

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 320
5536471

BETWEEN TRENT WILLIAMS
Applicant

AND BURKHART BUILDING
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Alex Hope for Applicant
Andrew Foster for Respondent

Investigation Meeting: 27 May 2015

Submissions Received: 15 June and 6 July 2015 from Applicant
29 June 2015 from Respondent

Determination: 13 October 2015

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Williams employment were not affected to his disadvantage by an unjustified action of Burkhart Building Limited.**

- B. Mr Williams was unjustifiably dismissed from his employment with Burkhart Building Limited.**

- C. Burkhart Building Limited is ordered to pay to Mr Williams the sum of \$5,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**

- D. Costs are reserved.**

Employment relationship problem

[1] Mr Trent Williams claims he was unjustifiably disadvantaged and unjustifiably dismissed from his employment with Burkhart Building Limited (Burkhart Building). Mr Williams also claims Burkhart Building breached its statutory obligations to provide a written employment agreement and claims arrears of wages of \$500.00.

[2] Since this matter was lodged Mr Williams has withdrawn his claim for a penalty for failure to provide a written employment agreement and the Authority has been notified that the arrears of wages claim has been satisfied.

[3] Burkhart Building says the employment relationship ended by mutual agreement on 21 April 2014.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Williams and Burkhart Building 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.

Background

[5] In 2013 Mr Williams was working as an apprentice builder in Australia when he decided to return to New Zealand with his family. Mr Williams contacted Mr James Burkhart the sole director and shareholder of Burkhart Building in January 2014 and eventually an offer of employment was made and accepted.

[6] Mr Williams commenced his employment on 3 March 2014 under the terms of an oral employment agreement. The relevant terms of the agreement included a wage of \$14.50 per hour for each hour worked for 40 hours each week. It was also agreed that, if satisfied with Mr Williams' progress, Burkhart Building would sign Mr Williams up to the Building and Construction Industry Training Organisation (BCITO) apprenticeship program.

[7] Mr Williams was accepted for an apprenticeship and worked as an apprentice for Burkhart Building until the end of the employment relationship.

[8] On 10 April 2014 Mr Burkhart had a problem with gear falling out of his trailer. He texted Mr Williams about this and asked if he had shut the trailer. Mr Williams acknowledged by return text that he must not have.

[9] On 11 April 2014 Mr Burkhart discovered batteries for his equipment had not been recharged. He texted Mr Williams about it in a way that made it clear that Mr Williams was to make sure the batteries and chargers go back into the gun cases when packing up the gear.

[10] On 14 April 2014 Mr Williams complained about the text message he had received and Mr Burkhart apologised and told Mr Williams to stop being a “baby” and get back to work.

[11] Mr Williams did not work on 15, 16 or 17 April 2014 due to being on bereavement leave.

[12] Mr Williams did not return to work after a discussion between himself and Mr Burkhart on 21 April 2014.

Issues

[13] The issues for determination are whether:

- a) One or more conditions of Mr Williams employment were subject to his disadvantage by an unjustifiable action by Burkhart Building?
- b) Mr Williams was dismissed either actually or unjustifiably?
- c) If there was an unjustified dismissal what, if any, remedies should be awarded.

Unjustified disadvantage

[14] Mr Williams claims he was disadvantaged when he received abusive text messages to address minor performance issues; raised issues of being uncomfortable on the phone on 21 April 2014 and a failure by Burkhart Building to provide Mr Williams with any notice or an opportunity to respond to concerns.

[15] The statutory test of justification is contained in section 103A of the Employment Relations Act 2000 (the Act). That section provides that the question of whether an action was justifiable must be determined on an objective basis, having regard to whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[16] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

(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.

[17] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.¹

[18] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[19] As a full Court observed in *Angus v Ports of Auckland Ltd*²

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that

¹ Employment Relations Act 2000, section 103A(5).

² [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

Abusive text messages

[20] Over the period 28 March to 14 April Mr Williams and Mr Burkhart exchanged text messages. Mr Burkhart sent a text on Friday 11 April 2014 in which he states (verbatim):

When u fucking pack up the gear make sure batterys and chargers go back into the gun cases.
I have one battery irs flat

[21] Mr Williams did not respond to this text.

[22] It is common ground that when Mr Williams arrived at work on Monday 14 April 2014 he complained to Mr Burkhart about the text Mr Burkhart had sent regarding Mr Williams failure to recharge the gun batteries.

[23] Mr Burkhart was already at work and was working on a roof on his own when Mr Williams arrived on 14 April 2014. Mr Williams asked Mr Burkhart – “*what was with the text on Friday?*” In response Mr Burkhart told Mr Williams that it had been raining on Friday and he had been trying to place trusses and could not complete the job due to the batteries not being charged. Mr Burkhart told Mr Williams not to take it personally, to stop being a baby and to get back to work.

[24] Mr Burkhart described Mr Williams’ behaviour as being confrontational, angry and aggressive. This is denied by Mr Williams. Mr Williams went to stand beside his car. Mr Burkhart walked to the edge of the roof and told Mr Williams he would not be paid to stand at his car and he should either start work or leave. Mr Burkhart says he told Mr Williams that if he left he could not expect to be paid. Mr Williams returned to his work.

[25] It was common ground that later that day Mr Burkhart took Mr Williams to one side and explained to him that he (Mr Burkhart) was not having a go at him personally. Mr Burkhart apologised and told Mr Williams that he did not mean for him to feel bad.

[26] Later that night on 14 April 2014 Mr Williams texted Mr Burkhart enquiring about his entitlement bereavement leave. In this text Mr Williams indicates that he believes things between he and Mr Burkhart have sorted.

[27] I am satisfied that by the evening of 14 April 2014 the issues between Mr Williams and Mr Burkhart were sorted to the extent that Mr Williams had accepted Mr Burkhart's apology and would continue working for Burkhart Building.

[28] I am also satisfied, having reviewed all of the texts sent between Mr Williams and Mr Burkhart that the use of swearing in texts was common place and Mr Williams himself used such language on at least two occasions.

21 April 2014

[29] On 21 April 2014 Mr Burkhart telephoned Mr Williams to discuss his hours in response to a text he received from Mr Williams. During the conversation Mr Burkhart raised with Mr Williams that he did not seem happy at work. Mr Williams responded that no, he was alright. Mr Burkhart asked Mr Williams whether there was any point in him staying in a job he was unhappy with. Mr Burkhart says Mr Williams agreed with everything he was saying.

[30] Mr Williams says that during this discussion he did agree with what Mr Burkhart was saying, but that he did was simply acknowledging what Mr Burkhart was saying and it did not mean that he agreed he was unhappy in his work.

[31] Mr Burkhart offered to pay Mr Williams two weeks' pay and holiday pay and he could take the time to look for another job. Mr Williams does not recall this part of the conversation. Mr Burkhart says Mr Williams response was "*sweet as*". Mr Williams says he was simply acknowledging what Mr Burkhart was saying and his response does not mean he was agreeing with the offer by Mr Burkhart.

[32] Mr Williams did not return to work after this discussion.

[33] On 29 April 2014 Mr Burkhart sent Mr Williams a text advising Mr Williams that Mr Boswell, of BCITO would like him to make contact as he had some good job opportunities and requesting Mr Williams to return the books. Mr Burkhart also offered to write Mr Williams a reference. Unbeknown to Mr Burkhart, Mr Williams was already in alternative work.

[34] Mr Williams did not respond to this text message until 6 May 2014 when he queried his final pay.

Failure to provide notice or an opportunity to respond to concerns

[35] Mr Williams claims the failure to provide notice or an opportunity to respond to concerns about his performance were unjustifiable actions causing him disadvantage.

[36] While Mr Burkhart offered to pay Mr Williams two weeks notice that payment was not received by Mr Williams. Therefore Mr Williams did not receive any notice of the ending of the employment relationship.

[37] Burkhart Building did not initiate any procedure which would have allowed a conversation to occur between Mr Burkhart and Mr Williams during which they could have discussed the issues relating to the performance concerns held by Mr Burkhart.

[38] It is clear on the evidence provided to the Authority that by 14 April 2014 Mr Williams had put matters behind him and was prepared to move on. It is equally clear that on 21 April 2014 Mr Burkhart had not put matters behind him and was not as open to the relationship continuing.

Determination on disadvantage

[39] I am not satisfied Mr Williams has established that one or more conditions of his employment were affected to his disadvantage by an unjustifiable action of Burkhart Building. The evidence shows that both Mr Burkhart and Mr Williams used robust language in their day to day dealings with each other and that this type of language is common in the industry. While Mr Williams may have been uncomfortable with the telephone discussion on 21 April 2014 this does not equate to being subject to disadvantage.

Dismissal

[40] Mr Williams' last day of work was Monday, 14 April 2014. Mr Williams was absent on a period of bereavement leave on 15, 16 and 17 April 2014. This leave was unpaid leave as Mr Williams had not completed six months employment and was not entitled to bereavement leave on pay.

[41] Easter weekend ran from 18 April 2014 to 21 April 2014 inclusive. The discussion between Mr Burkhart and Mr Williams where Mr Burkhart offered Mr Williams the opportunity to accept two weeks' notice and look for alternative employment took place on Easter Monday.

[42] The initiation of the ending of the relationship came from Mr Burkhart. As already mentioned in this determination, by 14 April 2014 Mr Williams had indicated he felt that matters had been sorted between the two. Mr Burkhart clearly did not think that was the case, he was of the impression that Mr Williams was unhappy in his job and should be looking to move elsewhere.

[43] Mr Williams did not correct Mr Burkhart during the conversation on 21 April 2014 instead Mr Williams seemed to be in agreement with Mr Burkhart that they should part company and seemed accepting of Mr Burkhart's offer to part company by receiving two weeks' notice.

[44] Mr Burkhart confirmed his understanding on 29 April 2014 when he texted Mr Williams offering him a reference and advising him that Mr Boswell may have employment opportunities for him and that Mr Williams should contact him. Mr Williams, of course, was already in alternative employment and was no longer available to work for Mr Burkhart.

[45] Having regard to the evidence from the investigation meeting I am satisfied that Mr Williams accepted Mr Burkhart's offer without protest and certainly gave the appearance that he was in agreement with him. Mr Williams apparent lack of immediate protest was seen by Mr Burkhart as his consent to the offer.

[46] However, I am not satisfied there was actual agreement by both parties for the employment relationship to end in this way and initiating the end of the employment relationship in the way he did, Mr Burkhart dismissed Mr Williams. That dismissal was unjustified given the lack of any process or any adherence to section 103A(3) of the Act.

Remedies

[47] Mr Williams seeks the payment of compensation pursuant to section 123(1)(c)(i) of the Act. In the statement of problem Mr Williams sought \$10,000. This was increased in closing submissions to \$12,000.

[48] Mr Williams had worked for Burkhart Building for seven weeks. Mr Williams was successful in gaining new employment which he commenced on 23 April 2014, two days after the 21 April 2014 telephone discussion. This work was as a labourer and was not as an apprentice. That was a significant loss for Mr Williams.

[49] In the circumstances of this case I order Burkhart Building Limited to pay to Mr Williams the sum of \$5,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act. Payment is to be made within 28 days of the date of this determination.

[50] As required by section 124 of the Act, I have considered whether Mr Williams contributed to the actions giving rise to his personal grievance and have determined that he did not.

Costs

[51] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the parties shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The parties shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[52] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards. The Authority will also take into account that both parties have achieved only partial success.

Vicki Campbell

Member of the Employment Relations Authority