

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 105
5644876

BETWEEN NELSON DOUGLAS EASON
Applicant

A N D FABRI-CELL
INTERNATIONAL LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: David Rooke, Counsel for Applicant
Dianne Ferguson, Manager employed by Respondent

Investigation Meeting: 07 April 2017 at Auckland

Written Record of Oral 07 April 2017
Determination:

**WRITTEN RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Eason was employed by Fabri-Cell International Limited (Fabri-Cell) for approximately 11 years. He started work as a Cutter but at the time his employment ended he was a Maintenance Man. Fabri-Cell was purchased by new owners 27 days before Mr Eason's employment ended.

[2] On 28 July 2016 Mr Eason advised his new manager, Mr James Deo CEO of Fabri-Cell that he wanted to resign because he had decided to retire from work. Mr Deo told him to talk to Mrs Dianne Ferguson, another manager who had responsibility for administrative issues.

[3] When Mr Eason approached Mrs Ferguson and told her he wanted to retire she suggested that he put his resignation in writing that night because he did not have access to a computer in the warehouse where he was based for work.

[4] Mr Eason left work on sick leave around 1.30pm on 28 July as he felt unable to work for the rest of the afternoon or the next day. In accordance with his usual practice he took some of his own tools which he used for work purposes home with him. He took the tools home that he kept in two big boxes and another employee helped him to load the tools boxes into his car. He had been doing this for years to keep his tools safe since he his tools were stolen in 2009.

[5] Mr Eason did not take all of the tools he owned home with him. Some of the tools would be used by his colleagues while he was not at work and some tools were too big or were fixed in the workshop.

[6] Mr Eason filed a list of the itemised tools he says he owns but which are still at Fabri-Cell. Mr Eason made no attempt to hide what he was doing as he loaded his tools into his car in front of other employees who knew he was leaving work early that day.

[7] On the evening of 28 July 2017 Mr Eason emailed Mrs Dianne Ferguson his resignation on the grounds he had decided to retire. Mrs Ferguson received that email the following day when she arrived at work.

[8] Mr Eason called his colleague Mr Gill on 29 July 2017 to say he would not be at work that day. Mr Eason said he called Mr Gill because Mr Gill would probably be covering some of the work that Mr Eason was not going to do because he was not at work. Mr Gill does not appear to have passed that message on to Fabri-Cell's management.

[9] Mr Eason says he started work as usual around 7.30am on Monday, 01 August 2016 and at around midday that he was called into the office by Mrs Ferguson who had two other employees with her. Mrs Ferguson handed Mr Eason a dismissal letter which had been signed by her.

[10] Mr Eason says he was shocked at his dismissal and didn't understand why he was being dismissed when he had already resigned. Mr Eason also says he was

surprised that it was Mrs Ferguson, in the presence of two other employees who acted as her witnesses, because Mrs Ferguson had never been his manager, Mr Deo was.

[11] Mrs Ferguson says she was given the letter by Mr Deo on the morning of 01 August and that Mr Deo instructed her to give it to Mr Eason. Mrs Ferguson accepts that she just handed the dismissal letter over to Mr Eason and told him his employment had been terminated for the reasons in the letter.

[12] Mrs Ferguson says she had no involvement in the decision to end Mr Eason's employment which is why she was unable to discuss it with him when he attempted to express his view about the content of the letter.

[13] Mr Eason says that when tried to dispute the allegations Mrs Ferguson told him she was not going to discuss it and he had to leave the premises immediately. Mrs Ferguson followed Mr Eason as he went into the tearoom to collect some personal items and then followed him to make sure he left the premises without going back into the workshop. Mr Eason says he found that "*highly embarrassing*".

[14] The dismissal letter said that Mr Eason's employment was being terminated under clause 11 of his employment agreement on the grounds that he had failed to undertake his duties and responsibilities in a professional manner. This consisted of him:

- Not following the resignation process in clause 14.1 of his employment agreement because he told colleagues he was resigning before he handed in his written resignation;
- Failing to advise of his whereabouts on 28 and 29 July 2016;
- He submitting an annual leave form to payroll for his absences on 28 and 29 July 2016; and
- Removing company property (meaning his tools which Fabri-Cell alleged were their tools).

[15] I find that all of these reasons for dismissing him are without merit. Mr Eason gave the correct contractual written notice. His employment agreement required him to report his sickness absence to an "*authorised employer representative.*" The new owners had not given him instructions as to who that was so Mr Eason reported his

absence to his colleague who would be covering some of Mr Eason's work in his absence. Mr Eason was on sick leave so there was no need for him to have applied for annual leave.

[16] Fabri-Cell had Mr Eason's contact details so could have contacted him to find out where he was if that was an issue. Fabri-Cell could also have asked Mr Eason's colleague (Mr Gill) where he was.

[17] Mr Eason viewed the allegation about taking company property very seriously. He says he saw that as an allegation of theft against him which highly distressed him. I accept Mr Eason's evidence that the tools he removed were owned by him and that he removed them in accordance with his practice to take his tools home over weekends and holidays. He did this in full view of other employees.

[18] I find that Fabri-Cell produced no evidence (despite being directed to do so by the Authority) to establish ownership of any of the tools it says Mr Eason took home with him. Fabri-Cell was also unable to even identify what tools it claimed had been taken, which I consider fundamentally undermines its claim that it owned the tools in issue.

[19] Fabri-Cell's position was that it purchased the business as a going concern so it therefore owned all tools that were used on the work premises. Mrs Ferguson accepts that the new owners did not communicate that view to staff so Mr Eason had no opportunity to identify to the new owners the tools he owned.

[20] Fabri-Cell's lack of evidence was contrasted with Mr Eason's detailed evidence of ownership which was supported by receipts, photos and other documentation. I am satisfied that Mr Eason used his own tools that he had purchased for work and that Fabri-Cell knew or ought to have known that.

[21] Mr Eason had been lugging his boxes of tools in and out of work each week in full view of other employees who knew he owned the items. Fabri-Cell's previous General Manager Mr John Jelley confirmed that Mr Eason used his own tools at work.

[22] Mr Eason was able to provide proof of ownership of the tools because in 2009 his work tools were stolen and his insurance paid for replacement tools which he then purchased using his own funds. Mr Eason has provided an insurance claim number

and supporting documentation detailing all of the tools that were stolen, which he subsequently replaced at his own cost.

[23] Mr Eason also provided receipts for the tools he purchased and photos taken by his wife of the new tools purchased with the insurance money. Mr Eason says that after purchasing these new tools he got into the practice of taking his tools home with him at weekends to keep safe.

[24] Mr Eason says that he had initially asked Fabri-Cell to replace the tools that had been stolen because they were used by him for work purposes or to provide him with a tool allowance but Fabri-Cell declined to do either.

[25] Mr Eason says that because he used his own funds to purchase the tools which he used, he considers the tools are his property and not Fabri-Cell's property. I agree with that view. If he paid for them he owns them, regardless of whether he used them for work purposes.

[26] Mr Eason also claims that he is owed three days' wage arrears because he was not paid his wages since his last pay on 26 July 2016. He also claims unpaid holiday pay. Mr Eason also seeks the return of the tools that he left at Fabri-Cell as per his itemised list.

[27] Fabri-Cell admits it did not pay Mr Eason for the last three days he worked and that it has still not paid him any holiday pay despite his employment ending in August 2016.

The issues

[28] The following issues are to be determined:

- (a) Was Mr Eason's dismissal by Fabri-Cell on 1 August 2016 justified?
- (b) If not, what if any remedies should be awarded?
- (c) Is Mr Eason owed wage arrears?
- (d) Is Mr Eason owed unpaid holiday pay?
- (e) What if any costs should be awarded?

Was Mr Eason's dismissal justified

[29] Justification is to be assessed in accordance with the justification tests in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether Fabri-Cell's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Eason was dismissed¹.

[30] This includes assessing the extent to which Fabri-Cell complied with its statutory requirements including the good faith requirements in s.4(1A) of the Act which required it to provide Mr Eason with all relevant information and an opportunity to comment on it before dismissing him.

[31] It also requires an assessment of the extent to which Fabri-Cell complied with each of the four procedural fairness tests set out in s.103A(3) of the Act together with other appropriate factors.

[32] Fabri-Cell admits that no disciplinary process was used because it says that that was unnecessary given that Mr Eason had already provided his resignation. Fabri-Cell admits that it did not make any inquiries with Mr Eason on the afternoon of 28 July or on 29 July 2016 to ascertain his whereabouts but merely assumed that he had ended his employment without notice.

[33] I find that Fabri-Cell unilaterally terminated Mr Eason's employment. It did not raise its concerns with him before dismissing him and it dismissed him without notice or pay in lieu of notice. Mr Eason's attempts to discuss the situation were shut down and he was effectively escorted off the premises.

[34] I find that Mr Eason's dismissal was procedurally and substantively unjustified. Not only was there a complete absence of any process but the matters which Fabri-Cell dismissed for were not capable of justifying dismissal.

¹ Section 103A(2) of the Act

What if any remedies should be awarded?*Lost remuneration*

[35] Mr Eason claims 90 days' lost remuneration. I do not accept that claim. Mr Eason had already provided two weeks' notice of termination meaning his employment was due to end on 12 August 2016 as a result of his resignation.

[36] I therefore consider that he is therefore only able to claim lost remuneration for the period during which he would have continued working but for his unjustified dismissal, which in his case is the balance of his notice period.

[37] Fabri-Cell is ordered to pay Mr Eason \$1,560 lost remuneration under s.128(2) of the Act.

Distress compensation

[38] Mr Eason gave evidence of his hurt, humiliation, distress and embarrassment. He says that he was told to leave the premises immediately and was followed around as he collected personal items before leaving.

[39] He was not given an opportunity to uplift the rest of his tools from the workshop or to say goodbye to the people he had worked for over the preceding 11 years. Mr Eason discussed how awful he felt to be accused of dishonesty and emphasised that he had not stolen anything in his life.

[40] Mr Eason says he suffered a stroke a few months later and his doctors say stress was a contributing factor.

[41] I accept that Mr Eason has suffered humiliation and embarrassment which I consider was aggravated by Fabri-cells unjustified allegations, by its refusal to have any discussion with him about its concerns, by following him as he collected his items, by requiring him to leave immediately, and by failing to pay him his wages or holiday pay.

[42] Fabri-Cell is ordered to pay Mr Eason \$9,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his unjustified dismissal.

Contribution

[43] Section 124 of the Act required me to consider the extent to which Mr Eason contributed to the situation that gave rise to his dismissal grievance. Contribution denotes blameworthy conduct which is established on the balance of probabilities.

[44] I am not satisfied that Mr Eason engaged in blameworthy conduct. I accept his evidence that he informed a colleague that he was leaving work at 1.30pm on 28 July 2016. I also accept his evidence that he informed Mr Gill that he would not be at work on 29 July 2016 because he was unwell.

[45] I further find that Fabri-Cell has failed to establish to the required standard of proof that Mr Eason removed any tools that were not his property from the workplace nor has Fabri-Cell established to the required standard of proof that Mr Eason failed to give two weeks' contractual notice as required under clause 14.1 of his employment agreement, which is what it alleged in the dismissal letter.

[46] For these reasons I am not satisfied that Mr Eason has engaged in any contributory conduct and therefore remedies are not to be reduced.

Wage arrears

[47] Fabri-Cell does not have any explanation for failing to pay Mr Eason his last three days' wages. The pay cycle runs weekly in arrears and is paid on Tuesday.

[48] I find that Mr Eason was not paid for Wednesday, Thursday or Friday 27-29 July 2016. Fabri-Cell is ordered to pay Mr Eason \$482.64 wage arrears.

Unpaid holiday pay

[49] Fabri-Cell had no explanation for why it has still not paid Mr Eason his holiday pay entitlements which should have been paid to him upon termination. Fabri-Cell is ordered to pay Mr Eason \$2,917.65.

[50] Fabri-Cell is also ordered to pay Mr Eason \$163.41 being 8% holiday pay on the \$2042.64 wage arrears and lost remuneration he has been awarded.

Return of tools

[51] I am satisfied that Mr Eason left some of the tools he owned at Fabri-Cell. He is entitled to have these items returned to him. Fabri-Cell is ordered to return the tools listed in the inventory list that Mr Eason filed with the Authority today. These tools are to be returned to him within 14 days of the date of this determination.

Costs

[52] Mr Eason as the successful party is entitled to a contribution towards his actual costs. I am satisfied that he has incurred actual costs in excess of the notional daily tariff which is currently \$4,500 for the first day of an Authority investigation meeting.

[53] The Authority adopts its usual notional daily tariff-based approach to costs. This investigation meeting involved two hours of investigation meeting time. The notional starting point for assessing costs is therefore \$1,285.71.

[54] Neither party identified any factors which they said should result in the notional daily tariff being adjusted and I am not aware of any.

[55] Fabri-Cell is therefore ordered to pay Mr Eason \$1,285.71 towards his actual legal costs plus \$71.56 to reimburse his filing fee.

Orders

[56] Within 14 days of the date of this determination Fabri-Cells is ordered to return to Mr Eason all of the tools on the list of tools he filed with the Authority today which he says he left in the workshop.

[57] Within 28 days of the date of this determination Fabri-Cell is ordered to pay Mr Eason:

- a. \$482.64 wage arrears;
- b. \$3,081.06 holiday pay;
- c. \$1,560 lost remuneration;
- d. \$9,000 distress compensation;

e. \$1,285.71 legal costs;

f. \$71.56 filing fee.

Rachel Larmer
Member of the Employment Relations Authority