



**C Metallic Sweeping’s dismissal of Mr Waru was substantively and procedurally unjustified.**

**D Metallic Sweeping is ordered to pay Mr Waru:**

**(i) \$6,210 lost remuneration;**

**(ii) \$186.30 for the employer’s KiwiSaver contribution on the lost remuneration he has been awarded;**

**(iii) \$3,500 distress compensation;**

**(iv) \$496.80 holiday pay on the lost remuneration awarded in paragraph D(i) above.**

### **Employment relationship problem**

[1] Metallic Sweeping manages and operates the Refuse Transfer Station at Turangi. It has a commercial contract with the Taupo District Council (the Council) which commenced on 01 February 2013.

[2] In November 2012 Mr Waru accepted a job as a “Working Supervisor” of the transfer station however he did not start work until 14 January 2013. Although Mr Waru signed a written employment agreement there is dispute over whether or not Mr Waru agreed to Metallic Sweeping taking a total remuneration approach to KiwiSaver.

[3] During Mr Waru’s employment Metallic Sweeping deducted its employer KiwiSaver contribution from his hourly wage. Mr Waru seeks reimbursement of the employer’s KiwiSaver contribution because he says it should have been paid on top of his hourly wage.

[4] On 03 February 2014 Metallic Sweeping dismissed Mr Waru for serious misconduct. Mr Waru claims his dismissal was unjustified. Mr Waru believes he was dismissed because he continued to raise concerns about Metallic Sweeping deducting its employer KiwiSaver contributions from his wages instead of paying it in addition to his hourly rate.

## Issues

[5] The following issues are to be determined:

- (i) Did the parties agree to take a total remuneration approach to KiwiSaver?
- (ii) If not, is Mr Waru owed wage arrears?
- (iii) Was Mr Waru's summary dismissal for serious misconduct justified?
- (iv) If not, what if any remedies should be awarded?
- (v) What if any costs should be awarded?

### **Did the parties agree to take a total remuneration approach to KiwiSaver?**

[6] Section 101B(1) of the KiwiSaver Act 2006 (KSA) makes it clear that the 'default' position is that an employer's compulsory contributions to KiwiSaver are to be paid in addition to the employee's gross salary or wages. However s.101B9(1) KSA allows parties to agree on terms and conditions that disregard that and make other arrangements, provided those are bargained for in good faith.

[7] The issue for me to determine is whether or not the parties agreed to depart from the default position. This requires an examination of how the disputed KiwiSaver reference came to be included in the signed employment agreement.

[8] Mr Waru was provided with a blank employment agreement which he signed on 22 November 2013 and returned to Mr Peter. This version of the employment agreement left blank details about the position, the length of the probationary period, and the wage rate.

[9] Mr Peter says he added this missing information together with the start date and a notation that "*if KiwiSaver then less from \$15.00*" and then signed the employment agreement on 27 November 2013. Mr Peter posted a copy of the signed employment agreement to Mr Waru but he did not keep a record of when that occurred.

[10] After the Authority's investigation meeting Ms Ngatai attached to her closing submissions a copy of a third version of a signed employment agreement. This

version contained most of Mr Peter's handwritten amendments but it did not include his handwritten reference to KiwiSaver.

[11] Mr Peter was not cross examined on that point during the Authority's investigation meeting. Ms Ngatai says that it was not discovered until after the investigation meeting that the version Mr Waru had received from Mr Peter did not include the KiwiSaver reference.

[12] That is surprising given Metallic Sweeping had attached a copy of a signed employment agreement that contained the reference to KiwiSaver to its Statement in Reply (filed on 18 August 2014) and Mr Peter had addressed that in his witness statement which was filed on 05 February 2015.

[13] Mr Peter was not clear about when and how he discussed KiwiSaver with Mr Waru. Mr Peter says he told Mr Waru that the maximum amount that could be paid for the role was \$15 per hour which meant that if Mr Waru opted in to KiwiSaver then *"any employer contribution would need to be included within the \$15 cost limit."*

[14] Mr Waru disputes that such a conversation occurred. Mr Waru says that as soon as he saw that his first pay had the employer's KiwiSaver contribution deducted from his \$15 hourly wage he raised an issue about that and continued to raise his concerns about that right up to just before he was dismissed.

[15] Whilst it is open to parties to agree a total remuneration approach to KiwiSaver such a departure from the default position under the KSA must be negotiated and agreed in good faith. I am not satisfied that occurred. That failure undermines Metallic Sweeping's ability to rely on the handwritten clause in the signed employment agreement.

[16] Because the KiwiSaver reference was added after Mr Waru had signed the employment agreement it was effectively a variation to the terms and conditions he had already agreed to. That means that the requirements of s.63A(2) of the Act apply.

[17] Section 63A(2) of the Act sets out the minimum requirements an employer must meet when bargaining for an employment agreement or a variation to an employment agreement. None of these four minimum requirements were met.

[18] Because of the manner in which this handwritten term came into existence (i.e. not as a result of good faith bargaining) I find there was no genuine offer and acceptance or mutual agreement reached regarding the handwritten KiwiSaver term.

[19] Accordingly I find that the parties did not agree to a total remuneration approach to the employer's KiwiSaver contributions. Under s.101B(1) KSA Metallic Sweeping was required to pay its compulsory employer KiwiSaver contribution on top of Mr Waru's agreed wage of \$15 per hour.

**Is Mr Waru owed wage arrears?**

[20] Mr Waru says he is owed \$19.86 because Metallic Sweeping based his KiwiSaver contributions on a gross hourly rate of \$14.70, not \$15. Mr Waru says this amount was calculated at the rate of 2% for the first six weeks of his employment and 3% for the remaining 44 weeks of his employment.

[21] Mr Waru also claims wage arrears of \$690 being a 0.30 cents per hour wage arrears incurred for each hour he worked because he was paid \$14.70 per hour and not the agreed rate of \$15.

[22] I order Metallic Sweeping to pay Mr Waru wage arrears of:

- a. \$19.86 being the unpaid compulsory employer KiwiSaver contribution on the wages Mr Waru has already earned; and
- b. \$690 being wage arrears due to Metallic Sweeping deducting its employer KiwiSaver contributions from Mr Waru's hourly wage.

**Was Mr Waru's dismissal for serious misconduct justified?**

[23] Justification is to be determined in accordance with the statutory justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether an employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Waru was dismissed.

[24] A fair and reasonable employer is expected to comply with its statutory obligations. This includes the four procedural fairness tests in s.103A(3) and the good

faith obligations in s.4(1A) of the Act. Failure to do so is likely to undermine an employer's ability to establish justification.

[25] I find that Metallic Sweeping is unable to discharge its onus of establishing that its decision to dismiss Mr Waru was substantively justified or that it conducted itself in a procedurally fair manner.

[26] I find that Metallic Sweeping did not comply with its s.4(1A) good faith obligations in the Act because it failed to provide Mr Waru with all relevant information or an opportunity to comment on that information before he was dismissed. Mr Waru did not get anything more than the bare allegations which were set out in the disciplinary letter.

[27] I am also not satisfied that Metallic Sweeping sufficiently investigated its concerns in breach of s.103A(3)(a) of the Act. It seems that basic inquiries into the nature of the specific concerns or the evidence available to support such concerns were not made. I discuss this in more detail later.

[28] Nor am I satisfied that Metallic Sweeping adequately raised its concerns with Mr Waru before he was dismissed in breach of s.103A(3)(b) of the Act. Mr Peter did not share the information he had available to him as the decision maker with Mr Waru. Mr Waru was therefore unaware of the full extent of Mr Peter's concerns or what such concerns were actually based on.

[29] I also consider that Mr Waru was not given a fair or reasonable opportunity to respond to the disciplinary concerns contrary to the requirements of s.103A(3)(c) of the Act.

[30] Mr Waru was given the disciplinary letter at 3.15pm and was required to attend a disciplinary meeting at 1pm the next day. Mr Waru worked until 5.30pm the day he received the disciplinary letter and he started work at 8.30am the next day which was the day of the disciplinary meeting.

[31] There was no good reason for such a tight timeframe. This timing did not allow Mr Waru an opportunity to take legal advice. I also consider it did not give Mr Waru a fair or reasonable opportunity to prepare his response. The disciplinary meeting was conducted by telephone so Mr Waru was deprived of the ability to speak

to the decision maker (Mr Peter) in person. A person to person discussion of Mr Peter's specific concerns may have resulted in a different outcome.

[32] Mr Waru did not receive any information relating to the disciplinary concerns other than what was recorded in the disciplinary letter. I also consider that Mr Peter's failure to share relevant information with Mr Waru was unfair and unreasonable and deprived Mr Waru of an opportunity to fully understand Mr Peter's concerns.

[33] Mr Peter categorised Mr Waru's actions as serious misconduct because Mr Peter believed they put Metallic Sweeping's contract with the Council at risk and/or undermined future tenders. There was no evidence to support that belief and I find that it is one that a fair and reasonable employer could not have arrived at given the information available at the time.

[34] That unsupported belief obviously played a part in Mr Peter's approach to these issues. However the evidential basis of that belief was not discussed with Mr Waru so he was effectively deprived of a fair or reasonable opportunity to address that concern.

[35] Likewise Mr Peter was concerned about information in an email a Council employee had sent to Mr Graeme Jackson which Mr Jackson had forwarded to Mr Peter. Mr Waru was completely unaware this information even existed so he had no opportunity to respond to it. I refer to Mr Jackson's involvement in these matters in more detail later in this determination.<sup>1</sup>

[36] I further find that Metallic Sweeping breached s.103A(3)(d) of the Act because it was unable to satisfy me on the balance of probabilities that it genuinely considered Mr Waru's response.

[37] There was no evidence that Mr Waru's explanations were followed up, or that any further inquiries into his explanation that the Kiosk Operator was responsible for one of the issues that Metallic Sweeping concluded amounted to serious misconduct by him.

[38] I consider that a fair and reasonable employer would have at least made inquiries into what if any instructions Mr Waru had been given around obtaining payment if it appeared the Kiosk Operator had not charged or had undercharged

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<sup>1</sup> See paragraphs 41-55.

someone who was dropping off refuse. It should also have looked into what processes were in place and whether Mr Waru had been given any guidance or training on the sorts of scenarios that had given rise to the disciplinary concerns. I consider that did not occur.

[39] Metallic Sweeping's failure to comply with its statutory s.4(1A) and s103A(3) obligations in the Act fundamentally undermines its ability to justify Mr Waru's dismissal.

[40] There are also other factors which also mean that Metallic Sweeping is unable to justify Mr Waru's dismissal. I now address these other relevant factors.

[41] The disciplinary procedure arose because on 30 January 2014 Mr Peter received an email from Mr Jackson, who was Metallic Sweepings principle contact at the Council. Mr Jackson effectively undertook the management of Metallic Sweeping's service contract with the Council.

[42] Mr Jackson's email was never shared with Mr Waru during the disciplinary process. In his email to Mr Peter, Mr Jackson said that he had visited the Turangi transfer station on Wednesday 29 January to investigate a "*series of complaints*" regarding the actions of Mr Waru. Mr Waru was not provided with any information about or supporting evidence regarding the alleged *series of complaints* which Mr Jackson referred to in his email to Mr Peter.

[43] There was no documentary evidence put before the Authority to establish that anyone had actually complained about Mr Waru, much less that there had been a "*series of complaints*" about him.

[44] Mr Jackson also identified in his email that he had spoken to "Maureen" at the transfer station and "Bernita" [Ms Rangitauria] from the Council about "*what had been going on.*" Mr Waru was not provided with any information about those discussions. Metallic Sweeping never explained what Mr Jackson's reference to "*what had been going on*" referred to and/or was based on.

[45] Mr Waru was never made aware that Mr Jackson had made inquiries or that he (Mr Jackson) had communicated with Mr Peter about such 'inquiries'. Mr Peter failed to obtain any records of these discussions nor did he undertake his own investigations

into these 'complaints' or Mr Jackson's 'inquiries'. Nor did Mr Peter take any notes of the information he says Mr Jackson communicated to him.

[46] Mr Peter's sole 'investigation' into what he categorised as serious concerns consisted of having one telephone conversation with Mr Jackson. Mr Peter did not keep any notes of this conversation despite it giving rise to the disciplinary process that resulted in Mr Waru's dismissal for serious misconduct. This is not the actions of a fair and reasonable employer.

[47] Mr Jackson provided Mr Peter with an email that Mr Jackson had received on Wednesday 29 January 2014 from Ms Rangitauria. This email referred to Mr T who had queried what he had been charged at the Turangi transfer station and to Mr K who objected to having been charged for refuse he claimed he had collected from all around Turangi on Council land.

[48] No written information from either Mr T or Mr K was provided. Nor was there a record of the inquiries that Ms Rangitauria had supposedly made with people at the Turangi transfer station regarding these issues. Mr Peter made no investigations into these matters himself. He also failed to obtain what information the Council had obtained. Mr Waru was never informed of the existence of Ms Rangitauria's email existed so he had no opportunity to address it.

[49] The first two disciplinary allegations relied on this email from Ms Rangitauria. These two disciplinary allegations both referred to Mr T and Mr K having complained about Mr Waru when Ms Rangitauria's email never said that. There was no reference in her email to Mr Waru or to either Mr T or Mr K having complained about Mr Waru.

[50] Although Mr Peter telephoned Mr Jackson to discuss to Mr Jackson's email Mr Waru was never told a discussion had occurred. Mr Waru was also given no information about what was discussed other than the vague and unspecific information contained in the disciplinary allegations.

[51] Mr Peter says that as a result of his discussions with Mr Jackson he learned that Mr Jackson had approached Mr Waru the previous day and Mr Waru had allegedly walked away from Mr Jackson saying that he was too busy to talk to him. There was nothing in writing about this. Mr Jackson did not consider it significant enough to even mention in his email and Mr Peter did not make any notes about it.

[52] Mr Peter says he considered the matters he discussed with Mr Jackson to be “*very serious*” as he believed they had the capacity to threaten Metallic Sweeping’s relationship with the Council by putting it in breach of its contractual obligations and therefore potentially impacting on future tenders, so he decided to start a disciplinary process.

[53] I note that Mr Peter’s belief that Metallic Sweepings relationship with the Council had been (or was potentially) adversely affected was not supported by any other evidence. In fact the Council had not even submitted a formal complaint.

[54] Instead of first speaking to Mr Waru about the issues Mr Jackson had raised Mr Peter elected to immediately commence a disciplinary process. Mr Peter appears to have done this without first conducting any investigation of his own and without obtaining the specific information from the Council which Ms Rangitauira referred to in her email to Mr Jackson.

[55] Nor did Mr Peter ask for a statement or anything in writing from Mr Jackson regarding his dealings with Mr Waru and/or the matters he had discussed during his telephone call with Mr Peter .

[56] I consider the way in which Mr Waru found out he was required to attend a disciplinary meeting for serious misconduct was not what a fair and reasonable employer could have done in all the circumstances.

[57] Mr Peter faxed the disciplinary letter to the Transfer Station where it was picked up off the fax by one of Mr Waru’s subordinates who read it before taking it outside to Mr Waru who was working on site. This subordinate commented to Mr Waru about content of the disciplinary letter before Mr Waru had even had a chance to see it.

[58] The disciplinary letter starts off by saying that Mr Waru had been spoken to before about the way he dealt with people and that it seemed he (Mr Waru) had not taken on board Mr Peter’s advice. Mr Peter also says “*There have been a number of complaints regarding your attitude. However far more serious complaints have now come to our attention.*”

[59] Mr Waru had not previously been subject to any other employment related processes and he denies that he had previously been made aware of any other

complaints. Metallic Sweeping failed to produce any evidence (other than Mr Peter's assertion) to support such claims.

[60] I consider this approach by Mr Peter in the first paragraph of the disciplinary letter tends to support Mr Waru's submission that the outcome of the process was predetermined. It is signalling that Mr Peter considers Mr Waru's attitude is not up to standard and that Mr Waru has not "taken on board" Mr Peter's advice about that.

[61] I also consider it unreasonable, unfair and a breach of good faith for Metallic Sweeping not to provide Mr Waru with any supporting information regarding the four separate disciplinary concerns it had raised. Mr Waru was not in a position to be able to fully understand, take advice or prepare a response to each of these four disciplinary matters without being fully informed about the information upon which each separate allegation was based.

[62] I do not deal with the first two disciplinary complaints (other than what has already been said) because Mr Peter concluded that he had insufficient information to form a conclusion that Mr Waru had engaged in serious misconduct in respect of these two allegations.

[63] However, I consider from the evidence I heard it more likely than not that Mr Peter was adversely influenced by these matters, notwithstanding that he had not been in a position to conclude that serious misconduct had occurred.

[64] The first finding of serious misconduct related to allegation 3, which says: *I note that you directed a trailer full of recyclable bottles to refuse pit when these bottles could have been recycled. Accordingly no fee was charged for the dumping of bottles. This is in breach of our obligations to Council to collect fees.*

[65] First I am not satisfied that a fair and reasonable employer could conclude that this amounts to serious misconduct even if the allegation had been established to the required standard. At worst it appears to be a performance based concern rather than a misconduct issue.

[66] This was the first occurrence. Metallic Sweeping had no policies or procedures around the situation where someone turns up on site (after passing the pay kiosk) and it is later discovered that they actually have mixed recycling and refuse. Payment is

usually processed by the Kiosk Operator at the kiosk as the vehicle enters the site. If the Kiosk Operator is satisfied the person only has recycling they are not charged.

[67] I find that Metallic Sweeping's procedures around this situation were unclear and had not been adequately communicated to staff.

[68] I also consider it unfair and unreasonable that Mr Waru was not advised in advance of the disciplinary meeting of the date on which this issue apparently arose or the identity of the person or vehicle involved. I consider that Mr Waru's explanation that the Kiosk Operator was responsible for obtaining payment and had failed to do so was not considered by Mr Peter.

[69] I note that the Kiosk Operator who had failed to obtain payment from the person involved in this event was not disciplined at all. This strongly suggests that Mr Waru was treated differently than others. I do not accept Mr Peter's explanation that Mr Waru as the most senior person on site was responsible for any issues that occurred satisfactorily explains this apparent disparity.

[70] I also find that Mr Peter had not given Mr Waru clear or specific training around this. Nor had he made it clear to Mr Waru that if the Kiosk Operator did not deduct the required fees then Mr Waru would be held responsible for that. Mr Peter's evidence did not satisfy me that Metallic Sweeping had appropriate procedures in place for addressing such matters.

[71] I also find that a fair and reasonable employer would not summarily dismiss an employee in circumstances where the responsibilities and obligations of the employee being disciplined have been unclear.

[72] I do not accept Mr Peter's evidence that Mr Waru was trained on these matters during his induction. The induction process was a much more generalised process and it did not set out with any clarity or specificity what should happen on the transfer station concourse should an issue arise where the client on the concourse identified that the trailer of items to be dropped off differed from that which may have been advised to the Kiosk Operator when the client entered the transfer station with their trailer load of refuse or recycling.

[73] I also find that a fair and reasonable employer could not have concluded in all of the circumstances that the fourth disciplinary allegation amounted to serious

misconduct. This allegation says: *“I also note that when the Council representative wished to meet with you, you walked away saying you were too busy and were not able to talk.”*

[74] First, the “Council representative” is not identified by name so Mr Waru is left to guess who it is. It is unfair to expect Mr Waru to respond in the absence of that basic information. There is also no reference to the date or time on which this event allegedly occurred, again making it unfair to expect Mr Waru to respond.

[75] There was nothing to support this concern other than Mr Peter’s recollection of what Mr Jackson had said during their telephone discussion. Mr Waru never knew exactly what Mr Jackson had allegedly said about him.

[76] I am also not satisfied that a fair and reasonable employer could conclude that that allegation if established to the required standard amounted to serious misconduct. Even if the allegation had been proven (and I am not satisfied that it was) I consider a fair and reasonable employer could not proceed directly to dismissal.

[77] This appeared to be an issue that could be dealt with by counselling, guidance and training or at worst as a performance concern. There was no evidence that Metallic Sweeping’s expectations regarding Mr Waru’s interactions with Council representatives had been made clear to him or the consequences of not complying with such instructions would be summary dismissal.

[78] There is also an obvious issue of whether a Council representative turning up unannounced on site and wanting to immediately speak to Mr Waru while he is busy doing his job about unspecific ‘complaints’ about him is an appropriate way for such matters to be handled. In such circumstances it may not be surprising that Mr Waru was unable to immediately drop everything to engage with Mr Jackson about his concerns.

[79] I find that the procedural defects I have identified were not minor and did result in substantial unfairness to Mr Waru so s.103A(5) does not preclude a finding of serious misconduct.

[80] Metallic Sweeping is unable to discharge the onus of establishing on the balance of probabilities that its actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed

Mr Waru.<sup>2</sup> Accordingly, I consider that Metallic Sweeping's dismissal of Mr Waru for serious misconduct was substantively and procedurally unjustified.

### **What if any remedies should be awarded?**

#### *Mitigation*

[81] I am satisfied that Mr Waru proactively sought new employment in order to mitigate his loss. Mr Waru obtained a new job nine weeks after his dismissal.

#### *Lost remuneration*

[82] Mr Waru seeks nine weeks' lost remuneration of \$6,210 which is calculated on an average of 46 hours per week at \$15 per hour. I am satisfied that Mr Waru has lost this remuneration as a result of his unjustified dismissal and he is entitled to be compensated for this loss.

[83] Metallic Sweeping is ordered, under s.128(2) of the Act, to pay Mr Waru \$6,210 to compensate him for his actual loss.

#### *KiwiSaver*

[84] Metallic Sweeping is ordered to pay Mr Waru \$186.30 (being 3% x \$6,210) as the employer's KiwiSaver contribution on the lost remuneration he has been awarded to compensate him for his unjustified dismissal.

#### *Holiday pay*

[85] Metallic Sweeping is ordered to pay Mr Waru \$496.80 (being 8% x \$6,210) being the holiday pay on the lost remuneration awarded.

#### *Distress compensation*

[86] Mr Waru says he has had a faultless employment record over his entire working life and that he prided himself on his reputation for being a hard-working, honest and trustworthy employee. Mr Waru believes that his good name has been destroyed as a result of this unjustified dismissal and I accept his evidence about the distress and humiliation he suffered as a result of that.

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<sup>2</sup> Section 103A(2) of the Act.

[87] Metallic Sweeping is ordered to pay Mr Waru \$3,500 to compensate for the hurt, humiliation and injury to feelings he suffered as a result of his unjustified dismissal.

### **Orders**

[88] Metallic Sweeping is ordered to pay Mr Waru:

- (a) \$690 wage arrears due to the employer's KiwiSaver contribution being deducted from his wages;
- (b) \$19.86 being the unpaid employer's contribution to KiwiSaver contribution whilst he was employed;
- (c) \$186.30 for the employer's KiwiSaver contribution on the lost remuneration he has been awarded;
- (d) \$6,210 lost remuneration.
- (e) \$3,500 distress compensation.
- (f) \$496.80 holiday pay.

### **What if any costs should be awarded?**

[89] Mr Waru was assisted by his Community Law Centre. It is unclear whether or not Mr Waru will be paying for the legal services he received. If he has actually incurred legal costs then as the successful party he is entitled to a contribution towards his actual legal costs.

[90] The parties are encouraged to resolve costs by agreement. If that is not possible then Mr Waru has 14 days from the date of this determination to file a costs application, Metallic Sweeping then has seven days within which to respond, with Mr Waru having a further three working days within which to file reply submissions.

[91] The Authority is likely to take its usual notional daily tariff based approach to costs. The parties are invited to identify any factors which they consider warrant an adjustment being made to the notional daily tariff which is currently \$3,500.

[92] If Mr Waru applies for costs and/or disbursements then he is expected to provide proof of the actual costs and/or disbursements he has incurred.

**Rachel Larmer**  
**Member of the Employment Relations Authority**