

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 2
5418600

BETWEEN KEITH TAAFULI
Applicant

AND MEGA WRECKERS LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Graeme Ogilvie, for the Applicant
Mohamad Nader Hossaini, for the Respondent

Investigation Meeting: 25 October 2013 at Wellington

Determination: 6 January 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Taafuli claims he was unjustifiably dismissed by his employer in March 2013, and was underpaid wages for the hours he worked during each of the three weeks of his employment. He seeks wage arrears, holiday pay and the reimbursement of wages lost as a result of his personal grievance. Mr Taafuli also seeks compensation for humiliation, loss of dignity and injury to feelings; a penalty for breaches of the Employment Relations Act (the Act); and costs.

[2] Mega Wreckers Limited (Mega Wreckers) is a vehicle wrecking company. Its Wellington branch is situated in Seaview, Lower Hutt. It denies owing any wages to Mr Taafuli although it acknowledges that it did not pay him holiday pay on the termination of his employment. Mega Wreckers says it was justified in dismissing Mr Taafuli on the grounds of his dishonesty and theft.

[3] The parties attended mediation but were unable to resolve their differences.

Issues

- [4] The issues for the Authority to determine are:
- (a) Whether Mr Taafuli was unjustifiably dismissed;
 - (b) Whether he is owed wage arrears and holiday pay;
 - (c) Whether a penalty should be awarded against Mega Wreckers; and
 - (d) What, if any, remedies are appropriate.

Background and evidence

[5] Mr Taafuli commenced employment on Tuesday 26 February 2013, reporting to the manager of the Wellington branch of Mega Wreckers, Mr Mohamad Hossaini. Mr Taafuli says he completed timesheets for his employer on a daily basis. He did not keep copies of these but recollects that he worked from 8am to 5pm, or sometimes 6pm, daily. He worked Monday to Friday and, in his second week, he also worked on a Saturday.

[6] Mr Taafuli was told he would be paid \$14 an hour. He was not provided with an employment agreement. His job entailed driving a tow truck and collecting vehicles that his employer had arranged to purchase. He was to be paid weekly in arrears by direct credit to his bank account. In fact Mr Taafuli received only one wage payment by direct credit. This was for the period from 26 February to 1 March 2013, received in his bank account on Thursday, 7 March 2013. Mr Taafuli provided evidence of this.

[7] On Thursday 14 March 2013 when Mr Taafuli checked his bank account his wages had not been paid. He asked Mr Hossaini about this and says he was told they had been deposited into his bank account. Mr Taafuli checked his account again by telephone and informed Mr Hossaini that his wages had not gone in. A discussion ensued between Mr Taafuli, who said he needed money for lunch and petrol, and Mr Hossaini, who claimed the wages would be paid the following day. The discussion ended with Mr Hossaini paying Mr Taafuli his wages in cash for the second and third weeks of his employment. It also concluded with Mr Hossaini telling Mr Taafuli not to come back to work again because he had been dismissed.

[8] The following morning, Mr Hossaini telephoned Mr Taafuli at home around 9.30am and asked him to come in to work. When reminded that he had dismissed Mr Taafuli the previous day, Mr Hossaini said they would “*work something out*”. He asked Mr Taafuli to go to Kelburn to purchase a vehicle from a customer on his way to work. He said Mr Taafuli should use the wages he had been given the previous evening to pay the client for the vehicle.

[9] Mr Taafuli went to the Kelburn address and says he negotiated a price in the normal manner. He said the parties agreed on \$300 and he gave the owner that amount in cash, for which she signed a receipt. Later that day, Mr Hossaini called Mr Taafuli to his office and informed him that the woman whose car he had bought that morning had told him she had received only \$200, not \$300.

[10] Mr Taafuli denied that, informing Mr Hossaini that he had given her \$300 and she had signed a receipt for that amount. While Mr Taafuli was there, Mr Hossaini called the woman using the speaker on his telephone. She repeated that she had received only \$200 from Mr Taafuli that morning. Mr Taafuli says Mr Hossaini dismissed him for dishonesty, telling him he had lied to his employer

[11] Mr Hossaini acknowledges he dismissed Mr Taafuli on Thursday, 14 March 2013. He says he did so because Mr Taafuli was upset and shouting about the lack of pay in his bank account. He had kept saying that he had no money to buy lunch that day and no money for petrol. Mr Hossaini claims to have treated Mr Taafuli “*like a brother*” and says it was not fair that Mr Taafuli shouted at him in the hearing of other employees. He acknowledges Mr Taafuli did not threaten him and stopped shouting when Mr Hossaini told him he would pay his wages in cash.

[12] Mr Hossaini also acknowledges he may have been a little hasty in dismissing Mr Taafuli and he thought they might have been able to work together which is why he telephoned Mr Taafuli the following morning. As well as the purchase of the car in Kelburn, he had a number of other jobs lined up for Mr Taafuli that day.

[13] Mr Hossaini’s evidence is that he telephoned the Kelburn customer in the afternoon of 15 March 2013. He says he did so because Mr Taafuli was still in training and it was his practice to contact customers to check that they were satisfied with the service they had received from him. It was during this telephone

conversation that he heard from the customer that she had received \$200 for her vehicle. Mr Taafuli had told him he had given her \$300.

[14] He later questioned Mr Taafuli, who reiterated that he had paid the customer \$300 and had a receipt signed by her for that amount. In the early evening of 15 March 2013 he had a telephone discussion with the customer from Kelburn, using the telephone's speaker function so Mr Taafuli could hear. When the discussion ended, he paid \$300 to Mr Taafuli to reimburse him for the purchase of the customer's vehicle and told him that he would see him on Monday. Then, when the customer called back and said she said she was going to go to the Police if she did not get the additional \$100 that day, Mr Hossaini says he dismissed Mr Taafuli for dishonesty.

[15] Mr Hossaini claims he was justified in doing this. He told the Authority that, if the customer was going to go to the Police, it proved she was correct in her claim to have been paid only \$200. He said he had to believe the customer and Mr Taafuli must have been lying.

[16] At the commencement of the investigation meeting Mr Hossaini contacted the customer whose car was at the centre of the dismissal incident. The customer, whom it is not necessary to name, agreed to attend the investigation meeting to give evidence, and did so. She said she had called four vehicle wrecking companies in order to obtain a price for her vehicle. All quoted the same price of \$300. She chose Mega Wreckers simply because it was the last company she called. She had no connection with the company or Mr Hossaini.

[17] The customer says she met Mr Taafuli at a mechanic's premises where he offered her \$150 for her vehicle. She informed him she had been quoted \$300. Mr Taafuli told her he was giving her a quote now and offered \$200. She did not recall anyone making a phone call during their negotiation. The customer says Mr Taafuli gave her \$200 and she handed the keys over and took off the number plates. He then wrote a receipt on refill paper, rather than a receipt book. She signed it and left. The customer says she did not read the receipt before she signed it. She felt uncomfortable about being paid less for her vehicle than the amount she had been quoted and, on arriving home, she called Mr Hossaini. She said he seemed surprised that she had been paid \$200 and promised to call her back.

[18] The customer recalled later taking part in a three-way telephone call with Mr Hossaini and Mr Taafuli. She confirmed to them that she had received \$200 and was adamant she had not been mistaken. When I asked the customer why she had signed a receipt she had not read, she said she had been very trusting. When asked if she had told Mr Hossaini she would go to the Police if she did not receive the additional \$100, the customer said she had not, but she could have said she may call the “*Consumer Board*”.

[19] Mr Taafuli, when questioned about the customer’s evidence, said he had initially offered her \$200 as Mr Hossaini had instructed. When the customer said she wanted \$300, he telephoned Mr Hossaini who approved his paying \$300 for the vehicle. Mr Hossaini confirmed that Mr Taafuli had telephoned him during the course of the negotiations to say that the customer wanted \$300. He also confirmed he had told Mr Taafuli to negotiate the price and had approved him paying her \$300.

[20] I note that there is some inconsistency between Mr Hossaini’s evidence that he made the first telephone call to the customer after the purchase of her vehicle, and her evidence that she made the first contact following her discomfort over the amount she had received from Mr Taafuli. I am satisfied that both witnesses were recounting events as they recalled them and that neither was deliberately misrepresenting the truth in relation to which of them telephoned the other first. The investigation meeting took place several months after the events of 15 March 2013, and it is understandable that memories will not be as acute after that time.

[21] There is also a difference in their accounts of what the customer said to Mr Hossaini about taking the matter further. The customer said she had not referred to going to the Police, although she may have indicated she was considering contacting a consumer organisation. Mr Hossaini was adamant that she had spoken of going to the Police. I prefer Mr Hossaini’s evidence on that matter and find it likely she referred to both organisations.

Was Mr Taafuli’s dismissal unjustifiable?

[22] Mr Taafuli was dismissed twice, on consecutive days. The first dismissal on 14 March 2013 was effectively nullified by mutual agreement the following morning when Mr Hossaini asked Mr Taafuli to come back to work, and Mr Taafuli agreed to do so. He has not raised a personal grievance in respect of the first dismissal.

[23] The second dismissal took place in the late afternoon or early evening of Friday, 15 March 2013 immediately after two telephone discussions. The first was the speaker telephone discussion between the customer, Mr Taafuli and Mr Hossaini. The second, about which only Mr Hossaini gave evidence, was between the customer and himself when she called him back following the earlier three-way discussion.

[24] Whether or not the dismissal of an employee is justified must be determined by the Authority on an objective basis by considering 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 occurred.¹

[25] When applying that test, the Authority must consider a number of factors specified in s. 103A (3) of the Act. It may additionally consider any other factors it considers appropriate. The required factors are:

- a. whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- b. whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- c. whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- d. whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[26] The Act provides that a dismissal must not be determined to be unjustifiable solely because of defects in the process followed by the employer, if the defects were minor and did not result in the employee being treated unfairly.

[27] In this instance, Mr Hossaini carried out an investigation by talking to Mr Taafuli and the customer separately, and then involving them in a three-way telephone discussion. It is clear from Mr Hossaini's evidence that he intended to continue employing Mr Taafuli following the three-way telephone discussion because he said he reimbursed Mr Taafuli \$300 and told him he would see him the following Monday morning.

¹ Employment Relations Act 2000, section 103A Test of Justification.

[28] It is reasonable to assume, therefore, that he believed Mr Taafuli's version of the sale, which was supported by a receipt signed by the customer that she had received \$300 for her vehicle. If he had any doubts over the matter, his indication to Mr Taafuli that he would see him on Monday demonstrated that he was willing to give Mr Taafuli the benefit of the doubt.

[29] Mr Hossaini changed his mind and decided he could not continue to employ Mr Taafuli after the customer telephoned him again, saying she would go to the Police and/or a consumer group if she did not receive her money in full. He made an assumption that she would not make that threat unless her assertion to have received only \$200 was correct. In his oral submissions, Mr Hossaini said he had worked to build the business up and he did not want to lose it by a customer going to the Police or to the "*Consumer Board*". In his view, this justified Mr Taafuli's dismissal.

[30] Mr Hossaini's assumption that the customer was right and Mr Taafuli had therefore lied and been dishonest was unreasonable. The customer had provided no new evidence to support her claim about the amount of cash Mr Taafuli had given her for her vehicle. All she had done was to indicate that she would, or may, take the matter further.

[31] That was insufficient for a reasonable employer to rely on as evidence of the dishonesty of Mr Taafuli, particularly in light of the evidence of the receipt the customer acknowledged signing. From Mr Hossaini's evidence, his dismissal of Mr Taafuli appeared to be a panicked reaction to the prospect of Mega Wreckers being investigated by an external agency. It did not result from a genuine change of mind by his employer about Mr Taafuli's honesty.

[32] In considering whether Mr Taafuli's dismissal was unjustifiable, I have considered the size of Mega Wreckers and the resources available to it. The company is relatively small and, while it may not have in-house human resources personnel, there appears to be nothing to prevent it from obtaining advice about its employment practices. The absence of an employment agreement for Mr Taafuli, and the company's failure with regard to wage and time records, which I shall return to later, indicates that it would be prudent for it to seek that advice.

[33] The process Mega Wreckers followed in its dismissal of Mr Taafuli was defective. The defects cannot be excused by a lack of human resources capacity and

nor can they be described as minor. I find that Mr Taafuli's dismissal was not the action a reasonable employer could take in all the circumstances. In short it was unjustifiable.

Are wages owing?

[34] Mr Taafuli says he was not paid correctly for the hours he worked for Mega Wreckers and did not receive holiday pay on the termination of his employment. He seeks \$883.79 (gross) in wages and holiday pay. Mr Ogilvie requested time and wages records and holiday records on behalf of Mr Taafuli in his letter of 19 April 2013 raising Mr Taafuli's personal grievance.

[35] No records were provided until 5 September 2013 when Mr Hossaini provided three pages of pay records purporting to cover each of the pay periods during Mr Taafuli's three week period of employment. Mr Hossaini confirmed under questioning that these records had been compiled in early September 2013, six months after Mr Taafuli's dismissal. They are reconstructions not copies of original documents. Mr Hossaini did not supply timesheets that had been signed daily by Mr Taafuli, and he provided no credible explanation for the failure to do so.

[36] According to the reconstructed pay records, Mr Taafuli worked 34 hours in his first week of employment and his take home pay was \$385.56. Mr Taafuli provided a bank statement showing that the sum of \$395 had been deposited into his account by Mega Wreckers. The discrepancy of \$9.44 suggests that the company's reconstructed records are not reliable. Mr Hossaini had no satisfactory explanation for the discrepancy, but suggested it might be due to tax.

[37] Mr Taafuli says the hours he was paid did not accurately reflect the hours he worked at Mega Wreckers. He worked between 9 and 9.5 hours a day with a 30 minute lunch break. He says he is happy to have his wages entitlement calculated on the basis of 8.5 hours a day, or 42.5 hours per week.

[38] In the second week of Mr Taafuli's employment, the company's reconstructed pay record shows he worked for 25.3 hours and his gross pay was \$354.20. In the third week of his employment the company says he worked 25.10 hours, and his gross pay was \$351.40. I do not accept Mega Wrecker's account of Mr Taafuli's hours.

[39] I am satisfied that Mr Hossaini had ample time and opportunity to provide the wage and time records requested on Mr Taafuli's behalf by Mr Ogilvie. In their absence, and faced with a conflict between Mega Wreckers' account of the hours worked by Mr Taafuli in each of the three weeks of his employment, and Mr Taafuli's account, I will exercise my discretion under s. 132(2) of the Act to accept as proved all claims made by Mr Taafuli in respect of the hours, days and time worked by him.

[40] Mr Taafuli says he worked at least 42.5 hours per week in each of the three weeks of his employment. The shortfall between the payment he received and the payment to which he was entitled is \$603.40 gross which is calculated as follows:

- a. Week One: \$119, being the 8.5 hour difference at \$14 per hour between the 42.5 hours he worked and the 34 hours for which he was paid.
- b. Week Two: \$240.80, being the 17.2 hour difference at \$14 per hour between the 42.5 hours he worked and the 25.3 hours for which he was paid.
- c. Week Three: \$243.60, being the 17.4 hour difference at \$14 per hour between the 42.5 hours he worked and the 25.10 hours for which he was paid.

[41] Orders for wage arrears will be made accordingly. Mega Wreckers has acknowledged that it did not pay any holiday pay to Mr Taafuli. He is entitled to payment based on 8% of the total wages he earned during his employment, in accordance with s. 23 of the Holidays Act 2003.

Should a penalty be awarded?

[42] Mr Taafuli claims that a penalty of \$4,000 should be imposed on Mega Wreckers. This is based on the employer's failure to provide reasons for Mr Taafuli's dismissal, and its failure to provide wage, time and holiday records when these items were requested by his advocate.

[43] I decline to impose a penalty for Mega Wreckers' failure to provide reasons for Mr Taafuli's dismissal when asked to do so and note that Mr Ogilvie made no specific submissions on that claim. I find that the imposition of a penalty is warranted, however, over Mega Wreckers' failure to provide wages and time records when requested.

[44] An employer is required to keep such records for each employee and to provide the employee, or an authorised representative of the employee, with access to, or a copy or extract of, those records on request. The request may relate to all or any

part of the employee's employment by the employer in the past six years. The Act specifies that the employer is obliged to meet the request "*immediately*". Failure to comply with any requirement relating to wage and time records renders the employer liable to a penalty imposed by the Authority.²

[45] As noted above, Mr Taafuli's advocate wrote to Mega Wreckers Limited on 19 April 2013, notifying Mr Taafuli's personal grievance for unjustifiable dismissal and, amongst other things, asking for a copy of Mr Taafuli's time and wages records and holiday records. He asked that this information be provided within 14 days of his request. Mega Wreckers did not respond to Mr Ogilvie. On 5 September 2013, it supplied reconstructed wage and time records following my request to Mr Hossaini during a telephone conference with the parties on 27 August 2013.

[46] Copies of the original wage and time records were not provided. Mega Wreckers either does not have the records or refuses to provide them. Either way, I am satisfied that Mega Wreckers was in breach of its obligation under s. 130 (2) to provide time and wage records immediately upon request by Mr Taafuli's authorised representative. I find a penalty of \$750 is warranted.

² The obligations to keep and produce wage and time records are contained respectively in ss. 130 (1) and 130 (2) of the Employment Relations Act 2000. Section 130 (4) provides for liability for penalties.

Remedies and contribution

[47] It follows from my finding that Mr Taafuli was unjustifiably dismissed that he is entitled to remedies. In considering appropriate remedies, I am obliged also to consider whether Mr Taafuli contributed to the situation that gave rise to his personal grievance. If I find he did, I must reduce the remedies that would otherwise have been awarded to him to reflect his contribution³.

[48] I find that Mr Taafuli did not contribute to the situation leading to his dismissal. I am not persuaded that he gave the customer only \$200 for her vehicle in light of the receipt she signed acknowledging she had received \$300. In any event, Mr Taafuli played no part in his employer's rapid change of mind from continuing his employment following the three-way telephone discussion, to terminating it following the customer's indication that she could take the matter further. It was Mr Hossaini's fear of adverse consequences on the business he had worked to build up that led to that reversal.

[49] Mr Taafuli asks for compensation in the sum of \$8,000 for the hurt and humiliation he has suffered. I accept evidence from Mr Taafuli that he was shocked to have been dismissed for dishonesty by his employer. I also accept that the fact that his partner was pregnant at the time, and fear that the stigma of a dismissal for dishonesty would prevent him from obtaining alternative employment, added to his distress. I find an award of \$6,000 to be appropriate.

[50] Mr Taafuli is also entitled to an award of the wages he lost as a result of his personal grievance for unjustifiable dismissal. It is to his credit that he was able to find new work within three weeks. He has quantified his loss of wages at \$1,785 gross less \$123.75 he was paid for a day's work trial during that time.

Determination

[51] Mega Wreckers is ordered to make the following payments to Mr Taafuli:

- a. Wage arrears in the sum of \$603.40 gross, pursuant to s. 131 of the Act;

³ Section 124.

- b. Holiday pay in the sum of \$142.80 gross, being 8% of his total gross earnings, in accordance with s. 23 of the Holidays Act 2003;
- c. Reimbursement of three weeks wages, less wages earned in that time, in the sum of \$1,661.25 gross under s. 123 (1)(b) of the Act;
- d. Compensation in the sum of \$6,000 (without deduction) under s. 123 (1)(c)(i) of the Act.

[52] Mega Wreckers is also ordered to pay a penalty of \$750 for a breach of s. 131 (2) of the Act, to be paid to the Crown account.

Costs

[53] The investigation meeting took more than half a day but less than a full day. Mr Taafuli's costs were not quantified precisely but were estimated by his advocate to be between \$4,500 and \$5,000. Mr Ogilvie submitted that it would be appropriate for the Authority to award its notional daily tariff of \$3,500 plus a reimbursement of the filing fee.

[54] It is usual for costs to follow the event, and it is fitting for that to happen in this instance, particularly as Mr Taafuli has largely succeeded in his claims. As the investigation meeting did not take up a full day, I find a contribution of \$2,500 to Mr Taafuli's costs to be appropriate. Mega Wreckers Limited is ordered to pay that amount to Mr Taafuli and to reimburse him the \$71.56 cost of the Authority's filing fee.

Trish MacKinnon
Member of the Employment Relations Authority