

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 524  
3132374

BETWEEN	RAWIRI ANDREWS Applicant
AND	MARAIS LAYING NZ LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Tarras Andrews, advocate for the Applicant Karen Radich, counsel for the Respondent
Investigation Meeting:	30 September 2021 at Napier
Submissions received:	15 October 2021 from Applicant 22 October 2021 from Respondent
Determination:	25 November 2021

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The applicant was employed by the respondent on a permanent basis, first as an operator, and later as a supervisor of a small team.

[2] The respondent terminated the applicant's employment by handing the applicant a letter of termination, and stating that the applicant did not need to come into work.

[3] At the time, the respondent's National Manager mistakenly believed that the applicant was employed on a fixed term basis, and that the term of employment was coming to an end. The respondent also offered the applicant further work on a fixed

term basis, although there is a dispute between the parties about when such an offer was made.

[4] The applicant raised a personal grievance claim for unjustified dismissal, seeking payment of contractual notice, lost wages, compensation for hurt and humiliation, and a claim for unpaid wages relating to a dispute about the agreed hourly rate of pay.

[5] The respondent maintained its incorrect position that the applicant had been on a fixed term employment agreement, and offered to provide the applicant with a further 7 weeks work on a fixed term basis.

[6] The parties were unable to reach agreement and the matter came before the Authority for determination.

### **The Authority's investigation**

[7] For the Authority's investigation written witness statements were lodged from the applicant, and from four other witnesses on the applicant's behalf. The respondent was represented by its National Manager, Mr Adrien Merceron. All witnesses, except for one who was overseas, answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions, and provided written submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) 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**

[9] The issues requiring investigation and determination were:

- (a) Was the applicant unjustifiably dismissed?
- (b) If the respondent's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act

- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to the applicant's unjustified dismissal grievance?

**Facts:**

[10] The respondent is a company engaged in the UFB2 (ultra-fast broadband) project, and is involved in the installation of infrastructure hardware.

[11] The applicant was employed by the respondent on 15 August 2018, initially as an Operator of certain specialised equipment, and later as a supervisor of his own team.

[12] The applicant was employed on a permanent basis, and worked 40 to 50 hours per week. He was employed to work in the Hawkes Bay region or "any other location as required and determined by the Company's needs".

[13] He received a formal pay-rise from \$23 per hour to \$27.50 per hour, in the company's "end of year" pay review cycle in December 2018.

[14] On 3 June 2019, the respondent's National Manager, Mr Adrien Merceron, planned a visit from Wellington to the Hawkes Bay. He texted the applicant asking that he attend the yard later in the day, with another team member, rather than his usual 6.00 am start.

[15] The applicant was aware that a key piece of work had come to an end, and that for the next two weeks, he and his team would be performing remediation work, including tasks like the laying of concrete.

[16] He did not know what the purpose of his meeting with Mr Merceron was, but assumed it had something to do with this.

[17] The applicant lived only about a five minute drive from the yard. When he arrived at the yard, he noticed there were no other staff present, and no work trucks, indicating to him that the team had already been sent out to start on the remediation work without him.

[18] Mr Merceron asked the applicant for his driver's licence, as he needed a copy of this for an insurance claim. The applicant did not have his licence on him, and had to go back to collect it. This took approximately 10 minutes. He then returned to the

yard, and brought his licence to Mr Merceron who was in the shed that served as an office and storage area, waiting behind the desk. Mr Merceron took a copy of the applicant's licence and returned it to him.

[19] Mr Merceron recalls that he asked the applicant to get his drivers' licence after the discussion that followed, but this dispute is not material.

[20] In any event, when the applicant was in the office with him, Mr Merceron handed the applicant an envelope. In that envelope was a letter headed "Private and Confidential – Termination of Employment". The applicant opened the envelope and started reading. He understood this meant that his employment was ending, and that he was being fired.

[21] The letter referred to a fixed term provision in the applicant's employment contract. It stated "*it is necessary to provide you with formal termination of employment. As such you are entitled to give you [sic] two (2) weeks' notice. Your last working day with the company will be the Friday 14th Jun. [sic]*"

[22] The applicant recalls that Mr Merceron told him he was no longer needed to attend work as a supervisor, or as an operator, and that he could go home. He asked Mr Merceron if he should come to work tomorrow, and was told no. He asked if he should come in next Monday, and Mr Merceron told him not to come in next week either.

[23] The applicant was in shock, and says he didn't know what to do or think. He recalls that, once he understood his employment was at an end, he "felt his gut drop", and many thoughts began to pop into his head, thoughts about how he would care for his babies, pay his bills, complete the purchase of his first home, and provide for his partner.

[24] He told Mr Merceron that he understood, and left. He didn't go home, but went to the office of another construction company, and asked if he could apply for a job there. He was immediately given an application form, as he had several years experience and desirable skills including a heavy vehicle licence, and experience managing a team. Once he had filled out the form, a lady from human resources came to speak with him. She asked why he was leaving his current employer. When he said that he had just been terminated, he recalls that the whole atmosphere in the room changed, and they sent him away without further discussion.

[25] The applicant applied for other jobs. He succeeded in obtaining other employment as an operator, rather than a supervisor, at another construction company. In total, the applicant was unemployed for some eight weeks, and the respondent paid him 1 weeks' notice in lieu.

[26] After the applicant had signed a new employment agreement, but before he started work, he visited his doctor and was diagnosed with depression. When queried about this, he explained that it was only after he had succeed in getting a new job that what had happened really sunk in for him. Part of this was the realisation that he had had to accept an operator role (rather than a supervisory role) to secure new employment, and many people knew that he had previously held a supervisor's position and were asking him about this change, and what he had done to deserve a demotion. The applicant explained that he had lost confidence, and that this was a totally new experience for him, that previously he had had the confidence to do what was best for himself, and not worry about what others thought or said. He emphasised that he had always been in full time work, ever since leaving school, and that the experience of being out of work was new for him, and he had not known how to explain to his doctor what was happening to him.

[27] The applicant gave some further evidence about what happened with his new job, and his eventual break up with his long term partner. I will not go into these matters here, as it is my view that it is only appropriate to focus on the effects on the applicant that can be clearly and immediately associated with the ending of his employment by the respondent.

[28] Unsurprisingly, Mr Merceron gives a slightly different view of events surrounding the applicant's termination.

[29] Mr Merceron set out from Wellington at about 4.00 am on the morning of Tuesday 4 June. He had arranged to meet with the applicant, and another employee who worked in the applicant's team. On the way, he stopped off at the company's office in Petone, to print the documents he would need for the meeting later that morning.

[30] He states that he printed out two template letters for the applicant, one terminating his employment on the basis that it was fixed term which was coming to an end, and a second letter offering the applicant new employment on a new project in Waipukurau. He also printed out the same two letters for the applicant's colleague, changing the name on the letter. Mr Merceron explained that he put both letters for the applicant in an envelope, and took the envelope with him to Hastings to give to the applicant.

[31] He was unable to explain why the termination letter was dated 5 days previously, if it had, as he said, been printed by him on the same morning, apart from suggesting that he had typed the wrong date. Mr Merceron also clarified that although the second letter offered work in accordance with an attached individual employment agreement and invited the reader to accept the offer of employment by signing and returning a duplicate letter of offer, there was no such agreement or duplicate copy for signing in the envelope.

[32] Mr Merceron gave the envelope to the applicant, and explained to him that he didn't need to come in to work for the next two weeks. He believes he told the applicant to contact him about working on the new project at Waipukurau, and then the applicant left.

[33] He accepts that he made no particular effort to focus on the new work opportunity, as he believed the applicant already knew about this.

[34] Mr Merceron clearly explained to the applicant that his current contract was at an end and that he was not to come into work, either as a supervisor or as a team member, for the next two weeks. He did not explain that the applicant was to be paid for the next two weeks, or that despite having had his employment terminated, the applicant was expected to continue working on a new project immediately thereafter with no loss of pay.

[35] Instead, Mr Merceron relied on the letter of offer of new employment (which on his own evidence was provided absent an attached employment agreement setting out the terms and conditions to be accepted) to have communicated his intentions to the applicant. It is plausible that this letter was not in fact in the envelope. Certainly, Mr Merceron never checked that the applicant had received or understood it, and did not

discuss this letter with the applicant him at the time of handing the envelope to him, as he discussed and confirmed the termination letter.

[36] Mr Merceron's failure to check that the applicant understood that Mr Merceron intended for his employment to continue despite being given a termination letter is perplexing under these circumstances.

[37] Mr Merceron says he was surprised that the applicant didn't contact him to start work on the new project.

[38] He says that he sent the applicant a text message, which the applicant says he never received. Apart from this, Mr Merceron waited passively for the applicant to contact him.

[39] After this, Mr Merceron's next contact from the applicant was when he received the applicant's personal grievance claim.

[40] In response to the applicant's personal grievance, the respondent maintained repeatedly, and incorrectly, that the applicant had been on a fixed term agreement. In addition, the respondent offered the applicant further employment on a fixed term, for seven weeks.

[41] The respondent paid the applicant for only one week's notice, when the applicant had been promised two weeks notice in accordance with his employment agreement.

[42] Shortly prior to the hearing of this matter, the respondent accepted that the applicant had been employed on a permanent basis, and that it had made a mistake as to the existence of a fixed term in his employment agreement. It also accepted that it had mistakenly paid only 1 week's notice instead of the two that had been promised, and made a payment of a further week's wages.

### **Findings**

[43] The respondent submitted that, although the applicant was dismissed, the dismissal was not unjustifiable, because it could not have come as a surprise to the applicant that the work performed by the applicant on a specific project in Hastings was ending.

[44] The respondent further submits that, despite being given a termination letter, the applicant's employment with the respondent could have continued if he had advised Mr Merceron that he wanted to continue working. And that, although the termination letter was a mistake, it was immediately remedied by the offer of other employment on another project. The respondent then concludes its submissions by stating that "*All that occurred was that the applicant was notified of the Hastings work ending, was provided effectively with two weeks off work on full pay, and was offered ongoing work nearby – with travel time being paid. It was the applicant's choice not to accept that offer of work.*"

[45] The difficulty with these submissions is that the applicant was in fact dismissed by the respondent. The respondent dismissed the applicant when the respondent's National Manager (Mr Merceron) handed the applicant a letter headed "Termination of Employment", which letter set out that it was "*provid[ing] you with your formal notice of termination of employment*", gave the applicant two week's notice, and set out the date of his last working day with the Company. Mr Merceron then explained to the applicant that his employment was at an end, he was not to come into work, and that he could now leave the work premises. Contrary to the respondent's later submissions, although Mr Merceron clearly explained to the applicant that his employment was at an end, no particular care was taken to explain what Mr Merceron said was his intention, that the applicant then return to work after a two week paid break.

[46] The applicant's dismissal by the respondent was clear and unequivocal.

[47] The dismissal was not substantively justified. This is for two reasons.

[48] First, the respondent's dismissal of the applicant was based on a fundamental misunderstanding by the respondent, that the applicant's employment was on a fixed term basis, and that fixed term was ending. In fact, the applicant's employment was not fixed term, and the respondent took no steps to check the true situation. This is not the fault of the applicant. It is the employer's obligation to retain a copy of the employment agreement, and any current terms and conditions of employment<sup>1</sup>, and to engage with any employee where there is a proposal that will, or is likely to, have an adverse effect on the continuation of employment, such that the employee is provided

---

<sup>1</sup> Section 64 of the Employment Relations Act 2000.

with access to relevant information about the decision, and an opportunity to comment before the decision is made<sup>2</sup>.

[49] Second, the respondent has repeatedly submitted that there was on-going work available for the applicant following the termination of his employment. This logically suggests that, if the respondent had fulfilled its obligations to the applicant, and engaged with him prior to terminating his employment, there would have been no reason for terminating the applicant's employment at that point in time.

[50] The dismissal was not procedurally justified. The respondent handed the applicant a letter of termination, and explained that his employment was at an end, before sending him away. This does not meet the test of justification set out in section 103A of the Employment Relations Act 2000, as no fair process was followed<sup>3</sup>.

[51] The submission by the respondent that the applicant cannot have been surprised when he was told that work on the Hastings project was ending has no force. The applicant was not told that work on the Hastings project was ending, he was dismissed. Even if the applicant had been told merely that the work on the Hastings project was ending, this would not have occasioned in him any surprise, because his on-going employment was not dependant on that work, his employment was of permanent tenure.

[52] The submission by the respondent that the applicant's employment with the respondent could have continued if he had advised Mr Merceron that he wanted to continue working is likewise problematic because it does not detract from the fact that the applicant was unjustifiably dismissed, and attempts to place on to the applicant the burden of remedying the respondent's unjustified actions.

[53] Insofar as the respondent is submitting that the applicant should have mitigated his losses arising from his unjustified dismissal, by accepting short-term fixed term employment with the respondent immediately after his unjustified dismissal, it is well-established that an applicant is required to take steps to mitigate their loss, but that this does not necessarily require the applicant to accept re-employment with the respondent<sup>4</sup>. In the present case, the applicant took active steps to find and secure other

---

<sup>2</sup> Section 4 of the Employment Relations Act 2000, as part of the requirements of good faith.

<sup>3</sup> Deficiencies in the dismissal process will render a dismissal unjustifiable, see for one example *Beloe v Ecolab Ltd* [2012] NZERA Christchurch 274.

<sup>4</sup> Westlaw, ER128.05.

employment, and succeeded in securing an offer of new employment after only 5 weeks<sup>5</sup>. The applicant explained that he was not comfortable accepting re-employment with the respondent as he had lost trust in the respondent's willingness and ability to treat him properly and fairly, particularly in light of the respondent's repeated incorrect insistence that his employment had ended due to the expiry of a fixed term, and because the subsequent employment the respondent was offering was for a short fixed term period, which in the applicant's view was not an adequate substitute for the permanent employment he had lost, and which he was seeking to replace.

[54] The applicant's stance is reasonable, and the respondent cannot expect that an offer of a few week's fixed term work would be sufficient to obviate the loss of permanent employment.

[55] The applicant was unjustifiably dismissed by the respondent. Accordingly, the applicant is entitled to lost remuneration resulting from his dismissal, being wages for the eight weeks he was unemployed, less the two weeks' notice paid by the respondent.

[56] The Authority notes that in written submissions, there was a disagreement between the parties as to what the applicant could expect to be paid in an average week.

[57] The respondent refers to the amount of \$1,209.41, which it states is an average weekly pay, calculated across the applicant's entire employment.

[58] The applicant notes that this figure is not an accurate reflection of what the applicant was earning at the time of his dismissal, as it did not take his then-current pay rate of \$27.50 into account, and submitted that the appropriate weekly rate is \$1,422.90.

[59] The Authority has considered the hours the applicant actually worked each week, excluding days taken as leave. The Schedule of Earnings provided by the respondent, which set out the applicant's hours of work, show that the applicant worked an average of 49 hours per week. The applicant's pay rate at the time of his dismissal was \$27.50 per hour. Multiplying the hours worked by the pay rate applicable at the time of termination, gives a weekly pay of \$1,347.50.

---

<sup>5</sup> The applicant's total period of unemployment was 6 weeks, once notice payments were taken into account, as although he secured a job offer after 5 weeks, the new employer was not able to take him on immediately, and there was a delay of 1 week while appropriate equipment and PPE was arranged.

[60] This amounts to a total of \$8,085 in lost remuneration.

[61] The applicant is entitled to receive an additional 8% of top of this sum (\$646.80) to represent the holiday pay he would have been entitled to but for his dismissal, as well as an additional 3% (\$242.55) to represent the Kiwisaver contributions he would have been entitled to but for his dismissal<sup>6</sup>.

[62] No awards of lost remuneration are made for losses arising from the ending of his subsequent employment, which is a separate matter, and which cannot be laid at the feet of the respondent.

[63] The applicant also makes a claim for compensation for hurt and humiliation resulting from his termination. The applicant gave clear and direct evidence of the impact on him, including his feelings at the time of the termination, and the stress it had placed on his family and finances. He also supported his evidence by medical records, and explained why he had only sought a medical diagnosis at the point he had secured other employment, as this is what forced him to accept his change in circumstances.

[64] The applicant is not to blame in any way for the termination of his employment, which occurred without warning. The applicant should have been able to rely on his employer to know the terms of his employment, and to act accordingly, including making a correct notice payment, and acknowledging its mistake when the applicant first brought this to the respondent's attention.

[65] Taking all these factors into account, the applicant is entitled to \$20,000 for compensation for hurt and humiliation.

### **The Pay Rate Claim**

[66] In addition to the claim for unjustified dismissal, the applicant also raised a claim for unpaid wages, resulting from a payrise he says was given him by Mr Merceron, sometime in September 2018.

[67] The applicant stated that he had been verbally promised a pay rise by Mr Merceron, sometime in September 2018 from \$23/hour to \$25/hour. He said that there

---

<sup>6</sup> *Lawton v Steel Pencil Holdings Limited (in Liq)*, [2021] NZEmpC 199.

had been a meeting with himself, Mr Merceron, the applicant's brother, who had also been offered a pay rise, and another manager of the respondent's (a Mr Mark Bishop).

[68] The applicant never received his pay rise. After about 2 months, in November or December, he asked Mr Merceron about it, on occasions when Mr Merceron was in the yard. He recalls that Mr Merceron responded to the effect of "he would sort it with payroll".

[69] There were no records that the applicant could provide in support of his claims.

[70] In the end, the applicant received another pay rise in the general end-of-year process, to the rate of \$27.50/hour, which was implemented as expected in the new year. The applicant makes a claim for back wages from an unspecified date in September, through to the end of January.

[71] Mr Merceron was adamant that he had not agreed to increase the applicant's pay. He says he did not have any formal meeting with the applicant to discuss and agree on pay rates, and that he would never have done this in the way described by the applicant for two reasons. First, the respondent had a standing policy to review wages once per year, in December, with any increases implemented in January, and second, he had a very firm personal policy that it was inappropriate to discuss a person's pay rate with other staff present, and he took great care not to talk about pay rates, and when he did so, this would only be in a private setting between himself and the staff member concerned.

[72] He indicated that staff would occasionally ask him for a pay rise from time to time, as he was in the yard, and his response was always to refer generally to the established end-of-year process.

[73] I find it is more likely than not that there was no firm agreement to increase the applicant's hourly rate, outside the respondent's end of year process when the applicant's pay rate did in fact increase as agreed. If there were group discussions, they were in the nature of a more general comment, rather than a clear agreement with a "meeting of the minds". Accordingly, no wages are owing to the applicant in respect of this.

## **Costs**

[74] The applicant made no claim as to costs, and was represented by his father in any event. No orders for costs are made.

## **Orders**

[75] The respondent is ordered to pay to the applicant within 28 days:

- a. A total of \$8,974.35 gross in lost remuneration, being \$8,085 for 6 weeks lost wages, plus 8% for holiday pay (\$646.80), plus 3% for Kiwisaver (\$242.55).
  
- b. A total of \$20,000 without deduction, being compensation for hurt and humiliation.

Claire English  
Member of the Employment Relations Authority