New Zealand Employment Relations Authority Decisions

Close v Recreational Services Limited (Christchurch) [2018] NZERA 1075; [2018] NZERA Christchurch 75 (25 May 2018)

Last Updated: 4 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 75
3017716

BETWEEN MARTIN CLOSE Applicant

A N D RECREATIONAL SERVICES LIMITED

Respondent

Member of Authority: David Appleton

Representatives: Peter Cahill & Kevin Murray, Advocates for Applicant

Garry Pollak, Counsel for Respondent

Investigation Meeting: 9 March 2018 at Christchurch

Submissions Received: 24 April and 7 May 2018 from Applicant

30 April 2018 from Respondent

Date of Determination: 25 May 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Mr Close was unjustifiably dismissed and is awarded the remedies set out in this determination.

B. Mr Close suffered an unjustified disadvantage in his employment but cannot recover any additional remedies in respect of that finding.

C. Deductions were made from Mr Close's pay in breach of the Wages Protection Act 1982. However, Mr Close does owe to the respondent the sums deducted and an adjustment is made to the remedies awarded to reflect that.

D. Matters raised for the first time on behalf of the applicant in written submissions are disallowed.

E. Costs are reserved. Prohibition from publication order

[1] Evidence was heard about an employee of the respondent who was cited by the applicant as a person who had been treated

differently to himself. This individual took no active part in the Authority's investigation meeting and I prohibit from publication any information leading to his identification save for the information set out in this determination.

Employment relationship problem

[2] Mr Close claims that he was unjustifiably dismissed and suffered unjustified disadvantage in his employment. He also claims that he was subjected to an unlawful deduction from his wages in breach of the Wages Protection Act 1982 in relation to a deduction for phone usage. In submissions received on behalf of Mr Close, new causes of action were added which had not been raised in the statement of problem or the statement of evidence served and lodged on behalf of Mr Close. I shall deal with these below.

[3] The respondent denies these claims, saying that Mr Close was justifiably dismissed for serious misconduct and that all deductions made from his salary were made in compliance with the Wages Protection Act. Mr Pollak objects to new matters being raised in submissions which were not before the Authority at the time of the investigation meeting.

Brief account of the events leading to the dismissal

[4] Mr Close was employed by the respondent on a permanent, full time basis as a labourer whose principal duties were to empty public rubbish bins and clean drinking fountains in reserves, parks and other recreational spaces within Christchurch.

[5] Mr Close entered into an individual employment agreement on 22 June 2015 and started his employment on 29 June 2015. Mr Close's employment was also subject to "common terms and conditions" contained in a document dated

1 April 2012. This document was expressly referred to in the offer of employment made to Mr Close which he confirmed by his signature that he had read and understood.

[6] The common terms and conditions imposed various obligations and duties upon Mr Close including, amongst other things, to:

(a) comply with all lawful orders and instructions and all and any rules and regulations;

(b) devote the whole of his attention to the performance of all of his duties;

(c) not do anything "whereby the goodwill and reputation of the company may be prejudicially affected";

(d) "keep and maintain proper records pertaining to [his] services and provide reports to the Company in such form and with such frequency as the Company may reasonably require detailing [his] activities in fulfilling [his] obligations".

[7] The common terms and conditions also obliged Mr Close to attend work at such times as may be required to meet the requirements of his position. The common terms and conditions also included a clause relating to deductions, including the following sub clauses:

Deductions

9.5.1 These may be made on a rateable basis for time lost due to default, sickness or accident beyond any entitlements provided for in the employee's terms or otherwise due to law, or at the request of the employee (e.g. agreed leave without pay).

9.5.2 Subject to there being agreement in writing, and subject to the Company's discretion, deductions may be made for other purposes including health insurance premiums, superannuation, or in respect to a debt owed by the employee to the company.

[8] The common terms and conditions also contained a section on "discipline" and "house rules" which included examples of serious misconduct and "less serious misconduct". The following sub-clauses are worth noting:

14.1.1 The company is entitled to trust that the employee/s will do what is required of them competently and act reasonably in their employment. In cases where that trust or expectation is not met the company is obliged to take disciplinary or dismissal action. This serves the need to clarify the limits beyond which certain conduct and poor performance will not be tolerated and offers the opportunity in most cases, for the employee at fault to correct the problem.

[9] Examples of serious misconduct, which are defined as "actions which can result in Instant Dismissal" include the following;

2. Not working within the boundaries of trust and confidence issues and in good faith with matters that could harm/or damage the employer/employee relationship.

4. Action or inaction that causes disruption to organisational workflow or to meeting client expectations.

5. Falsification or being party to falsification of any company or client document or record or making a false declaration. This includes time/wage/accident/expense/leave/production/scrap records etc.

6. Knowingly undertaking any activity/action/inaction that may potentially cause embarrassment to the company or bring the company into disrepute during and also outside of work hours e.g. while operating a company vehicle or wearing a company

identified uniform.

[10] Examples of less serious misconduct, which are defined as "actions which can result in Warnings being given and after due process potentially dismissal" include the following:

2. Failure to perform work to a required standard.

7. Negligence or misuse of company resources and/or property.

8. Careless or indifferent performance of duties.

[11] The company's warning procedure was stated to be as follows:

The following warning procedure shall be used for permanent employees, however, should the employer considers [sic] the behaviour serious enough, it may proceed to a higher level of penalty.

Written Warning

Final Written Warning

Possible Termination of Employment

In all events, a thorough investigation will be undertaken. All allegations will be put to the employee concerned in the presence of a support person of his/her choice and the employee will be given a real opportunity to provide an explanation.

[12] At this point it is worth explaining how Mr Close conducted his work. There were three 'runs' in Christchurch, divided between three employees, of which Mr Close was one. The exact route relating to any given run would vary over time, as the need to empty bins varied with the seasons. For example, during the summer, bins located by beaches need emptying more frequently than during the winter. Generally, though, from week to week, any given run would be the same.

[13] Each morning that Mr Close worked, he would log into a mobile phone app using a certain username. The app would indicate the parks he was to visit that day, showing the appropriate route. This app is called Con X and it was also used to keep track of which parks had been serviced each day, so that, for each park, Mr Close would use the app to show that the bins had been emptied and the drinking fountains cleaned in that park. Mr Close could also indicate whether the bins were full, half full or empty, which helped the respondent plan changes to runs. Every time the app was used by the employees to show that a specified park had been serviced, it sent a charge to Christchurch City Council, as charging by the respondent was done on a per park per day basis.

[14] Mr Close also used the same vehicle each day, which was fitted with a Navman GPS tracking system. This enabled the respondent to know where Mr Close's vehicle was at any given time, including whether the vehicle had entered into a park (each of which has a geofence installed), how fast he had been driving and when he has turned the ignition on and off. The accuracy of the GPS tracking is fairly exact.

[15] On 8 July 2016, Mr Close was invited to attend a disciplinary hearing to discuss the following concerns of the respondent:

(a) Falsification, or being party to falsification of any company record or making a false declaration.

(b) Failing to comply with organisational and job specific requirements, procedures and policies.

(c) Not working within the boundaries of trust and confidence issues and in good faith with matters that could harm and/or damage the employer/employee relationship.

[16] The respondent's concerns that prompted this invitation to the disciplinary meeting involved discrepancies between the GPS Navman history related to Mr Close's work vehicle and the hours that he had noted on his time sheet. Seven discrepancies had been identified and were set out in a letter to Mr Close from the operations manager of the respondent, Ed Hadfield, dated 8 July 2016. The discrepancies over the seven dates in question totalled 11.25 hours with, in each case,

more hours being recorded on Mr Close's time sheet (in accordance with which he was paid) than had been indicated by the Navman.

[17] According to the respondent, as a result of the disciplinary investigation meeting, which took place on 13 July 2016, Mr Close was issued with a final written warning dated 15 July 2016. A copy of this written warning, signed by a senior manager, Warwick Sisson, stated that the company had found that Mr Close had admitted recording six hours on his time sheet for a day (26 June 2016) when he did not work. The letter stated that Mr Close had also confirmed that there were further discrepancies. The letter stated that the final written warning was to remain active on Mr Close's file for a period of 12 months and that "any further acts of misconduct may result in further disciplinary action up to and including dismissal". Mr Close denies receiving the letter, and says that he did not know he had received a final written warning.

[18] On 31 August 2016 the respondent received two customer complaints about two bins (in separate locations) not being

emptied. It received a further complaint, via Christchurch City Council, on 2nd September 2016. As a result of this Mr Hadfield wrote to Mr Close on 24 September 2016 inviting him to attend a disciplinary meeting. The house rules that were alleged to have been breached were as follows:

(a) Action or inaction that causes disruption to organisational workflow or to meeting client expectations.

(b) Knowingly undertaking any inaction that may potentially cause embarrassment to the company or bring the company into disrepute during and also outside of work hours; and

(c) Falsification or being party to falsification of any company or client document or record or making a false declaration.

[19] In addition to the letter referring to a "number of complaints received from both the public and other contractors surrounding the emptying of bins in the parks on your regime" the letter also referred to "evidence of Con-X jobs being signed off as completed when they allegedly had not been done". The letter stated that the allegations were considered to be serious misconduct and that, if found to have substance, may result in disciplinary action, up to and including dismissal. The letter encouraged Mr Close to bring a support person or representative with him.

[20] For a reason that is not apparent, a further invitation letter was issued on 30

September inviting Mr Close to a disciplinary meeting on 6 October. However, Mr Close then went on extended sick leave between 3 October and 30 November 2016. His given reason for this was stress, caused by the disciplinary process. This sick leave was extended on two occasions by Mr Close's GP, being first imposed until 17

October, then extended until 31 October and finally extended to 30 November. During this period, further attempts were made by the respondent to arrange for Mr Close to attend the disciplinary meeting, all of which had to be postponed due to the ongoing sickness.

[21] At the beginning of November 2016 Mr Close was required to return his mobile phone so that it could be used by another employee and, on 7 November 2016, Mr Close wrote an email to Micaela Parker, a human resource manager, complaining of bullying and a negative attitude towards him by Mr Hadfield. This complaint related to the allegations of him not carrying out his duties. The complaint also alleged disparate treatment between him and other employees, harassment by the company during his sick leave (namely the delivery of the disciplinary invitation letters), pressure imposed on him to return his telephone and referred to Mr Close's concern about $200 being taken from his pay. Mr Close sent this complaint on more than one occasion. Ms Parker states that she investigated Mr Close's concerns and did not find any substance to them.

[22] Mr Close returned to work on 30 November 2016 and the respondent checked Mr Close's performance on 1 December, and on the 3rd, 4th and 7th December. It found that, over that four day period, 55 bins had not been emptied.

[23] Accordingly, on 13 December 2016 Mr Sissons wrote to Mr Close requiring him to attend a formal disciplinary meeting on 14 December. This letter alleged that the same house rules had been breached as had been alleged in the original 24

September letter from Mr Hadfield but added a fourth alleged breach, namely, "not working within the boundaries of trust and confidence issues and in good faith with matters that could harm/or damage the employer/employee relationship".

[24] This letter of 13 December set out in table form a summary of the details of the allegations and had attached to it several pages of information including activity reports for Mr Close's vehicle extracted from the Navman system, together with details from the Con-X system.

[25] It is necessary to explain in greater detail exactly what was being alleged. These allegations were;

a. On 31 August 2016 a complaint was received that a bin in Plynlimon Park had not been emptied. Although the park had been assigned to Mr Close on 28 August, he did not sign off on Con-X that he had serviced that park that day, and the GPS showed he did not visit it. The GPS also showed that he had not visited it on 31 August, the next day that Mr Close had worked.

b. On 31 August and 2 September 2016 complaints were received that a bin had not been emptied in Crosbie Park. The GPS data showed that Mr Close had visited Crosbie Park on 28 August and had signed the job off, indicating that he had emptied the three bins and cleaned the fountain. However, the GPS data showed that Mr Close had only been in the park for five minutes, which was not long enough to have completed all those tasks. This was also the case for 31 August. This was an example of falsification according to the respondent, because Mr Close had indicated via the app that he had completed all the assigned tasks, when he had not.

c. On 1 December 2016 Mr Close had not signed off 13 bins which had been assigned to him via Con-X, and which he had not visited according to the GPS data.

d. On 3 December 2016 Mr Close had not signed off 10 bins which had been assigned to him via Con-X, and which he had not visited according to the GPS data.

e. On 4 December 2016 Mr Close had not signed off 15 bins which had been assigned to him via Con-X, and which he had not

visited according to the GPS data. In addition, parks that had been visited by Mr Close had not been signed off on Con-X.

f. On 7 December 2016 Mr Close had not signed off 17 bins which had been assigned to him via Con-X, and which he had not visited according to the GPS data. Complaints had been received about two

bins and only two jobs had been signed off on Con-X, by a different operator.

[26] Mr Sisson's letter of 13 December stated the following:

Martin the propensity of these allegation[sic] are considered by the Company to constitute serious misconduct and if they are found to have substance you need to appreciate that it may result in disciplinary action, up to and including dismissal.

[27] Mr Sisson explained in his evidence to the Authority that, by 'propensity', he meant frequency. In other words, the failings were not a 'one-off'.

[28] The disciplinary meeting took place on 15 December as arranged, and Mr Close was accompanied by Mr Cahill. The meeting was chaired by Mr Sisson and he was accompanied by a manager. Mr Hadfield took no part in the investigation meeting because of the allegations of bullying against him.

[29] The Authority saw minutes of the meeting. The following extracts from these minutes are, in my view material:

Martin was given an opportunity to explain or give reasons, the following was said:

• I have been off for 2 month due to stress

• I told you that I did not know where the parks were

- The run was not organised well and I found it hard to comprehend the run

• I was used to doing the East run and found it hard to change

- I believe that the company and management are trying to push me too hard

Warwick pointed out that the only thing we wanted Martin to do is to

do his job properly and to the companies' [sic] standard. Martin said that he did.

Warwick pointed out that run was not complete on several occasions and complaints happened.

Martin once again pointed out that he was stressed and that the run was too hard for him. Due to that he had to take two months of stress leave and visit the doctor.

Warwick pointed out that after the stress leave Martin was signed off to be back at work fit for purpose but once again the bins were signed off by him and some occasions not signed off but the point was they were not emptied. He also pointed out that other people managed to do the run while Martin was absent without many problems.

Martin said that ConX was confusing for him and that he is not very good with phones or technology.

Warwick asked if that was raised with management and pointed out that Martin did not seek help from management when it comes to phones.

Martin agreed that he did not ask for help with phone usage as well as general help with understanding the run better.

...

Martin: "some of the parks I did not do because I did not know where they are".

Martin: "I've made mistakes and I am not denying it but I am having

difficulties trying to organise the parks".

Martin: "Eventually I would find the parks and do them but in the main time [sic] they were not done because I could not find them."

Martin also pointed out that in the beginning when he started he was told that he was given a couple of days to find the park and that he shouldn't worry too much as he will find the parks eventually.

Warwick struggled to understand this part and was not sure how this is a thing as operators are given runs straight away and are expected to ask for help if they can't find parks or are confused.

[30] The minutes show that some discussion ensued between Mr Cahill and Mr Sisson about how often bins in certain parks were emptied and Mr Sisson replied that he was not there to discuss the contract. The minutes also show that Mr Cahill stated

that the investigation meeting had not been completed by the company and so the disciplinary process should not yet have been started. In reply to this, after a 15 minute adjournment, Mr Sisson is recorded as having stated:

The facts are clear; as we view this as serious we do not need to undergo investigation.

[31] The minutes also record the following exchange:

Warwick: Why did you not complete your run? Martin: Because I was stressed.

Warwick: This is not an excuse to not tell the managers that you are struggling.

[32] The minutes show that Mr Cahill was attempting to engage Mr Sisson in

discussion on elements of Mr Close's complaints about other bins on other runs (other

than Mr Close's) not being emptied, with photographic evidence of unemptied bins,

but that Mr Sisson refused to engage.

[33] The end of the minutes record the following:

Warwick: As I've explained before we view these as serious.

You've not disputed what we have put in front of you. You have been stressed but you also said that

you didn't tell the managers about your stress.

Martin: I have been told that I have 2 days to find the parks by the person from Auckland.

Warwick: Given the fact that you have given no excuse.

Martin: 2 days to complete the run, stress for me. I knew that I was watched and that is stressful.

Warwick: I have listened and I feel like this gives us no choice but to terminate your employment.

The lawyer said he will send us the letter and we will talk later.

[34] Mr Sisson sent a letter to Mr Close on 19 December 2016 to confirm that, after taking all of Mr Close's comments into consideration, as well as the fact that he was currently under a final written warning for similar circumstances, he reached the conclusion that Mr Close's actions constituted serious misconduct and that he was justified in summarily terminating his employment. Mr Sisson indicated that "given the time of year" he had decided to terminate Mr Close's employment with notice. However, Mr Close was not required to work that notice.

[35] A personal grievance was raised on behalf of Mr Close by way of a letter from

Mr Cahill dated 30 December 2016.

The issues

[36] The following issues were before the Authority at the time of the investigation meeting and need to be determined by the Authority:

(i) Whether Mr Close was unjustifiably dismissed from his employment; (ii) Whether Mr Close was unjustifiably disadvantaged in his employment; (iii) Whether an unlawful deduction was made from Mr Close's wages in

breach of the Wages Protection Act 1982.

Was Mr Close unjustifiably dismissed?

[37] Section 4 of the Employment Relations Act 2000 ("the Act") defines the extended concept of good faith and states the following:

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other. (1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[38] Section 103A of the Act sets out the test of justification that the Authority must apply when deciding whether a dismissal by an employer, or actions undertaken by an employer, are justified or unjustified. Section 103A provides as follows:

Test of justification

(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.

(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.

(4) In addition to the factors described in subsection (3), the

Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or

an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the

defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[39] When asked about his response to the five points of explanation made by Mr Close in the disciplinary meeting (referred to in the cited extracts of the minutes at paragraph [29] above) Mr Sisson said that Mr Close was not a new employee, and he had done a good job sometimes. He said that Mr Close had also not asked for help despite the culture in the company that enabled employees to do so.

[40] As for the statement by Mr Close that he did not know where the parks were, Mr Sisson said this was not true, and that Mr Close had been to them. He also had a map book in his truck which he could use to check the location of the parks and the bins. Mr Sisson also said that the runs were simple, and were set out in a logical order, although the company would listen to operatives and would change the routes if that made them more efficient.

[41] Mr Sisson also said that Mr Close had never said that he could not do the run, and that when he had started he had "been great" and that they had had to "slow him down" as he had been working too many hours.

[42] Mr Sisson also said that everyone liked Mr Close and that he had been hoping that Mr Close would give him "a golden

bullet" which would have enabled him to understand what the reason for the failings was, such as personal problems, effectively to give Mr Sisson an excuse not to dismiss Mr Close. Instead, Mr Close was not defending the allegations; he was just accepting them. Mr Sisson also said he had laboured the seriousness of the disciplinary investigation with Mr Close.

[43] Mr Sisson said that he did not believe Mr Close when he said he had been struggling to do the job. He also said that the company had not introduced any new

technology, and that although runs had changed, they had not changed significantly so as to impact the three operatives.

[44] In deciding whether the dismissal was fair, I need to focus on the following sub issues:

a. Were the data relied upon by the respondent accurate and fairly presented?

b. Was the respondent justified in relying upon the final written warning?

c. Was Mr Close treated differently from another employee?

d. Were the issues for which the respondent dismissed Mr Close misconduct or performance issues?

e. If they were performance issues, did the respondent adopt a fair process?

Were the data relied upon by the respondent accurate and fairly presented?

[45] I address this issue because of an apparent discrepancy in the data which was spotted by Mr Cahill; namely, that Mr Close usually signed on as user EAS1, but on 1

December data for user WES1 were being relied upon. However, Mr Hadfield explained that no operator owned a run, and that they did sometimes sign on using different user names.

[46] My conclusion is that, even if the data for 1 December 2016 were incorrect, other data clearly showed Mr Close's runs on the other dates for which the respondent had concerns, and that the concerns raised with respect to the 1 December data were of the same type as the concerns raised for the other data. Therefore, the overall data relied on are not credibly incorrect.

Was the respondent justified in relying upon the final written warning?

[47] There are two issues of relevance here. The first concerns the allegation that Mr Close did not receive the final written warning letter. No one in the respondent was able to confirm exactly how the letter was dispatched to Mr Close. This is not surprising given the passage of time. However, Mr Sisson said in evidence that he had announced in the meeting that a final written warning would be issued.

[48] I believe that it is more likely than not that Mr Close either did receive the letter, or he knew in any event that he was going to be issued with one. The minutes of the disciplinary meeting record that Mr Sisson did announce that he was going to issue a final written warning, and the respondent's file copy was produced.

[49] The second issue to consider was whether the respondent was justified in relying on the written warning in its decision to dismiss Mr Close. The written warning was still 'live' at the time of dismissal. However, it was issued because Mr Close recorded on his timesheets (or had the office staff do so) hours which GPS data confirmed he did not work. The issues for which Mr Close was dismissed were largely for different reasons; namely, not carrying out assigned duties.

[50] There was one example of an alleged falsification in August 2016, where Mr Close signed off a job to say he had cleared the bins in Crosbie Park, when he had not cleared them all. However, this appears to be of a different character to over recording his hours. The key concern of the respondent was that a bin had not been cleared; not that the sign off had been done.

[51] On balance, I believe that it was not appropriate to rely upon the final written warning in circumstances where the issues of concern for which Mr Close was dismissed were of a different character to those for which the warning was given.

Was Mr Close treated differently from another employee?

[52] Mr Close says that a co-worker refused to empty bins on steep hills because he was nervous of driving on them. The respondent acknowledges this, but says that the worker had approached the manager and asked to be excused servicing these parks. There was no question of it being a disciplinary matter it says.

[53] I do not regard this as a matter of impermissible discrepancy of treatment because the employee in question sought help from the respondent. Mr Close did not.

Were the issues for which the respondent dismissed Mr Close misconduct or performance issues?

[54] In his submissions Mr Pollak asserts that the difference between a performance process and a 'disciplinary matter' is of little consequence in reality. However, the distinction I raised in the Authority's investigation meeting related to

the difference between a performance matter and a misconduct matter. I will say more about that below.

[55] Mr Pollak also says that it is unreasonable for Mr Close to now come to the Authority when he has never previously contended that his misconduct could be characterised as poor performance. It is true that it was I that first raised the possibility that Mr Close's failure to properly carry out his role related to poor performance. It could perhaps, more accurately, be characterised as an incapability issue rather than a lack of training or understanding. However, the fact that Mr Close or his advocates did not first raise this does not preclude the Authority from considering it, provided the parties were given a chance to consider the matter, which they have been. Section 122 of the Act provides that nothing in Part 9 prevents a finding that a personal grievance is of a type other than alleged.

[56] There is an important distinction between a misconduct concern on the one hand and a performance or capability concern on the other because they require different approaches, as Ms Parker effectively acknowledged in her evidence, although both aspects of an employer's concern are covered by s 103A of the Act. In

the Employment Court case of *Yan v Commissioner of Inland Revenue1*, Her Honour

Judge Inglis, as she was then, set out the factors that should be applied when a poor performance concern is being addressed by an employer (citations omitted).

[3] It is well accepted that an employer may dismiss an employee for poor performance. Section 103A of the Employment Relations Act 2000 (the Act) provides the yardstick for assessing the justification or otherwise for the Department's actions. While Mr Scott, advocate for the plaintiff, cautioned against a formulaic tick- box approach, the factors identified in *Trotter v Telecom* (which largely mirror or are subsumed within the statutory considerations set out in s 103A(3)) provide a useful framework for analysis and it is convenient to summarise them at the outset:

(a) Did the employer in fact become dissatisfied with the

employee's performance?

(b) Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher

standard of performance?

(c) Was information given to the employee readily comprehensible, an objective critique of the employee's

work and an objective statement of the standards to reach?

(d) Was the employee given a reasonable time to attain the required standards?

(e) Following the expiry of a reasonable time:

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(i) Use of an objective assessment of measurable targets?

(ii) Fairly putting tentative conclusions before the

employee?

(iii) Listening to the employee's explanation with an

open mind?

(iv) Considering the employee's explanation and favourable aspects of the employee's service and the

employer's responsibility for the situation (for example, not detecting weaknesses sooner or

promoting beyond level of competence).

(v) Exhausting all remedial steps including training, counselling and exploring redeployment.

[4] Ms Hornsby-Geluk (counsel for the defendant) drew my attention to *Bagchi v Chief Executive of the Inland Revenue Department*. In that case the plaintiff had been dismissed after a performance improvement plan failed to produce the required results, and claimed that the employer had improperly prejudged the

outcome of the process. The Chief Judge observed that:

[70] It is simply not possible for a court, perhaps years later, to determine many elements of justification for a

performance dismissal as does the employer. It is, after all,

the employer, that sets the expected standards and must assess those. It is also the employer that is aware of, and

must deal with, the consequences of poor performance on

the enterprise and other staff. All the court can do is to ensure that the decision to dismiss was taken in good faith, fairly and reasonably and otherwise is a decision that it is reasonably open to the employer to make.

[5] The employer's actions are not to be subjected to minute

scrutiny in an effort to find any fault, however minor. The overarching question is whether what the employer did and how it did it was what a fair and reasonable employer could have done in all of the circumstances at the relevant time.

[57] I accept the evidence of Mr Sisson that he tried unsuccessfully to get Mr Close to explain the cause of his failings and that Mr Close had not let anyone know prior to the disciplinary meeting that he was struggling. I also accept that he concluded in the absence of an explanation that Mr Close had committed serious misconduct. The question is, was that conclusion reasonable?

[58] The Authority must not step in the shoes of the respondent; that is to say, I must not decide what I would have done had I been confronted with the evidence that the respondent faced. Instead, the Authority must assess whether the actions of the respondent in dismissing Mr Close were what a fair and reasonable employer could have done in all the circumstances. Another way of putting that test is to assess whether dismissal fell within the range of responses open to a fair and reasonable employer which had all the information that the respondent had at the point of dismissal.

[59] When I step back and assess what relevant information the respondent had at the date of dismissal, I find it was the following:

a. Mr Close had apparently been able to do the job satisfactorily, albeit initially on a different run, up to around the end of August 2016 (over a year);

b. In July 2016 Mr Close had received a final written warning for over stating on his timesheets hours worked, including for a day he was off sick.

c. Mr Close had very recently returned back to work from two months' sick leave due to a stress related condition when his performance of the role started to fall apart;

d. There was clear evidence from the GPS tracking and ConX data that

Mr Close had failed on several days in late August and early December

2016 to carry out tasks which he had previously carried out adequately;

e. These failings had started to occur relatively suddenly;

f. These failings were stark and multi-faceted, involving:

i. failing to visit several assigned parks;

ii. failing to sign off jobs on ConX; and

iii. failing to empty all bins in parks visited.

g. Mr Close had stated in the disciplinary investigation meeting that he had been stressed, and implied he had been struggling with aspects of the job.

[60] Although Mr Sisson says that he was unable to get Mr Close to explain what the cause of the failings was, he knew that Mr Close had recently been signed off sick by his doctor for two months with a stress related condition, and had been effectively told by Mr Close in the meeting that he was struggling with aspects for the job.

[61] Even though Mr Close had not told the respondent before the meeting that he had been struggling, he had just done so, unambiguously, in that meeting. The

minutes of the meeting do not indicate that Mr Sisson asked any questions about what was stressing Mr Close, or why he had suddenly started to find aspects of the job difficult. They indicate, rather, that Mr Sisson rejected those explanations without further enquiry.

[62] There was a clear possibility that an event or events had occurred in Mr Close's life which had significantly and suddenly disrupted his ability to concentrate. This needed to be explored by Mr Sisson. Section 103A(3)(d) of the Act requires the employer to genuinely consider the employee's explanation, if any, in relation to the allegations against the employee before dismissing.

[63] I do not find that Mr Sisson deliberately failed to consider Mr Close's explanation, but he did fail, I find, to investigate whether the sudden and stark failings, after a history of a year's satisfactory performance, were due to a sudden, out of character wilful misconduct or another cause beyond his control for which Mr Close could have been given guidance or further training or some other assistance.

[64] I accept that Mr Close was not readily forthcoming about the reasons for being stressed. However, not all employees are articulate or confident in formal disciplinary processes, and not all employees express themselves in conventional ways. This is especially likely to be the case where there may be personal reasons for a sudden dip in performance. However, the Act acknowledges in s 3 the inherent inequality of power in employment relationships and addresses ways to safeguard against it in s 103A, amongst others. The respondent is not a small employer with limited resources. It is a large employer with over 350 staff and its own HR function. There was no reason, therefore, for it not to have investigated Mr Close's proffered explanations further.

[65] Mr Sisson found that Mr Close had committed serious misconduct. However, that means he must have concluded that Mr Close was lying about struggling, and that he had deliberately failed over a four day period to empty 55 bins, had deliberately missed parks he had previously attended and had deliberately sent false information via Con X. Whilst these conclusions were not beyond the bounds of possibility, the minutes of the disciplinary meeting show that Mr Close did not say anything that could reasonably have led Mr Sisson to believe that the omissions were deliberate.

[66] Mr Close did not express any anger according to the minutes, save possibly towards the end by which time he is likely to have realised that he was about to be dismissed. All of Mr Close's other responses consistently indicated that he had been struggling. I find that a conclusion that Mr Close had committed serious misconduct was not a conclusion that a fair and reasonable employer could have reached in all the circumstances.

[67] In addition, the reliance upon a final written warning, which was for a misconduct issue, when Mr Close's explanation of being stressed and struggling raised a possible performance issue, resulted in an impermissible mixing up of misconduct and performance/capability issues.

[68] Finally, before actioning his decision to dismiss Mr Close, Mr Sisson did not give Mr Close and Mr Cahill the opportunity to comment on the sanction of dismissal.

[69] It is my finding that a fair and reasonable employer, faced with the information that Mr Sisson was faced with, could not have made a finding of serious misconduct and dismissed Mr Close in all the circumstances that prevailed at the time. Accordingly, I find that the dismissal of Mr Close was unjustified.

Was Mr Close unjustifiably disadvantaged in his employment?

[70] Mr Close alleges that the unjustified actions of the employer were that it relied on a final written warning which he never received, and that the cost of calls he had made on the work mobile telephone had been deducted from his wages without his knowledge and authorisation. Mr Cahill mentioned at the Authority's investigation meeting that he was also claiming that the investigation into his complaints about Mr Hadfield had not been properly investigated, but he also conceded that no personal grievance had been raised to that effect. I therefore regard this complaint as background in support of the unjustified dismissal allegation.

[71] I have already found that the respondent was not justified in relying upon the final written warning in dismissing Mr Close; not for the reason that he did not receive the letter, but because the warning was for an issue which was of a different character to the reasons for which he was dismissed. However, this finding does not result in any additional remedies being awarded to Mr Close as it forms part of the reasons why the dismissal is unjustified.

[72] I address below the issue of the alleged unlawful deductions.

Was an unlawful deduction made from Mr Close's wages in breach of the Wages

Protection Act 1982?

[73] During the Authority's investigation meeting, there was confusion and uncertainty on the part of Mr Close and his representatives about what deduction was being complained about. In his written submissions, however, Mr Cahill asserts that all deductions made prior to 8 December 2016 were unlawful.

[74] The evidence before the Authority shows that the following sums were

deducted from Mr Close's wages due to his use of the work mobile telephone:

a. $2.78 on 8 November 2015; b. $1.28 on 14 February 2016; c. $15.29 on 8 May 2016;

d. $64.64 on 3 July 2016;

e. $76.36 on 31 July 2016;

f. $180.03 on 28 August 2016; and

g. $339.63 after 8 December 2016, pursuant to a specific written consent. [75] Mrs Close gave evidence that she recalled the same deduction being

mistakenly made twice from Mr Close's wages but could not identify it as Mr Cahill had had to leave the Authority's investigation meeting early and had taken the paperwork with him. Having reviewed all of the wage slips for Mr Close, that allegation does not appear to be the case. It is possible that Mrs Close was misled by the confusing way that deductions were shown on Mr Close's payslips, featuring twice, but only being deducted once.

[76] However, it appears that Mr Close is now claiming that all deductions before 8

December 2016 were unauthorised.

[77] Although Mr Close could use the mobile telephone to make private phone calls he was expected to repay those sums, which he fully accepted in evidence.

However, in order to allow the respondent to make deductions from Mr Close's salary, it needed his consent pursuant to s 5 of the Wages Protection Act, which provides:

5 Deductions with worker's consent

(1) An employer may, for a lawful purpose, make deductions from

wages payable to a worker—

(a) with the written consent of the worker (including consent in a

general deductions clause in the worker's employment agreement);

or

(b) on the written request of the worker.

(1A) An employer must not make a specific deduction in accordance with a general deductions clause in a worker's employment agreement without first consulting the worker.

(2) A worker may vary or withdraw a consent given or request made by that worker for the making of deductions from that worker's

wages, by giving the employer written notice to that effect; and in that case, that employer shall—

(a) within 2 weeks of receiving that notice, if practicable; and

(b) as soon as is practicable, in every other case,—

cease making or vary, as the case requires, the deductions concerned.

[78] Clause 9.5.2 of the respondent's Common Terms and Conditions make clear that the respondent may make deductions "subject to there being agreement in writing". The respondent relies upon a "Tool Issue Agreement" to show that Mr Close agreed to having deductions for his mobile usage made from his pay if his calls or data usage exceeded his capped allocation, but this agreement was not signed by Mr Close. It also stated "New Vodafone Mobile Agreements effective from 30 March

2017", suggesting that it was not in force until after that date. An earlier "Tool Issue Agreement" that was produced by the respondent did not have any wording permitting a deduction for mobile usage.

[79] On the basis of the requirement of s 5 of the Wages Protection Act, and clause

9.5.2 of the respondent's Common Terms and Conditions, and in the absence of proof that specific written consent has been given by Mr Close, I conclude that Mr Cahill's submission is correct; namely, that all of the deductions made prior to 8 December

2016 were unlawful under the Wages Protection Act.

[80] Under s 11 of the Wages Protection Act, Mr Close is entitled to recover any deduction made from his wages that was not

consented to in writing. Therefore, Mr Close is entitled to recover $340.38 from the respondent. However, there is no doubt that Mr Close agrees that he had to pay for personal calls made above the cap imposed by the phone package. Whilst I cannot avoid ordering the respondent from repaying

$340.38 to Mr Close, in order to avoid the respondent then having to sue Mr Close to recover the expenses it incurred in letting him use the work mobile phone for personal calls, I will deduct the same sum from the remedies that I will order the respondent to make to Mr Close in respect of his unjustified dismissal.

[81] In addition, given that Mr Close accepted in evidence that he had to pay for personal calls that he made on the mobile phone above the cap, he cannot have been subjected to any disadvantage by having had the costs of those calls deducted from his pay, even if they were technically in breach of the Wages Protection Act.

Other matters raised in submissions

[82] The following matters were referred to in written submissions served and lodged on behalf of Mr Close, which were not expressly before the Authority during the investigation meeting.

a. Breach of the Holidays Act 2003 by paying Mr Close six hours' sick

pay instead of eight hours;

b. The imposition of a penalty for breach of the Holidays Act;

c. Unjustified disadvantage in relation to alleged bullying of him by Mr

Hadfield;

d. Unjustified disadvantage in relation to a failure to investigate a complaint of bullying of him by Mr Hadfield;

e. Arrears of pay by reference to his stated salary and contracted hours of work; and

f. The imposition of a penalty for failing to supply time and wage records.

Holidays Act

[83] The alleged breach of the Holidays Act was not referred to by Mr Close in his statement of problem, nor in his statement of evidence, and no questions were directed to the respondent's witnesses about it during the Authority's investigation meeting. It would be a breach of the rules of natural justice to allow Mr Close to raise this issue

now in his advisers' written submissions when the respondent has not had the chance to respond to the allegation in its evidence.

[84] I decline to allow this allegation to be raised at this late stage, as it would require the investigation meeting to be reconvened and fresh evidence led. That would not be in the best interests of either party in my view. For the same reason I decline to consider the application for a penalty under s 75 of the Holidays Act.

Alleged bullying by Mr Hadfield

[85] Regarding the allegations of being bullied by Mr Hadfield, no specific details were referred to in the statement of problem2, and when I asked Mr Cahill during the case management conference call on 25 January 2018 what actions by the respondent were alleged to have caused Mr Close an unjustified disadvantage, he said that it related to a written warning being relied upon which had never been received and that unlawful deduction from wages had occurred in relation to telephone usage. He did

not include bullying.

[86] The Authority's Notice of Direction confirmed that the Authority would investigate, inter alia, whether Mr Close suffered an unjustified disadvantage in relation to a written warning being relied upon which he says he never received. Mr Cahill did not protest that Mr Close also wished the Authority to investigate alleged bullying.

[87] I am also not convinced that a personal grievance was raised with sufficient specificity to allow the Authority to investigate that allegation.

[88] Accordingly, I decline to allow Mr Close to raise the alleged bullying now, in his written submissions.

Alleged failure by the respondent to properly investigate bullying

[89] No personal grievance was raised about this by Mr Close, and it was not raised in the statement of problem. Again, therefore, I cannot allow this to be raised as a

separate cause of action now, after the investigation meeting has occurred.

2 The statement of problem stated “Martin feels he is being bullied and pushed out and has been suffering severely from stress as a result”.

Arrears of pay by reference to his stated salary and contracted hours of work

[90] Again, this claim was not raised in the statement of problem, nor in Mr Close’s evidence. Mr Cahill and/or Mr Murray seek to argue that it follows from evidence given by the respondent’s witnesses, but if they believed that to be the case, they should have made that assertion during the investigation meeting. It is not sufficient to raise it for the first time in submissions. I therefore decline to allow this matter to be raised at this late stage.

The imposition of a penalty for failing to supply time and wage records

[91] There is no mention of seeking a penalty in the statement of problem, and Mr Cahill and Mr Murray did not do so during the investigation meeting. Again, it would be unjust to allow such a claim to be brought for the first time in submissions. I decline to allow it therefore.

Conclusion

[92] I conclude that Mr Close was unjustifiably dismissed by the respondent and is entitled to an award of remedies. I also conclude that he was unjustifiably disadvantaged in his employment by the respondent relying upon the final written warning in that dismissal, although that does not give rise to any additional remedies.

[93] I also conclude that the deductions in respect of Mr Close’s telephone use were made unlawfully, but that Mr Close does owe the respondent money in respect of those calls.

[94] Additional claims purported to be raised in submissions are disallowed.

Remedies

[95] The relevant parts of s 123 of the Act provide 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:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations

to the employer concerning the action the employer should take to prevent

similar employment relationship problems occurring.

[96] 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.

[97] Mr Close was paid a salary of $36,000 a year and was paid up to 30 December

2016. Mr Close's gross fortnightly pay was $1,380.82.

[98] I do not consider that there is any cogent reason to exercise the discretion referred to in s 128(3) of the Act and to award Mr Close more than 3 months' pay. This is because Mr Close had clearly failed to perform his tasks and, although I find that that was likely to have been due to incapacity, which he may have been able to have addressed satisfactorily with support from the respondent, there is a not immaterial chance that he would not have been able to have done so and could have been justifiably dismissed within three months' time or less. I therefore restrict the award to the lesser of a sum equal to his lost remuneration and three months' ordinary time remuneration.

[99] Mr Close said that he could only get agency work after his dismissal, and only found a permanent position two weeks before the Authority's investigation meeting. Mr Cahill provided a table showing what earnings Mr Close said he had earned but

had no back up documentation annexed which showed where these figures came from. They suggest that Mr Close only earned $1,024 in the first three months after his dismissal, and $9,209.20 until 24 December 2017.

[100] It would not be safe to award lost wages based on an unverified table. I therefore direct Mr Close to provide to the respondent and the Authority tax records showing all income earned by him between 1 January 2017 and the date of the Authority investigation meeting. He is to serve and lodge this by no later than 14 days from the date of this determination. The parties are then to seek to agree what award of lost wages is to be made to Mr Close by the respondent pursuant to s 128(2) of the Act, taking account of the fact that the sum of $340.38 is to be deducted from the award. If they cannot do so within a further 14 days, then the Authority will determine the award.

[101] Turning to compensation for humiliation, loss of dignity and injury to Mr Close's feelings, Mr Close said he found being dismissed very hurtful. He said he felt disappointed and that he had been cheated, and felt very low to have been dismissed just before Christmas. Mr Close said he became stressed and anxious and was prescribed medication from his doctor for anxiety.

[102] I accept this evidence, which was not challenged by Mr Pollak in cross examination. The Employment Court in *Waikato District Health Board v Kathleen Ann Archibald* 3 awarded $20,000 for effects which it judged fell around the middle of

'band 2' (involving mid-range loss/damage). Mr Close's evidence was not detailed, but it did indicate effects a little less than the middle of the mid-range of damage, given his anxiety and stress which resulted in him being put on medication. That suggests that an award of $15,000 under s123(1)(c)(i) is appropriate.

[103] 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).

3 [2017] NZEmpC 132, at paragraph [62]

[104] I believe that Mr Close did contribute to the situation giving rise to the personal grievance, in that he did clearly fail to fulfil his duties, and he failed to tell his managers that he was doing so. Even if he was stressed, it was foolish to just bury his head in the sand as an early admission he was struggling and the reasons why may well have resulted in support being given which could have helped him address his issues which, in turn, would have avoided a dismissal. I believe that it is appropriate to reduce the remedies in recognition to Mr Close's contribution, and assess the appropriate percentage to be 25%.

Recommendation

[105] Section 123(1)(ca) of the Act provides that, if the Authority finds that any workplace conduct or practices are a significant factor in the personal grievance, it may make recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring. I have the following recommendations. The respondent should take steps to ensure that its managers are able to:

a. distinguish between concerns relating to misconduct and concerns relating to poor performance or capability;

b. recognise answers given to them during a disciplinary investigation that may signal that further investigation is needed before a conclusion as to outcome is reached.

Orders

[106] I order the respondent to pay to Mr Close within 28 days of the date of this determination the following sums:

a. $11,250 pursuant to s 123(1)(c)(i) of the Act; and

b. $340.38 in relation to unlawful deductions made from Mr Close's pay;

and

c. Such sum as the parties agree is due to Mr Close pursuant to s 128(2)

of the Act and paragraph [100] of this determination.

Costs

[107] I reserve costs. The parties are to seek to agree how costs are to be dealt with, but if they are unable to do so within 28 days of the date of this determination, any party seeking a contribution to their costs must serve and lodge a memorandum setting out what contribution they seek, and the basis of it, within a further 14 days, and any response must be served and lodged within a further 14 days.

David Appleton

Member of the Employment Relations Authority
