

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 41
5613028**

BETWEEN RICHARD HARTSTONE
 Applicant

AND ENVIRO SCIENTIFIC GROUP
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Alex Hope, Counsel for Applicant
 David Hayes, Counsel for Respondent

Investigation Meeting: 17 & 18 January 2017 at Hamilton

Submissions received: 18 January & 31 January 2015 from Applicant
 23 December 2016 & 18 January 2017 from Respondent

Determination: 21 February 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Richard Hartstone, claims that he was unjustifiably disadvantaged and unjustifiably dismissed by the Respondent, Enviro Scientific Group Limited (Enviro).

[2] Mr Hartstone also claims that Enviro breached the individual employment agreement provided to him (the Employment Agreement) by failing or refusing to pay him overtime payments, or provide lieu days in respect thereof, for additional hours he worked.

[3] Mr Hartstone further claims that Enviro breached the Employment Agreement by failing or refusing to pay him accrued annual holiday pay.

[4] Enviro denies that Mr Hartstone was unjustifiably dismissed or disadvantaged in his employment, and claims that he resigned.

[5] Enviro also denies that Mr Hartstone is owed holiday pay, and claims that all holiday pay entitlement has been paid.

Issues

[6] The issues for determination are whether or not:

- Mr Hartstone was unjustifiably disadvantaged by Enviro as a result of:
 - being suspended on 24 March 2015
 - disparity of treatment
 - being dismissed by telephone on 24 March 2016
- Mr Hartstone was unjustifiably dismissed by Enviro or whether he resigned
- Enviro breached the Employment Agreement in respect of overtime worked by Mr Hartstone but not paid to him
- Enviro breached the Employment Agreement in respect of holiday entitlement earned by Mr Hartstone but not paid to him

Background Facts

[7] Enviro was established by Mr Todd Sheppard, Director and Shareholder, and offers methamphetamine testing and decontamination services. It currently employs 10 staff, including Mr Sheppard's wife and joint shareholder, Ms Connie Sheppard, her son, Mr Damien Pruden, and her daughter, Ms Jasmine Pruden, and Mr Sheppard's son.

[8] Mr Hartstone said he commenced employment with Enviro on 28 April 2014. He was employed as Manager on a salary of \$1,250.00 per week for a 40 hour week, and had unlimited use of a company vehicle. In his role he organised initially two, then three, teams of employees. His job required him to work offsite managing the teams.

[9] Mr Hartstone said he was provided with a written individual employment agreement on 30 April 2014 (the Employment Agreement).

[10] The Employment Agreement includes the following clauses:

1.2: *This Agreement constitutes the entire agreement between the parties*

2 PREVIOUS TERMS AND CONDITIONS

2.1 *This Agreement shall supersede any agreement, or contract, between the parties whether written or verbal that may have applied prior to the signing of this agreement. The terms of this agreement as varied will come into force on the variation or start date.*

23 COMPANY VEHICLES

23.1 *The Employee may be provided with a company vehicle.*

23.2 *The Employee agrees to use the company vehicle solely for business purposes unless the Employer has given the Employee express permission to use the vehicle for another purpose.*

34 ABANDONMENT

34.1 *Where the employee absents themselves from work for more than three consecutive working days without notification to the employer, and the Employer despite its best efforts has not been able to establish any good reason why the Employee is absent the Employee shall be deemed to have terminated their employment without notice.*

[11] Clause 4 of the Employment Agreement stated that Mr Hartstone's duties and job description were set out in the Second Schedule to the Employment Agreement, however no Second Schedule has been provided to the Authority.

[12] The First Schedule to the Employment Agreement is blank at the sections where the date of commencement and remuneration should be stated. The remuneration section states: "*The Employee will be paid an hourly rate of ...*" Hours of work are stated to be between 9.00 a.m. and 5 p.m. Monday to Friday.

[13] The Employment Agreement concludes with a statement that:

The Employee further acknowledges that they:

(a) Have been advised of the entitlement to seek independent advice about the rights and obligations contained in this Agreement; and

- (b) Have been given a reasonable opportunity to seek that independent advice before entering into this Agreement; and*
- (c) Have been provided with a copy of this Agreement; and*
- (d) Understand the provisions in this Agreement; and*
- (e) Did not rely on the Employer's advice when entering into this Agreement; and*
- (f) Were not induced to enter into this Agreement by oppressive means, undue influence, or duress by the Employer.*
- (g) Confirm that any issues raised by the Employee during the offer and acceptance stage have been properly considered.*

[14] Mr Sheppard and Mr Hartstone had signed the Employment Agreement below this statement and dated it 30 April 2014, and initialled each of the 15 numbered pages of the agreement but not the two pages headed 'First Schedule'..

Overtime

[15] Mr Hartstone said that on or about October 2014 Mr Sheppard had verbally agreed that he would be paid overtime or alternatively he would be given one paid day off for every 8 additional hours he worked. The overtime rate was agreed to be \$1,250.00 net divided by 40 hours per week.

[16] The employees who reported to Mr Hartstone completed timesheets which he checked and forwarded them to Ms Pruden, the Wages Clerk, for payment.

[17] He did not complete timesheets himself but provided his worked hours to Ms Pruden, and she would arrangement for payment. Mr Hartstone said he had received overtime payments prior to 2015; however these payments had been sporadic after January 2015.

[18] Mr Sheppard said he had never checked the payroll payments as he was too busy to do so, and he trusted Mr Hartstone.

[19] Whilst he said that there had been no agreement that Enviro would pay Mr Hartstone overtime, he confirmed during the Investigation Meeting that he had in fact agreed to some overtime being paid, but had become aware that it was: "*ballooning* " and he put a stop to further payment being made.

Incident on 20 March 2015

[20] At the time of the incident on 20 March 2015 Mr and Mrs Sheppard lived in a house situated on the property where the Enviro office premises were situated. Prior to and during the move to the property, the Enviro business had been based in Mr and Mrs Sheppard's home, but following the opening of separate office premises, that had no longer been necessary.

[21] Mr Hartstone said that at the date of the incident on 20 March 2015 Mr Pruden worked in a team which reported to him. Mr Pruden had been re-employed after being dismissed in July 2014 following performance issues raised by Mr Hartstone. This dismissal had been approved by Mr Sheppard; however Mr Pruden had subsequently been re-employed by Mr Sheppard who had neither consulted nor advised Mr Hartstone prior to the re-employment taking place on or about October 2014.

[22] Mr Hartstone said he had only become aware that Mr Pruden had been re-employed after he appeared as a member of one of the teams he managed.

[23] Following Mr Pruden's re-employment, Mr Hartstone said he had again encountered problems in Mr Pruden's performance, including Mr Pruden's interactions with the other employees and his refusal to accept Mr Hartstone's authority as his manager.

[24] Following a refusal by Mr Pruden to carry out an instruction Mr Hartstone had given him on 20 March 2015, Mr Pruden had gone into the residence of Mr and Mrs Sheppard. Mr Hartstone followed him into the house to continue their discussion.

[25] Mr Hartstone said Mr Pruden had been standing by the fridge located in the property, the door of which was open. There had been words exchanged between them, but Mr Hartstone said voices were not raised and no physical contact took place. Mr Hartstone then walked out of the premises.

[26] Mrs Sheppard said that she had heard raised voices between Mr Hartstone and Mr Pruden in the office area that morning. She had tried to ascertain the cause, but as she had to take her younger son to school, she had thought it best to separate both of them until her return, and she instructed Mr Pruden to go into her home, and Mr Hartstone to carry on liaising with his team in the office area.

[27] When she arrived back at Enviro, she discovered Mr Hartstone and Mr Pruden having a heated discussion at the back door of her home. She had told Mr Pruden to continue with

what he had been instructed to do by her earlier, and asked Mr Hartstone to return to the office area.

[28] She realised that she had left milk for the office in her car and asked Mr Hartstone to wait whilst she went to get it. When she returned with the milk she saw Mr Pruden backed into the fridge with Mr Hartstone standing over him. She had told Mr Hartstone to leave.

Events 24 March 2015

[29] Mr Sheppard said that he had been working away from the office on Friday 20 March and was not told of the incident until the following day, Saturday 21 March 2015 when Mr Pruden and Mrs Sheppard told him what had occurred. He had sought advice from Mr Denis Quigan of the EMA over the weekend, and said that Mr Quigan had advised him to suspend Mr Hartstone pending further investigation.

[30] As Mr Hartstone was working off-site on Monday 24 March 2015, and he was away from the office himself on Tuesday 25 March 2015, Mr Sheppard asked Mrs Sheppard to tell Mr Hartstone that he had been suspended.

Suspension 25 March 2015

[31] Mrs Sheppard said that when she told Mr Hartstone he had been suspended on Tuesday 25 March 2015, he had become abusive and because she was concerned for her safety, she had telephoned the Police.

[32] Mr Hartstone said he had told Mrs Sheppard that she had no authority to suspend him when she had spoken to him. He had left to get into the Ute vehicle he used, however Mrs Sheppard had told him he would be charged with theft if he took it.

[33] Mr Hartstone said that as a result he had left with the Police who gave him a lift, and dropped him off at the Base, a shopping mall where his partner worked. He had not been arrested, charged, or cautioned by the Police.

[34] Shortly afterwards another Enviro employee, Mr Jeff Hawkes, had telephoned him on his mobile telephone, picked him up from the Base and had driven him to his home in Huntly. Mr Hawkes had given him the keys to the Ute.

[35] During the car journey to his home, Mr Hartstone said he received a telephone call on his mobile phone from Mr Sheppard, during which he also received an automated message on

his mobile phone which informed him of the speed Mr Sheppard was travelling at in his vehicle.

[36] He said Mr Sheppard had been shouting at him and told him he was dismissed. Mr Sheppard confirmed that he had told Mr Hartstone he was dismissed, but only after Mr Hartstone threatened him with media exposure in connection with Mr Pruden's personal behaviour.

[37] A transcript of the telephone conversation on 24 March 2015 was provided at the Investigation Meeting which records Mr Hartstone repeatedly asking Mr Sheppard if he intended to suspend Mr Pruden, and comments regarding Enviro employing: "*a known meth user*" and commenting: "*It'll look good in the paper!*" It was following this remark that Mr Sheppard comments that Mr Hartstone has threatened him, and states: "*Right now I have sacked you on the spot for threatening of a director*".

[38] Mr Hartstone said he had asked Mr Sheppard why he was travelling at 129 km as advised by the message on his cell phone, and told him to stop the car. Mr Sheppard responded by telling him he had no right to company property or information since he had been suspended. The recording ends with a final comment by Mr Sheppard and Mr Hartstone laughing in reply.

[39] A few days later, Mr Hawkes had uplifted Mr Hartstone's employment folder containing the Employment Agreement from the Enviro office cabinet and given it to Mr Hartstone. Mr Hartstone said he had not requested Mr Hawkes do so, but he had not returned the Employment Agreement to Enviro.

Disciplinary Process

[40] Mr Sheppard said that following his discussion with Mr Quigan he had prepared a letter to send to Mr Sheppard in order to arrange a disciplinary meeting. The letter was dated 30 March 2015 and stated:

This is a notice requiring you to attend a formal disciplinary hearing to be held at 10 am on Wednesday 1st April at 301 Te Kowhai Road.

At the hearing you will be asked to respond to an allegation of serious misconduct.

Specifically that, on Monday 23rd March 2015 at approximately [time] you entered the private residence of your employer, after being told not to do so by Connie Sheppard and return to the office building, and adopted stand over, threatening behaviour towards Damian, your employer's son. Subsequently, some two hours after that incident, you said that you would do it again if the situation arose again.

...

I confirm also, that you have been placed on suspension from attending work on full pay, until the matter relating to the above allegation has been resolved. I stress that you have not been dismissed and that you should remain available to return to work at my request.

[41] Mr Hartstone attended the disciplinary meeting on 1 April 2015. The meeting was attended by Mr and Mrs Sheppard and Mr Quigan. Although Mr Hartstone had been advised that he could have a support person at the meeting, he had attended without one.

[42] During the course of the meeting which was recorded, Mrs Sheppard took an active part, acknowledging that Mr Pruden had an anger issue and commenting in relation to him and Mr Hartstone that: "*you two are at loggerheads*". The altercation between Mr Hartstone and Mr Pruden on 20 March 2015 had been discussed.

[43] Mr Hartstone said he had been given an opportunity to explain his version of events. He had discussed the situation with Mr Sheppard and stated: "*If you are going to draw a line for me you need to draw a line for him, it is not rule for one and rule for the other*".

[44] Mr Hartstone had also discussed his concern at the fact that Mr Pruden had been re-employed without any discussion with him and explained that he believed a written job description should set out his responsibilities with reference to his understanding that he was: "*going to be in charge*".

[45] The meeting concluded with Mr Sheppard acknowledging that Mr Hartstone had raised some good points, and a commitment that Mr Hartstone would have a response the next day.

[46] Mr Sheppard set out his response in a letter dated 1 April 2015. The letter stated:

We have given serious consideration to your input and consider that your action of entering the private premises of the Company Directors to be very serious particularly as it was to behave threateningly to an employee of the company.

We do however acknowledge that there were extenuating circumstances that led up to your behaviour occurring, which does not excuse the behaviour but does go some way to explaining why it happened.

....

We have decided to issue you with a final warning ... on the condition that you discuss with the Company Directors whether some form of third party intervention may be needed to address any underlying issues that may have led to your behaviour occurring. If subsequently you are directed by the Company Directors to undertake some form of intervention, then you must do so. Otherwise the Company Directors will review their decision not to dismiss you.

We also recognise that there is an issue in the working relationship between yourself and Damian.

We commit to working with you to ensure that your authority as Manager of Operations is firmly re-established and supported by us and that all employees, including Damian are aware of that. ...

[47] Mr Sheppard said that he had telephoned Mr Hartstone on 2 April 2015 and invited him to a meeting on 7 April 2015 to be formally advised of the decision to issue him with a final written warning and to discuss anger management; however Mr Hartstone had told him he was not intending to return to work.

[48] Mr Hartstone said he had refused to return to work because he had lost trust and confidence in Mr Sheppard as his employer; however he stated that he had not resigned.

[49] Mr Sheppard said he had subsequently tried to contact Mr Hartstone, asking him to confirm his resignation in writing, but he had received no response. Mr Sheppard said that he and Mr Hartstone had a conversation on or about 7 April 2015 during which Mr Hartstone advised that he would not be returning to work as he wanted to work for himself.

[50] Enviro ceased paying Mr Hartstone on 1 April 2015. Mr Hartstone said he had received a final payment from Enviro on 17 April 2015.

Determination

Was Mr Hartstone unjustifiably dismissed or did he resign?

[51] It is not disputed by the parties that sometime following 1 April 2015 Mr Hartstone informed Mr Sheppard that he would not be returning to work. Whilst Mr Hartstone denies that he offered his formal resignation to Enviro, I find that his employment with Enviro ceased as a result of his refusal to continue the employment relationship following the outcome of the disciplinary meeting on 1 April 2015.

[52] In effect Mr Hartstone's employment with Enviro was ended by an action taken by Mr Hartstone that operated in effect as a resignation. I find that Mr Hartstone resigned with effect from 7 April 2015.

[53] Mr Hartstone claims that his effective resignation was on the basis that he no longer had trust and confidence in Mr Sheppard as his employer. I therefore consider whether or not Mr Hartstone was constructively dismissed by Enviro.

[54] An employee is usually entitled to resign from his or her employment on a unilateral basis. The agreement of the employer to such unilateral notice is not required; the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen.

[55] There is no obligation on the employer to dissuade the employee from leaving, although he or she may choose to do so in some cases. An employee who has resigned has not been dismissed.

[56] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action or actions of the employer.

[57] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there

had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.¹

[58] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*² there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- iii. There had been a breach of duty by the employer which causes an employee to resign.

[59] Mr Hartstone was not given a choice of resigning or being dismissed, neither do I find that Enviro followed a course of conduct with the deliberate purpose of coercing Mr Hartstone to resign. I therefore turn to examine whether or not there has been a breach of duty which caused Mr Hartstone to feel that he had no alternative but to terminate his employment with Enviro.

[60] The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*³. The Court of Appeal in examining the question of constructive dismissal observed:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[61] Therefore in examining whether a constructive dismissal has occurred two questions arise:

¹ *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113; p 985)+

² (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372

³ [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[62] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁴ observed in describing this type of constructive dismissal:⁵

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[63] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option.

Breach of Duty

[64] Mr Hartstone claims that the issues which resulted in him feeling unable to return to his employment fell into a number of areas:

- (i) the re-employment of Mr Pruden after he had dismissed him without his being consulted;
- (ii) the lack of disciplinary action against Mr Pruden following the incident on 20 March 2015;
- (iii) the verbal dismissal by Mr Sheppard during the telephone conversation on 24 March 2015;
- (iv) not being provided with documents recording Enviro's investigation prior to or at the meeting on 1 April 2015;

⁴ [1983] ACJ 965

⁵ at [975]

- (v) Mrs Sheppard being involved in the disciplinary meeting; and
- (vi) being issued with a final written warning.

(i) *The re-employment of Mr Pruden*

[65] Mr Hartstone was clearly unhappy at the lack of consultation prior to Mr Pruden being re-employed. Given the previous disciplinary action taken by Mr Hartstone which resulted in Mr Pruden's dismissal in July 2014, I consider it would have been reasonable for Mr Sheppard to have at least advised Mr Hartstone that he had decided to re-employ Mr Pruden before Mr Hartstone discovered that he had been re-employed as part of a team which he had the responsibility to manage.

[66] However whilst I find that there may have been what Mr Hartstone perceived to be inconsiderate conduct by Mr Sheppard causing some unhappiness or resentment on his part, I find no breach of duty such as to constitute: "*dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship*".

(ii) *The lack of disciplinary action against Mr Pruden*

[67] Mr Hartstone considered there had been no corresponding disciplinary action taken against Mr Pruden regarding the incident on 20 March 2015, whereas he himself had been suspended and subsequently issued with a final written warning and advised that he might be required to undertake some form of third party intervention if directed to do so by the company directors. Mr Hartstone is claiming that it was this disparity of treatment which led to his losing trust and confidence in Enviro and to a situation of constructive dismissal.

[68] Disparity of treatment arises in a situation in which there has been a dismissal. Whilst the Employment Court⁶ has confirmed that it is the prerogative of the employer to decide whether to dismiss or not, that right must be exercised in accordance with the principles of fairness and reasonableness.

[69] In *Chief Executive of the Dept of Inland Revenue v Buchanan*⁷ the Court of Appeal outlined three separate issues to be considered in relation to the question of disparity of treatment:

- i. *Is there disparity of treatment?*

⁶ *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610

⁷ [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

- ii. *If so, is there an adequate explanation for the disparity?*
- iii. *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*⁸

[70] The first issue to consider is the establishment of disparity of treatment. Should disparity be found then the employee may be found to have been dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

[71] In *Samu v Air New Zealand*⁹ the Court of Appeal stated:

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.

[72] Mr Sheppard's evidence at the Investigation Meeting was that action had been taken against Mr Pruden in that he (Mr Pruden) was also suspended from work after the incident on 20 March 2015 and he did not return to employment with Enviro after that date. No evidence was produced relating to the date or terms of the alleged suspension of Mr Pruden nor was evidence produced relating to the reason that Mr Pruden did not return to work at Enviro.

[73] Despite the matter of disparity being raised in Mr Hartstone's Statement of Problem, the fact that action was taken against Mr Pruden was not explained until the Investigation Meeting on 17 January 2017. I find it reasonable that Mr Hartstone's perception was that he had been treated more harshly than Mr Pruden.

[74] However whilst I find that regarding the non-communication of the action taken in regard to Mr Pruden and himself there may have been what Mr Hartstone perceived to be inconsiderate conduct causing some unhappiness or resentment on his part, I find no breach of duty such as to constitute: "*dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship*".

[75] Moreover disparity of treatment will not arise where there is an adequate explanation for it. I observe that Mr Hartstone had responsibility as a manager whilst Mr Pruden was a

⁸ Ibid at para [45]

⁹ [1995] 1 ERNZ 636 (CA)

junior employee under him. It is also clear from the evidence that Mr Hartstone followed Mr Pruden into the Sheppard family house twice after being instructed by Mrs Sheppard to return to the office. Mr Sheppard's evidence was that because Mr Pruden was a family member who had been told by his mother to enter the house and therefore had a right to be there, Mr Hartstone was in effect trespassing.

[76] I find that there was an adequate explanation for any disparity of treatment although given Mr Sheppard's statement that Mr Pruden's employment was also suspended and subsequently terminated following the incident on 20 March 2015, I do not accept that there was a real, as opposed to perceived, disparity of treatment.

(iii) *Verbal statement of dismissal on 24 March 2015*

[77] The statement that Mr Hartstone had been dismissed during the telephone conversation arose during a heated conversation between Mr Hartstone and Mr Sheppard immediately following Mr Hartstone being told that he was suspended.

[78] I do not find that the statement was intended or taken to be a serious statement of intention, nor did the later actions of Mr Hartstone and Mr Sheppard confirm that was the case.

(iv) *Mr Hartstone not being provided with documents pertinent to the disciplinary process*

[79] The duty of good faith as set out in s 4(1A)(c)(1) and (ii) of the Act requires employers, when considering making a decision which might have an adverse effect on an employee's terms and conditions of employment, to provide employers access to relevant information and an opportunity for the employee to comment on it before a decision is made.

[80] I find that in the letter dated 30 March 2015 Mr Sheppard had set out in some detail the allegation sufficient for Mr Hartstone to understand the matter he was being asked to discuss at the disciplinary meeting on 1 April 2015. There is no evidence that Mr Hartstone requested any information prior to the meeting. During the disciplinary meeting there had been lengthy discussion and Mr Hartstone confirmed that he had been given an opportunity to explain his version of events.

[81] I do not find a breach of duty relating to the disciplinary meeting such as to constitute: "*dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship*".

(v) *Mrs Sheppard's involvement in the disciplinary meeting*

[82] Mrs Sheppard was a shareholder, but not a director of Enviro. She had also been involved in the incident on 20 March 2015, but the outcome letter dated 1 April 2015 with its reference to "*the Company Directors*" infers that Mr Sheppard regarded her as fulfilling a similar position.

[83] Enviro was essentially a family business: 5 of the 10 employees were members of the Sheppard family, Mr Hartstone had been a long-term friend of Mr Sheppard, and his son also worked for Enviro. In that environment it is clear that the formal lines between family, friendship and business relationships were blurred.

[84] Mr Hartstone did not object to the presence of Mrs Sheppard at the meeting and I do not find that during the meeting on 1 April 2015 the involvement of Mrs Sheppard, whilst unorthodox, lead to any unfairness in the treatment of Mr Hartstone.

[85] I do not find that the involvement of Mrs Sheppard in the meeting on 1 April 2015 was a breach of duty on the part of Enviro.

(vi) *Issuing of a Final Written Warning*

[86] During the Investigation Meeting Mr Hartstone stated that he had been prepared to accept disciplinary action but had wanted disciplinary action to also be taken against Mr Pruden.

[87] I find that the issuing of a final written warning constituted disciplinary action.

[88] I do not find that issuing a final written warning to Mr Hartstone was a breach of duty.

Was the breach sufficiently serious so as to make it reasonably foreseeable by the employer?

[89] Having found that there was no breach of duty on the part of Enviro which caused Mr Hartstone to leave his employment; the question of whether it could have been reasonably foreseeable to Enviro that Mr Hartstone would not return to work does not arise.

[90] I determine that Mr Hartstone was not constructively dismissed by Enviro.

Unjustifiable Disadvantage

[91] Mr Hartstone is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[92] The elements of s103 (1) (b) are twofold:

- An unjustifiable action by the employer, which
- Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[93] Mr Hartstone must therefore establish that there was some unjustifiable action by Enviro which affected his terms and conditions of employment to his disadvantage.

Was Mr Hartstone unjustifiably disadvantaged by being suspended on 24 March 2015?

[94] There is no contractual right to suspend in the Employment Agreement.

[95] Mr Sheppard's evidence was that he believed suspension was appropriate on health and safety grounds in order to ensure the safety of his employees.

[96] The Employment Court in *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice* established that there is a requirement to apply the rules of natural justice to a decision involving suspension¹⁰.

[97] Additionally there is a legislative requirement that that parties to an employment relationship deal with each other in good faith as set out in s4 of the Act:

S4(1A)The duty of good faith in subsection (1)-

- requires the parties in an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in*

¹⁰ [1993] 2 ERNZ 546

which the parties are, among other things, responsive and communicative; and

ii. without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-

- 1. access to information, relevant to the continuation of the employees' employment; about the decision; and*
- 2. an opportunity to comment on the information to their employer before the decision is made.*

[98] Mr Sheppard did not witness the incident on 20 March 2015 which led to Mr Hartstone's suspension, and his evidence is that he was not informed of it until 21 March 2015. He did not speak to Mr Hartstone himself to discuss suspension, ask for his views and consider any suggestions Mr Hartstone may have been able to make regarding alternatives to suspension. Instead he asked Mrs Sheppard to inform Mr Hartstone that he had been suspended on Tuesday 24 March 2015.

[99] Mr Hartstone was suspended pending an investigation into potentially serious misconduct that might, and in fact did, have an adverse effect on his employment. The law is clear that Mr Hartstone should have been provided with access to pertinent information about the decision to suspend him, and the opportunity to comment on this information prior to the decision to suspend him being made by Enviro.

[100] I find that with regard to the matter of suspension, Mr Hartstone was in effect presented with a *fait accompli* on 24 March 2015. The decision to suspend him had been pre-determined by Mr Sheppard, and he had not been provided with any opportunity to comment on alternatives to suspension or to seek support and/or advice.

[101] Mr Sheppard seeks to justify the suspension on the grounds of safety concerns. Despite this assertion, the evidence is that following the incident on the morning of Friday 20 March 2015 neither Mrs Sheppard nor Mr Pruden felt a need to alert Mr Sheppard to health and safety concerns in order to prevent Mr Hartstone continuing to work that day or if required to work over the weekend.

[102] In addition, although Mr Sheppard had been advised about the incident the next day and spoke to Mr Quigan over that weekend, he took no action to prevent Mr Hartstone

working at a remote location 2015 supervising a team of employees on Monday 23 March 2015.

[103] There is no evidence that the alleged breach of health and safety was documented or an incident form completed. Not only do I find this to undermine the alleged safety concerns, but any adverse reaction of Mr Hartstone to the announcement of the suspension decision came after that decision had been made and could therefore not have contributed to any safety concerns giving rise to a decision which had been made and communicated at that point.

[104] In addition I find that any safety concerns could have been addressed by having Mr Hartstone work off-site as he frequently did, pending a disciplinary meeting, however he was not consulted prior to the suspension decision being made and therefore had no opportunity to discuss that option as an alternative to suspension.

[105] I determine that the suspension of Mr Hartstone constituted an unjustifiable action by Enviro and resulted in an unjustifiable disadvantage.

Was Mr Hartstone unjustifiably disadvantaged as a result of disparity of treatment?

[106] I have addressed the issue of disparity of treatment in paragraphs [67] to [76] above

[107] I do not find that Mr Hartstone was unjustifiably disadvantaged as a result of disparity of treatment.

Was Mr Hartstone unjustifiably disadvantaged as a result of being dismissed by telephone on 24 March 2015?

[108] I have addressed this issue in paras [77] and [78] above.

[109] I do not find that Mr Hartstone was unjustifiably disadvantaged as a result of being told that he was dismissed in the telephone conversation on 24 March 2015.

Mr Hartstone's Remuneration

[110] Mr Hartstone claims that he received a net salary payment of \$1,250.00 from Enviro in respect of a 40 hour working week. Enviro claims that Mr Hartstone received a gross salary of \$1,250.00 and denies that this sum was a net figure.

[111] The Employment Agreement states at clause 8.1 that: "*The Employee's remuneration is set out in the First Schedule to the Employment Agreement*". The First Schedule of the

Employment Agreement states under the heading “**REMUNERATION**” that: “*The Employee will be paid an hourly rate of*” and is blank.

[112] The Employment Agreement does not assist with the question of the amount of remuneration Mr Hartstone was to receive, however the Bank Statements provided by Mr Hartstone confirm that the payment amounts made regularly into Mr Hartstone’s Bank Account by Enviro were usually in the sum of \$1,250.00. Where this amount varied, it correlated to the payments set out in the wage records supplied by Enviro and to hours recorded as exceeding 40 a week.

[113] It is usual for employers to make gross salary payments to employees from which it is required to deduct PAYE, ACC, Kiwisaver in addition to any other authorised deductions, leaving a net payment to be remitted to the employee. The wage records received from Enviro set out a gross salary payment to Mr Hartstone of \$1,640.55 from which deductions were made for PAYE, resulting in a net payment of \$1,250.00. As observed, variations in the amount equated to the payment into Mr Hartstone’s Bank Account and to increased hours recorded as worked in the wages record.

[114] I determine that Mr Hartstone was paid a gross wage of \$1,640.55 gross resulting in a weekly net payment of \$1,250.00 per week.

[115] Mr Hartstone was responsible for remitting to Ms Pruden the information required in order that wage payments could be made, consisting of timesheets in respect of the employees who reported to him and information regarding his own hours, although he did not complete a timesheet. He based the information regarding his hours from a record he kept in a work diary.

[116] Mr Sheppard confirmed that due to pressure of work he did not regularly check the payroll and relied on Mr Hartstone to carry out that task.

Did Enviro breach the Employment Agreement in respect of overtime worked but not paid?

[117] The Employment Agreement is silent as regards overtime. Mr Hartstone asserts that there was a verbal agreement that he was to be paid overtime for hours worked in excess of 40 per week. Mr Sheppard confirmed that he agreed that Mr Hartstone would be paid for some hours, but refused to authorise the overtime payments at a later stage in his employment.

[118] The wage records supplied by Enviro record wage payments being made to Mr Hartstone in line with additional hours recorded and the net amount correlates to a payment made by Enviro into Mr Hartstone's Bank Account on the same date.

[119] I am satisfied that Enviro approved overtime payments to Mr Hartstone.

[120] There is no documentation supplied by Enviro recording the hours worked by Mr Hartstone, however Mr Hartstone has supplied copies of his diary entries for the period 28 April 2014 to 1 April 2015, and claims \$6,250.00 net in respect of arrears of overtime for the 5 week period 23 February 2015 to 20 March 2015.

[121] Based on Mr Hartstone's hourly net pay of \$31.25 and an uplift of 50% premium, the amount claimed represents in the region of 133 hours worked in a 20 day period, an average of 6.65 hours per day. In the absence of a detailed claim showing the locations and work done, I do not find this claim to be credible.

[122] I find that subject only to Mr Hartstone producing a detailed claim showing the hours worked, locations and the work done, which is to be verified by Enviro, Mr Hartstone's claim for overtime worked but not paid is not accepted.

Did Enviro breach the Employment Agreement in respect of holiday entitlement earned but not paid?

Public Holidays

[123] . Enviro does not dispute that Mr Hartstone worked on Queens Birthday (2 June 2014) and Waitangi Day (6 February 2015) and that he was not provided with an alternative day and 1.5 times normal pay.

[124] Mr Hartstone is also claiming that he worked on Christmas Day 2014 in that he claims he received two telephone calls on that day.

[125] There is no suggestion that Enviro required Mr Hartstone to work on Christmas Day 2014 pursuant to s 47 of the Holidays Act 2003, nor that he was required to be available to deal with customer calls on that day.

[126] I determine that Mr Hartstone is not entitled to a payment in respect of Christmas Day 2015.

Remedies

Lost Wages

[127] Mr Hartstone was required to attend a meeting on 7 April 2015 to discuss the outcome of the disciplinary meeting held on 1 April 2015. During that period I find that Mr Hartstone's period of paid suspension continued until he informed Mr Sheppard that he did not intend to return to Enviro on or about 7 April 2015. Enviro did not pay Mr Hartstone any wages after 1 April 2015.

[128] I find that Mr Hartstone is entitled to the payment of wages for the week ended 7 April 2015.

[129] I order Enviro to pay to Mr Hartstone the sum of \$1,772.99 gross (calculated as \$1,640.55 plus 8% holiday pay) in respect of the period of 1-7 April 2015.

Repayment of Overpayment of wages incorrectly deducted

[130] Enviro confirmed during the Investigation Meeting that the deduction of \$1,640.55 from Mr Hartstone's final wages in respect of an alleged overpayment was incorrect and this must be repaid.

[131] I order Enviro to pay to Mr Hartstone the sum of \$1,640.55 gross in respect of the overpayment deducted in error.

Public Holidays worked but not paid

[132] Mr Hartstone worked two statutory holidays on 2 June 2014 and 6 February 2015 for which he was not paid in accordance with s.56 of the Holidays Act 2003.

[133] I order that (i) Enviro pay to Mr Hartstone the sum of \$984.33 gross in respect of statutory holidays worked but not paid at the rate of 1.5 x the daily rate of \$328.11 per day pursuant to s 56(2) of the Holidays Act 2003; and (ii) Enviro pay to Mr Hartstone the sum of \$652.22 in respect of the alternative days not provided nor paid at the daily gross rate of \$328.11 per day pursuant to s 56(1) and (2)(ii) of the Holidays Act 2003.

Unpaid Holiday Pay

[134] Both parties agree that an amount of holiday pay due at termination remains unpaid, however there is some disagreement as to the amount. I accept the detailed statements

provided by Enviro, note the errors made and calculate the amount outstanding pursuant to s 25 of the Holidays Act 2003 as:

Gross pay for the period:	\$86,408.21
Holiday pay at 8%:	\$ 6,912.65
Less 4 days taken gross:	\$ 1,312.44
Holiday pay due:	\$ 5,600.21
Gross Pay Deduction Error:	\$ 1,640.55 <i>(to be repaid paragraph [131])</i>
Gross amount paid at termination:	\$ 3,262.76
Gross holiday Pay Outstanding:	\$ 696.90

[135] I order that Enviro pay to Mr Hartstone the sum of \$696.90 gross in respect of the underpayment of holiday pay.

Unjustifiable Disadvantage

[136] I have found that Mr Hartstone was unjustifiably disadvantaged in his employment by Enviro suspending him from employment on 24 March 2015.

[137] I order that Enviro pay Mr Hartstone the sum of \$3,000.00 as compensation pursuant to s.123(c)(i) of the Act.

Contribution

[138] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[139] Mr Hartstone and Mr Pruden were the only parties involved in the incident which lead to the suspension of Mr Hartstone. Mr Hartstone entered the house after being requested by Mrs Sheppard to return to the office area, it was upon his return that the incident occurred.

[140] I find that Mr Hartstone contributed to the situation which resulted in his suspension, and reduce the amount ordered as compensation pursuant to s.123(c)(i) of the Act to be reduced by 20%.

Costs

[141] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs

within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[142] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority