

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 202
5567380

BETWEEN GARY LUCKMAN
Applicant

AND TK & A STEVENS
CONTRACTING LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Alan Whelan, advocate for the Applicant
Diana Hudson, counsel for the Respondent

Investigation meeting: 23 August 2016 at Invercargill

Submissions: At the investigation meeting and 4 September from the
Applicant, and 9 September from the respondent

Determination: 9 November 2016

DETERMINATION OF THE AUTHORITY

- A. TK & A Stevens Contracting Limited unjustifiably dismissed Gary Luckman.**
- B. Within 28 days of the date of this determination TK & A Stevens Contracting Limited must pay Gary Luckman:**
- (i) \$2,000 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000, and**
- (ii) the filing fee of \$71.56.**
- C. The Authority dismisses TK & A Stevens Contracting Limited's counter-claims.**

Employment relationship problem

[1] Gary Luckman was employed by TK & A Stevens Contracting Limited (the company) as a stock manager/tractor driver. He began work on 5 November 2012. He lived in a house on the farm.

[2] On 2 March 2015, his employment ended during a telephone call with Tony Stevens, a director and shareholder of the company. Mr Luckman says Mr Stevens unjustifiably dismissed him while he was off work recuperating from a non-work injury.

[3] The company says it was unable and unwilling to hold Mr Luckman's position open indefinitely and therefore it acted fairly and reasonably in dismissing him.

[4] Mr Luckman claims compensation of \$8,000 for humiliation, loss of dignity and injury to his feelings stemming from the dismissal.

[5] The company counter-claims \$634.14 for costs it says it incurred cleaning the cottage after Mr Luckman's parents came to collect his belongings.

Procedural background

[6] Mr Luckman was unable to attend the investigation meeting in person due to a combination of ill health and inability to afford to travel. I gave him permission to appear by teleconference.

[7] I held the investigation meeting in Invercargill with the witnesses John and Wilma Luckman, Mr Luckman's parents, and Tony and Amanda Stevens, the company's directors and shareholders present. Mr Gary Luckman was present by way of teleconference throughout the meeting except for the last few minutes in which his representative, Alan Whelan, spoke to me via the telephone. He remained in Mr Whelan's presence for the whole meeting.

[8] Mr and Mrs Luckman chose to leave the meeting after all the evidence had been heard because Mrs Luckman was not feeling well.

[9] Before the investigation meeting I was aware that Mr Whelan was going to attend to represent Mr Luckman. He was also going to be connected by telephone.

When Mr Luckman was on the telephone and connected to the meeting, Mr Whelan could not hear what the witnesses, Ms Hudson, counsel for the company, or I said. I was unaware of that until I spoke to Mr Whelan at the end of the meeting. I believed that Mr Whelan and Mr Luckman would use a phone with a speaker. When Mr Whelan was talking to me via telephone Mr Luckman could not hear me or Ms Hudson when we spoke with Mr Whelan.

[10] All the witnesses, Gary Luckman, Mr and Mrs Luckman and Mr and Mrs Stevens gave evidence under affirmation and were questioned by Ms Hudson and me. Mr Luckman was given the opportunity to question Mr and Mrs Stevens. After hearing from Mr and Mrs Luckman and Mr and Mrs Stevens, I questioned Mr Luckman a second time.

Relevant facts

[11] Mr Luckman worked as a stock manager/tractor driver from early November 2012. He reported to Mr Stevens.

[12] Mr Stevens had arrangements to go to an agricultural show and then had booked travel to Europe with his family from the end of March 2015. He made Mr Luckman aware of his plans in late 2014.

[13] On Boxing Day 2014, Mr Luckman suffered an injury to his leg when he slipped off a ladder. He went to work on 27 December 2014. He worked that day despite Mr Stevens advising him to leave to get medical care.

[14] Mr Luckman remained living in the farm cottage before he went to Tauranga in early February 2015. Mr Stevens told Mr Luckman that he had to be back at work fulltime by 15 March 2015.

[15] Mr Luckman remained off work and on ACC as his injury was healing very slowly.

[16] On the evening of Sunday, 1 March 2015, Mr Luckman telephoned Mr Stevens. Mr Luckman told Mr Stevens that he was bored and wanted to return to the farm. Mr Stevens says that he told Mr Luckman it was fine for him to return but that ACC had told Mr Stevens Mr Luckman would not be fit to work until 8 March 2015.

[17] Mr Stevens says Mr Luckman was drunk and that he told Mr Luckman he did not appreciate Mr Luckman calling while he was in that state.

[18] The next morning, Mr Stevens rang Mr Luckman. He repeated that he was not impressed by the drunken call the previous evening. He said that if Mr Luckman wanted to return to work he had to be fully fit.

[19] I am satisfied that Mr Stevens also told Mr Luckman that the business could not afford to pay another employee to cover Mr Luckman if he was not fully fit to return to work. Mr Luckman responded that it sounded as if Mr Stevens was trying to get rid of him, or to “replace an old dog with a young pup.” He told Mr Stevens that he could not guarantee when his leg would be fully healed.

[20] Mr Luckman says that Mr Stevens told him that if he was not back and fully fit by 15 March he would no longer have a job.

[21] During the conversation, Mr Stevens says Mr Luckman said that Mr Stevens “might as well make me redundant.” Mr Luckman denies that. However, Mr Stevens says he told Mr Luckman “if you want to be made redundant, fine. You’ll be paid what you are entitled to.” Mr Stevens says he had “just about had enough.”

[22] Mr Stevens denies that he dismissed Mr Luckman but says he accepted that Mr Luckman did not want to return from Tauranga. I do not accept that Mr Luckman said that he would not be returning to work. However, he may well have said he did not know when he would be fully fit for work.

[23] Mr Luckman says he did not ask to be made redundant and expected Mr Stevens to keep his job open for him to come back to once his leg was properly healed.

[24] Mr Luckman’s leg did not heal completely until July 2015, and he remained on ACC earnings-related compensation until then.

Did the company unjustifiably dismiss Mr Luckman?

[25] Mr Stevens’ says that he had been clear with Mr Luckman for months that he needed him back at work by 15 March because of his planned absences. As Mr

Luckman clearly could not be back at work when the company needed him to be it was fair to accept that Mr Luckman did not want to return.

[26] Mr Luckman says that he always wanted to return to work but that the slow healing of his injury prevented him from doing so. He expected the company to hold his job open for him.

[27] Mr Stevens' evidence was that the company was very busy and that Mr Luckman was a skilled and valued employee. In Mr Luckman's absence he had been struggling to find staff to do Mr Luckman's role and often had to take on Mr Luckman's role himself.

[28] Mr Stevens says that the business needed certainty and Mr Luckman's ongoing unavailability was causing problems for the business and he needed to make a decision in the company's best interests.

[29] At some point after 8 March 2015, Mrs Stevens sent Mr Luckman the following letter with his final pay slip:

As you know we initially agreed to hold your position open, on the basis that you would be back early in the new year once you'd recovered from the non-work injury you suffered on Boxing Day.

We now understand that you have still not recovered from your injury and therefore cannot return to work on 8th March¹ and that you are not fit enough to cover the winter. We assume you have been keeping your ACC manager informed of your circumstances, but we will notify them as well just in case.

Although we are not obliged to do so, we have agreed to pay you two weeks wages as part of your final pay, along with any holiday pay that is due to you – see final pay slip.

We have already given your parents access to the property to clear your belongings. We have carried out an inspection and identified some minor damage to the paintwork. Ordinarily, we would deduct these repair costs from your final pay, however in the circumstances we will not do so seeing as you have been away for such a long time and your absence is due to your injury.

We hope your rehabilitation goes well, we know that these past few weeks have been difficult for you, and wish you all the best for the future.

¹ I accept Mr Stevens' evidence that this date should have been 15 March and that Mrs Stevens erred in writing "8th March".

[30] I consider that the company's approach that Mr Stevens communicated to Mr Luckman was that unless he was fully fit and back at work by 15 March 2015, he would lose his job. I consider that to have been a dismissal.

[31] The company argues that the dismissal was justified because of the difficulties it faced in continuing to hold Mr Luckman's job for him on an open-ended basis and particularly, the complication caused by the Stevens' trips off the farm that had been booked for late March onwards. The company points to the fact that Mr Luckman's injury was only fully healed in July 2015 and says that it could never have held his position open for that long.

[32] In terminating Mr Luckman's employment the company was bound to follow the process it agreed to in clause 25 of Mr Luckman's IEA, as well as complying with s 103A of the Employment Relations Act 2000.

[33] Section 103A provides that a dismissal can be justified so long as the dismissal, and the way that the employer made its decision to dismiss, are actions that a fair and reasonable employer could carry out in all the circumstances. Those circumstances include the provisions in Mr Luckman's individual employment agreement (IEA).

[34] In addition, s 103A(3) sets out the procedural steps an employer must carry out before making a decision to dismiss an employee. Factors include:

- Whether having regard to the resources available to the company, did it sufficiently investigate the allegations?
- Did it raise its concerns with Mr Luckman before dismissal?
- Did it give him a reasonable opportunity to respond to its concerns before dismissal?
- Did the company genuinely consider Mr Luckman's explanation before dismissal?

[35] I can also consider any other factors I consider relevant. However, I must not decide that a dismissal was unjustified if there were minor defects in the process that did not result in the employee being treated unfairly.

[36] Clause 25 of Mr Luckman's IEA provides:

25.1 The Employer may terminate the Employee's employment by giving such notice to an Employee that the Employer deems appropriate in the circumstances if, as a result of mental or physical illness, incapacity or injury of the Employee, he or she is unable, in the opinion of the Employer, to fulfil his or her duties under this agreement.

25.2 Termination of the Employee's employment for medical reasons shall not occur until:

25.2.1 The Employer has taken reasonable steps to consult the Employee ...

25.2.2 The Employer has taken all reasonable steps to obtain informed medical opinion as to the Employee's ability to perform the required duties under this Agreement.

25.3 In deciding whether to terminate the employment under the foregoing provisions, the Employer may take the following considerations into account:

25.3.1 The nature of the illness or injury, including how long it has continued, and the prospects for recovery;

25.3.2 The duration of the employment;

25.3.3 The position held by the Employee, with particular regards to the length of time for which such position can reasonably be held open;

25.3.4 Whether the employment was likely to last significantly longer in the absence of the illness or injury (for instance, if it was a fixed-term Agreement);

25.3.5 The extent to which the illness or injury is work related and. If work related, whether that fact would justify a lengthier absence from work than otherwise; and

25.3.6 Any other circumstances to the medical reports that the Employee may wish to place before the Employer.

[37] Clause 25 confirms that the company had a right to terminate Mr Luckman's employment for medical reasons because of his injury.

[38] It is arguable that the company did not take reasonable steps to consult Mr Luckman about the timeframe within which he expected his injury to be healed, as required under clause 25.2.1. In my view, that would have included giving Mr Luckman an opportunity to present the company with medical evidence. In addition, I do not consider the company took reasonable steps to obtain informed medical opinion as to Mr Luckman's ability to perform the required duties under the IEA. The company would have been able to ask ACC to assist it to obtain an up to date medical opinion on the prognosis for Mr Luckman's full recovery.

[39] In terms of the s 103A(3) tests I consider that in investigating the possibility that Mr Luckman would not be fit to return to work by 15 March or soon thereafter, the company should have sought a medical opinion. The company put its concerns to Mr Luckman about him not being available to work from 15 March, and told him that it could not hold his position open past then. However, the company did not give him a reasonable opportunity to respond when he had that knowledge. A fair and reasonable employer could not expect him to respond in the same phone call in which he was told that unless he was fully fit by 15 March he could not return to work at all.

[40] Any defects were procedural and I accept that it is more likely than not that Mr Luckman's employment would have been terminated even if a fair process, which would have taken a bit longer, had been followed. However, I do not accept that the defects were minor and I do consider they resulted in Mr Luckman being treated unfairly in being dismissed the way he was.

[41] I consider that a fair and reasonable employer could not have acted in the way the company did in all the circumstances. Therefore, Mr Luckman was unjustifiably dismissed.

Remedies

Compensation

[42] Mr Luckman has claimed \$8,000 in compensation for the humiliation, loss of dignity and injury to his feelings in losing his employment. I concluded that Mr Luckman's dismissal would likely have occurred even if the company had undergone a fair process under s 103A and the IEA. Therefore, Mr Luckman cannot be compensated for the actual loss of his job. However, I consider if the company had followed a fair process Mr Luckman would have had a better understanding of why the company could not afford to wait any longer to replace him.

[43] Mr Luckman was under the impression that the company had some other reason for dismissing him in addition to his injury. If the company had used a fair process he would not have been left with the impression that he was dismissed for any shortcoming in his work.

[44] I acknowledge that the company paid Mr Luckman two weeks' pay, presumably in lieu of a notice period. Mrs Stevens' note to Mr Luckman says that the

company was not obliged to pay him two weeks' wages. There is no provision for any particular length of notice period in the IEA. However, clause 25.1 provides that the employer may terminate the employee's employment on medical grounds by "giving such notice ... that the Employer deems appropriate in all the circumstances". Clearly, the company deemed two weeks' notice appropriate in this case.

[45] Mr Luckman says he was "gobsmacked" and "devastated and lost for words. I'd made it my life and my home and I enjoyed the work down there."

[46] In all the circumstances, I consider that minimal compensation is payable to compensate for the impact on Mr Luckman of the lack of a fair process only and order the company to pay him \$2,000.

Contribution

[47] I need to consider the extent to which Mr Luckman's actions contributed to the situation giving rise to his personal grievance. If there was a causal connection between those actions and the situation that gave rise to the dismissal, and if those actions so require, I must reduce the remedy that would otherwise be awarded.

[48] The company submits that Mr Luckman was the "author of his own misfortune" because he travelled to Tauranga and did not make any arrangements to return on or before 15 March, failed to provide sufficient information to the company about his prognosis and telephoned Mr Stevens when he was drunk.

[49] I do not consider Mr Luckman's actions outlined above amount to contribution. First, he sought permission to travel to Tauranga and his lack of plans to return could not amount to contribution as he could have made such plans at short-notice if necessary. Neither of those two things contributed to the situation giving rise to his dismissal, nor did the drunken phone call. There were two further phone calls and Mr Stevens does not allege Mr Luckman was drunk during those calls.

[50] Mr Luckman lost his job because of his injury, not because of any blameworthy contributory behaviour, and I will not reduce his compensation.

The respondent's claim

[51] As a part of its statement in reply, the company decided to claim the cost of labour and materials to clean Mr Luckman's accommodation after his parents had removed his belongings. That is despite Mrs Stevens' note to Mr Luckman not seeking any costs. Once it received Mr Luckman's claim the company changed its mind and decided to seek what it says were its costs of cleaning the house for a new worker.

[52] I dismiss this claim for three different reasons. The first is that I consider I do not have jurisdiction over what was a residential tenancy, although the tenancy was incorporated into the IEA. Clause 15 of the IEA calls the tenancy a 'residential service tenancy'.

[53] Section 4 of the Residential Tenancies Act 1986 provides that the Act applies to all residential tenancies except as specifically provided. Section 5 excludes certain tenancies but it does not specifically exclude service tenancies. However, there are some different provisions for them, for example, allowing a shorter notice period to be given at the end of the employment.

[54] Secondly, even if I did have jurisdiction I would not grant the claim because the evidence establishes that Mr Luckman's parents cleaned and tidied the premises when they collected his belongings. They particularly asked Mr Stevens if he was happy with the state they were intending to leave the premises in. He declined to go inside and inspect the house but told them he was happy nonetheless. Mrs Stevens note did not seek costs of cleaning either. In failing to notify Mr Luckman at an early stage he would be held responsible for cleaning costs the company denied him a fair chance to rectify any aspect of the premises that was not left reasonably clean and tidy.

[55] Thirdly, there was insufficient evidence of the state the Stevens say the premises were left in. In particular, there were no property inspection reports and photographs from the beginning and end of the tenancy.

Costs

[56] Generally, the losing party can expect to pay a reasonable contribution towards the winning party's legal costs. However, Mr Luckman was not legally represented and I do not understand that he will be claiming such costs. However, the company should reimburse him the \$71.56 he paid for the filing fee.

Christine Hickey
Member of the Employment Relations Authority