied to Mr Peck?**

[57] Warrior NZ made significant deductions from Mr Peck's wages, purportedly to cover the purchase price of tools supplied to him.

[58] Warrior NZ have not made out any claim for reimbursement and did not provide evidence, nor did it appear, at the investigation meeting. There is no evidence before the Authority establishing that Mr Peck kept tools belonging to Warrior NZ for which

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<sup>9</sup> Section 28(4) provides, in effect, that an entitlement to four weeks annual holidays will apply in addition to any non-compliant payments made in terms of s 28, but only where the employment has continued for 12 months or more.

the value exceeded the amounts deducted from his wages. I find that there is no basis for any order requiring Mr Peck to make payment to Warrior NZ in relation to the supplied tools.

### **Summary of orders**

[59] Warrior NZ must make payment to Mr Peck, within 28 days of the date of this determination of:

- (a) \$7,642.90 for lost wages under s 128(2) of the Act;
- (b) \$10,000 as compensation for hurt, humiliation, and injury to feelings under s 123(1)(c)(i) of the Act;
- (c) \$2,090.78 arrears of wages relating to the wage rate reductions;
- (d) \$8,333.15 as recovery of deductions made from Mr Peck's wages without written request or consent; and
- (e) \$167.26 in unpaid annual holiday pay.

### **Costs**

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

[61] If they are not able to do so and an Authority determination on costs is needed Mr Peck 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 Warrior NZ would 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.

[62] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>10</sup>

Rowan Anderson  
Member of the Employment Relations Authority

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<sup>10</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).