

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 517
3118624

BETWEEN PRINCE DION COLLIER
Applicant

AND MD CONSTRUCTION
LIMITED
Respondent

Member of Authority: Sarah Kennedy

Representatives: Robert Morgan, advocate for the Applicant
Alwyn O'Connor, counsel for the Respondent

Investigation Meeting: 14 June 2022 at Wellington

Submissions received: 16 June 2022 from Applicant
4 July 2022 from Respondent

Determination: 10 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Prince Collier was employed at MD Construction Limited in a maintenance role from November 2018 to 5 August 2020 when he was dismissed without notice for assaulting another employee, failing to work his required hours and inaccurate time recording. Mr Collier says his dismissal was unjustified and claims lost wages and compensation.

[2] MD Construction says it carried out an investigation into Mr Collier's conduct and after following a fair process, it decided the conduct was serious misconduct warranting dismissal and that at all times it acted as a fair and reasonable employer dealing with what it was confronted with about Mr Collier's conduct.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mr Collier and Natasha Wana, Mr Colliers partner, Joseph Tekeu, a former work colleague, Glenn Nixon, branch manager at MC Construction, Tevita Silatolu, employee at MD Construction and Sharnee Lewis, former employee. All witnesses answered questions under oath or affirmation from me and the parties' representatives, other than Joseph Tekeu who provided an unsigned written statement. The representatives also gave oral and written submissions.

[4] Ms Lewis was expected to attend in person but did not. She was given leave to attend by telephone.

[5] Having regard to s 174E of the Employment Relations Act 2000 (the Act), it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[6] As permitted by 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

The issues

[7] Whether the decision of MD Construction to dismiss Mr Collier, and how it reached the decision, was what a fair and reasonable employer could have done in all the circumstances, at the time, including consideration of:

- (a) What was the misconduct and was it capable of being grounds for dismissal?
- (b) Whether MD Construction could have reasonably come to its conclusion that Mr Collier had committed serious misconduct?
- (c) Whether MD Construction's actions met the procedural standards set in s 103A(3) of the Act;
- (d) If MD Construction is found to have acted unjustifiably (in dismissing Mr Collier), what remedies should be awarded to him.

Background

[8] Mr Collier started working for MD Construction in November 2018 doing building maintenance work on houses for clients of MD Construction in the Wellington Region. The first incident occurred on 23 March 2020, as New Zealand went into Covid-19 lockdown.

[9] After a meeting at MD Construction about arrangements during the lockdown, Mr Collier went to get the fuel card from Sharnee Lewis, administrator, in the office. He was going to be on call to do urgent work during the lock down so needed the fuel card.

[10] Ms Lewis says that Mr Collier became frustrated while waiting for her to finish on the phone and then for confirmation from Mr Nixon that she could hand over the fuel card as requested. As she reached for it in her wallet, she says Mr Collier reached out and twisted her ear, similar to what someone would do to a naughty child.

[11] Mr Collier accepts that his hand made contact with Ms Lewis' ear but says this was unintentional. As she started to get the fuel card out of her wallet, he was standing beside her, and he put his hand forward to receive the card from her. As he outstretched his arm, he says she moved slightly, and his hand "flicked" her ear.

[12] Mr Nixon said he could see that Ms Lewis was very upset at the time because she came to see him and was crying in his office, but she did not say what Mr Collier had done. Mr Nixon said he was unsure what to do next because he had never been in this situation before, with an employee upset about another employee's behaviour at work to that extent.

[13] Mr Collier says Mr Nixon came out to see him and told him that Ms Lewis had accused him of "grabbing hold of her ear and twisting it". Mr Collier says he told Mr Nixon that was not what happened. He said he was really upset about the allegation, and he left and went home.

[14] Nothing more was said to Mr Collier about Ms Lewis' complaint until the letter of 21 July inviting him to attend a disciplinary meeting.

[15] Sometime approximately two weeks before 21 July 2020, Mr Nixon says he received a call from Head Office about a video that cast Mr Collier in a bad light with MD Construction. Mr Nixon said his boss was irate with him and asked if that was

how people perceived MD Construction. He said Head Office were also upset because Mr Collier's dog was in the work van, but Mr Nixon said he gave permission for his team to bring their dogs to work.

[16] The invitation to the meeting was headed up "notice of disciplinary meeting" and listed the concerns as being an assault and inaccurate time recording. The letter stated:

I would like to meet with you to discuss an employment matter that I have become aware of. In particular I have concerns about your inaccurate time recording, and an assault on another staff member – Sharnee.

...

[17] The letter also set out that the employer was very concerned about the seriousness of the matter and that if proven, and it amounted to serious misconduct, this may lead to Mr Collier's dismissal.

[18] No other information was provided to Mr Collier. He knew there was a video recording of him speaking to an unknown male that had been sent to MD Construction in Auckland, but he had not seen it and was not given any other information at that stage. He assumed the alleged assault was the incident with Ms Lewis before lock down.

[19] They met on 30 July 2020 at Alwyn O'Connor's offices and Mr O'Connor ran the meeting. The video was played to Mr Collier and Mr Collier accepted it was him speaking in the video but denied inaccurate time recording or dishonest reporting on time sheets. His explanation was that the conversation was bluff and bluster and that that was common amongst tradespeople. In his evidence he describes it as "blowing".

[20] Mr Collier told the meeting he was in a work van that day, parked at Ngauranga interchange in circumstances that he says were normal. He had had a busy day and was sitting in the van doing paperwork ready to do an urgent job if one came in. He did this because there was insufficient time to complete a new job before the end of the work day other than an urgent job, so his intention was to take his lunch break and finish his paper work in his van before heading home.

[21] Mr Collier said he knew he was not permitted to work overtime so finishing up at 5:00pm everyday was important. He also said to Mr Nixon at the meeting that he

had worked through his lunch break that day and how in the past, Mr Nixon had been okay with him doing that and taking his break at the end of the day.

[22] Mr Collier says he did not know he was being videoed and says he was merely boasting in jest to a stranger about relaxed hours when asked for his boss's phone number by the unknown male who pulled up alongside him and said he was looking for work. He felt he had been set up because that conversation was secretly filmed and provided to MD Construction.

[23] Mr Collier's response to the allegation of assault on Ms Lewis was that he accepted he touched her ear but said it was accidental.

[24] The preliminary findings were verbally conveyed to Mr Collier in the meeting and recorded in a letter dated the same day as follows:

1. That we did not accept your explanation in that the assault on Sharnee was accidental as you described it, and
2. Your explanation in response to time recording was unacceptable and amounted to flagrant dishonesty; and
3. That the employer considered this as serious misconduct warranting instant dismissal; and
4. That you should be given the opportunity to seek advice and provide a response to this proposed outcome.

[25] Mr Collier responded by sending an email, repeating the explanations given at the meeting and Mr Nixon wrote again on 5 August setting out his final view that dismissal was the outcome and said:

As you know we have found the allegation made by Sharnee proven. Your conduct was unacceptable and disregarded company values. Similarly, the inaccurate reporting of time. This is flagrant dishonesty. There is no room for dishonesty in our business which predominantly involves a high trust model while working in the homes of others. We note your honesty in this regard, which was appreciated.

Serious misconduct

[26] The Authority is asked to determine whether MD Construction were justified in the decision it made and the actions it took to dismiss Mr Collier. It is required to apply the justification test which is set out in s 103A of the Act. In applying the test, the Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether

the actions of MD Construction, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[27] This includes whether the allegations against Mr Collier were sufficiently investigated, concerns raised with him, whether he had a reasonable opportunity to respond to the concerns and whether such explanations were genuinely considered by MD Construction before dismissal. The Authority may take into account other factors as appropriate and must not determine the dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Mr Collier being treated unfairly.¹

[28] MD Construction could be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

Discussion

[29] The alleged misconduct was failing to work the required hours and an alleged assault on another employee and these matters can amount to serious misconduct. However, the main issue in this case is whether MD Construction could have reasonably concluded that Mr Collier had committed serious misconduct. If not, then dismissal would not be an appropriate outcome and MD Construction's actions would not be justifiable.

The covert video recording

[30] A covert recording in and of itself is not unlawful in circumstances where one person consents to a private conversation between two people being recorded. The issue with MD Construction relying on this covert recording for the purposes of Mr Collier's employment investigation is that the origin of the recording is unknown and there was no other information about whether the conduct amounted to serious misconduct other than Mr Collier's explanation.

[31] This raises immediate questions about whether MD Construction could have complied with its obligation to deal with Mr Collier in good faith as it is required to do.

[32] The obligation of good faith is set out in s 4 of the Act and includes not doing anything to mislead or deceive the other party to the employment relationship either directly or indirectly. The parties to an employment relationship are to be active and

¹ Employment Relations Act 2000, s 103A(5).

constructive in establishing and maintaining a productive employment relationship and to be responsive and communicative.²

[33] In relation to covert videos, the case of *Ravnjak v Wellington International Airport Ltd*³ says that where evidence is unlawfully obtained and there is a statutory prohibition on its use in civil proceedings, it cannot be adduced or relied on in Authority investigations. While the legislation that was in place at the time that case was decided has changed, there is still a requirement that investigators (subject to some exceptions), that are conducting workplace investigations, should either be licensed in accordance with the Private Security Personnel and Private Investigators Act 2010 or be regulated under another Act.⁴

[34] Based on the information provided by MD Construction I am unable to ascertain those things.

[35] In those circumstances I am satisfied the covert recording was either obtained unlawfully for the purposes of an employment investigation (because an employment investigator recorded the video) and therefore falls foul of the good faith obligations in s 4 of the Act or to have provided insufficient information about Mr Collier's conduct for MD Construction to have reached the conclusions it did.

[36] Mr Nixon accepted that the issue of inaccurate time recording was not raised with Mr Collier prior to the video surfacing. What he did say was that a concern had previously been raised with him by the job dispatchers that Mr Collier would disappear during the afternoons but would still indicate on his timesheets that he worked to 5.00pm. The dispatchers were Ms Lewis and Mr Nixon's wife. Mr Nixon said despite that concern "I was unable to prove or disprove any allegation. I parked the concern."

[37] This issue was not put to Mr Collier during the investigation and is not recorded as being taken into consideration by Mr Nixon in his final decision letter

[38] No further investigation was undertaken before or after the meeting and Mr Collier's explanation was simply not accepted. The only evidence of inaccurate time recording was the covert video recording that gives a general impression from the questions asked by the unknown male and the answers given by Mr Collier, that tends

² Employment Relations Act 2000, s 4(1)(b) and (1A).

³ *Ravnjak v Wellington International Airport Ltd* [2011] NZEmpC 31.

⁴ <https://www.employment.govt.nz/about/news-and-updates/private-workplace-investigators-may-require-licence/>

to suggest he left work early. No specific days or times were provided to Mr Collier for his response.

[39] Mr Silatolu gave evidence that he found Mr Collier hard to manage because he often wanted certain jobs and not others, but Mr Silatolu did not raise those issues with Mr Collier. That issue also has little or no relevance to the allegations.

[40] If those things were relied on by Mr Nixon when he made decisions about Mr Collier, none of that information was provided to Mr Collier. It is an essential part of a fair process that any information a decision maker relies on to reach a decision is provided to the employee whose conduct is being considered.

[41] Given Mr Collier's explanation and the fact no issues about inaccurate time recording had been raised with him before the video surfaced, and no further enquires were made, I am satisfied it was not open to MD Construction to conclude that allegation was proven based only on the information from the video.

The alleged assault

[42] This allegation was simply that Mr Collier had assaulted Ms Lewis at work. An intentional touching of another by definition is an assault and is capable of constituting serious misconduct in an employment context. One party said it was intentional and the other said it was accidental meaning there was a conflict in the evidence but one which had a direct bearing on how serious the conduct could be considered to be.

[43] While Mr Nixon had an obligation to address Ms Lewis' concerns, he also had obligations to Mr Collier, his employee who the complaint was about. The truth of a complaint should not be accepted automatically, and it must be tested in a fair way and a conclusion drawn reasonably before any action is taken. This in simple terms means a full and fair process must be followed.

[44] The assault was raised with Mr Collier briefly at the time with no specific details and this was approximately four months before he received the letter in July that set it out as an allegation, asking him to respond.

[45] In Ms Lewis' statement to the Authority, provided 3 days before the Authority's investigation meeting, she set out specific detail about what occurred that day including the involvement of a co-worker named "Ema" immediately after what happened with Mr Collier. That information was not provided to Mr Collier during the investigation

process. No statement was provided by Ema, who I understood to be Mr Nixon's wife, who also worked as a dispatcher/administrator at MD Construction.

[46] Ms Lewis said she was asked to write down what happened but Mr Nixon never followed up so she did not provide anything in writing until the investigation meeting. What this meant was that there was no detail and more importantly nothing directly from Ms Lewis for Mr Collier to respond to. I note Ms Lewis said she was scared of repercussions, and I accept that was likely the case in the overall circumstances, but it was up to the employer to navigate these issues with its obligations to both employees in mind.

[47] I note the Statement in Reply records that Mr Collier's response was put to Ms Lewis, but that was not in Mr Nixon's written or oral evidence or recorded in any of the letters to Mr Collier. A fair and reasonable employer could have been expected to put Mr Collier's denial to Ms Lewis before reaching a conclusion about whether the conduct occurred.

[48] Mr Nixon said that the lockdown had impacted on his ability to address the assault issue but I am satisfied there was sufficient time to have addressed it prior to the video coming to light after the lockdown was lifted on 13 May 2020.

[49] The delay in dealing with the assault allegation and only raising it as a concern, once the video surfaced in July 2020 are significant flaws in the process followed by MD Construction.

[50] Mr Nixon also gave evidence that he had received complaints on two occasions about perceived anger issues out on jobs and he had pulled Mr Collier aside and discussed those concerns. He felt Mr Collier had heard him and so decided to take no further action. These were raised with the Authority at the investigation meeting but again not put to Mr Collier so to the extent they were relied on to make decisions about Mr Collier's dismissal, they should not have been.

[51] It is clear from the dismissal letter that MD Construction chose to believe Ms Lewis over Mr Collier which it is entitled to do when there is a conflict in the evidence. However, the test in s 103A of the Act provides that a fair and reasonable employer would be expected to investigate and genuinely consider the employee's explanation before making such a decision. No reasons or explanation were provided as to why MD Construction preferred Ms Lewis' account over Mr Collier's, there was no

evidence that Mr Collier's response was put to Ms Lewis so that could be factored into the decision making process, and no direct evidence from Ms Lewis about what had occurred.

[52] Mr Nixon gave evidence about how Mr Collier had been a valued employee and very good at what he did. He described him as a craftsman and it was clear that prior to this incident occurring that there had been high levels of trust between the two.

[53] It is unlikely that a fair and reasonable employer would have reached the conclusion that there was sufficient information to form a firm view that Mr Collier had assaulted Ms Lewis in an intentional way based on what was recorded as being available to the decision maker. Even if a decision maker could have reached that view, it is unlikely that a fair and reasonable employer would have concluded that dismissal was appropriate without considering alternatives and seeking further input from the employee.

Conclusion

[54] I am satisfied that both allegations about Mr Collier's conduct were insufficiently investigated, Mr Collier's explanations were not given genuine consideration and that in these circumstances a fair and reasonable employer could not have reached the conclusion that Mr Collier had committed serious misconduct. There were also significant defects in the process that were not minor and have resulted in unfairness to Mr Collier.

Outcome

[55] Mr Collier has been successful in bringing his claim for an unjustified dismissal.

[56] The use of a covert video recording in the circumstances of this case amounts to a breach of good faith by MD Construction.

Remedies

[57] Having established that Mr Collier's employment ended by way of unjustified dismissal, Mr Collier is entitled to an assessment of remedies for his personal grievance.

Lost wages

[58] Reimbursement of lost wages are sought, and I accept that reimbursement is appropriate in circumstances where there has been an unjustified dismissal. Mr Collier gave evidence of knocking on doors attempting to get further employment and several names and phone numbers of potential employers (who agreed) were provided to the Authority.

[59] Submissions were also made on Mr Collier's behalf that a dismissal for an assault and dishonesty made it difficult for him to get new work because these are "two matters which a prospective employer would not desire to have in their workplace" and I do not disagree with that submission. He secured new employment in January 2021.

[60] I therefore consider that reimbursement for lost wages in the amount of three months ordinary time wages would be appropriate.⁵

Compensation for humiliation, loss of dignity and injury to feelings

[61] Mr Collier's evidence established that he was humiliated by how he was unfairly treated in relation to the allegations against him that led to his dismissal. Having a covert recording made of a conversation with an unknown person at the side of the road, used by his employer in an employment investigation was unfair and upsetting. Delays in addressing concerns about how he had treated Ms Lewis caused him and his family distress.

[62] The evidence from Mr Collier's spouse was that the way these allegations were handled had been greatly detrimental to Mr Collier's mental health. Mr Collier's evidence was that he could not see his general practitioner about his feelings of depression because he could not afford it. He was the main bread winner in the family and said they had to borrow money from whanau and friends just to try and keep up.

[63] Considering the distress experienced by Mr Collier, the evidence of the ongoing effects on him, and the general range of awards in similar cases, an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$22,000.00. This is the amount MD

⁵ Employment Relations Act 2000, s 123(1)(b) and s 128(2).

Construction must pay Mr Collier within 28 days of this determination as compensation for humiliation, loss of dignity and injury to his feelings.

Contributory conduct

[64] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance.

Assertions were made about aspects of Mr Collier's approach in the workplace that others had found difficult and the conversation with the unknown male did occur. While less than satisfactory, no aspect of what Mr Collier did or did not do was sufficiently blameworthy to require a reduction of the remedies awarded for his grievance. Accordingly, no reduction in remedies is required.

Penalties - breach of good faith

[65] Having concluded that use of a covert video recording in the employment investigation amounts to a breach of MD Construction's duty of good faith, I have carefully considered whether a penalty would be appropriate under s 4A(a) and (b) (iii) of the Act for misleading and deceptive conduct that was intended to undermine the employment relationship.

[66] For the purposes of considering a penalty under s 4A of the Act I am satisfied that the decision to rely on the covert video recording of Mr Collier was deliberate and serious. However, I am not satisfied that the conduct was sustained and therefore no penalty is awarded against MD Construction on that basis.

Outcome and orders

[67] In relying on the covert video MD Construction Limited has failed to comply with the duty of good faith in s 4(1) of the Act by engaging in a course of conduct that was deceptive and misleading and failed to be active and constructive in maintaining a productive employment relationship in which the parties are responsive and communicative.

[68] MD Construction Limited is ordered to make the following payments to Prince Dion Collier

- (a) Lost wages amounting to three months ordinary wages under s 123(1)(b) of the Act; and

- (b) The sum of \$22,000.00 under s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation suffered by Mr Collier because of his unjustified dismissal.

Costs

[69] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Collier may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum MD Construction Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[70] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Sarah Kennedy
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1