New Zealand Employment Relations Authority Decisions

Talipope v Truck Systems Logistics Limited (Auckland) [2017] NZERA 247; [2017] NZERA Auckland 247 (22 August 2017)

Last Updated: 31 August 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 247
3007191

BETWEEN VIANNEY TUALA TALIPOPE Applicant

AND TRUCK SYSTEMS LOGISTICS LIMITED

Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: E Latimer-Bell, Counsel for Applicant

E Kuo, Counsel for Respondent

Investigation Meeting: 9 and 10 August 2017 at Auckland

Submissions Received: 11 August 2017 from Applicants

11 August 2017 from Respondent

Date of Determination: 22 August 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Mr Tuala was unjustifiably dismissed by TSL.

B. TSL is ordered to pay to Mr Tuala the following amounts within 14 days of the date of this determination:

i. **The sum of $2,016.00 gross, equating to 2 weeks' wages, for monies**

lost as a result of his personal grievance;

ii. **The sum of $8,400.00 under s 123(1)(c)(i) of the Employment Relations Act 2000, such sum taking into account a 30% reduction for contributory conduct;**

iii. **The sum of $567.00 gross for wage arrears;**

iv. **The sum of $45.36 for holiday pay due on the wage arrears;**

v. **The sum of $1,998.76 for unlawful deductions**

C. TSL must pay $6,000.00 by way of penalty for breaches of the Wages Protection Act. 75% of that amount ($4,500.00) is to be paid to Mr Tuala. The remaining 25% ($1,500.00) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

D. Payment of the penalty must be paid within 28 days of the date of this determination.

Employment Relationship Problem

[1] The Applicant was summarily dismissed from his employment with the Respondent on 21 September 2016. He says this dismissal was unjustified and the Respondent breached its obligations of good faith. He further says the Respondent owes him wage arrears. This arises firstly from a shortfall between the hours he worked and the hours he was paid. Secondly, for deductions made to his wages without his consent.

[2] The Respondent denies the Applicant's dismissal was unjustified or that it breached its obligations of good faith. It says it paid the Applicant for the hours he worked and made deductions from his wages with his consent.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from the applicant and respondent but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[4] The issues to be determined are:

a) First Issue: Whether the Applicant was unjustifiably dismissed;

b) Second Issue: If the Applicant was unjustifiably dismissed what remedies should be awarded;

c) Third Issue: If any remedies are awarded should they be reduced, under s124 of the Act, for blameworthy conduct by the Applicant that contributed to the situation giving rise to his grievance;

d) Fourth Issue: Whether the Applicant is due any arrears of wages. If so, what is the quantum of those arrears;

e) Fifth Issue: Whether the Respondent made deductions from the Applicant's wages without the Applicant's consent or made unreasonable deductions;

f) Sixth Issue: Whether a penalty should ordered under s13 of the Wages

Protection Act 1983;

g) Eighth Issue: Whether the respondent breached its duty of good faith under s 4(1) of the Act to the applicants and, if so, whether it should pay a penalty;

h) Seventh Issue: Whether the Applicant owes money to the Respondent arising from an overpayment of wages or otherwise arising in the employment relationship.

Background against which issues are to be determined

[5] The Applicant, Vianney Tuala Talipope (Mr Tuala), was employed by Truck Systems Logistics Limited (TSL) on 28 November 2015 as a class 5 truck driver. He was provided with an individual employment agreement but did not sign it.

[6] Mr Tuala was paid a sum of $21.00 per hour gross. He was required to be available to work between the hours of 6am and 6pm Monday and Friday and between 6am and 3pm on a Saturday. Mr Tuala recorded the hours he worked in a logbook and on daily and weekly timesheets.

[7] In May 2016 TSL's director, Mr Prasad, undertook an audit of staff weekly timesheets. He discovered a number of staff were recording their time incorrectly. He directed his wife, Ms Narayan, to contact staff and instruct them to record their time in their timesheets based on the EROAD devices fitted into each vehicle. EROAD devices record when the ignition on the truck is turned on/off and the various locations it goes to throughout the day.

[8] Ms Narayan spoke to a number of staff to confirm Mr Prasad's instructions but

was unable to speak to Mr Tuala.

[9] In June 2016, another audit was undertaken by Mr Prasad. Mr Tuala's weekly timesheets did not match the EROAD recordings. Mr Prasad said he asked Ms Narayan to contact Mr Tuala. Once again, Ms Narayan tried to contact Mr Tuala but was unsuccessful in speaking with him.

[10] On 31 August 2016, TSL sent Mr Tuala a letter advising he had been making incorrect time entries on his weekly timesheets. It identified inaccuracies in Mr Tuala's timesheets for the three weeks ending 28 August 2016. The letter advised that if Mr Tuala continued to incorrectly record his time then it may result in final disciplinary action being taken.

[11] On 10 September 2016, Mr Tuala responded to TSL's letter. His letter recorded Mr Tuala's disappointment as to the manner in which TSL had brought the issue to his attention. He recorded TSL had failed to notify him of alleged incorrect time entries and had failed to follow the proper procedures regarding disciplinary matters. He stated that, as far as he was

aware, the start and finish times which he had recorded on his timesheets were the same as his logbooks. If they were not, then he asked TSL to provide him with information to the contrary when they met to discuss. He asked TSL to make a time for a meeting as soon as possible.

[12] On 19 September 2016, a notice of disciplinary meeting was placed by TSL in TSL's cubbyhole for the attention of Mr Tuala. This letter required Mr Tuala to attend a disciplinary meeting the following day. The letter advised:

At this meeting the question of disciplinary action, in accordance with the company's disciplinary procedure, will be considered with regard to our letter dated 31st August 2016 regarding incorrect time entries on the timesheet.

You are entitled, if you wish, to be accompanied by another work colleague or a trade union representative.

[13] On 19 September 2016 at 7.45pm, Mr Prasad sent a text message to Mr Tuala. The text message read:

Hi Vianney I need to have a catch up with you tomorrow, please advise a time thanks.

[14] Mr Prasad then called Mr Tuala. The outcome of this discussion was an agreement to reschedule the meeting/catch-up. Mr Prasad said that during the phone call he also told Mr Tuala that he needed to check the TSL cubbyhole as he had placed letters in it for him to read. Mr Tuala denies he was told this and said he did not therefore check the cubbyhole.

[15] On 20 September 2016, Mr Prasad placed another letter for Mr Tuala in the

TSL cubbyhole. This letter required Mr Tuala to attend a meeting on 21 September

2016 at 11am. This letter advised:

At this meeting the question of disciplinary action against you, in accordance with the company's disciplinary procedure, will be considered with regard:

1. To our letter dated 31st August 2016 regarding incorrect time entries on the timesheet.
2. To your response letter dated 10th September 2016 which was received by our company on 19 September 2016.

You are entitled, if you wish, to be accompanied by another work colleague or a trade union representative.

[16] That same day, at 7.45pm, Mr Prasad sent Mr Tuala a text message stating:

Please make sure you are in the yard 11am tomorrow thanks.

[17] Mr Tuala admits he received this text message. He says he did not however see the letter of 20 September 2016. He said it was not common practice for staff to check the TSL cubbyhole unless directed to do so. Mr Singh, a supervisor engaged by the Respondent, confirmed this was correct.

[18] The disciplinary meeting took place on 21 September 2016 at 11.30am. At the commencement of the meeting, Mr Prasad provided Mr Tuala with a bundle of documents. The bundle included the letters dated 19 September 2016 and 20

September 2016. It also included a further letter of 19 September 2016 which

responded to Mr Tuala's letter of 10 September 2016 and provided copies of various documents.

[19] There was a short discussion between Mr Prasad and Mr Tuala regarding the differences between the hours recorded in Mr Tuala's timesheets and the hours recorded on the EROAD device. There was also a brief discussion about an overweight container and damage allegedly caused by Mr Tuala to his truck. These discussions resulted in Mr Tuala becoming aware that TSL had not paid him for all the time he had recorded on his weekly timesheets. He also became aware that various deductions had been made from his wages. The discussion became heated. Mr Prasad was overheard swearing at Mr Tuala.

[20] At the end of the meeting, Mr Tuala asked Mr Prasad if he was fired and

Mr Prasad responded that he would call him.

[21] On 22 September 2016, Mr Tuala attended work as usual. When he arrived at the yard, he viewed another driver getting into his truck. At 5.52am he sent Mr Prasad a text message saying *"So I take it I'm fired?"* Mr Tuala did not receive a response and left work.

[22] Later that day, Mr Tuala received a text message from Mr Prasad advising him to check his emails. Upon checking his email account he discovered a letter of termination dated 21 September 2016 together with the two letters of 19 September

2016, the letter of 20 September 2016 and the attachments to those letters.

Issue 1: Unjustified Dismissal

[27] There is no dispute that Mr Tuala's employment was terminated. The onus falls upon TSL to justify whether its actions were justified.

[28] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of TSL, 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.

[29] 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, an

employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[30] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly (s.103A(5)). A failure to meet any of the s.103A (3) tests is likely to result in a dismissal being found to be unjustified.

Why was the Applicant dismissed?

[31] The termination letter of 21 September 2016 stated:

Final outcome of disciplinary meeting on 21st September 2016

1. You have misled the company by falsifying timesheet information and the logbook on many occasions despite being warned about it as far back as July 2016.

2. The company considers this serious misconduct and will not tolerate theft by an employee.

3. You will not follow the NZTA approved electronic monitoring that is installed on each truck.

4. You instead dictated your own terms and conditions in that

you won't follow the company policies.

5. You were aggressive and hostile towards the management and refused to listen or understand the issues discussed.

Other issues unsuccessfully attended to during the meeting:

1. Accepting damaged container without checking on 16/6/16.

2. Damage caused on truck EYD295 on 12/7/16 which is still not resolved.

3. Carrying overweight container on 2/8/16 despite being fully aware of max weights fine $950.

4. Demurrage of $550 plus GST on 8/9/16 failed to notify

despatch of uncompleted job.

5. You failed to fill the daily vehicle checklist which is to be submitted weekly.

6. You have a habit of sending a last minute text and saying that you are not coming to work; however company rules state that you have to apply for leave prior to taking day off.

Your response to these issues was " t ha t you d o n' t c a re a bo ut that" which clearly defines your behaviour and attitude towards the job and the company that you work for.

I am therefore writing to you to confirm the decision that your employment with TSL has been terminated effective immediately. Please return all company property including the gate/truck keys ASAP before any pay is released next Wednesday 2016.

[32] During the course of the Investigation meeting Mr Prasad said that he didn't consider the incorrect time entries to be serious misconduct. This is why he said he did not warn Mr Tuala, in TSL's letters of 19 and 20 September 2016, that a possible outcome of the disciplinary meeting may be termination. He said he thought Mr Tuala would correct his time-recording after he had spoken with him and they would "*get on with things*".

[33] Mr Prasad said the reason why he terminated Mr Tuala was his behaviour at the 21 September meeting. He said Mr

Tuala was aggressive towards him. The examples Mr Prasad provided to support his view were that Mr Tuala would not listen to him, Mr Tuala was upset, and Mr Tuala was angry with him. He said Mr Tuala threatened to take TSL to court.

[34] Mr Prasad's evidence as to the reason for TSL terminating Mr Tuala's employment was confirmed by Ms Kuo in her closing submissions. Ms Kuo submitted TSL dismissed Mr Tuala summarily because of his behaviour at the 21

September meeting. She submitted this was by virtue of Clause 12.1 of the IEA

which provides:

12.1 An Employee's employment may be terminated by the Employer

immediately in the event of:-

(c) The employee is abusive or threatened physical violence towards other staff members or management.

Was the decision to dismiss justified?

[35] I find TSL's decision to summarily dismiss Mr Tuala was unjustified. This is the case whether the reason for the dismissal was due to Mr Tuala's behaviour at the

21 September meeting or whether it was due to the falsification of time-records.

Clause 12.1(c) Behaviour at Meeting

[36] The process leading to dismissal by virtue of Clause 12.1(c) of the IEA was defective. There is no evidence TSL met any of the mandatory considerations set out in s 103A(3). There was no investigation into Mr Tuala's alleged behaviour at the meeting before dismissal. TSL did not raise its concern about the behaviour before dismissal. There was no opportunity to respond to the concern before dismissal. There was no genuine consideration of the explanation before dismissal. In effect the

dismissal was immediate and abrupt. These defects were not minor and did result in

Mr Tuala being treated unfairly (s 103A(5)).

[37] In addition, the conduct complained of was not of a nature which a fair and reasonable employer could have concluded "deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."1

Falsification of time-records

[38] TSL was also not justified in terminating Mr Tuala on the grounds of falsification of time-records.

[39] TSL failed to sufficiently investigate the allegation that Mr Tuala had falsified his time-records by not recording his start and finish times in accordance with the EROAD device. TSL's only investigation was to compare the EROAD records with Mr Tuala's time records.

[40] A fair and reasonable employer could have investigated whether Mr Tuala had carried out work duties after the truck was turned off and what time he spent doing these duties. This is especially so where the Individual Employment Agreement (IEA) identified duties that Mr Tuala and Mr Prasad agreed were to be undertaken after the truck was switched off. These duties included inspecting the truck and trailer and reporting any defects/damages, keeping the truck and associated equipment clean and in good working order, and accurately completing and submitting all necessary paperwork. Mr Singh, a supervisor called by TSL to give evidence, confirmed that paperwork was normally undertaken after the truck was switched off.

[41] TSL failed to raise its concerns with Mr Tuala. I accept by its letter of 31

August 2016 TSL raised with Mr Tuala its concern that his timesheets did not record the time he was working. However, neither this letter, nor the letters of 19 and 20

September 2016, raised any concern that Mr Tuala's time did not match the EROAD records. This was TSL's primary concern. Mr Prasad said he didn't address this with Mr Tuala because Mr Tuala should have known. He said if Mr Tuala had come to the monthly meetings like he was supposed to then he would have been informed. It was his choice not to attend. In Mr Prasad's words "*Why is he crying about things now*

when he raised no issues?" Mr Singh's evidence however was that he (Mr Singh)

1 *Northern Distribution Union v BP Oil NZ Ltd* [1992] NZCA 228; [1992] 3 ERNZ 483

was unaware that start and finish times were to be based on the EROAD system. He said there was no mention of this at the monthly meetings. He said it was his expectation that his staff would be paid for any work duties they undertook even if the truck was turned off i.e. EROAD wasn't recording.

[42] I record that I did consider whether or not Mr Tuala received a text or email from TSL advising him to record his time on his timesheets based on the EROAD devices. Taking into account TSL's denial that it notified Mr Tuala in this manner, and in the absence of any supporting text or email, I do not accept a text or email was sent by TSL.

[43] TSL did not provide Mr Tuala with all the information it was relying on to make its decision. Whilst some information was provided at the beginning of the 21

September meeting, this did not include any of the EROAD records, logbook entries or run sheets. Mr Tuala was not provided with an opportunity to review the information he was provided with before being required to respond.

[44] TSL failed to provide notice that the 21 September 2016 meeting was disciplinary in nature. I do not accept the letters of 19 or 20 September 2016 were seen by Mr Tuala prior to the meeting. The letters were neither sent nor emailed. If they were placed in the TSL cubbyhole, as Mr Prasad said, then I find they were not seen by Mr Tuala. The only reason for an employee, other than management or supervisors, to go to the cubbyhole was to file their daily run sheet or to obtain their payslips if these were unable to be emailed. An employee would not go through the cubbyhole otherwise unless told to do so. I find Mr Tuala was not told to check the cubbyhole. Text messages sent by Mr Prasad on these dates refer to a "catch up" as opposed to a disciplinary meeting.

[45] I find the actions of TSL, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. These defects were not minor. They resulted in Mr Tuala being treated unfairly. Mr Tuala was unjustifiably dismissed from his employment with TSL and is entitled to remedies.

Issue 2: Remedies

[46] Mr Tuala claims two weeks' lost wages and compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act in the sum of

$12,000.00.

Claim for lost wages

[47] In *Allen v Transpacific Industries Group Ltd2,* Chief Judge Colgan emphasised that those representing dismissed employees intending to take personal grievances should keep complete records of their attempts to mitigate losses. He said:

[D]ismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[48] In *Xtreme Dining Limited v Dewar3* the full Court confirmed that where the employer puts mitigation in issue, the employee must provide relevant information as to the steps taken to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[100] It has long been the position in this jurisdiction that the common law tests as to onus are applicable to claims for statutory remedies. Given that onus, it is incumbent on the employer as the defaulting party to raise the issue, usually in the relevant pleading. Having raised the issue, the employer continues to carry the ultimate onus, or as it has sometimes been described, the "legal burden".

[101] But there is an "evidential burden" on the employee to provide relevant information. This is what the Court referred to in *Transpacific*. It is necessary for the employee to provide this information, if called on, because it is information of which he or she has knowledge. This obligation is a manifestation of the famous statement made by Lord Mansfield in 1774 in *Blatch v Archer* that "it is certainly a maxim that all evidence is to be weighed according to the proof of which it was in the power of one side to have produced, and in the power of the other to have contradicted."

[102] That does not preclude the employer from leading its own evidence on the topic, for instance as to employment options which were reasonably

2 [2009] NZEmpC 38; [2009] 6 NZELR 530 (EmpC)

3 [2016]NZEmpC 136

available but not pursued; or to challenge the accuracy or adequacy of the evidence given by the employee.

[103] But when considering all the evidence, this issue of fact must be assessed on the basis that the employee is the victim of a wrong. The Authority or Court cannot be too stringent in its expectations of a dismissed employee. Further, what has to be proved – by the employer – is that the employee acted unreasonably; the employee does not have to show that what he did was reasonable.

[104] In summary, where the employer puts mitigation in issue, the employee must provide relevant information as to the steps he took to mitigate the asserted loss, but ultimately it is for the employer to persuad e the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[49] Mr Tuala said he did not take any immediate steps to find a job following his dismissal. He gave compelling evidence of the stress he was under when terminated. He said following dismissal his prostate became enlarged and he started to pass blood. Whilst acknowledging his prostate condition was pre-existing, he said the prostate can enlarge during stressful periods. Mr Tuala's condition meant that he was unable to immediately look for another position. Before being in a position to do so, he was offered another job which he accepted.

[50] No medical evidence was provided to me by Mr Tuala to support his evidence that he was unwell during the period immediately following his dismissal. However, TSL did not put mitigation at issue in its statement in reply or its amended statement in reply. Nor has TSL made any attempt to persuade me that Mr Tuala acted unreasonably in failing to mitigate his loss due to the medical reasons outlined during the investigation meeting.

[51] Considering the evidence, I am satisfied two weeks to find alternative employment was reasonable. This is also the notice period specified in the IEA had Mr Tuala's termination been on notice.

[52] Mr Tuala said two weeks wages equates to $2,016.00 gross. This sum has been calculated using Mr Tuala's usual hours of work (8 hours per day), multiplied by

the number of days normally worked (6 days), multiplied by Mr Tuala's hourly rate

($21.00 per hour). No issue has been raised by TSL in regard to these calculations.

[53] TSL is ordered to make payment to Mr Tuala of $2,016.00 gross, equating to 2 weeks' wages, for monies lost as a result of his personal grievance. Payment must be made within 14 days of this determination.

Claim for Compensation under s 123(1)(c)(i)

[54] Mr Tuala seeks a compensatory award of $20,000.00 under s 123(1)(c)(i) of the Act.

[55] Mr Tuala gave evidence as to the impact of the dismissal on him including the consequences to his health that I have previously addressed. As TSL pointed out, this evidence was not independently corroborated. However, the emotional toll Mr Tuala suffered as a result of his unjustified dismissal was apparent under questioning. He felt shocked and humiliated by the dismissal.

[56] The surrounding circumstances, and particularly the impact of TSL's failings to treat Mr Tuala fairly in reaching its conclusion, had an effect on Mr Tuala. Ms Latimer-Bell submits the dismissal had a moderate, but not severe, effect on Mr Tuala. I agree.

[57] The allegations made against Mr Tuala, both at the 21 September meeting and in the letter of termination, were serious. He was accused during the meeting of "ripping the system off". The letter of termination alleged theft. These were serious allegations which Mr Tuala took to heart. He said he was made to "*feel like a crook*". He felt angry and upset that he was being accused of lying about his hours.

"Thinking about the situation makes me very stressed, and unfortunately I have to see Michael quite a lot because my new employer also works from the same yard. I now have to take blood pressure medication every day, as well as 4 other medications. Going to church helps me find peace but I still feel terribly stressed".

[58] Mr Tuala said he was also embarrassed by the public nature of the 21

September 2016 meeting. I viewed photographs showing the office where the meeting took place. This office is attached to the lunchroom. Mr Tahitahi's evidence was that he was eating lunch with four other truck drivers at the time. He said they were all quiet, listening to the conversation. Despite Mr Tahitahi's hearing

impairment he said he could hear Mr Prasad swearing at Mr Tuala. He could also hear Mr Tuala asking if he was being sacked.

[59] I also take into account the manner in which Mr Tuala was notified of his dismissal. There was no meeting. There was no phone call. Upon arriving at work on

22 September 2016 Mr Tuala discovered another driver had been assigned to his

truck. He sent a text message to Mr Prasad at 5.56 am stating "*I saw another driver getting in the 833 so I take it that I'm fired...*". Mr Tuala was not afforded the courtesy of a reply. Instead the letter of termination dated 21 September 2016 was emailed to him with a text being sent telling him to check his emails.

[60] I find the sum claimed by Mr Tuala of $12,000.00 is an appropriate level of award under s 123(1)(c)(i) of the Act. This sum compensates Mr Tuala for the loss of dignity and injury to his feelings resulting from his dismissal and how it was carried out. This sum is set being mindful of the need not to keep compensatory payments artificially low.

Issue 3: Contribution

[61] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded (s 124 of the Act).

[62] There are two grounds upon which TSL relies to support a reduction in remedies. First, Mr Tuala adding time to his timesheets for hours he didn't work. Secondly, his behaviour at the 21 September 2016 meeting.

Did Mr Tuala's behaviour with regard to time sheets contribute towards the situation that gave rise to the personal grievance?

[63] Ms Kuo submitted Mr Tuala's actions of adding hours to the end of his workday contributed to his dismissal.

[64] Ms Latimer-Bell submitted that Mr Tuala's behaviour with regard to filling out his timesheets cannot be said to have caused his own demise, when that behaviour had not been established to have occurred. She relied on Chief Judge Goddard's comments in *Tupu v Romano's Pizzas Wellington Limited4* and those in *Harris v The*

Warehouse Limited5.

[65] For the reasons set out in my findings at Issue 4 below, I find the hours recorded by Mr Tuala in his weekly timesheet were in large part for hours genuinely worked. The exception is for the times on Saturday 2 July 2016, Saturday 9 July

2016, Saturday 23 July 2016 and Saturday 6 August 2016. Mr Tuala said he rounded his time on these days at the instruction of a third party dispatcher. The rounding was for approximately 2.5 hours each day. The addition of these hours brought the time- recording issue to a head. It was at this point that TSL stopped paying Mr Tuala for the hours recorded on his weekly timesheet and started paying him according to the EROAD system.

[66] I find Mr Tuala's actions in recording more hours than he worked on Saturdays contributed towards the situation that gave rise to his dismissal. I accordingly reduce the quantum of remedies payable under s 123(1)(c)(i) by 30% to

$8,400.00.

[67] TSL is ordered to make payment to Mr Tuala of $8,400.00 gross under s

123(1)(c)(i). Payment must be made within 14 days of this determination.

Did Mr Tuala's Conduct at 21 September 2016 meeting contribute towards the situation that gave rise to the personal grievance?

[68] It is clear Mr Tuala was angry and upset with Mr Prasad at the meeting on 21

September 2016. However, the context is relevant. Mr Tuala had been asked to attend a "catch up" with Mr Prasad. He was then given a bundle of letters and documents which showed TSL had been making deductions from his wages and not paying him for all of the hours he worked. Mr Tuala's conduct was not blameworthy. It does not justify a further reduction of the remedies awarded to him for his

dismissal.

4 [1995] NZEmpC 275; [1995] 2 ERNZ 266

5 (2014) 12 N

[69] From July 2016 TSL paid Mr Tuala based on the hours recorded by the EROAD device i.e. when his truck ignition was turned on and off. Mr Tuala's evidence was that he undertook a number of work tasks before and after the ignition was turned on/off. The time he recorded on his timesheets took these tasks into account. He claims for the shortfall between the time he recorded on his weekly timesheet and the time he was paid which was based on the EROAD records.

[70] TSL submitted it is not liable to pay for any time Mr Tuala spent doing work outside his job description and not required by the Respondent. It submitted that Mr Tuala should have noted down any additional duties on his logbook so that it would

know what he was claiming time for.

[71] I find the duties that Mr Tuala undertook after the ignition was turned off were largely duties included in the job description attached to the IEA. The job requirements set out in the IEA included duties specifically required to be undertaken after the ignition was turned off. For example, inspection of the truck and trailer, keeping truck and associated equipment clean and in good working order, accurately completing and submitting all necessary paperwork.

[72] I am satisfied there was no variation to Mr Tuala's role description. I am also satisfied there is no evidence of any prior agreement to limit Mr Tuala's hours to those recorded by the EROAD system. Mr Tuala is entitled to be paid for the hours that he worked. After hearing the evidence from Mr Tuala and Mr Singh I am satisfied, on a balance of probabilities, that the hours recorded by Mr Tuala in his weekly timesheet were in large part for hours genuinely worked.

[73] The exception is for the four dates which I was referred to in the course of the investigation meeting, namely Saturday 2 July 2016, Saturday 9 July 2016, Saturday

23 July 2016 and Saturday 6 August 2016. On these dates Mr Tuala said he rounded

his time to 2.30 pm at a request of a third party dispatcher. This was done without the knowledge or consent of TSL. TSL's non-payment of this additional time, equating to approximately 10 hours, was not a default in payment of monies due under the IEA.

[74] Deducting 10 hours from the 37 hours claimed by Mr Tuala leaves 27 hours. At Mr Tuala's hourly rate of $21.00 per hour this equals a sum of $567.00 gross. TSL is ordered to pay Mr Tuala the sum of $567.00 gross. It must also pay him 8%

holiday pay on those wages in the sum of $45.36. These sums must be paid within 14 days of the date of this determination.

Issue 5: Deductions

[75] Section 4 of the Wages Protection Act 1983 requires an employer to pay the entire amount of wages to an employee without deduction. Section 5 creates an exception. An Employer may make deductions from wages payable to a worker where the written consent of the employee has been provided. This includes consent in a general deductions clause in the worker's employment agreement but only where the employer first consults with the employee. Section 5A provides that a deduction made under a general deduction clause, in reliance on s 5, must not be unreasonable.

[76] In *Jonas v Menefy Trucking Ltd*[6], Ford J held at [62] that where a general deductions clause in an employment agreement is relied upon to make a deduction from wages payable, rather than an individualised written consent, then consistently with its good faith obligations under the Act, an employer must, at a minimum, consult with the employee before making the deduction. His Honour noted that

"[w]ithout such a safeguard, the protection intended to be afforded by the

Wages Protection Act 1983 would be illusory".

[77] The IEA was not signed by Mr Tuala and he did not provide his written consent to any deductions. TSL did not consult with Mr Tuala prior to making deductions from his wages. The first time Mr Tuala become aware of deductions being made to his wages was during the meeting on 21 September 2016. There was no consultation at this meeting.

[78] I am satisfied the deductions made by TSL to Mr Tuala's wages breached s 4 of the Wages Protection Act. TSL must repay these sums without deduction or any further delay. The sum payable is $1,998.76 being the combined total of the deductions made on 6 September 2016 ($147.50), 13 September 2016 ($150.00), 20

September 2016 ($144.13) and 21 September 2016 ($1,557.13).

6 [2013] NZEmpC 200

[79] The deductions made by TSL from Mr Tuala's wages breached the Wages

Protection Act 1983. TSL is therefore liable to a penalty by virtue of s 13 of that Act.

[80] Section 13 of the Wages Protection Act 1983 makes an employer who contravenes any provision of that Act liable, upon the application of the affected employee, to a penalty imposed under the Employment Relations Act ("the Act"). Section 135 of the Act makes a company liable for penalties not exceeding

$20,000.00.

[81] The quantum of any penalty is to be determined using the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

Step 1: Nature and number of breaches

[82] Step one is to identify the number of breaches and the maximum penalty applicable. In this case TSL made unlawful deductions in contravention of s 4 of the Wages Protection Act 1983 on a number of occasions. Firstly, with regard to the deduction of fines, on four occasions namely 6, 13, 20 and 21 September 2014. Secondly, TSL made deductions from the hours worked on eight occasions between

27 June 2016 and 12 September 2016.

[83] I consider it appropriate that a global penalty is imposed for the breaches relating to the deductions for fines and a global penalty for the breaches relating to the deductions from the hours worked. This means TSL is liable to a maximum penalty of

$20,000.00 for each offence.

Step 2: Severity of the Breach

[84] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This includes will include an adjustment for aggravating and mitigating factors in relation to the breach.

[85] Factors to be taken into account when considering the first part of Step 2, aggravating factors, include whether the breach or breaches were committed knowingly and/or calculatedly, the duration of the breach or breaches, the number of persons affected adversely, the extent of any departure from the statutory requirements and any history of previous breaches.

[86] I find neither breach was committed knowingly and/or calculatedly. TSL was under the misunderstanding that it was entitled to make deductions from Mr Tuala's wages for fines on the basis of the unsigned IEA. It was unaware that it needed to consult with Mr Tuala before making deductions. This is not surprising given the small size of the business. With regard to the deductions for his hours, TSL genuinely believed that he was not entitled to these hours.

[87] The deductions took place over approximately 3 months. The deductions made from Mr Tuala's wages were a significant sum for Mr Tuala. The deductions made included all of his final pay and holiday pay. He was entitled to receive these monies in a timely manner.

[88] TSL does not appear to have come before the Authority previously in relation to a breach of the Wages Protection Act.

[89] I assess the degree of severity for each penalty at 50%, a potential penalty of

$10,000.00 for each breach.

[90] The second part of step 2 is to consider any mitigating circumstances, whether compensation has been paid and/or steps taken to mitigate the effect of the breach. In this case I know of no mitigating circumstances or steps having been taken by TSL. TSL continues to maintain that it has done nothing wrong by making deductions from Mr Tuala's wages without his written consent and without his prior agreement. The need for deterrence remains an important balance against any mitigating factor. I conclude that this stage has a neutral effect on my calculation.

[91] Step 3 is an assessment of TSL's ability to pay. There is no evidence that TSL will suffer any financial or other hardship by the imposition of a penalty. I conclude that this stage has a neutral effect on my calculation.

Step 4: Proportionality of penalty

[92] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty I have arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances. Looking at recent Authority and Court imposed penalties I conclude an appropriate penalty is $3,000.00 for each breach ($6,000.00 total). This sum is proportionate to the breaches and is sufficient to act as a deterrent to TSL.

Conclusion on Quantum

[93] Adopting the approach applied by Judge Inglis in *Lumsden* I consider it appropriate that part of the penalty be paid to Mr Tuala as he has suffered the impact of the breach and has been obliged to take steps to enforce his rights. I apply the same ratio of payment as Judge Inglis to reflect this.

[94] TSL is ordered to pay $6,000.00 by way of penalty for breaches of the Wages Protection Act. I direct that 75% of that amount ($4,500.00) is to be paid to Mr Tuala. The remaining 25% ($1,500.00) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[95] Payment of the penalty is to be paid within 28 days of the date of this determination.

Issue 7: Duty of Good Faith and Penalty

[96] Ms Latimer-Bell submitted TSL breached its statutory obligations of good faith contained at s 4 of the Act. She submitted it did this by failing to provide Mr Tuala with access to information relevant to allegations against him and failing to

allow him to comment on that information prior to a decision being made. TSL

denies this.

[97] I find that TSL did not provide relevant information to Mr Tuala until the start of the 21 September 2016 meeting. Mr Tuala was not afforded with an opportunity to review this information, and in large part was unable to comment, prior to a decision being made.

[98] TSL breached s4 of the Act but I do not find that breach was deliberate, serious, and sustained. Nor do I find it was intended to undermine the employment relationship. No penalty is payable by TSL for these reasons and also for the reason that the facts have contributed to my finding of unjustified dismissal.

Issue 8: Respondent's Counterclaim

[99] The Statement in Reply raises a counterclaim against Mr Tuala. The first part of the counterclaim seeks recovery of a sum of $1,395.24 for wages TSL claims were overpaid to Mr Tuala. TSL claims it paid Mr Tuala based on the hours Mr Tuala recorded on his weekly timesheets. It claims these were incorrect because Mr Tuala had not worked these hours. In support of its claim it refers the EROAD records.

[100] The second part of the counterclaim is for a sum of $618.74, This is the balance of the fines TSL claims Mr Tuala owes to TSL. Ms Kuo submitted this sum should increase to $2,617.50 if TSL has to repay the deductions it made from Mr Tuala's wages.

Counterclaim for overpayment of wages

[101] I have already found, on a balance of probabilities, that the hours recorded by Mr Tuala in his weekly timesheet were in large part for hours genuinely worked. The only exception was for Saturday 2 July 2016, Saturday 9 July 2016, Saturday 23 July

2016 and Saturday 6 August 2016. No payment was made by TSL for the additional hours claimed on these days but not worked. I am not satisfied that Mr Tuala has been paid for hours that he has not worked.

[102] Clause 10.3 of the IEA provides:

The Employee agrees to pay all speeding fines or any other transport related infringement notes issued against them

[103] Whilst the IEA was not signed, I find there is conduct which infers an agreement by Mr Tuala to be bound by its terms. Mr Tuala had the IEA from around November 2015. He told me he was aware of and had read Clause 10.3. Notwithstanding this, Mr Tuala didn't notify TSL of any concerns about it. He continued to receive the benefits set out in the agreement. In the circumstances, his conduct infers he agreed to, and is bound, by clause 10.3.

[104] TSL claims for three amounts. The first claim relates to an overweight fine of

$950.00. The second is for a sum of $1,035.00 for Road user charges arising from the overweight assessment. The last claim is for demurrage in the sum of $632.50. For the reasons I set out below, I am not satisfied that Mr Tuala is responsible for payment of these amounts.

$950 Fine

[105] The fine of $950.00 relates to an overweight fine incurred when Mr Tuala was asked to collect a container by the head contractor's dispatcher (Conlinxx). The container weighed more than the permitted carrying capacity of the truck. At the time Mr Tuala was driving a temporary truck as his normal truck was being repaired.

[106] The evidence of the parties' conflicts as to who is responsible for this fine. Mr Prasad said drivers are responsible for the load they carry. If they accept an overweight container they are liable for any fines incurred even if they are instructed to carry the load by the Conlinxx Dispatcher. He said that Mr Tuala should have known the container was too heavy for his truck.

[107] Mr Tuala says he did not know the maximum weight of his truck as it was not the truck he normally drove. He said the Dispatcher told him that the container was within the permitted weight. He said he was simply following instructions. He said Conlinxx is responsible for payment of the fine not him. From his experience working for Conlinxx previously, this was the usual process. Mr Tahitahi, who is employed by Conlinxx, confirmed the Dispatcher knows the weight of the truck and

the weight of the goods when allocating jobs to drivers. He said it is the Dispatcher's

ultimate responsibility if a truck is overweight.

[108] The Dispatcher was not called to give evidence. I have no knowledge if Conlinxx took ultimate responsibility for the fine as Mr Tuala and Mr Tahitahi said would happen. I was not provided with the slips which show the weight of containers. Mr Prasad said these are given to a driver before he accepts the container. I was also not provided with any evidence that showed Mr Tuala was told or knew the loading capacity of the temporary truck he was operating. In the absence of this evidence I am not satisfied that Mr Tuala is responsible for payment of this fine.

Road User Charges - $1,035.00

[109] The documentation provided to me to support TSL's counterclaim for

$1,035.00 records this sum was charged because the Police "*identified that the value of the Road user charges licence you purchased at the time did not cover the weight of your vehicle*". This charge arose in connection with the carrying of the overweight container which I addressed above.

[110] The documentation identifies the charge as a "road user charge". I have received no explanation why Mr Tuala is responsible for payment of this road user charge when it is neither a "fine" nor a "transport related infringement notice". The Amended Statement of Problem provided no detail. Ms Kuo made no submission as to this counterclaim, or the other claims, in her closing submissions other than to submit "*the Respondent is seeking the fines (total to $2,617.50) incurred by the Applicant be paid by the Applicant as those were resulted (sic) from the Applicant's actions*".

[111] For these reasons I am not satisfied Mr Tuala is responsible for payment of the

Road User Charges.

Demurrage $632.50

[112] Demurrage is a charge payable to the owner of a ship if a container isn't picked up or is picked up late. Mr Prasad said demurrage was incurred because Mr Tuala didn't complete a job on 8 September 2016 but confirmed he had.

[113] Mr Tuala said he told the Conlinxx Dispatcher that he was unwell so he could not pick up the container. Mr Tuala's logbook records show he finished at 11.30 am and had "*gone home sick*". He produced a prescription showing he had been prescribed antibiotics on this day.

[114] I am not satisfied Mr Tuala is responsible for payment of the demurrage charge. The charge does not appear to be either a "fine" or a "transport related infringement notice". In addition, Mr Tuala said that even if he had collected the container on the day in question a demurrage charge would still have been incurred as the charge was for a three day period. Mr Prasad does not dispute this.

Issue 9: Costs

[13] The parties are encouraged to resolve costs by agreement. If that is not possible, then Mr Tuala has seven days to file a costs memorandum. TSL has a further seven days to file its costs memorandum. Mr Tuala then has three working days to file and serve a reply. This timetable will be strictly enforced and any departure from it requires prior leave of the Authority.

Jenni-Maree Trotman

Member of the Employment Relations Authority
