

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 290
3096514

BETWEEN LUCAS NGAPERERA
Applicant

AND TARANAKI ENGINEERING PROUD
LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Alex Kersjes, advocate for the Applicant
Murray Dick, on behalf of the Respondent

Investigation Meeting: 24 March 2021 at New Plymouth

Submissions Received: At the Investigation Meeting with further information on 19 May
and 8 July 2021

Date of Determination: 8 July 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Lucas Ngapera, claims he was unjustifiably dismissed by the respondent, Taranaki Engineering Proud Limited (TEP), on 29 July 2019.

[2] TEP accepts it dismissed Mr Ngapera but says it can justify the decision.

Background

[3] TEP is an engineering firm domiciled in New Plymouth. Murray Dick is its sole director/shareholder and Mr Ngapera was a CAD designer.

[4] In June 2019 TEP was engaged as a subcontractor by a firm known as JLE. JLE was itself a subcontractor charged with gathering a workforce to complete a maintenance shutdown at the Kinleith Pulp and Paper Mill near Tokoroa managed by a company called IMG. As part of its obligation, TEP would provide a group of staff of which Mr Ngapera was one.

[5] While there is some confusion about exact dates which is ultimately irrelevant to the matters I must decide, it would appear there was a five-day period of preliminary work conducted between Monday and Friday of the first week of June 2019. The shutdown proper would then commence on the Saturday and run for approximately ten days.

[6] The parties agree that prior to departure from New Plymouth those who were to go to Kinleith were given a briefing about work conditions. Included was advice shifts would be 12 hours on, 12 hours off and work would continue till the job was complete. It was emphasised there would be no leave. It is also agreed staff were, at that point, given a chance to opt out should that not be acceptable.

[7] As events transpired, Mr Ngapera asked to be allowed to take leave on the second day of the shutdown (the first Sunday). In his statement of problem, he says he made the request to two *employees in superior roles*. The first was said to be Andrew Wells, TEP's supervisor at Kinleith, and the other was Raju, a team leader. He says both approved his request. He also says the request was made as by then he was exhausted given long days and what he portrays as extra duties pertaining to timesheets.

[8] In oral evidence Mr Ngapera says the request was only made to Mr Wells. He says the response was *you can have a Sunday off*.

[9] Mr Wells denies the request was made of him but accepts that in a general statement to all staff made early in their stay he suggested that notwithstanding the requirement work be continuous there was a possibility the schedule might be altered to allow staff to have a break on the second Sunday. He also said he advised there was, as yet, no decision in that respect.

[10] That said, it is accepted the leave request was made. Allan Jackson, JLE's construction manager, states Mr Ngapera approached him and asked for the first Sunday off. Mr Jackson is adamant he advised Mr Ngapera that was not possible and he would have to adhere to the requirement work continue for the duration of the shutdown without a day off.

[11] Notwithstanding that Mr Ngapera was absent when the staff bus departed the employer arranged accommodation for the work site on Sunday morning. As already said, Mr Ngapera is of the view that was because his leave had been approved. TEP's witnesses are of the view it had more to do with the fact Mr Ngapera was hungover and incapable of arising in time for work. While Mr Ngapera accepts he had been drinking the previous night he says that was not an issue as he was not expected to work the following day.

[12] Here it should be noted that notwithstanding the various employers' aversion to excessive alcohol consumption on health and safety grounds (there were various references to the hazardous nature of the work) and IMG's rigorous policing of behaviour in the accommodation it had arranged, this was not the first instance of transgression that week. While the parties were uncertain as to which day, they agree there was a prior incident during which a group of workers had indulged and returned to the accommodation just after midnight. Mr Ngapera was one of the group and had lost the keys to his accommodation. As a result he attempted to wake some of his colleagues and it is fair to say his behaviour was deemed disruptive and inappropriate by the accommodation's owner who raised the issue. Even Mr Ngapera accepts it warranted his apologising to both the owner and Mr Jackson who, in Mr Ngapera's words, *gave a bollocking which was fair enough*.

[13] Mr Jackson became aware of Mr Ngapera's absence when the bus arrived. He says he was incensed by it especially as he had expressly denied Mr Ngapera's request for a day off. Mr Jackson rang and advised Mr Ngapera he was no longer acceptable and could return to Taranaki. Here it should be noted Mr Ngapera was not the only person who got a call of that nature from Mr Jackson that morning. There were four or five, with another of those also being an employee of TEP.

[14] Mr Jackson then rang Mr Dick, told him what had happened and said he was not prepared to have the two TEP employees on site. Mr Jackson says that while he had other concerns with Mr Ngapera his decision was attributable to the failure to follow directions and the drinking culture.

[15] It is agreed Mr Ngapera attended work in New Plymouth the following day. It is also agreed Mr Dick approached Mr Ngapera and advised he had heard there was some issues. Mr Ngapera accepts he was allowed to put his view about what had happened and claims

Mr Dick then said *leave it with me and go back to your desk*. Mr Ngapera says he thought Mr Dick was fairly blasé about it and things would be fine.

[16] Mr Dick has a different view. He says he had two different versions of events and felt he therefore had to make further inquiries. This he ultimately did but it took some weeks as by then Mr Jackson had left New Zealand and was difficult to contact. When the two did eventually speak Mr Jackson reiterated his view that Mr Ngapera's continued presence had been unacceptable given the drinking issues and the failure to follow instructions. Here it should also be noted that shortly thereafter the head contractor applied a random alcohol testing policy to workers engaged in the shutdown.

[17] Mr Dick says that having considered what he had heard he concluded Mr Ngapera's conduct constituted serious misconduct and that he should be dismissed.

[18] In respect to the imparting of that decision Mr Ngapera says that at around midday on 29 July 2019 and as he was sitting at his desk Mr Dick approached, tapped him on the shoulder, and *told me that I didn't have a job anymore*. The parties agreed there was then a quick discussion about the fact Mr Ngapera would get a week's pay in lieu of notice and he could choose whether or not he would work it out. As events transpired, he continued for another two days before departing.

[19] Mr Dick essentially agrees Mr Ngapera's portrayal of events is correct.

[20] Just over a week later Mr Ngapera sent an email to Mr Dick. It expressed shock at the way he had been dismissed before asking for a reference and reasons for the dismissal. The email went on say *I am struggling to accept that I have wronged you somehow. We hardly spoke to each other nor had any disagreements*.

[21] The reply came within half an hour. It reads,

As You can see by the email below I stated on your last day T/E has been having talks with JLE for a while now and with the workload adding to the situation on the shut I had no choice I have tried to work through this with JLE but it hasn't worked so I made the decision.

Answer to your Question about a reference it would be hard recognising the situation below but if you need a phone reference in reference to drawings etc. yes I would do that.

Sorry that this has gone this way mate but my hands were tied at the end of the day.

[22] The attached email includes a quick summary from IMG which read:

Lucas Ngapera ... Missed van, decide to take day off against the advice of his supervisor. Was given a warning for drunk and disruptive behaviour at motel. Last pay day 15th June, day shift. Note: poor performer.

Determination

[23] As already said, TEP accepts it dismissed Mr Ngapera. As a result, it accepts it is required to justify that decision.

[24] In oral evidence and when explaining why he chose to dismiss, Mr Dick cites two rationales. The first was that Mr Ngapera was guilty of serious misconduct in that he had been *drunk and disorderly*. The second was that he had put TEP's reputation at risk by bringing it into disrepute with both JLE and IMG. Mr Dick denied the days absence played a part in the decision as *you can't sack them for that*.

[25] Here comment has to be made about the reference in Mr Dick's email of 8 August to workload and the fact Mr Ngapera interpreted this as meaning one of the reasons why he was dismissed was that TEP no longer had sufficient work for him. Mr Dick's evidence, which I accept, is that is not so. While he accepts the amount of work available was reducing he is clear it was never to the extent Mr Ngapera would no longer be required. Indeed, he refers to the fact he had to replace Mr Ngapera's almost immediately. It is Mr Dick's evidence the reference to workload related to problems that arose at Kawerau as a result of Mr Ngapera's departure and the e-mails content is, I conclude, consistent with that.

[26] With respect to justification s 103A of the Act states the issue:

... must be determined, on an objective basis, [by considering] 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 ... occurred.

[27] In determining this the Act requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. A sufficient investigation requires, as a bare minimum, that the employer put its concerns to the employee, allow an opportunity to reply and consider the response with an open mind.

[28] Traditionally and while issues of substance and process overlap and there is no such thing as a firm delineation, separation has often been used for analytical purposes especially as the requirements of [27] are enshrined in statute and have a procedural focus.¹

[29] As previously noted, Mr Dick states there were two reasons for the dismissal. One was that Mr Ngapera had brought TEP into disrepute with the companies to which it contracted. While both subsequent events and Mr Jackson's evidence would confirm that is correct the problem for TEP is that Mr Dick conceded, when cross-examined, that he never raised this concern with Mr Ngapera. It follow TEP simply cannot comply with its obligation to put the issue to its employee, then seek and consider comment before making a decision.

[30] Furthermore, there must be some question about the substantive merit of this justification as while Mr Dick gave it as a reason for dismissal he also said, when cross-examined, that he did not raise this with Mr Ngapera as he didn't then know about the impact of Mr Ngapera's actions on TEP's relationship with JLE. In other words, and if this was truly a factor in the dismissal as Mr Dick has said, his own evidence strongly suggests he had no substantive reason for concluding the allegation valid at the time he made his decision.

[31] I now turn to the second allegation which, in Mr Dick's mind, warranted Mr Ngapera's dismissal, namely that Mr Ngapera had been drunk and disorderly. Considering first the process, and while Mr Ngapera accepts that when first approached he was asked what happened and allowed to express his views, the evidence is the contextual setting was one in which Mr Dick was simply making enquiries and there was no mention of disciplinary action. Indeed it was Mr Ngapera's evidence that following the discussion he thought Mr Dick considered it *all in a days play* and nothing further would be said.

[32] Mr Dick did not dispute this saying that when Mr Ngapera arrived he simply said *I've heard something, what do you have to say*. He said he heard Mr Ngapera out but felt he was less than forthcoming before saying something like *I've heard it was getting pissed*. Mr Dick accepts he then said he'd have to follow it up which he did.

[33] Having then heard from others, including the motelier and Mr Jackson, Mr Dick then concluded Mr Ngapera was guilty of serious misconduct and advised the dismissal absent any further detailed discussion. In other words the decision was made before Mr Dick had told

¹ Employment Relations Act 2000 at ss 103A(3)(b) to (d)

Mr Ngapera what he had heard and there was no opportunity for Mr Ngapera to comment before a decision was made. Again the requirements of s 103A of the Act have not been met.

[34] For the above reasons I conclude TEP has failed to justify the dismissal on either ground relied upon.

[35] The conclusion the dismissal is unjustified leads to the question of remedies. Mr Ngapera seeks \$18,200, being three months lost wages,² and a compensatory payment of \$25,000 pursuant to s 123(1)(c)(i) of the Act.³

[36] With respect to lost wages s 128(2) of the Act requires the payment of three months wages, which is the amount sought, or the actual loss, whichever is the least. While some confusion arose, the original statement was that Mr Ngapera had failed to get replacement employment within three months of dismissal.⁴ When giving oral evidence he suggested he might have had some casual work but could not remember when he got it. The subsequent provision of his bank statements shows that did not occur within three months of his dismissal from TEP and he has confirmed that meaning the amount claimed is payable.

[37] Turning to compensation. Supporting evidence in Mr Ngapera's written brief was sparse and amounted to some six lines stating he was humiliated, depressed, felt betrayed and was reluctant to go out in public. He reiterated these feelings in oral evidence but again the evidence was minimal. That said I accept hurt must emanate from a dismissal in circumstances such as these and Mr Ngapera showed visible signs of hurt during the investigation. I do not consider the evidence sufficient to justify a median award and having regard to both it and current trends with respect to compensation I consider \$10,000 appropriate.

[38] Finally the conclusion Mr Ngapera has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.⁵ While it is clear Mr Ngapera did not contribute to the various failures, particularly procedural, which led to his claims success his own evidence is that his conduct was less than perfect and warranted censure (refer [11] above).

² Brief of evidence at [35]

³ Statement of Problem

⁴ Brief of evidence at [32]

⁵ Section 124 of the Employment Relations Act 2000

[39] Having considered other examples of reduction for contribution, I conclude ten percent appropriate.

Conclusion and Orders

[40] For the above reasons I conclude Mr Ngapera has a personal grievance in that he was unjustifiably dismissed. As a result I order the respondent, Taranaki Engineering Proud Limited, pay Mr Ngapera:

- (a) \$16,380.00 (sixteen thousand, three hundred and eighty dollars) gross as recompense for wages lost as a result of the dismissal; and
- (b) A further \$9,000.00 (nine thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[41] Costs are reserved. The parties are encouraged to resolve this between themselves and by way of assistance I remind them the Authority generally uses a tariff approach. As this investigation took about a third of a day that would mean a starting point in the order of \$1,500.

Michael Loftus
Member of the Employment Relations Authority