

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 525
5402552

BETWEEN TRAVIS DANIEL COLLIER
 Applicant

A N D TAMA RAKAU LOGGING
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: S Austin, Advocate for Applicant
 M Insley, Counsel for Respondent

Investigation Meeting: 16 July 2013 at Whakatane

Date of Determination: 15 November 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Travis Collier, says that he was unjustifiably dismissed on 17 August 2012. He asks the Authority to find that he has a personal grievance and award him the remedy of compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the ERA). For reasons of completeness only, I record that Mr Collier was claiming reinstatement to his previous position as a remedy but this was withdrawn. Mr Collier was also claiming the remedy of reimbursement of lost wages but it became apparent during the investigation meeting that due to an operation being required on his shoulder (on 5 September 2012), and an associated recovery period, whereby he received accident compensation, he was unfit for work for some time. Mr Collier then obtained new employment in January 2013 after the seasonal break. Hence there can be no valid claim for reimbursement of wages.

[2] The respondent, Tama Rakau Logging Limited (TRL), denies that Mr Collier was unjustifiably dismissed. The company says that the termination of Mr Collier's employment was appropriate due to his repeated and unauthorised absence from work.

Background

[3] Mr Collier was employed as a tree feller and log spotter. He worked in the latter role at the time of his dismissal and had done so for approximately six months. A log spotter is a person who directs the log hauler driver in regard to where to position the hauling ropes in order to extract logs from the logging site. It is the first link in the chain of the logging recovery operation and without the presence of the log spotter, logs cannot be recovered.

[4] The evidence of Mr Andrew Wood, a director of the company and its Operations Manager, is that the new code of practice for the industry specifies that the person fulfilling the role of log spotter must be experienced and hold relevant training modules. If Mr Collier was absent, this created a problem for the company and Mr Shane Wood, another director of the company, was required to step in, with the consequence that he was taken away from his normal duties. This placed some pressure on other crew members according to Shane Wood.

[5] In order to get to work, Mr Collier used to drive a company vehicle from his home and then meet up with the other members of his team at Awakeri, near Whakatane. The team would then all travel to the particular forest area that was being logged.

[6] The evidence of Mr Collier is that on Wednesday, 16 August 2012, at about 5:00a.m, he sent a text message to Shane Wood to say that he "had trouble at home" and that he would not be at work that day; the intent being that the other members of the team should not wait for him. Mr Collier is mistaken about the date as it was, in fact, 15 August 2012. Mr Collier did not get a reply from Shane Wood. This is because Mr Wood left home at 3:30a.m, arriving at the work site at 5:00a.m. and there is no cellphone reception there. Mr Wood says that he did not receive the text message until that evening when he got back into a cellphone reception area.

[7] In any event, both Shane and Andrew Wood attest that the first point of contact for Mr Collier is Andrew Wood¹. This is confirmed at clause 4 of the employment agreement between the parties, and Mr Collier acknowledged this when cross-examined by Ms Insley. In any event, the reality of the situation was that no one within the company was aware that Mr Collier would not be at work on 15 August 2012, until some time later that morning.

The dismissal

[8] On Thursday, 16 August 2012, Mr Collier arrived at the work site as usual. His evidence is that shortly after his arrival he and Shane Wood spoke to each other. Mr Collier says that Shane Wood said he had received the text message from him the day before. Mr Collier attests that he just nodded to Shane Wood and went off to get on with his work.

[9] But the evidence of Shane and Andrew Wood is rather different. Shane Wood attests that upon his arrival at work on the morning of 16 August 2012, Mr Collier came over to him and Andrew Wood and greeted them. Andrew Wood attests that he was at the vehicle carpark waiting for the team van to arrive that morning and upon Mr Collier exiting the van, Andrew Wood says he called Mr Collier to the back of the van so that he could speak to him in private.

[10] Andrew Wood says that Mr Collier then proceeded to inform him why he had been off work the day before “whilst looking down at his feet”. Andrew Wood says that he did not find the explanation convincing because Mr Collier failed to provide an adequate explanation or “produce any evidence” to justify his absence. Andrew Wood attests that it had been brought to his notice, by another worker, that Mr Collier had been out celebrating his birthday on the evening of 14 August 2012. It has been suggested that Mr Collier may have been drinking too much and this is the reason why he was absent from work on 15 August 2012. Mr Collier denies this. While the evidence is inconclusive about why Mr Collier did not attend work on the day in question, the reason he gave has not been proven to be wrong.

[11] The evidence regarding exactly how Mr Collier was informed that he was dismissed is not entirely clear. But it appears to be commonly accepted that Mr Collier was informed by Andrew Wood that his absence on 15 August 2012 was

¹ The evidence is that Mr Collier lived about 800 metres from Mr Andrew Wood’s home

unacceptable and because there had been other absences, his employment was to be terminated after working out two weeks' notice. Mr Collier was told to go home for the rest of the day (16 August 2012) and come back to work the next day.

[12] The evidence of Shane Wood is that he informed Mr Collier that his poor attendance was not the only issue. This is because the company had to rework areas that had been logged previously due to logs being left in some areas by Mr Collier. Shane Wood says that the harvesting contract held by the company requires that a minimum standard of recovery is 10 tonnes per hectare and this standard had not been met by Mr Collier over the previous months in his role as a log spotter. Shane Wood attests that, in order for the business to be sustainable, it needs to produce 380 tonnes of sawn logged timber. If areas have to be reworked, the company is unable to meet this production target. But there is no evidence that the log recovery issue had ever been raised previously with Mr Collier.

[13] The further evidence of Shane Wood is that Mr Collier became quite emotional during the discussion about his absence and that Mr Collier admitted that he was not doing a good job and accepted his dismissal. Mr Collier denies both these assertions. Shane Wood attests that Mr Collier was sent home on 16 August 2012 because he was "emotional and erratic and deemed to be unfit/unsafe to work by himself".

[14] After leaving the work site on 16 August 2012, Mr Collier consulted his advocate, Mr Austin. The evidence of Ms Nickita Wood (the wife of Andrew Wood) is that she received a phone call from Mr Austin on Friday, 17 August 2012, asking to speak to her husband. Mr Austin informed that he had forwarded a letter to the company on behalf of Mr Collier seeking his reinstatement. Ms Wood attests that Mr Austin informed her that if Mr Collier was not reinstated he would "put a \$15,000 hole in the company's pocket", and then hung up.

[15] On Friday, 17 August 2012, Mr Collier went to the work site and started work as usual. He attests that Andrew Wood approached him at about 3:30p.m. and spoke to him to the effect that he was aware that Mr Collier had "got some lawyer". Mr Collier was then informed that he could finish that day and he would be paid two weeks in lieu of notice. This was the last day that Mr Collier was employed by the company.

Analysis and conclusions

[16] In determining, on an objective basis, whether a dismissal was unjustifiable, the Authority must apply this test²:

... 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.

[17] Then, in applying the test, the Authority must consider³:

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

Was the dismissal of Mr Collier what a fair and reasonable employer could have done in all the circumstances?

[18] The company says that the dismissal of Mr Collier was justified largely on the grounds that there was not a good reason for his absence on 15 August 2012. The company says that the absence on this day was, effectively, "the final straw" as he had been absent on other occasions, without good reason. The evidence of Andrew Wood is that during the total period that Mr Collier was employed by the company (from 12 April 2010 to 16 August 2012), he should have worked 570 days but he only worked 468.5 days: being absent for 99.5 days. However, Andrew Wood acknowledged that Mr Collier was off work for two days on accident compensation, hence he was absent over the period of his employment, without authority, for 97.5 days. Mr Collier disputes this and the evidence as to the exact number of days that Mr Collier was absent without authority and when, is inconclusive. Nonetheless, the Authority accepts that his attendance had been less than satisfactory to TRL.

² Section 103A(2) of the ERA

³ Section 103A(3) of the ERA

[19] Andrew Wood also refers to the termination of Mr Collier's employment in September 2011, as evidenced by a letter dated 5 September 2011, whereby Mr Collier was dismissed due to unacceptable absences from work. The common evidence is because Mr Collier pleaded for his job back, and because he had been known to the family for a long time, he was reinstated. However, Mr Wood says that Mr Collier knew then that he was on a "final warning" in regard to his absences. While this may have been the perception of TRL, there is no evidence of any written warnings being given to Mr Collier or of him being put on notice that any further transgressions would place his employment in jeopardy. But I have no doubt that Mr Collier was aware that further absences on his part would have serious consequences in regard to his continued employment.

[20] The overall evidence is that Mr Collier, more probably than not, was less than reliable regarding his attendance and given that he was an essential part of the logging team, his absences had the potential to compromise the production of the company, and, possibly, also the safety of the team due to it being under-manned, as Mr Collier was in the habit of not giving notice of his absences.

[21] However, I am bound to find that the dismissal of Mr Collier was unjustifiable on several grounds. First, the company failed to meet the requirements of at least some of the criteria set down by s.103A(3) of the ERA. It is accepted that the company has very few resources in regard to employment relationship matters and that Andrew and Shane Wood are very much "hands on" logging contractors operating on tight margins. It also has to be accepted that there was very little to investigate in regard to the absence of Mr Collier on 15 August 2012 as his reason for not being at work that day was somewhat nebulous.

[22] Nonetheless, it is clear that Andrew and Shane Wood did not give Mr Collier a reasonable opportunity to respond to their concerns before dismissing him. Neither did they genuinely consider Mr Collier's explanation before dismissing him; in fact, it appears that little or no consideration was given at all. And then to compound matters, when Mr Collier sought advice and obtained representation, the termination of his employment was brought forward.

[23] The failure to comply with the relevant criteria under s.103A(3) of the ERA is not minor and it goes to the general application of natural justice whereby Mr Collier was entitled to have any allegations properly put to him and a reasonable opportunity

to respond, and then have his responses or explanation genuinely considered. It follows that the failure on the part of the company to observe these essential requirements of the ERA (and common law) makes the dismissal of Mr Collier unjustified. He has a personal grievance.

Remedies

[24] Having found that Mr Collier has a personal grievance because his dismissal was unjustified; under s.123 of the ERA the Authority may provide for various remedies. In this case, only the remedy of compensation under s.123(1)(c)(i) is applicable. Mr Collier seeks an award of the sum of \$14,000 but there is no evidence before the Authority that suggests anything other than a modest award is appropriate. Mr Collier gave some evidence about the effects of the dismissal in that he lost sleep and was “down in the dumps” and “grumpy” most of the time. Mr Collier also related to his dismissal being a cause of his domestic relationship dissolving. But ironically, he also says that the reason he did not come to work on 15 August 2012 was because of “problems at home”. It is apparent from the overall evidence that Mr Collier’s domestic relationship was less than stable prior to his dismissal. Mr Collier refers to the loss of income but failed to recognise that he was already scheduled for accident compensation related surgery (with one month’s notice) on 5 September 2012, hence the dismissal had no discernable affect on his income.

[25] Taking all the circumstances into account, I conclude that an award of \$4,000 is appropriate.

[26] Pursuant to s.124 of the ERA, the Authority must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and decide if any reduction in remedies is appropriate accordingly. Mr Collier had been dismissed less than one year ago on the grounds of poor attendance and he knew how important it was to his employer that he attended work, and if unable to do so, to at least ensure that his employer was notified in good time to make alternative arrangements, in order to maintain productivity and safety for the logging team. While Mr Collier sent a text at 5:00a.m. on the morning of 15 August 2012, it is most probable that he knew Shane Wood would not receive the text message, as Mr Collier would have been aware of Mr Wood’s travel requirements and the lack of cellphone coverage. The point has already been made that in any event,

Mr Collier was required to report to Andrew Wood and in fact the two men lived approximately 800 metres apart.

[27] I conclude that Mr Collier's failure to notify his employer in good time of his absence was blameworthy conduct to the extent that the compensation awarded should be reduced by 30%; also taking into account that it was not Mr Collier's fault that the company failed to observe the essential requirements of s.103A(3) of the ERA.

Determination

[28] For the reasons set out above, I find that the dismissal of Mr Collier was not what a fair and reasonable employer could do in all the circumstances; the dismissal was unjustified.

[29] Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, Tama Raku Logging Limited is ordered to pay to Mr Collier the sum of \$2,800.00 (\$4,000 less 30%).

Costs

[30] Costs are reserved. The parties are invited to resolve this matter if they can. In the event that a resolution is not possible, the applicant has 28 days from the date of this determination to file and serve submissions. The respondent has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority