

This determination includes an order prohibiting publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 488
3203799

BETWEEN OIT
 Applicant

AND HKL
 Respondent

Member of Authority: Peter van Keulen

Representatives: Kevin Mclaughlan, advocate for the Applicant
 Wendy Larsen, representative for the Respondent

Investigation Meeting: 7 August 2023

Submissions Received: 7 August 2023 from the Applicant
 7 August 2023 from the Respondent

Date of Determination: 30 August 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] OIT was employed by HKL as a Site Supervisor, in HKL’s building business.

[2] OIT left work early one Friday afternoon leaving site security, which he would check at the end of each working day, in the hands of other employees. Over the course of the weekend HKL discovered two breaches of its site security – one was a building site left

unlocked and the other was building material in HKL's yard left unsecured such that the materials blew off site and onto neighbouring properties.

[3] HKL conducted a disciplinary process with OIT resulting in a 12-month written warning being issued to him. OIT disagreed with the warning, believing he was not at fault for the security issues. OIT resigned and claimed he was constructively dismissed.

[4] It is OIT's claim for constructive dismissal and, in the alternative, unjustified action causing disadvantage that I have investigated and this determination resolves.

The Authority's investigation

[5] I investigated OIT's claims by receiving written evidence and documents, by holding an investigation meeting on 7 August 2023, in which the witnesses answered questions about their written evidence, and by assessing the oral and written submissions of the parties' representatives.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Non-publication orders

[7] Before I turn to consider OIT's claims I will deal with a request for non-publication orders made by HKL. HKL is concerned about negative publicity and damage to its reputation arising for it out of my determination.

[8] HKL says the negative publicity will arise because the events that are central to the claim being determined by me deal with security at HKL's various building sites and its own yard. HKL says the events that occurred over the weekend in question caused harm to its reputation at the time and having them repeated in a publicly available document will cause ongoing harm and damage to its reputation. And, crucially it says this is not fair as OIT was responsible for the security failings and there is no basis for his claims, yet despite this and

even if the claims are successfully defended HKL will come out of this process worse off in terms of its reputation being damaged – and that is wrong if it is not at fault.

[9] My discretion to make the non-publication order sought is broad but I must exercise it in line with the applicable principles. The key principle is that of open justice i.e., parties being named and identified in litigation. But that principle can be displaced by sound reasons.¹ What I need to be satisfied of, in order to depart from the principle of open justice, is that there is a material risk of adverse consequences for a party if it is named in my determination.²

[10] In this case there are particular circumstances, which I will not identify, that mean there is a material risk of adverse consequences for HKL if it is named in my determination; these adverse consequences include negative publicity resulting in potential loss of reputation and goodwill and loss of business.

[11] Overall, I am satisfied that the concerns raised support non-publication orders being made.

[12] So pursuant to Clause 10 of schedule 2 of the Act, I grant non-publication orders prohibiting the publication of name and identity of HKL. In order to effect this I also order non-publication of OIT's identity as otherwise HKL might be identified through him.

[13] I have adopted the following references for the purposes of this determination:

- (a) The applicant will be referred to as OIT.
- (b) The respondent will be referred to as HKL.
- (c) Other employees and certain information specific to HKL and its business will not be identified but referred to in generic terms.

¹ *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511; and *JGD v MBC Ltd* [2020] NZEmpC 193.

² *GF v Comptroller of Customs* [2022] NZEmpC 47.

Issues and steps for resolving the employment relationship problem

[14] The two personal grievances have a similar threshold issue to resolve. I will describe how that threshold issue arises for each grievance in turn and will then outline how I will proceed to resolve that issue and the other aspects of OIT's claims, as required, once the threshold issue is resolved.

Unjustified action causing disadvantage

[15] An unjustified disadvantage personal grievance is set out in section 103(1)(b) of the Act. An employee may have a personal grievance where their employment or any condition of employment is or was affected to their disadvantage by some unjustified action by their employer.

[16] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustified action causing disadvantage personal grievance are:

- (a) Were there any unjustified actions carried out by HKL in respect of OIT?
- (b) If so, did the actions cause any disadvantage to OIT's employment or a condition of employment?

Unjustifiable dismissal

[17] The first issue for an unjustifiable dismissal grievance is, was the employee dismissed?

[18] In this case OIT was not dismissed by HKL; he resigned. OIT says that his resignation amounts to a constructive dismissal because he resigned in response to breaches of duty by HKL, i.e., his resignation should be treated as a dismissal.

[19] The relevant case law shows that for a constructive dismissal I need to be satisfied that:³

- (a) There was a breach of duty by HKL.
- (b) The breach of duty was sufficiently serious, i.e., repudiatory or dismissive, to warrant OIT's resignation.
- (c) It was reasonably foreseeable that OIT might resign in response to the breach.
- (d) OIT did resign in response to that breach of duty.

[20] If these things are established such that OIT was dismissed, I must then consider the second issue; was the dismissal justified?

Steps for investigating OIT's claims

[21] The threshold issue to answer is did HKL act in the manner alleged as being an unjustified action and a breach of duty; that is, was the decision to issue OIT with a 12-month warning an unjustified action and/or a breach of duty?

[22] So, I will decide if HKL acted justifiably in giving the 12-month warning to OIT:

- (a) If it did not, there is an unjustified action and a breach of duty; I will then consider whether HKL's actions give rise to an unjustifiable dismissal personal grievance or an unjustified disadvantage personal grievance, by considering the other issues for each grievance as set out above.
- (b) If it did, there is no unjustified action and no breach of duty; and that means there is no basis for OIT's personal grievances and his claims will end there.

[23] If either personal grievance is established, I will then consider what remedies OIT is entitled to.

³ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

What happened?

Terms of employment for OIT

[24] OIT was employed by HKL as a Site Supervisor. He worked Monday to Friday completing 45 hours between the hours of 7:00 am and 6:00 pm.

[25] OIT said his role required him to look after building sites, supervise foremen and work on the tools. In regard to site security, he explained that he would do a walk through of all building sites at the end of each day to check security and also to check on progress of the builds.

[26] HKL says OIT's role specifically included responsibility for site security and safety, adding a layer of supervision to these aspects as it had less than ideal results in the past by relying simply on its various foremen.

[27] HKL acknowledged there was also a construction manager who OIT reported to and he also had responsibility for site management including security, particularly in OIT's absence.

OIT leaves work early on Friday, 20 May 2022

[28] On Monday, 16 May 2022, OIT decided he would like to leave work early on Friday 20 May. It was not normal practice for employees of HKL to leave work early, there was no flexi-time arrangement and employees generally worked a set routine of hours completing 9 hours work per day and 45 hours per week.

[29] Despite this, and probably because leaving three hours early this particular Friday was an exception to his normal working hours, on Monday 16 May 2022, OIT spoke to the Construction Manager about leaving three hours early on the Friday. The Construction Manager was not at work all of the week commencing 16 May, so would not be there on the Friday 20 May, but agreed that OIT could leave early on that day.

[30] Having obtained permission from the Construction Manager to leave early on Friday, 20 May 2022, OIT did not apply for leave, which would have required the approval of the

Managing Director of HKL, given OIT's seniority in the business. And OIT did not notify the Managing Director of his intention to leave early.

[31] In terms of site security in OIT's absence (and the Construction Manager), OIT delegated this responsibility to relevant foremen, advising them to ensure each building site they were working on was secure at the end of the working day on Friday, 20 May 2022. He also told the Project Manager he was leaving early.

[32] With this in place and because he had permission from the Construction Manager, OIT left work early on Friday, 20 May 2022.

Security issues on Saturday, 21 May 2022

[33] On Saturday, 21 May 2022, HKL was advised of two separate site security issues. First, an owner of a new build visited the building site of the house and discovered that the site had been left open with fences blown over and the keys left in the door to the house. Second, neighbours of HKL's yard reported that building materials from the yard had been blown across into their properties.

[34] The Managing Director of HKL was made aware of the site security issues over the weekend and a representative from HKL dealt with both issues, attending the sites and securing the house and the building materials.

HKL's investigation into the security issues

[35] On Monday, 23 May 2022, the Managing Director spoke to OIT and the Construction Manager about the site security issues over the weekend. OIT told the Managing Director that he had left early on Friday 20 May. OIT admitted he had not applied for leave and had simply told the Project Manager that morning that he was leaving early.

[36] The Managing Director said in evidence that OIT also accepted that he was responsible for site security and that he probably should not have left early, and OIT said security issues (over the weekend) were not good enough and it was not ideal.

Disciplinary process

[37] Having spoken to OIT and knowing what had occurred in terms of the site security issues, the Managing Director decided he had enough information to decide if HKL should hold a disciplinary process with OIT; his decision was that this was appropriate.

[38] The Managing Director identified two concerns both of which he believed had been admitted by OIT in the discussion on Monday morning:

- (a) That OIT had taken time off from work and had not applied for leave.
- (b) As a result of taking this time off work OIT had been negligent in his obligation to ensure site security was satisfactory at the end of each working day.

[39] The Managing Director set these concerns out in a letter to OIT dated 23 May 2022. In this letter HKL invited OIT to attend a disciplinary meeting, cautioning him that if, as a result of that meeting, HKL decided his behaviour amounted to misconduct he might receive a written warning. The letter also set out that OIT was entitled to bring a representative or support person with him to the meeting.

[40] The disciplinary meeting was held on Wednesday 25 May 2022. OIT attended the meeting on his own. The Managing Director and a consultant to HKL attended on behalf of HKL.

[41] In the disciplinary meeting OIT was given an opportunity to provide his explanation for the events that occurred and his response to the concerns as set out in the letter of 23 May 2022.

[42] OIT explained that he had been around all of the building sites on the morning of 20 May 2022 telling all of the foremen to ensure sites were left clean and secure as he was leaving at 2:30 that afternoon. That he then left at 2:30, having cleared that with the Construction Manager in advance. He clarified that he had not applied for leave but had approval from the Construction Manager to leave early. He explained that he thought site

security would be okay as he had left it with the foremen and they would do what was required.

[43] The Managing Director and the consultant both said in evidence that OIT accepted responsibility for the site security failings over the weekend, saying it was not acceptable and should not have happened.

[44] OIT said in evidence he did not accept responsibility for the site security failings as he had delegated the responsibility to the foremen and they had failed, not him.

HKL gives OIT a warning and OIT resigns

[45] After the disciplinary meeting the Managing Director considered the explanations provided by OIT and concluded:

- (a) No sanction was appropriate in respect of taking time off without applying for leave. OIT had spoken to the Construction Manager and obtained approval to leave early; this was the wrong thing to do, but OIT did not know that at the time.
- (b) That a written warning was appropriate for OIT's failings in respect of the site security. OIT had been negligent in leaving work early when the Construction Manager was not at work and without informing the Managing Director so that a senior person was able to check site security at the end of the working day; leaving site security to the various foremen was not acceptable, and OIT knew that.

[46] HKL then gave OIT a written warning, dated 25 May 2022, which was to remain in place for 12 months.

[47] OIT was unhappy with receiving a written warning but he did not raise any concerns or issues with HKL. On 1 June 2022 OIT resigned, giving four weeks' notice.

[48] On 2 June 2022 OIT was unwell and did not attend work. He was subsequently signed off work on sick leave by his doctor for the rest of June 2022 and, as a result he did not return to work.

Did HKL act justifiably in deciding to issue OIT with a warning?

[49] The question of whether HKL acted justifiably in deciding to issue OIT with a warning must be assessed in two parts. First, whether HKL carried out a fair process in coming to the decision to issue a warning and second, whether its decision to issue a warning was substantively justified.

The process adopted by HKL

[50] Whether a disciplinary process was justified is governed by s 4(1A) and s 103A of the Act. Based on these sections, in order to carry out a fair process when disciplining OIT, HKL needs to show that:

- (a) It investigated what occurred in terms of the concerns it had about OIT's conduct.
- (b) It set out these concerns, provided relevant information and explained the possible implications of an adverse finding, so that OIT could consider all of this and respond.
- (c) It gave OIT a reasonable opportunity to respond to these concerns, before it made its decision on what had occurred and whether this justified a warning being issued.
- (d) It considered what OIT said before it made its decision on what happened and that a warning was appropriate.

[51] I am satisfied that HKL did enough to investigate the site security issues and OIT's involvement in those issues. The Managing Director undertook the investigation and this involved assessing the advice he received from the person who attended to the site security

issues on Saturday 21 May 2023 and his discussion with OIT and the Construction Manager on Monday 23 May.

[52] The key to the adequacy of the investigation is that the Construction Manager believed he had received an admission from OIT. OIT says he did not admit responsibility for the site security issues so he disputed the conclusion that he had made an admission and, in those circumstances, he questioned the adequacy of the investigation.

[53] I find that OIT did admit responsibility for the site security issues. The evidence on this aspect fits together and is credible; HKL personnel say he did, HKL's contemporaneous actions are consistent with this and there are contemporaneous notes that support this.

[54] But, even if OIT did not admit responsibility for site security issues, he did admit the actions that gave rise to the issues, i.e., that he left without getting leave approved (albeit with the agreement of the Construction Manager) and in doing so he left site security in hands of others, which he was not authorised to do. In this case even this limited admission is enough to satisfy the requirements on HKL to investigate the concerns.

[55] The remaining steps of the process adopted by HKL are straightforward:

- (a) HKL provided information to OIT that set out its concerns. The letter of 23 May 2022 was clear and OIT understood the concerns.
- (b) OIT was given an opportunity to answer the concerns raised by HKL. The disciplinary meeting on 25 May 2022 was conducted appropriately and there was no prejudice or disadvantage to OIT. OIT had an opportunity to explain what happened and respond to the concerns, which he did.
- (c) HKL did consider what OIT said in the disciplinary meeting before it made its decision. The best evidence of this is the fact that HKL decided OIT was not responsible in terms of failing to obtain leave and therefore a sanction was not appropriate.

[56] Overall, I am satisfied that HKL carried a fair and justified process with OIT.

The substantive decision

[57] The question of whether the substantive decision, i.e., the decision to issue OIT with a warning, is justified turns on whether the decision was one that a fair and reasonable employer could have come to in all of the circumstances.⁴

[58] The relevant circumstances in this case include:

- (a) OIT knew that he or the Construction Manager had responsibility for checking site security at the end of each day. HKL had discussed this with both of them prior to 20 May 2022 in terms of expectations on them and in response to specific failures with site security; in particular site security incidences on 16 December 2021 had led to a formal discussion and HKL reiterating to both OIT and the Construction Manager that site security was their responsibility and it needed ongoing monitoring.
- (b) OIT knew that by leaving early on 20 May 2022 neither he nor the Construction Manager would be available to check site security at the end of the day.
- (c) OIT knew that HKL had struggled with site security in the past when this had been left to various foremen dealing with individual work sites.
- (d) Knowing these three points (above) OIT must have known that leaving site security with individual foremen would not be acceptable to HKL and he should have discussed alternative arrangements with HKL (notably the Managing Director).
- (e) The failure by OIT to check site security at the end of 20 May 2023 and the failure to have a suitable alternative in place led to two incidences of site security which were significant for HKL.

[59] In these circumstances a fair and reasonable employer could conclude that:

⁴ Section 103A of the Act.

- (a) The site security issues that occurred on 21 May 2023 were a result of negligence by OIT.
- (b) Therefore, OIT was ultimately responsible for the site security issues that occurred on 21 May 2022.
- (c) This amounted to misconduct by OIT.
- (d) And a 12-month warning was the appropriate sanction – noting that this outcome was in line with HKL’s employee handbook.

[60] Therefore, I conclude that the 12-month warning issued to OIT was substantively justified.

Conclusion on HKL’s decision to issue OIT with a warning

[61] HKL acted justifiably in issuing OIT with a 12-month written warning and HKL did not breach any of the duties it owed to OIT. It follows that there is no basis for OIT’s personal grievances.

Wage arrears

[62] In his statement of problem OIT has claimed payment for his notice period from 2 June 2022, when he resigned; this is expressed as a loss arising out of the alleged unjustifiable dismissal. As OIT has not been successful with his unjustifiable dismissal claim I do not need to consider this remedy.

[63] However, in terms of the notice period I wish to record, for completeness in case there remains any issue over OIT’s entitlement to be paid during the notice period, my finding that OIT was paid correctly during the notice period; OIT was not working and on sick leave and HKL paid him what accrued sick leave pay was owing.

Conclusion

[64] OIT’s claims are not successful.

Costs

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, HKL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum OIT will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[66] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁵

Peter van Keulen
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.