New Zealand Employment Relations Authority Decisions

Milton v T.C.'s Tyres Limited (Christchurch) [2018] NZERA 1181; [2018] NZERA Christchurch 181 (10 December 2018)

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Last Updated: 19 December 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 181
3025592

BETWEEN CATHERINE MILTON Applicant

A N D T.C.'S TYRES LIMITED

Respondent

Member of Authority: Helen Doyle

Representatives: Louise Laming, Counsel for applicant

Phillip de Wattignar, Advocate for respondent

Investigation Meeting: 23 November 2018 in Oamaru

Submissions Received: On the day from the applicant and respondent

Date of Determination: 10 December 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A Catherine Milton was unjustifiably dismissed.

B T.C.'s Tyres Limited is to pay to Ms Milton the following:

(i) Reimbursement of lost wages under s 123(1)(b) of the

Employment Relations Act 2000 (the Act) in the sum of

$3932.50 gross.

(ii) Compensation for hurt, humiliation and loss of dignity under s 123(1)(c)(i) of the Act in the sum of $10,000 without deduction.

C Costs are reserved and failing agreement a timetable has been set.

Employment Relationship Problem

[1]

Catherine Milton was employed on 8 November 2006 by T.C.'s Tyres Limited

(T.C. Tyres) as an Office Manager in Oamaru. At the material time she worked for

3.25 hours per day for five days a week and was paid $22 per hour.

[2]

T.C. Tyres is a duly incorporated company having its registered office in

Oamaru and carrying out the business of tyre supply, repairs and services. The

Managing Director is Tony Conn.

[3]

A disciplinary process commenced from in or about early September 2017.

Ms Milton was on sick leave recovering from a chest infection for which she had been hospitalised. There was correspondence from Mr Conn to Ms Milton raising concerns, a written response from Ms Milton, two disciplinary meetings and then Ms

Milton was dismissed on notice.

[4]

Ms Milton says that her dismissal was unjustified substantively and

procedurally. She says that the process was not in accordance with good faith obligations.

[5]

Ms Milton seeks reimbursement of lost wages and compensation for

humiliation, loss of dignity and injury to feelings in the sum of $10,000 together with costs on a solicitor/client basis.

[6]

T.C. Tyres say that Ms Milton was justifiably dismissed in respect of the

issues raised that had caused loss of trust and confidence in her and further that she was unable to perform the full range of her duties.

[7]

The parties attended mediation but were unable to resolve the employment

relationship problem.

Test of justification

[8]

The Authority has been asked to consider the justification of Ms Milton's

dismissal. Matters involving justification require the application by the Authority of the justification test in s 103A of the Employment Relations Act 2000 (the Act). The Authority does not determine justification by considering what it may have done in all

the circumstances. It is required under the test to consider on an objective basis whether the actions of T.C. Tyres and how it acted were what a fair and reasonable

employer could have done in all the circumstances at the time of dismissal.

[9]

The Authority must consider the four procedural fairness factors set out in s

103A of the Act. These are whether before dismissing Ms Milton the allegations she was facing were sufficiently investigated. Further whether the concerns were raised with Ms Milton and she had a reasonable opportunity to respond to them and have her explanation considered genuinely by T.C. Tyres before dismissal. The Authority may also take into account other factors as appropriate and must not determine a dismissal unjustified solely because of defects in the process if they were minor and did not

result in Ms Milton being treated unfairly.

[10]

T.C. Tyres could be expected as a fair and reasonable employer to comply

with good faith obligations set out in s 4 of the Act.

Issues

[11]

The Authority is required to determine the following issues in this matters:

(a) What are the material provisions of the employment agreement? (b) What were the reasons for dismissal?

(c) Was there a full and fair investigation into the allegations that formed the reasons for dismissal?

(d) Could a fair and reasonable employer have concluded medical incapacity to perform the role?

(e) Could a fair and reasonable employer conclude from the investigation it carried out there was a lack of trust and confidence because of the data entry concerns?

(f) Was the decision to dismiss Ms Milton on notice from 27 September

2017 what a fair and reasonable employer could have done in all the circumstances.

(g) If the dismissal was not justifiable then what remedies should be awarded and are there issues of mitigation and contribution.

Material provisions of the individual employment agreement

[12]

The individual employment agreement (the agreement) that Ms Milton had

entered into with T.C. Tyres is dated 11 September 2006.

[13]

The clauses have headings but are not numbered. There is a clause about

disciplinary procedures. The process to be used as set out in the employment agreement is in accordance with s 103A of the Act.

[14]

For misconduct and substandard work performance the disciplinary outcomes

commence with a series of warnings from verbal to final written warning before dismissal. It does provide that where misconduct or substandard work performance is considered serious enough an outcome including dismissal may be issued without a

verbal or written warning preceding it.

[15]

There is a clause about termination for medical reasons on the grounds of

incapacity due to illness or injury where the employee is rendered incapable of the proper ongoing performance of his or her duties under the agreement. The maintenance of a high standard of cleanliness inside and outside the store is included

as a duty in the job description attached to the employment agreement for Ms Milton.

[16]

Under the clause "*title and duties*" the employer may after consultation with

the employee amend duties from time to time.

What were the reasons for dismissal?

[17]

I find that there were two reasons for dismissal. These are set out in Mr de

Wattignar's letter of 27 September 2017.

[18]

The first was that Ms Milton could not carry out the full range of duties

because she could not undertake vacuuming.

[19]

The second which was regarded as more significant by Mr Conn in his

decision making was the mistake in the data entry. Mr Conn said that he lost

Was there a full and fair investigation into the allegations that formed the reasons for dismissal?

Letter dated 7 September 2017 from Mr Conn to Ms Milton

[20]

Mr Conn gave Ms Milton a letter dated 7 September 2017 that set out some

concerns about Ms Milton's intention to return to work. Concerns were raised about whether Ms Milton could properly perform the full range of work duties. Emphasis was placed on the vacuuming and floor sweeping tasks that Ms Milton said

she was not medically able to perform because she has sinus tachycardia that increases her heart rate rapidly and can lead to dizziness and fainting. Ms Milton did carry out other less strenuous cleaning. Mr Conn had been undertaking the vacuuming duties for about a year since Ms Milton had advised him that she was unable to do so for

medical reasons.

[21]

The letter also provided that Mr Conn was concerned about the quality of

Ms Milton's data input and understood that she had had trouble with her eyes and had

time off to go to Dunedin to get it seen to.

[22]

The letter concluded with an initial view that Mr Conn felt the job had become

too much for Ms Milton to adequately perform, and the quality of her work had suffered. On that basis Mr Conn was not prepared to have Ms Milton return to work until these issues had been discussed. Mr Conn asked Ms Milton to meet with him and his advisor at 9am on 11 September 2017 at his office. Ms Milton was advised that she may bring a support person or adviser with her.

Written response from Ms Milton

[23]

Ms Milton provided responses in writing to the concerns and presented

Mr Conn with that written account and an updated medical certificate on

11 September 2017. Mr Conn wanted time to consider the written responses and it was agreed that there would be a first disciplinary meeting on 18 September 2017.

First disciplinary meeting 18 September 2017

[24]

Ms Milton attended the meeting with Ms Laming and Mr Conn with Mr de

Wattignar. There was discussion about Ms Milton's written responses including those about the vacuuming issues. Ms Milton said that the vacuuming was only a fifteen minute task each day. That was not a matter in dispute. She said in her evidence that she was willing to reach a resolution on that matter including a reduction in her hours of work to cover the cost of a cleaner in the morning. Mr Conn could not recall that being said but in any event that seemed to be overtaken by a new data entry concern

that I shall come to.

[25]

Ms Milton provided further medical information at the meeting. There was a

letter from an optometrist that Ms Milton's eye sight was 20/20 following cataract surgery. There was a letter from a Triage Nurse that Ms Milton showed good resilience and recovery from the chest infection illness and a letter from a Doctor that Ms Milton was capable of doing office work for at least 3.5 hours per day. The Doctor's letter confirmed Ms Milton had a tachycardia which prevented her doing heavy duties like carrying heavy weights and running but that she could do light

duties like office work.

[26]

Ms Milton also explained in her written explanation that her error rate for job

card entry is 0.53% in accordance with data provided to her by Mr Conn. Mr Conn agreed in his evidence at the Authority investigation meeting that Ms Milton was not making a lot of mistakes and that the then afternoon employee made more mistakes

when she entered the job cards.

[27]

A new matter was raised at the meeting. Mr Conn had heard in all likelihood

that morning from the company accountant that there had been a significant data entry mistake. Mr Conn advised that the company accountant was reviewing the records to determine the extent of the problem and any financial repercussions for T.C. Tyres.

[28]

He made it clear at the meeting that it was his view that this was an incorrect

coding matter that Ms Milton was responsible for. Ms Milton said that there was no information supplied to her that identified her as the person responsible. There was one other person who also undertook data entry and others had access to her computer. She understood that further information would be supplied from the accountant. Her explanation was that she could not understand how a mistake like

[29]

Ms Milton was either at the end of this meeting or the meeting that followed

on 20 September 2017 asked to provide a medical certificate that gave her full medical clearance to work and perform the full range of duties. Ms Milton could not do that because of her tachycardia. She did provide a further medical certificate dated

25 September 2017 that provided she can, when doing heavy exercise like vacuum cleaning, have sinus tachycardia which can lead to dizzy spells and fainting.

Letter from Mr de Wattignar 18 September 2017

[30]

Following the meeting but on the same day Mr de Wattignar wrote a letter to

Ms Laming. It referred to two matters from the meeting. The first was the cleaning duties. Under that heading it referred to a concern that Ms Milton did not believe her employment agreement required her to perform cleaning duties. The second matter was concerns about poor work performance. There was reference to *a very serious failure of data entry.* Mr de Wattignar set out the identity of the two tyre suppliers for which there was an incorrect data entry (coding) under waste management instead of purchase. Mr de Wattignar wrote that the accountant is reviewing the records as the problem may have financial consequences for the company. The evidence supported that GST issues would arise as a consequence.

Second disciplinary meeting 20 September 2017

[31]

There was I find another meeting on 20 September 2017 although Ms Milton

did not have a clear recollection about it. I conclude that at the meeting Ms Milton was represented by Ms Laming and Mr Conn attended with Mr de Wattignar.

Letter advising of dismissal 27 September 2017

[32]

Ms Milton was subsequently dismissed by letter dated 27 September 2017 on

the basis that her responses to the matters of cleaning duties and concerns about poor work performance were unacceptable.

[33]

Mr de Wattignar in his letter of that date advised that T.C. Tyres expected Ms

Milton to provide a medical clearance to enable her to return to work and perform her full range of duties but she had failed to do so. It was stated that her other

explanations about the nature of duties she is obliged to perform were unconvincing

and not accepted.

[34]

Further that she had made serious mistakes in data entry and the only response

was that Ms Milton did not understand how it could have happened. Mr de Wattignar wrote that Ms Milton's responses caused Mr Conn a serious loss of trust and confidence and there could be no guarantee that it would not happen again. Ms Milton's employment was duly terminated. She was paid two weeks' which is the notice period in the employment agreement.

Conclusion on fairness of investigation

[35]

The disciplinary process in Ms Milton's employment agreement required that

she be advised of the specific allegation prior to any disciplinary meeting. The letter of 7 September 2017 referred to a concern about quality of data input but I find that was a different matter to that ultimately relied on for dismissal because that initial concern was about the job cards which Mr Conn checked. As set out earlier Ms Milton's data input had very few mistakes and that was more a concern about the afternoon worker at that time. Mr Conn accepted in his evidence that his checks did not extend to the general ledger where the concerns the accountant had raised

originated from.

[36]

The allegation about the serious data coding errors was raised for the first

time at the disciplinary meeting on 18 September 2017. I accept Ms Laming's

submission that Ms Milton was expecting the meeting to be about the matters in the 7

September letter which she had responded in writing to and it was a shock for her to then face a new allegation. The raising of the new allegation at the meeting was not

in accordance with the employment agreement. That was unfair.

[37]

Further I find that there was insufficient information provided about that new

allegation for Ms Milton to properly explain at that meeting and she expected further information to be forthcoming. Mr de Wattignar was more specific about the two tyre company suppliers in his letter of 18 September 2017 where there was an incorrect code entry and he set out what the incorrect code entry was. That was the extent of the information supplied. Mr Conn in his evidence said that it was not until

the middle of 2018 that the information came back from the accountant. $1000 was owing to the Inland Revenue Department for GST. There was no penalty interest payable but there was I accept cost for the time required for the accountant to look

into the matter.

[38]

Mr Conn said that the accountant was not sure how that data entry issue had

arisen. There was some thought from the accountant that if the first entry was incorrect it may have been *dragged through* to subsequent entries. Mr Conn said that

Ms Milton set up new products and he was *99% certain* that the mistake was hers.

[39]

Ms Milton's explanation that she could not understand how the coding error

occurred was found to undermine the trust and confidence that the company had in her about that matter. Mr Conn said that the explanation from Ms Milton was *quite vague.* I find that was in all likelihood because she was not supplied with enough

information to adequately explain the new allegation.

[40]

I find that there were other aspects of the process that suggested Ms Milton's

explanations were not considered genuinely before she was dismissed. Ms Milton explained that she was not able to undertake vacuuming and why. She was then asked to provide a full medical clearance that she could complete her full duties. When she could not do that that was referred to in the letter of dismissal as something that she could not provide. There was insufficient consideration about other options for

undertaking the 15 minute vacuuming duty.

[41]

The allegations also seemed to move somewhat without reference and

clarification of earlier matters. Ms Milton provided confirmation for example that her eyesight was fine when that was raised as a concern about data entry. It was also known Ms Milton did not make very many data entry mistakes about job cards because Mr Conn had checked the error rate but that was not referred to in correspondence or weighed. There was a medical statement provided by Ms Milton that she was capable of performing light duties such as office work in response to a suggestion that the job had become too much for her and her work had suffered. That

was not referred to.

[42]

I find that the process adopted by T.C. Tyres was unfair. There was no

advance notice of the new allegation about the serious data entry mistakes before the disciplinary meeting. The information supplied about the data entry mistakes was insufficient for Ms Milton to be able to properly explain or refute the matter. Although there was reference to potentially serious financial consequences it was not clear what they were. Importantly it was not clear to Ms Milton that she was in fact the person responsible for the coding error. Objectively assessed there seemed to be a closed mind to the explanations given.

Could a fair and reasonable employer have concluded medical incapacity to perform the role?

[43]

Mr Conn said in his evidence that the data entry mistakes were a more

significant issue for him that the vacuuming concern. Ms Milton had undertaken the vacuuming as part of her role since the shift into new premises until she became medically unfit to do so. Mr Conn then undertook that duty for about a year before dismissal. It was not a significant part of Ms Milton's role. It was 15 minutes of the

3.5 hours she worked each day. Her medical incapacity to undertake vacuuming was confirmed in a medical certificate dated 25 September 2017. I accept that the undertaking of the vacuuming was important to Mr Conn but there was inadequate consideration of alternatives to termination for medical capacity in all the

circumstances. Mr Conn said in his evidence that he still undertakes the vacuuming.

[44]

I do not find a fair and reasonable employer could have reached the point of

finding Ms Milton was rendered incapable of performance of her duties for medical incapacity and her employment should be terminated.

Could a fair and reasonable employer conclude from the investigation carried out a lack of trust and confidence because of the data entry concerns?

[45]

Mr de Wattignar relies on the Court of Appeal judgment in *W & H*

Newspapers Ltd v Oram1 as authority that a single incident of carelessness or negligence, when sufficiently serious, can impair trust and confidence and there can

be a loss of trust and confidence into the future.

[46]

Often a lack of procedural fairness and substantive fairness overlap. In *Oram*

1 *W & H Newspapers Ltd v Oram* [2001] NZCA] 142; [2000] 2 ERNZ 448

the Court of Appeal did not agree that there were procedural failings. I have found that there was in this case. There was inadequate information provided about the incorrect coding. Ms Milton was not in fact sure she had made the error. The inadequacy of information impacted on Ms Milton's ability to properly explain what occurred. Her inability to explain then counted against her to reach a view that there

was no guarantee it will not happen again.

[47]

Whilst there was a financial impact to T.C. Tyres it was primarily for the cost

of involving the accountant to ascertain what the issue was. The payment of GST would in all likelihood have been payable if the purchases had been coded correctly. There was no evidence of more widespread issues. Mr Conn accepted when questioned that Ms Milton if she had made a mistake would not have done so deliberately. Ms Milton had been employed for 11 years without earlier warnings or

disciplinary issues.

[48]

I find that the lack of procedural fairness directly impacted on the ability for

Ms Milton to properly understand and explain or refute this allegation about data entry. I do not find in those circumstances that an employer could have fairly and reasonably concluded that Ms Milton made serious mistakes in data entry and that it could not rely on her in the future.

Was the decision to dismiss what a fair and reasonable employer could have done in all the circumstances?

[49]

There were procedural and substantive fairness failings as set out above in this

matter. I do not find that a fair and reasonable employer could have reached the decision to dismiss. Ms Milton has a personal grievance that she was unjustifiably dismissed and she is entitled to consideration of remedies.

Remedies

Lost wages

[50]

Ms Milton seeks lost wages from the time of her dismissal until the

investigation meeting. Ms Milton did not make any application for new roles. She said that she felt her age because she is in her early sixties, her medical condition and

the lack of a reference went against her ability to secure new work. In short Ms Milton told the Authority that she feels she is unemployable. She sold a small farm that she owned outside of Oamaru as she had used all her savings and was unable to

meet the running costs.

[51]

The Authority in this matter has no evidence to support Ms Milton's view that

she is unemployable such as unsuccessful applications for employment. An employee has a duty to attempt to mitigate loss. I note that Mr Conn was not asked for a reference so I am not able to conclude that he would not have provided one. Mr de

Wattignar submits that there should be no award under the head.

[52]

I find in all likelihood that Ms Milton suffered a loss of confidence in herself

and her employability after her dismissal. This prevented her from taking the steps of applying for other roles. I find that in those circumstances there should be some reimbursement of lost wages because that lack of confidence was due to the dismissal. I find that T.C. Tyres should not be liable for lost wages outside of the 3 month period

less notice paid of two weeks.

[53]

Ms Milton was paid $22 per hour and worked 16.25 hours per week or 3.25

hours per day for five days. That is a gross sum per week of $357.50.

[54]

Subject to any findings about contribution Ms Milton is entitled to

reimbursement of the sum of $3,932.50 which is 13 weeks multiplied by $357.50 less

the two weeks' notice paid.

Compensation

[55]

Ms Milton seeks the sum of $10,000 under this head. She said that she felt a

loss of everything. She feels she is now unemployable. She had to sell the farm and will be living frugally off her savings until she qualifies for superannuation. Ms Milton said that she enjoyed her role and liked the data entry. She also got on well

with Mr Conn and enjoyed working with him.

[56]

I find that Ms Milton was impacted significantly by her dismissal.

[57]

Subject to any findings about contribution there should be an award under this

head of $10,000 for compensation.

Contribution

[58]

Where the Authority finds that an employee has a personal grievance it must

in deciding remedies consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if

required reduce the remedies that would otherwise have been awarded.

[59]

I do not find that Ms Milton contributed to the situation that gave rise to her

personal grievances. There could be no contribution by reason of her medical condition. I could not be satisfied on the balance of probabilities that she was the one who made the coding error. The above remedies therefore are not reduced.

Orders made

(a) T.C. Tyres Limited is to pay to Catherine Milton the sum of $3,932.50 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.

(b) T.C. Tyres Limited is to pay to Catherine Milton the sum of $10,000 without deduction being compensation under s 123(1)

(c)(i) of the Employment Relations Act 2000.

Costs

[60]

I reserve the issue of costs. Failing agreement and with the holiday period in

mind Ms Laming has until 18 January 2019 to lodge and serve submission as to costs and Mr de Wattignar has until 31 January 2019 to lodge and serve submissions in reply.

Helen Doyle

Member of the Employment Relations Authority
