

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 119
3004257

BETWEEN MICHAEL CLARK
 Applicant

A N D CANTERBURY BUTYNOL
 FIXERS LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Michael McDonald, Advocate for Applicant
 James Dawson, Advocate for Respondent

Investigation Meeting: 4 July 2017 at Christchurch

Submissions Received: 4 July 2017, from the Applicant
 4 July 2017, from the Respondent

Date of Determination: 6 July 2017

DETERMINATION OF THE AUTHORITY

- A. The applicant was unjustifiably dismissed and is entitled to the remedies set out in this determination.**
- B. The applicant was not unjustifiably disadvantaged in his employment.**
- C. The respondent is to pay a penalty of \$500 to the Crown for failing to provide a written employment agreement to Mr Clark.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Clark claims that he was unjustifiably dismissed from his employment with the respondent and that he has suffered unjustified disadvantage in his

employment by not having been issued with an employment agreement, by way of alleged bullying and by way of a flawed dismissal process. Mr Clark seeks the imposition of a penalty upon the respondent for the failure to issue him with an employment agreement.

[2] The respondent denies unjustified disadvantage and unjustified dismissal, although concedes that the dismissal process followed was not in accordance with legal requirements. It admits not having issued Mr Clark with an employment agreement.

Background

[3] The respondent is a roofing company, specialising in the installation of butynol membranes for waterproofing purposes. Mr Clark and the director of the respondent company, Jamie Dawson, have known one another for many years. Prior to the spell of employment which ended with the dismissal which is the subject of this investigation, Mr Clark had worked for the respondent previously as a teenager.

[4] Mr Clark commenced the most recent period of employment with the respondent in November 2015. According to the evidence of Mr Clark, between November 2015 and his dismissal in March 2016 he alleges that he was subjected to bullying by Mr Dawson as follows:

- (a) Name calling. For example, Mr Clark alleges that, if he had a cold sore on his lip, which he was prone to, Mr Dawson would call him insulting names;
- (b) He would be shouted at in front of builders and other persons. For example, if he was carrying a roll of butynol and was not walking fast enough;
- (c) Mr Dawson would push him physically;
- (d) He would be yelled at to get things that were within Mr Dawson's reach.

[5] Mr Clark says that he did complain about the name calling regarding his cold sore but did not complain about the others issues. Mr McDonald accepts that no formal personal grievance was raised about any of these alleged incidents of bullying.

[6] Mr Clark says that, on Thursday 24 March 2016, just before the start of the Easter holiday, Mr Dawson and he had been working on Mr Dawson's house alongside some builders. Mr Clark says that, as he was leaving for the day, he asked Mr Dawson whether he was wanted back at work on the Tuesday or the Wednesday (after Easter). Mr Clark says that Mr Dawson replied "don't know, see you mate". Mr Clark says that he went home and then drove to Blenheim with his partner and her child. Mr Clark says he did not hear anything from Mr Dawson during the extended weekend but did send a text at some point asking when he was to return to work.

[7] Mr Clark said it was not until midday on Easter Monday that he received a text message from Mr Dawson saying that he wanted Mr Clark back at work the following day, Tuesday 29 March, at 7am. Mr Clark says that, by this time, his partner's young daughter had a stomach upset and was sick and so he texted Mr Dawson back telling him this, saying that he and his partner did not want to travel back to Christchurch with her in the car that day. He said he would be available for work on Wednesday morning.

[8] Mr Clark says that Mr Dawson sent a text message back to him saying that the reply was not acceptable and then sent a further text message which said "take as long as you want". Mr Clark said that he believed that Mr Dawson was dismissing him, which was confirmed when a further text message was sent saying "last pay, last week". Mr Clark says that he knew that he had been dismissed at that point and replied saying he would see Mr Dawson in court. Mr Dawson then replied to him saying "DPB" [Domestic Purposes Benefit], a reference to Mr Dawson's belief that Mr Clark and/or his partner were dishonestly claiming DPB.

[9] Mr Dawson gave evidence setting out the problems he says he had been having with Mr Clark in general, and in particular in the week leading to Easter. His dissatisfaction in general was, he says, about Mr Clark's habitual lateness, poor workmanship, answering back and use of his mobile phone when he was working, against Mr Dawson's instructions.

[10] With regard to the week leading up to Easter Friday, Mr Dawson said that Monday 21 March had been a busy day, but that Mr Clark had been late and had used his phone a lot when he was not allowed to. The following day, 22 March, Mr Clark did not turn up for work and did not text until 9.30am even though the start time had been 7am.

[11] Mr Dawson says that, on Wednesday 23 March, Mr Clark was late again. Mr Dawson says that on this day, he also found out that Mr Clark had been responsible for some “unforgivable workmanship” a few days before which was such gross negligence that it would have resulted in eight units having suffered water damage through leakage if Mr Dawson had not discovered it. Mr Dawson says that the job had not been a difficult one for Mr Clark, but he had taken shortcuts.

[12] Mr Dawson says that, as soon as Mr Clark turned up to work that morning, they had a discussion about the issue, as well as about Mr Clark’s “sloppy attitude” and poor attendance. Mr Dawson says it would have been impossible for him not to have known that his future with the respondent was “at a thin end”. Mr Dawson says that they then left in separate cars to go onto the next job and Mr Clark crashed into the back of another car because he had been texting. That was the end of Mr Clark’s working day.

[13] Mr Dawson says that he drafted a written warning that evening, which he intended to give to Mr Clark the following day. However, he did not do so in the end because it turned out that he and Mr Clark worked well together that day. The written warning does corroborate Mr Dawson’s evidence that he addressed his concerns with Mr Clark. It read as follows¹:

23-3-16
Final Warning
ATT Mike

Final Warning
To Michael Clark

As discussed this is a letter to let you know that after repeated warnings you still haven’t bothered to improve or try harder.

Continually late even its 10 min still late.

Substandard workmanship very poor.

¹ Spelling errors have been corrected

Texting all the time even though phone is meant to be left in car.

Smart answering back when I tell you what to do.

Continual lying and excuses.

Your sneakiness and lack of job seriousness has made it impossible to carry on like this.

Yours sincerely
Jamie Dawson

[14] Mr Dawson says that, on that day (Thursday 24 March) he and Mr Clark worked on Mr Dawson's home as it was raining and they were unable to do roofing work. Mr Dawson says that they discussed the following week's work, but that no mention was made of having Tuesday off as they were very busy. Mr Dawson denies the account given by Mr Clark about him asking whether they were back at work on the Tuesday or the Wednesday after Easter.

[15] Mr Dawson does not deny dismissing Mr Clark by text on Easter Monday, but he says that Mr Clark's refusal to come to work the following morning was "the last straw". He says that he did not believe Mr Clark when he texted that his partner's little girl was sick. This is because, he says, Mr Clark appeared to be setting the situation up, by texting him to ask what day he was to return to work when he knew already that he was to return on Tuesday.

[16] In his statement in reply, Mr Dawson suggested that Mr Clark could have travelled back to Christchurch from Blenheim by bus on Easter Monday, although it is unlikely that Mr Clark would have found a bus on Easter Monday that left after midday in time to get him back for Tuesday morning at 7am, at least on the evidence of Mr Clark, who says that he did not know about the requirement to get back in time for Tuesday morning until after midday on Monday.

[17] Mr Dawson also denies the allegations of bullying. He denies that he called Mr Clark insulting names when he had a cold sore, saying he did not even understand the meaning of one of the names he is supposed to have called him, but says that they did have a joke about his cold sore on one occasion, which Mr Clark found amusing. Mr Clark denies he ever found jokes about his cold sores amusing.

[18] Mr Dawson does not deny that he occasionally yelled at Mr Clark but says that this was after he had told him something and got a “smart reply” back. He denies that he ever pushed Mr Clark.

[19] It is clear from Mr Dawson’s evidence that he had significant concerns about Mr Clark’s use of the telephone during work hours. He suggests in his statement in reply that this created a health and safety hazard as Mr Clark would be distracted. Mr Dawson said that he would often yell at Mr Clark when he found him on his phone.

[20] Mr Clark accepted that there were occasions when Mr Dawson and he would discuss a number of things that both he and Mr Dawson “did not like about the other” during his employment. He accepts that he was late in the mornings on occasions, but this was because they had inconsistent start times and it was difficult for his body to adjust.

[21] Mr Clark says that Mr Dawson did yell at him in respect of the work he had done shortly before Easter, but he had not been properly trained how to do the job in question. He denied using his phone inappropriately. Mr Clark says that he was never aware that he could have been dismissed.

The issues

[22] The following issues need to be determined by the Authority:

- (a) Was the dismissal of Mr Clark justified;
- (b) Was Mr Clark unjustifiably disadvantaged in his employment; and
- (c) Should a penalty be imposed upon the respondent for not having issued Mr Clark with an employment agreement?

Was the dismissal of Mr Clark justified?

[23] Sub-sections 103A(1) and (2) of the Employment Relations Act 2000 (the Act) set out the test of justification that the Authority must apply when deciding whether a dismissal was justified. This is as follows:

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[24] Sub-section 103A(3) sets out the steps that employers have to follow when contemplating dismissal or other actions in respect of an employee. They are as follows:

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[25] Section 103A concludes by stating that, in addition to the factors described in subsection (3), the Authority may consider any other factors it thinks appropriate, and that the Authority must not determine a dismissal or an action to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly

[26] Mr Dawson concedes that the procedure followed by him was unjustified. In short, the procedure was fundamentally flawed because it did not give Mr Clark a chance to defend himself. Prior to dismissing Mr Clark by text on Easter Monday 2016 Mr Dawson did not make known to Mr Clark that he believed Mr Clark was lying about his partner's daughter being ill, preventing him from attending work the next morning. Mr Dawson therefore also did not allow Mr Clark the chance to have his say. Obviously therefore, in turn, Mr Dawson could not consider Mr Clark's explanation as he was not given the chance to give one. These requirements are all the fundamental hallmarks of a minimally fair process, and failing to follow them is not minor.

[27] Mr Dawson suggested that, although the process was unjustified, the dismissal was substantively justified. However, I cannot make that finding. As no process whatsoever was followed I cannot safely assume that a dismissal would have been justified nevertheless. For example, Mr Clark may have been able to have furnished proof that the daughter was ill, preventing travel. If that were the case, even if Mr Clark had known he was supposed to have attended work the following day, that illness may still have genuinely prevented him for doing so. It would not have been substantively justified to have dismissed Mr Clark under those circumstances.

[28] Therefore, as a proper investigation meeting with Mr Clark once he had returned to work may well have changed Mr Dawson's views, I must find that the dismissal was both procedurally and substantively unjustified.

Was Mr Clark unjustifiably disadvantaged in his employment?

[29] Mr Clark says that he has suffered unjustified disadvantage in his employment by not having been issued with an employment agreement, by way of alleged bullying and by way of a flawed dismissal process.

Employment agreement

[30] Whilst Mr Dawson agrees that he did not issue Mr Clark with an employment agreement, Mr Clark gave no evidence as to how he was disadvantaged by this fact. Whilst it is possible that there was disadvantage suffered, it is not appropriate for me to guess at what that disadvantage was, and so I cannot make any finding that Mr Clark was unjustifiably disadvantaged by not having been issued with one.

Alleged bullying

[31] No personal grievance was ever raised in respect of the alleged yelling and pushing, and no application has been made by Mr Clark to raise a personal grievance after the statutory deadline. The Authority therefore has no jurisdiction to consider these claims.

[32] Mr Clark says he did ask Mr Dawson to stop making fun of his cold sores, although it is not clear that he raised a personal grievance by doing so, as insufficient evidence has been given about that. On balance, I cannot be satisfied that a personal grievance was raised about the alleged name calling, and so, again, as no application

has been made to raise the grievance out of time, the Authority has no jurisdiction to make a finding about this claim.

The flawed dismissal process

[33] I have found that the dismissal was unjustified. Therefore, it is not necessary to find whether the process caused disadvantage to Mr Clark, as he cannot recover remedies for the same action under two separate headings.

Should a penalty be imposed upon the respondent for not having issued Mr Clark with an employment agreement?

[34] Section 65 of the Act requires that an individual employment agreement of an employee must be in writing. It must also contain six pieces of information, as set out in that section. Sub-section 65(4) provides that an employer who fails to comply with that section is liable to a penalty imposed by the Authority.

[35] Mr Dawson admits that he did not issue an employment agreement. Therefore, on the face of it, the respondent is liable for a penalty.

[36] Applying the principles of *Jeanie May Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*² requires me to use a four step approach. The first step is for the Authority to first identify the nature and number of applicable breaches for statutory penalty purposes. There was one breach (of section 65). The maximum penalty that may be imposed upon a company or other corporation is \$20,000 per breach. The starting point is, therefore, a penalty of \$20,000.

[37] The second step requires that the severity of the breach should then be assessed, together with any ameliorating circumstances. I believe that the severity is not great in this case, as Mr Dawson said that he had meant to give Mr Clark a contract, but did not get round to it. In other words, the respondent did not hold back from issuing an agreement in order wilfully to disadvantage Mr Clark. In addition, Mr Clark was the only employee affected, as all other staff were contractors, according to Mr Dawson. Mr Dawson was also not aware of his statutory obligation. I am satisfied that, had he been, he would have issued Mr Clark with an agreement. I

² [2016] NZEmpC 143.

am not aware of any other ameliorating circumstances. I therefore adopt as step two a 75% reduction, giving a potential penalty of \$5,000.

[38] Step three requires the Authority to consider the means and ability of the person in breach to pay the penalty reached under step 2. I heard no evidence about the means of the respondent to pay a penalty of \$5,000, but am aware that it is a small company. I believe that a reduction of 20% is appropriate. That brings the total to \$4,000.

[39] The final step involves the proportionality or totality test, in which the Authority must consider whether the provisional penalty reached after the first 3 steps is proportionate to the seriousness of the breach, and harm occasioned by it. A penalty of \$4,000 is too high in light of the fact that this was a one off failing which was not deliberate. Mr Dawson now understands the need to issue an employment agreement for any other employees. Mr McDonald on behalf of Mr Clark argues that a penalty of \$6,000 is appropriate. I do not consider, though, that this is a case where a substantial penalty is warranted.

[40] However, there has been a failing of a statutory requirement, and a penalty is appropriate, albeit a small one. Stepping back, I believe that a penalty of \$500 is appropriate. I do not believe that it is appropriate for this sum to be paid to Mr Clark as there is no evidence of how he has been disadvantaged by not having been provided with an employment agreement. The penalty is therefore to be paid to the Crown.

Remedies

[41] Having been successful in his claim of unjustified dismissal, Mr Clark is eligible for an award of remedies. Sub-section 123(1)(a) to (c) of the Act provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of 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:

- (c) the payment to the employee of compensation by the employee's employer, including compensation for—
- (i) humiliation, loss of dignity, and injury to the feelings of the employee; and
 - (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[42] Section 128 provides:

128 Reimbursement

- (1) This section applies where the Authority or the court determines, in respect of any employee,—
- (a) that the employee has a personal grievance; and
 - (b) that the employee has lost remuneration as a result of the personal grievance.
- (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
- (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[43] Mr Clark asks for an award of 39 weeks' loss of wages. However, this requires the Authority to exercise its discretion under s 128(3) of the Act. I do not believe that such a discretion is warranted. This is because it is clear that Mr Dawson genuinely had significant concerns about various aspects of Mr Clark's performance. On balance, unless Mr Clark had shown significant improvement, I believe that Mr Clark would have been dismissed justifiably by the respondent within the following three months of his dismissal.

[44] In addition, Mr Clark also stated in evidence that he did not want to go back into roofing after having been dismissed. However, Mr Clark had three years' experience of roofing, and so should have been able to have obtained roofing work within three months of being dismissed. Whilst Mr Clark is free to decide what work he wishes to do, it is not just to expect the respondent to reimburse lost wages which could have been reduced had Mr Clark not decided to change his career path.

[45] Therefore, I decline to award Mr Clark 39 weeks' lost wages. Applying s128(2), Mr Clark is entitled to be awarded a sum equivalent to 3 months' ordinary time remuneration. This is the gross sum of \$10,480.21, averaging the wages received by Mr Clark during his 18 weeks' employment with the respondent. From

this must be deducted gross earnings received during this period of \$164, leaving the sum of \$10,316.21.

[46] Mr Clark is entitled to holiday pay on this sum of 8%, which gives a gross sum of \$825.30.

[47] Turning to compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to his feelings in respect of the effects of the dismissal, Mr Clark said that his dismissal resulted in him falling back into depression, having to go back onto anti-depressants and becoming suicidal. He claims an award under s123(1)(c)(i) of \$15,000. Mr Clark produced in evidence a brief letter from his GP which refers to being on anti-depressants, but says nothing about suicidality or the severity of the depression.

[48] Whilst I accept that Mr Clark fell back into depression, and went back onto anti-depressants, I would need to see more evidence to be satisfied that the effects of being unjustifiably dismissed were as severe as Mr Clark said. Nonetheless, Mr Clark was a fairly vulnerable person having had a history of depression, which Mr Dawson knew about. Some of that history is obviously quite severe. As such, the respondent must take Mr Clark as he was, and must bear the responsibility for precipitating a relapse into depression by an unjustified dismissal. I assess the appropriate level of compensation to be \$10,000.

[49] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[50] Mr Dawson says that he dismissed Mr Clark because his statement that he would not attend work on Tuesday 29 March 2016 was the last straw. He said that there had been a culmination of events which had been causing him concerns about Mr Clark. The week leading up to Easter 2016 had been particularly bad. I accept Mr Dawson's evidence in this respect. Mr Clark admitted being late on occasions. He denied using his phone inappropriately, and producing poor workmanship by taking shortcuts, but I found Mr Dawson's evidence credible in this respect.

[51] Given my finding that Mr Dawson's evidence was credible, and that the dismissal followed was a reaction to what was seen as a last straw, I believe that Mr Clark's actions during his employment, which were blameworthy, did contribute towards the situation that gave rise to the personal grievance. I therefore believe that it is appropriate to reduce the remedies awarded to Mr Clark. I believe that a reduction of 50% is appropriate.

[52] **Orders**

[53] I order the respondent to pay the following within 21 days of the date of this determination:

- a. To Mr Clark the gross sum of \$5,158.11 in relation to lost wages;
- b. To Mr Clark the further gross sum of \$412.65 in relation to holiday pay on lost wages;
- c. To Mr Clark the further gross sum of \$5,000 under s 123(1)(c)(i) of the Act; and
- d. To the Authority a penalty of \$500, which will then be paid by the Authority into a Crown account.

Costs

[54] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. If they are unable to do so within 14 days of the date of this determination, then Mr McDonald may, within a further 14 days, serve and lodge a memorandum setting out what contribution towards Mr Clark's costs he seeks from the respondent, and the respondent will then have a further 14 days within which to serve and lodge a written reply.

David Appleton
Member of the Employment Relations Authority