

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 2
3289099

BETWEEN ROBERT STOWERS
Applicant

AND A B LIME LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Yvette Hope, counsel for the Applicant
Janet Copeland and Grace Wallace, counsel for the
Respondent

Investigation Meeting: 1 October 2024 in Invercargill

Submissions and further 1 October and 7 October 2024 from the Applicant
information received:
1 October 2024 from the Respondent

Date of Determination: 7 January 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robert Stowers was employed by A B Lime Limited as a quarry operator from July 2014.

[2] In April 2023 Mr Stowers was arrested and detained for an incident that was unrelated to his work. Mr Stowers was held in custody for nearly five weeks and could not attend work; during this time Mr Stowers failed to contact A B Lime to explain his absences.

[3] In May 2023 Mr Stowers was released from custody and sought to return to work. A B Lime commenced a disciplinary process with him regarding his absence from work and after completing that process it dismissed Mr Stowers for serious misconduct.

[4] Mr Stowers was unhappy with the decision to dismiss him and he raised a personal grievance for unjustified dismissal. Mr Stowers and A B Lime have not been able to resolve this employment relationship problem.

The Authority's investigation

[5] I investigated this employment relationship problem by receiving written evidence and documents, holding an investigation meeting on 1 October 2024 and assessing the oral and written submissions of the parties' representatives.

[6] I received witness statements from Robert Stowers, and from Marius Adendorff, Shane Harvey and Jack Hunter of A B Lime. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. I also received a written statement from Sharon Harvey that was accepted by both parties and Ms Harvey was excused from attending the investigation meeting.

[7] The parties' representatives then provided oral and written submissions.

[8] 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 any orders made as a result.

What happened?

[9] On Saturday, 8 April 2023 Mr Stowers was arrested as a result of an incident that was unconnected with his work. Mr Stowers was charged and remanded in custody.

[10] The weekend commencing 8 April 2023 was Easter weekend and given the public holidays Mr Stowers was not due to work a shift until Wednesday 12 April, which was a night

shift.

[11] Mr Stowers was still remanded in custody on 12 April 2023 and he was unable to attend work, he says he was also unable to contact A B Lime to explain his absence.

[12] On the morning of Thursday 13 April 2023, Ashley Adams, Mr Stowers' partner, called Mr Harvey, the Night Shift Supervisor for A B Lime. Mr Harvey's wife, Sharon Harvey, answered the phone. Ms Adams told Ms Harvey that Mr Stowers would not be at work as he was in custody on remand until "the 15th". Ms Harvey passed this information on to Mr Harvey. Mr Harvey, in turn, passed the information on to Mr Hunter, the Operations Manager for A B Lime.

[13] Following this call AB Lime did not receive any further contact from Mr Stowers or anyone else on his behalf for the balance of that week.

[14] Mr Adendorff, the Human Resources and Health and Safety Manger for A B Lime, called Mr Stowers on 18 April 2023 but the call was not connected. Mr Adendorff then called Ms Adams and there was no answer, Mr Adendorff called Ms Adams a second time that day and left a voice mail message.

[15] The next contact in respect of Mr Stowers' absence from work was on 1 May 2023 when Ms Adams called Mr Hunter. Ms Adams told Mr Hunter that Mr Stowers was remanded in custody at Otago Corrections Facility and his next court appearance was 9 May 2023. Mr Hunter's overall recollection from that call was there was no certainty about when Mr Stowers would be able to return to work.

[16] Mr Hunter passed this information on to Mr Adendorff.

[17] In response to this information A B Lime decided to commence a disciplinary process with Mr Stowers over his absence. In a letter to Mr Stowers dated 3 May 2023 AB Lime advised:

(a) Mr Stowers had not presented at work since 12 April 2023.

(b) A B Lime had made various attempts to contact Mr Stowers and his

emergency contact person (Ms Adams) whom they heard back from on 1 May 2023.

- (c) A B Lime now knew he was remanded in Otago Corrections Facility and his next court appearance was on 9 May 2023.
- (d) A B Lime had no information about any charges laid against Mr Stowers, including any hearing date and as a result it had no understanding of when he might be able to return to work.
- (e) The current failure to attend work and to communicate about this and the lack of certainty about any possible return to work were extremely concerning.
- (f) A failure to report to the workplace without consent is an action that could amount to serious misconduct under Mr Stowers employment agreement (clause 23.2 (j)).
- (g) If serious misconduct in respect of his absences was confirmed it could result in dismissal without notice.
- (h) Mr Stowers was invited to attend a disciplinary meeting on 15 May 2023 if he was released from custody at that time or alternatively, he could provide written responses to the outlined concerns for A B Lime to consider.

[18] On 10 May 2023 Mr Stowers called Mr Hunter and told him he was released from custody and he asked if he could come back to work. Mr Hunter told Mr Stowers that he needed to speak to Mr Adendorff as there was a process underway. Mr Hunter then told Mr Adendorff that Mr Stowers had been released from custody.

[19] There is disputed evidence about what occurred next:

- (a) Mr Stowers says he called Mr Adendorff call on 10 May 2023 and they discussed, amongst other things, his suspension. Mr Stowers then received the letter of 11 May 2023 the next morning and he attended a meeting with Mr Stowers in the afternoon as requested in that letter. In response to questions

from counsel for A B Lime Mr Stowers accepted that he had consented to the proposed suspension but said he did so because he had no choice.

- (b) Mr Adendorff says there was no call on 10 May 2023 and he hand delivered the 11 May 2023 letter to Mr Stowers on the morning of 11 May 2023. There was a discussion in which Mr Adendorff outlined the points in the letter. There was no subsequent meeting on 11 May 2023 and no response from Mr Stowers regarding the proposed suspension other than that he stayed away from work, which A B Lime took as consent to the suspension.

[20] In any event the position I have established, based on the evidence, is that:

- (a) Mr Stowers was suspended by A B Lime from 11 May 2023, and Mr Stowers accepted the suspension albeit because he believed he had no choice, and A B Lime assumed this consent based on the circumstances.
- (b) By 11 May 2023 Mr Stowers had received the two letters from A B Lime (3 and 11 May 2023) setting out its concerns over his absences from work and inviting him to attend a meeting on 15 May 2023.

[21] On 15 May 2023 Mr Adendorff and Mr Stowers met. Mr Adendorff took handwritten notes in the meeting and then produced fuller typed notes shortly after the meeting. I have reviewed the notes and accept them as a contemporaneous record of the meeting. Based on these notes and the evidence of Mr Stowers and Mr Adendorff, I find that the key aspects of the 15 May meeting include:

- (a) Mr Adendorff explained that the purpose of the meeting was to go through the allegations as outlined in the letters so that he could hear Mr Stowers' explanation and feedback. Mr Stowers advised he had received the letters and understood them.
- (b) Mr Adendorff reiterated (as set out in the letters) that the allegations were serious and disciplinary action up to and including summary dismissal was possible if proven. Mr Adendorff stressed that no decision had been made.

(c) Mr Stowers explained that:

- i. He could not contact A B Lime whilst he was in custody.
- ii. Ms Adams had contacted A B Lime and told it that he was in custody, although he had not asked her to contact A B Lime.
- iii. He had regular contact with his father and an aunt whilst in custody but he did not ask them to contact A B Lime to explain his absence because he did not think of it.
- iv. He had contact with his lawyer but this was only after four weeks in custody.

(d) Mr Stowers would not discuss why he was in custody or his pending charges but told Mr Adendorff could speak to his lawyer about this.

(e) Mr Stowers accepted that there needed to be good communication with A B Lime. And he accepted that he had not contacted A B Lime whilst in custody, with his explanation being that he was in custody.

(f) Mr Stowers understood that his actions could amount to a breach of his employment agreement.

[22] On 17 May 2023 A B Lime provided its preliminary decision in a letter to Mr Stowers. In this letter A B Lime set out Mr Stowers' explanations (as outlined in the notes) and then set out its preliminary findings – these were:

- (a) Mr Stowers had been absent from work without consent and had failed to take steps to advise A B Lime that he was in custody and unable to attend work. This behaviour constituted serious misconduct as set out in Mr Stowers employment agreement (clause 23.2(j)).
- (b) A B Lime needed to have trust and confidence in Mr Stowers acting in its best interests which included attending work as required in his employment

agreement and making A B Lime aware as soon as possible if he could not attend.

(c) A B Lime also had concerns about the pending criminal charges (having spoken to Mr Stowers' lawyer) such that it had no certainty about the impacts on Mr Stowers and therefore A B Lime in terms of his work.

(d) A B Lime no longer had trust and confidence in Mr Stowers to act with good judgement, attend work as required and when absent to notify A B Lime as required.

[23] A B Lime's preliminary decision, set out after its preliminary findings, was that dismissal without notice for serious misconduct was the appropriate outcome.

[24] Mr Stowers was invited to provide feedback on the preliminary decision.

[25] Mr Stowers provided feedback in a handwritten note. In this note he recorded that Ms Adams had advised A B Lime that he was in custody, whilst he was in custody he was unable to contact A B Lime and that he would like to keep his job.

[26] On 23 May 2023 A B Lime recorded its final decision in a letter to Mr Stowers. After setting out his feedback it concluded that Mr Stowers failed to attend work without consent and this was serious misconduct. In terms of dismissal as a sanction for serious misconduct it stated that Mr Stowers' employment agreement set out that serious misconduct may justify dismissal without notice, that it had no information from Mr Stowers about the pending charges and the impact on his ability to work, and that his failure to engage and respond has undermined A B Lime's ability to have trust and confidence in him as a team member. In conclusion A B Lime's final decision was that the serious misconduct and the irreparable breakdown in trust and confidence meant the appropriate disciplinary sanction was dismissal without notice.

Suspension

[27] Before I turn to consider whether Mr Stowers' dismissal was justified or not I will

briefly deal with the issue of Mr Stowers' suspension. Whilst this was not raised in Mr Stowers' personal grievance and it was not expressed in the statement of problem it became clear from Mr Stowers' evidence and counsel's submissions that he did not accept his suspension was justified.

[28] In this regard, I accept that I can resolve an employment relationship problem essentially as I see it rather than being limited to how it is described by the parties.¹ But in this employment relationship problem there are two impediments to concluding that the suspension was unjustified and awarding remedies as a result:

- (a) I do not have jurisdiction to resolve an unjustified action personal grievance, which would be the basis for an unjustified suspension problem, because a personal grievance of this type was not raised within 90 days.
- (b) In any event Mr Stowers' accepted the suspension and A B Lime acted in reliance on that in suspending him – to deem A B Lime's actions as unjustifiable in those circumstances would seem inappropriate.

Issues for unjustified dismissal

[29] So, this employment relationship problem is solely about unjustified dismissal.

[30] If an employee has been dismissed the employer must prove that the dismissal was justified, in line with the test for justification and the duty of good faith set out in the Act.²

[31] The test for justification applies to two aspects of the dismissal:

- (a) The process by which the employer established what happened and whether dismissal should be the outcome.
- (b) The substantive rationale for the decisions made by the employer as to what happened and then the decision to dismiss.

¹ Employment Relations Act 2000, s 160(3).

² Employment Relations Act 2000, sections 4 and 103A.

[32] Mr Stowers was dismissed by A B Lime; so, for this employment relationship problem, A B Lime must show that the dismissal was justified, both procedurally and substantively.

The disciplinary process

[33] In terms of process, in order to show that it has met the test for justification and good faith, A B Lime will need to show that:

- (a) It properly investigated what occurred in terms of the concerns it had about Mr Stowers.
- (b) It set out these concerns, provided relevant information and explained the possible implications of an adverse finding to Mr Stowers so that he could consider all of this and respond.
- (c) It gave Mr Stowers a reasonable opportunity to respond to its concerns, before it made its decision on what had occurred and whether this justified dismissal.
- (d) It properly considered the explanations given by Mr Stowers before it made its decision on dismissal.

Substantive justification

[34] Mr Stowers was dismissed because:

- (a) He failed to report to work without consent; this being serious misconduct.
- (b) His failure to communicate during his absence and his failure to engage over possible further absence given the pending criminal charges had undermined the trust and confidence A B Lime had in him.
- (c) For both serious misconduct and a loss of trust and confidence, dismissal without notice was appropriate.

[35] In order to show that Mr Stowers' dismissal was substantively justified A B Lime

needs to establish that, on the basis of the process conducted, a fair and reasonable employer could have decided that Mr Stowers acted as it concluded, that is, that Mr Stowers' actions amounted to serious misconduct and undermined trust and confidence and that dismissal without notice was appropriate.³

Analysis

The disciplinary process

[36] The disciplinary process conducted by A B Lime was sufficiently thorough and stepped through the requirements I have set out. Specifically:

- (a) A B Lime, through Mr Adendorff, investigated what occurred in terms of the concerns it had about Mr Stowers. The evidence is clear about what A B Lime understood about Mr Stowers not attending work and what it had been told (and therefore what A B Lime knew). AB Lime formulated its concerns based on an appropriate investigation.
- (b) A B Lime then set out these concerns clearly, in its correspondence of 3 and 11 May 2023. It was also clear in this correspondence that the actions if proven could be serious misconduct and this, in turn might justify dismissal without notice.
- (c) A B Lime did give Mr Stowers the appropriate opportunities to consider its concerns and respond, before it made its decision on what had occurred and whether this justified dismissal; Mr Stowers did consider all of this and respond both in the 15 May 2023 meeting and then his response to the initial proposal to dismiss.
- (d) A B Lime properly considered the explanations given by Mr Stowers before it made its decision on dismissal – this is clear from Mr Adendorff's evidence and the correspondence.

³ Applying Employment Relations Act 2000, s 103A(2).

[37] For completeness I record here that there has been no real complaint articulated by Stowers about the process.

[38] Overall, I conclude that A B Lime's process was what a fair and reasonable employer could have done in all the circumstances and was therefore justifiable.

Substantive justification

[39] It is clear that A B Lime had two issues with Mr Stowers' conduct:

- (a) Mr Stowers had not reported to work and had not informed A B Lime of this, including why he could not attend. This spanned almost five weeks and whilst there had been contact from Ms Adams on two occasions this was inadequate as there was insufficient detail and clarity about what was happening.
- (b) It had no confidence that Mr Stowers would be able to continue to work because of the upcoming trial and there was no indication of possible outcomes and resultant impact on A B Lime regarding Mr Stowers' ability to work. Further A B Lime had no confidence, based on the failure to engage by Mr Stowers, that he would communicate with it properly if he was unable to attend work in the future.

[40] As a result of carrying out the disciplinary process A B Lime concluded that:

- (a) Mr Stowers failed to report to work without consent; this being serious misconduct pursuant to his employment agreement.
- (b) Mr Stowers' failure to communicate during his absence and his failure to engage over possible further absences given the pending criminal charges had undermined the trust and confidence A B Lime had in him.
- (c) For both serious misconduct and a loss of trust and confidence, dismissal without notice was appropriate.

[41] Reflecting on these conclusions by A B Lime I am satisfied that a fair and reasonable

employer could have concluded these three things as a result of the disciplinary process. Therefore, A B Lime's dismissal was substantively justified.

[42] Standing back from this and reflecting on what occurred the position was:

(a) Mr Stowers had not attended work for almost five weeks and his inadequate communication during this time meant A B Lime had no clarity about why he was absent and how long the absence would be.

(b) A B Lime had no guarantees that Mr Stowers would be able to attend work in the future without further absence and, importantly, if further absences occurred it had no confidence that Mr Stowers would properly advise it of what was occurring.

[43] In short, A B Lime had an employee who went missing for nearly five weeks without properly explaining why at the time and it had genuine concerns this could happen again if it continued to employ that employee. In the circumstances dismissal without notice was appropriate.

Conclusion

[44] A B Lime's dismissal of Mr Stowers was justified.

Summary

[45] A B Lime's dismissal of Mr Stowers was justified in the circumstances and this employment relationship problem is resolved in favour of A B Lime; no remedies are awarded to Mr Stowers.

Costs

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

[47] If the parties are unable to resolve costs, and an Authority determination on costs is needed, A B Lime 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 Mr Stowers 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.

[48] 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.⁴

Peter van Keulen
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1