

[3] BPL also argues any remedies awarded to Mr Wood should be offset against various costs it says are owed to it by Mr Wood, including lost tools and equipment and unauthorised phone costs.

Issues

[4] The issues identified for investigation by the Authority were:

- (i) whether Mr Wood accepted a proposal for a period of unpaid leave or was dismissed; and
- (ii) if he was dismissed, whether BPL was justified in concluding Mr Wood had committed serious misconduct and dismissal was appropriate in the circumstances; and
- (iii) if there was a dismissal which was not justified, what remedies are due (considering wages, holiday pay, compensation for hurt and humiliation and costs), subject to mitigation and any contribution.

The investigation

[5] Mr Wood provided two written witness statements. A joint witness statement was provided by BPL's three directors: registered plumber Terry Bradshaw, his wife and BPL office administrator Jan Bradshaw, and their son and journeyman plumber Alwyn Bradshaw. Each witness, under oath or affirmation, confirmed their statements and answered questions from the Authority. The parties' representatives asked additional questions and provided oral closing submissions.

[6] In preparing this determination I reviewed the witnesses' written and oral evidence, the parties' closing submissions, and relevant background documents provided. As allowed for under s174 of the Act, I have not recorded here all evidence and submissions received but state findings of facts and issues of law and express conclusions on the issues for determination.

How the employment ended

[7] BPL says its business deteriorated slowly throughout 2008 as a result of the economic recession. Reduced workloads led to a decision to put a proposal to Mr

Wood that he take leave without pay for an unspecified period. Terry and Jan Bradshaw did this in a meeting on 19 November 2008. Their statement describes the proposal this way:

“We especially advised Robin that we would keep his job open for him to resume work again with BPL just as soon as the building trade picked up and BPL had enough work again. We told him that we would be contacting him whenever we would be able to offer him some work ...”

[8] Mr Bradshaw says Mr Wood agreed to this proposal and asked if he could take a job elsewhere for a three month period. Mr Wood was also told he could keep the use of the company mobile phone and the company vehicle he drove in order to look for other work in the meantime. Mr Bradshaw encouraged Mr Wood to go to the Work and Income New Zealand (WINZ) office to inquire about getting a benefit.

[9] As Mrs Bradshaw said in her evidence: *“It was our intention that he get the unemployment benefit to help him over.”* However he was not granted an unemployment benefit by WINZ, probably due to his partner’s income, and was not employed elsewhere in the following months. In December he was called by BPL to do 12.5 hours work.

[10] In early January 2009 he sought further information about his work prospects with BPL and on 12 January Mr Wood and his father arrived unannounced at Terry and Jan Bradshaw’s residence – which was also BPL’s office. Mr Wood’s father asked Mr Bradshaw why he would not pay *“redundancy”* to Mr Wood. After some sharp words were exchanged between the two older men, Mr Wood’s father was asked to leave the premises and he did. Mr Bradshaw then told Mr Wood that there were three days of work available but Mr Wood refused that work because he was upset about how his father had been spoken to by Mr Bradshaw.

[11] On 15 January Mr Wood telephoned Mr Bradshaw to further discuss his work prospects. Their accounts of that conversation differ markedly. Mr Bradshaw says Mr Wood abused him and he hung up. Mr Wood says that he asked Mr Bradshaw to *“pay me redundancy”* because he had no work and no pay and that Mr Bradshaw referred to letting him go. However Mr Wood says that when he asked Mr Bradshaw if he was dismissed, Mr Bradshaw said, *“No, your job’s still open”*.

[12] From that point on Mr Wood regarded himself as dismissed and sought legal advice. He wrote to BPL and received a letter dated 10 February 2009 which stated Mr Wood was not “*fired or dismissed as your job is always open for you to return when the work volume improves*”. The letter noted that Mr Wood had returned the company truck when asked but not a company phone. It also raised issues about whether Mr Wood had disclosed an attention deficit disorder (ADD) when he first applied for the job, and whether he had paid for lost tools and personal calls on a company mobile phone.

Agreed leave or dismissal?

[13] BPL submits Mr Wood agreed to the leave-without-pay proposal and he was aware for some months of the company’s business difficulties affecting the availability of work for him. It says this was sufficient notice for the proposal put to him on 19 November and that he also had opportunities in the following days to comment on the proposal.

[14] I find there was no genuine agreement or consent by Mr Wood to the proposal. This was confirmed in Mr Bradshaw’s oral evidence when he acknowledged that Mr Wood had not said ‘yes’ or ‘OK’ to leave-without-pay. Rather, as Mr Bradshaw said, “*He didn’t disagree with it*”. That, I find, was not sufficient in the circumstances of an apprentice being called into a meeting with his employer and told there was no work for him and he would have to take leave-without-pay. He was presented with a *fait accompli*, not a proposal.

[15] His subsequent conduct of going to WINZ to inquire about a benefit represents acquiescence to the situation not acceptance of BPL’s unilateral decision to stop paying him for 40 hours a week.

[16] Mr Wood submits the failure to pay him amounted to an unjustified disadvantage for the period from 19 November 2008 through until 15 January 2009 when his dismissal was confirmed in the telephone conversation with Mr Bradshaw.

[17] However BPL submits there was no disadvantage or dismissal. Rather it submits Mr Wood resigned on 12 January 2009 when he refused three days of work offered to him. It says at that point Mr Wood's actions indicated he considered the employment relationship was at an end because he no longer wanted to work for BPL.

[18] I agree with neither submission. I consider the facts support a different construction of the legal consequences of the parties' actions.

[19] By 19 November 2008 BPL was in a position where it had no work for Mr Wood. I accept Mr Bradshaw's evidence that this was the situation for several months prior and BPL had "*carried*" the cost of employing Mr Wood for some time, hoping the recession would ease and business would increase.

[20] Mr Wood was, in reality, surplus to BPL's requirements for labour at the time and it could not afford to pay him. His position was, in that sense, redundant.

[21] In informing Mr Wood on 19 November that there was no work and no pay for him, he was, in reality, dismissed for redundancy from his full-time position. What BPL sought to put in place, through the purported leave-without-pay proposal, was a replacement position as an on-call casual. That it did not formally declare Mr Wood's position redundant was a matter of financial convenience as BPL would otherwise have then be required to pay him for a notice period (if not worked) and for his outstanding holiday leave. Saying that his job would be "*kept open*" was partly in recognition of his service in the preceding three years and also preserved the company's ability to use his labour if work did become available.

[22] The actual intention of BPL to end the full-time employment relationship for the foreseeable future was confirmed by encouraging Mr Wood to seek an unemployment benefit, agreeing he could seek employment elsewhere, and providing him with temporary ongoing use of the vehicle and phone to do so.

[23] The reality of the redundancy of Mr Wood's position was confirmed by Mr Bradshaw's evidence that BPL has not since employed another hand and that it would have had no work for Mr Wood through 2009 apart from the few days mentioned in

January. The notion of keeping his job “open” through that period would have resulted in no work and no pay.

Performance and misconduct issues

[24] BPL’s statement in reply suggested an alternative justification of its actions if the Authority found Mr Wood had been dismissed.

[25] I do not accept BPL’s evidence comes anywhere near establishing misconduct or inadequate performance by Mr Wood which would justify his dismissal.

[26] While there may have been complaints from some customers about his work, problems with him losing some tools and not completing paperwork, those issues had not proved serious enough for Mr and Mrs Bradshaw to do anything other than give him some reminders and verbal cautions. There were no formal meetings to identify problems and steps to resolve them in the way that would be required to justify a dismissal for poor performance.

[27] Neither do I accept that a failure to disclose his ADD condition prior to employment constitutes serious misconduct in these particular circumstances. Firstly, I accept as more likely Mr Wood’s evidence that he did, in fact, disclose, that matter during a pre-employment interview. Secondly, during the course of his employment, BPL was aware of his condition and had not pursued the question of disclosure as a misconduct issue before Mr Wood raised his grievance.

A justified dismissal?

[28] In closing submissions Mr Wood accepted that, if the termination of his employment was found to amount to a dismissal for redundancy, there was no question as to its genuineness. He knew BPL was getting fewer jobs and had been sent around various neighbourhoods dropping off business cards in an attempt to attract more customers.

[29] What is at issue is the fairness of how BPL carried out what was really a dismissal under the guise of putting Mr Wood on leave-without-pay. It was obliged to

deal with Mr Wood in good faith, not mislead or deceive him, and to give him a fair opportunity to comment about decisions affecting the future of his employment with BPL before those decisions were made. And in taking action which effectively ended his full-time employment with the company, BPL was also obliged to take reasonable steps to minimise the negative impact of the decision on him.

[30] In the meeting on 19 November 2008 Mr Wood was presented with a decision about his future employment about which he had no notice and no real opportunity for any meaningful input or consultation. The notion Mr Wood's job was being "*kept open*" was also misleading given what Mr Bradshaw knew of the economic reality.

[31] The steps taken to encourage Mr Wood to apply for WINZ assistance and providing transport and a phone to assist with looking for other work were, however, appropriate steps if BPL had been open about the true purpose and effect of its proposal. Overall, however, the manner in which it brought Mr Wood's job to an end were less than what a fair and reasonable employer would do in all the circumstances at the time. Consequently the termination of his employment on 19 November 2008 was an unjustified dismissal. He has a personal grievance.

Remedies

Lost wages

[32] As a result of the finding that Mr Wood was dismissed for redundancy, no award is made for the lost wages he sought for two periods – from 19 November 2008 to 15 January 2009 and from 16 January 2009 until he began a new job on 9 March 2009. As the position was genuinely redundant, he could not have continued to earn wages in that position but for his dismissal.

[33] However Mr Wood is entitled to a period of notice which he was not given. He had no written employment agreement, being employed under oral terms only. In those circumstances the Authority must determine a reasonable period of notice. I find that period to be two weeks. That is the period of notice referred to in the employment agreement of Alwyn Bradshaw. It is also the period of notice referred to

in a 'model agreement' which BPL says was given to Mr Wood for the purpose of discussion at some unspecified period during his employment.

Outstanding holiday pay

[34] BPL accepted Mr Wood was owed three weeks holiday pay. That amount is to be paid to him.

Interest

[35] Both the two weeks notice and three weeks holiday pay should have been paid to Mr Wood on 19 November 2008. After allowing for PAYE and student loan deductions, he was getting \$449.87 net a week at the time. For five weeks that totals \$2249.35 he would otherwise have received. He is entitled to interest on that amount from 20 November 2008 until the date of this determination – that is 705 days. Under clause 11 of Schedule 2 of the Employment Relations Act 2000 the applicable interest rate is 5.19 per cent. The amount due in interest is \$225.48.

Compensation for hurt and humiliation

[36] I accept the abrupt nature of the termination of Mr Wood's full-time employment and the ensuing uncertainty in the following weeks caused humiliation, loss of dignity and injury to his feelings which were not solely the result of the loss of the job. He had to seek financial assistance from family members which was embarrassing and reported problems sleeping.

[37] In the particular circumstances of this matter, and having regard to the general level of awards in cases of this type, \$5000 is awarded to Mr Wood in compensation under s123(1)(c)(i) of the Act.

Contribution

[38] Mr Wood's dismissal was unjustified because of how it was carried out by BPL. Mr Wood did not contribute to that situation giving rise to his grievance and no reduction of his remedies is required.

Counterclaim

[39] BPL identified a “*schedule of costs*” which it sought to be offset against any remedies awarded to Mr Wood.

[40] He accepts he owed BPL \$70 as the balance of payments for a bed. I also find BPL is entitled to deduct \$87.84 for personal calls made on the mobile phone used by Mr Wood in the period from November 2008 to January 2009 as the use of the phone was identified by that time as being for the purpose of seeking alternative work. I decline to allow deduction of amounts for calls prior to that period as that was a matter known to BPL at the time and about which it did nothing to recover any money until Mr Wood raised his grievance. For the same reason no deductions are allowed for any amounts said to be owed for lost tools. Neither can BPL now recover the costs of a GPS system stolen from the company vehicle driven by Mr Wood. I am not satisfied the evidence establishes he was responsible for the circumstances in which BPL’s insurer was said to have refused a claim for that loss.

[41] In the last week of December 2008 BPL made a payment of \$652 to Mr Wood’s bank account. That amount has now been identified as pay for the 12.5 hours he worked on a casual basis in December and a ‘goodwill’ payment made at the time of the Christmas holidays. An equivalent amount may be deducted from payments ordered.

Summary of determination

[42] I have found Mr Wood was unjustifiably dismissed by BPL on 19 November 2008.

[43] In remedy of that unjustified dismissal BPL is to pay Mr Wood \$2249.35 for the two week notice period and three weeks of outstanding holiday pay; interest of \$225.48; and \$5000 as compensation under s123(1)(c)(i) of the Act.

[44] BPL may deduct \$809.84 from those payments for reimbursements owed to it by Mr Wood.

Costs

[45] Costs are reserved. The parties are encouraged to resolve any issues between themselves. If they are unable to do so and a determination of costs is sought from the Authority, Mr Wood may lodge and serve a memorandum as to costs within 28 days of the date of this determination. BPL will then have 14 days from service to lodge a reply memorandum. No application will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority