

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 114
3091432

BETWEEN CHRISTOPHER WAYNE WRIGHT
Applicant

AND MAIDEN CONSTRUCTION LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Anna Oberndorfer, advocate for the Applicant
Carl Pascoe, advocate for the Respondent

Investigation Meeting: 23 February 2021 in Christchurch

Submissions Received: 23 February 2021 from the Applicant
23 February 2021 from the Respondent

Date of Determination: 23 March 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christopher Wayne Wright from 3 February 2020 worked as a ‘Tradesman Painter’ for Maiden Construction Limited, a Christchurch construction and contracting company that is part of an umbrella group of companies (Maiden Group Limited) that at the time of the investigation meeting employed twenty nine people. Mr Wright says he was unjustifiably dismissed on 10 February 2020.

[2] Murray James, a director of Maiden Group, conceded that Mr Wright was dismissed in circumstances where the company wrongly believed that he was the subject of a ninety day trial period provision that was not detailed in Mr Wright’s employment agreement. Otherwise, Maiden Construction assert that the reasons for the dismissal were justified.

Issues

[3] The issues I have to determine are:

- (i) Was Mr Wright unjustifiably dismissed by Maiden Construction?
- (ii) If I find Mr Wright was unjustifiably dismissed, what remedies are appropriate given Mr Wright is claiming:
 - (a) lost wages; and
 - (b) Compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (“the Act”).
- (iii) If any remedies are awarded should they be reduced taking into account s 124 of the Act if it is found Mr Wright contributed to the situation giving rise to his personal grievance claim.
- (iv) Costs of these proceedings.

The Authority’s investigation

[4] At the investigation meeting I heard evidence from Christopher Wayne Wright, by telephone link from Australia; Murray James, Maiden director; and Geoff Yeatman, a painting foreman who had briefly worked alongside Mr Wright.

[5] Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on identified issues. Whilst I record that I have carefully considered all material placed before me, I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses are drawn from their written statements, the parties’ submissions and attached documentation.

What caused Mr Wright’s employment relationship problem?

[6] On 20 January 2020, Mr Wright who is an experienced painter and decorator, was interviewed by Murray James and Mark Fahey (Maiden Construction’s business development manager) in Christchurch for a role as part of a team being put together to complete a painting project for a third party in Blenheim. The interview resulted in a job offer and Mr Wright

signed an employment agreement on 27 January. The agreement describes the role as a “Tradesman Painter” and that the employment is of a fixed term duration to complete a specified project that was estimated to last fourteen weeks and be based in Blenheim. The agreement did not contain a 90 day trial period but Mr James claims that he mentioned that a trial period would apply in the job interview.

[7] Mr Wright attended a briefing with the rest of the painting team on 31 January and then commenced work by travelling to Blenheim on 3 February in a group of six painters. Mr Wright drove a company provided vehicle to Blenheim accompanied by three co-workers with Mr Yeatman travelling behind them in a separate vehicle. Mr Wright says that he became concerned that at a stop en-route in Kaikoura his co-workers bought alcohol and consumed such in the vehicle during the onward leg of the journey. Mr Wright says the alcohol consumption continued upon arrival at Blenheim in the early evening and that, at the motel they were accommodated in, this morphed into cannabis use that Mr Wright did not partake of. Mr Wright claimed that alcohol and cannabis use persisted for the whole week after work and that his co-workers appeared ‘hung over’ on the following days. Mr Wright claimed that he socialised and consumed alcohol with his co-workers but did not smoke cannabis.

[8] By contrast, whilst admitting that the use of cannabis had been occurring, Mr Yeatman gave evidence that Mr Wright did not fit in well with his co-workers, was viewed as being confrontational, opinionated and not willing to share the burden of difficult tasks and he tried to openly undermine Mr Yeatman in his foreman’s role. Mr Wright vigorously disputed this analysis.

[9] At the end of his first week at work on Friday 7 February, Mr Wright travelled back to Christchurch where he resided for the weekend but on the way he had cause to ring Mr Fahey over an issue of using the company fuel card. In this conversation Mr Fahey asked him to drop by the Christchurch office for a discussion that, he says, Mr Fahey did not specify the purpose of. Mr Wright says he also indicated that he had something he wanted to discuss.

[10] Upon arriving in Christchurch at around 5pm, Mr Wright says that he was met by Mr Fahey and Mr James who opened the meeting indicating that they were about to sack him. However, after he then related allegations that his co-workers were using cannabis and drinking heavily in the work vehicle and motel, Mr Wright was told by Mr James that his

concerns would be investigated and the outcome of the investigation would be relayed to him on the following Monday and that he could retain the work vehicle over the weekend. Mr Wright claimed that during the aforementioned meeting he was not apprised of why his employer was contemplating dismissing him.

[11] By contrast, Mr James said that after listening to Mr Wright's allegations he told him it had been his intention to dismiss him under the trial period provision that he mistakenly believed was in place. He then briefly gave the reasons as being his inability to fit in with his co-workers and complaints from the foreman and Maiden Group managing director (Stu Gordon) who had briefly visited the Blenheim work site earlier in the week. Mr James recalled that he then told Mr Wright that he was willing to pause the dismissal process until he completed his investigation into the drug allegations.

[12] Mr James says he ascertained by interviewing Mr Wright's co-workers over the weekend that Mr Wright's allegations of cannabis use were established but he candidly explained that he had a dilemma in that, despite a company drug policy, a dismissal of all involved would leave him with no painting team to complete the project and retaining Mr Wright, in his opinion, would cause disruption and potential resignations. Mr James determined, still believing that Mr Wright was on a 90 day trial period, that the dilemma would be resolved by dismissing Mr Wright and retaining the other employees albeit with suitable warnings over drug use. Mr James did not provide any notes of interviews conducted during his investigation.

[13] Mr James says he then phoned Mr Wright on the morning of Monday 10 February and when Mr Wright asked him if he still had a job, said he did not and, asked him to return company property. Mr Wright's recollection of the conversation was he was not told of his dismissal but told to bring the van to the office for a meeting.

[14] Mr Wright attended a meeting later in the morning of 10 February with Mr James and Mr Gordon. What emerged from evidence given by both parties was that Mr James: immediately advised of Mr Wright's summary dismissal decision, briefly outlined the reasons as being for incompatibility with co-workers and he refused to disclose the results of his investigation into the drug allegations claiming it was confidential.

[15] Mr James acknowledged that Mr Wright reacted badly to the decision and then was driven home by him.

[16] Mr Wright says he was threatened when he raised the unfairness of the decision and told if he went to court he would lose and that when he was driven home, Mr James refused to engage further with him on his contentions of the unfairness of the decision. The decision to dismiss was not confirmed in writing.

Was the dismissal justified?

[17] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[18] Section 103A details factors that the Authority must objectively measure an employer's actions against before concluding whether the employer, in context, acted in a fair and reasonable manner. These summarised are:

- a) Given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;
- c) was the employee afforded a reasonable opportunity to respond to identified concerns; and
- d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- e) any other factor the Authority regards appropriate.

Applying factors identified by the Act

[19] I find on the facts, that Maiden Construction gave insufficient attention to all of the above factors.

[20] Mr James, who alongside Mr Gordon was the decision-maker, conceded that the process adopted was deficient – I observe key factors included that Mr James:

- Communicated a preliminary decision to dismiss before conducting an investigation or hearing from Mr Wright.
- Did not, initially identify specific concerns or put them to Mr Wright for consideration before the disciplinary meeting.
- Failed to document the investigation.
- Did not disclose the results of his investigation prior to or during the final meeting.
- Did not allow Mr Wright any opportunity to get advice or indeed to provide an explanation of any mitigating factors prior to issuing the decision to summarily dismiss.
- Having concluded after only a week of employment that Mr Wright was ‘incompatible’ he provided no opportunity for Mr Wright to reflect upon and address the concerns of co-workers (that were not specifically put to him).
- Ostensibly failed to treat all involved in the same manner and apply disciplinary sanctions in an even handed or proportionate manner.
- Failed to check Mr Wright’s employment status as his employment agreement contained no 90 day trial period provision.
- Failed to observe Mr Wright’s employment agreement disciplinary procedures.
- Ignored Maiden Construction’s drug and alcohol policy.

[21] As a result of the approach taken to the dismissal, Maiden breached good faith obligations owed to Mr Wright principally s 4(1A)(c) of the Act that mandatorily requires disclosure of information “relevant to the continuation of the employees employment” and an

“opportunity to comment on the information” before any decision that will adversely impact on continuing employment is made.¹

Finding

[22] I find that Mr Wright was unjustifiably dismissed in a summary manner and that he is successful in his personal grievance and is entitled to remedies.

Remedies

Lost wages

[23] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Wright and, s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months’ ordinary time remuneration. Here I find Mr Wright’s lost remuneration was attributed to the personal grievance.

[24] Mr Wright says he should be paid for the remainder of his fixed term agreement but he secured alternative employment as a painter a week after his dismissal and he provided documentary evidence that he received a first payment from his new employer of \$370.35 on 17 February 2020. Mr Wright says he voluntarily relinquished this new role due to bullying concerns and was paid a final pay on 23 March 2020 and thereafter until 30 June 2020 he was in receipt of a jobseekers benefit. Subsequently Mr Wright has relocated to Australia

[25] I find that Mr Wright securing alternative employment then resigning, broke the chain of causation in regard to his lost wages. Ms Oberndorfer suggested that I should take into account the fact that the new employment was on a trial basis and that Mr Wright had identified that he left as he was being bullied and therefore it was unreasonable for him to continue in employment. Conceptually, two issues arising counter these submissions: 1) my inability to test the assertion that bullying took place at the new employer without hearing further contextual background and 2) Maiden Construction cannot reasonably be held responsible for any actions of a subsequent employer in terms of causation and any cause of action for an unjustified constructive dismissal and a remedy of lost wages would have to be pursued against Mr Wright’s subsequent employer.

¹ Section 4 (1A) (c) Employment Relations Act 2000.

[26] However, I find it is appropriate and equitable in all of the circumstances, to award Mr Wright two weeks' pay in lieu of the notice that Maiden Construction did not provide him and a further two weeks' pay to take account of a reasonable period of time Maiden should have taken to properly investigate the situation, allow Mr Wright time to get legal advice and then conduct a careful disciplinary process. I fix this sum of lost wages on the basis of 50 hours per week at a rate of \$25 per hour for four weeks being \$5,000 gross.

Compensation for hurt and Humiliation

[27] Mr Wright gave evidence of the impact of the summary dismissal and the affect upon him. He explained that he was shocked and frustrated by the hurried and sudden nature of the dismissal, felt belittled and not listened to.

[28] With some justification, Mr Wright felt Maiden Construction dispensed with his services in a callous and peremptory fashion and that Mr James was unwilling to discuss the situation or listen to his perspective of the situation. In the circumstances that perspective included Mr Wright alerting his employer of co-worker behaviour that was clearly incompatible with their obligations.

[29] I find Mr Wright was afforded no dignity and he suffered significant humiliation as a direct result of how he was summarily dismissed. Mr Wright had extensive trade experience having worked as both a contractor and an employee and appeared to set himself high standards.

[30] I am convinced that at the time, Mr Wright suffered humiliation, loss of dignity and injury to feelings but that he quickly found alternative employment but was unable to put this unfortunate experience behind him. He has dwelt on it for some time perceiving that he was treated very unfairly. Mr Wright claimed he did suffer psychological distress on an ongoing basis but sought no professional help for such and did not advance any corroborating evidence to support his claims. I do surmise that the distress was genuinely felt as a sense of outrage about his situation.

[31] Taking into account all the circumstances, including that this was a relatively short period of employment that was of a fixed term nature (and ultimately curtailed by Covid restrictions), that the employer did not aggravate the situation post-employment, and

considering the awards made by the Authority and Court in similar situations, I consider Mr Wright's evidence warrants an award of compensation of \$12,000 under s 123(1)(c)(i) of the Act.

Contribution

[32] Section 124 of the Act states that I must consider the extent to which, if at all, Mr Wright's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedies granted should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*².

[33] Given the short period of employment involved (four and a half days) and the fact that the dismissal was for performance issues not properly put to Mr Wright, I do not see any issues of contribution from Mr Wright have been appropriately established. I observe that his attempts to apprise his employer of his co-workers actions were not met with an appropriate response and nor were the claims of his incompatibility properly assessed and contrasted with the difficult situation that he had been placed in.

[34] The hasty decision to dismiss, even though I accept the employer genuinely but mistakenly believed a 90 day trial period prevailed, was a disproportionate response and any reasonable employer would have taken more care and sought advice before proceeding to dismiss. I cannot objectively or fairly deem Mr Wright's conduct to have been 'culpable'.

[35] I find that no reduction in the remedies I have awarded is justified.

² *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76]

Overall finding

[36] **I have found that:**

- a. Christopher Wayne Wright was unjustifiably dismissed from his employment with Maiden Construction Limited.**
- b. Maiden Construction Limited must pay Mr Wright the sums below:**
 - (i) \$5,000 gross lost wages;**
 - (ii) \$12,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Act**

Costs

[37] Costs are at the discretion of the Authority but here Mr Wright established his predominant claim that he was unjustifiably dismissed and has obtained compensatory remedies in an investigation meeting that took a day.

[38] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[39] If no agreement is achieved, Mr Wright has fourteen days following the date of this determination to make a written submission on costs and Maiden Construction Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David Beck
Member of the Employment Relations Authority