

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 249
3174324

BETWEEN	SAM WILSON Applicant
AND	AZ SCAFFOLDING (2017) LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Richard Anderson, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	2 March 2023
Submissions received:	9 March 2023 from the Applicant No submissions from the Respondent
Determination:	17 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sam Wilson was employed by AZ Scaffolding (2017) Limited (AZ Scaffolding) between 17 January 2022 and 12 March 2022. Mr Wilson claims that he was unjustifiably dismissed from his employment following accusations of theft made against him by AZ Scaffolding. He also claims that he is entitled to payment of an arrears of wages relating to his final day of work.

The Authority's investigation

[2] An initial case management conference was held on 10 August 2022 at which directions were made providing Mr Wilson time to lodge and serve an amended statement of problem. AZ Scaffolding participated in that case management conference

and had lodged an initial statement in reply. However, they did not lodge an amended statement in reply and there was no further engagement from them following the initial case management conference.

[3] On 31 August 2022 the Authority received email correspondence from Gerard Rolton, making enquiries on behalf of the director, Aaron Smith, of AZ Scaffolding's father. That correspondence sought an adjournment to any case management conference for a period of four to six weeks for various reasons, including purported health reasons relating to the director. The correspondence confirmed that Mr Rolton did not have authority to act on behalf of AZ Scaffolding at that time, but requested time for that to be arranged.

[4] Approximately four weeks later, on 29 September 2022, a further case management conference was held to discuss programming of the Authority's investigation. There was no appearance at that case management conference on behalf of AZ Scaffolding, nor did Mr Rolton correspond further with the Authority. At that case management conference, I made directions for the lodgement of statements of evidence and an investigation meeting was scheduled for 2 March 2023.

[5] On 27 October 2022 Mr Wilson's representative advised that a claim of unjustified disadvantage, that was included in the statement of problem, was withdrawn. As such, the Authority did not need to investigate that claim.

[6] Mr Wilson provided a statement of evidence to the Authority and was the only witness to do so. Mr Wilson attended the investigation meeting and answered questions under affirmation.

[7] 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

[8] The issues requiring investigation and determination were:

- (a) On what basis was Mr Wilson employed?
- (b) Is Mr Wilson entitled to an arrears of wages relating to his final day of work?
- (c) Was Mr Wilson unjustifiably dismissed?

- (d) If AZ Scaffolding (2017) Limited's actions were not justified (in respect of the dismissal), what remedies should be awarded, considering:
 - (i) Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - (ii) Compensation under section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).
- (e) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Wilson that contributed to the situation giving rise to his grievance?
- (f) Should either party contribute to the costs of representation of the other party?

On what basis was Mr Wilson employed?

[9] Mr Wilson claims that he was employed on a full-time permanent basis.

[10] In addition to his evidence as to the working arrangements, Mr Wilson also gave evidence that he reached an agreement with Mr Smith as to residential accommodation. His evidence is that he then moved into accommodation at AZ Scaffolding's premises in Auckland, where Mr Smith also lived along with several other employees.

[11] In its statement in reply, AZ Scaffolding alleged that there were two relevant documents as to Mr Wilson's terms and conditions of employment. It says that an employment contract was signed by Mr Wilson on 14 January 2022, prior to Mr Wilson commencing work on 17 January 2022. It says that a second document, dated 20 January 2022, although referred to as being on 19 January 2022 by AZ Scaffolding, was only produced for the purposes of securing a work grant from Work and Income for Mr Wilson.

[12] The statement in reply also asserted that Mr Wilson was employed on a casual basis only.

[13] Mr Wilson maintains that he was a permanent employee and was not engaged on a casual basis and says that he never signed the document dated 14 January 2022. In relation to that document, Mr Wilson submits that the signature that appears on it is an identical copy of his signature as appears on the 20 January 2022 document.

[14] The 20 January 2022 document refers to Mr Wilson as being employed for a minimum of 30 hours per week, Monday to Sunday, 7.00am to 7.00pm at an hourly rate of \$22.00. The document refers to the employment as being a ‘fixed term contract’ for a period of more than 91 days.

[15] The 14 January 2022 document describes the employment as being on a casual “as required” basis and includes a range of days and hours during which work may be offered.

[16] Mr Wilson’s evidence is that he commenced work without having signed an individual employment agreement, that his signature as appears on the 14 January 2022 document is a forgery, and the document of 14 January 2022 was never given to him at all. I asked Mr Wilson a number of questions at the investigation meeting about the sequence of events and how it was that he became employed. In the circumstances, noting that AZ Scaffolding have not provided any evidence to the contrary, I accept Mr Wilson’s evidence.

[17] Having reviewed the two documents, I conclude that the signatures are in fact identical. Mr Wilson has given evidence that he did not sign the 14 January 2022 document and in the absence of evidence to the contrary I accept his evidence. I conclude that Mr Wilson did not sign the document dated 14 January 2022 and that he was employed on a full time and permanent basis.

[18] So far as the letter of 20 January 2022 suggests that Mr Wilson was engaged on a fixed term basis, I also find that that was not in fact the case. Neither the letter, nor any other information received as part of the Authority’s investigation, suggest that Mr Wilson was employed on a compliant fixed term basis. I find that there was no agreement compliant with s 66 of the Employment Relations Act 2000 (the Act) and that Mr Wilson was in fact employed on a permanent and ongoing basis.

[19] I find that Mr Wilson was employed on a permanent basis.

Was Mr Wilson unjustifiably dismissed?

[20] Section 103A of the Act sets out the relevant test for justification, that being whether the employer’s actions, and how the employer acted, were what a reasonable employer could have done in all of the circumstances at the time the dismissal or other

action occurred.¹ In applying the test of justification, I must consider the factors listed at s 103A(3) of the Act that, in a non-exhaustive manner, set out procedural considerations.

[21] The question of justification applies in two parts, to the process adopted by the employer and the substantive justification.

[22] Prior to considering justification, I must first be satisfied that Mr Wilson was dismissed from his employment. Whether there was a dismissal is a contested matter, albeit that there was no appearance on behalf of, nor witnesses providing evidence on behalf of, AZ Scaffolding at the investigation meeting. I set out the relevant background below, followed by an analysis as to the question of dismissal, and then proceed to consider both procedural and substantive justification.

The events of 12 March 2022

[23] Mr Wilson claims that he was unjustifiably dismissed on 12 March 2022. He says that the dismissal followed a series of events that same day which, broadly speaking, related to allegations that Mr Wilson had stolen money from Mr Smith's wallet.

[24] The fact that the allegation of theft precipitated the dismissal is clear from the evidence of Mr Wilson, from email correspondence on 24 March 2022 following the relevant events, and from allegations made in the statement in reply by AZ Scaffolding.

[25] Mr Wilson's evidence is that he was working on 12 March 2022 on a scaffolding job in Ruakaka with several other employees. That involved traveling to and from Auckland as well as dropping off Mr Smith in Waipu to pick up a trailer from his father's house.

[26] Mr Wilson says that, sometime after dropping Mr Smith in Waipu, Mr Smith called him and asked him if he had any money. Mr Wilson responded that he didn't and says he was then told to meet Mr Smith at the Big Tomato in Ruakaka where he was given \$50.00 to buy some drinks for the other workers. Mr Wilson says that he purchased \$28.00 worth of drinks and later in the day also purchased ice blocks with the remainder of the \$50.00, also at the Big Tomato.

¹ Employment Relations Act 2000, s 103A(2).

[27] During the day, Mr Wilson says he asked to move Mr Smith's truck when they were at the job in Ruakaka and Mr Smith gave him the keys to do so. He also gave evidence that after he had moved the truck, he locked it and gave the keys back to Mr Smith. Mr Wilson says he later became aware of an allegation that he had taken \$100.00 from Mr Smith's wallet, initially when Mr Smith refused the offer of an ice block. Mr Wilson denies having taken the \$100.00.

[28] After purchasing the ice blocks from the Big Tomato, Mr Wilson says he returned to the job and offered Mr Smith one. It is at that time that Mr Wilson says Mr Smith made the allegation of theft and that Mr Smith said words to the effect of "you need it more than me" in relation to the allegedly missing sum.

[29] The job finished for the day at approximately 6.30pm and Mr Wilson returned to Mr Smith's father's place where he was waiting for him. Mr Wilson's evidence is that he then asked if he could retrieve his tool belt from Mr Smith's truck, and that Mr Smith responded by saying "you won't be needing that anymore".

[30] After traveling back to AZ Scaffolding's premises in Auckland, Mr Wilson says that he went to take a shower, but that Mr Smith walked in and said "na bro pack up your shit and get out of my house". Mr Wilson says he took that, in addition to the earlier comment relating to the tool belt, as being both a dismissal from his employment and as being told to leave the accommodation. Mr Wilson left the premises, and he and his partner subsequently spent the night in his car outside on the road.

Was Mr Wilson dismissed from his employment?

[31] The fact of dismissal is contested, albeit that AZ Scaffolding has not provided any evidence and no witnesses appeared to support the contentions raised in its statement in reply.

[32] Mr Wilson submits that he was dismissed by a combination of actions taken by Mr Smith and AZ Scaffolding on 12 March 2022. This included Mr Smith advising Mr Wilson that he would no longer need his tool belt and his being sent from the premises upon his return from Auckland.

[33] On 24 March 2022, following a request for the reasons for dismissal, AZ Scaffolding sent an email response which included the following:

Sam was within his 90 day trial period, he only worked for us for less than 2 months. The day he was dismissed on Sunday he was caught stealing money from the owners wallet on site, we have no time for stealing within our business. Also within the 2 months worked by Sam there were multiple days taken off and not showing up which Aaron addressed with him. All of these together have lead to us no longer requiring Sam as part of the team but wish him all the best in his future endeavours.

[34] In summary, AZ Scaffolding says that Mr Wilson was not dismissed from his employment but was sent away from his accommodation by other residents. In its statement in reply, AZ Scaffolding allege that the email of 24 March 2022 was sent in error and that the employee who sent it had not consulted with Mr Smith before doing so.

[35] The statement in reply lodged by AZ Scaffolding also contends that Mr Wilson's employment ended by reason of abandonment. To that end, the Authority has been provided correspondence alleged to have been sent to Mr Wilson by AZ Scaffolding on 16 and 21 March 2022 in support of AZ Scaffolding's position that Mr Wilson abandoned his employment. Mr Wilson's uncontested evidence is that he did not receive the correspondence at the time. It is also the case that, whilst the letters have been produced, no evidence is support of them being drafted and sent at the time has been. I hold serious concerns as to the timing and validity of the correspondence that AZ Scaffolding has produced, and I am not prepared to accept that the correspondence is genuine.

[36] Mr Wilson submits that he was dismissed on 12 March 2022 when Mr Smith sent him from the premises. In doing so, Mr Wilson's representative provided submissions as to there having been a "sending away" amounting to the termination of employment at AZ Scaffolding's initiative,² and as to an express statement not being necessary and dismissal being considered objectively and in light of the circumstances at the relevant time.³

² *Wellington, Taranaki and Marlborough clerical etc IUOW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre* (1983) ERNZ Sel Cas 95 at 102-103.

³ *Surplus Brokers Limited v Armstrong* [2020] NZEmpC 131; *Cornish Truck & Van Ltd v Gildenhuis*. [NZEmpC 6 at [45].

[37] I am satisfied that AZ Scaffolding dismissed Mr Wilson from his employment and I accept Mr Wilson's uncontested evidence as to the events of 12 March 2022 and his employment arrangements. Mr Wilson was not subject to a valid trial period and was not dismissed on that basis, nor did he abandon his employment.

[38] When viewed objectively, the actions and statements of Mr Smith on 12 March 2022 amounted to a 'sending away' and an unequivocal dismissal of Mr Wilson from his employment. I do not accept that Mr Wilson's exclusion from the premises was merely at the bequest of other employees as AZ Scaffolding has suggested without providing any evidence.

[39] The fact of dismissal is supported by the email correspondence of 24 March 2022 confirming that Mr Wilson was dismissed. I do not accept the suggestion by AZ Scaffolding that the correspondence was sent in error.

[40] I find that Mr Wilson was dismissed from his employment by AZ Scaffolding on 12 March 2022.

Procedural justification

[41] Mr Wilson's evidence is that he was dismissed without notice and in the absence of any investigation being undertaken in relation to his alleged conduct. His evidence is uncontested in the sense that AZ Scaffolding, aside from lodging an initial statement in reply, did not put forward any witnesses disputing that evidence. I accept the evidence given by Mr Wilson.

[42] Having regard to the factors as to procedural justification that I must consider, being those listed at s 103A(3) of the Act, I find that the dismissal was without procedural justification. AZ Scaffolding has not provided evidence of such justification and they bore the onus of doing so.

[43] There is no evidence of any investigation being undertaken in relation to the allegations of theft as contained in the email correspondence of 24 March 2022. Such as those allegations formed the reasons, or part of the reasons, for the dismissal, they were not investigated and nor were they raised with Mr Wilson in any reasonable manner such as would have put him on notice of the concerns or provided him an opportunity to respond to the allegations prior to the dismissal.

[44] AZ Scaffolding's statement in reply also alleges that Mr Wilson abandoned his employment. I have found that not to have been the case and, in such circumstances, it cannot be said that the dismissal was procedurally justified.

[45] I find that the dismissal was procedurally unjustified.

Substantive justification

[46] AZ Scaffolding have variously said that Mr Wilson was dismissed based on a combination of theft and absences from work, the use of a valid trial period, and that Mr Wilson abandoned his employment.

[47] The onus is on AZ Scaffolding to show that they had a substantive justification for the dismissal. They have not done so, and I am not satisfied that there was a proper substantive basis for the dismissal.

[48] Having regard to the findings I have made in relation to the absence of any reasonable procedural justification, it cannot be that AZ Scaffolding had a sufficient basis on which to establish that Mr Wilson has stolen money, nor to conclude that Mr Wilson had abandoned his employment.

[49] A fair and reasonable employer could not, in all the circumstances at the time of the dismissal, have dismissed Mr Wilson from his employment. I am satisfied that the dismissal was both substantively and procedurally unjustified.

Is Mr Wilson entitled to remedies?

Lost wages

[50] Mr Wilson took appropriate steps to mitigate his loss of income, was successful in obtaining alternative employment relatively quickly, and has not claimed lost wages on that basis.

Compensation for humiliation, loss of dignity and injury to feelings

[51] Mr Wilson submits that he was impacted significantly by the dismissal and seeks an award of \$15,000 in compensation for humiliation, loss of dignity and injury to feelings.

[52] Mr Wilson's evidence included that being thrown out of his accommodation and dismissed without notice was particularly humiliating. I accept that was the case and that the impacts on Mr Wilson were compounded by AZ Scaffolding's making of allegations without having undertaken any reasonable investigation. The allegations were of a very serious nature and were repeated following the dismissal, including by email on 24 March 2022.

[53] Having considered all of the relevant evidence, and awards made in cases involving similar circumstances, I am satisfied that an award of \$15,000, as claimed, is appropriate.

[54] I order that AZ Scaffolding make payment to Mr Wilson of the sum of \$15,000 as compensation for humiliation, loss of dignity, and injury to feelings.

Should any reduction be made to remedies on account of contribution by Mr Wilson?

[55] I am not satisfied that Mr Wilson in any way contributed to the circumstances giving rise to his personal grievances and there is no basis on which any remedies ordered should be reduced.

Is Mr Wilson entitled to an arrears of wages relating to his final day of work?

[56] Mr Wilson claims that he was not paid for the last day of work he performed during his employment. Mr Wilson's rate of pay was \$22.00 per hour, and he says that on 12 March 2022 he commenced work at 9.30am and that the job finished at 6.30pm. I accept Mr Wilson's evidence and find that Mr Wilson is entitled to payment of \$198.00.

[57] I order that AZ Scaffolding make payment to Mr Wilson, subject to any applicable taxation, of \$198.00 in arrears of wages.

Costs

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

[59] If they are not able to do so and an Authority determination on costs is needed Mr Wilson may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service

of that memorandum AZ Scaffolding would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Summary of orders

[60] AZ Scaffolding (2017) Limited is ordered, within 28 days of the date of this determination, to make payment to Mr Wilson of:

- (a) \$15,000 (without deduction) as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act relating to the unjustified dismissal; and
- (b) \$198.00 on account of wages owed relating to the unilateral reduction to his hours of work.

Rowan Anderson
Member of the Employment Relations Authority