

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 223
5619868

BETWEEN DANIEL REVELEY
Applicant
A N D MIKE GALLOP BUILDERS
LIMITED
Respondent

Member of Authority: David Appleton
Representatives: Ma'á Faletanoai, Counsel for Applicant
Mike Gallop, Advocate for Respondent
Investigation Meeting: 16 December 2016 at Christchurch
Submissions Received: 16 December 2016 from both parties.
Date of Determination: 21 December 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Reveley's dismissal was procedurally unjustified, but substantively justified. He is awarded \$3000 under s. 123(1)(c)(i) of the Employment Act 2000.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Reveley claims that he was unjustifiably dismissed from his employment on 19 February 2016. The respondent denies that Mr Reveley was unjustifiably dismissed and asserts that the dismissal was due to the company ceasing to trade.

Brief account of events leading to the dismissal

[2] Mr Reveley was employed by the respondent as a leading hand, earning \$30 an hour at the time of the termination of his employment. Whilst the respondent company was a small operator, employing only two people at the time it ceased trading, it had had some reasonably large contracts in its pipeline.

[3] In January 2016, some damage was suffered by the work van that Mr Reveley had been given the use of, while parked outside a house where a party was taking place. Mr Reveley had permission to use the van for reasonable personal use but Mr Gallop does not consider that that extends to being parked outside of a house where a party was taking place.

[4] Over the Waitangi weekend of 2016, tools worth several thousands of dollars were stolen from the respondent company's container on site. Mr Gallop, the director of the company, holds Mr Reveley partially responsible for the theft, as he was the leading hand on site, and Mr Reveley had relied on the apprentice to check the container had been properly locked rather than checking himself, as instructed. Mr Reveley says that Mr Gallop had advised him not to spend time going around site, and to use the apprentice for such tasks.

[5] It is agreed that, on the morning that the theft was discovered, Mr Gallop told Mr Reveley and the apprentice that the company may not be able to carry on because of the theft.

[6] Work was able to continue with the remaining tools and new tools purchased by the company, but on Friday 12 February, Mr Reveley injured his shoulder at work. This turned out to be a substantial injury requiring five weeks off work. Mr Gallop says he was annoyed because, the following week, he found out through a third party (who had found out via Facebook) that Mr Reveley's injury involved his rotator cuff, which Mr Reveley knew would take several weeks to recover. Mr Gallop says that Mr Reveley should have kept him fully informed.

[7] During this period, it appears that Mr Gallop and Mr Reveley had some heated discussions. I understand that both men were feeling stressed and under pressure.

[8] On 17 February, Mr Gallop was told by one of his customers that a contract for a commercial repair job was being withdrawn. On the following day, Mr Gallop was told that another contract involving a new build was being withdrawn.

[9] Upon learning of the loss of the second contract, Mr Gallop took advice from his accountant, and decided to finish the project he was working on and then to close the company down, to avoid getting into further debt.

[10] On Friday 19 February, Mr Gallop called Mr Reveley and told him he was giving him notice of termination of employment. Mr Reveley says that he was not given notice. It appears, however, that there has been some confusion between Mr Gallop and Mr Reveley about what was meant by the word “notice”, with Mr Reveley using the term to mean warning, whereas Mr Gallop used it to mean contractual notice.

[11] There also appears to have been some confusion about the use of the word “dismissed”, with Mr Gallop saying he did not dismiss Mr Reveley, but gave him notice. However, even with notice being given, the termination of Mr Reveley’s employment was a dismissal, the term being neutral, and not necessarily meaning an unfair termination. Finally, Mr Gallop apparently denied that Mr Reveley was being made redundant. However, as I will find, he clearly was, as his post was surplus to requirements once the company ceased trading.

[12] The telephone conversation became heated, and during the ensuing argument, Mr Gallop said words to the effect that, “if he [Mr Reveley] wanted to go down that road, he would give him warnings for the damage to the van and the theft of the tools from the container”.

[13] Some further correspondence between the two men then took place concerning the return of company property, and final pay.

Issues to be determined

[14] I am satisfied that Mr Reveley was paid all outstanding sums owed to him, given that he was entitled to be given two weeks’ notice under the employment agreement and that he was in receipt of ACC compensation during that two week period, after the telephone conversation. He was paid his final holiday pay. The sole

issue to be determined, therefore, is whether Mr Reveley's dismissal was justified or not.

[15] Section 4(1A) of the Employment Relations Act 2000 (the Act) sets out the following requirements:

4(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[16] Section 103A of the Act sets out the test of justification, including the key steps that the employer must follow when it is contemplating a dismissal, as follows:

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

[17] Although Mr Gallop did mention the damage to the van and the theft of the tools from the container during the dismissal conversation, I am satisfied that he did so because he was angry, and that the sole reason for Mr Gallop dismissing Mr Reveley on 19 February 2016 was due to his decision to close the company and cease trading with effect from 31 March 2016. I am also satisfied that this closure actually occurred, either on 31 March 2016 or 1 April 2016 at the latest. I am also satisfied that Mr Gallop now no longer operates his own business, and that he is now an employee himself.

[18] I believe that Mr Faletanoai accepts on behalf of his client that the dismissal was substantially justified, as Mr Reveley would have been dismissed by the time he was well enough to come back to work, even if a fair process had been followed. I must find that the dismissal was substantively justified.

[19] However, I am satisfied that the process followed in dismissing Mr Reveley was unjustified, as no opportunity was given for Mr Reveley to comment upon a proposal to dismiss him, and, indeed, Mr Gallop refused to answer Mr Reveley's question whether the company as being shut down. Mr Reveley did not know it had shut down, and that the apprentice had also been dismissed, until sometime later.

[20] It is very likely that Mr Reveley could have said nothing to prevent the company from shutting down, given the loss of the contracts. However, Mr Reveley was entitled to know why he was being dismissed, and he was not even told that. This is a fundamental flaw in the process required by ss 4 and 103A of the Act. Whilst I appreciate that Mr Gallop was stressed, and angry, he was still acting as the agent of the employer, and as such had basic responsibilities to comply with the relevant legislative requirements.

[21] Mr Faletanoai submits that Mr Reveley was treated unequally in comparison with the apprentice because the apprentice was given notice the following week. It also seems that the apprentice was given more notice than Mr Reveley. However, I do not accept that being dismissed one working day earlier renders Mr Reveley's dismissal unjustified per se. As far as the different notice periods are concerned,

Mr Reveley was unable to work, and he was only entitled to two weeks' notice under the employment agreement. The respondent could choose to give another employee longer notice if it chooses, so long as there is a justified reason for doing so. In this case there was, as the apprentice was needed to assist in finishing the existing contract.

Conclusion

[22] I conclude that, whilst Mr Reveley's dismissal was substantively justified, it was procedurally unjustified, as no fair and reasonable employer could have failed to have followed a fair process in dismissing Mr Reveley in all the circumstances. He therefore has a personal grievance.

Remedies

[23] Section 123(1) of the Act provides as follows:

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

....:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

[24] My conclusion means that Mr Reveley is not entitled to receive any remedies in relation to lost wages, as he would have been dismissed prior to his recovery in any event, even if a fair process had been followed.

[25] However, he is eligible to be considered for an award for compensation arising out of any humiliation, loss of dignity, and injury to the feelings that he suffered because of the defective process. This is not humiliation, loss of dignity, and injury to the feelings arising out of the dismissal, as that dismissal was substantively justified.

[26] Mr Reveley was not very expansive about the effects he says he suffered. Most of his evidence related to the effects on his financial situation, and some of that

seems to have been because of administrative problems within the ACC regime and its policies. However, Mr Reveley did say, without any prompting, that he would have felt differently if Mr Gallop had told him that he was closing the company down on 31 March.

[27] This evidence is entirely credible. A dismissal of an employee because of the closure of one's employer is not a criticism of the employee himself. It is reasonably likely that Mr Reveley would not have brought a claim to the Authority at all had he been told at the outset that the respondent company had lost two major contracts and that Mr Reveley saw no option but to cease trading. Both Mr Reveley and Mr Gallop are obviously sensible and pragmatic people but, as is so often the case, they were let down by a failure to communicate. That failure must lie mainly at the feet of the respondent as Mr Gallop knew what had happened regarding the loss of the contracts and what he intended to do. Mr Reveley was at home, injured, and did not.

[28] I accept, therefore, that Mr Reveley is entitled to compensation for humiliation, loss of dignity, and injury to his feelings when he was left wondering why he was being dismissed. Separating this from the effects of the dismissal itself, I assess the compensation should be in the sum of \$3,000.

[29] 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 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).

[30] Whilst Mr Gallop regards Mr Reveley was responsible to a degree for the events that unfolded because he failed to check the container was locked on Waitangi Day weekend, he was not dismissed for that reason. Whilst that omission was the start of the chain of causation that led to the dismissal for redundancy, I consider it to be too remote to justify a reduction in the award.

[31] This is because Mr Reveley was not responsible for the main subsequent events that led to the company closing down, including the insurers not paying for the entire loss and the decisions of the customers to withdraw their business.

Orders

[32] I order that the respondent pay to Mr Reveley the gross sum of \$3,000 as compensation under s 123(1)(c)(i) of the Act.

[33] In making this order, I recognise that the respondent has ceased trading, and probably has no assets, and that it may well not be in a position to pay the award.

Costs

[34] Costs are reserved. It is not clear whether Mr Reveley has had to pay any costs for the representation of Mr Faletanoai, who works for Community Law. If he has, then the parties are to seek to agree how costs should be dealt with between them. However, in the absence of such agreement within 28 days of the date of this determination, any costs sought by Mr Reveley should be set out in a memorandum from counsel to be served on the respondent and lodged with the Authority within a further 14 days. The respondent would then have a further 14 days within which to serve and lodge any memorandum in reply.

David Appleton
Member of the Employment Relations Authority