

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 422  
3124155

BETWEEN

NARENDRA PRATAP  
SINGH  
Applicant

AND

ROHIT VIMAL PRASAD  
Respondent

Member of Authority: Peter Fuiava  
Representatives: The applicant and the respondent are self-represented  
Investigation Meeting: 14 July 2021  
Determination: 4 October 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This is a claim brought by Mr Singh against Mr Prasad for unpaid wages, unjustified dismissal and a penalty under s 63A of the Employment Relations Act 2000 (the Act) for failing to provide a written employment agreement.

**Relevant facts**

[2] Mr Singh and Mr Prasad used to be good friends. The two men, former residents of Fiji, first met in March 2019 while driving tipper trucks to a quarry site in Auckland. The friendship developed to the point where Mr Prasad invited Mr Singh and his wife to his home for dinner and *kava*.

[3] In August 2019, Mr Singh and his wife left Auckland to live in Hamilton to be near one of their sons who worked as a dairy farmer.

[4] In September 2019, Mr Prasad called Mr Singh and asked if he could drive one of his tipper trucks for \$27 per hour. Mr Singh accepted the offer and, in January 2020, he and his wife returned to Auckland.

[5] Mr Singh worked for Mr Prasad from 13 January to 17 January 2020. He was given a fuel card and one of Mr Prasad's six-wheeled tipper trucks which was left at Mr Singh's home. Mr Prasad texted Mr Singh the details of each job that he needed him to attend.

[6] There is a dispute concerning the number of hours Mr Singh worked for Mr Prasad. According to Mr Singh's log book, he worked a total of 51 hours. Mr Prasad says that this was incorrect and that he worked 41.25 hours instead because Mr Singh had got lost for four hours and had starting recording his time the moment he entered the cab as opposed to the time he reached the first job site.

[7] On the evening of Friday 17 January 2020, Mr Prasad was waiting at Mr Singh's home to collect his truck. Despite saying that he would have it back early the following week, it was never returned. Mr Singh was not paid his wages and Mr Prasad stopped texting him the details of any further work.

[8] Despite texting Mr Prasad a number of times in late January and early February 2020 about his wages, Mr Singh did not hear back from his employer. By late February 2020 it had become apparent to Mr Singh that he had been dismissed because one of his sons had seen someone else driving the same truck he had driven earlier.

[9] Mr Prasad says that he has not paid Mr Singh's wages because he damaged his truck and that he gifted Mr Singh roofing irons which were worth more than \$1,500.

[10] After receiving some legal advice from his local community law centre, Mr Singh texted Mr Prasad on 13 March 2020 of his intention to take legal action against him if he did not pay his wages. Mr Prasad's response was as follows:

Let's meet in court and for the WAGES deduct the money from the roofing iron which I gave you worth more \$1500.00 and you talking about your WAGES who will pay for the damages you have done to my truck.

## **The Authority's investigation**

[11] Proceedings in the Authority commenced by way of a statement of problem that was lodged by Mr Singh on 6 November 2020. Mr Prasad did not lodge a statement in reply and despite being directed by the Authority to file his written statement and any supporting documents by 16 June 2021, he failed to do so.<sup>1</sup>

[12] Mr Singh and Mr Prasad attended the investigation meeting which took place on 14 July 2021. Under affirmation, the two men answered questions from the Authority.

[13] 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. It has not recorded all evidence and submissions received.

## **The issues**

[14] The issues requiring investigation and determination were:

- (a) Was there an employment relationship between Mr Singh and Mr Prasad?
- (b) Is Mr Singh owed wages?
- (c) Was Mr Singh unjustifiably dismissed from his employment?
- (d) If Mr Prasad's actions were not justified (in respect of the dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours by Mr Singh to mitigate his loss); and
  - Compensation under s123(1)(c)(i) of the Act for hurt and humiliation
- (d) Is Mr Prasad liable for a penalty under the Act for failing to provide Mr Singh with an employment agreement?

## **Mr Singh was an employee**

[15] Mr Prasad confirmed that he employed Mr Singh as a tipper truck driver and that their relationship was that of employer and employee. Towards the end of the investigation meeting there was a half-hearted attempt by Mr Prasad to cast his company, which operates as a road freight transport service, as the employer. I reject

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<sup>1</sup> Minute of the Authority dated 27 May 2021.

the claim as a last-minute defence raised by Mr Prasad in which no supporting evidence was provided.

### **Mr Singh is owed wages**

[16] Mr Prasad's initial explanation for not paying Mr Singh's wages was that he had damaged his truck. However, at the investigation meeting, Mr Prasad stated for the first time that the mirror and clutch plate to his truck had been damaged and that it cost him \$2,500 to fix the clutch plate. There was also the cost of not having the vehicle on the road while it was being repaired.

[17] There are a number of difficulties with Mr Prasad's claim regarding the alleged damage to his truck. The first is a matter of jurisdiction because motor vehicle damage claims belong in the Disputes Tribunal where it has jurisdiction to award compensation in tort.

[18] Second, assuming for the moment that Mr Singh is in some way indebted to Mr Prasad, the employer cannot make a deduction from an employee's wages without the worker's written consent.<sup>2</sup> Mr Prasad has neither sought nor obtained Mr Singh's consent to deduct anything from his wages.

[19] Third, there is the question of fairness and natural justice. Mr Prasad has not filed a statement in reply to Mr Singh's statement of problem and neither has he provided a written statement as earlier directed. The alleged damage to the mirror and clutch plate is 'news' to Mr Singh.

[20] The purpose of filing documents in advance of an investigation meeting is to avoid parties being caught by surprise. Mr Singh has not been given fair notice of Mr Prasad's claim for damages to his truck.

[21] Mr Prasad says that he did not file any documents with the Authority because he had technical difficulties retrieving his old text messages from a mobile phone he had given to his daughter. I am not persuaded by that explanation because if Mr Prasad

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<sup>2</sup> Wages Protection Act 1983, ss 4 and 5.

genuinely wanted to file a written statement, he could have applied for an extension of time in order to do so but he did not.

[22] Mr Prasad initially sought to off-set Mr Singh's unpaid wages claim against the roofing irons that he had gifted him earlier when their friendship was very much afoot. However, Mr Prasad conceded that this was a gift and did not pursue the matter any further.

[23] For the above reasons, I find that Mr Singh worked for Mr Prasad from 13 to 17 January 2020 as an employee. I further find that Mr Prasad is liable to Mr Singh for his wages. I turn now to quantum.

#### *Calculation of wage arrears*

[24] Mr Singh recorded 51 hours in his run sheet which was adjusted by Mr Prasad to 42.15 hours because of time that had been recorded in error. At the investigation meeting, Mr Prasad explained that his business was contracted to another transport company which paid on the basis of when a driver started a job. The time spent traveling from home to a job site was not paid for. Mr Prasad stated that he had discussed this with Mr Singh and that he had deducted another four hours because Mr Singh had got lost somewhere.

[25] At the investigation meeting, Mr Singh did not object to the points raised by Mr Prasad concerning his run sheet which gives me confidence that I can rely on Mr Prasad's calculation for the hours that he worked.

[26] As to the hourly rate, the evidence was ambiguous. Although both men agreed that Mr Singh was to be paid \$27 per hour, I was provided with a text message (20 January 2020) from Mr Prasad in which Mr Singh stated "remember I said, I will no[t] take 27, you can pay me \$24". Mr Singh did not deny that the text was his and I questioned him as to why it was missing from his own set of documents lodged with the Authority, but he remained somewhat sheepish on the issue.

[27] In any case, I have adopted the lower rate of \$24 per hour as there is nothing before to indicate that after Mr Singh's text message of 20 January 2020 that the parties had agreed to a higher rate of \$27 per hour.

[28] In terms of wage arrears, I find that for the period from 13 January to 17 January 2020, Mr Singh worked 42.15 hours for Mr Prasad at the rate of \$24 per hour. This equates to gross wages of \$1,011.16 which I order Mr Prasad to pay to Mr Singh within 14 days of the date of this determination.

#### *Holiday pay*

[29] As an employee Mr Singh was entitled to holiday pay upon termination of his employment calculated at eight per cent of his gross earnings.<sup>3</sup> Eight percent of Mr Singh's gross earnings of \$1,011.16 is \$80.90 (rounding up to the first decimal point) which I order Mr Prasad to pay within 14 days of the date of this determination.

#### *Interest*

[30] Mr Singh is entitled to an award of interest on the total wages claimed including the holiday pay component. 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.

[31] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[32] Mr Prasad is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:<sup>4</sup>

- (i) Interest on the sum of \$1,092.06 (\$1,011.16 + \$80.90) from 17 January 2020 until the date payment is made in full.

[33] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

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<sup>3</sup> Holidays Act 2003, s 23.

<sup>4</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

## **Unjustifiable dismissal**

[34] The onus is on Mr Prasad to show that, at the time of the dismissal, his actions were what a fair and reasonable employer could have done in all the circumstances.

Section 103A of the Act sets out the test of justification:

### 103A Test of justification

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[35] Section 4(1A)(b) of the Act requires the employment relationship to be active and constructive and for the parties to be responsive and communicative with each other. Here, Mr Prasad failed to clearly communicate his intentions with Mr Singh who was left wondering why he had not been paid his wages and whether he was still employed. It is not for Mr Singh to discern these matters for himself but for Mr Prasad to actively communicate and to be responsive with his employee.

[36] It is unclear exactly when Mr Singh was dismissed because Mr Prasad had simply stopped communicating with him after 17 January 2021. After not hearing from Mr Prasad for a week, Mr Singh remained hopeful that he still had a job because of his belief that their friendship was 'pure' and that nothing 'bad' would happen as a result. However, in February 2020, one of Mr Singh's sons saw that the truck he had been driving was being driven by someone else. It was then that Mr Singh realised that he had been dismissed. Having regard to Mr Singh's evidence, I find that he was dismissed from employment by early February 2020.

[37] Mr Prasad said he decided to dismiss Mr Singh because he negligently damaged the truck. However, there was never a disciplinary process or an investigation undertaken into the matter. Mr Singh was not given access to information regarding the damage to the mirror and the clutch plate which was relevant to the continuation of his employment. Neither was he given an opportunity to provide further comment before he was dismissed. Mr Prasad failed to communicate with Mr Singh in a manner that was responsive and communicative. He had simply gone 'underground'. These are not the actions of a fair and reasonable employer and fail in every respect when assessed against the statutory considerations set out at s 103A(3) of the Act.

### *Lost wages*

[38] Where a personal grievance has been found, section 128 of the Act states that the Authority *must* order the employer to pay the employee the lesser of the actual amount lost or three months' ordinary time remuneration.

[39] During the investigation meeting, Mr Singh advised me that because his knee had given out, he had not been able to work. Mr Singh further stated that he has been on a disability benefit since March 2020. Precisely when he stopped working is not clear. Mr Singh has a duty to mitigate his losses. I find that it was reasonable for him to wait for two weeks to hear back from Mr Prasad after which it would have become apparent to Mr Singh that he had been dismissed. I find further that had Mr Singh been provided with an employment agreement, it would likely have included a notice period. A period of one week's notice is reasonable in the circumstances.

[40] I fix Mr Singh's entitlement for lost remuneration at three weeks ordinary time remuneration which includes the one week notice period noted above. This equates to lost wages of \$2,880 (40 hours x \$24 per hour x 3 weeks).

### *Hurt and humiliation*

[41] Mr Singh gave evidence that he would not have minded so much had Mr Prasad not kept him "waiting like a fool". I take into account the inconvenience to Mr Singh and his wife in having to relocate to Auckland to take up employment that ended after one week. However, the couple live with immediate family and have not been put out to a significant degree. On balance, an award of \$1,000 compensation for hurt and humiliation under s 123(1)(c)(i) of the Act is appropriate under the circumstances.

[42] As I have awarded remedies to Mr Singh I must consider whether he has contributed to the situation that gave rise to his unjustified dismissal.<sup>5</sup> It has not been demonstrated that Mr Singh has done anything wrong or has contributed to his own dismissal. A reduction in remedies is not warranted.

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

### **Should a penalty be awarded?**

[43] Mr Prasad failed to provide Mr Singh with an employment agreement and is consequently liable for a penalty under s 63A of the Act. Factors to weigh in determining an appropriate penalty are identified in s 133A of the Act and in Employment Court decisions applying the statutory criteria and other relevant considerations.<sup>6</sup>

[44] The maximum penalty that may be imposed in the case of an individual is \$10,000 per breach. Mr Singh worked for Mr Prasad for one week and I understand that Mr Prasad operates a small transport business. Considering the quantum of penalties imposed in similar circumstances and the relevant factors, I order Mr Prasad to pay a penalty of \$150 which is to be paid to Mr Singh to compensate him for the loss caused to him by the failure to provide him with an employment agreement.

### **Orders**

[45] Mr Prasad owes the following in wage arrears to Mr Prasad and these are to be paid to him within 14 days of this determination:

- (a) \$1,011.16 (gross) for unpaid wages; and
- (b) \$80.90 (gross) for holiday pay.

[46] Within 14 days of the date of determination Mr Prasad is to calculate and pay Mr Singh interest on wage arrears and holiday pay as awarded in paragraph [32] above.

[47] Mr Prasad unjustifiably dismissed Mr Singh and in satisfaction of this grievance must pay Mr Singh, within 14 days of this determination:

- (a) \$2,880 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Act; and

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<sup>6</sup> *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

(b) \$1,000 without deduction for compensation pursuant to s 123(1)(c)(i) of the Act.

[48] Within 14 days of this determination, Mr Prasad must pay Mr Singh \$150 as payment of the penalty imposed for his failure to have an employment agreement.

[49] Finally, Mr Singh paid a filing fee of \$71.56 to lodge his statement of problem with the Authority. He can reasonably recover this amount from Mr Prasad. Mr Prasad is to pay the sum of \$71.56 to Mr Singh within 14 days of the date of this determination.

Peter Fuiava  
Member of the Employment Relations Authority