

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 266
3216319

BETWEEN	TIMOTHY RYDER Applicant
AND	LEOPARD LIME LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Hayley Johnson, advocate for the applicant James Eade, for the respondent
Investigation Meeting:	18 March 2025 in Palmerston North
Submissions:	Up to 25 April 2025
Determination:	13 May 2025

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Timothy (Tim) Ryder raised a claim he was unjustifiably dismissed by Leopard Lime Limited (LLL). Mr Ryder was employed at a quarry by the former operators of the quarry from November 2021 until the quarry's operations were taken over by LLL in September 2022. Mr Ryder's employment ended in November 2022.

[2] In a preliminary determination issued on 12 November 2024¹ I found Mr Ryder was employed by LLL from 20 September 2022 until his employment was ended by LLL on 3 November 2022.² I recorded Mr Eade, the sole director of LLL, had been frank in asserting he did not consider LLL had dismissed Mr Ryder, rather it had chosen

¹ *Timothy Ryder v Leopard Lime Limited* [2024] NZERA 668.

² *Ibid* at [39].

to not offer him further employment.³ I expressed my preliminary view, given my finding LLL had employed Mr Ryder, was that LLL unjustifiably dismissed him as it followed no process in deciding to end his employment, based on the assumption it could simply chose to not offer him further employment.⁴

[3] This second determination responds to LLL's view it had justifiably dismissed Mr Ryder.

The Authority's investigation

[4] For the Authority's second investigation meeting supplementary written witness statements were lodged for Mr Ryder and by his brother-in-law Shaun Driscoll, and for LLL by (Gordon) James Eade, sole shareholder and director of LLL. All witnesses answered questions, under oath or affirmation, from me, Mr Ryder's advocate and Mr Eade.

[5] At the conclusion of the investigation meeting I timetabled for submissions to be provided and identified a number of points I considered it would be helpful for submissions to address. Following the investigation meeting the representatives provided written submissions and responses⁵ in accordance with timetable directions made at the conclusion of the investigation meeting.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination are:

- (a) Whether Mr Ryder was unjustifiably dismissed by LLL?
- (b) If LLL's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:⁶

³ Ibid at [36].

⁴ Ibid at [37].

⁵ LLL provided a document titled "Statement of Evidence" in the name of Mr Eade, which has been treated as LLL's submissions. Mr Ryder's advocate provided a document titled "Statement of Evidence" in the name of Mr Ryder, which has been treated as Mr Ryder's submissions in reply.

⁶ The remedies to be considered reflect those sought in submissions on behalf of Mr Ryder dated 18 July 2024 in relation to the preliminary determination.

- (i) Lost wages under ss 123(1)(b) and 128 of the Act, subject to quantification and evidence of reasonable endeavours to mitigate Mr Ryder's losses;
 - (ii) Compensation under s 123(1)(c)(i) of the Act; and
 - (iii) Compensation under s 123(1)(c)(ii) of the Act for loss of a benefit related to use of a company vehicle.
- (c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Ryder that contributed to the situation giving rise to his grievances?
- (d) Should either party contribute to the costs of representation of the other party?

[8] Submissions for Mr Ryder also referred in passing to penalties. While a claim for penalties was referred to in Mr Ryder's original statement of problem lodged in March 2023, no evidence was presented at the second investigation meeting related to penalties and no substantive submissions were made on the basis for the Authority to consider penalties in relation to either the preliminary determination or this second determination. I decline to consider the issue of penalties further and it is not addressed further in this determination.

Was Mr Ryder was unjustifiably dismissed by LLL?

Relevant law

[9] To determine whether Mr Ryder was unjustifiably dismissed by LLL I need to apply the test of justification set out at s 103A of the Act. 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 occurred.

[10] In reaching my conclusion, reflecting s 103A I must consider:

- a. having regard to the resources available to it, did LLL sufficiently investigate before taking action?;
- b. did LLL raise concerns that it had with Mr Ryder before taking action?;
- c. did Mr Ryder have a reasonable opportunity to respond?; and
- d. did LLL genuinely consider Mr Ryder's comments?

[11] I may also take into account any other factors I think are appropriate.⁷ I must not determine an action to be unjustifiable where there were defects in LLL’s process that were minor and did not result in Mr Ryder being treated unfairly.⁸

Submissions of the parties

[12] Mr Ryder says he was sent away by Mr Eade from the quarry on 2 November 2022 with “no process or any of the required elements to justify a dismissal”, including no proposal to terminate his employment relationship, no meeting to discuss and no opportunity to provide feedback. Mr Ryder says this also amounts to a breach of LLL’s duty of good faith to him under s 4 of the Act.

[13] LLL said Mr Ryder was “summarily dismissed for operating the quarry with complete disregard for WorkSafe regulations and processes and a failure to change or adapt his approach”. Mr Eade said he had been observing Mr Ryder and researching what was required under the Health and Safety at Work Act 2015 (HSWA) and Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016 (HSWR) in relation to the quarry manager role which he understood Mr Ryder to occupy. This included Mr Eade discussing his concerns with WorkSafe and requesting the removal by WorkSafe, as the regulator of quarries, of Mr Ryder from his role as the appointed quarry manager.

[14] Mr Eade said he then discussed his concerns with Mr Ryder and his responses were not satisfactory, meaning he could not allow Mr Ryder to continue to manage the quarry. Mr Eade said this “provided sufficient grounds for summary dismissal effective immediately”.

Discussion

[15] At the Authority’s second investigation meeting Mr Eade described having spent time after taking over the quarry from its previous owners assessing Mr Ryder and discussing in conversations with him matters related to his role as the designated quarry manager. I asked Mr Eade when he formed the view Mr Ryder could not perform the role of quarry manager, which he said was during the second week he was on-site at the quarry, though he decided on 1 November 2022 he would have one last conversation with Mr Ryder and if he was unable to give answers which demonstrated

⁷ Subsection 103A(4) of the Act.

⁸ Subsection 103A(5) of the Act.

he understood the responsibilities and requirements of his role, then Mr Eade could not have him on site.

[16] I find LLL has failed to demonstrate it met the requirements under s 103A for employer when dismissing an employee. While Mr Eade considered he had grounds to summarily dismiss Mr Ryder, I am not satisfied he adequately raised concerns with Mr Ryder or provided Mr Ryder with a reasonable opportunity to respond. It has long been held that whether an employer can justify summarily dismissing an employee involves consideration of both procedural and substantive fairness.⁹ When asked at the second investigation meeting what he considered was required for a summary dismissal to be possible Mr Eade's response was focussed on the significance of the actions of an employee and did not acknowledge the importance of procedural fairness in reaching a view dismissal was appropriate.

[17] I accept Mr Eade had significant concerns with Mr Ryder's performance over the period from when LLL took over the operation of the quarry and Mr Eade undertook reasonable steps to identify what was legally required of a quarry manager under the HSWA and HSWR. Mr Eade did not however formally raise those concerns with Mr Ryder and I am not satisfied any conversations between them were sufficient to amount to an informal raising of concerns which would meet the expectations of a fair and reasonable employer. Mr Eade also said he did not advise Mr Ryder he was discussing his concerns with WorkSafe or that he had taken steps to remove Mr Ryder from the designated role as quarry manager for WorkSafe's purposes.

[18] I am also concerned LLL's position at the second investigation meeting and in submissions reflects an ex-post justification of its position. At the time of the ending of Mr Ryder's employment, he emailed Mr Eade asking about his final pay and expressing disbelief "you fired me just like that on the spot without any warning". Mr Eade's email reply on 3 November 2022 said:

I did not fire you. Over the past few weeks I have had to evaluate you and your fit for the job and have decided to not offer you employment.

[19] When asked at second investigation meeting why he had changed his stance on whether Mr Ryder was dismissed Mr Eade said he had to change his position as LLL had been found to be Mr Ryder's employer, but the email decision to not employ was

⁹ See, for example, the Court of Appeal's judgment in *BP Oil NZ Ltd v Northern Distribution Union* [1992] 3 ERNZ 483 at 487.

for the same reasons as he was advancing as the basis for claiming Mr Ryder had been summarily dismissed.

[20] While I accept the reason for Mr Ryder's employment ending may have been the same, Mr Eade's evidence fails to demonstrate how the procedural fairness requirements incorporated in the test of justification set out at s 103A of the Act were met by LLL. I find those requirements were not met and Mr Ryder was unjustifiably dismissed by LLL for this reason.

[21] For completeness, I do not consider the defects in LLL's process were minor and consider those defects resulted in Mr Ryder being treated unfairly. Mr Eade acknowledged he did not seek advice prior to ending Mr Ryder's employment. I consider the resources of LLL, considering the investment LLL had made into the quarry operations, means taking advice on what would be required to formally and justifiably raise performance concerns with Mr Ryder was a step which LLL could be expected to have taken.

Mr Ryder was unjustifiably dismissed

[22] For the above reasons, I find Mr Ryder was unjustifiably dismissed by LLL on 2 November 2022, with his dismissal confirmed by Mr Eade's email of 3 November 2022, notwithstanding Mr Eade's comments at the time he had not dismissed Mr Ryder.

What remedies should be awarded to Mr Ryder in relation to being unjustifiably dismissed by LLL?

[23] Having determined Mr Ryder was unjustifiably dismissed by LLL, I need to consider what remedies should follow. Mr Ryder sought compensation in the region of \$25,000 for hurt and humiliation under s 123(1)(c)(i) of the Act and compensation for lost wages and loss of a benefit totalling \$8,928.50 under ss 123(1)(b), 123(1)(c)(ii) and 128 of the Act.

[24] LLL did not address the issue of remedies in its submissions.

[25] Mr Ryder described being humiliated and kicked in the guts by his dismissal, being shocked and losing pride. His dismissal occurred at a difficult personal time as his wife was unwell and passed away shortly after his dismissal. Submissions for Mr Ryder characterised the impact as being significant and "as a direct result of the callous actions of his employer".

[26] I consider Mr Ryder has demonstrated evidence of significant impacts from his dismissal by LLL, separate from the understandable impacts of his wife's passing away relatively close in time. I have considered other Authority determinations where similar levels of impact were referenced. I consider in this case \$20,000 compensation under s 123(1)(c)(i) of the Act is appropriate.

[27] Mr Ryder gave evidence he was out of work for 12 days before securing a new role which paid \$2 per hour less. He claimed for 13 weeks lost wages totalling \$4,112.

[28] I accept Mr Ryder's claim for lost wages for the period of time he was out of work is appropriate, totalling \$3,072.¹⁰ Mr Ryder's claim for reduced wages in his new role was for a further 13 weeks, totalling \$1,040.¹¹ I consider only 10.6 weeks should be awarded, totalling \$848¹², making a total of 13 weeks for which lost wages are awarded. No reasons were advanced for me to exercise my discretion under s 128(3) of the Act to award more than 13 weeks lost wages and I see no reason to do so. Combined, I award Mr Ryder \$3,920 for lost wages under ss 123(1)(b) and 128 of the Act.

[29] At the conclusion of the investigation meeting, I indicated evidence should be provided supporting or clarifying Mr Ryder's claim for lost benefit under s 123(1)(c)(ii) of the Act related to the loss of use of a company vehicle. I indicated my preliminary view there was an inconsistency between the basis on which this claim had been presented, being a calculation using the IRD mileage rate, and Mr Ryder's evidence he was paid an hourly rate for travel time. Submissions were invited to address this apparent inconsistency.

[30] Submissions for Mr Ryder referred to a provision in Mr Ryder's employment agreement which said "The employer shall provide to the employee a vehicle for the purposes of travelling to and from Dannevirke to the Quarry" and Mr Ryder's evidence he used the provided vehicle to get to and from work, as well as "around town". Submissions did not address the points I had requested be addressed in relation to the inconsistency between the basis on which this claim had been presented and Mr Ryder's evidence.

¹⁰ Being 2.4 weeks calculated at \$32 per hour for 40 hours per week.

¹¹ Being 13 weeks calculated at \$2 per hour for 40 hours per week.

¹² Being 10.6 weeks calculated at \$2 per hour for 40 hours per week.

[31] I am not satisfied Mr Ryder has established he was paid an additional amount for travel. The only payslip provided did not identify this and appeared to reflect payment for an eight-hour working day. There was no evidence of a reimbursing payment based on the IRD mileage rate, which was advanced as the appropriate basis for an award of lost benefits in submissions. Submissions also referred to the calculation of travel expenses in relation to “travel to and from his new place of employment”.

[32] I can see no basis to make an award to Mr Ryder on the basis of his evidence and submissions on his behalf, and decline to make an award for this element of his claimed remedies.

Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Ryder that contributed to the situation giving rise to her grievance?

[33] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mr Ryder that contributed to the situation giving rise to his grievance. I can see no reason to do so. While Mr Eade had concerns about Mr Ryder’s capabilities to perform his role, I consider Mr Ryder was in no way responsible for the shortcomings in LLL’s process in ending his employment.

Orders

[34] For the above reasons I order Leopard Lime Limited to pay Timothy Ryder within 28 days of the date of this determination:

- a. \$20,000 in compensation without deduction under s 123(1)(c)(i) of the Act; and
- b. \$3,920 for lost wages under ss 123(1)(b) and 128 of the Act.

Costs

[35] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[36] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Ryder may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum LLL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[37] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.¹³

[38] The first investigation meeting for this matter finished mid-afternoon, while the second investigation meeting finished early afternoon. My preliminary view is the notional daily rate for three quarters of a day for the first investigation meeting and half a day for the second investigation meeting is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1