IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 148
3001031

	BETWEEN	PAUL MORRIS Applicant
	A N D	P & W PAINTERS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Kevin Murray, Advocate for Applicant Warren Pitches, Advocate for Respondent
Investigation Meeting:	4 August 2017 at Christchurch
Submissions Received:	30 August 2017 from Applicant 5 September 2017 from Respondent
Date of Determination:	7 September 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. The Applicant was unjustifiably dismissed and is awarded $6,000 compensation.

B. Costs are reserved.

Employment relationship problem

[1] Mr Morris claims that he was unjustifiably dismissed by the respondent. This is denied by the respondent, which asserts that Mr Morris abandoned his employment.

[2] At the investigation meeting, Mr Murray stated that Mr Morris was also seeking payment of wages for the first week of his absence following an injury, which Mr Morris asserts occurred at work, but which the respondent denies. This claim was

not raised in the statement of problem, nor in the personal grievance letter, or any other correspondence seeking leave to amend the statement of problem. Non-payment of compensation for the first week of injury was referred to in Mr Morris' brief of evidence, but it was not clear in that document that a separate claim for payment was being raised. I decline to adjudicate on this matter as it would not be just to do so as the respondent was not given sufficient notice that it was in contention.

[3] In his submissions, Mr Murray also made mention of an unjustified disadvantage claim. However, again, this claim was not raised in the statement of problem, nor in the personal grievance letter, or any other correspondence, and so it would not be just to determine it.

[4] In addition, Mr Murray sought the imposition of a penalty in his submissions. Again, this was not pleaded in the statement of problem, or in any correspondence, and so I decline to determine this application.

[5] Finally, Mr Murray claimed non-payment of holiday pay in his submissions. However, again this was not claimed in the statement of problem, nor in the letter of grievance. Non-payment of holiday pay was referred to in Mr Murray's brief of evidence, but that did not make clear that he was seeking it as part of his claim.

[6] Mr Pitches, the director and representative of the respondent company, did not appear in person at the investigation meeting because, he says, he did not get the notice of hearing. I accept that he did not deliberately fail to make himself available, but note also that he did expressly agree in person to the date of the investigation meeting at the Authority's case management telephone conference, and the Authority's notice of hearing was definitely sent to him by email.

[7] Mr Pitches reluctantly agreed to take part in the investigation meeting by telephone. Having conducted the meeting, I am satisfied that Mr Pitches was fully able to have his say and to answer questions without any prejudice to him or the respondent. This was effectively confirmed in the respondent's submissions.

[8] Mr Pitches said in evidence that the respondent company had ceased trading in October 2016 and was the subject of an application to place it into liquidation, which was to be heard in the Timaru High Court on 11 September 2017. I advised Mr

Morris that it was therefore possible that he would recover nothing from the respondent if he were successful. Although Mr Morris said he knew this, he said that he wished to continue with the application as a matter of principle.

Brief account of events leading to the termination of the employment

[9] Mr Morris was employed by the respondent as a brush hand. An individual employment agreement was in place between the parties which Mr Morris had signed. According to Mr Morris, he rolled his ankle at work on around 29 October 2015. According to the respondent, this is untrue, as Mr Morris did not report a workplace accident and Mr Morris came to work the next day. It appears common ground, though, that Mr Morris' last day working was Friday, 30 October 2015. It would appear that, from 2 November 2015, Mr Morris was initially signed off sick for 14 days.

[10] However, on Monday, 9 November 2015, Mr Morris slipped in the shower and hurt his left ankle and knee. Mr Morris started to receive ACC compensation from 15 November and started to receive treatment from 25 November. On 4 December, he was referred to a surgeon.

[11] On 9 December 2015, the Accident Compensation Corporation contacted Mr Warren Pitches, the director of the respondent, and explained that the work-related injury claim had been closed and that a new claim had been opened for the knee injury.

[12] The Authority saw copies of ACC documents which recorded notes of conversations between the ACC case worker on the one hand and with Mr Morris and Mr Pitches on the other. One note shows that, on 21 December 2015, ACC spoke with Mr Pitches and that Mr Pitches said "that he does not think Paul [Mr Morris] will be returning to work for them at all". The ACC note also records that weekly compensation was being paid to Mr Morris from 15 November 2015 up to 18 February 2016, including statutory holidays.

[13] Another ACC note dated 23 December 2015 records a conversation with Mr Pitches in which Mr Pitches said that Mr Morris "cannot go to work until he is fully fit; however, at this stage in time he may not have a job to come back to". The note also stated the following:

> Warren [Pitches] advised that he feels [Mr Morris] is not honest and has stolen from him. Warren adv that Paul has a serious criminal record, he also advised that at one stage Warren [sic][1] and his partner were living on his property in a caravan. Warren advised that he will be looking to pay Paul's annual leave however this will be when he is fit to return to work.

[14] A further ACC note dated 19 February 2016 records that Mr Morris had surgery on 18 February. It also records that a manager from the respondent company telephoned the ACC case worker on 19 February 2016. The note records the following:

> P&W manager called in to adv that she is not sure what is happening with Paul but they were expecting him back at work and have not heard from him or his CM so called me…..Very upset adv she has not been contacted….

[15] The notes also indicate that Mr Morris was feeling depressed because of not being able to work.

[16] A note dated 24 February recorded a conversation between the case worker and Mr Morris as follows:

> I asked him if he has kept his employer up to date, he advised NO when asked why not he said he didn't know and there was no excuse, he advised will contact them today to update them.

[17] A note by the case worker dated 3 March 2016 recorded a conversation between the ACC case worker and Mr Morris in which the case worker notes that Mr Morris told her that he had been given a referral to see a specialist. It also states:

> Paul confirmed that he has still got a job and has been keeping his Employer up to date (I asked this question as I knew that there is a breakdown with employer).

[18] However, a subsequent note of the same date recorded a conversation between the case worker and Mr Pitches as follows:

> EMPLOYER CONTACT, Spoke with Warren [Pitches] and advised I wanted to discuss Paul. It is at this time that Warren advised that there was nothing to discuss as Paul no longer works there as he has never kept up to date with his injury also he advised again that Paul has stolen from him. He adv Paul has done nothing but lie to him while on ACC [following text has been redacted by ACC]. I asked if we were able to complete a worksite assessment of what Paul's tasks were which would help us achieve a RTW for pre-injury. I was

[1] Presumably, this should have referred to Mr Morris, not Mr Pitches

> advised that Warren does not want to waste any more time on him. Employer very upset/angry with the ACC process and Paul.

[19] A note by the ACC case worker dated 9 March 2016 indicates that she had texted Mr Morris on 3 March following her conversation with Mr Pitches, but it appears that Mr Morris had never received the text. The note records the following:

> Adv that I had spoken to his Employer in regards to confirming to have an OT assess his workplace however was advised that he no longer works there. Paul seemed quite shocked and was unaware that he no longer was Employed. He advised that he had been keeping his Employer up to date.

[20] Mr Morris engaged an employment law advocate to raise a personal grievance on his behalf by way of a letter dated 9 May 2016. On 9 May, Mr Pitches emailed the advocate saying the following:

> Thank you very much for your letter dated 9/5/16 informing us that Paul Morris is now fit and able to return to work for us.[2]
> We have a large contract at Mt Cook Hermitage starting on the 23/5/16.
> Please advise us if he is available for work.
>
> Regards Warren Pitches
> P&W Painters Limited

[21] Mr Pitches says that he received no reply to this email, and that one of the staff waited for Mr Morris to take him to the job, but that he never turned up. It seems that neither Mr Morris nor Mr Pitches tried to contact the other after that.

[22] Mr Pitches says that this failure constituted an abandonment of employment. However, he also says that Mr Morris remained on the respondent company's books until it ceased trading on 31 October 2016.

[23] Mr Morris says he would have been unable to have worked on 23 May 2016 as he was still recovering. Mr Pitches says that he had been advised by ACC that he was fit to work then. The ACC notes indicate otherwise though, and state that Mr Morris was under a series of medical certificates, the last of which expired on 4 October 2016. He commenced employment again on 9 October 2016 as a traffic controller.

The issues

[24] The following issues need to be determined by the Authority:

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[2] The letter in question does not state that Mr Morris was fit and ready to return to work.

(a) How did the employment of Mr Morris terminate;

(b) If the employment ended by way of a dismissal by the respondent, was that dismissal justified?

How did the employment of Mr Morris terminate?

[25] There is a direct conflict between the parties as to how employment ended. However, Mr Pitches' argument that Mr Morris abandoned his employment is not supported by the evidence. That evidence is as follows.

[26] Mr Pitches said himself in evidence that Mr Morris remained on the respondent company's books until it stopped trading on 31 October 2016. However, that does not fit with abandonment. Abandonment is a contractual concept and operates to terminate employment in accordance with the terms of the relevant contractual term. Clause 13.11 of the individual employment agreement between the parties dated 19 December 2014 states the following:

> **Abandonment of Employment.** In the event that the Employee is absent from work for a period of three consecutive workdays without the written consent of the Employer, or for no good reason, the Employee shall be deemed to have terminated his/her own employment without notice.

[27] If Mr Pitches were right that Mr Morris had abandoned his employment in May 2016, the company would have been able to have treated his employment as having terminated. However, it did not if he was still on their books in October 2016.

[28] In any event, the ACC notes show that the company knew that Mr Morris was not fit for work in May 2016. Therefore, he was not absent without good reason, as is required in the abandonment clause.

[29] Finally, the respondent never wrote to Mr Morris to advise him that it was treating his employment as having terminated.

[30] In the case of *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust*[3] the Employment Court discussed the concept of a dismissal in paragraphs [68] and [69]. It stated the following (omitting case citations):

[3] [2015] NZEmpC 89

> [68] In *Sharpe v MCG Group Pty Ltd* [2010] FWA 2357, Fair Work Australia considered cases dealing with the concept of termination at the initiative of the employer. In my view, the principles discussed in those cases would have equal application in any consideration of the meaning of the same expression in this jurisdiction. In *Sharpe*, it was noted:
>
> > [24] … Essentially, termination at the initiative of the employer involves as an important feature, that the act of the employer results directly or consequentially in the termination of the employment, so that the employee does not voluntarily leave the employee relationship. …
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> [69] Reference was made in *Sharpe* to a particular passage by Justice Moore in the case of *Rheinberger v Huxley Marketing Pty Ltd*, which had subsequently been referred to with approval by the full Court of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd.* Justice Moore stated:
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> > However, it is plain from these passages that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable consequence of the employer's conduct.

[31] Did Mr Morris' employment terminate at the initiative of the respondent? I accept the evidence presented in the ACC case notes that, on 3 March 2016, Mr Pitches told the case manager that Mr Morris "no longer works there". Mr Pitches said in evidence that he did not recall if he said this or not, but did not deny it. In any event, it is not likely that the case manager would have made this up or misunderstood.

[32] I find that it is also more likely than not that Mr Pitches would have known that the case manager would have told Mr Morris that he had made this statement. Mr Pitches is a very experienced businessman who, he said, has employed over 400 people. Therefore, he would have known that ACC would have had to have passed this on to Mr Morris.

[33] In other words, Mr Pitches used the ACC case manager as his agent in disclosing to Mr Morris that he was treating him as no longer employed. He even gave a reason to the case manager; namely, that Mr Morris had not been keeping him up to date with the injury.

[34] What difference does the offer of work in May 2016 make? The making of this offer followed the raising of the personal grievance by Mr Morris' representative of the time. I infer that it was made disingenuously, in order to try to disarm the representative. In any event, even if the offer was genuinely made, it followed two months after Mr Morris found out from the ACC case worker that he was no longer employed by the respondent. In such a case, there was no obligation upon Mr Morris to accept this offer.

[35] On this basis I accept that Mr Morris' employment was terminated at the initiative of Mr Pitches, on behalf of the respondent, and that the termination was communicated via the ACC case manager.

Was the dismissal justified?

[36] Section 103 A of the Employment Relations Act 2000 (the Act) sets out the "test of justification", which is the test that the Authority must apply when determining whether a dismissal was justifiable. Section 103A provides:

> **Section 103A Test of justification**
> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
> (3) In applying the test in subsection (2), the Authority or the court must consider—
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
> (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
> (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
> (a) minor; and
> (b) did not result in the employee being treated unfairly.

[37] It is not difficult to conclude that the dismissal was unjustifiable given that no procedure whatsoever was followed by the respondent. The respondent not only did not give Mr Morris an opportunity to give a response to Mr Pitches' concerns, but Mr Morris was not even told that the concerns existed.

[38] Therefore the dismissal was unjustified, as no fair and reasonable employer could have acted in the way the respondent did, in all the circumstances.

Remedies

[39] Mr Morris is entitled to be considered for the award of remedies. During the investigation meeting, Mr Murray submitted that Mr Morris is entitled to the following:

a. One week's pay following the injury when Mr Morris was waiting for the ACC paid compensation to commence (on the basis that Mr Morris says it was a work injury);

b. 20% of lost wages for 13 weeks (on the basis that Mr Morris was in receipt of ACC compensation at the rate of 80% of his pay during this period); and

c. Compensation for humiliation, loss of dignity, and injury to the feelings of Mr Morris under s 123(1)(c)(i) of the Act.

[40] With respect to the first matter, Mr Morris has not pleaded non-payment for the first week of his incapacity, and his representative at the time did not refer to it in the personal grievance letter she sent to the respondent in May 2016. It would not be just to allow this claim to proceed when it was first raised (in answer to a question from me) at the investigation meeting itself. This is because Mr Pitches vehemently

denies that Mr Morris had a work place accident at all. I therefore decline to accept this claim.

[41] An individual on sick leave due to an injury covered by ACC is not automatically entitled to have his pay topped up by his employer. There has to have been an express agreement that such a top up would occur. The employment agreement between the parties does not refer to such an express agreement. I therefore cannot find that Mr Morris is entitled to loss of wages at 20% of his salary.

[42] I would add that, following *Judea Tavern Limited v Patricia Jesson*,[4] had Mr Morris been able to work for the respondent during the period of claimed loss, but for his termination, he would have been entitled to have been awarded reimbursement of his full loss of wages (subject to s 128 of the Act), notwithstanding the receipt of ACC compensation. However, I am satisfied that Mr Morris was not able to work during the period in question, and so would not have been able to have worked even if he had not been dismissed. No award can therefore be made.

[43] Mr Morris is eligible to be considered for an award under s 123(1)(c)(i) of the Act. He said that he was angry when he became aware that he no longer had a job with the respondent, and also went on to suffer depression, although he concedes that that was partly due to him not being able to work and becoming frustrated.

[44] The Authority must be cautious when there are mixed reasons for an employee suffering significant effects, some of which arise from an unjustified disadvantage or dismissal and some of which arise from factors unrelated to the employer's actions. It is often impossible to separate out how those effects are divided between the different causes. This is the case here.

[45] Depression is a serious effect to suffer and, had it been attributable wholly to unjustified dismissal, an award in the region of $15,000 would have been appropriate. However, as the depression is likely to have been caused at least in part by the knee injury and enforced absence from work, I must take that other factor into account. I therefore award Mr Morris $7,500.

[46] 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

[4] [2017] NZEmpC 82, at paragraph [40]

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 and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[47] There is evidence that Mr Morris did not keep the respondent up to date with his injury. This is the comment he made himself to the ACC case manager about not doing so, as well as the call from the respondent's office manager who seemingly did not know about Mr Morris' surgery the day before. This seems to have been the reason for Mr Pitches saying that Mr Morris was no longer employed. On balance I believe that Mr Morris did not keep the respondent fully informed of the progress of his injury and recovery, in breach of his duty to be responsive and communicative. This failure would obviously have been frustrating and disruptive for the respondent, which was trying to run a small business.

[48] I believe that Mr Morris' failure in this regard was blameworthy, and should be reflected in a reduction in the award of compensation. I reduce the award by 20%.

Comment

[49] I would comment that Mr Morris tried to raise four claims very late in the proceedings. Two matters (the first week's pay of injury and holiday pay) were referred to obliquely in his brief of evidence, but it was not clearly stated that he was seeking a determination in respect of them. The other two claims (disadvantage and penalty) were referred to for the first time in Mr Murray's written submissions, after the investigation meeting.

[50] Even when a respondent is professionally represented, it is important that it and its representative fully understand what claims it must respond to. Otherwise, it cannot produce relevant evidence and is not given a fair chance to defend itself. This is even more important when a respondent is not professionally represented, as was the case here. In addition, of course, the Authority needs to know with certainty what claims are being pursued.

[51] The statement of problem is the operative document which sets out the cause of action that the applicant seeks the Authority to determine. I would therefore strongly urge representatives to check carefully, well in advance of the Authority's

investigation meeting, that the statement of problem raises expressly and unambiguously all claims being pursued, and to seek leave urgently to amend it if it does not do so.

Order

[52] I order the respondent to pay to Mr Morris the sum of $6,000 pursuant to s 123(1)(c)(i) of the Act. The sum is to be paid with 7 days of the date of this determination.

Costs

[53] Costs are reserved. The parties are directed to seek to agree how costs are to be dealt with between them. However, if they are unable to agree within 7 days of the date of this determination, Mr Murray may serve and lodge within a further 7 days a memorandum setting out the contribution towards its costs sought against the respondent, and the basis for that contribution. The respondent may then serve and lodge a memorandum in reply within a further 7 days.

David Appleton
Member of the Employment Relations Authority