New Zealand Employment Relations Authority Decisions

Tamati v Mid-Land Contracting Limited (Christchurch) [2017] NZERA 1154; [2017] NZERA Christchurch 154 (20 September 2017)

Last Updated: 2 October 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 154
3000447

BETWEEN NATHAN TAMATI Applicant

AND MID-LAND CONTRACTING LIMITED

Respondent

Member of Authority: Andrew Dallas

Representatives: Timothy Jackson and Hannah Goddard, Counsel for the

Applicant

Christopher Jones, Counsel for the Respondent

Investigation Meeting: 30 May 2017 at Timaru

Submissions 7 and 19 June 2017 for the Applicant and 14 June 2016 for the Respondent.

Determination: 20 September 2017

DETERMINATION OF THE AUTHORITY

A. Mr Tamati was unjustifiably dismissed by Mid-land Contracting

Limited (Mid-land)

B. Mid-land must settle Mr Tamati's personal grievance by paying him the following amounts:
(i) $5,900 gross as reimbursement for lost wages;

(ii) $10,000 as compensation for humiliation, loss of dignity and injury to feelings.

C. Costs are reserved

Employment relationship problem

[1] Nathan Tamati was employed by Mid-land Contracting Limited as a horticultural worker. Mid-land is a contracting company

based in Temuka, South Canterbury and employs approximately 40 staff. In early February 2016, an investigation was commenced into Mr Tamati's use of a company fuel card. Mr Tamati said the fuel card was for his personal use. Mid-land disagreed and dismissed him on

26 February 2016. Mr Tamati said he was unjustifiably dismissed. He sought monetary and non-monetary compensation to remedy his personal grievance.

The Authority's Investigation

[2] During the investigation meeting, I heard evidence from Mr Tamati and his partner. For Mid-land, Allan Jones, Regan Jones and Mira Gibson provided witness statements. Allan Jones attached purported statements from Gerald Norman and Kerry Kavanagh to his statement. However, as Mr Norman and Ms Kavanagh did not attend the investigation meeting, this evidence was set aside because it could not be tested by either the Authority or Counsel for Mr Tamati. Luis Woods, Mid-land's former general manager who investigated the allegation against Mr Tamati and, seemingly, was a decision-maker with Allan Jones was also unavailable to give evidence.

[3] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[4] The following are the issues for investigation and determination: (i) Was Mr Tamati unjustifiably dismissed by Mid-land?

(ii) If Mid-land's actions were not justified what remedies should be awarded, considering:

(a) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act;

(b) compensation for lost wages under s 123(1)(b) of the Act?

(iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Tamati that contributed to the situation giving rise to their grievances?

Was Mr Tamati unjustifiably dismissed by Mid-land?

The Employment Investigation

[5] In early 2016, the processing of an invoice by Mid-land's administrator led the company, on its case, to discover Mr Tamati was still in possession of, and using, a company fuel card he had been temporarily given by Regan Jones in September 2015.

[6] In response to this information, Mr Woods appears to have commenced an investigation into the use of the fuel card. Mr Tamati had the fuel card in his possession from 24 September 2015 to 18 January 2016. Mid-land said the total spend on the fuel card was $3047.69. It claimed the amount authorised to be spent by Mr Tamati was $100.

[7] Mr Tamati was approached by his manager, Mr Norman, who asked him if he still had the fuel card. Mr Tamati confirmed he did. Mr Norman told Mr Tamati to return the card to Regan Jones. He did so on 18 January 2016 and, on Mr Tamati's account, he said "all good". Regan Jones would deny this was said.

[8] In a subsequent discussion with Mr Woods about an unrelated matter, which became heated, Mr Tamati was advised he was subject to an "investigation" about fuel card use. Mr Tamati was then asked to attend a meeting on 12 February 2016. Nothing was put in writing at this stage.

[9] Mr Tamati attempted to discuss the issue with Allan Jones, however Mr Jones was unwilling or unable to do so at that time.

[10] On 12 February 2016, Mr Tamati attended the meeting. Mr Woods, Mr Jones, Mr Norman and Wendy Connolly were also in attendance. Allan Jones did not participate in the meeting. Mr Tamati said he was asked to sit in the middle of the room and the other attendees sat around him. Mr Woods was the investigator for Mid- land. The meeting was recorded. Regan Jones and Mr Norman were in attendance,

presumably, as witnesses as to the discussions with Mr Tamati about the fuel card, but may also have attended the meeting in their capacity as managers.

[11] A review of the meeting notes discloses that Mr Woods asked Mr Tamati at the commencement of the meeting why he had overspent his limit of $50 per week on the fuel card and for a period greater than two weeks. Mr Tamati denied there was a limit and said no-one had asked for the card back. Mr Woods then asked Regan Jones for his version of events and he basically confirmed what Mr Woods had stated to Mr Tamati.

[12] Mr Tamati said he felt intimidated and overwhelmed during the meeting. He said this was why, at one stage in the meeting, he answered "no comment" to a question from Mr Woods about why he believed it was "Ok" to keep the card after Mr Norman

returned to duty.

[13] The meeting ended with Mr Woods stating: “[b]asically we have to decide what

we are going to do. We will let Nathan know the outcome”.

[14] After the meeting, Mr Norman approached Mr Tamati and suggested he “get a lawyer”.

[15] On 19 February 2016, Mid-land issued Mr Tamati with a letter headed

“allegations of serious misconduct and your employment”. The letter stated:

It is my finding that from 18/10/2015 when [Mr Norman] returned, from that time onwards when you were in possession of the fuel card that you were in breach of clause 37.8.8 (sic) of your employment agreement which states; 37.1 Conduct which may justify summary dismissal includes but is not limited to the following: Point eight: Being in unauthorized possession of, or causing wilful damage to, the Employer’s, any client’s or another employee’s property.

[16] The reference to “clause 37.8.8” appears to actually be a reference to cl 31.7

(bullet point 8). Clause 37.1 does, however, deal with termination of employment.

[17] The letter went on to say Mid-land wished to “consider [Mr Tamati’s] response to the allegations once again”. The letter proposed a meeting on 24 February 2016, however the meeting occurred on 25 February.

[18] At the meeting, Mr Tamati was represented by a solicitor. Mr Woods, Regan

Jones and Allan Jones also attended the meeting.

[19] Allan Jones said he decided to become involved in the second meeting because Mr Tamati did not have a “support person” at the first meeting (despite, on his evidence, being advised he should have one). Allan Jones also said he wanted to give Mr Tamati an opportunity to reconsider his answers to some of the questions raised beyond saying “no comment”.

[20] The meeting proceeded on the basis of Mr Tamati having a right of reply to the letter of 19 February 2016. In addition, four further allegations were raised by Mid- land, for which Mr Tamati was not put on notice in the letter or prior to the meeting, about providing the pin for the fuel card to a third party (his partner, it would transpire), multiple transactions in one day, multiple transactions during the Christmas/New Year period and a transaction for diesel (when Mr Tamati only had a petrol car).

[21] A third meeting was held with Mr Tamati on 26 February 2016. Mr Woods, Allan Jones and Mr Tamati attended this meeting. Mr Tamati was summarily dismissed at this meeting. It is clear from the transcript of the meeting no consideration to alternatives to dismissal was made nor was Mr Tamati permitted to make submissions about his proposed dismissal.

[22] Mr Tamati would say in his evidence he was not sure who the decision-maker was during the employment investigation. The transcript records Mr Woods stating: “we’ve made our decision concerning this case... [a]nd unfortunately we upheld that serious misconduct has occurred and therefore grounds for summary dismissal”.

[23] Mr Woods subsequently issued a letter dated 26 February 2017 confirming Mr Tamati’s dismissal. The letter identified five substantiated allegations against Mr Tamati – the primary allegation made on (or around) 12 February 2016 (and confirmed in the letter of 19 February 2016) and the four further allegations put to him on 25

February 2016.

Evaluation

Procedure

[24] Unfortunately, there were a number of defects in Mid-land’s employment

investigation into Mr Tamati’s alleged serious misconduct.

[25] It was not clear what experience Mr Woods had as an investigator. Had he given evidence, this issue could have been addressed. The concern here is how he conducted the first meeting on 12 February 2016. Allan Jones, on his evidence, also appeared to be concerned about what had occurred. That Mid-land managers, including Regan Jones and Mr Norman, both witnesses/informants to the investigation, sat around Mr Tamati as he was questioned by Mr Woods is very concerning.

[26] Of further concern is that Mr Woods, at the commencement of the meeting, effectively put the company’s position to him about the use of the fuel card rather than asking him for his understanding about what he understood had been agreed about its use. Mr Woods then used Regan Jones’ and Mr Norman’s “evidence” to the meeting to simply confirm the company position. This was simply unfair to Mr Tamati.

[27] Regan Jones and Mr Norman should not have attended the meeting with Mr Tamati. They were both witnesses/informants to interactions with Mr Tamati which were essential to gaining an understanding about the issuance of the fuel card. They should have been separately interviewed by Mr Woods and the information obtained from those interviews put to Mr Tamati for comment.

[28] Mr Tamati said he felt intimidated and overwhelmed during the meeting and this affected his responses. I accept this evidence.

[29] The meeting ended with Mr Woods stating: "[b]asically we have to decide what we are going to do. We will let Nathan know the outcome". It is open to conclude based on this statement that this was going to be the first and only meeting.

[30] Mid-land had an opportunity to cure these procedural problems at this point and this may have been Allan Jones' intention by becoming involved in the process. However, it was not to be.

[31] On 19 February 2016, Mr Woods issued a letter to Mr Tamati. The letter specifically refers to the meeting of 12 February 2016 and makes findings adverse to Mr Tamati based on it.

[32] The second meeting appeared to be slightly more orthodox than the first meeting. Mr Tamati was also represented at this meeting. However, the meeting proceeded on the basis of Mr Tamati first providing a response to the letter of 19

February 2016 and second, being asked to respond to four further allegations for which he had not been put on notice. His lawyer raised this as a concern during the meeting as can been seen from the transcript.

[33] By the time the third meeting occured the next day, five allegations had been substantiated against Mr Tamati and a decision to dismiss him had been made. While the investigation appears to have occurred over a reasonable period that there was very little time between the putting of the four additional allegations and their substantiation is suggestive of a failure to give proper consideration to Mr Tamati's responses and/or investigate these further.1

[34] Mr Tamati said he was unsure who the decision-maker was. Ultimately the evidence established that Mr Woods was also co-decision-maker with Allan Jones. Dependent upon all the circumstances at the time, there is nothing inherently wrong with Mr Woods being an investigator and decision-maker. The Court and Court of Appeal have emphasised the test for justification in s 103A of the Act is one of "substantive fairness" rather than "pedantic scrutiny". However, Mr Tamati should have been put clearly on notice about who the decision-maker or decision-makers were at the outset of the employment investigation. He should have been given an

opportunity to address Allen Jones and Mr Woods about the penalty of dismissal [2]

[1] Employment Relations Act, s103(A)(3)(d)

2 See, *Angus v Ports of Auckland Limited (No.2)* NZEmpC 160 at [26] and *A Ltd v H* [2106] NZCA 419 (CA) at [46]

[35] These procedural deficiencies were not minor and they resulted in Mr Tamati being treated unfairly.3

Substance

[36] There was no dispute in the evidence that Mr Tamati was issued with a fuel card by Mid-land. There was also no dispute it was recognition for extra work. Regan Jones made the decision to issue Mr Tamati with the card after discussions with Mr Norman. Ordinarily, Mr Tamati would have expected, and should have received, extra wages for extra work. Indeed, this, on his evidence, was the position he consistently adopted with the company. When Mr Tamati was asked to return the fuel card by Regan Jones in January 2016, he asked him for a pay-rise when it became apparent the card was not being returned to him.

[37] Ultimately, the factual dispute between the parties was the extent of the use of the fuel card and the timeframe for that use. There was no common understanding about this. The evidence of Mr Norman or a written record of the arrangement may have helped resolve the factual dispute. However, neither was available to the Authority. Mr Tamati believed he was given the fuel card as a reward for his hard- work and overtime. Regan Jones said Mr Tamati was given the fuel card for a two week period with a $50 limit per week in exchange for higher duties.

[38] During the investigation meeting, Regan Jones said when he gave Mr Tamati the card, he placed no time limit on the return of the card. Mr Tamati's understanding of the arrangement was further informed by a discussion with Mr Norman. On Mr Tamati's account, Mr Norman said words to the effect of "fill up your car, go for a drive, use it". A further complicating factor was that Regan Jones commenced working off-site for several months after Mr Tamati was issued with the card and no other Mid- land managers appeared to have an understanding of the arrangement. Ultimately, at best for Mid-land, Regan Jones had a vague expectation the fuel card would be

returned by Mr Tamati.

3 Employment Relations Act, s103(A)(5)

[39] Allan Jones said the supply of company fuels cards was generally reserved for managers and was not common. He said Mr Tamati was not a senior employee, supervisor or manager. There was no evidence Mr Tamati had prior experience or training in the use of fuel cards. Mr Tamati said his spending on the fuel card was never questioned. He said he believed, reasonably in my view, Mid-land was monitoring his card use and paying the invoices.

[40] It was clear from the evidence Mr Tamati's understanding Mid-land's expected practices around use of the fuel card was acquired from two separate conversations with his managers. This ad-hoc approach coupled with the absence of a policy or guidelines for fuel card use created the scene for a misunderstanding to arise. Within this context, Mid-land's view that, in effect, its business culture – based on Allan Jones' evidence – of "family values" and the general principles of "honesty, trust and integrity" should prevail must be weighed against Mr Tamati's reasonable belief about the conditions of use for the fuel card. Ultimately, objectively assessed, a fair and reasonable employer could have found Mr Tamati's belief to be reasonably held.

Could a fair and reasonable employer have reached in all the circumstances the decision to dismiss Mr Tamati?

[41] I have found that the Mid-land carried out an unfair and inadequate employment investigation.4 A fair and reasonable employer could not have concluded Mr Tamati's actions in this matter amounted to misconduct that was so serious so as to deeply impair or destroy trust and confidence. Mid-land dismissed Mr Tamati after approximately three years of unblemished employment. In addition, it gave no consideration to alternatives to dismissal or allowed Mr Tamati to make submissions about this proposed sanction.

[42] I find that the decision to dismiss Mr Tamati was not one a fair and reasonable employer could have reached in all the circumstances at the time. Having found that Midland was not justified in dismissing Mr Tamati, he was entitled to an assessment of

remedies to settle his personal grievance.

4 Employment Relations Act, s 103(A)(3)(a)

What remedies should Mr Tamati be awarded?

Reimbursement for lost wages

[43] In determining reimbursement for lost wages under s 123(1)(b) of the Act, consideration is given to s 128. The evidence supported Mr Tamati lost remuneration as a result of the personal grievance. Subject to issues of contribution under s 124 of the Act, the Authority must order payment of the lesser of a sum equal to lost wages or three months ordinary time wages.

[44] Mr Tamati has asked the Authority to consider exercising its discretion under s

128(3) of the Act to require Mid-land pay to Mr Tamati by way of compensation for lost remuneration a sum greater than that in s 128(2) of the Act from the date of dismissal to 26 February 2017.

[45] Mr Tamati sought lost wages of $17,294. He also sought lost earnings for a period from November to 26 February 2017 at a rate of $2.50 per hour. The figure of

$17,294, was based on a claim of $5,900 for the first three months after his dismissal (when he earned $2,500) and $11,394 for the six month period after that (when he earned $5,406). His claim for lost earnings was based on the difference in pay-rate between his former and current job. Little additional evidence was provided to support this claim and it was not quantified.

[46] I find that this is not an appropriate case to exercise my discretion for lost remuneration greater than three months. However, Mr Tamati did provide sufficient evidence to demonstrate mitigation of loss. He took active steps to find work including putting up notices on shop notice boards, making cards to place in people's letterboxes and searching the newspaper and the internet. Mr Tamati found casual work as gardener and arborist through family friends. Mr Tamati obtained full-time, permanent employment within his skill-set in October 2016 away from Temuka.

[47] Mid-land claimed Mr Tamati approached its clients in breach of a restraint of trade clause but did not bring a counter-claim against him. If such a claim was brought, it is unclear what proprietary interest Mid-land might be seeking to protect in respect of a non-managerial employee.5 Midland also claimed Mr Tamati moved from Temuka for other reasons.

[48] Subject to contribution, I find that an award of $5,900 as reimbursement for lost wages under s 123(1)(b) of the Act is appropriate.

Compensation for humiliation, loss of dignity and injury to feelings

[49] Mr Tamati sought $10,000 compensation for humiliation, loss of dignity and injury to feelings. This was a relatively modest amount when having regard to the recent upward trend of awards in the Authority and the Court.6 However, it is

impermissible to award an amount greater than claimed.7

[50] Mr Tamati said he suffered significant financial and mental hardship as a result of being dismissed. He said he was upset to

leave his work team. Mr Tamati said his family struggled to pay his bills and had to borrow money. He said he was embarrassed about the extent his family had to rely on the support of friends. His partner provided evidence supportive of these claims.

[51] Mr Tamati said his limited qualification and skills reduced his job prospects in the Timaru area. He eventually found stable employment but he and his family were required to move from Temuka so he could undertake it. The move for work caused upheaval for the family. This included Mr Tamati's wife having to give up her job.

[52] I accept that Mr Tamati suffered humiliation, loss of dignity and injury to feelings because of his dismissal.

[53] Subject any consideration of contribution under s 124 of the Act, I find $10,000 as compensation for that humiliation, loss of dignity and injury to feelings is an

appropriate amount to award under s 123(1)(c)(i) of the Act.

5 See, *Air New Zealand Limited v Kerr* [2013] NZEmpC 153

6 See, for example, *Stormont v Pebble Thorpaitken Limited* [2017] NZEmpC 71

7 *McIver v Saad* [2015] NZEmpC 145 at [56]

Contributory behaviour by Mr Tamati?

[54] Having found that Mr Tamati was entitled to remedies for his personal grievances, I was required by s 124 of the Act to consider whether Mr Tamati's actions were causative and blameworthy of the situation he found himself in.

[55] Mr Tamati could be criticised for his failure to make inquiries with Mid-land about the *reasonableness* of his fuel card use and for allowing his partner to use the fuel card. Against this, however, Mr Tamati was acting on the assumption, wrong as it ultimately was, he was provided with the fuel card without restriction. Mid-land, at the time, had no formal policy in place on the use of fuel cards, including for personal use, and no proper system in place to monitor fuel card usage. In addition, Mid-land did not attempt to recover the money pre or post-employment or involve the police.

[56] On balance, Mr Tamati's actions did not contribute to the situation that led to his personal grievance and I decline to reduce remedies as a consequence.

Summary

[57] The orders made are for Mid-land to settle Mr Tamati's personal grievances by paying his the following amounts:

(i) $5,900 gross as wages reimbursement under s 123(1)(b) of the Act; and

(ii) $10,000 as compensation, without deduction, for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act;

Costs

[58] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Mr Tamati has 28 days from the date of this determination in which to file and serve a memorandum on costs. Mid-land has a further 14 days in which to file and serve a memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[59] If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, $4500 for a matter such as this commenced after 1 August 2016, and adjusted upwards or downwards for relevant

factors.8

8 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

Andrew Dallas

Member of the Employment Relations Authority