

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 12
3092792

BETWEEN DANIEL MAINWARING
Applicant

AND RAC GROUP LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Paul Mathews, advocate for the Applicant
Robert Thompson, advocate for the Respondent

Investigation Meeting: 17 August, 17 December 2021 and 18 January 2022 in
Christchurch

Submissions Received: 17 August 2021 and further information 29 October 2021
from the Applicant
17 August 2021 from the Respondent

Date of Determination: 21 January 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Daniel Mainwaring was employed by RAC Group Limited (RAC), a civil construction company, as a labourer and machine operator from November 2018 until his employment ended on or around 31 January 2020. Mr Mainwaring is claiming he was actually or constructively dismissed after he returned from annual leave and indicated that he was available to resume work from 14 January and none was promptly offered. Mr Mainwaring is

also claiming that he was unjustifiably disadvantaged by the denial of ongoing work and the negative tenor of RAC's communication to him in late 2019.

[2] By contrast, RAC say Mr Mainwaring resigned on 30 November 2019 indicating he was travelling overseas and that his last day of employment was 6 December 2019. RAC say when Mr Mainwaring returned after shortening his overseas trip, they were surprised but offered him ongoing casual employment that he declined.

[3] RAC say the untoward communications referred to in the disadvantage claim were robust but not in the circumstances and context, unjustified.

[4] The parties attended mediation but the matter remained unresolved.

The Authority's investigation

[5] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise, carefully considered the helpful submissions and further information provided from both parties and refer to them where appropriate and relevant.

[6] At the 17 August 2021 investigation meeting I considered written briefs and heard evidence from Daniel Mainwaring; his friend Craig Malyon and for RAC - Curtis McNaughton, sole director/shareholder and group general manager; Reed McNaughton, manager of Auckland projects; Andrew Boyhan and Angus McCool, respectively operations manager and construction manager, for Auckland residential and retaining wall projects.

[7] After Mr Mainwaring submitted additional material in the form of a GP report and message exchanges with Mr Maylon and RAC asked for an opportunity to question him on such, I recalled Mr Mainwaring and questioned him further at teleconference meetings of 17 December 2021 and 18 January 2022. At the latter meeting, Cameron Mill an RAC construction manager also gave evidence. RAC was directed to provide Mr Mainwaring's complete wage and time records but failed to do so.

Issues

[8] The issues I need to resolve are:

- i. Did Mr Mainwaring resign on 30 November 2019 in circumstances that prevent him from pursuing an unjustified dismissal claim or was Mr Mainwaring still employed up to 31 January 2020 and if so, did his employment end at this date or earlier and in what circumstances?
- ii. Prior to leaving the workplace on 6 December 2019, was Mr Mainwaring the subject of actions and omissions of RAC that caused him detriment sufficient to establish a disadvantage grievance?
- iii. If any of Mr Mainwaring's claims are established what remedies should follow?
- iv. Should the Authority reduce any remedies granted as a result of Mr Mainwaring's contributory conduct?
- v. An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[9] Mr Mainwaring, a UK citizen, says he arrived in New Zealand around three years before he commenced employment with RAC and he transferred a temporary work visa to RAC. Mr Mainwaring was initially employed in Christchurch in a permanent full time role with terms and conditions recorded in an individual employment agreement. That agreement provided at cl 6 that: "The minimum hours of hours to be provided each week to the employee is 35".

[10] Mr Mainwaring recalled work slowing down in Christchurch and he agreed to temporarily work in Auckland from mid November 2019. RAC paid for his accommodation and airfares. RAC has around forty employees working on various civil construction projects and they say that around 90% of employees worked in Auckland.

[11] Just prior to commencing work in Auckland, Mr Mainwaring had some time off due to a pre-existing medical issue. Mr Mainwaring recalls having a dispute on 18 November 2019 over the absence of sick pay, a request his job title be changed from 'labourer' to assist his immigration status, and a discussion about his pay level. Mr Mainwaring says this led to some snap-chat message exchanges (that were not produced) where his employer was abusive.

[12] Reed McNaughton acknowledged "there were some tough text messages between us" and he put that down to a request from Mr Mainwaring to portray his job in a more favourable light for immigration purposes, a request Reed felt uncomfortable with accommodating.

[13] Mr Mainwaring's friend Craig Malyon says the exchange with Reed was related to him as threatening by Mr Mainwaring and this had a negative impact on Mr Mainwaring who expressed a view to Mr Malyon that he was stuck in a company with work visa restrictions; he was not appreciated and he was contemplating returning to the UK. Messages disclosed between Mr Malyon and Mr Mainwaring included Mr Mainwaring indicating that when he returned from Thailand in early January 2020, he would begin searching for alternative employment.

[14] I was provided a separate 18 November 2019 exchange of polite text messages of between Mr Mainwaring and RAC's pay administrator in which Mr Mainwaring asked to be paid a portion of his holiday pay (\$228).

[15] Mr Mainwaring proceeded to work in Auckland from 19 November 2019.

Work social function and alleged resignation

[16] On Saturday 30 November 2019, Mr Mainwaring attended an end of year work social gathering that commenced with a charter boat trip on the harbour then moved on to an evening drinking session in an Auckland CBD public house.

[17] All RAC witnesses claim in a group setting either on the boat, at the function or both, that Mr Mainwaring announced that he was resigning to go travelling in Thailand and he said his last working day would be 6 December 2019.

[18] In his initial written brief Mr Mainwaring did not mention the 30 November work function. This is despite Mr Mainwaring being put on notice in RAC's statement in reply that they believed he had ended the employment relationship "on or about 30 November 2020 [sic]" and that at the 30 November 2019 social function he "advised that he was travelling overseas to Thailand" and further, that Mr Mainwaring had "notified management and staff that he was leaving". RAC witnesses that attended the function all indicated Mr Mainwaring had said he was leaving RAC to travel in Thailand. Cameron Mill indicated that up until this point in time he was unaware of Mr Mainwaring's intentions.

[19] To place this in further context, in response to a 4 February 2020 personal grievance email claiming Mr Mainwaring had returned from planned annual leave and was not provided any work and believed he had been dismissed, Curtis McNaughton responded in part: "Your assertions are so far from the truth it is comical. There is zero merit to your baseless claims you assert without foundation".

[20] Only after receiving the RAC witness briefs, did Mr Mainwaring address the allegation that he had announced his resignation during the social function. In a written brief in reply of 14 December 2020, Mr Mainwaring variously commented in denying he had resigned, that:

- "I might have mentioned by [sic] holiday to Thailand but only in passing".
- "I recall the Xmas party well. There was a lot of alcohol consumed during the day"
- "If I talked about Thailand at all, which I don't specifically recall, it would have been because I was excited about my upcoming holiday".

[21] When pressed during the investigation meeting about what he said during the social gathering, Mr Mainwaring responded "I would likely have said going to Thailand if I had intended to resign I would have done so in writing". Clause 16.1 of Mr Mainwaring's employment agreement had a provision under "Termination of Employment" that: "Notice must be given in writing".

[22] It was evident following the social function, no further discussion occurred on Mr Mainwaring's intentions. Curtis McNaughton said he assumed Mr Mainwaring was a 'traveller' and was resigning to pursue this lifestyle and made the point that Mr Mainwaring, although not confirming his resignation in writing, did not fill out an annual leave form for his

Thailand trip. RAC produced three previous signed leave application forms to evidence that Mr Mainwaring was aware of this requirement.

[23] Mr Mainwaring indicated that he did little travel other than arriving from the UK and he claimed he thought he was not required to fill out a leave form as his leave spanned an RAC shutdown period, although that did not commence until 23 December. The envisaged leave Mr Mainwaring says he had approval for, was up to and including 17 January 2020 (four weeks) Mr Mainwaring did not have enough accumulated leave to cover the whole period.

Final working week

[24] Mr Mainwaring says he worked the week of 2-6 December 2019 after the social gathering but no work was offered the following week. He claimed this was because RAC knew he had sought 9 December off to return to Christchurch for a medical appointment (Mr Mainwaring provided evidence of this appointment).

[25] Mr Mainwaring's outgoing flight to Thailand departed at 7 am on Monday 16 December 2019 from Christchurch. The return trip to Christchurch was initially booked for 16 January 2020.

[26] Mr Mainwaring had booked his return flight to Thailand in June 2019 (producing a bank account statement evidencing he paid for his flight on 12 June 2019). Mr Mainwaring did not recall seeking annual leave approval before he booked his airfare but claimed he may have discussed it with Reed McNaughton. When questioned, Reed said he could recall no such conversation and said he only knew of the planned trip when Mr Mainwaring announced his intentions during the 30 November 2019 social gathering.

Final pay?

[27] RAC, whilst suggesting Mr Mainwaring had resigned and his last day was 6 December 2019, did not produce full wage records to evidence this. For the pay period 16 December 2019 to 22 December 2019 Mr Mainwaring's pay slip shows he was paid 14 hours holiday pay (\$341.09) which is consistent with him taking annual leave. The next pay slip covering the period 23 December to 29 December however, is headed "Final Pay" and Mr Mainwaring was

paid out an amount of holiday pay (\$366.17) but the accumulated holiday hours due are not recorded.

[28] Mr Mainwaring's disclosed IRD records show for the period 30 November 2019 to 31 December 2019 he was paid \$2,549.09 by RAC.

[29] To further complicate matters, I was provided with uncontested text and email extracts of messages between Curtis McNaughton and Mr Mainwaring - one of which (18 December 2019), Curtis said:

How's thialamd [sic] mate

Hope you have a great holiday

Let me know when u get back to New Zealand.

Have a good a good think mate

As we could do with you with us in our team next year in Auckland

Would be good hourly rate, company ute etc

[30] Further on 20 December 2019, Mr Mainwaring messaged Curtis asking could he be reimbursed for an Uber trip whilst he was in Thailand and he said he had asked the pay roll administrator "if I could get my holiday pay on Wednesday but didn't receive anything".

[31] I observe none of the exchanges with different RAC managers explicitly or impliedly suggest Mr Mainwaring was not returning to work and his requests for holiday pay seemed to be due to his expressed concern that he was running out of money during his holiday. The latter situation being consistent with Mr Mainwaring's evidence that he was not 'travelling' per se but merely taking a holiday break. I took the reference to ongoing Auckland work as being in accord with RAC's desire to have Mr Mainwaring relocate permanently from his Christchurch base and the reference to increasing his pay to be consistent with an earlier bargaining request by Mr Mainwaring.

Mr Mainwaring's return from Thailand

[32] Mr Mainwaring says he cut short his holiday, leaving Thailand on 8 January, and he returned to Christchurch whereby he emailed Curtis McNaughton on 12 January saying he was

back home early “cause Thailand emptied the bank account be ready Tuesday”. Getting no immediate response, Mr Mainwaring followed this up with a message to Curtis on Monday 13 January asking: “Any work this week? There was no response until Thursday 16 January, when in response to Mr Mainwaring messaging: “No work then?” - Curtis replies: “I’ll ask bro”.

[33] Curtis did not address the above text exchanges in his brief of evidence and when questioned why he did not initially respond to Mr Mainwaring on 12 January, he claimed it was because he had resigned. I observe in exchanges later in the week, Curtis did not state his belief of the resignation and offered to look to see if any work was available for Mr Mainwaring.

[34] Curtis later messaged Mr Mainwaring on 31 January 2020, indicating some digger work was available the following week and he implored: “Do a fucken good job though!!!” but he got no response to this or his further message of 2 February, that said: “You want some work mate”. As I understood Curtis’s evidence, he was suggesting at this point in time that he was only offering Mr Mainwaring casual work believing he had resigned his permanent role.

[35] Mr Mainwaring had also messaged Reed McNaughton on Friday 17 January asking: “Any work next week”. Reed responded: “U back now”. After Mr Mainwaring confirmed he was, no further messages occurred until Wednesday 22 January when Mr Mainwaring messaged Reed: “What’s going on?”, to which Reed replied: “Prett much U” and then despite Mr Mainwaring following this up on Thursday 23 January, Reed stopped communicating with him.

[36] Other than to reinforce Curtis’s view that Mr Mainwaring could return and “look us up for work” only “if he was returning to New Zealand”, Reed did not elaborate on his messages around the time Mr Mainwaring signalled his return and availability for work. When questioned, Reed indicated he could not recall and was unsure of the communication Mr Mainwaring had had with Curtis.

The end of the employment relationship from Mr Mainwaring’s perspective

[37] Mr Mainwaring suggested by the time of the message exchanges of 22 January 2020, he considered his employment at an end and when he was messaged on 30 January indicating digger work was available, he resolved not to reply. When asked why, Mr Mainwaring says

he was concerned about the tone of the message so he resolved to look for employment elsewhere.

[38] Mr Mainwaring secured alternative employment with a civil construction company in Christchurch on 5 February 2020 and a variation to his work visa on 3 March 2020 was approved, allowing him to commence new employment on 9 March 2020.

[39] Mr Mainwaring meanwhile had instructed his advocate to raise a personal grievance, that was contained in a 4 February 2020 email to Curtis McNaughton, indicating in part:

Given the length of time he was left with no work this either amounted to a dismissal or you can take it that resigned his position in order to seek income elsewhere. This dismissal does not meet any of the requirements for a fair process set down in s 103A of the Employment Relations Act. This renders the dismissal unjustified; and

The denial of work and the abusive text in the latter part of last year amounts to an unjustified disadvantage in Daniel's employment.

Issue one: did Mr Mainwaring resign?

[40] This is a factual inquiry and in considering the evidence and documentation, it is not abundantly clear that Mr Mainwaring intended to resign or indeed did resign by conduct even if I was to accept that RAC perceived that to be the case. I was not convinced that the perception expressed by two RAC witnesses that Mr Mainwaring was a 'traveller' was based on anything but an ill-informed and latterly expressed assumption.

[41] The communication between the parties and Mr Mainwaring's travel documentation, show he intended a relatively short holiday break at one destination that partially took in his employer's closedown period and, that he cut that break short for financial reasons (a fact he communicated to RAC). Unfortunately for RAC, the failure to insist on the employment agreement provision that a resignation be confirmed in writing and laxity around policing Mr Mainwaring's holiday break with no leave form, counts against any suggestion that this was a communicated resignation.

[42] All communication between the parties is consistent with RAC expecting Mr Mainwaring to return to work. To be fair to RAC and to perhaps explain the responses to

Mr Mainwaring, was the fact that he was not based in Auckland and appears to have already been treated as a 'semi-casual' despite his employment agreement having a minimum floor of 35 hours per week. I note that RAC, if there was insufficient work for Mr Mainwaring in Christchurch, had the option of making him redundant but instead by mutual consent, they provided him with ongoing employment in Auckland and RAC appeared to wish that to be ongoing.

[43] A further contraindication of the employment relationship having ended by resignation, was the unexplained weekly pay slip covering the period 23 December – 29 December 2019 that purported to be his final pay. Had Mr Mainwaring, as claimed by RAC, resigned on 30 November (with effect 6 December), then one would have expected his final pay to have been made up for the following week. What the incomplete payslips were consistent with up to the last one, was Mr Mainwaring being paid his accumulated holiday pay on an ongoing basis.

[44] The 18 December 2019 exchange between Curtis McNaughton and Mr Mainwaring is not conclusive – Curtis asks him to enjoy his holiday and discusses wanting him in his team when he is back in Auckland but also appears not to know when he is due back to work. The latter issue is not decisive as the evidence demonstrated that communication between Mr Mainwaring and RAC went through various people he worked for at different times, and was ripe for confusion.

[45] I have also considered that Mr Mainwaring's friend Mr Malyon, gave evidence that Mr Mainwaring told him he was unhappy working for RAC, felt underappreciated pay wise and was concerned about the robustness of communications. RAC suggested these were indications that Mr Mainwaring was planning to leave.

[46] However, I have to consider the fact that Mr Mainwaring was on a work visa tied to RAC and he took no immediate steps to change this which would have been consistent with him intending to resign at the time (before he left for Thailand) so he could seek work elsewhere. Mr Mainwaring's communication in early January 2020 also did not demonstrate that he had decided to sever links with RAC and gave an impression he still considered himself employed by RAC.

Finding

[47] I find Mr Mainwaring did not resign on 30 November 2019.

Issue two – was Mr Mainwaring unjustifiably dismissed?

[48] Having made a finding that Mr Mainwaring did not voluntarily resign and that his employment was still ‘on foot’ when he returned from his holiday, I have to consider how his employment ended and whether in all the circumstances, this amounted to an unjustified dismissal. This involves first identifying at what point in time the employment ended and who brought it to an end.

[49] An obvious starting point is Mr Mainwaring signalling on 12 January 2020 that he wished to return to work on Tuesday 14 January. This was rebuffed by RAC until 30 January.

[50] In assessing the situation and perception of Mr Mainwaring that he was dismissed, a useful approach is the test outlined recently by Judge Holden who posited that:

The test is an objective one; was it reasonable for somebody in Mr Gildenhuis’ position to have considered that his or her employment had been terminated? ¹

[51] The question that follows is - was RAC’s belief that Mr Mainwaring’s return to work was only to be on an ‘as needed’ or casual basis a reasonable assumption or an unequivocal act bringing his permanent employment to an end.

Finding

[52] In the circumstances I find RAC brought Mr Mainwaring’s employment to a premature end. This entailed an end to an ongoing obligation to pay Mr Mainwaring a minimum 35 hours per week when he was available for work. In fixing the date when the employment ended, I prefer 20 January 2020, being the date Mr Mainwaring originally intended his annual leave was to finish.

[53] Having found that RAC could not in all the circumstances have reasonably believed Mr Mainwaring had resigned, I have to find that the dismissal was unjustified. This was a

¹ *Cornish Trucks & Van Ltd v Gildenhuis* [2019] NZEmpC 6 at [45].

dismissal that did not meet any of the procedural requirements set out in s 103A of the Act or good faith provisions of s 4 of the Act. In particular, I refer to Reed McNaughton's 22 January 2020 response to Mr Mainwaring that indicated RAC had unspecified problems with Mr Mainwaring and by implication had decided to not fulfil their obligations under his employment agreement. If any problems did exist, it was incumbent on RAC to be clear what they were and to give Mr Mainwaring an opportunity to address those concerns in a formal setting.

[54] By 30 January 2020, an unacknowledged offer of ongoing work was made but evidence given by RAC showed this was believed to be of a casual nature so, it cannot be construed as a spurned offer of reinstatement on existing conditions that may have protected RAC from the unjustified dismissal finding. I also observe that the tenor of the offer and pejorative language used was objectively unlikely to restore Mr Mainwaring's trust and confidence in his, by then, former employer. These in my view, were not objectively the actions of what a fair and reasonable employer could have done in all the circumstances at the time.

[55] In concluding on an objective basis that Mr Mainwaring was unjustifiably dismissed, he is entitled to consideration of available remedies. I note in exercising the discretion I have under s 160(3) of the Act that I have not considered the separate disadvantage claim Mr Mainwaring identified. This is because the background facts are identical to those I have to consider in the predominant unjustified dismissal claim. They form part of the same factual matrix and the remedies I intend to consider for the unjustified dismissal will adequately resolve Mr Mainwaring's employment relationship problem.

Remedies

Compensation for hurt and Humiliation

[56] Mr Mainwaring gave evidence of the impact of the dismissal on his personal life and relationships, the stress and anxiety he suffered from dealing with RAC, and the humiliation he experienced at the attitude RAC displayed towards him in communications. Given Mr Mainwaring's work visa status, this made him additionally vulnerable.

[57] However, the distress appears to have been temporary and Mr Mainwaring struck me as resilient despite some long standing health and lifestyle issues that RAC cannot be held responsible for. Mr Mainwaring was able to move on and he found alternative employment (more conveniently in Christchurch where he had retained an accommodation option) albeit he says at a reduced hourly rate.

Finding

[58] Taking into account the evidence proffered and awards made by the Authority and Employment Court in similar situations, I consider that Mr Mainwaring's evidence warrants moderate compensation in the sum of \$8,000 under s 123(1)(c)(i) of the Act. ²

Lost wages

[59] Having found that Mr Mainwaring was unjustifiably dismissed he is entitled to a consideration of lost wages. In the circumstances, I award Mr Mainwaring as claimed, seven weeks lost wages for the period 20 January 2020 to 9 March 2020 when he secured alternative employment pursuant to s 123(1)(b) of the Act: calculated at \$23 per hour and 35 hours per week in the amount of \$5,635.

Contribution

[60] Section 124 of the Act states that I must consider the extent to what, if any, Mr Mainwaring's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To do this I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*. ³

[61] Whilst the granting of his leave would have been likely, I find Mr Mainwaring inexplicably failed to seek approval when he booked his air fare in June 2019 and did not fill out a leave form for what was a significant period of leave (four weeks). This led to confusion over his intentions. Mr Mainwaring knew of this requirement having previously signed leave

² See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

³ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

approval forms - the last one being 30 May 2019. As such, Mr Mainwaring did contribute in a blameworthy fashion to the circumstances that gave rise to his personal grievance and I consider that this warrants a ten percent reduction in the compensation that I have assessed under s 123(1)(c)(i) of the Act.

Summary

[62] I have found that:

- (a) Daniel Mainwaring was unjustifiably dismissed by RAC Group Limited.
- (b) In the circumstances, RAC Group Limited must pay Daniel Mainwaring:
 - (i) \$7,200 pursuant to s 123(1)(c)(i) Employment Relations Act 2000; and
 - (ii) \$5,635 (gross) lost wages pursuant to s 123(1)(b) Employment Relations Act 2000.

Costs

[63] Costs are at the discretion of the Authority. The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of costs based on a daily tariff.

[64] If no agreement is achieved, Daniel Mainwaring has fourteen days following the date of this determination, to make a written submission on costs and RAC Group Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority