

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 121  
5353153

BETWEEN            NATHAN KENTISH  
                                 Applicant  
  
A N D                D C M ROOFING LIMITED  
                                 Respondent

Member of Authority:     David Appleton  
  
Representatives:         Georgina Burness, Advocate for Applicant  
                                 John Brandts-Giesen, Counsel for Respondent  
  
Investigation meeting:    15 May 2012 at Christchurch  
  
Submissions Received    15 May 2012 from both parties. Also, from the  
                                 respondent on 23 May 2012 and the applicant on 12 June  
                                 2012.  
  
Date of Determination:    25 June 2012

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**DETERMINATION OF THE AUTHORITY**

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- A.     The Applicant was unjustifiably dismissed, and is awarded remedies, subject to reduction of 50% for contribution.**
- B.     The Applicant was not unjustifiably disadvantaged in his employment.**
- C.     The Applicant was given an employment agreement.**
- D.     Costs are reserved.**

**Employment relationship problem**

[1]     Mr Kentish claims that he was unjustifiably dismissed on 17 June 2011. He also claims that he has been unjustifiably disadvantaged by the respondent making

late payment of his first week's ACC compensation and by giving to the Accident Compensation Corporation erroneous information, causing it also to make late payments to him.

[2] In addition, Mr Kentish claims that his first week's compensation paid by the respondent under ACC was short by \$90. Finally, Mr Kentish claims that he was never given an employment agreement during his employment.

### **Brief account of the events leading to the employment relationship problem**

[3] Mr Kentish was employed as a roofer and chimney repairer by the respondent in Christchurch. He started work in April 2011.

[4] Around the beginning of June 2011 Mr Kentish injured his knee at work which resulted in him putting in a claim with ACC. The claim was accepted and the respondent was therefore obliged to pay the first week's compensation in accordance with the ACC legislation. Unfortunately, a large earthquake struck Christchurch on 13 June 2011, which caused disruption within the respondent company. This, coupled with the illness of the office manager who administered the ACC payments, resulted in the first week's compensation being paid to Mr Kentish five days later than his next wages payment would have been paid. (The payment arrived into Mr Kentish's bank account on 15 June 2011). Until it was paid, Mr Kentish sent a number of text messages to the Managing Director of the respondent, Mr Iain McPhail, asking where the payment was. When the payment was eventually made, it was less than Mr Kentish expected.

[5] Mr Kentish worked on Friday 17 June but, when he returned to the yard, Mr McPhail dismissed him. Mr Kentish's evidence is that no explanation was given and he infers that he was dismissed because he had been sending text messages to Mr McPhail chasing for payment of his first week's ACC compensation. Mr McPhail's evidence was that he had dismissed Mr Kentish because he had, earlier that day, taken a work vehicle away for one and a half hours without permission and, when Mr McPhail had asked Mr Kentish where he had been, Mr Kentish had told him that it was none of his business. Mr McPhail's evidence was that this was the *last straw* as it came on top of a number of other performance and conduct concerns he had had with Mr Kentish since his employment began.

[6] Following his dismissal, a payment owed to Mr Kentish from ACC was late which, the respondent conceded, was due to an error on its part which had not been picked up by ACC. The respondent's evidence, which I accept, was that as soon as the error was discovered, it was made known to ACC, which quickly made the late payment to Mr Kentish.

### **Issues**

[7] The following are the issues which the Employment Relations Authority needs to determine:

- (a) Whether Mr Kentish was unjustifiably dismissed by the respondent;
- (b) Whether Mr Kentish suffered unjustifiable disadvantage in his employment by the late payment of the first week's compensation by the respondent;
- (c) Whether Mr Kentish suffered unjustifiable disadvantage in his employment by the error which resulted in the ACC making a late payment of compensation to Mr Kentish;
- (d) Whether Mr Kentish is owed \$90 in arrears in respect of the first week's compensation payment, due to a miscalculation by the respondent; and
- (e) Whether Mr Kentish was given an employment agreement.

### **Was Mr Kentish unjustifiably dismissed?**

[8] The respondent dismissed Mr Kentish after the amendments to the Employment Relations Act 2000 (the Act) took effect. The test which the Authority must apply in determining whether the dismissal was justifiable is set out in s.103A of the Act. It states as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether 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 generally 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 considers 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.*

[9] The respondent conceded, during the investigation meeting, that it did not follow a fair process in dismissing Mr Kentish. In particular, it:

- a. did not tell Mr Kentish that he could have a representative present at the meeting at which Mr McPhail dismissed him;
- b. did not tell Mr Kentish that the various concerns that it had about his performance and conduct could lead to his dismissal;
- c. had never given Mr Kentish written warnings about any of the performance or conduct concerns; and

- d. did not give Mr Kentish sufficient time to consider the employer's concerns and to give his explanation of them in the knowledge that he was facing dismissal.

[10] All in all, the process followed was inadequate by a number of measures. Accordingly, I must find that the dismissal was unjustifiable due to fundamental flaws in the process followed.

[11] Mr McPhail, for the respondent, said during the investigation meeting that he had believed that the 90 day trial period contained in the employment agreement that he says had been given to Mr Kentish obviated any need to follow a procedure prior to dismissal. Whilst this was not formally pleaded as a defence by the respondent, I shall deal with that point briefly.

[12] Even if the employment agreement had been given to Mr Kentish, he did not sign it and nor did the respondent. In accordance with the principles of *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152 and *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253, Mr Kentish cannot have been bound by such a trial period, and so the respondent was not protected by s 67B of the Act.

[13] I will consider below, when I deal with remedies, and in particular contribution, the extent to which the respondent would have been justified in dismissing Mr Kentish had a fair procedure been followed.

**Was Mr Kentish disadvantaged by the late payment of the first week's compensation?**

[14] The respondent concedes that it paid the first week's compensation five days late. The respondent had not realised that this was the case until the investigation meeting.

[15] I am satisfied that this late payment caused a disadvantage in the employment of Mr Kentish. This is evidenced by the fact that he was chasing for payment and the fact that the lack of payment from the respondent was evidentially causing him distress and financial hardship. However, in order to succeed in his personal grievance, he must also show that the action of the employer causing the disadvantage was unjustified. (Section.103 of the Act).

[16] The explanation of the office manager was that the late payment must have been due to the confusion the company had been in immediately after the 13 June earthquake and the fact that she also had been on strong painkillers during that period. I accept that explanation and, whilst it was unfortunate for Mr Kentish that he had to wait five days for the payment, I do not believe that the reason for this was due to an unjustified action by the respondent.

[17] The respondent is a small employer, which had little experience of ACC at that point, had recently experienced a huge growth in demand of its services due to the earlier February 2011 earthquake and, I am satisfied, was trying to do its best to cope. Under these circumstances, I do not believe that the disadvantage caused to Mr Kentish was unjustified.

**Did Mr Kentish suffer unjustifiable disadvantage by the error which resulted in the ACC making a late payment of compensation to Mr Kentish?**

[18] For the same reasons, whilst I accept that the late payment by ACC of compensation to Mr Kentish caused him a disadvantage, I do not believe that it was due to an unjustified action on the part of the respondent.

**Was the payment to Mr Kentish of the first weeks ACC compensation miscalculated?**

[19] During the investigation meeting the respondent agreed that it had used the wrong basis of calculation in working out how much was owed to Mr Kentish by way of the first week's compensation. The basis of calculation is set out in s.97 of the Accident Compensation Act 2001. Section 97(2) states that the compensation payable is 80% of the amount of earnings lost by the employee as a result of the incapacity during the first week of incapacity. Section 97(3) states that, for the purposes of this section, there is a presumption that the earnings the claimant loses as a result of the incapacity is the difference between the claimant's earnings in the 7 days before his or her incapacity commenced and the claimant's earnings in the first week of incapacity.

[20] During the 7 days prior to the incapacity, namely between 19 and 25 May, Mr Kentish worked 46.5 hours. At \$16.50 per hour, that made a gross income of \$767.25. As Mr Kentish earned nothing during his first week of incapacity, that produces a compensatory gross sum of \$613.80 (taking 80% of \$767.25). It was agreed between the parties during the investigation meeting that that should have been the gross figure of the compensation payable to Mr Kentish and, accordingly, the

parties agreed that the respondent would calculate the shortfall between that sum and the sum actually paid, and pay Mr Kentish the difference.

[21] However, it is my view that the Authority does not have the jurisdiction to enforce s.97 of the Accident Compensation Act, and so, whilst I record the agreement made by the respondent during the investigation meeting to pay Mr Kentish the shortfall, I do not order payment of the shortfall.

#### **Was Mr Kentish given an employment agreement?**

[22] The respondent produced a written employment agreement with Mr Kentish's name written on it, but which was unsigned by either party. Two witnesses appeared during the investigation meeting who gave evidence that they had both been present when Mr Kentish had been given a copy of an employment agreement. Mr Kentish denied that he had been given a copy of the employment agreement.

[23] On balance, I prefer the evidence of the respondent and conclude that Mr Kentish had been given a copy of the employment agreement, and that he must have forgotten this fact. Therefore, insofar as Mr Kentish may have been seeking a penalty against the respondent for failure to provide a written employment agreement, I decline to order that such a penalty should be payable.

#### **Remedies**

[24] Having established that Mr Kentish was unjustifiably dismissed due to the failure of the respondent to follow a fair process, it now falls on me to consider what remedies should be payable to him.

[25] Section 123 of the Act provides for the provision of remedies following the finding of unjustifiable dismissal. Mr Kentish does not seek reinstatement, but seeks lost wages and compensation for humiliation, loss of dignity and injury to feelings.

[26] Where the Authority finds that there is a personal grievance and that the employee has lost remuneration as a result, s.128 of the Act requires the Authority to order the employer to pay to the employee the lesser of a sum equal to that lost remuneration up to three months ordinary time remuneration. Sub-section (3) gives the Authority the discretion to award a greater sum than is provided for by s.128. Section 124 deals with contribution, which I will deal with below.

[27] Given that Mr Kentish had worked for the respondent for only just over two months, I do not believe that the circumstances justify me exercising a discretion under sub-section (3) to award more than three months lost wages, and so will fix the award of lost remuneration at three months ordinary time remuneration, less income received by Mr Kentish during that period. In the three months from his dismissal, ignoring WINZ benefits, Mr Kentish appears to have received the net sum of \$272.30 from temping work. His evidence was that he found permanent employment from 2 November 2011 when he was paid \$20 per hour and is now on \$25 per hour.

[28] I have ignored WINZ benefits in accordance with *James and Co Ltd v Hughes* [1995] 2 ERNZ 432 (EmpC), which held that an *unemployment benefit* should not be treated as mitigation of lost wages to reduce an award. Reimbursement of wages to an unjustifiably dismissed employee should be made without regard to the worker's receipt of a benefit. Mr Kentish may, however, have an obligation to repay to the Crown benefit sums received under s.71 of the Social Security Act 1964, although that issue does not lie within the jurisdiction of the Authority.

[29] During the seven weeks of Mr Kentish's employment, he was paid the net total sum of \$4,117.00 (including the shortfall in the compensation dealt with above). That equates to a net pay of \$588.00 per week on average. \$588.00 per week x 13 weeks equals \$7,645.00 net. It is necessary to deduct from that sum pay of \$272.30 net which had been received by Mr Kentish on 17 August. That leaves a sum of \$7,373.00 net lost wages.

[30] During the investigation meeting, Mr Kentish's partner said that she believed that Mr Kentish had carried out some cash jobs and that they had always had money to put food on the table, pay the rent and buy cigarettes and petrol. Mr Kentish was not present when that evidence was given, and was not questioned on what cash jobs he had done, and so he was given the opportunity to give evidence by affidavit after the investigation meeting on this matter. In that affidavit evidence (which was not submitted in conventional affidavit form, but which I accept) Mr Kentish and his partner both deposed that no cash jobs had been carried out. Counsel for the respondent submits that, as the evidence was lodged and served outside of the date set by me, it should be ignored. However, it was late by only a small margin, and I do not intend to ignore it. The respondent was given the opportunity to comment upon it, and did through its counsel.

[31] The Authority saw copies of Mr Kentish's bank statement for the period from his dismissal until the beginning of December 2011, as well as copies of his partner's bank statements for the same period. Whilst Mr Kentish maintained a small credit balance for most of that period, his partner maintained a fairly substantial overdraft. She also received regular payments from WINZ as well as a one off payment from the Red Cross. I am therefore satisfied that, whilst Mr Kentish and his family did not go hungry and managed to pay the rent, that was more likely to be due to the regular WINZ payments both received, the Red Cross payment Ms Gray received, and the fact that Ms Gray maintained an overdraft, rather than because of undeclared cash jobs.

[32] Mr Kentish is also entitled to compensation for humiliation, loss of dignity and injury to his feelings in accordance with s.123(1)(c)(i) of the Act. There was not a great deal of evidence from Mr Kentish as to how he had been affected by the dismissal but his partner gave evidence that she had probably been more upset than he was. Mr Kentish had sought the sum of \$3,000 and, although this is a rather modest sum, I believe that, when one takes into account the short period of the employment, and the fact that Mr Kentish sought and obtained temporary work very quickly, this is an appropriate sum to award.

### **Contribution**

[33] Having assessed the remedies, s.124 of the Act provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and 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.

[34] Mr McPhail's evidence was that, whilst Mr Kentish taking the work vehicle without permission, and then refusing to explain why he had done so, was the last straw which made him to decide to dismiss Mr Kentish, there were other factors that weighed in his decision as well. These included the following:

- (i) That Mr Kentish had used foul language to a client of the company, who had made a written complaint;

- (ii) That Mr Kentish had refused to use safety gloves and goggles which had resulted in him hurting his eyes;
- (iii) That Mr Kentish had been driving work vehicles too roughly.

[35] Mr Kentish denied all of these things completely. He said that he had never seen the client before who had complained about the use of foul language. (This man had turned up at the Authority investigation meeting to give evidence). Mr Kentish said that he had not been given any safety equipment to use and that he had hurt his eyes because he had been allergic to the treated wood dust. He denied driving vehicles roughly and he also denied that he had taken a vehicle without permission on the day he had been dismissed.

[36] Evidence was also given by Mr McPhail and two other employees that Mr Kentish had been involved in the sale of drugs to other employees (which Mr Kentish also denied) but it was my impression that, although Mr McPhail had been aware of this allegation at the time he dismissed Mr Kentish, it had not been the main reason that he had dismissed him.

[37] It was notable to me that Mr Kentish denied outright all of the allegations made against him and, on the balance of probabilities, I find that the evidence of the respondent's four witnesses regarding Mr Kentish's performance and conduct to be more credible. I find, in particular, that Mr McPhail was telling the truth when he says that the reason he dismissed Mr Kentish on 17 June 2011 was because Mr Kentish had taken away a work vehicle for an hour and a half without permission and had then told him that it was none of his business when Mr McPhail had asked him where he had been with it.

[38] In view of this, I believe that Mr Kentish's actions did contribute towards the situation that gave rise to the personal grievance. I also find that that contribution was blameworthy.

[39] Having found that Mr Kentish contributed to the personal grievance in a blameworthy way, I must now assess whether I should reduce the remedies that would otherwise have been awarded to Mr Kentish.

[40] I believe that Mr McPhail had good reason to harbour concerns about Mr Kentish's conduct and that an employee taking a work vehicle away from the

work site without permission, leaving his work mate behind in breach of health and safety rules, was a serious matter, and that his contribution to his personal grievance was therefore significant. I believe that a reduction in the remedies awarded of 50% is therefore appropriate.

**Orders**

[41] I order the respondent to pay to Mr Kentish:

(i) \$1,500.00 under s.123(1)(c)(i) of the Act;

and a further, net sum, of

(ii) \$3,686 under s.123(1)(b) of the Act.

**Costs**

[42] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days of the date of this determination. Any memorandum in reply should be lodged and served within a further 28 days.

David Appleton  
Member of the Employment Relations Authority