

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 234
5378631

BETWEEN

MICHAEL INGRAM
Applicant

A N D

SOUTHERN FLOORING
(2011) LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Sarah Saunderson-Warner, Counsel for the Applicant
Robert Moir, for Respondent

Investigation meeting: 3 October 2012 at Dunedin

Submissions Received 3 October 2012 from Applicant
17 October 2012 from Respondent

Date of Determination: 26 October 2012

DETERMINATION OF THE AUTHORITY

- A. Michael Ingram was unjustifiably dismissed from his employment by Southern Flooring (2011) Limited.**
- B. Southern Flooring (2011) Limited is to pay Michael Ingram \$9017.09 in lost wages under sections 123(1)(b) and 128 of the Employment Relations Act 2000 (the Act) plus interest from the date of filing the Statement of Problem until the date of payment in full.**
- C. Southern Flooring (2011) Limited is to pay Michael Ingram \$2,000.00 as compensation for humiliation, loss of dignity etc. under section 123(1)(c)(i) of the Act.**

D. Costs are reserved.**Employment relationship problem**

[1] The applicant, Michael Ingram, claims that his summary dismissal by Southern Flooring (2011) Limited (SFL), the respondent, was both substantively and procedurally unfair.

[2] Mr Ingram claims that he is entitled to remedies of pay in lieu of notice for a period of two weeks, actual lost wages, interest costs that he paid through having to pay his mortgage by credit card, compensation for injury to his feelings and legal costs.

[3] SFL, represented by Robert Moir who is a director of SFL, claims that it was entitled to dismiss Mr Moir in the way that it did because of information that Mr Moir said was orally conveyed to his wife, another director of the company, by an ACC employee.

[4] At the beginning of the hearing Mr Moir told me that Mrs Moir had intended to attend but had been unable to. Mr Moir indicated that he felt somewhat disadvantaged by her absence but wished to proceed with the meeting. Ms Saunderson-Warner presented written submissions and I gave SFL 14 days to make written legal submissions in reply.

[5] Instead, I received an e-mail from SFL's accountant, Mr John Davey, stating that he:

...expected that the Company's Assets would not significantly exceed its liabilities as the Company's activities have been funded by bank loan and overdraft.

It is difficult to see how the Company would be able to pay a claim in Mike Ingram's favour.

[6] I have proceeded to determine the matter because Mr Ingram's right to have this matter concluded is not dependant on the respondent's financial situation.

Background

[7] Mr Ingram was a fulltime vinyl and carpet layer for Southern Flooring Limited since the beginning of 2009. His hourly rate was \$24 per hour. His hours of work were 40 hours per week, with occasional overtime also at \$24 per hour.

[8] In early July 2011 Southern Flooring Limited was sold to Mr Robert Moir and Mrs Elizabeth Moir. The company name changed to Southern Flooring (2011) Limited. Mr and Mrs Moir are the sole directors of that company.

[9] In early July Mr Moir and Mr Gregory Merwood, the vendor of the business, met with Mr Ingram and another employee. The purpose of the meeting was to inform the employees that Mr and Mrs Moir had purchased the business. Mr Moir informed the employees, including Mr Ingram, that their terms and conditions of employment would remain the same. Mr Moir also told Mr Ingram that he would receive a new individual employment agreement. However, Mr Ingram did not receive a written individual employment agreement.

[10] On the afternoon of 16 December 2011, Mr Ingram was working at a client's house. He had lifted a large wall unit back into place. He got down onto the ground, turned to reach for a knee kicker and felt a sudden pain in his lower back.

[11] Mr Ingram's evidence was that he considered that he had a minor injury. He did not mention it to the client or to his colleague at the time.

[12] Mr Ingram had agreed to work the following day, which was a Saturday for SFL. However, on the evening of 16 December 2011 he sent a text to Mr Moir to the effect that he could not work the next day because of an injury. Mr Ingram took sick leave because of his lower back injury on Monday 19 and Tuesday 20 December 2011. On 21 December 2011 Mr Ingram went to see a general practitioner, Dr Keith Abbot. Dr Abbot diagnosed Mr Ingram as having a right-sided lumbar sprain and right-sided pain in his neck. Dr Abbot made a claim to ACC on Mr Ingram's behalf for ACC cover on Mr Ingram's injuries and referred Mr Ingram to physiotherapy. Dr Abbot also certified that Mr Ingram was unfit for work for nine days from 19 December until 28 December 2011.

[13] ACC granted cover for Mr Ingram's injury and approved payment of ACC compensation while Mr Ingram remained off work.

[14] On 28 December 2011 Mr Ingram returned to the Medical Centre and was able to see his own general practitioner, Dr Peter Radue. Dr Radue certified Mr Ingram as being unable to work from 28 December 2011 for 14 days, up to 10 January 2012. Dr Radue recommended further physiotherapy and also osteopathy.

[15] On 11 January 2012 Mr Ingram returned to Dr Radue. Dr Radue noted that Mr Ingram was *having physiotherapy, and is going to attend osteopath also. Some improvement noted.* Dr Radue certified that Mr Ingram was unable to return to work for 14 days from 11 January 2012.

[16] On Friday 20 January 2012 Mr Ingram returned to Dr Radue who certified that Mr Ingram was *cleared for full duties and fit to return to normal work on 23-01-2012.*

[17] Mr Ingram telephoned SFL to speak to Mr Moir on Friday 20 January 2012. He told Mr Moir that he had been certified as fit and able to return to full duties at work on Monday 23 January 2012. Mr Moir returned Mr Ingram's call later that same day.

[18] Mr Moir informed Mr Ingram that Mr Ingram's case manager at ACC had told Mrs Moir that Mr Ingram had received a number of back injuries at work before and that ACC had previously advised Mr Ingram to *get out of the trade.* Mr Moir told Mr Ingram that he was *high risk and I don't want to see you in a wheelchair and the job is not for you.* Mr Moir told me that he told Mr Ingram that because of his injury history he had to *let him go.* Mr Ingram asked for some clarification about whether he was being dismissed or not and Mr Moir confirmed *we are going to have to let you go.*

[19] Mr Moir told me that he did not fire Mr Ingram but told him that because of his injury history he had *to let him go.*

[20] Therefore, Mr Ingram did not return to work as he had planned on 23 January 2012. However, at some stage he took the medical certificate from Dr Radue confirming that he had been found fit to return to normal work on 23 January 2012 into the SFL office.

[21] On 25 January 2012 Mr Ingram received a payslip dated 22 January 2012 stating that the amount paid was termination pay. Mr Ingram was paid his holiday pay. He was not paid for any period of notice.

Issues

[22] The issues that the I need to determine are:

- (a) Whether SFL's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal; and
- (b) If Mr Ingram was unjustifiably dismissed what remedies he is entitled to.

Determination

[23] Mr Moir said that he did not fire Mr Ingram. However, his words to Mr Ingram on 20 January 2012 definitely were a sending away and therefore amounted to a dismissal. Was that dismissal justified?

[24] As a general rule an employer is not obliged to hold open a job for an injured employee indefinitely. However, the test for whether a dismissal is justifiable on the grounds of injury is that contained in section 103A of the Employment Relations Act 2000 (the Act): was the decision to dismiss one which a fair and reasonable employer could have made in the particular circumstances at the time the decision to dismiss was made?

[25] In this case Mr Ingram was dismissed on 20 January 2012 with immediate effect. He was dismissed on the same day on which Dr Radue had certified that he was fully fit to return to full duties at work as of Monday 23 January 2012. At the time Mr Moir made his decision to dismiss Mr Ingram he had not even seen Dr Radue's medical certificate. However, Mr Moir told me that *going by the information I'd been given this* [he pointed to the medical certificate dated 20 January 2012] *was not good enough.*

[26] At the investigation meeting Mr Moir impressed me as having a very genuinely held belief that if he allowed Mr Ingram to return to work as a carpet and vinyl layer SFL would have been in some kind of bother or trouble with ACC when

Mr Ingram was injured again. Mr Moir genuinely believed that it was not a question of *if* but *when* Mr Ingram would hurt his back at work again.

[27] Mr Moir also told me that Mr Ingram's December injury was not a genuine injury. He believes Mr Ingram *lied to the doctors*. He also said Mr Ingram is *a repeat offender on the ACC and he's lazy and he'll play the game to get back on it*. Mr Moir also said that Mr Ingram was *dishonest and no good*. Mr Moir does not believe that Mr Ingram had *any injury at all, let alone a work injury*.

[28] Despite Mr Moir's genuine belief that Mr Ingram was no longer fit to work in the flooring industry SFL had no evidence whatsoever to support that at the time Mr Moir dismissed Mr Ingram. There is no medical evidence that SFL was able to produce to me to counter Dr Radue's medical certificate dated 20 January 2012 certifying Mr Ingram as fit to return to work.

[29] I have carefully reviewed the ACC Contact File provide by Mr Ingram. There is no record of any ACC staff member telling Mr or Mrs Moir that Mr Ingram had previously been advised by ACC or a medical practitioner that he should no longer be working in the flooring industry.

[30] Mr Ingram's evidence was that around the time that SFL took over as his employer he had been off fulltime work for a period of 20 months because of a neck injury, being a bulging disc. However, ACC had been managing his injury and his gradual introduction back into fulltime work. He returned to fulltime work in July 2011.

[31] I accept that Mr Ingram was told informally by one of the ACC rehabilitation providers, but not a medical doctor, that *if* he continued to injure himself he should consider retraining.

[32] I do not accept that ACC has some medical evidence that Mr Ingram is or has been permanently incapacitated by an ACC covered injury so that he is unsuitable for ongoing employment in the flooring industry. There is simply no evidence to support the Moirs' belief.

[33] In addition, I do not accept Mr Moir's view that Mr Ingram faked his December lumbar sprain injury. There is simply no evidence to support Mr Moir's belief. The written evidence of the client in whose home Mr Ingram was working on

that day has little weight when measured against medical certificates from not one but two general practitioners who examined Mr Ingram.

[34] There was quite simply no substantive reason that SFL had to dismiss Mr Ingram on the day that he was certified as fit to return to work.

[35] In addition, the process which SFL used to dismiss Mr Ingram was not a fair process. In applying the justification test, the Authority must consider the four tests in s.103A(3) of the Act. The full Court of the Employment Court in *Angus & McKean v. Ports of Auckland Ltd*¹ held that failure to meet all four tests would result in a dismissal being unjustified.

[36] SFL failed to sufficiently investigate its allegation against Mr Ingram before dismissing Mr Ingram. SFL failed to raise the concerns that it had with Mr Ingram before dismissing him, in particular Mr Moir's belief that the injury was not genuine. SFL failed to give Mr Ingram a reasonable opportunity to respond to its concerns before dismissing him. SFL failed to genuinely consider Mr Ingram's explanation that in fact he had been certified as medically fit to return to work.

[37] SFL failed to meet any of the four tests of basic procedural fairness and therefore it did not act in a way that a fair and reasonable employer could have acted in all the circumstances at the time of the dismissal. SFL's dismissal of Mr Ingram was unjustified. Mr Ingram has a personal grievance for unjustified dismissal.

Remedies

Lost wages

[38] Section 128(2) of the Act states that if I determine that Mr Ingram has a personal grievance and that he has lost remuneration as a result of his grievance then I must order SFL to pay Mr Ingram the lesser of the sum equal to his lost remuneration or to three months' ordinary time remuneration. Mr Ingram started his own business on 4 April 2012. He claims lost remuneration for the period between 20 January and 3 April 2012; a period of 10 weeks and 2 days.

[39] Mr Ingram's usual weekly pay for 40 hours at \$24.00 per hour was \$960.00 gross. I have received a summary of earnings from Ms Saunderson-Warner which

¹ [2011] NZEmpC 160.

sets out how much was received by Mr Ingram for the claimed period from ACC and from Lay It On Flooring. I am satisfied that Mr Ingram was paid \$966.91 from ACC and Lay It On Flooring in the relevant period. If he had remained employed by SFL he would have earned \$9984.00 gross. That is calculated as being 10 weeks remuneration at \$9600.00 to 30 March 2012 plus two days being 2 & 3 April at \$384.00. When I subtract the \$966.91 Mr Ingram earned SFL should pay \$9017.09.

Interest

[40] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum. The awarding of interest is within my discretion and need not be applied for.

[41] I consider that Mr Ingram is entitled to be paid interest on the full amount of \$9017.09 because he has been deprived of the use of the wages for a considerable period. Interest should be calculated from the date of filing the Statement of Problem, 20 April 2012, until the date of payment.

Compensation in lieu of notice

[42] Mr Ingram did not receive a written individual employment agreement from SFL. I accept his evidence that when SFL took over the business it employed him on the same terms and conditions of employment that he had been previously employed on. Mr Ingram presented what he said was the standard terms and conditions of employment of his previous employer. Clause 10 of the unsigned individual employment agreement reads:

The Employee shall be employed on a weekly basis and this contract may be terminated by one two weeks notice by either party. Where such notice is not given, remuneration for the notice period shall be paid or forfeited as appropriate.

[43] It is clear that this term is ambiguous in that it is unclear whether the notice period is one or two weeks long.

[44] I accept that Mr Ingram was dismissed with no notice and should have been paid for a period in lieu of notice. Mr Ingram's evidence was that he was paid weekly. Clause 10 states that he was *employed on a weekly basis*. I consider that it is

therefore most likely that when he signed the original individual employment agreement with SFL's predecessor company, he understood that he must give and must be given one week's notice. Therefore I consider that Mr Ingram should have been paid one week's pay in lieu of notice. However, given that I have already awarded him lost wages from the date of dismissal it is not necessary for SFL to pay an amount in lieu of notice in addition.

Interest on Mr Ingram's credit card

[45] At the investigation meeting Ms Saunderson-Warner made a claim on Mr Ingram's behalf for the sum of \$748.13 by way of interest Mr Ingram paid on his credit card. She submitted that Mr Ingram, having lost his job, was required to pay his mortgage from his credit card. This in turn resulted in increased interest costs on his credit card.

[46] I accept that the Authority is able to award compensation for any detriment that an employee suffered which they would not have suffered if the personal grievance had not arisen. However, I do not accept that such a late claim for a remedy can be made. Although Mr Ingram's brief of evidence dated 7 September 2012, which Mr Moir and I had prior to the hearing, gives evidence about the fact that Mr Ingram paid his mortgage from his credit card as a result of being dismissed, this is not sufficient to notify either the Authority or SFL in a fair amount of time that a remedy would be sought in the amount of \$748.13. Accordingly, I told Mr Ingram and Ms Saunderson-Warner at the investigation meeting that I did not accept that I could make an award of the amount sought.

Compensation for humiliation, loss of dignity and injury to Mr Ingram's feelings

[47] Mr Ingram said that after he was dismissed he was a *bit peeved off, not happy and confused as well as I am pretty good at my job*. He claims \$2,000 by way of compensation from SFL for the humiliation, hurt and injury to his feelings from the unjustified dismissal. I consider that as a very reasonable and fair claim and I order that SFL pay Mr Ingram \$2,000 under section 123(1)(c)(i) of the Act.

Contribution

[48] Section 124 of the Act requires me to consider whether Mr Ingram's actions contributed in any way to the situation that gave rise to the personal grievance. If he

contributed in any way then I would reduce his remedies accordingly. However, Mr Ingram made no contribution whatsoever to the personal grievance and therefore the remedies will not be reduced.

Costs

[49] Ms Saunderson-Warner presented a schedule of the legal costs which Mr Ingram has incurred in bringing this personal grievance. I note that the schedule of costs was prepared in advance and estimated that the hearing would take three hours. I note that in fact the hearing took two hours. Ms Saunderson-Warner submitted that I should take into account SFL's conduct has unnecessarily added to the costs incurred by Mr Ingram. Ms Saunderson-Warner submitted that SFL had prolonged the matter using delaying tactics. She noted that the grievance was raised with SFL by a letter of 16 February 2012. However, there was no reply received by Mr Ingram until SFL's Statement of Reply was filed on 13 July 2012. I note that the Statement in Reply was lodged considerably out of time considering that the Statement of Problem was lodged with the Authority on 20 April 2012. The total amount of costs Mr Ingram has incurred is \$8,634.50.

[50] Ms Saunderson-Warner's costs appear to be on the basis that she has spent approximately 29 hours working for Mr Ingram on this matter. That includes participating in mediation, a telephone directions conference with me, preparing a brief of evidence for Mr Ingram, preparation for the hearing and time spent at the hearing.

[51] Mr Ingram has been wholly successful in his claims. For SFL's benefit I note that the successful party can expect a reasonable contribution to its legal costs from the unsuccessful party. Costs in the Authority are normally awarded on a nominal daily rate of \$3,500. The hearing took half a day. I encourage the parties to come to an agreement on costs. If that is not possible Ms Saunderson-Warner should notify the Authority that she wishes me to make a ruling on costs. Until then my decision on costs is reserved.

Christine Hickey
Member of the Employment Relations Authority