

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 27
5568680

BETWEEN ANDREW KIERAN ADAMS
Applicant

AND AMC CONTRACTING
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Clayton Williams, counsel for the Applicant
Katherine Thompson and Ashley McAllister, advocates
for the respondent

Investigation Meeting: 16 February 2016 in Christchurch

Oral Submissions: Heard from both parties at the investigation meeting

Determination: 10 March 2016

DETERMINATION OF THE AUTHORITY

A. AMC Contracting Limited unjustifiably dismissed Andrew Adams.

B. Within 28 days of the date of this determination AMC Contracting Limited must pay Andrew Adams:

(i) \$627.86 in unpaid holiday pay gross,

(ii) Lost wages of \$1,773.30 gross,

(iii) Compensation of \$7,000 for humiliation, loss of dignity and injury to feelings,

(iv) Legal costs of \$1,821.56.

[1] This determination follows the oral indication given to the parties on 16 February 2016 at the investigation meeting.

Employment relationship problem

Mr Adams' claims

[2] Mr Adams worked as a truck driver for AMC Contracting Limited (AMC). AMC believed Mr Adams stole 6 cartons of chicken sausages he was supposed to have delivered to a facility in Dunedin. Katherine Thompson, AMC's general manager, dismissed Mr Adams during a telephone call.

[3] Mr Adams denies he stole the sausages. He claims AMC unjustifiably dismissed him. He claims two weeks lost wages, and compensation for humiliation, loss of dignity and injury to his feelings. He also claims AMC owes him \$627.86 in unpaid holiday pay.

AMC's response

[4] AMC's representatives are adamant that they were justified in dismissing Mr Adams, although Ms Thompson concedes that the process could have been better. AMC says that it deliberately withheld Mr Adams' holiday pay because he:

- had the company's water blaster at his home,
- owed AMC \$450.00 and he had given written authority to take that amount out of his wages, and
- should pay AMC the amount it reimbursed its client for the missing sausages.

Evidence at the investigation meeting

[5] I heard sworn or affirmed evidence from Mr Adams and his witness, Alisha Macdonald and from Ashley McAllister, AMC's director, Ms Thompson, and Richard Hammersley, AMC's trucking foreman.

[6] I did not have any evidence from two apparent eye witnesses. They were unable to attend the investigation meeting and had not provided written statements or affidavits despite AMC's advice to the Authority on 31 July 2015 in its statement in reply that *all witnesses are prepared to do Affidavits in support*.

Issues I need to decide

[7] I need to determine:

- (i) Whether AMC acted as a fair and reasonable employer could act in dismissing Mr Adams. That includes consideration of how AMC reached its decision.
- (ii) If AMC did not act as a fair and reasonable employer could have acted in all the circumstances it has unjustifiably dismissed Mr Adams. In that case I need to consider what remedies AMC should pay Mr Adams.
- (iii) Whether Mr Adams contributed in any way to the situation leading to his dismissal.
- (iv) If he did so in a blameworthy way whether the remedies should be reduced to reflect that.
- (v) How much holiday pay AMC owes Mr Adams, taking into account the water blaster, the loan AMC made to Mr Adams and the value of the missing sausages.
- (vi) Whether AMC should make a reasonable contribution to Mr Adams' legal costs.

Factual background

Mr Adams' work 17-18 April 2015

[8] Mr Adams drove a truck and trailer unit to CoolTranz in Christchurch on the evening of 17 April 2015. At CoolTranz the trailer was loaded with Tegel products. He travelled to Dunedin to deliver them and picked up another load of product bound for the CoolTranz yard in Christchurch.

The baby clothes

[9] Mr Adams and his partner had recently had a baby boy. Mr Adams and his friend, Ms Macdonald, say that they had prearranged for Mr Adams to stop in Tinwald where Ms Macdonald would be waiting with some used baby clothes.

[10] Mr Adams and Ms Macdonald say sometime between 10.30 and 11 pm on 17 April 2015 Ms Macdonald handed over 4 boxes of clothes. Mr Adams says he stowed the boxes in the cab alongside and at the feet of his passenger.

[11] Ms Macdonald says there was not a passenger in the cab. However, I am satisfied she was mistaken and Mr Adams had a friend travelling with him in the passenger seat. When Mr Adams returned to Christchurch he drove to the AMC yard to drop his passenger off. The passenger was going to drive Mr Adams' car to the CoolTranz yard to pick up Mr Adams after he dropped the trailer off. Mr Adams says his car would not start so he called his partner to bring her car to tow it home. She came, towed the car and followed the truck.

[12] Mr Adams says they stopped near the weighbridge by the CoolTranz yard to unload the 4 boxes of baby clothes before he dropped the trailer at CoolTranz. He drove the tractor unit home.

CoolTranz asks AMC to dismiss Mr Adams

[13] A few days later Graham Rule of CoolTranz invited Mr McAllister and Ms Thompson to come to a meeting. He told them that 6 cartons of Tegel sausages were missing from Mr Adams' load to Dunedin. He also said he had two eye witnesses, and CCTV footage. He said the evidence proved that on the morning of 18 April Mr Adams loaded 6 Tegel cartons out of the cab of AMC's truck and into two cars in Halwyn Drive.

[14] CoolTranz demanded that AMC dismiss Mr Adams because Tegel was adamant that he could not drive their product again.

[15] Mr Rule said that if AMC kept Mr Adams as a driver CoolTranz would not be able to maintain the lucrative contract between it and AMC. Mr McAllister told me that last year the value of the contract was \$24 million. Mr Rule said that if AMC dismissed Mr Adams and paid Tegel for the missing product neither CoolTranz nor Tegel would go to the police.

The dismissal

[16] Mr McAllister and Ms Thompson did not hear from the apparent eye witnesses or see any footage before agreeing with Mr Rule that AMC would dismiss Mr Adams.

[17] Mr McAllister and Ms Thompson went back to the AMC office and accessed the GPS data on Mr Adams' Dunedin run. They decided to ask him to come in to a meeting with them where they would tell him what they believed he had done and ask him to explain.

[18] Ms Thompson says she called Mr Adams but that he did not answer the phone. She sent Mr Adams a number of texts asking him to come in for a meeting. He asked what it was about but Ms Thompson did not inform him what it was about. Mr McAllister also telephoned Mr Adams.

[19] On Friday 24 April Ms Thompson rang Mr Adams who began recording the telephone conversation sometime after it began. During the course of the conversation Ms Thompson told Mr Adams that there was footage of him stealing the sausages and that she had seen it.

[20] Mr Adams denied having stolen anything and told Ms Thompson she needed to look at the footage again. In fact, although CoolTranz had told AMC there was footage apparently none existed. Therefore Ms Thompson had certainly not seen it. However, she told Mr Adams that he was instantly dismissed.

Did AMC unjustifiably dismiss Mr Adams?*Submissions for Mr Adams*

[21] Mr Williams submitted that Mr Adams' dismissal was procedurally unjustified because:

- AMC failed to carry out the process set out in Mr Adams' employment agreement, and
- failed to undertake the steps set out in the Employment Relations Act 2000 (the Act).

[22] Mr Williams submits that there is no proof that Mr Adams stole anything. Mr Williams also emphasised that Ms Thompson lied to Mr Adams when she said she had seen footage of him stealing six Tegel cartons.

What did AMC have to do to ensure the process leading to Mr Adams' dismissal was fair?

[23] Section 103A of the Employment Relations Act 2000 sets out the test I need to apply to determine whether AMC justifiably dismissed Mr Adams. The test is:

... whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[24] Section 103A(3) of the Act requires me to consider a number of factors in determining whether a dismissal has been implemented in a procedurally fair manner. These factors include whether the employer:

- Sufficiently investigated the allegations, having regard to its available resources;
- Raised its concerns with the employee before dismissal;
- Gave the employee a reasonable opportunity to respond to the concerns before dismissal; and
- Whether the employer genuinely considered the employee's explanation before dismissal.

[25] The Employment Court has made it clear that if all four parts of the process are absent the decision to dismiss is not one that a fair and reasonable employer could make.

[26] Section 103A(4) of the Act allows me to consider any other procedural factors I think are appropriate.

[27] However, I cannot determine Mr Adams' dismissal to be unjustified solely because of procedural defects if they were minor and did not result in him being treated unfairly.

Was AMC's investigation into the allegation of theft sufficient?

[28] AMC's decision to dismiss Mr Adams was made after Mr Rule convinced Ms Thompson and Mr McAllister Mr Adams had transferred 6 cartons of Tegel sausages to his own car or cars before dropping the trailer at the CoolTranz yard.

[29] Mr Rule did not show AMC any kind of proof that:

- 6 cartons of sausages that had been loaded into Mr Adams' trailer were missing once the load arrived in Dunedin,
- or when and how that apparent theft was discovered.

[30] AMC did not ask for any kind of proof. It simply accepted its client's version of events.

[31] I consider AMC had the resources it needed to investigate the allegation against Mr Adams. AMC should have spoken to the apparent eye witnesses and asked to see the footage. AMC did not know until after it had dismissed Mr Adams that Mr Rule misrepresented the existence of CCTV footage.

[32] I accept that Mr McAllister and Ms Thompson examined the GPS information first before contacting Mr Adams. There is GPS data showing that the truck stopped near CoolTranz and AMC took that as proof that Mr Adams had transferred the stolen product to his own car then and there.

[33] I consider that AMC had sufficient resources to conduct its own investigation but that it did not do so. AMC's investigation was insufficient.

Did AMC adequately inform Mr Adams what the allegation was?

[34] AMC says that it is Mr Adams own fault that he did not know what the allegation against him was. It says Ms Thompson in particular tried to contact Mr Adams via mobile phone to invite him to a meeting but he did not call her back or agree to come in.

[35] However, AMC should have informed Mr Adams of the allegation of theft before he was asked to explain himself. Ideally such notifications should be in writing, whether by

letter, email or as a last resort by text message. AMC should have invited Mr Adams to a meeting at a specific time and place and told him it wanted to hear from him about the allegation.

[36] Mr Adams was entitled to have access to the information that had convinced AMC he had committed theft, such as the GPS data. He had no access to such information so he was unable to provide any other information that he wished AMC to take into account.

[37] AMC did not adequately inform Mr Adams of the allegation against him.

Did AMC give Mr Adams a reasonable opportunity to respond to its concerns before dismissing him?

[38] It follows from Mr Adams not being adequately informed of the allegation that he was not given a reasonable opportunity to respond.

Did AMC take Mr Adams' explanation into account before deciding to dismiss him?

[39] It logically follows from my findings so far that AMC did not take into account Mr Adams' explanation before it made the decision to dismiss. Mr Adams had no reasonable opportunity to give such an explanation.

Another relevant procedural defect

[40] Ms Thompson knowingly lied to Mr Adams about the CCTV footage. Good faith is a fundamental requirement from both parties in an employment relationship. Ms Thompson did not act in good faith when she lied to Mr Adams.

[41] Ms Thompson's lie was more than a minor defect and resulted in Mr Adams being treated unfairly.

The process followed was unfair

[42] A fair and reasonable employer is expected to follow the law and carry out a fair process. None of the four basic procedural fairness steps set out in s 103A(3) were followed. AMC breached its duty of good faith to Mr Adams when Ms Thompson lied. The dismissal was not justified.

Leaving the procedural defects aside did AMC have reasonable grounds to decide Mr Adams was guilty of theft?

What test do I need to apply?

[43] AMC acknowledges that its process was lacking. However, it says it made the right decision because it is convinced that Mr Adams stole its client's product. I need to consider whether a fair and reasonable employer could have dismissed Mr Adams in all the circumstances that existed at the time the decision was made.

[44] I can only consider whether AMC did what a fair and reasonable employer could have done based on the knowledge and evidence AMC had at the time it made its decision to dismiss Mr Adams.

[45] The more serious the allegation against an employee is, such as an allegation of theft which is also a crime, the stronger the evidence an employer must have to be able to decide that it is likely the employee committed the theft. In this case because AMC did not carry out its own investigation it did not have strong evidence. It wrongly believed that footage existed and it did not speak to the eye witnesses.

Can I consider post dismissal evidence?

[46] Mr McAllister gave evidence of being told by another person in more recent times that Mr Adams had stolen the sausages. However, Mr McAllister was not aware of that at the time AMC made its decision to dismiss so I cannot take that into account in assessing what a fair and reasonable employer could have done in all the circumstances at the time.

[47] At the investigation meeting Mr McAllister and Ms Thompson said there was no GPS data showing the truck stopped in Tinwald on the way to Dunedin so that Mr Adams and Ms Macdonald must be lying. However, AMC did not know of Mr Adams' explanation until after it dismissed him so that information was not part of AMC's knowledge at the time it made the decision to dismiss.

AMC was not safely able to decide Mr Adams stole the sausages

[48] I accept that AMC was in a very difficult position given the ultimatum delivered to it by CoolTranz. However, it had separate duties to Mr Adams as his employer than those it had to CoolTranz.

[49] It may have been that if AMC had carried out an adequate investigation and followed the other steps of a fair process it would have still decided to dismiss Mr Adams. In that case it may have been able to prove to me that it acted as a fair and reasonable employer could have acted in all the circumstances. However, in this case it has not been able to do so. Mr Adams was unjustifiably dismissed.

Remedies*Holiday pay*

[50] At the investigation meeting I heard that Mr Adams had given permission for AMC to deduct a further \$400 from his wages. AMC accepted that it could only recover \$400 out of Mr Adams' final pay, and not the \$450 that it originally claimed.

[51] Mr Adams returned the water blaster on 21 September 2015. This is now resolved.

[52] AMC had no supporting evidence of the amount it had paid to its client, CoolTranz, for the missing product. AMC did not claim the reimbursement amount as part of these proceedings. I decline to consider AMC's reimbursement of the cost of the missing product.

[53] AMC must pay Mr Adams unpaid holiday pay of \$627.86 gross. That is the balance once the \$400.00 Mr Adams owes AMC is deducted.

Lost wages

[54] Mr Adams claimed the first two weeks of his lost wages after his dismissal. His evidence was that he got some part-time work through an agency after that. He does not want to claim any more lost wages.

[55] Section 123(1)(b) of the Act allows me to provide for the reimbursement by AMC of the whole or any part of wages Mr Adams lost as a result of his grievance.

[56] Section 128(2) of the Act provides that I must order AMC to pay Mr Adams the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration. Since Mr Adams is only claiming for two weeks I need to award him his actual lost remuneration for the first two weeks after his dismissal.

[57] Mr Adams worked full time and was paid \$23 per hour. His pay slips disclose that he worked an average of 38.55 hours per week. Therefore his average weekly pay was \$886.65 gross and a fortnight's lost wages amounts to \$1,773.30 gross. AMC must pay him that amount.

Compensation for humiliation, loss of dignity and injury to Mr Adams' feelings

[58] Mr Adams claimed an unspecified amount to compensate him for humiliation, loss of dignity and injury to his feelings.

[59] He says that losing his job in the way that he did caused him a lot of distress and humiliation. He says that rumours circulated in the trucking industry that he had been dismissed for theft and he felt embarrassed having to face people who thought he was a thief. He says his dismissal and the consequent loss of earnings caused friction and arguments between him and his partner. He says his dismissal *made me feel like shit to be quite honest* and he was *pretty stressed*.

[60] AMC says that it was not the source of any rumours that he was dismissed for theft and cannot be held accountable for any harm arising out of such rumours. I accept that AMC may not have spread the word that it dismissed Mr Adams for theft but the fact remains that it did so, and it did so unjustifiably. Whoever spread the rumours was aware that Mr Adams had been dismissed and had been dismissed for dishonesty. That caused him stress and humiliation.

[61] In addition, the Employment Court has held that there is always some emotional harm in an unjustified dismissal. Taking into account Mr Adams' evidence of that harm I consider AMC must compensate him by paying \$7,000.00.

Did Mr Adams contribute to the situation leading to his unjustified dismissal?

[62] Section 124 of the Act requires me to consider whether Mr Adams contributed to the situation which gave rise to his dismissal and if he did to reduce his remedies accordingly.

[63] AMC says the GPS data shows that Mr Adams did not stop in Tinwald and therefore both he and Ms Macdonald are lying.

[64] Mr Williams submits that Mr Adams stopped to pick up the baby clothes and left the truck idling at 22.47.

[65] There is recorded GPS data which shows that the truck 'moved' at 0 kilometres an hour at 22.47 and travelled 0 kilometres at 22.47. Also at 22.47 the truck began moving again going 6 kilometres an hour although still only having travelled 0 kilometres an hour by the end of 22.47.

[66] I cannot conclude that there is sufficient evidence in the GPS data to show Mr Adams and Ms Macdonald are lying. It is equally possible there was a brief, less than a minute, handover of baby clothes. That is consistent with Ms Macdonald's evidence that she was tired after her work shift and in a hurry to get home to relieve the babysitter.

[67] In all the circumstances, which include the lack of an adequate investigation by AMC, I consider there is insufficient evidence to establish that Mr Adams engaged in any blameworthy conduct. Therefore, I do not reduce Mr Adams' remedies on the grounds of contribution.

Costs

[68] Mr Adams has been successful in his claims. He claims the cost of his legal representation. AMC as the unsuccessful party is expected to make a reasonable contribution to Mr Adams' legal costs. The Authority generally calculates costs by a daily tariff of \$3,500.

The investigation meeting took half a day. Therefore, AMC must pay Mr Adams \$1,750.00 towards his legal costs. In addition AMC must reimburse the cost of \$71.56 for making the application to the Authority.

Christine Hickey
Member of the Employment Relations Authority