

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 492  
3151183

BETWEEN

EZEKIEL DIXON  
Applicant

AND

WARRIOR NZ LIMITED  
Respondent

Member of Authority: Claire English

Representatives: Kirsten Westwood, advocate for the Applicant  
No appearance for the Respondent

Investigation Meeting: 13 September 2022 at Napier

Submissions received: 13 and 15 September 2022 from Applicant  
None from Respondent

Determination: 28 September 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant was employed by the respondent company as an apprentice builder. After a period of some 4 months he was dismissed by way of text message.

[2] The applicant claims that he was unjustifiably suspended, and unjustifiably dismissed, and claims remedies of lost remuneration, compensation for hurt and humiliation, and costs.

[3] The respondent denies unjustifiably dismissing the applicant, and says that the applicant ended his own employment by acting in bad faith, that the contract was cancelled, and that the contract was frustrated.

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

[4] For the Authority's investigation written witness statements were lodged from the applicant, Mr Dixon. Mr Dixon's mother, Ms Eboni Wilkin also attended the hearing and gave evidence about the effect of the dismissal on Mr Dixon. All witnesses answered questions under affirmation from me. Mr Dixon's representative also gave closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[6] The issues requiring investigation and determination were:

- (a) Was the applicant unjustifiably disadvantaged, when he was suspended by way of text message?
- (b) Was the applicant unjustifiably dismissed, again by way of text message?
- (c) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to the grievance?
- (e) Should either party contribute to the costs of representation of the other party.

### **Background – the respondent's lack of participation**

[7] The respondent (Warrior NZ) did not attend the investigation meeting. I must therefore consider if Warrior NZ was properly aware of the investigation meeting.

[8] The file shows that Warrior NZ was served with the statement of problem and supporting documents.

[9] Warrior NZ was represented by an experienced professional advocate. The advocate filed a Statement in Reply on behalf of Warrior NZ, together with its own supporting documents.

[10] A case management conference was held with both the representative for Mr Dixon and the representative for Warrior NZ. The date of the investigation meeting was agreed to by both representatives, together with timetabling orders for the filing of witness statements and relevant documents.

[11] Mr Dixon, through his representative, filed his witness statement and some further documents, in accordance with the agreed timetable.

[12] Shortly prior to the deadline for the filing of Warrior NZ's witness statement and further documents, Warrior NZ's representative filed a letter stating that "liquidation will occur", and "the Respondent will not be attending the investigation meeting." Neither Warrior NZ nor its representative attended the investigation meeting.

[13] Accordingly, I am satisfied that Warrior NZ knew that the investigation meeting was to take place, and chose not to attend.

[14] As of the morning of the investigation meeting, liquidation had not occurred, and there had been no change to Warrior NZ's status as a registered limited liability company. The investigation meeting accordingly proceeded by way of formal proof.

### **Background – the employment relationship**

[15] Mr Dixon was employed by Warrior NZ as an apprentice builder. He signed an individual employment agreement on 6 March 2021, and started work very shortly thereafter.

[16] This was not his first job, although it was his first job as a builder. Mr Dixon was aware that as a builder, he would need tools. He discussed this with the director of Warrior NZ, Mr John Gemmell. Mr Dixon and Mr Gemmell agreed that Warrior NZ would provide Mr Dixon with a tool box with some necessary tools in it, and Mr Dixon would repay the cost of this at the rate of \$100 per week, to be deducted weekly from Mr Dixon's wages. The cost of the tools and toolbox was \$1,000 and Warrior NZ charged an additional 10% fee on top of this.

[17] Mr Dixon recalls that this happened in the second week of his employment, and the agreed \$100 per week was then deducted from his wages, and shown on his weekly pay slips together with the remaining balance, reducing each week.

[18] At first, Mr Dixon worked at smaller construction sites, doing a variety of jobs as an apprentice. About a month into his employment, Warrior NZ subcontracted him to work on a much larger job at Napier Girls High. After a short time, it was suggested that he needed two different nail guns to properly contribute to the available work. Mr Dixon did not own these tools.

[19] He spoke with Mr Gemmell about it, and told him that, as well as continuing to pay off the tool box and existing tools, he had a plan to save up and buy the two nail guns over the next two months.

[20] Mr Dixon recalls Mr Gemmell seemed unhappy with this suggestion, and instead suggested that Warrior NZ buy the two nail guns immediately, with Mr Dixon paying them off in the same fashion, eg at the rate of \$100 per week plus a 10% fee.

[21] Mr Dixon declined, and explained to Mr Gemmell that if this occurred, he would not be left with enough money for rent and board.

[22] He recalls that Mr Gemmell did not seem happy with this, but that he continued working at the Napier Girls High School site, although he was given a lot of demolition work which did not require the use of nail guns.

[23] Mr Dixon also recalls that Mr Gemmell habitually asked him to perform Saturday work. This was even though the employment agreement specifically stated that the working week would be 7.30 am to 5.00 pm, Monday to Friday, and Mr Dixon had told Mr Gemmell that he did not wish to work on the weekends, as he needed to spend some time with his family. Mr Dixon recalls that he agreed to work on a Saturday about once a month, although Mr Gemmell suggested that habitually working on Saturdays was necessary to get ahead, or words of that nature.

[24] At the end of May 2021, Mr Dixon fell ill with a lung infection. Mr Gemmell was concerned, and telephoned Mr Dixon's mother. In the end, Mr Gemmell came to Mr Dixon's house at about 7 or 7.30 am on a Saturday, and took Mr Dixon to the local

medical centre. Mr Dixon was diagnosed with an infection, and prescribed antibiotics. While at the medical centre, Mr Gemmell asked Mr Dixon to take a drug test. Mr Dixon agreed, and this was performed immediately at the medical centre by way of a urine test. This took only a few minutes. Mr Dixon recalls the test was in the nature of a “strip test”, which displayed results by way of coloured lines in the presence of certain substances. The test indicated the presence of marijuana. Mr Dixon freely admitted to Mr Gemmell that he had smoked a joint at a party one weekend. Mr Gemmell told him not to do so again, as this could become a safety issue, but also reassured him that nothing else would occur.

[25] This conversation was brief, and took place in the foyer of the medical centre. Mr Dixon completed his course of antibiotics, and returned to work.

[26] Mr Dixon recalls that he took 4 days off work due to this illness. He was initially paid for these days, but the following week, 4 days were deducted from his payslip, meaning his sick leave was effectively unpaid. He has provided payslips that support his account.

[27] It appears that matters came to a head over Mr Gemmell’s involvement in the repair of Mr Dixon’s car. Mr Dixon had a Toyota Corolla that he used to get to work. When it needed repairs, he instead started using a scooter to drive to work. Mr Gemmell was not satisfied with this, and arranged to have Mr Dixon’s car repaired, at a mechanic that it appears Mr Gemmell and/or Warrior NZ had an existing relationship with, on around 18 June 2021. Mr Gemmell told Mr Dixon that the repairs would be \$700, to be repaid in the same way as the toolbox. Mr Gemmell then confirmed in a text message that this meant \$200 would be deducted from Mr Dixon’s pay each week, and a 10% fee would be charged.

[28] The car was in fact legally owned by Mr Dixon’s mother, Ms Wilkin. She contacted the garage to find out what was being done to her car. She asked for an itemised invoice. When an invoice was provided, dated about 21 June, it was for \$1,423.95. By that date, the repairs had already been completed and Mr Dixon had collected the car. Mr Dixon and Ms Wilkin were both surprised by this, as Mr Gemmell had told each of them (he had contacted Ms Wilkin direct) that the cost would be \$700.

[29] In addition, the invoice was addressed to Mr Gemmell and Warrior NZ, and had no date for payment. Ms Wilkin advised that she had paid the bill to the garage in full

by 8 July, which she believed was in line with the common practice that most invoices were payable by the 20<sup>th</sup> of the following month.

[30] On the evening of Friday 2 July, Mr Gemmell texted Mr Dixon. The text was lengthy, starting with the suggestion that the vehicle in question could be sold to “reclaim all associated costs”. The text then said:

Please stand down from any work until this matter is resolved.

[31] The text then listed a number of other things which were to be discussed by Mr Gemmell, including: your “drug positive test”, the accident, arriving at work 10 minutes early each day, personal hygiene, Mr Gemmel’s comments on Mr Dixon’s lunches, the failure to purchase tools, that Mr Dixon had been offered paid work on Saturdays to help him better himself, and paid sick leave.

[32] The text ended by saying that:

The issues mentioned shall be decussed,with k3 meeting set at k3 offices  
Hastings street Napier  
for Monday 5 th July 2021 time to be confirmed.

[33] K3 was the organisation assisting Mr Dixon with his apprenticeship. Mr Dixon immediately forwarded the text on to his advisor at K3, in preparation for the meeting on Monday.

[34] On Sunday 4 July, Mr Gemmell sent Mr Dixon a further text, which stated:

Zek there is no work available for you.  
You will meet with K3 tomorrow depending on time frame to discuss your  
attitude please take this time to find employment elsewhere please make keys  
to your vehicle available to energy and marine immediate  
Thank you for your time .

[35] Mr Dixon met with his advisor at the premises of K3 on Monday morning as instructed. Mr Gemmell did not attend. Mr Dixon advises he did not hear from Mr Gemmell again, until his attendance at mediation, with the assistance of Mediation Services.

[36] Mr Dixon was shocked and confused by the abrupt ending of his employment. With the assistance of K3, he immediately enrolled at Tradestaff, and after

approximately 1 and a half weeks, he found temporary part time work. This continued until he was able to secure a permanent job with a reputable company and progress his apprenticeship in February 2022. He gave evidence that he felt depressed and embarrassed. Because he was unable to meet his outgoings without a steady job, he had to move back in with his mother. Ms Wilkin confirmed this, including the negative impact on Mr Dixon's confidence.

## **Findings**

### *Claim of Unjustified Disadvantage*

[37] Mr Dixon was suspended by Warrior NZ, by way of text message on the evening of Friday 2 July 2021, with a text directing that Mr Dixon was to "stand down from any work".

[38] When considering if Mr Dixon has a personal grievance in relation to his suspension, I must consider whether a condition of his employment has been affected to his disadvantage by some unjustifiable action by Warrior NZ.

[39] Mr Dixon was suspended, on an immediate and indefinite basis, by Warrior NZ. This was conveyed to him by a text message, and he had no opportunity to comment or respond. The failure to consult prior to suspending means that Warrior NZ's actions were unjustified.

[40] The suspension commenced after Mr Dixon had finished work for the week. Before the start of his normal working week on the following Monday, Mr Dixon was dismissed (again by text message) on Sunday. The dismissal effectively "overtook" the suspension, rendering the suspension of no effect as Mr Dixon's employment was at an end. This means that there were no conditions of Mr Dixon's employment affected to his disadvantage, as his employment did not continue, and any loss of wages or work opportunities were caused by Mr Dixon's dismissal, rather than suspension.

### *Claim of Unjustified Dismissal*

[41] Mr Dixon was dismissed by Warrior NZ. Dismissal occurs when the employment ends at the initiative of the employer<sup>1</sup>. Mr Gemmell's actions amount to him "sending away" Mr Dixon<sup>2</sup>.

[42] This is shown in the text message from Mr Gemmell to Mr Dixon on the evening of Sunday 4 July 2021, stating "there is no work available for you...please take the time to find employment elsewhere". This was followed by a lack of any contact by Mr Gemmell (eg attending the meeting with Mr Dixon and K3, calling or texting Mr Dixon with his daily or weekly work assignment) that might have indicated the continuation of the employment relationship.

[43] The suggestion in the statement in reply that Mr Dixon was somehow responsible for the ending of the employment relationship, or that the employment relationship ended 'automatically' cannot stand against Mr Gemmell's own words at the time.

[44] I must then consider whether the employer's actions in dismissing Mr Dixon, 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<sup>3</sup>.

[45] I must consider:

- a. whether Warrior NZ sufficiently investigated the allegations it had against Mr Dixon before dismissing him; and
- b. whether Warrior NZ raised the concerns it had with Mr Dixon before dismissing him; and
- c. whether Warrior NZ gave Mr Dixon a reasonable opportunity to respond to the concerns raised before dismissing; and
- d. whether Warrior NZ genuinely considered Mr Dixon's explanation (if any) before dismissing; and
- e. any other factors I think are appropriate<sup>4</sup>.

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<sup>1</sup> *NID Distribution Workers etc IUOW v Foodtown Supermarkets Ltd* [1988] NZILR 588 (LC), where a constructive dismissal is described as a situation where the initiative for the dismissal comes from the employer.

<sup>2</sup> In *Actors IUOW v Auckland Theatre Trust Inc* [1989] 2 NZLR 154, (1989) ERNZ Sel Cas 247 (CA), it was held that a dismissal includes a "sending away".

<sup>3</sup> The test of justification, set out at section 103A of the Employment Relations Act 2000.

<sup>4</sup> Sections 103A(3) and (4) of the Employment Relations Act 2000.

[46] The text sent to Mr Dixon by Mr Gemmell on the evening of Friday 2 July 2021 sets out what may be described as a “laundry list” of various items, which it is clear Mr Gemmell wanted to discuss with Mr Dixon.

[47] The text ends by instructing Mr Dixon to attend a meeting for this purpose, at the offices of K3. The difficulty is obvious in that Mr Gemmell did not attend any such meeting with Mr Dixon, or at any point discuss these items with him. Mr Gemmell in fact sent Mr Dixon a second text on the evening of Sunday 4 July 2021, dismissing him without further notice or discussion, in advance of the stated Monday meeting.

[48] It follows that Warrior NZ cannot meet the tests set out in section 103A of the Act. It simply did not engage with Mr Dixon in a way that would have allowed these concerns, such as they might have been, to be fairly discussed, or to allow Mr Dixon to understand them and fairly engage and respond to them.

[49] Accordingly, Mr Dixon’s dismissal was unjustified.

[50] I also find that the way in which Mr Gemmell went about this to be unfair, in that it seems that he listed out a variety of apparently small and unrelated matters that Mr Dixon recalls occurred at various points throughout his employment, but which he was not aware were on-going unresolved issues. The reference to Mr Dixon receiving paid sick leave is a good example, as in fact Mr Dixon did not receive paid sick leave. Although he was initially paid for four day’s absence due to his lung infection, this was deducted from his following week’s pay. Likewise, the text refers to Mr Gemmell’s decision to pay for Mr Dixon’s medication, which I am advised was a reference to the antibiotics for his lung infection. This was a decision made by Mr Gemmell at the time, and there was no prior indication that this would have future consequences for the security of Mr Dixon’s employment. Rather, it appears that these matters had all been stored up, and then laid at Mr Dixon’s feet without him having been given a prior opportunity to improve<sup>5</sup>.

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<sup>5</sup> Noting that in cases where poor performance is alleged, the employer must have: “previously identified the perceived deficiencies to the employee and given the employee an opportunity that is reasonable to improve his or her performance by means and to a standard both of which are objectively measurable and have been objectively measured.” In *Ramankutty v Vice-Chancellor of the University of Auckland* EmpC Auckland AC53B/01, 25 October 2001 at [23]–[24].

[51] In looking at the contemporaneous text messages, it is difficult to escape the conclusion that Mr Gemmell's action in terminating Mr Dixon's employment was primarily motivated by what appears to be a misunderstanding about the payment of the repairs that Mr Gemmell had arranged to be done to Mr Dixon's car. Mr Dixon, with the assistance of his mother, paid for these repairs to the garage directly, and it seems that Mr Gemmell had a strong preference that Mr Dixon paid him for these repairs instead, to the extent that when Ms Wilkin asked the garage to render an itemised invoice, the stated cost more than doubled. However, this cannot properly justify the termination of Mr Dixon's employment, especially given the lack of process.

[52] Having been unjustifiably dismissed, Mr Dixon is entitled to reimbursement of his lost wages. He advised that he was out of work for one-and-a-half weeks. He has calculated his average weekly pay was \$950.84. He is entitled to be reimbursed for lost remuneration, which for one-and-a-half weeks at his average weekly pay amounts to \$1,426.16 gross.

[53] I must also consider whether Mr Dixon should be awarded compensation for hurt and humiliation resulting from his dismissal. Mr Dixon gave evidence as to the shock, embarrassment, and depression he experienced in the moment, as well as the on-going effects of loss of confidence, the need to move back in with his mother as he was unable to meet his financial obligations, and the delay in completing his qualifications that resulted. His mother gave evidence in support of these effects. I accept this evidence. I also take into account the suddenness of the dismissal, that it occurred over the weekend, that Mr Gemmell told Mr Dixon to attend a meeting to discuss and then never attended himself, and that it occurred via text message rather than any more personal or considered means of communication for such an important decision.

[54] Weighing all these factors, I consider that an appropriate award of compensation in respect of hurt and humiliation is \$14,000, payable without deduction.

[55] I must also consider whether, and to what extent, Mr Dixon's actions contributed to the situation that gave rise to the personal grievance<sup>6</sup>. Warrior NZ in its statement in reply alleges that Mr Dixon acted with "ongoing bad faith"<sup>7</sup>. At paragraph 3 of its Statement in Reply, Warrior NZ sets out a number of concerns including: low

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<sup>6</sup> As set out at section 124 of the Act.

<sup>7</sup> See paragraph 2.14 of the Statement in Reply.

productivity; inability to listen to instructions; not having proper tools; constantly losing his tools; refusal to purchase tools; lack of punctuality; failures to provide start and finish times; failing a drugs test; and a third party company that did not want the applicant working on site.

[56] These allegations against Mr Dixon are not the same as those mentioned in Mr Gemmell's text of 2 July 2022; some of them are new, and Mr Dixon was not aware of them prior to his dismissal. Warrior NZ has provided no evidence to support this list of allegations against Mr Dixon, or to suggest that any of these issues were raised with Mr Dixon at the time.

[57] There is one exception to this, and this is the failed drug text. Mr Dixon freely accepted he agreed to undergo a drug test, and he did test positive for marijuana use. Mr Dixon said that Mr Gemmell spoke to him about it on the spot, made his future expectations clear, and then told him that there would be no further employment ramifications on that occasion. It is to Mr Dixon's credit that he admits this rather than seeking to avoid it.

[58] I have considered the terms of the employment agreement as they relate to drug testing. Page 15 of Mr Dixon's employment agreement provides for drug testing on a "for cause" basis. The clause also requires that the test "shall be done within working hours". Mr Dixon's drug test was not "for cause", occurring when he was at the medical centre after having just been diagnosed with a relatively severe lung infection. In addition, it was on a Saturday morning, which was outside the working hours specified in the employment agreement at schedule five. While in theory Mr Dixon's positive drug test might have been conduct that could have contributed to his eventual dismissal, it occurred in a situation where the employer was not entitled to require the test at all; and where I have found that it was not the motivating cause for his dismissal.

[59] It is also worth mentioning that the statement of reply emphasises what is said to be Mr Dixon's failure to have, or refusal to buy, tools. This is factually incorrect, as Mr Dixon gave evidence that he was repaying the basic tools already supplied to him by Warrior NZ, and the payslips show this to be the case. In addition, page 6 of the employment agreement provides for a reimbursing allowance, and states:

Where the Employer agrees that the Employee will provide tools for the Employer's business for use on the Employer's premises, the Employee shall be reimbursed at the rate set out in Schedule Seven.

[60] Schedule Six, at page 24 of the employment agreement, provides for an agreed reimbursement rate, however, this has been left blank and the page struck through. Warrior NZ has not explained why it did not provide Mr Dixon with reimbursement if it wanted him to provide his own tools, which would presumably have alleviated Mr Dixon's expressed concern that he was unable to bear the full cost of buying too many tools at once. Instead, the evidence shows that Mr Dixon kept to an alternative agreement to pay back Mr Gemmell with an additional charge of 10%. This is in stark contrast to the suggestion in the employment agreement that Mr Dixon should have been the person receiving an allowance.

[61] I consider these matters to be particularly relevant when assessing whether Mr Dixon's actions can be said to be "both causative of the outcome and blameworthy<sup>8</sup>." They are both matters that are repeated in the texts from Mr Gemmell on 2 and 4 July 2021, and in the statement in reply.

[62] While Mr Dixon's positive drug test may be properly considered blameworthy, it cannot be said to be causative of his dismissal, and the test itself should never have been required of him. Likewise, any disagreements around the purchase of tools are not the result of blameworthy conduct on the part of Mr Dixon, and nor do I consider they were the true, or only, cause of his dismissal<sup>9</sup>.

[63] In these circumstances, where Warrior NZ has not abided by its own employment agreement, I decline to find that Mr Dixon's conduct is either in bad faith (as alleged), or that his conduct can properly be viewed as contributing to his dismissal.

## **Orders**

[64] Warrior NZ Limited is ordered to pay to Ezekiel Dixon:

- a. One-and-a-half week's lost wages, being \$1,426.16 gross.

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<sup>8</sup> *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

<sup>9</sup> I note more generally that the Authority may be "entitled to find on the facts that the employee's performance shortcomings were not sufficiently blameworthy to justify a reduction in remedies, because they were not properly brought to his attention and he did not have the opportunity of correcting his performance." See *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC). I also consider this to be the case here.

- b. Compensation for hurt and humiliation, being \$14,000 without deduction.

### **Costs**

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[66] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the respondent 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.

[67] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>10</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>10</sup> Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>