

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 682
3164301

BETWEEN AIDAN SAMUELSON
Applicant

AND CODEY HALSE
Respondent

Member of Authority: Alex Leulu

Representatives: Hayley Johnson, advocate for the Applicant
No appearance by the Respondent

Investigation Meeting: 11 July 2023 at Hamilton

Submissions and further Submissions and further information on 6 September
information received: 2023.
No information received from Respondent

Determination: 17 November 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Aidan Samuelson was employed by Codey Halse as an assistant painter on 17 May 2021. On 8 December 2021 Mr Samuelson resigned from his employment after a dispute with Mr Halse about a change to his pay rate and payment of his sick leave. He has now sought orders requiring Mr Halse to pay arrears of wages, remedies for unjustified disadvantage and unjustified dismissal. He also sought penalties against Mr Halse for breaches of good faith and minimum employment standards.

The Authority's investigation

[2] Mr Halse did not participate in the Authority's investigation. On 2 March 2023 Mr Samuelson's statement of problem was served on Mr Halse's residential address. The courier's record confirmed receipt of the statement by "Codey". Apart from this

confirmation, Mr Halse had not engaged with any other aspect of the Authority's investigation. This included a case management conference on 3 April 2023, the investigation meeting and a further opportunity extended to him to provide a response to Mr Samuelson's written closing submissions.

[3] Mr Samuelson also provided evidence confirming Mr Halse's email address. All notices, directions and minutes were served on Mr Halse at his address and by email.

[4] For the Authority's investigation, a written witness statement was lodged by Mr Samuelson and he answered questions under oath. Ms Johnson also gave oral closing submissions on Mr Samuelson's behalf and was followed by filing of written closing submissions.

[5] 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

[6] The issues requiring investigation and determination were:

- (a) Whether or not Mr Samuelson was unjustifiably dismissed by Mr Halse by constructive dismissal;
- (b) Whether or not Mr Samuelson was unjustifiably disadvantaged during his employment with Mr Halse when, Mr Halse unilaterally changed Mr Samuelson's hourly pay rate from \$23 per hour to \$20 per hour;
- (c) In the event it is found Mr Samuelson was unjustifiably disadvantaged and/or unjustifiably dismissed, whether or not Mr Samuelson is entitled to:
 - (i) Compensation for hurt & humiliation in accordance with s 123 (1)(c)(i) of the Act; and
 - (ii) Reimbursement of lost wages or failure to be paid out his notice period;

- (d) Whether or not Mr Samuelson is still owed payment of wages for his employment with Mr Halse;
- (e) Whether or not Mr Halse had carried out unlawful deductions from Mr Samuelson's wages;
- (f) In the event Mr Samuelson is found to be owed unpaid wages and/or has been subject to an unlawful wage deduction by Mr Halse, to determine whether or not:
 - (i) Mr Samuelson is entitled to payment for these outstanding amounts (including interest);
 - (ii) A penalty is to be imposed against Mr Halse under s 13 of the Wages Protection Act 1983 (Wages Protection Act) for unlawful deduction;
 - (iii) A penalty is to be imposed against Mr Halse under s 130 of the Act for failing to provide wage and time records upon request;
- (g) Whether or not Mr Halse had breached his obligation of good faith to Mr Samuelson and if so, whether or not a penalty is imposed against Mr Halse under s 4 of the Act; and
- (h) Should either party contribute to the costs of representation of the other party.

Background

Initial employment with Mr Halse

[7] Codey Halse operated a painting business which traded as Halse Painters and Decorators. In early 2021 Mr Samuelson was informed by a friend about potential work for Mr Halse. This led to a job interview meeting between Mr Samuelson and Mr Halse. On 17 May 2021 Mr Samuelson started work for Mr Halse as an assistant painter.

[8] Upon starting work for Mr Halse, Mr Samuelson's work hours were usually between 7am until 5pm from Monday to Friday. His work included painting, scaffolding, cleaning and surface sanding.

[9] Mr Samuelson enjoyed his work and initially he shared a friendly work relationship with Mr Halse.

Mr Samuelson's sick leave

[10] On Monday 29 November 2021 Mr Samuelson planned to take sick leave because he was due to have wisdom teeth surgery. Mr Halse approved Mr Samuelson's leave in advance.

[11] Mr Samuelson did not fully recover from the surgery and on the same day, he contacted Mr Halse and informed him of his need to take further sick leave for the following day (Tuesday 30 November). Eventually Mr Samuelson remained on sick leave for the remainder of the week.

[12] In response to Mr Samuelson's request for further sick leave on 30 November, Mr Halse sent him a text message saying they would have a meeting on his return. Mr Halse did not provide any further information about what the meeting was about.

[13] Mr Samuelson returned to work the following week on Monday 6 December 2021. On the same day he reviewed his payslip for the previous week and realised he was only paid for two days sick leave. At the time he thought he had sufficient sick leave to cover the time he was away from work.

[14] Mr Samuelson sent a message to Mr Halse seeking an explanation. Mr Halse responded by text message saying he did not receive a medical certificate from Mr Samuelson and said "your lucky u got 2". He sent another message to Mr Samuelson saying "Gtfoh" which stands for "get the fuck out of here". Mr Samuelson responded by sending through a copy of his medical certificate.

Mr Samuelson's payrate and resignation

[15] Mr Samuelson also noticed a further anomaly on his payslip. His hourly rate was changed from his previous rate of \$23 per hour to \$20 per hour. Mr Samuelson also queried his payrate change with Mr Halse. Mr Halse responded by saying he reduced Mr Samuelson's pay rate because of lack of productivity. Mr Samuelson said he had never had any previous discussions or issues with Mr Halse about his work productivity.

[16] This led to further messages between them about Mr Samuelson's reduced pay rate. The messages continued for a number of days and on Wednesday 8 December 2021 Mr Samuelson sent Mr Halse a text message saying he had no choice but to resign. In response, Mr Halse messaged him saying, "send your resignation to halse.painters@hotmail.com".

[17] On 13 December 2021 Mr Samuelson, through his representative, sent Mr Halse a personal grievance letter for unjustified disadvantage, unjustified dismissal and recovery of unpaid wages. His personal grievance was raised well within the 90-day time period.¹

[18] In his letter, he also requested a copy of his wage and time records. Mr Halse did not respond to the letter or provide Mr Samuelson his wage and time records.

Mr Samuelson's claim for constructive dismissal

[19] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal has provided guidance in determining what may constitute as constructive dismissal and includes (but is not limited to) the following situations:²

- (a) Where the employee is given a choice of resigning or being dismissed.
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to leave.
- (c) Where a breach of duty by the employer leads the employee to resign.

[20] Mr Samuelson said he had no option but to resign because of Mr Halse's non-payment of his sick leave, the change to his pay rate and also Mr Halse's failure to respond to his queries about these two matters.

[21] Mr Samuelson also said the nature of the breaches were of sufficient seriousness to make it reasonably foreseeable, his resignation would follow. On Wednesday 8 December 2021 at 9.45am Mr Samuelson sent the following message:

¹ Employment Relations Act 2000, s 114.

² *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374-375.

I have come to work this morning even though I'm not really feeling up to it because of your treatment of me. I need to know, are you paying me \$23 an hour for my work this morning or not? If you don't reply to me by lunch time I'm out of here. No worker would stay and work for less money than they were promised.

[22] The messaging platform Mr Samuelson used to notify Mr Halse also indicated whether or not Mr Halse had seen the message. In this case, Mr Samuelson could see Mr Halse had viewed the text message but decided not to respond to his message.

[23] Mr Samuelson confirmed his resignation by text later in the day at 6.37pm. Mr Samuelson was entitled to query the changes to his employment circumstances. He was also entitled to an explanation about his queries. The steps Mr Samuelson took to end the employment relationship on or around 8 December 2021 were readily foreseeable. Mr Samuelson was constructively dismissed by Mr Halse.

Mr Samuelson's claim for unjustified disadvantage

[24] A personal grievance includes a claim that an employee's employment, or 1 or more conditions of employment, was affected to the employee's disadvantage by some unjustifiable action by the employer.³

[25] Mr Samuelson said he was unjustifiably disadvantaged when Mr Halse had unilaterally changed his pay rate and had not properly paid his sick leave.

[26] The grounds for Mr Samuelson's claim for unjustified disadvantage are not separate and distinct from his established claim of constructive dismissal. For this reason, the resolution of his grievances are appropriately confined to his successful claim for unjustified constructive dismissal.

Remedies

[27] Mr Samuelson has established his personal grievance for unjustified constructive dismissal. He is entitled to consideration of the remedies he has sought.

Compensation

[28] Mr Samuelson said he was "horrified" and "dumbfounded" at the way he was treated by Mr Halse, and he also felt betrayed. He also said he was left in the unenviable

³ Employment Relations Act 2000, s 103(1)(b).

position of having to immediately find new employment due to the abrupt end of his employment.

[29] As a result of Mr Halse's actions, Mr Samuelson said he suffered stress and struggled to find employment. He was then reliant on Ministry of Social Development benefits for nearly five months. Considering the range of awards made in cases of similar circumstances, Mr Samuelson's sense of humiliation, loss of dignity and injury to his feelings warranted an award of \$5,000 compensation under s 123(1)(c)(i) of the Act.

Reimbursement for lost wages

[30] Mr Samuelson had lost income as a result of his constructive dismissal and has sought reimbursement for lost wages.⁴ After resigning from his employment, Mr Samuelson said he was proactive in his efforts to secure alternative employment. He began looking for employment on the day of his resignation. He returned to full time employment in late April 2022.

[31] Up until finding full employment, he managed to find casual employment for furniture moving business earning a total of \$712.80 gross.

[32] Mr Samuelson is claiming payment from Mr Halse for 19 weeks he remained out of work at a total of \$16,767.20 gross. This is calculated at 40 hours per week at an hourly rate of \$23 and deducting his earnings his casual employment.

[33] As a remedy for the resulting loss of income, the Authority must order Mr Halse to pay Mr Samuelson "the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration".⁵

[34] In the circumstances of this case, the lesser sum of three month applies. On his ordinary annual income of \$47,841 (based on his hourly rate of \$23 for a 40-hour week) and deducting his casual employment pay, the award to Mr Samuelson for lost remuneration is \$11,247.20 less any applicable tax. Mr Halse is to pay this amount for lost wages to Mr Samuelson within 28 days of the date of this determination.

⁴ Employment Relations Act 2000, s 123(1)(b).

⁵ Employment Relations Act 2000, s 123(1)(b) and s 128(2).

Contribution

[35] Where the Authority determines an employee has a personal grievance, it must also consider the extent to which the employee's actions contributed towards the situation giving rise to the personal grievance and if the actions require, then reduce remedies it would otherwise have awarded.⁶

[36] Mr Samuelson was entitled to adequate communication and explanation for non-payment of his sick leave and the reduction of his pay rate. It is not unreasonable for an employee to request payment for wages due and owing. No further reductions are warranted from the monetary remedies for reasons of contribution.

Wage arrears and deductions

Arrears to be paid

[37] Mr Samuelson is entitled to and owed sick leave for the days he was unable to attend work due to his dental surgery. During his one-week period on sick leave, he was only paid the gross sum of \$261.06. His payslip records show he should have received \$920 gross.

[38] Also, although Mr Halse paid Mr Samuelson his final pay, he did not pay Mr Samuelson's accrued annual leave entitlement due upon termination of his employment.⁷ Mr Samuelson's accrued annual leave entitlement is also shown on his final payslip dated 6 December 2021.

[39] Based on the payslip Mr Samuelson had accrued 98.46 hours in unpaid annual leave at the end of his employment. Calculated in accordance with his pay rate this equates to \$2,264.58 before tax.

[40] The sick leave and annual leave arrears are based on Mr Samuelson's original pay rate of \$23 per hour. These amounts are owed and Mr Halse is ordered to pay Mr Samuelson \$2,923.52 gross within 28 days of this determination.

Interest on the arrears

⁶ Employment Relations Act 2000, s 124.

⁷ Holidays Act 2003, s 23.

[41] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[42] It is appropriate where a person has been deprived of the use of money to make an award for interest. Mr Samuelson is entitled to an award of interest on his wage arrears.

[43] Mr Halse is ordered to pay interest, using the civil debt interest calculator, within 28 days of this determination, interest on the sum of \$2,923.52, being the total of arrears awarded, calculated from 8 December 2021 until the date payment is made in full.⁸

Unlawful deduction and breach of employment agreement

[44] Under the Wages Protection Act, an employer is generally required to pay an employee's wages without deduction.⁹ The amount an employee is entitled to be paid will depend on the terms of the employment agreement. If wages were due and not paid in accordance with the employment agreement, then an employee may have a claim for unlawful deduction.¹⁰

[45] Although Mr Samuelson's initial agreement showed his payrate to be \$21 per hour, he said he later received a pay raise up to \$23 per hour. This is supported by payslips he had provided which shows he was paid \$23 per hour from at least September 2021 up until the reduction of his hourly rate in December 2021. This was sufficient evidence to show an agreed variation to the initial employment agreement.

[46] By unilaterally reducing Mr Samuelson's wage rate from \$23 per hour to \$20 per hour without agreement or consultation with him, Mr Halse had breached the terms of their employment agreement. Also, by paying Mr Samuelson at the reduced rate, Mr Halse had also made an unlawful deduction from Mr Samuelson's wages.

Penalties

[47] Mr Samuelson submitted penalties should be imposed against Mr Halse for:

⁸ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

⁹ Wages Protection Act, s 4.

¹⁰ *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] ERNZ 609 at 627.

- (a) the unlawful deduction from his wages.¹¹
- (b) failure to provide Mr Samuelson a copy of his wage and time records.¹²
- (c) breach of its good faith obligations.¹³

[48] Although not initially set out in his statement of problem, Mr Samuelson also claimed in his closing submissions further penalties for breach of employment agreement by reducing Mr Samuelson's pay rate and non-payment of annual holiday pay upon the end of his employment.¹⁴ These claims are out of time. Claims for a penalty must be made within one year from when the cause of action first became known or when the cause of action should reasonably have become known to Mr Samuelson.¹⁵

[49] The remaining breaches have been established and a penalty should be imposed against Mr Halse as a general deterrent from such conduct. The maximum penalty against Mr Halse is \$10,000 for each breach. Given each breach arose from several related actions (or inactions) by Mr Halse, a single global penalty is appropriate in this case.

[50] In absence of any response from Mr Halse, his actions appear to have been intentional and shows a general disregard of his obligations to Mr Samuelson as his employer. For this reason, his culpability is relatively high.

[51] Due to his failure to engage with the Authority's investigation process, there is no evidence before the Authority about Mr Halse's capacity to pay a penalty.

[52] The only available factor related to Mr Halse's circumstances is the relatively small size of his business. As far as he was aware, Mr Samuelson said there were only four people engaged in the painting operation which included Mr Samuelson, Mr Halse and two other people.

¹¹ Wages Protection Act 1983, s 13.

¹² Employment Relations Act 2000, s 130.

¹³ Employment Relations Act 2000, s 4.

¹⁴ Employment Relations Act 2000, s 134 and Holidays Act 2003, s 27.

¹⁵ Employment Relations Act 2000, s 135(5).

[53] Standing back and including comparison with other cases, the relevant matters and Mr Halse's first appearance before the Authority, a global penalty of \$5,000 is appropriate. Mr Halse is ordered to pay half the penalty to Mr Samuelson to compensate him for the inconvenience and resources expended in pursuing the payment of entitlements. The other half is ordered to be paid to the Authority, for transfer to a Crown bank account. The penalty is to be paid within 28 days of the date of this determination.

Summary

[54] Mr Halse must pay the following amounts to Mr Samuelson within 28 days of the date of this determination:

- (a) \$5,000 under s 123(1)(c)(i) of the Act;
- (b) \$11,247.20 (gross) for loss wages; and
- (c) \$2,923.52 (gross) in wage arrears with interest calculated.

[55] Mr Halse must also pay a global penalty of \$5,000 within 28 days of the date of this determination as follows:

- (a) \$2,500 to be paid to Mr Samuelson; and
- (b) \$2,500 to be paid to the Authority.

Costs

[56] Mr Samuelson is entitled to a contribution to the costs of representation incurred in bringing his claims to the Authority. He has asked the Authority to reserve its decision of costs until after a determination on the substantive matters had been made.

[57] Accordingly, costs are reserved subject to further confirmation from Mr Samuelson. If Mr Samuelson still seeks costs in this matter, a memorandum on costs should be lodged with the Authority within 14 days of the date of issue of the written determination in this matter.

[58] From the date of service of the memorandum Mr Halse 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.

[59] 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 the tariff.¹⁶

Alex Leulu
Member of the Employment Relations Authority

¹⁶ See www.era.govt.nz/determinations/awarding-costs-remedies.