

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 475
3072152

BETWEEN

MICHAEL JOHN BURT
Applicant

A N D

DRUCE NILSEN
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person
Respondent in person

Investigation Meeting: 2 September 2021 by video conference

Submissions Received: 2 September 2021 from the Applicant
2 September 2021 from the Respondent

Date of Determination: 28 October 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a 10 December 2020 determination of the Authority I found that Michael John Burt established he was in an employment relationship with Druce Nilsen for the period 8 March 2019 to 28 May 2019 when he worked alongside Mr Nilsen on his fishing vessel operating out of Bluff. As a result, Mr Burt established an arrears of wages claim, in the amount of \$5,083 (gross) and \$406.64 (gross) outstanding holiday pay.

[2] In the same determination I found that Mr Burt's personal grievance that alleged Druce Nilsen unjustifiably dismissed him, be heard out of time. Pursuant to s 114 (5) of the Act I directed the parties to mediation to seek to mutually resolve the grievance. ¹ In a subsequent costs determination of 10 February 2021 the Authority ordered Druce Nilsen to make a costs contribution of \$6,000 to Mr Burt and to pay his Authority filing fee. ²

[3] The parties attended mediation but the matter remained unresolved and during the 2 September 2021 investigation meeting, Mr Burt indicated that none of the compensatory amounts and costs awarded to him had been paid by Mr Nilsen.

The Authority Process

[4] Mr Nilsen did not as directed attend mediation or file a brief of evidence or participate in the earlier investigation meeting of 1 October 2020. Subsequently, on being provided by the Authority with submissions from Mr Burt's counsel for comment prior to the determination being issued, Mr Nilsen claimed that he was unaware of the investigation meeting occurring. The Authority had previously provided the investigation meeting notice by the same email address and an earlier directions notice alluding to the investigation meeting date and on 27 June 2020, the Authority using a document server, had delivered to Mr Nilsen's residential address a copy of the investigation notice. I was satisfied that Mr Nilsen was aware of the proceedings.

[5] Further, after engaging counsel, Mr Nilsen made an unsuccessful application to reconvene the investigation meeting and in making a submission on such, his counsel acknowledged that Mr Nilsen's non-attendance at the 1 October 2020 investigation meeting was "inexcusable and may be answered by a costs award". ³

[6] In the current proceedings Mr Nilsen who had dispensed with counsel and was representing himself, did not as directed file a brief of evidence but he did attend the 2 September 2021 investigation meeting by video conference.

¹ *Michael John Burt v Druce Nilsen* [2020] NZERA 514.

² *Michael Burt v Druce Nilsen* [2021] NZERA 50.

³ *Michael Burt v Druce Nilsen* [2020] NZERA 478.

[7] Pursuant to s 174E of the Employment Relations Act (“the Act”) I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received.

[8] At the brief investigation meeting I heard from Michael Burt and Druce Nilsen.

Issues

[9] The issues to be decided are:

- a) Was Mr Burt unjustifiably dismissed by Mr Nilsen?
- b) If Mr Burt establishes that he was unjustifiably dismissed what remedies are appropriate?
- c) If any remedies are awarded should they be reduced due to any contribution from Mr Burt?
- d) An assessment of the level of costs to be awarded to the successful party.

What caused Mr Burt’s employment relationship problem?

[10] Mr Burt was engaged by Mr Nilsen to work alongside him as a deck-hand on a fishing vessel Mr Nilsen skippered that sailed out of Bluff. The work commenced on 8 March 2019. Nothing of the engagement was documented.

[11] Mr Burt says the relationship deteriorated after he: contested the payment of his share of the fishing catch on or around 10 May 2019; made a request on 24 May 2019 for time off in mid-June to undergo knee surgery and because he began requesting payslips from Mr Nilsen’s father who he understood administered wage payments for Mr Nilsen.

[12] Matters came to a head when Mr Nilsen texted Mr Burt on 27 May 2019 saying that he was going out on a fishing trip by himself and he needed “to think about things”. Mr Burt says this trip involved Mr Nilsen engaging another deckhand in preference to him being available. Mr Nilsen denied this saying he fished alone but confirmed he had decided to do this without prior discussion with Mr Burt and that he then blocked communication with Mr Burt.

[13] Mr Burt persisted texting Mr Nilsen about his disputed remuneration and pay-slips but his texts were blocked by Mr Nilsen who then resumed texting him in early June requesting a “face to face” meeting.

[14] Mr Burt says the disputation culminated in a meeting on 5 June 2019 that took place on the fishing vessel. Mr Burt says Mr Nilsen during this meeting, expressed upset at Mr Burt involving his partner Jess in the disputed remuneration issue and a perception that Mr Burt had not adequately cleaned the boat after a recent trip. Mr Burt indicated a heated discussion occurred in which Mr Nilsen stood over him and yelled at him indicating if Mr Burt further pursued the issue of remuneration he felt he was owed or discussed this with others around the wharf, then he would “do him in” and Mr Nilsen indicated in a loud voice: “I don’t want you back on the boat mate”.

[15] Mr Burt says he considered himself dismissed and he removed his personal belongings from the boat. He subsequently tried unsuccessfully to get Mr Nilsen to attend mediation.

[16] Mr Burt related a further incident on 1 July 2019 saying that when Mr Nilsen approached him in the presence of his new employer at the Bluff wharf, Mr Nilsen threatened to kill him.

[17] Mr Nilsen’s self-authored statement in reply, filed with the Authority on 14 October 2019, claimed that Mr Burt had voluntarily resigned and that: “Things became hostile when the applicant’s wife text me demanding payslips”. Mr Nilsen acknowledged that the mediation service had contacted him but he said he was “fishing at the time and so could not partake”.

[18] Mr Burt’s then counsel, raised a personal grievance claim with Mr Nilsen by way of a letter of 5 February 2020 that after reiterating the claim for unpaid wages, raised new claims of unjustified disadvantage and unjustified dismissal summarising the allegations as:

Refusing to pay Mr Burt’s wages, threatening him and dismissing him were unjustified actions which have significantly detrimentally affected Mr Burt and his young family who have had to relocate as a result.

[19] Mr Nilsen responded to counsel by email of 14 April 2020, claiming that he was not Mr Burt’s employer, that he had been a “co-worker of Mr Burt” and that “our employer was

my father Olaf Nilsen. Employees can only bring personal grievances against their employer, not third parties or fellow employees”.

[20] Mr Nilsen concluded the email after contesting remuneration matters, claiming Mr Burt had engaged in serious misconduct (alleged theft of safety gear) that would have justified a summary dismissal if he had not quit, with: “I will not be attending mediation with your client on this personal grievance and I trust this has now been resolved”.

[21] Counsel on Mr Burt’s behalf, filed an amended statement of problem with the Authority on 6 August 2020, detailing various remuneration grievances and in respect of the unjustified disadvantage and unjustified dismissal claims sought a determination pursuant to s 115 “that the applicant can raise personal grievance claims out of time”. That latter request was granted in the Authority determination of 10 December 2020⁴

[22] Mr Nilsen did not file a statement in reply or engage further on the unjustified dismissal claim until the investigation meeting of 2 September 2021. Prior to the meeting, the Authority provided a brief summary explaining the investigation meeting purpose and process, Mr Nilsen’s ability to ask questions of Mr Burt and vice versa and a broad indication of what issues Mr Nilsen should address in his evidence in response to Mr Burt’s unjustified dismissal claim. Mr Burt’s brief of evidence was also re-copied to Mr Nilsen.

Druce Nilsen’s recollection of events

[23] During the investigation meeting of 2 September 2021 Mr Nilsen indicated that he had previously worked with Mr Burt on a fishing vessel and that he approached him to discuss working for him after his previous crew had refused to return after a boat crash. Mr Nilsen indicated he had decided he would fish with only one other crew member and Mr Burt fitted the bill. Mr Nilsen had no comment to make when asked about how the working relationship progressed but said it hit a rocky patch when Mr Burt’s wife Jess began texting him asking for payslips. Mr Nilsen says he had a meeting with Mr Burt telling him to “man up on this shit himself” and not get Jess to approach him but could not recall the date of this meeting. As a result of this dispute, Mr Nilsen says he decided to go and fish by himself and he confirmed this decision to Mr Burt in a text of 27 May 2019 that said: “I’m going to do this trip by myself Mike, need to think about things”.

⁴ Op cit 1.

[24] When asked what Mr Burt's reaction to him fishing solo was, Mr Nilsen said they then exchanged texts on the matter and when he returned he noticed that Mr Burt had taken his personal gear off the boat. Mr Nilsen says at this point he thought Mr Burt had quit and said he did not approach him any further. When I suggested Mr Burt had indicated in his earlier statement to the Authority that a confrontation occurred, Mr Nilsen said he could only recall one meeting being the one where they discussed Mr Burt's request, via Jess, for payslips.

[25] The incident after the employment ended where Mr Burt claimed he was threatened by Mr Nilsen was put to Mr Nilsen. Mr Nilsen recalled Mr Burt arriving at the wharf and pulling up in his car near him and he told him to "fuck off" and he said Mr Burt then drove away but nothing further than that.

Michael Burt's recollection of events

[26] Mr Burt indicated he had nothing further to add to his written statement and disclosed text exchanges. Some pertinent matters to 'fill the gaps' in the events leading up to how the relationship ended from Mr Burt's recollection, were that around early May 2019 he had briefed Mr Nilsen that he would soon be needing time off in mid-June for a knee operation (covered by ACC), that would then involve a further recovery period that he estimated would be three weeks. Mr Burt claimed Mr Nilsen indicated no problem with this and Mr Nilsen said he would get someone to relieve for him. This was the point in time that Mr Burt recalls asking for payslips so he could provide evidence to ACC for earnings related compensation when he was absent following his knee operation. A text from Mr Nilsen of 22 May 2019 indicated he was working on the pay slips issue and he apologised for the delay in not providing them.

[27] Further exchanges occurred and it was evident from them that Mr Nilsen got angry about Mr Burt's wife Jess texting him. This coincides with a 27 May text of Mr Nilsen indicating he would do his next fishing trip by himself to which Mr Burt responded:

Yep gdaz im booked in for surgery on 14th so ya mite need someone for 3 weeks after that – Any word on pays etc d.. ?

[28] Mr Burt says Mr Nilsen then refused to respond to further messages and a text from him of 31 May confirms that he was blocking contact with Mr Burt as Mr Nilsen said he "had

to get away clear my head, back now, we will catch up after lunch..” Terse exchanges then occurred with Mr Nilsen confirming he wanted to meet Mr Burt ‘face to face’.

[29] Mr Burt recalled the subsequent ‘face to face’ meeting at the boat early on the morning of 5 June 2019 and that was when he says Mr Nilsen lost it, began yelling at him, stood over him and physically threatened him and, said he would “do him in” if he kept on going on about pay issues. Mr Burt said this was when he collected his gear from the boat (clothes, leggings and a jacket) and left shaken by the interaction. Jesse Burt gave evidence at the 1 October 2020 investigation meeting recalling Mr Burt returning home on 5 June appearing “very shaken” and saying Druce had threatened him.

[30] Mr Burt provided a 9 am text message of 5 June to Mr Nilsen that he said was sent after the confrontation. It indicated in part “you have fucked us around time and time again ... and I am not going to be threatened by you” to which Mr Nilsen robustly responded:

Haha, I see where Jess gets her mouth from, but I knew that, & I can recall several times your family issues stopped my fishn operation or I brought u back early because of that, also you saying il cum down scrub boat, blah blah, but not once have I seen u scrub the Motuara down in 5 months, So who’s the shit talker Mike, & u want paid, & I blame u for that lost coff of fish, coz you have forgotton to put ties on them before because you have been to stoned, but keep running that big mouth of yours, coz that’s all u do..

[31] Mr Burt says he then took from the tenor of the exchange on the boat and the text above, as being indicative of him having been dismissed and that he otherwise felt unsafe trying to return to work. Mr Burt says he did not return after this and he reported the matter to the police fearing his family safety and he obtained a trespass order against Mr Nilsen (a copy of which dated 5 June 2019 was provided to the Authority).

[32] Mr Burt described the further incident at the Bluff wharf on 1 July 2019 saying Mr Nilsen called him out from his boat whilst Mr Burt was talking to his new employer. Mr Burt says Mr Nilsen called him a “parasite” and threatened to kill him and then got off his boat and chased Mr Burt down the wharf. Mr Burt says he got in his car and drove away. Afterwards, Mr Burt says he complained to the port company about Mr Nilsen’s threatening behaviour. I was also provided with a copy of a trespass order of 1 July 2019 indicating

Mr Burt had been trespassed from the fishing boat by Mr Nilsen which Mr Nilsen omitted to mention when giving evidence.

Assessment - was Mr Burt dismissed?

[33] At the investigation meeting Mr Nilsen denied threatening Michael Burt and essentially claims nothing untoward happened and that this was a voluntary resignation. By contrast, Mr Burt was of the belief that he had been dismissed, a view reinforced by events including the existence of the then unresolved pay dispute, the communication on 5 June and the fact that Mr Nilsen ceased offering him ongoing work.

[34] In the absence of any witnesses to the events that were said to constitute the dismissal, I have to assess in the light of the communications what is more likely than not to have happened. What emerges is a dispute initially over pay and the non-production of payslips that led to Mr Nilsen unilaterally suspending Mr Burt's employment when he chose to go fishing without him. From this point in time, the employment relationship never recovered. The tenor of the subsequent text communications and what Mr Nilsen said during the investigation meeting regarding Mr Burt in his view inappropriately raising issues through his wife about pay slips, leads me to conclude that Mr Nilsen brought the employment to an end at the meeting he had with Mr Burt on 5 June 2019 on his boat.

[35] I find that rather than having resigned, Mr Burt was sent away and summarily dismissed during the 5 June conversation – a conversation that was more likely than not confrontational. I prefer Mr Burt's account.

Was the dismissal justified?

[36] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[37] Section 103A details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner; these summarised are:

- (a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- (b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;
- (c) was the employee afforded a reasonable opportunity to respond to identified concerns;
- (d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- (e) any other contextual factor the Authority regards as appropriate to consider.

Applying factors identified by the Act

[38] In considering all the circumstances leading up to the ending of Mr Burt's employment I find Mr Nilsen had no regard to the factors set out in s 103A above. No specific concerns were identified to Mr Burt when Mr Nilsen decided to go fishing without him and the purpose of the meeting on 5 June was ostensibly to discuss Mr Burt's concerns. Afterwards Mr Nilsen's 5 June text communication was unhelpful and could not be construed as constructive in tone or asking Mr Burt to address Mr Nilsen's concerns and, no explanation was sought. This was a dismissal lacking any semblance of procedural fairness.

[39] I have considered that Mr Nilsen was only latterly found to be Mr Burt's employer and he essentially is a 'one man operation' with no immediate access to legal advice but my finding leads to a conclusion that Mr Nilsen summarily dismissed Mr Burt 'in the heat of the moment' on 5 June then did nothing to reflect upon or seek to resile from his stance.

Finding

[40] The dismissal was not substantively a decision open to a fair and reasonable employer in all the circumstances. I find that a fair and reasonable employer would have promptly provided the pay-slips Mr Burt was seeking and not reacted so negatively to this reasonable request that placed Mr Burt in a difficult position with ACC. Mr Burt was communicative, upfront with his concerns and accommodating to Mr Nilsen when without

good reason Mr Nilsen went fishing without him. Mr Nilsen had the opportunity to sort matters out at the 5 June meeting but did not take a conciliatory approach.

[41] I find in the overall circumstances, that the summary dismissal of Mr Burt was not substantively justified on the grounds that he did not engage in any identified serious misconduct and the significant procedural deficiencies render the dismissal unjustified. Mr Burt is entitled to consideration of remedies as he was unjustifiably dismissed.

Remedies

Compensation for hurt and humiliation

[42] Mr Burt gave evidence of the impact and circumstances of his dismissal that has led him to relocate to work elsewhere and not being able to find alternative work in Bluff. The situation was compounded by Mr Nilsen's aggressive actions that led to a breakdown in an otherwise good working relationship of some standing. As such Mr Burt was humiliated and lost a sense of dignity at the manner by which he was dispensed with by Mr Nilsen and that aggression towards Mr Burt continued after the dismissal.

Finding

[43] Taking into account the evidence proffered and awards made by the Authority and Court in similar situations, I consider that Mr Burt's evidence warrants compensation of \$12,000 under s 123(1)(c)(i) of the Act.⁵

Lost wages

[44] Having found that Mr Burt was unjustifiably dismissed he is entitled to a consideration of lost wages. Mr Burt indicated that he secured an alternative fishing job at Bluff on 14 June 2019 but unfortunately this ended on 7 July 2019 due to a serious hand injury he sustained. In addition, Mr Burt had to have a further break to have scheduled surgery on his knee and then a recovery period. Mr Burt then says he had a period of unemployment and was unable to secure work in Bluff so he went to work in Nelson fishing on 1 January 2020 but this was temporary and he returned to Bluff after a month and has since then been working as a contractor trapping pests.

⁵ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

[45] In the circumstances, following his employment ending with Mr Nilsen, Mr Burt has only made out lost wages of two weeks being the period between when his pay stopped with Mr Nilsen (he was paid up to the end of May 2019) and him commencing new employment on 14 June.

[46] Given that there was a dispute over what constituted Mr Burt's wages as he was paid a percentage of the catch, I have to exercise the Authority's discretion and estimate what two weeks lost remuneration was likely to be. The only 'rough' yardstick I had was four weekly payslips that were provided to Mr Burt covering March 2019 – these showed weekly amounts of \$823.48, \$1,277.79 and \$942.00 and \$264.37. I have averaged these payments to come to a weekly sum of \$814.41 and so I award Mr Burt two weeks lost wages in the amount of \$1,628.82.

Contribution

[47] Section 124 of the Act states that I must assess the extent to what, if any, Mr Burt's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*⁶.

[48] I find that although Mr Burt failed to properly articulate his concerns in a timely manner after he was dismissed this did not give rise to the circumstances that led to the dismissal and so he was not engaged in blameworthy conduct warranting any reduction in remedies.

[49] By contrast, Mr Nilsen's communication was at times non-existent and when Mr Burt became persistent over what were legitimate concerns it riled Mr Nilsen.

[50] I have examined the robustness of Mr Burt's texts but consider that they were not out of kilter with the contextual culture of how they normally communicated. In the circumstances I have not reduced the remedies awarded.

⁶ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Summary

[51] I have found that:

(a) Michael John Burt was unjustifiably, summarily dismissed by Druce Nilsen.

(b) In the circumstances, Druce Nilsen must pay Michael Burt:

- (i) \$12,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.
- (ii) \$1,628.82 (gross) lost wages pursuant to s 123(1)(b) Employment Relations Act 2000.

Costs

[52] Costs are at the discretion of the Authority and here the investigation meeting was brief and Mr Burt represented himself. In the circumstances no costs issues arise.

David G Beck
Member of the Employment Relations Authority