

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 534
3175726

BETWEEN

RIKI GREEN
Applicant

AND

RISE ROOFING LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Kirsten Westwood, advocate for the Applicant
Nathan Pere, advocate for the Respondent

Investigation Meeting: 22 September 2022 at Christchurch

Submissions Received: 22 September 2022 from the Applicant
29 September 2022 from the Respondent

Date of Determination: 14 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Riki Green was employed by Rise Roofing Limited (Rise Roofing) for a period between 10 November 2021 and 10 January 2022 as a roofer. Rise Roofing is a duly incorporated company having its registered office at Christchurch and carrying on the business of fixing metal roofs. It was incorporated on 12 August 2021. The sole director of Rise Roofing is Nathan Pere.

[2] Mr Green says that his dismissal by text on 10 January 2022 was unjustified. He seeks reimbursement of lost wages in the sum of \$1,792 and compensation in the sum of \$20,000 together with costs. I record that the claim for compensation increased in final submissions from the amount of \$20,000 in the statement of problem, to \$25,000.

[3] Rise Roofing says that there was a 90-day trial period in the employment agreement it had with Mr Green that it could rely on. Further, that earlier text messages on 10 January 2022 from Mr Green were belittling and attacking. Mr Pere said that he considered a dangerous situation was developing for him and other employees at Rise Roofing and that the conduct and content of the message was not in accordance with the positive workplace goal of Rise Roofing.

The investigation meeting

[4] The Authority at its investigation meeting heard evidence from Mr Green and Mr Pere.

[5] Submissions on behalf of Mr Green were handed in at the investigation meeting and Mr Pere was given a period of seven days to consider these and then submit any submission on behalf of Rise Roofing. The Authority has submissions from both parties.

The Issues

[6] The Authority needs to determine the following issues in this case:

- (a) Was Rise Roofing able to rely on a 90 day trial period?
- (b) If not, then what is the legal framework for assessing justification of the dismissal?
- (c) Was the dismissal justified?
- (d) If the dismissal was not justified, then what remedies should flow and are there issues of contribution and mitigation?

Was Rise Roofing able to rely on a trial period?

[7] The unsigned individual employment agreement contained a trial period in clause 5 that provided materially:

- 5.1 The period of 90 days starting at the beginning of your employment is a trial period. This means that during this trial period the staff disciplinary procedures do not apply and the company may end your employment and you will not be entitled to bring a personal grievance or other legal proceedings in respect of this.

[8] Mr Green was provided with a copy of the individual employment agreement on 3 November 2021. On that day he raised an issue with Mr Pere about the sick leave entitlement stating that it needed to increase after six months. He noted about the agreement that other than that, it was “cool as.” Mr Pere responded to Mr Green to the effect that he would have the employment agreement adjusted about the sick leave. The employment agreement was never changed and signed before the employment relationship ended.

[9] I have considered whether the unsigned employment agreement contains a trial provision in accordance with s 67A of the Employment Relations Act 2000 (the Act).

[10] The unsigned employment agreement provided in clause 2 that its provisions would come into force on the date of signing. I conclude that it was not intended that the parties be bound by the agreement until it was signed. It was never signed.

[11] I do not find that the unsigned employment agreement contains a trial period in accordance with s 67A of the Act in those circumstances. The consequence of this is that Mr Green is not prevented from bringing a claim for unjustified dismissal.

What is the legal framework for assessing justification of the dismissal?

[12] Under s 103A of the Act, the Authority is required to objectively consider whether what Rise Roofing did and how it did it was what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[13] The Authority must as part of its objective assessment consider the minimum procedural fairness factors in s 103A(3)(a) to (d). These considerations require regard to be had to the resources available to the employer, whether there was sufficient investigation of the issues of concern, whether concerns were raised with Mr Green and if he had a reasonable opportunity to respond to them and whether his responses were genuinely considered prior to the decision to dismiss him.

[14] If the deficiencies in the process were minor and didn't result in Mr Green being treated unfairly then the dismissal will not be unjustified. If however they were not minor and did cause unfairness then this is likely to result in a finding that the dismissal was unjustifiable.

Was the dismissal justifiable?

[15] The relationship appeared to be a satisfactory one until after the Christmas holiday period. Mr Green was concerned that he had not been paid his forty hours a week over the Christmas period. He acknowledged that this was not a requirement given that he had only commenced employment with Rise Roofing on 10 November 2021. Rather, his concern was that he had been led by Mr Pere to believe that he would be paid in this manner over the holiday period because he had received an assurance about this prior to his employment commencing, and then closer to the time of the Christmas holiday period.

[16] The evidence supported that both parties had different views about what had been said and agreed about this matter.

[17] What followed was that when Mr Green returned to work on 10 January 2022, he was concerned to discover that he had not been paid in accordance with what he believed the agreement was.

[18] A series of text messages were sent after Mr Green finished work for the day on 10 January 2022.

[19] In the first text message in the series Mr Green set out that he could not understand how Rise Roofing had paid him. He set out what he had been paid and in the final sentence stated "Is this is a mistake or did you purposely not top me up like you said you were going to?" Mr Pere responded to say that there wasn't a mistake. He explained that the days worked on 10 January 2022 and 11 January 2022, as discussed before the holidays, had been paid in advance to Mr Green and another employee and that both had agreed to that. Mr Pere offered to talk about it the following day if Mr Green wanted to.

[20] Mr Green then responded in a further text to say that he had been told that he was going to be paid forty hours through the holidays at the "pub", before he accepted an offer of employment. He wrote that he said he could have kept the holiday pay from his previous job but that Mr Pere had reassured him that he would pay him the forty hours through the holidays. He said that he was reassured again about a week before the Christmas two-week break that he would be topped up to forty hours for the two weeks, but that didn't occur. Mr Green wrote that he could have done things differently to save or earn money over that period. He concluded

the text messages with “..it’s really fuked me and my family over if u say ur guna do something do it.”

[21] In response by text message Mr Pere wrote that there had been a meeting on 21 December prior to final pays being processed and what Mr Green and another employee would receive was agreed to. Mr Pere again made an offer to talk about matters.

[22] I set out the text that then followed from Mr Green in full:

Bro u just paid stat days and the annual leave days we had. I agreed to you topping me up to 40 hrs. You told us all that. sold us a dream and didn’t deliver. What’s to talk about? That you’re not a man of your word? il be at work in morning. I just know now can’t believe what u say.

You told Me dre Ezra and Pete that’s what u were doing.

[23] The next text was sent from Mr Pere. It provided as follows:

After much consideration around this issue that has arisen. I'm sorry Rick, but I'm not feeling positive about keeping your employment here at Rise Roofing, and as director of the company I do need to make the right decisions for the company. Unfortunately I've decided that your terminated as of Monday 10th of January. I'm sorry it had to come to this, but I see this is a deep seeded issue that would have continued issues if employment was to continue. I really didn’t want to do this.

I can still help by giving you contact information to a couple of other roofing companies that are currently looking for workers, whether the wage is the same/better or less I’m unsure. But I will give them a good reference, as there isn’t any issue around your work ethic. I’m truly sorry. Nathan Pere.

[24] Rise Roofing is a small business. There is no evidence Mr Pere had access to human resource or legal advice before the termination of Mr Green’s employment. I have weighed that.

[25] Mr Pere had concerns about the text messages from Mr Green. He did not however raise these with Mr Green before he was dismissed. Mr Green did not have an opportunity to respond before he was dismissed and have his response genuinely considered.

[26] There was an absence of any process and a failure to comply with the factors in s 103A (3) (a) to (d) of the Act. The defects were major and not minor and they did cause unfairness. The lack of any process overlapped with any findings about substantive justification. Mr Green’s dismissal was unjustified.

[27] Having made out his personal grievance that he was unjustifiably dismissed Mr Green is entitled to an assessment of remedies.

Remedies

Lost wages

[28] Mr Green managed to obtain a new role on 20 January 2022 and he seeks reimbursement of eight days lost wages. In submissions there was a claim for two weeks' notice however I have approached this claim on the basis set out in the statement of problem and the statement of evidence. There are eight working days between 10 January 2022 and 20 January 2022. Whilst there is a dispute about what was agreed to be paid or not agreed to be paid over the Christmas break, it appears that part of the payment over that period was made based on an advance payment for 10 and 11 January 2022. Mr Green worked on 10 January 2022 and was paid. He did not work on 11 January but was also paid for that day. I conclude it fair and appropriate to give a credit for two of those days.

[29] Subject to any issues of contribution therefore Mr Green is entitled to be reimbursed for six days of lost wages. His hourly rate was \$28, and he was paid for forty hours per week. That is \$224 per day. Six days lost wages is six times the amount of \$224 in the sum of \$1,344 gross.

Compensation

[30] I accept that Mr Green suffered hurt and humiliation at the sudden and unexpected nature of his dismissal. His partner was pregnant with their eighth child and was due to give birth in February. This led to stress about how to meet the outgoings for the family. Mr Green needed to borrow money from his mother and go to foodbanks. He said that he had ongoing concerns about trusting people notwithstanding he obtained new employment very soon after dismissal.

[31] I do weigh that some of the longer lasting hurt and humiliation about trust arose from Mr Green's firm view that there was an agreement to pay him in full over the Christmas break. He did not meet with Mr Pere about that although invited to do so. Such a meeting would have potentially resolved the issue and in so doing alleviated some of the hurt.

[32] The other matter that I consider when I come to compensation for the unjustified dismissal is that Mr Green stated in his final text message that whilst he would return to work he could not believe what Mr Pere had to say. Further that Mr Pere was not a “man of his word.” This was a conclusion reached without meeting and discussing the pay issue with Mr Pere. It is likely the dispute about payment over the Christmas period was never going to be resolved but Mr Green would have continued to have a view that Mr Pere could not be trusted or believed. It is difficult to see with that fundamental loss of trust and no way forward to resolve it, the employment relationship could have lasted for any extended period.

[33] The hurt and humiliation resulted primarily, I conclude, from the way the relationship ended and resulting short term financial issues until new employment was obtained. The award of compensation should reflect that.

[34] Subject to contribution I conclude an appropriate award under this head is \$6000.

Contribution

[35] The Authority must under s 124 of the Act in deciding the nature and extent of the remedies, consider the extent to which the actions of Mr Green contributed to the actions that gave rise to the personal grievance. The text messages from Mr Green objectively assessed were somewhat aggressive. Mr Pere’s response in proposing meetings to discuss the concerns were measured and reasonable. Mr Green continued to text and whilst he stated there was nothing to talk about, there clearly was.

[36] Statutory good faith obligations require parties to an employment relationship to be responsive and communicative. I accept that Mr Green was upset but Mr Pere was happy to discuss the issue in person. There was no need for further text messaging. Mr Pere said that he felt fearful, because of the text messages, for himself and the other employees. Further, that it was contrary to the positive team environment he wanted to have. These views contributed to his decision to terminate the relationship.

[37] To continue with the text messaging when there could have been a face-to-face discussion the following day was blameworthy conduct. It was conduct that did not accord with good faith obligations and was not constructive.

[38] In considering the extent of the remedies I do not consider the award for lost wages should be reduced. The compensatory award should be reduced by 15% award to reflect contribution.

Orders made

[39] Rise Roofing Limited is to pay to Riki Green the sum of \$1344 gross being reimbursement of lost wages under s 123(1)(b) of the Act.

[40] Rise Roofing Limited taking contribution into account is to pay to Riki Green the sum of \$5,100 without deduction being compensation.

Costs

[41] Ms Westwood has asked that costs be reserved.

[42] I reserve the issue of costs.

[43] If costs cannot be resolved, then Ms Westwood may lodge and serve a costs submission within 14 days from the date of this determination.

[44] Mr Pere will have a further 14 days from receipt of the submission to lodge and serve a reply submission as to costs.

[45] Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[46] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.¹

Helen Doyle
Member of the Employment Relations Authority

¹ Please note the Authority has issued an updated Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>.