

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 123
5450661

BETWEEN SHANE WRATT
 Applicant

AND J&D McLENNAN LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Caroline Rieger, Counsel for Applicant
 Danielle Falconer, Counsel for Respondent

Investigation Meeting: 2 September 2014 at Wellington

Submissions Received: 8 September 2014 from the Applicant
 11 September 2014 from the Respondent

Determination: 4 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Shane Wratt, was employed by J&D McLennan Limited (JDM) as a metal worker for approximately 6 years until he was dismissed on 11 December 2013 with one week's notice. He alleges that the termination of his employment was procedurally unfair and that he was unjustifiably dismissed. He seeks reimbursement of 12 weeks' wages, compensation of \$10,000 and costs.

[2] JDM is a small to medium sized business, specialising in mechanical and structural engineering. JDM says Mr Wratt was dismissed for failing to notify it of his absence before work was due to commence in circumstances where he had previously received two final written warnings for the same conduct. In this context it says the decision to dismiss Mr Wratt was one that was open to a fair and reasonable employer.

The issues and the law

[3] There is no dispute that Mr Wratt was dismissed. The particular issues which need to be determined in this matter are:

- a. whether Mr Wratt's dismissal was unjustified;
- b. if Mr Wratt was dismissed unjustifiably, did he contribute to the situation which gave rise to his personal grievance;
- c. what remedies should be awarded.

[4] The legal test as to whether a dismissal is justified is set out at s.103A(2) of the Employment Relations Act 2000. The Act requires the Authority to consider and determine, objectively, whether the employer's actions (in this case JDM), and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The test requires two considerations: what the employer did (the substantive dismissal and the grounds for it); and how the employer acted (the process leading to those outcomes)¹.

Summary of background information

[5] During the Authority's investigation meeting JDM's Workshop Manager, Mr James McLennan acknowledged that Mr Wratt had been a conscientious employee when he was at work. At issue for JDM was its perception that Mr Wratt had become increasingly unreliable with his attendance at work and his failure to notify JDM before work began when he was not able to attend work.

[6] Mr Wratt's usual hours of work were Monday to Friday, 7.30am to 4pm. His written employment agreement recorded he was entitled to five days per annum of paid sick leave, and further stated: "*You shall ensure that notice is given to us as soon as practicable on the first day of absence due to sickness.*"

[7] Mr Wratt does not dispute that for several months prior to May 2011 he had been absent from work from time to time without providing notification to JDM.

[8] Following a further instance where Mr Wratt had not attended work and had failed to notify JDM of his absence², Mr Wratt received a letter entitled "*Ongoing*

¹ *X v Auckland District Health Board* [2007] ERNZ 66

² 13 May 2011

*expectations*³ from Mr McLennan. The letter was not disciplinary in nature and consequence, but stated that it was a requirement of his employment to advise before the start of a shift, or as soon as possible thereafter, if he was not able to attend work. Mr Wratt was told that a failure to meet the recorded expectations may result in disciplinary action, up to and including summary dismissal, depending on the seriousness of the breach. Mr Wratt did not contest the contents of the letter nor the reasons for which it was given.

[9] On Friday 22 June 2012, Mr McLennan sent Mr Wratt a text message at 7.58am asking where he was and stating “*You promised me this wasn’t going to happen again*”. Mr Wratt responded saying he had slept in but was not far away.

[10] On Monday (25 June 2012), Mr Wratt sent a text message to Mr McLennan at 10.16am as follows:

*You are going to spew on me I f**** up badly and got on the piss and I’m crook, I feel real bad for mucking you and Duncan around I’m such an idiot. Please don’t let Duncan sack me I can’t afford to lose my job I’d be screwed.*

[11] The following day Mr Wratt sent a further text message to Mr McLennan stating the following:

James I’m too embarrassed to come into work, haven’t slept all night worried sick about losing my job, can’t afford to lose job feel like such a let down. I will come in tomorrow I’m hoping you will just give me a written warning. Not the sack, I need my job so much and I’m sorry I’ve been such an unreliable worker, could you think about giving me one last chance, will come in tomorrow.

[12] The parties met later in the afternoon. The next day Mr Wratt received a letter from Mr McLennan⁴ issuing him with a final written warning. The correspondence referred to previous discussions with Mr Wratt about management of leave entitlements including that he had received 8 days unpaid leave over the previous 12 months (having taken all available paid leave) and that Mr McLennan had previously indicated he was unwilling to accept leave without pay without a doctor’s certificate. The letter set out Mr McLennan’s expectations going forward as follows:

1. *Work starts at 7.30am...*
2. *Should you not be able to get to work by 7.30am you must contact [JDM] to inform Mr McLennan of what is going on.*

³ Dated 16 May 2011

⁴ 27 June 2012

3. *Any further time off must be validated by a doctor's certificate informing [Mr McLennan] of your incapacity to work.*

[13] The letter concluded by advising Mr Wratt that he needed to be aware that further breaches in relation to the matters discussed and listed in the correspondence would result in summary dismissal.

[14] On Friday 8 March 2013 and Monday 11 March 2013 Mr Wratt was again absent from work. In both instances he did not contact JDM until after his shift had commenced and on the first occasion not until JDM had sought to contact him by phone but without success. At 10.45am Mr Wratt advised by text message that he was not coming to work.

[15] The parties met on 14 March 2013. Amongst other things Mr McLennan reiterated that it was unacceptable for Mr Wratt not to ring in if he was unable to attend work. Mr Wratt responded to Mr McLennan's concerns and advised that "*if it happens again you can sack me on the spot*". Notes from the meeting reveal JDM's desire for Mr Wratt to improve his communication and he was given a further final written warning. A letter dated the same day recorded their exchange including JDM's expectations that it be notified of absence before work started. Mr Wratt was advised that he should not expect such leniency in the future. Yet again the company advised that should breach of its requirements occur disciplinary action would be taken and dismissal may result.

[16] In April 2013, Mr Wratt's partner died unexpectedly. He took a week off from work then returned. He says in hindsight he was not in the "*right head space*" to be at work but agrees he did not inform JDM of this.

[17] Mr McLennan's evidence is that on 1 November of each year, entitlement to accrued annual leave and sick leave crystallised for all staff. Mr McLennan says Mr Wratt's past practice had been to take all paid leave entitlements within a few months of it becoming available, and when these extinguished he would request unpaid time off. Mr McLennan says he wished to discuss his concern about Mr Wratt's approach to leave entitlements and a meeting was held on 6 November 2013. JDM's HR consultant, Ms Danella Rennie also attended.

[18] As a consequence of that meeting Mr Wratt was provided with a letter on 7 November 2013. The correspondence acknowledged Mr Wratt's personal difficulties

over the year but emphasised the impact ongoing absenteeism had on the workload of other employees and its operations in general. JDM advised it could no longer “*accommodate ...continued absenteeism*”. Mr Wratt was informed that he could have no expectation of further leave without pay. The letter advised that it was Mr Wratt who was expected to call if he was late or absent and not other people on his behalf.

Events leading to dismissal

[19] On Friday 6 December 2013, Mr Wratt was absent from work. He did not notify JDM before his shift commenced at 7.30am.

[20] Very soon after 8.30am Ms Rennie called Mr Wratt’s home. She rang several times and eventually left a voice message. She was later contacted by Mr Wratt’s mother and advised he was unwell. Ms Rennie asked to speak to Mr Wratt personally.

[21] Mr Wratt says Ms Rennie advised him “*well you know what this means, you were told if you didn’t have a doctor’s certificate that you wouldn’t be coming back to work*”. Mr Wratt says he was told that he should get up, have a shower, and that he would feel better and could come into work. His evidence is that he was too sick to attend work that day. Mr Wratt said that he was unable to obtain a doctor’s appointment and therefore a certificate, but concedes he did not advise anyone at JDM of this.

[22] The following Monday Mr Wratt sent a text message to Mr McLennan saying he was not available to come to work.

[23] Mr Wratt did not contact JDM on Tuesday 10 December but Mr McLennan sent a text message to Mr Wratt asking “*how are you feeling today?*”. Mr Wratt responded:

Not that great without a job, it was made quite clear to me if I missed a day I was sacked, so I will just have to deal with that when Danella gets back tell her to sort out my pay and I find something else, its been a shit of a year anyway. Sorry I was such a hopeless worker.

[24] Mr McLennan responded stating:

Not sacked I need to have some time to work this out. Stay at home until I contact you. We need to have a meeting.

[25] Mr Wratt says he was relieved to find out that he had not been dismissed and that he would get a chance to get a medical certificate that proved he was unwell so that he could continue to have his job. Mr Wratt concedes he did not obtain a medical certificate.

[26] On Wednesday 11 December 2013, Mr McLennan sent a text message to Mr Wratt asking if he had time for a call which subsequently occurred.

[27] The content of the telephone discussion between Mr McLennan and Mr Wratt is largely undisputed. Mr Wratt and Mr McLennan each agree that Mr McLennan said he had spoken with the management team and they held a view that *“this was just another time where there would be another apology but nothing more would come of it”*. Mr McLennan noted their meeting two weeks previously and Mr Wratt responded saying by stating that it had been earlier than Mr McLennan’s estimation. Mr McLennan referred to historical text messages written by Mr Wratt where he acknowledged he *“keeps on letting [JDM] down and how sorry he is”*. Towards the end of the conversation Mr McLennan advised Mr Wratt that he could come in for a talk if he wanted, but that it might be a *“pointless exercise”*. Mr Wratt replied by asking *“is that it then?”* and Mr McLennan said *“yes I’m afraid so”*. Mr Wratt asked if Ms Rennie could make up his final pay and the phone call ended.

[28] A week later, on 17 December 2013, Mr Wratt was paid one week’s wages in lieu of notice and outstanding annual leave entitlement.

Were there justifiable grounds to dismiss Mr Wratt?

[29] There is no dispute that Mr Wratt did not notify JDM before work was due to begin on 6 December 2013 that he was not going to attend. I am satisfied that it was open for JDM to form a view that there were substantive grounds to dismiss Mr Wratt.

Was Mr Wratt’s dismissal procedurally fair?

[30] Section 103A(3) requires the Authority, when determining whether a dismissal was justified, to consider the following:

- a. having regard to the resources available to the employer, whether it sufficiently investigated the allegations;

- b. did the employer raise its concerns with the employee prior to dismissing him
- c. whether the employer gave the employee a reasonable opportunity to respond to the concerns before taking action;
- d. did the employer genuinely consider the employee's response before taking action;
- e. any other factors which may be appropriate;
- f. if there were minor defects in the process taken by the employer which did not result in the employee being treated unfairly, these cannot be treated by the Authority or the Court as the basis for a determination that the dismissal was unjustified.

[31] The Employment Court in its decision *Angus and McLean v Ports of Auckland Limited*⁵ made it clear that procedural fairness remains an important feature of an employer's (in this case JDM) process when contemplating a decision to dismiss or disadvantage an employee. Not only must JDM's decision to dismiss Mr Wratt be based on reasonable grounds but the way JDM dismissed Mr Wratt must be fair.

Was Mr Wratt's dismissal predetermined?

[32] On Mr Wratt's behalf it is alleged that the decision to dismiss Mr Wratt, as evidenced by Mr McLennan's testimony of management consensus prior to the phone call of 11 December, was predetermined.

[33] Mr McLennan's evidence is that the telephone discussion with the management team immediately prior to his conversation with Mr Wratt was to put management on notice that a further instance of absenteeism by Mr Wratt had occurred. He says there was a consensus amongst the management team that Mr Wratt would need to provide a "*remarkably good reason*" for failing to notify his absence before work began on 6 December. This aspect of Mr McLennan's testimony persuades me on balance that the primary purpose of the phone call with Mr Wratt was made as a consequence of management's discussed approach to have Mr McLennan meet with Mr Wratt and hear his response.

⁵ [2011] NZEmpC 160

Was Mr Wratt given an opportunity to respond to JDM's concern?

[34] I have accepted there was no premeditation to dismiss Mr Wratt over the phone. However during questioning Mr McLennan candidly acknowledged his growing exasperation with Mr Wratt as their telephone conversation progressed. He agrees that nothing specifically untoward was said by Mr Wratt but says Mr Wratt's tone led him to conclude that any meeting would likely be similar to those held previously with respect to JDM's requirement for Mr Wratt to properly notify it of absences and that it may be a "*pointless exercise*".

[35] I find it likely that Mr McLennan became increasingly frustrated over the course of the telephone conversation and that this prevented him from advancing arrangements to meet with Mr Wratt to hear his explanation.

[36] I am unwilling to accept submissions on behalf of JDM that Mr McLennan's offer to meet satisfied JDM's obligation (as a fair and reasonable employer) to provide an opportunity for Mr Wratt to explain. Section 103A(3) requires an employer to provide an employee a "*reasonable opportunity to respond*". I do not accept that an offer to meet immediately followed with a statement that the proposed event may be a "*pointless exercise*" can be fairly characterised as providing an employee with that reasonable opportunity. I am also unable to accept that an absence to contest Mr McLennan's proposition can be construed as agreement by Mr Wratt that he did not wish to meet and respond to JDM's concerns. I accept that Mr Wratt was denied an opportunity to respond to JDM's concerns.

Was the failure to provide Mr Wratt with an opportunity to respond a minor procedural defect?

[37] JDM submits that even if it did not provide an opportunity for Mr Wratt to respond to its concerns, the procedural flaw was minor and did not result in Mr Wratt being treated unfairly. In support of this argument JDM emphasised that at no point between 6 and 11 December 2013, including during the initial telephone conversation with Ms Rennie, or the exchange of text messages over the material period, or the telephone discussion with Mr McLennan on 11 December, did Mr Wratt volunteer any reason for his failure to advise JDM of his absence on 6 December.

[38] I accept that Mr Wratt did not offer any reason as to why he did not notify JDM before work commenced on 6 December 2013. Mr Wratt says in his evidence that he relied on Mr McLennan's text message of 10 December 2013 stating that a meeting was needed. I accept that he had a reasonable expectation that he would be able to respond to the matter at that point.

[39] There is a further inference that Mr Wratt did not proffer any explanation because he had no plausible account to give. I agree that Mr Wratt's inability to furnish any explanation as to why he did not contact his employer tends to support that proposition. However that impression can only be speculative. The importance of procedural fairness is described by Megarry J in *John v Rees* as follows:⁶

It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in any event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded an opportunity to influence the course of events.

[40] The right of an employee to be provided with an opportunity to respond to an employer's concern is a principle of natural justice that is fundamental to modern employment relationships. The entitlement is now specifically drafted into legislation at s.103A(3)(c) of the Act. The possibility that an employee may not have an acceptable explanation in response to an employer's concerns does not lessen an employer's obligation to provide a reasonable opportunity to allow an employee to respond. JDM's omission to provide Mr Wratt with that opportunity was not a minor procedural flaw. It resulted in Mr Wratt being treated unfairly and was not an action open to a fair and reasonable employer. In these circumstances I am bound to find that Mr Wratt's dismissal was procedurally unjustifiably and he has a personal grievance.

⁶ [1969] 2 All ER 274 (Ch), at p402

Remedies

Reimbursement for lost wages

[41] Mr Wratt seeks reimbursement of the loss of 12 weeks' wages.

[42] His evidence was imprecise about when exactly he set out about looking for alternative employment. On questioning he advised that he was "*not really looking for work before Christmas*". No evidence was furnished to verify whether Mr Wratt made any attempt to obtain employment after Christmas. He says he approached a recruitment agency but was unsure if this was in late January or late February 2014. On balance I consider it more likely that Mr Wratt did not seek work until late February when he was placed in a casual position on 27 February 2014. This period of employment appears to have been short-lived and Mr Wratt left the position on 12 March 2014. There is some dispute about whether Mr Wratt declined an offer of permanent employment or whether there was insufficient work available for him.

[43] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee "*as a result of the grievance*". Section 128(2) of the Act stipulates that the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months' ordinary time remuneration. Where an employee seeks reimbursement of wages the employee should attempt to reduce any losses as a result of the dismissal. In *Allen v Transpacific Industries Group Limited (t/a Medismart Limited)*⁷ Chief Judge Colgan described an employee's obligation in the following way:

“...dismissed employees who intend taking personal grievances must keep good and complete records of their attempts to mitigate their losses or otherwise or such losses that they may wish to claim from the employer.

...

However, dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.”⁸

⁷ (2009) 6 NZELR 530

⁸ Ibid at [78]

[44] With regards to an employee's obligation to mitigate loss, Judge Ford observed in *Radius Residential Care Limited v McLeay*⁹ that "*The Court should not be left to speculate or guess.*"

[45] I accept that annual close down of many businesses from 25 December to the conclusion of statutory holidays in or about 2 January may impede an applicant from swiftly obtaining alternative employment at that time of the year. However I am unwilling to accept these circumstances exempt an applicant from attempting to mitigate his or her losses.

[46] Mr Wratt's admission that he did not seek work before the Christmas/New Year statutory holidays, as well as the absence of any information about attempts to find work after that period until mid-February does not satisfactorily demonstrate mitigation of loss. In these circumstances I decline to make an order for reimbursement of wages.

Compensation

[47] Mr Wratt gave limited testimony of the effect his dismissal had on him. His written evidence is that JDM should have given closer regard to his personal circumstances including the death of his partner earlier in the year and that his dismissal, coming so close to Christmas, was insensitive.

[48] He refers to financial concerns and the humiliation he felt being 45 years old, unemployed, and having had to return to live at the family home, although I note this event had occurred prior to his dismissal.

[49] I accept that Mr Wratt is likely to have felt a level of distress as a consequence of his dismissal, his evidence leads to me consider a modest award of \$5,000, subject to my assessment as to contributory behaviour, is appropriate.

Contribution

[50] In considering Mr Wratt's entitlement to remedies the Authority must apply s.124 of the Act, which provides that the Authority must consider the extent to which

⁹ [2010] NZEmpC 149 at [51]

the actions of the employee contributed to the situation which gave rise to the personal grievance.

[51] I am unwilling to limit my considerations solely to whether Mr Wratt contributed to the procedural aspects of JDM's decision to dismiss, as suggested by counsel. In *Harris v The Warehouse Limited*¹⁰ Chief Judge Colgan observed:

“the situation that gave rise to” that personal grievance is the series of relevant events which caused the employee to have been dismissed or disadvantaged unjustifiably.¹¹

[52] Mr Wratt was not dismissed for a single omission to notify his employer of his absence. JD had formally addressed its concerns with Mr Wratt's ongoing failure to notify JDM of absences on at least three occasions prior to the instance which led to his dismissal, including two written warnings within 9 months and a formal letter setting out JDM's expectations had been issued. Without doubt those events are intrinsic to the “*situation that gave rise*” to his dismissal and personal grievance.

[53] There is no argument that Mr Wratt was unaware of his obligations. He conceded during the Authority's investigation that from JDM's perspective it was important for it to have employees notify it of absence before work began, and when he did not contact JDM before 7.30am on 6 December 2013 he was aware his employment was at risk.

[54] Although I have concluded there were procedural flaws to the way in which Mr Wratt was dismissed, a causal connection exists between his blameworthy conduct and JDM's decision to dismiss.

[55] I assess Mr Wratt's contribution to the situation that gave rise to his personal grievance as being 75 percent.

Comment

[56] Final submissions on behalf of Mr Wratt raise the possibility that he may be contractually owed a further week's notice. This matter was not claimed in the statement of problem nor advanced in evidence during the Authority's investigation

¹⁰ [2014]NZEmpC 188

¹¹ *ibid* at [178]

meeting. In the absence of a full opportunity for JDM to respond to the issue I am unwilling to determine the matter.

Summary of orders

[57] Pursuant to s.123(1)(c)(i) of the Act and after an assessment as to contribution J&D McLennan Limited is ordered to pay Mr Wratt the sum of \$1,250¹².

Costs

[58] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

¹² \$5,000 minus 75%