

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 341
5444344

BETWEEN DARRYL MELVILLE PATON
 Applicant

A N D LENDICH CONSTRUCTION
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Roland Samuels Advocate for Applicant
 Danny Lendich Director of Respondent

Investigation Meeting: 18 August 2014 at Auckland

Date of Determination: 19 August 2014

DETERMINATION OF THE AUTHORITY

- A. Lendich Construction Limited (Lendich Construction) unjustifiably dismissed Mr Paton.**
- B. Lendich Construction is ordered within 28 days of the date of this determination to pay Mr Paton:**
- a. \$2,630 lost remuneration;**
 - b. \$4,000 distress compensation.**

Employment relationship problem

[1] Mr Paton worked as a casual truck driver for Lendich Construction for approximately two years before he left to go to Australia to work for a period of time. When Mr Paton later returned to New Zealand he approached Mr Lendich (sole director and shareholder of Lendich Construction) for work. Mr Paton was offered

and accepted full time work as a truck driver. Mr Paton worked for seven and a half days before Mr Lendich dismissed him on 7 November.

[2] Mr Paton claims he was working on the platform of a concrete crusher machine¹ when he became aware of Mr Lendich beside him on the platform pushing him. Mr Paton says he retreated by climbing down the ladder of the machine. He claims Mr Lendich followed him down off the platform and assaulted and abused him.

[3] Mr Paton claims Mr Lendich pushed him in the chest with both hands, hit his hard hat off his head and punched him on the right cheek while yelling at him “*piss off and fuck off the property*”. Mr Paton says he left the worksite and raised concerns about what had happened with the Operations Manager, who told Mr Paton to go home.

[4] Around 3pm that day the Operations Manager called Mr Paton and confirmed he did not have a job because Mr Lendich did not want him around. Mr Paton was told to come in to work the next day to return all company property. Mr Paton met with the Operations Manager who apologised for Mr Lendich’s behaviour. When Mr Paton asked why he had been dismissed he was just told that Mr Lendich (owner of the company) did not want him around.

[5] Mr Paton claims his dismissal was substantively and procedurally unjustified.

[6] Mr Lendich claims Mr Paton’s dismissal was justified because he “*was useless*”. Mr Lendich denies assaulting Mr Paton. Mr Lendich admits he shoved Mr Paton in the chest but says he only did that for Mr Paton’s own safety to get him out of the way of an expel shoot on the concrete crusher machine.

[7] Mr Lendich admits he knocked Mr Paton’s hard hat off his head but says he only did that because he thought it was a company hat and he did not want Mr Paton to leave the worksite with it. It turns out the hard hat was Mr Paton’s own hat not the company’s. Mr Paton says he left his hard hat on the ground because he decided he needed to make a hasty retreat in the face of Mr Lendich’s unexpected and unexplained anger.

¹ He was wearing safety goggles and earmuffs and was working to remove timber and plastic debris from the conveyor belt of the machine before the debris got into the concrete crusher part of the machine. He had not seen or heard anything before Mr Lendich suddenly appeared on the platform and started pushing him.

[8] Mr Lendich admits that he did not tell Mr Paton why he had been told to “*piss off and fuck off*” and that Mr Paton was never given any explanation for his dismissal. There is no dispute that no disciplinary allegations were ever put to Mr Paton to respond to and there was no disciplinary process or any supporting or relevant documentation prepared regarding this event. There were no records of any kind apart from Mr Paton’s final pay slip.

[9] Mr Lendich repeatedly told the Authority (in very strong terms) that he (acting on behalf of Lendich Construction) was completely justified in all of the actions he had taken. Mr Lendich maintains his actions towards Mr Paton were necessary and appropriate because he (Mr Lendich) takes health and safety extremely seriously and he had to take immediate action because he believed Mr Paton was doing his job in an unsafe manner.

[10] Mr Lendich says after viewing Mr Paton working on the concrete crusher he concluded Mr Paton was “*completely useless*” and a danger to himself which is why he wanted him gone immediately. Mr Lendich says he is not one for paperwork because he is out on the job with his employees every day and he deals with issues on the spot. Mr Lendich prides himself his company’s enviable health and safety record which he attributes to the hard-line he takes to such issues.

Issues

[11] The following issues are to be determined:

- a. Was Mr Paton’s dismissal justified?
- b. If not, what if any remedies should be awarded?
- c. What if any costs should be awarded?

Was Mr Paton’s dismissal justified?

Justification test

[12] Lendich Construction bears the onus of establishing on the balance of probabilities that Mr Paton’s dismissal was justified. Justification is assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether Lendich

Construction's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time that Mr Paton was dismissed.²

[13] A fair and reasonable employer is expected to comply with its statutory obligations. This includes the good faith obligations in s.4(1A) of the Act to provide an employee whose employment may be adversely affected by an employer's decision with relevant information before a final decision is made. It also includes compliance with each of the four procedural fairness tests set out in s.103A(3) of the Act.

Good faith obligations

[14] I find that Lendich Construction did not comply with its good faith obligations. Mr Paton was not given any information. He had no idea why Mr Lendich was so angry and upset, why he was being pushed around by Mr Lendich, why his hard hat had been knocked off him or why he had been ordered to leave immediately. In the absence of any information about his employer's concerns Mr Paton was deprived of the opportunity to address such concerns.

Procedural fairness

[15] Lendich Construction failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act. There was no investigation. No allegations or concerns were ever put to Mr Paton to respond to. Mr Lendich never explained why he was so angry at Mr Paton. There was no disciplinary process. There was also no explanation ever given to Mr Paton regarding the reasons for his dismissal.

[16] I find that these are serious and fundamental breaches of the most basic procedural fairness requirements which resulted in substantial unfairness to Mr Paton.

Previous "warnings"

[17] Mr Lendich sought to rely on a pattern of safety breaches by Mr Paton to justify the dismissal on 7 November. He claims he gave Mr Paton two previous verbal warnings for health and safety breaches and that the incident that occurred on 7 November 2013³ was the "*final straw*."

² Section 103A(2) of the Act.

³ Day Mr Paton was sent home.

[18] Mr Lendich claims the first verbal warning was given in relation to an incident where Mr Paton allegedly backed and parked a truck incompetently during a job he did in Mangere. Mr Lendich alleges the second verbal warning was given after he saw Mr Paton driving the work truck while smoking with his young son in the truck with him. Mr Lendich claims he gave verbal warnings for each of these issues which he categorises as safety breaches.

[19] Mr Lendich accepts there is no documentation around these two events and that there was no disciplinary process or even specific allegations put to Mr Paton about either of these matters. Mr Lendich could not recall when either event occurred and there were no records kept of these alleged incidents or verbal warnings.

[20] Mr Paton denies receiving any warnings prior to his dismissal. I accept that evidence.

[21] Mr Paton says the Mangere job and the driving with his son in the truck incidents (he denies smoking) both occurred while he was a casual employee before he went to Australia. I accept that evidence and find these previous alleged safety concerns are irrelevant to the dismissal which occurred on 7 November 2013.

[22] These two previous incidents (even if they did occur as Mr Lendich claims and I have my doubts about that) clearly had nothing to do with the permanent employment from which Mr Paton was dismissed.

[23] If these incidents did occur they related to a previous engagement involving casual employment. That raises the unanswered question about why Mr Lendich would permanently employ Mr Paton if during his earlier casual employment he was the health and safety risk that Mr Lendich now makes him out to be.

Health & safety concerns

[24] In terms of establishing that Mr Paton's actions amounted to serious breaches of health and safety I find that Lendich Construction has failed to establish that on the balance of probabilities. The specific safety concerns Mr Lendich reported to the Authority were that Mr Paton was smoking with one hand and removing items from the conveyor belt with the other hand and that he was "*shaking*" whilst standing on the concrete crusher platform.

[25] Mr Lendich told the Authority he observed these issues for approximately half an hour before climbing onto the platform to “*show Mr Paton how to do it.*” That is a surprising way to deal with the alleged health and safety breaches given the concern he expressed about them to the Authority.

[26] Mr Lendich admits he did not stop the machine (which he could do from the ground) and he did not speak to Mr Paton, who was wearing earmuffs. If there had been genuine health and safety concerns these would have been basic first steps to take. It is hard to see how Mr Lendich climbing onto the platform beside Mr Paton without any attempt to communicate with Mr Paton was appropriately or adequately addressing any perceived health and safety concerns.

Substantive justification

[27] I consider the failure to meet basic good faith requirements and the complete absence of any kind of process undermines Lendich Construction’s ability to establish that it had a good reason for dismissing Mr Paton.

[28] I also find that it is not open to a fair and reasonable employer faced with the situation Mr Lendich describes to react in the manner in which he did in response to perceived safety concerns. Even more so when Mr Paton had not been given any guidance, training or instructions on how he was to do the job he was doing at the time Mr Lendich confronted him.

[29] I consider Mr Lendich’s actions were unnecessarily aggressive and confrontational. There was no need for him to physically knock Mr Paton’s hard hat off his head while he was wearing it – Mr Lendich could and should have just asked for it to be handed over. Nor did he have to physically push Mr Paton – Mr Lendich could have just turned the machine off using the emergency switch.

[30] The fact that Mr Lendich admits shouting and swearing at Mr Paton while simultaneously knocking his hat off and pushing him in the chest supports Mr Paton’s account of an aggressive and worrying encounter with an employer who appeared to have suddenly lost control of himself.

[31] The facts as I have found them to be do not suggest that this is a situation in which there were genuine safety concerns which a fair and reasonable employer could decide to dismiss an employee over. The worst that could be concluded based on Mr

Lendich's own evidence is that Mr Paton smoking while working on the platform and "shaking" both of which Mr Paton denies.

[32] Accordingly I find this is not a situation in which a fair and reasonable employer could have justifiably dismissed Mr Paton, based on the information available at the time he was dismissed, had a fair and proper process been followed.

[33] I consider that Mr Paton's dismissal was fundamentally flawed in all respects. It was procedurally unfair and substantively unjustified. Accordingly, I find Lendich Construction unjustifiably dismissed Mr Paton.

What if any remedies should be awarded?

Mitigation of loss

[34] I accept Mr Paton's evidence that he took appropriate steps to mitigate his loss. He found casual work driving trucks within a week and that lasted until Christmas. He then obtained a permanent job three months after his dismissal.

Lost remuneration

[35] I am satisfied on the balance of probabilities (based on the evidence of earnings Mr Paton produced at the investigation meeting) that he has lost total remuneration of \$2,630 over the three month period following his unjustified dismissal.

[36] It is appropriate for him to be compensated for that lost. Accordingly Lendich Construction is ordered to pay Mr Paton \$2,630 under s.128(2) of the Act to compensate him for his actual lost remuneration.

Distress compensation

[37] I also accept Mr Paton's evidence that he was humiliated, distressed and stressed as a result of his unexpected and unjustified dismissal. The aggressive manner in which it occurred and the complete lack of any information about why he had been dismissed are factors which I find aggravated Mr Paton's distress. Mr Paton has custody of his young son so losing his income and permanent job caused him some anxiety.

[38] Lendich Construction is ordered to pay Mr Paton \$4,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

Contribution

[39] Having concluded that Mr Paton has a dismissal grievance, s.124 of the Act requires me to assess the extent (if any) to which Mr Paton contributed to the circumstances which gave rise to his grievance and to reduce any remedies accordingly.

[40] Contribution requires blameworthy conduct which must be established on the balance of probabilities. Mr Lendich's complaint was essentially that Mr Paton was smoking whilst working on the crusher which meant he was using one hand to remove debris and not two hands. Mr Paton completely denies that he was smoking and maintains he was using two hands.

[41] The absence of any kind of investigation or process and the failure of Mr Lendich to put any allegations to Mr Paton at the time or to provide any explanation at the time of dismissal about why Mr Paton had been dismissed means Lendich Construction is unable to establish blameworthy conduct by Mr Paton to the required standard.

[42] I am therefore not satisfied that Mr Paton contributed to the situation which gave rise to his grievance so his remedies are not reduced on the grounds of contribution.

[43] I note that if Mr Lendich's version of events is correct (and the evidence did not satisfy me it was) I would have expected him to have stopped the crusher machine and called Mr Paton down so that they could talk about what was required whilst Mr Paton was not wearing safety glasses and earmuffs which obstructed his ability to see and hear what was going on around him while he was working on the platform of the crusher.

[44] If Mr Lendich had genuine safety concerns about the manner in which Mr Paton was doing the job then he (Mr Lendich) could and should have raised that with Mr Paton in a calm, clear and reasonable manner. At the very least Mr Paton should

have been given training on how to do the job that was required of him and on the safety aspects associated with the job he was required to do.

[45] Mr Lendich could also have issued Mr Paton with clear instructions regarding what was expected of him and outlined the possible consequences of not complying with such instructions. None of that occurred so it is difficult to see how Mr Paton could have engaged in blameworthy conduct when he was just doing the best he could at the time.

Outcome

[46] It is found that Mr Paton was unjustifiably dismissed by Lendich Construction. It is ordered within 28 days of the date of this determination to pay Mr Paton:

- a. \$2,630 lost remuneration; 349.06 wages arrears from 14 January to 19 April 2013;
- b. \$4,000 distress compensation.

What if any costs should be awarded?

[47] Mr Paton was represented by an Advocate so it is not clear whether he has actually incurred any costs. If Mr Paton has incurred costs then as the successful party he is entitled to a contribution towards his actual legal costs. If Mr Paton wishes to claim costs then he must provide proof of the legal costs he has actually incurred.

[48] The parties are encouraged to resolve costs by agreement but if that is not possible Mr Paton has 14 days within which to file costs submissions, Lendich Construction has 7 days within which to respond with Mr Paton having a further 7 days within which to file any reply submissions. This timetable will be strictly enforced and any departure from it requires the prior leave of the Authority.

[49] In assist the parties in reaching an agreed position on costs the Authority indicates that it is likely to adopt its usual notional daily tariff based approach to assessing costs. This matter involved a half day investigation meeting so the starting point for assessing costs is therefore \$1,750 (being half of the current notional daily tariff of \$3,500).

[50] If a costs application is made then the parties are invited to specifically identify in their costs submissions any factors which they say should result in the notional starting tariff of \$1,750 being adjusted.

Rachel Larmer
Member of the Employment Relations Authority