

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 75
5534455

BETWEEN FRANK FURZE
 Applicant

A N D HARLEY INTERIOR
 PLASTERERS LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Michael McDonald, Advocate for Applicant
 Ben Harley, Advocate for Respondent

Investigation Meeting: 15 March 2016 at Christchurch

Submissions Received: Further information received from respondent on 11
 April 2016.
 Submissions received from Applicant on 20 May 2016
 Submissions received from Respondent on 2 June 2016

Date of Determination: 9 June 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Furze was an employee, and not a contractor.**
- B. Mr Furze was unjustifiably dismissed by the respondent and is entitled to the remedies set out in this determination.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Furze claims that he was unjustifiably dismissed from his employment on or about 26 November 2014. He also claims arrears of wages and arrears of holiday pay.

[2] The respondent did not take part in the Authority's initial telephone conference, nor lodge any statement in reply or any statements of evidence. However, Ben Harley, the director and owner of the respondent company, appeared at the investigation meeting on behalf of the respondent. Mr Harley said in evidence that Mr Furze had never been an employee of the respondent company but had been a labour-only contractor. He also said that, in any event, Mr Furze had not been dismissed by the company but had abandoned his employment.

Brief account of the facts leading to the termination of the relationship

[3] Mr Furze is an experienced gib fixer and commenced working for the respondent company in or around the beginning of September 2014. It is his evidence that he was given an individual employment agreement when he started work but that he no longer has a copy of it, or had never kept a copy.

[4] Mr Furze said that he had been encountering some bullying from other workers while working for the respondent and had complained to Mr Harley about it, but that Mr Harley had done little to stop it. Mr Furze said that, on 10 November 2014, he had had enough of the bullying and, when he spoke to the foreman about it, the foreman told him that if he did not like it he should leave. Mr Furze therefore left the worksite he was working on and went home. The Authority saw a copy of a text message that he had sent to Mr Harley in which he stated that he had left site at 1.30 as he *didn't want to cause any more drama*.

[5] The Authority saw Mr Harley's texted response, which said that he needed Mr Furze to be back onsite as soon as possible as his reputation as Harley Interior Plasterers was at major risk. It is clear from Mr Harley's text message that Mr Harley was under some pressure from the contractor to finish the job that day. In the text message, Mr Harley stated:

So I am telling u as a boss to head back and site [sic] and help the other boys fix this please.

[6] Mr Furze says that he believed that he went back to work the following day but that he did not receive any warning for absenting himself.

[7] Around about the same time, Mr Harley held a barbecue after work at which he announced that he wanted all of the staff to sign independent contractor agreements. A copy of the agreement that had been handed to Mr Furze at the

barbeque was shown to the Authority. It was dated 10 November 2014 and was stated to be an independent contractor agreement between the respondent and Mr Furze. The document appears to be an internal University of Waikato agreement which has been amended so as to change the parties to the respondent and Mr Furze.

[8] Mr Furze said that he had wished to obtain legal advice about it before he signed it, which he did. Mr Harley agreed with this in his evidence, and said that Mr Furze had various queries about the agreement and ultimately did not sign it, possibly because he did not agree with the withholding tax part.

[9] It would appear that Mr Furze continued working for the respondent until Saturday, 22 November 2014 when, according to Mr Furze, he found out that his then partner's grandmother was seriously ill and was expected to pass away. Although he was expected to work on that Saturday he did not do so as his partner, Sabrina Hodgson, who was very close to her grandmother, wished to be with her and Mr Furze needed to look after her children, who were of school age. Mr Furze says that he sent a text message to Mr Harley on that Saturday saying that he could not make it as his partner's grandmother was dying, that she and her dad needed to go and sit with her, and that he had to look after the children.

[10] Although the Authority did not see a copy of that text message or any reply from Mr Harley, the Authority did see a string of text messages that passed between Mr Furze and Mr Harley from around 8.03am on Monday, 24 November 2014. It is not necessary to replicate all of these text messages, although it is necessary to show a fair number of these exchanges as they demonstrate how the relationship deteriorated during the course of that day and the following two days. It appears that the entirety of the communications between Mr Furze and Mr Harley was carried out by text message from Monday 24 November. The first exchange of text messages of any significance on Monday, 24 November, was as follows:

Mr Harley: Can u take any gear u have of mine to the job or drop them at my house. Wash my shirt as well.

Mr Furze: Why its it over.

*Mr Harley: Im over ppl taking days off.
Im sick of it frank.*

*Mr Furze: Bro I cant help missus gran dieing f**cken hell what would you do she need supporting.*

Mr Harley: Do wot u have to Do.

Mr Furze: Ok sweet as pay me what Im owed then and I'll give your tshirt back as soon as its washed.

[A text from Mr Harley appears to be missing at this point.]

Mr Furze: Support her so she doesn't do anything stupid stop her from crying all the time help make things easier eg: send kids to school tea washing dishes etc

Mr Harley: Show me proof grandma died.

*Mr Furze: How??
Go see her then.
35.5 hours last week.*

*Mr Harley: Im sure your work it out. S letter from the paper. Wat ever frank. I am tightening down on attendance. I don't care who it is. Over it. Alot of changes are in place.
Why u sending hours. Don't need them.*

[Some text messages omitted as not relevant.]

Mr Harley: Appreciate that. But your not helping abandoning your job.

[Text messages omitted.]

Mr Furze: ... pay me what Im owed today or Im going to lawyers.

Mr Harley: Good luck.

Mr Furze: [some text unreadable] black and white bro it's not what I wanted to do but if that's the way you want it.

*Mr Harley: It's the way u made it.
See u in court.*

*Mr Furze: So now your not gonna pay me??
Your the one that fired me.*

Mr Harley: Didn't fire u. U abandoned your job.

*Mr Furze: No way Im grieving over gran dieing it's Called brieivement leave.
So what does this mean ...
Can you take any gear you have of mine to the job or drop them at my house. Wash my shirt as well.*

*Mr Harley: Thst means I need u on the job. That's wat that means.
And brieivement only applies if u have proof.*

Mr Furze: Now your workers threaten me that's a good look.

Mr Harley: Don't know why. I haven't said anything to them.

Mr Furze: It's a good look for Harley interior decorators.

*Mr Harley: Maybe cause u let the team down. And u better look at employee s right s for brievment. It's actually grievement and u are not entitled to it as u have only worked with me less than 3 months. Its not a family member. And u need to supply evidence regarding the death. And more notice. For example. I didn't hear bout the death or u going to a funeral? So to me this is a lie and u need to prove it.
Got nothing to do with me wats going on with u or the other boys. Only person it's not looking goid for is u.*

[11] There then followed some text messages where Mr Harley accused Mr Furze of smoking marijuana onsite, drinking onsite and using P. Mr Furze denies these accusations in his replies.

[12] Mr Furze and Mr Harley's text exchange continued as follows (some irrelevant text messages have been omitted):

Mr Furze: And abandonment of job means no contact have spoken with my lawyer.

Mr Harley: Well wen you are lying to your boss frank then it is. I'm not stupid so don't insult my intelligence. ... Look. U have put yourself in this situation. So if the blame is pointed anywhere it's to u.

[Further texts have been omitted.]

Mr Harley: This not this is about. It's about u lying to me cause you can't b bothered coming to work. Like I said. U didn't tell me bout a funeral. You can't supply me with proof so I'm not excepting your lye. So u need get onsite asap.

Mr Furze: I have told you read your text properly I told you she was dieing there's no lie there.

Mr Harley: Hey bro I'm gonna need a couple days off the missus isn't copping with her gran dieing so I nee to be there to support her.

Mr Furze: Yeah dieing.

*Mr Harley: Sounds to me she has died frank. If her grandma was sick then u would say u can't coming in as her grandma is sick.
So in that case there is no brievment if ppl r sick frank.*

So go to work.

Mr Furze: Her gran is dying not sick and hasn't passed yet they have been by her side holding her hand.

Mr Harley: Its Not how u worded it frank. So brieivement is not needed. I'm sure your partner has all her family for support. So I will give u the optunity to go to work. I need u there now. If I don't hear from my foreman u r there then u have quit. Or abandoned your job.

Mr Furze: I ask for time off to support her and help with the kids you said yes. So are you now saying that if I don't go that you are firing me after saying yes to me having time off.

Mr Harley: I said was ok. Didn't say yes. As u can see next text was we need to talk. Wouldn't that ring alarm bells. And the further thru texting the more I didn't think it was legit. So it's not ok frank. So il telling you one more time. Go to work.

Mr Furze: You fired me so I want my money. The Forman new she was dieing because she came to site before going to see her.

Mr Harley: So me saying ok is not yes. Its saying ok .. we need to talk. And why text me 7.30am wen u could told me last week or week before or even fri. Your not fired. As u can see by my texts I have told u to go to work. How is thst text saying u r fired.

*Mr Furze: This one I take as fired ... Can u take any gear u have of mine to the job or drop them at my house. Wash my shirt as well. I told you on Saturday in this text I can't make it bro missus gran dieing and she and her dad going to see and sit with gran and I have to look after kids.
11:23 dead*

Mr Harley: Not up to my foreman to tell me bout your issues. I'm sure he has his own issue s to deal with. Listen to wat i am saying frank. Go to work. U still have your job. I will be in contact with foreman later today.

*Mr Furze: F**ck you she just f**cken died have some f**cken respect.*

[13] There appears to have been no further text messages that day. The next text was from Mr Furze to Mr Harley the following day, sent at 1.08pm, in which Mr Furze said that he would send Mr Harley a copy of the death notice as soon as the family had finished writing it. There appears to have been no response to that from Mr Harley.

[14] On Wednesday, 26 November 2014 the following exchange occurred between Mr Furze and Mr Harley:

Mr Furze: Just wanting to clarify that you no longer want me to work for you?

Mr Harley: Let's get this right frank. It was u who didn't want ya job. And I haven't got time for ppl. who mess me around and don't show up. yo work.

Mr Furze: I did want my job I explained to you that gran was dying and that I needed to support my family but you didn't believe me and then she died. Her death notice will be in the paper and like I said yesterday I will send you a copy.

Mr Harley: The thing is frank. This is a on going thing for u Taking time off. If it's not one thing it's another. Over it. And I will be doing the same with the other boys.

Mr Furze: Ok.

Mr Furze: As soon as my pay goes in I can bus out and give you shirt back as I don't have a car.

[15] On Thursday, 27 November 2014, Mr Furze texted Mr Harley asking why he had not been paid for the 35.5 hours that he had worked, to which Mr Harley asked where his proof was for taking days off and saying that it had been four days that he had not heard from him. The following exchange then occurred:

Mr Furze: My days off this week do no affect the hours I have already worked and need to be paid. I have already informed you that I will get you the death notice as soon as it has been printed.

Mr Harley: Your days off has affected your job. Once I receive proof of death notice also something on paper related to your partner with the death not Ie then we will talk.

Mr Furze: You can not by law withhold my pay as I have already done this work.

Mr Harley: Well u r wrong. U are a contractor. U are not on wages. So laws are different. And u recon 35.5hrs. Yeah right frank. Get real. Way off. U be lucky if u did any. You get wat i have asked for then we go from there. I will put funds in tonight. Make sure u supply me wirh wat I have required u to give me. I want my

shirt in letterbox by 8pm tonight or I won't b putting funds thru.

Mr Furze: Work top is in letter box.

Mr Harley: Cheers.

[16] That was the last text between the parties that appears to have been sent and, apparently, there were no further communications of any sort between Mr Furze and Mr Harley.

[17] On 9 December 2014, the offices of I R Thompson Associates wrote to Mr Harley raising a personal grievance on Mr Furze's behalf for unjustified disadvantage and unjustified dismissal.

The issues

[18] The Authority must determine the following issues:

- (a) Whether Mr Furze was an independent contractor or an employee;
- (b) If Mr Furze was an employee of the respondent, then whether Mr Furze suffered an unjustified dismissal; and
- (c) Is Mr Furze owed arrears of wages and arrears of holiday pay?

Was Mr Furze an employee or an independent contractor?

[19] The concept of *employee* is defined in s.6 of the Employment Relations Act 2000 (the Act) as follows:

6. Meaning of employee

- (1) *In this Act, unless the context otherwise requires, **employee** –*
 - (a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service;*
 - ...
- (2) *In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
- (3) *For the purposes of subsection (2), the court or the Authority-*
 - (a) *must consider all relevant matters, including any matters that indicate the intention of the persons; and*

- (b) *is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.*

[20] In deciding for the purposes of s.6(1)(a) of the Act whether Mr Furze was employed by the respondent company on a contract of service, it is helpful to take into account the factors identified by the Supreme Court in *Bryson v. Three Foot Six Ltd (No 2)*¹, namely:

- (a) The written and oral terms of the contract which will usually contain indications of the common intention concerning the state of the relationship;
- (b) Any divergence from those terms and conditions in practice;
- (c) The way the parties have actually behaved in implementing their contract;
- (d) Features of control and integration and whether the contracted person has been effectively working on his or her own account (known respectively as a control, integration and fundamental test).

The written and oral terms of the contract

[21] The Authority saw no copy of an agreement other than the independent contractor's agreement that had been offered to Mr Furze, and which he refused to sign. That agreement is not helpful as it was introduced after Mr Furze started working with the respondent.

[22] It was Mr Furze's evidence that he did not believe there were any express discussions with Mr Harley about the nature of the relationship between himself and the respondent company but that he believed that he was an employee when he started. Mr Furze did, however, say that he was not sure of the difference between an employee and a contractor at that point.

[23] It was Mr Harley's evidence that he treated all of his workers as independent contractors and took withholding tax from their pay. He could not explain during the Authority's investigation meeting why a printout of Mr Furze's tax over the relevant

¹ [2005] NZSC 34

period from the IRD did not show the respondent company as having paid withholding tax on behalf of Mr Furze, except that he suggested that Mr Furze had perhaps not provided his IRD number to Mr Harley. Later, Mr Harley provided a copy of a letter from the IRD which showed that Mr Furze had been treated as having withholding tax taken from his pay, and that his pay had been treated as schedular payments. Mr McDonald asserts in his submissions, though, that the letter shows the incorrect IRD number. It does cite Mr Furze's name though.

[24] It was Mr Harley's evidence that he decided to issue his workers with an independent contractor contract on or around 10 November 2014 because he was getting frustrated with the way they were working, turning up for work late, taking long breaks and having days off sick. My understanding of his evidence is that he basically wanted to make them more accountable. Mr Harley also said that he did not issue a contract to Mr Furze as soon as he started because he believed that he could dismiss staff within the first 90 days in any event without a contract.

[25] Mr Harley stated in his written submission that he clearly stated to Mr Furze the rules and regulations and spoke in great detail about his role with the respondent.

[26] I believe that Mr Harley had the intention of Mr Furze being an independent contractor, but that Mr Furze either believed he was an employee, or he was not clear what his status was. Either way, this means that the parties were not of one mind. In turn, this means that there was no agreement between the parties, as they did not have a common intention, and so it is necessary to look at the real nature of the relationship, (as required in s.6(2) of the Act).

How the parties actually behaved

The control test

[27] This test effectively examines the extent to which the activities of Mr Furze were controlled by the respondent.

[28] Mr Furze said that he was told where to go and what to do by either the foreman or Mr Harley. He said he had the same start and finish hours each day.

[29] Mr Furze says he was not allowed to leave the workplace without permission, and this appears to be confirmed by the text messages sent by Mr Harley to Mr Furze; especially the text messages sent on 10 November 2014.

[30] Mr Harley said that he would have had no problem at all with Mr Furze carrying out work for someone else whilst working for the respondent so long as he did not do so during hours that he was supposed to be working for the respondent and so long as he did not use the company's work tools without permission. He said that he would not have been happy, though, if Mr Furze or anyone else had worked directly for the contractor he was subcontracted to. In reality, though, Mr Furze only worked for the respondent.

The integration test

[31] This test examines the extent to which Mr Furze was integrated into the respondent's business.

[32] Mr Furze said that he was sometimes picked up from work by the foreman. Mr Furze also said that he had his own tools and equipment except for a screw gun, the main tool required in gib fixing, which was supplied by the respondent. Mr Furze also said that the company provided everything else he needed to do the job including gib, screws and other tools. Mr Furze also said that he was supplied with a tee-shirt that was printed with the respondent's name. Mr Harley said that he did supply tee-shirts to the staff but this was because it was a requirement of the main contractor. He said the tee-shirts carried the name of the main contractor, and the name of the respondent company in smaller text.

[33] Mr Harley said that he carried public liability insurance and that his workers did not need their own insurance because they were covered by his insurance.

[34] When asked why he referred to his workers as employees in his evidence, this was because he thought it was a more friendly way of referring to them than *labourers*.

The fundamental or economic reality test

[35] This test examines the extent to which Mr Furze took on financial risk himself in providing his services.

[36] Mr Furze said that he did not submit any invoices for his pay and that he did not recall having to fill out any timesheets. Mr Harley said that he required his staff to submit invoices to get paid, although he was quite lenient and several of them did not do so. He would pay them nevertheless.

[37] His pay rate was set by the respondent and I accept that Mr Furze had no control over the price that was charged for his work. I do not find that he took on any financial risks himself.

Conclusion

[38] I note that Mr Furze was treated as a contractor for tax purposes. However, how a party is treated for tax purposes follows from what the employer tells the IRD, and does not dictate the status of that relationship. It tells me that Mr Harley regarded Mr Furze as a contractor, but it does not persuade me that this was the legal reality of the relationship. There are a number of other factors which point to Mr Furze having been an employee in reality, despite what Mr Harley intended.

[39] Of particular relevance is Mr Harley's evidence that he thought he could dismiss Mr Furze in the first 90 days. That right is only relevant to employees. Also of relevance, though, are the following aspects of the evidence:

- a. that the respondent supplied the screw gun, an essential piece of equipment for a gib fixer, as one would have expected Mr Furze to have had his own if he had been working on his own account, moving from contractor to contractor;
- b. that Mr Furze was covered by the respondent's insurance. One would have expected him to have had his own insurance if he had been working on his own account;
- c. the fact that Mr Harley gave Mr Furze an independent contractor's agreement part way through the arrangement, rather than at the start of it; and
- d. the degree of control exerted over Mr Furze by Mr Harley, including saying in one of his texts that he was Mr Furze's boss, demanding he turn up for work, and accusing him of abandoning his job.

[40] When I weigh up these factors, they outweigh any factors suggesting that Mr Furze was an independent contractor.

[41] Having established that Mr Furze was an employee in law, I can now consider whether he was unjustifiably dismissed.

Was Mr Furze unjustifiably dismissed?

[42] In determining this question I must first determine whether Mr Furze was dismissed, or whether he abandoned his employment. Second, if he was dismissed, I then must decide whether that dismissal was justified or not.

Dismissal or abandonment?

[43] This question arises because Mr Furze and Mr Harley have differing views as to the state of the employment during those crucial days of 24 to 26 November 2014. Mr Harley did text Mr Furze on more than one occasion saying that he wanted Mr Furze to be back onsite and that he was not fired. Mr Harley last stated this to Mr Furze at 11.30am on Monday 24 November 2014 when he said *go to work. U still have your job.* This was, however, immediately after Mr Furze had advised Mr Harley that his partner's grandmother had died, although it is possible that the text messages crossed with one another as they both appear to have been sent at the same time.²

[44] Analysing the exchange of text messages, it emerges later in the text exchanges that Mr Harley had misunderstood the ambiguous phrase that Mr Furze had used when he initially texted Mr Harley saying *Hey bro I'm gonna need a couple days off the missus isn't coping with her gran dieing so I need to be there to support her.*³

[45] The phrase *the missus isn't coping with her gran dieing* can have two meanings:

- a. The missus isn't coping with her gran having died; or
- b. The missus isn't coping because her gran is dying.

² I am aware that texts do not always get delivered as soon as they are sent, and that delays can occur in delivery.

³ Whilst the Authority did not see this original text, Mr Harley quoted it in one of his later texts.

[46] Mr Furze intended the second meaning, while Mr Harley understood the first meaning. Mr Harley cannot be blamed for the misunderstanding as either meaning is equally plausible in the absence of clarifying context. Equally, Mr Furze cannot be blamed for writing the sentence the way he did. It was a perfectly acceptable sentence, and given the situation he was in, the ambiguity would not have occurred to him. The English language often lends itself to ambiguity, which context usually resolves. That resolution is less likely in the written language than in conversation though.

[47] Having fixed upon the first meaning, Mr Harley automatically suspected that Mr Furze was lying, and expected proof of the *death*. That is where the communication went awry.

[48] Mr Harley's messages were contradictory on 24 November.

- a. He initially treated Mr Furze's employment as having already ended (*Didn't fire u. U abandoned your job.*).
- b. Then he required Mr Furze to attend work on the morning of 24 November 2014 or else he would be deemed to have *quit*. (*If I don't hear from my foreman u r there then u have quit or abandoned your job.*).
- c. Finally, he says that Mr Furze still has his job, and that he should go to work. (*Listen to wot I am saying frank. Go to work. U still have your job. I will be in contact with foreman later today.*).

[49] Mr Furze did not go to work that day, though, as his partner's grandmother had just passed away.

[50] I treat Mr Furze as having been on bereavement leave on 25 November⁴. On 26 November, he asked for clarification that Mr Harley no longer wanted him to work for him. Mr Harley said that was right, as he did not have time for people who do not show up for work.

[51] My analysis of this situation is that Mr Harley imposed a condition upon Mr Furze which he was not reasonably able to comply with. The condition was, turn up

⁴ Pursuant to an entitlement referred to in ss. 63(1)(b) and 69(2)(b) of the Holidays Act.

for work despite your partner needing support from you, or be treated as having *quit*. As Mr Furze did not comply with the condition, he reasonably understood himself to have been dismissed. That was confirmed when he checked on 26 November.

[52] It is a common misunderstanding amongst employers that they can treat someone as having quit their job when the employee fails to do something they are told to do. An employer cannot impose a resignation upon an employee, or characterise the employment as having ended by resignation when the employee does not actively resign. The imposition of the condition (*do X, or you will be deemed to have quit*) is actually a dismissal.

[53] Similarly, an employee does not abandon his or her employment when they are in contact with the employer, explaining why they are absent, as Mr Furze did.

[54] In conclusion, Mr Furze was dismissed on 24 November 2014.

Was the dismissal unjustified?

[55] There are two very important duties which employers must comply with. They are encapsulated in two sections of the Act; section 4 and section 103A. I set them out below:

4 Parties to employment relationship to deal with each other in good faith

(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.

Section 103A 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

[56] Mr Harley gave his instruction to Mr Furze to turn up to work despite knowing that Mr Furze had said that he needed to be at home to look after his partner's children while she was with her dying grandmother. Mr Harley thought that the grandmother had already died, but that does not cast a more sympathetic light on Mr Harley's actions.

[57] Mr Harley therefore created a condition for the continued employment of Mr Furze which he knew Mr Furze was in no position to comply with. Giving him an ultimatum for the continuation of his employment which he knew he could not comply with, amounts to a dismissal. Furthermore, Mr Harley took no steps to withdraw the ultimatum, or to make arrangements for Mr Furze to return to work after the heat had gone out of the situation.

[58] In all the circumstances, Mr Harley's actions were not actions which any fair and reasonable employer could have taken. I must, therefore, conclude that these actions amounted to an unjustified dismissal.

Remedies

[59] Having determined that Mr Furze was unjustifiably constructively dismissed, I need to consider what remedies he is entitled to.

[60] Sections 123 and 128 of the Act address remedies, 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;

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.

Lost wages

[61] Mr Furze was without work until 18 March 2015. Although this seems like a relatively long time for a gib fixer in Christchurch during the rebuild of the city, by the time Mr Furze was dismissed, the Christmas and New Year holidays were not far away, and it would have been unlikely that builders were hiring at that point, and probably would not have started again until mid-January at the earliest.

[62] In addition, Mr Furze suffered depression which was made worse by the dismissal. The evidence suggests that, at its height after his dismissal, Mr Furze's depression was quite debilitating. I therefore do not regard the time that it took Mr Furze to find new employment as unreasonably long.

[63] In his brief of evidence Mr Furze states that he was out of work for 13 weeks, although he received \$500 from his brother. In his brief of evidence he says that he sustained a loss of income of \$12,922, less \$500, equating to \$12,422. In his submissions, however, Mr McDonald states that Mr Furze sustained a loss of \$14,560. As Mr Furze swore on oath that his brief of evidence was true and accurate to the best of his knowledge and belief, and that he did not wish to make any changes to it, I take the figure of \$12,422 as his loss.

[64] Mr Furze is entitled to holiday pay on this sum, in the gross amount of \$993.76.

Arrears of pay

[65] Mr Furze says that he was owed \$694 gross in respect of arrears of wages for the week he had worked prior to the week in which he was dismissed. He said his rate of pay was \$28 per hour gross and that he had worked 35.5 hours during that week. He acknowledged having received \$300 and said that he was therefore owed the sum of \$694. Mr Harley denied that Mr Furze had worked 35.5 hours that week.

[66] It is noted that I R Thompson Associates Limited requested wage and time records in respect of Mr Furze in their letter of 9 December 2014 but that no such records were produced. Section 132 of the Act provides that the Authority may, unless the respondent proves that the claims are incorrect, accept as proved all claims made by the employee in respect of wages actually paid to the employee and the hours, days and time worked by the employee when the respondent has failed to keep

or produce a wage and time record in respect of that employee and that failure prejudices the employee's ability to bring an accurate claim under s.131 of the Act.

[67] Therefore, in reliance on s.132 of the Act, I accept the evidence of Mr Furze that he is owed the gross sum of \$694 for arrears of wages. To this is to be added the gross sum of \$55.52 holiday pay.

Holiday pay on earnings

[68] In addition, Mr Furze claims unpaid holiday pay on his earnings during his employment, in the sum of \$426.76. Again, no holiday and leave records were produced by the respondent, and so it is not possible to work out whether Mr Furze took any annual holidays in advance or whether any amounts were paid to Mr Furze in respect of annual holidays with his pay.

[69] I find that the respondent has breached ss.81 and 82 of the Holidays Act. In reliance on s.83(4) of that Act, and pursuant to s.23 of that Act, I agree that Mr Furze is owed holiday pay on his earnings, calculated at 8% of his gross earnings whilst employed by the respondent company.

[70] However, in his brief of evidence Mr Furze claims holiday pay on \$5,334.45. It is not clear where this figure comes from, as it does not match the figure shown on a letter from the IRD which shows that a total of \$5,170 gross was paid. Although the letter shows these payments as schedular payments, and apparently shows the wrong IRD number for Mr Furze, the letter, and a payslip that was produced by Mr Harley (which shows the same total sum paid) are the only independent documents which show total pay. I therefore take this figure as the correct sum. Holiday pay on that sum equates to \$413.60.

Compensation for humiliation, loss of dignity and injury to his feelings

[71] Mr Furze stated in his brief of evidence that he was seeking \$15,000 compensation. In his submissions, Mr McDonald submitted that the compensation should be \$10,000. No figure was cited in the statement of problem, which was probably the wisest approach, as the amount of compensation is in the discretion of the Authority.

[72] However, having revised the figure sought by Mr Furze down from \$15,000 to \$10,000, it would not be just to award more than that revised figure. The question then is, is \$10,000 a reasonable figure to award?

[73] Mr Furze stated in his evidence that he was really angry about the dismissal as his leave was legitimate and required. Then, after a few months of feeling angry, he realised he was hurt and upset. The dismissal had affected his confidence and made him second guess himself about the decisions he made.

[74] He also had difficulties getting employment benefit because of the confusion as to whether he abandoned his employment or not. He then had difficulties paying his bills, and that was very stressful for him. He was then ashamed because he had to borrow money from friends and family. That in turn made him feel bad, and caused him to try to avoid social situations.

[75] Mr Furze consulted his doctor and was told that his depression had got worse. His medication was increased. He then had to move out of the home he was sharing with his partner because of concerns that it was not good for his children to see him in a state of depression. He felt shame because of his depression. I accept all of this evidence.

[76] Detailed information about the causes of Mr Furze's relapse into depression was not adduced to the Authority. It is possible that the loss of his job was not the sole cause. However, Mr Furze's evidence was credible, and I accept that Mr Furze suffered effects of humiliation, loss of dignity and injury to feelings which probably fall within the higher end of moderate.

[77] I believe that Mr Furze's humiliation, loss of dignity and injury to feelings should be compensated under s.123(1)(c)(i), and that \$10,000 is the minimum sum that he should be awarded. However, for the reason given above, I limit the award to that sum.

Contribution

[78] 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 (s.124 of the Act).

[79] The situation which gave rise to the personal grievance was Mr Furze taking leave to support his partner while her grandmother was dying. Mr Furze cannot be blamed for wishing to do this, and I do not regard his conduct as blameworthy. What actually contributed towards the situation that gave rise to the personal grievance was Mr Harley's misunderstanding about what Mr Furze had said in his text, suspecting him of lying, and then following a path which escalated tensions beyond the point of no return.

[80] It is not appropriate to reduce any of the remedies awarded to Mr Furze.

Recommendations

[81] Section 123(1)(ca) of the Act states that, if the Authority finds that any workplace conduct or practices are a significant factor in the personal grievance, the Authority may make recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring.

[82] I make the following recommendations:

- a. Prior to a worker commencing work, the respondent should issue a draft proposed agreement to the worker which sets out clearly the status of the arrangement, and the terms of the arrangement, and give the worker time to get independent advice. If the arrangement is to be one of employment, the respondent is to ensure that the agreement is compliant with the requirements of s.65 of the Act.
- b. When expressing any concerns about an employee's conduct or performance, the respondent should do so face to face, rather than by text, so as to reduce the risk of misunderstandings. It should also be mindful of the requirements of s.4 and s.103A(3) of the Act.

Orders

[83] I order that the respondent pays to Mr Furze the following sums:

- a. \$12,422 gross in respect of his lost wages arising out of his unjustified dismissal;

- b. \$694 gross in respect of arrears of wages;
- c. A total of \$1,462.88 gross in respect of holiday pay; and
- d. \$10,000 in respect of compensation for humiliation, loss of dignity and injury to his feelings.

Costs

[84] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. If they are unable to agree within 14 days of the date of this determination, Mr McDonald may serve and lodge a memorandum of costs within a further 14 days, setting out what contribution Mr Furze seeks, and the basis of that contribution. Mr Harley will then have a further 14 days within which to serve and lodge a response.

David Appleton
Member of the Employment Relations Authority