

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 281
3089813

BETWEEN STEPHAN MENZIES
Applicant

AND TREE SCAPE LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Robert Morgan, advocate on behalf of the Applicant
Stephen Langton, counsel on behalf of the Respondent

Investigation Meeting: 04 June 2020

Submissions and further 07 June 2020 from the Applicant
Information Received: 08 June 2020 from the Respondent

Date of Determination: 21 July 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tree Scape Limited specialises in tree removal and pruning, arboriculture, horticulture, landscaping and grounds maintenance. Tree Scape employed Stephen Menzies as an Arborist on 22 November 2016.

[2] Mr Menzies' employment was terminated on 24 May 2019. He alleges his dismissal was unjustified. He claims for lost wages and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Tree Scape denies Mr Menzies' claim. It maintains its decision to dismiss him was substantively justified and procedurally fair.

[3] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The Issues

- [4] The issues identified for investigation and determination are:
- a. Was Mr Menzies unjustifiably dismissed?
 - b. If Mr Menzies was unjustifiably dismissed, what remedies should be awarded?
 - c. If any remedies are awarded, should they be reduced under s124 of the Act for blameworthy conduct by Mr Menzies that contributed to the situation giving rise to his grievance?
 - d. Should either party contribute towards the costs of representation of the other party?

Background

[5] In April 2019, Mr Menzies was part of a team of three that was sent by Tree Scape to Waiheke Island to prune trees. Whilst away, the team was provided with accommodation in a local motel and a work vehicle for transportation.

[6] On 8 May 2019, Mr Menzies and his team had a few drinks at their motel with some other workers they had met. By 11.30 pm the group had become bored. They decided to go for a joyride. Mr Menzies and his supervisor, who I shall refer to as Mr X, took the Tree Scape work ute. Mr X drove.

[7] Around 30 minutes later, the Police pulled the ute over. A breath alcohol test was performed on Mr X and he failed. When Mr Menzies offered to drive, the Police undertook a test on him too. He also failed. The Police subsequently drove the vehicle and the two men back to their motel.

[8] The next morning Mr X phoned Bryson Middleton. Mr Middleton is Tree Scape's Business Manager and is ultimately responsible for overseeing Mr Menzies and Mr X. Mr X told him that he had been drinking the previous night and had been stopped by the Police in the work ute. Mr Middleton questioned him as to whether he was fit to work that day and he assured him that he was. He asked him to complete an incident form and to give this to his direct manager.

[9] On 10 May 2019, Mr Middleton received two completed incident forms, one from Mr X and one from Mr Menzies. He later received another incident form from the third member of Mr Menzies' team.

[10] The incident forms confirmed that Mr Menzies and Mr X had been drinking, they had decided to go for a drive to the beach and the Police had pulled them over. Mr Menzies' form recorded that it was a "stupid decision" and he had not realised they had drunk so much as to be over the limit. After reading the forms, Mr Middleton concluded that an investigation was necessary and conveyed this to Mr Menzies on or about 13 May.

[11] Thereafter, Mr Menzies continued to work and to drive the work ute and a work truck allocated to him as he normally would.

The disciplinary process

[12] After consideration, Tree Scape decided to commence a disciplinary process against Mr Menzies and Mr X. Simon Hughes, Tree Scape's Chief People and Services Officer assisted Mr Middleton with the process.

[13] On 20 May 2019, Mr Menzies was provided with a letter requesting that he attend a disciplinary meeting with Mr Hughes and Mr Middleton to "discuss matters relating to your employment with Treescape Ltd". The letter advised:

This meeting is to discuss an incident on Waiheke Island on Wednesday 8th May 2019 at approximately 11.30 pm where you were a passenger in a company vehicle driven by work colleague [Mr X] who failed a roadside breath test due to excess alcohol. You both admit that you had been consuming alcohol in the motel that evening.

[14] The disciplinary meeting took place on 23 May 2019. Present at this meeting were Mr Middleton, Mr Hughes and Mr Menzies.

[15] At the commencement of the meeting, Mr Menzies was provided with copies of documentation relied upon by Tree Scape. Mr Middleton then explained the purpose of the meeting was to discuss Mr Menzies use of the Tree Scape ute after work hours. Specifically, that Mr Menzies was a passenger in the Tree Scape ute that was pulled over by the Police at around 11.30 pm on 8 May 2019 and his understanding was that he and Mr X had failed a Police roadside breath test.

[16] Mr Menzies then gave an overview of the events that took place that evening. Thereafter, Mr Middleton asked Mr Menzies several questions including raising inconsistencies in what he had told Tree Scape.

[17] It was at this point that Mr Middleton raised a new concern, namely that Tree Scape considered Mr Menzies' actions were a breach of the Fleet and Asset Management Guidelines. He then outlined Tree Scape's policy around the use of work vehicles. Specifically, the Fleet and Asset Management Guidelines, clause 5.8 that provided:

The purpose of take home vehicles is to allow emergency response for contractual requirements and to improve work efficiencies...Personal use of a take-home vehicle or its use as a business convenience is not permitted.

[18] This allegation was met with no response from Mr Menzies.

[19] Mr Hughes then raised another concern; Mr Menzies' and Mr X's actions had put themselves and members of the public at risk. Mr Menzies responded by advising it was Mr X who was driving not him and they only went around the corner and got stopped.

[20] At the end of the meeting, Mr Hughes confirmed the process going forward.

[21] Later that day, another meeting was held where Tree Scape provided Mr Menzies with its preliminary decision. Before doing so, it asked him if he had anything further to say. He apologised and asked not to be fired. He said he only went in the car because he was worried about Mr X being drunk and driving, and that he wanted to make sure he was okay driving. He spoke about trying to talk the guys out of going.

[22] Mr Middleton then informed Mr Menzies that the preliminary decision was dismissal. Mr Menzies was advised that he should seek advice and that he could respond to the preliminary decision at the next meeting before a final decision was made.

[23] A final meeting was convened on 24 May 2019. Mr Menzies did not provide any additional information at this meeting that caused Mr Middleton to depart from his preliminary decision. Mr Middleton then advised Mr Menzies that he was dismissed without notice for serious misconduct.

[24] The reasons for termination were recorded in a letter of the same date. After recounting what occurred on 8 May 2019, the letter went on to say:

As discussed during the meeting, your conduct during that incident:

- Was wilful or deliberate behaviour by you that is inconsistent with your employment continuing
- Caused a serious and imminent risk to the health or safety to yourself, your colleague and to members of the public
- Was conduct which was considered to be in breach of company guidelines regarding use of company property and in the circumstances your continued employment during a notice period would be unreasonable.

Issue one: unjustified dismissal

[25] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Tree Scope, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[26] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[27] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.¹

[28] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

¹ Section 103A (5), Employment Relations Act 2000.

[29] For the reasons that follow, I find Tree Scape has failed to discharge the onus of proving that its actions in dismissing Mr Menzies were justified. I am satisfied that the decision that Tree Scape made was both procedurally and substantively unjustified.

Procedure

[30] It is well-established that an employee accused of serious misconduct, with dismissal as a possible outcome, is entitled to have the charge and the employer's issues of concern clearly identified. An employer must provide an employee with details of the evidence the employer intends to rely upon in support of the allegations and a proper opportunity to respond before any final decision is made. Those requirements are encompassed in the statutory obligations of fairness and good faith.²

[31] Tree Scape did not meet these obligations.

[32] The disciplinary invitation letter did not disclose Tree Scape's primary issues of concern nor did it provide copies of the information that Tree Scape relied upon. It also failed to advise Mr Menzies of the allegation that his conduct was being viewed as serious misconduct. This information could have been made available to Mr Menzies prior to the meeting so that he had a proper opportunity to take advice and respond.

[33] It was not until the disciplinary meeting that Mr Menzies was informed of the allegations against him and provided with the information relied upon by Tree Scape. Even then, the allegations were vague, expanding during the course of the meeting. Mr Hughes said that when he drafted the disciplinary invitation letter Tree Scape's concern was that Mr Menzies had consumed alcohol before getting into the work vehicle. The allegation was then expanded at the commencement of the meeting to include personal use of the work vehicle. Half way through the meeting an allegation of breach of the Fleet and Asset Management Guidelines was raised. Then later another allegation; that Mr Menzies had risked his health or safety, and that of Mr X and members of the public.

[34] No opportunity was afforded to Mr Menzies to consider the allegations, or to review the material provided, before he was asked to respond.

[35] Tree Scape's actions were unfair. They led to Mr Menzies not understanding the allegations, not appreciating the seriousness of the allegations that he faced, and

² Hoff v The Wood Lifecare (2007) Ltd [2015] ERNZ 669 at [34].

being ill prepared to respond to the allegations that were raised. Even when he exhibited signs of being visibly upset, the meeting continued without a break.

[36] It also became apparent during the Authority's investigation that Tree Scape did not consider alternatives to dismissal, such as a written warning. Under questioning, Mr Middleton acknowledged that at the time of Mr Menzies' dismissal he had no access to a vehicle after hours, having returned to work in Auckland. He said that he was not sure why, in those circumstances, a written warning was not sufficient.

[37] I am satisfied that Tree Scape's procedural failings were not minor and did result in Mr Menzies being treated unfairly. Had Mr Menzies been on notice of the allegations against him ahead of the meeting then this may have altered the responses that he provided and the outcome. During the Authority's investigation, Mr Menzies pointed to a number of matters that he would have raised that could have led to a different outcome.

Substance

[38] Although the procedural flaws render Mr Menzies' dismissal unjustified, I move to consider the substantive fairness of the decision as that may bear upon contribution issues.

[39] In *Emmanuel v Waikato District Health Board*, the Court summarised the nature of an assessment involving behaviour said to justify summary dismissal, as follows:³

[58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing, or destructive of, the basic confidence of trust essential to the employment relationship, justifying dismissal. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

[59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.

...

[61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable

³ [2019] NZEmpC 81.

employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant to the context.

[62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate.

[40] I am satisfied that a fair and reasonable employer could not have concluded that Mr Menzies' conduct was capable of amounting to serious misconduct.

[41] First, Tree Scape did not have sufficient evidence to conclude that Mr Menzies had breached the Fleet and Asset Management Guidelines. While these guidelines prohibited personal use of a take-home vehicle, it is evident that an exception existed where employees were using a work vehicle while away from home.

[42] Mr Middleton's oral evidence was that Tree Scape consented to some personal use of the work ute whilst Mr Menzies' team were working on Waiheki Island. The extent of that personal use was not defined. Mr Menzies' uncontested evidence was that his supervisor, Mr X, told him that the work vehicle could be used as a means of transport for the team whilst on Waiheki Island.

[43] Second, at the time of his dismissal, Tree Scape did not have sufficient evidence to conclude that Mr Menzies had engaged in wilful or deliberate behaviour inconsistent with his employment continuing. Notes taken by Mr Hughes during the disciplinary meeting record Mr Menzies saying that he did not realise it was so late and he had "just jumped into the ute without really thinking about it". No enquiries were made to ascertain Mr Menzies' understanding of the permitted personal use of the vehicle whilst on Waiheki Island.

[44] Third, I am not satisfied that Tree Scape has established that Mr Menzies had "caused a serious and imminent risk to the health or safety to yourself, your colleague and to members of the public" given he was a passenger and not the driver of the vehicle.

[45] Last, I was not persuaded that Mr Menzies' conduct impaired or destroyed the confidence or trust essential to the employment relationship.

[46] After the incident on 8 May, Tree Scape did not stand Mr Menzies down or take any other steps to monitor or supervise his activities prior to the disciplinary meeting on 23 May. Nor did it reinforce the Company's policy on personal use of work vehicles.

Instead, and with knowledge of the material events that had taken place, Tree Scape had trust and confidence in Mr Menzies to perform his duties for a further two weeks, which duties included driving a Tree Scape vehicle.

[47] Mr Middleton explained that Tree Scape did not stand Mr Menzies down because it needed him to keep working to finish various projects. He said they had no one else to finish the project on Waiheki Island and needed Mr Menzies to start and complete a job on Kawau Island as he had a particular skillset that Tree Scape needed for the job. Mr Middleton acknowledged that both of these projects involved Mr Menzies using a Tree Scape vehicle.

[48] In response to questioning, Mr Middleton explained that he trusted Mr Menzies to look after himself, Tree Scape's equipment and its vehicle. He said he did not feel the need to check up on Mr Menzies' use of the vehicle during the two weeks prior to the disciplinary meeting. While he acknowledged he could have done this by looking at the Company's GPS records, he did not do so as he said he trusted that Mr Menzies would not use the vehicle for personal use.

Findings on issue one

[49] I am satisfied in all the circumstances that Mr Menzies' dismissal was unjustified.

Issue two: Remedies

Lost wages

[50] Section 123(1)(b) of the Act provides for the reimbursement by Tree Scape of the whole or any part of wages lost by Mr Menzies as a result of his personal grievance. Section 128(2) provides that I must order Tree Scape to pay Mr Menzies the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.⁴

⁴ Employment Relations Act 2000, s 128(3).

Analysis

[51] Neither Mr Menzies' statement of problem, nor his witness statement stated the amount or period of lost wages claimed. This was despite the Authority directing Mr Menzies to provide this information in his witness statement. In submissions filed on his behalf, Mr Menzies' Representative submitted that Mr Menzies had:

1. lost wages as a result of the dismissal.
2. tried to remedy his situation by finding employment following the dismissal and gained permanent employment in November 2019.
3. was able to find some 'cash jobs' which were one off tasks that provided some supplementary income.
4. should be paid his notice period of one week.
5. is entitled to further provision for lost income, commencing from eight weeks. This takes into consideration that the Applicant has not provided job applications as sought by the Authority.
6. any lost wages should also include Holiday Pay.

[52] Mr Menzies' individual employment agreement provided that his normal hours of work were 47.5 hours per week (45 hours excluding a 30 minute unpaid lunch break). His hourly rate was \$25. This equals a weekly wage of \$1,125 gross or \$906.10 net. Had it not been for his termination in the 13-week period following Mr Menzies' termination, 27 May to 25 August 2019, Mr Menzies would have earned \$11,779.30 net.

[53] During this same period, Mr Menzies' bank statements show that he received earnings in the sum of \$9,532.50 net. These earnings do not include cash jobs that he said he earned totalling at least \$200 and other monies that he said he received but passed on to Mr X in payment of his share of the work undertaken. Deducting these earnings (\$9,732.50 net) from the sum of \$11,779.30 net, I reach a net loss in the 13-week period following Mr Menzies' termination of \$2,046.80. This equates to just over two weeks' wages and is reasonable in all the circumstances.

[54] Tree Scape is ordered to pay Mr Menzies the sum of \$2,046.80 net for lost wages. Payment must be made within 14 days of the date of this determination.

Section 123(1)(c)(i) Compensation

[55] Mr Menzies claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i).

[56] Mr Menzies gave evidence of the effects that his dismissal had on him including the financial impact and the psychological impact. He said he had to vacate his rental property and move in with his family, he broke up with his girlfriend due to the strain he was under, he had to drawdown monies from his Kiwi saver, and explained how he felt deeply depressed, worthless and overwhelmed.

[57] I am satisfied Mr Menzies suffered humiliation, loss of dignity and injury to his feelings. Taking into account the evidence that he provided, his ability to source an income within a relatively short period of time, and the duration of his employment, I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$10,000. When setting the sum payable I have been mindful of the need not to keep compensatory payments artificially low. Recent cases reflect a discernible upswing in the quantum of awards for compensation under s 123(1)(c)(i).

[58] Tree Scape is ordered to pay Mr Menzies the sum of \$10,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Issue three: Contribution

[59] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.⁵

[60] I am satisfied that Mr Menzies did not contribute to his personal grievance and for this reason I make no deduction to the remedies I have awarded.

⁵ Employment Relations Act 2000, s 124.

Costs

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[62] If they are not able to do so and an Authority determination on costs is needed Mr Menzies may lodge, and then should serve, a memorandum on costs within 7 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, Tree Scape will then have 3 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[63] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Outcome

[64] The overall outcome that I have reached is:

- a. Stephen Menzies was unjustifiably dismissed from his employment with Tree Scape Limited.
- b. Tree Scape Limited is ordered to pay Stephen Menzies the following amounts within 14 days of the date of this determination:
 - i. The sum of \$2,046.80 net for lost wages.
 - ii. The sum of \$10,000 as compensation under s 123(1)(c)(i) of the Act.
- c. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].