

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 241
5437389

BETWEEN MICHAEL LYTTLE
 Applicant

A N D RYH CONTRACTING
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Mark Nutsford, Advocate for the Applicant
 Russell Harris, Advocate for the Respondent

Investigation Meeting: 19 May 2014 at Tauranga

Submissions Received: 22 May 2014 from the Applicant
 23 May 2014 from the Respondent
 13 June 2014 from Applicant

Date of Determination: 17 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] RYH Contracting Limited (RYH Contracting) employed Mr Lyttle as an Operator/Labourer on 22 August 2013. Mr Lyttle claims that he was unjustifiably dismissed after presenting his employer with an ACC form signing him off work due to a back injury. RYH Contracting says Mr Lyttle resigned without notice on 15 October 2013.

[2] Mr Lyttle claims he did not know that his employment had been terminated until he discovered that he had not received his normal weekly pay. He says that when he contacted his employer he was told he had quit so it had withheld his wages and holiday pay for not giving notice.

[3] Mr Lyttle claims wage arrears for short pay whilst employed, failure to pay his final wages and failure to pay holiday pay upon termination. He also claims reimbursement of \$186 that was also withheld. RYH Contracting says the short pay was because Mr Lyttle did not work his full hours, it is entitled to withhold Mr Lyttle's final pay and holiday pay because he did not give notice and he did not return all of his gear and what was returned was dry-cleaned.

[4] Mr Harris, Managing Director of RYH Contracting, was the person Mr Lyttle spoke to on 15 October. There is a conflict in the evidence over what was said during this discussion. Mr Harris claims Mr Lyttle said he was "*leaving today*" which Mr Harris says was a resignation. Mr Lyttle says he told Mr Harris he was leaving work that day because he was on ACC not that he was leaving his job.

[5] There is also a conflict over what was allegedly said when Mr Lyttle called Mr Harris to discuss the non-payment of his wages. Mr Harris claims Mr Lyttle asked for his "*final pay*" indicating he had indeed resigned. Mr Lyttle denies referring to "*final*" pay because he did not know his employment had ended. He says he referred to his "*unpaid*" pay.

[6] After this discussion, Mr Lyttle took advice from the Ministry of Business, Innovation and Employment (MBIE) which advised him to write to his employer setting out his view of events. Mr Lyttle wrote to Mr Harris on 18 October 2013 denying he had resigned, asking for his unpaid wages and indicating that if he was not paid then mediation would be the next step. Mr Lyttle asked for Mr Harris' response by 29 October 2013.

[7] Mr Harris says that he did not receive the 18 October letter until 19 November. I do not accept that as I prefer the evidence Mr Lyttle's partner gave about posting the letter shortly after it was written. Mr Lyttle was deeply concerned about Mr Harris' view he had resigned and was trying to correct that, so it is unlikely he wrote the letter but did not send it. Mr Harris says he did not respond to it because it was not signed by Mr Lyttle.

[8] Mr Lyttle engaged an advocate to raise a personal grievance for him and that occurred on 18 November 2013. This letter referred to the fact that Mr Lyttle's partner had taken the letter to the District Court and had filled out a statutory

declaration on 24 October that the letter had been sent by her. Mr Lyttle also requested mediation directly from Mediation Services.

[9] Mr Harris acknowledged receipt of the personal grievance by return letter dated 27 November 2013. He did not provide a substantive response to the matters Mr Nutsford had raised.

[10] Mr Nutsford telephoned Mr Harris on 12 December requesting a substantive response to Mr Lyttle's grievance. Mr Harris agreed to attend mediation but refused to provide a substantive response prior to mediation.

Issues

[11] The issues for the Authority to determine include;

- (a) Was Mr Lyttle dismissed?
- (b) If so, was dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) Is Mr Lyttle entitled to wage arrears?
- (e) What if any costs should be awarded?

Was Mr Lyttle dismissed?

[12] Dismissal is the 'sending away' of an employee at the employer's initiative. No particular form of words needs to be used to effect a dismissal so an employee may be dismissed by an employer's actions. Mr Lyttle bears the onus of establishing on the balance of probabilities that his employment ended because he was dismissed and not as the result of his resignation.

[13] On Sunday 13 October 2013, Mr Lyttle injured his back. He saw his doctor the following day (14 October) and was signed off work on ACC for two weeks. Mr Lyttle advised a work colleague (G) who was giving him a ride to work on the Monday that he would not be at work that day because he was seeing his doctor about a back injury. He asked G to pass that message on to Mr Harris but G does not recall whether or not he passed the message on to Mr Harris. Mr Harris says he was not told that Mr Lyttle would not be at work on Monday.

[14] On the morning of Tuesday, 15 October, Mr Lyttle went to the RYH Contracting workshop to hand over his ACC form to Mr Harris who was in the workshop with two other employees, Mr Glen Fountain and Mr Robert Peacock. Mr Lyttle claims he asked Mr Harris if they could talk in the office but Mr Harris did not move from the workshop area.

[15] Mr Lyttle says that when he talked to Mr Harris, there was another employee working on and in around a vehicle while the other employee was repairing equipment beyond an air compressor which was making quite a bit of noise. Mr Lyttle says both employees were some distance from where Mr Harris stood.

[16] Mr Harris and the two employees who were in the workshop say that they were standing together when Mr Lyttle spoke to Mr Harris. They support Mr Harris' evidence.

[17] Mr Lyttle says he told Mr Harris he was no good to him (Mr Harris) because his (Mr Lyttle's) doctor had put him on ACC for two weeks. Mr Lyttle says he told Mr Harris he suspected he might be off work longer than two weeks. Mr Lyttle says he was trying to give Mr Harris a heads up so he could take Mr Lyttle's injury into account when he was doing his staff planning.

[18] Mr Lyttle claims he handed Mr Harris the ACC form and his bank statement and payslip which showed a short payment of wages. Mr Harris denies being handed anything by Mr Lyttle. I have resolved that conflict in favour of Mr Lyttle.

[19] Mr Lyttle had just seen his doctor and received the ACC form. He was concerned at the short pay so he and his partner had been to the bank and printed out their bank statement to show Mr Harris the short pay. They had gone together to Mr Lyttle's work (his partner waited in the car) specifically to hand over the ACC form and raise the short pay issue. These were both important issues from Mr Lyttle's perspective so it does not make sense for him not to have handed this information to Mr Harris because that was the specific purpose of him attending the workshop that morning.

[20] It is clear from the evidence I heard that Mr Harris was already annoyed at Mr Lyttle for not reporting to work the previous day and was not receptive to him when he turned up on Tuesday morning. It was also a busy work morning and Mr Harris was focused on work and not on engaging with Mr Lyttle who he did not rate highly

as an employee. He was also already very annoyed with Mr Lyttle. I consider it is more likely than not that Mr Harris either failed to register or dismissed the paperwork Mr Lyttle handed him on the morning of 15 October.

[21] Mr Lyttle claims that after he explained he was off work on ACC Mr Harris said to him in an aggressive manner and with a harassing attitude “*what are you trying to say*”. Mr Lyttle says he was nervous speaking to Mr Harris who had previously demonstrated unhappiness about Mr Lyttle requiring time off work for illness. Mr Harris had already emphasised to Mr Lyttle that he was expected to attend work in order to complete duties to take pressure off other team members so Mr Lyttle was anxious about informing him he would be off work again due to an injury.

[22] Mr Lyttle said he was trying to explain that although he had been signed off work by his doctor for two weeks, there was a possibility it would be longer than that. He says that Mr Harris told him to leave his gear on the bench which Mr Lyttle took to be a reference to his work and safety gear. Mr Lyttle says he kept his work and safety gear bundled in a bag in his car so he retrieved that and left it on the bench as instructed.

[23] Mr Harris claims that when he asked Mr Lyttle what he was telling him Mr Lyttle replied that he was “*leaving now because I’m no good to you*”. Mr Harris says he asked Mr Lyttle when he was leaving and Mr Lyttle replied “*today*” so Mr Harris told Mr Lyttle to return his gear and to leave it on the bench if no-one was around. Mr Lyttle assumed his gear needed to be available to other employees while he was on ACC.

[24] Mr Harris says Mr Lyttle went to this car and returned with his gear which supported Mr Harris’ view that Mr Lyttle was resigning. Mr Harris claims that when Mr Lyttle returned with his gear Mr Harris told him he would lose two weeks’ pay for not giving notice.

[25] Mr Lyttle denies that conversation occurred. I accept Mr Lyttle’s evidence on the basis it is more likely than not to be correct. There was no reason for Mr Lyttle to have resigned much less to have agreed to have forgone two weeks’ wages. Mr Lyttle was signed off work for two weeks so even if he had intended to resign (and I do not accept he did) he could still not have worked out his notice. His notice would have run over the period he was signed off work. I consider that is something that would

have been discussed if Mr Harris had raised the deduction and if Mr Lyttle had intended to resign.

[26] Not only did RYH Contracting have no contractual right to deduct any pay from Mr Lyttle for not giving sufficient notice I consider the manner in which Mr Harris claims to have raised the deduction with Mr Lyttle unclear and unfair. A fair and reasonable employer would not have responded to the information Mr Lyttle gave Mr Harris on 15 October in the way that Mr Harris claims occurred.

[27] I consider it unusual that the material parts of Mr Peacock's and Mr Fountain's statements are word for word identical yet each told me they prepared their statements themselves. I do not see how two witnesses can write an identical account in the way that these two witnesses claim to have coincidentally done. I accept Mr Nutsford's submission that it appears more likely the material part of their statements were prepared for them by Mr Harris given how closely it reflects his view.

[28] These two witnesses are both employed by Mr Harris and their account follows his. Both Mr Peacock and Mr Fountain also make unnecessary and irrelevant adverse comments about Mr Lyttle of the same type of criticisms put forward by Mr Harris. I consider these factors undermine the credibility of these two witnesses.

[29] I find that there is some commonality in the accounts of all witnesses in that Mr Lyttle was advising he had been signed off work for two weeks and was leaving that day. Mr Lyttle's reference to leaving was to commencing ACC that day while Mr Harris viewed it as a resignation without notice.

[30] Mr Harris catalogued a litany of issues he had with Mr Lyttle regarding why he considered him to be a poor employee. It clearly suited RYH Contracting to dispense with Mr Lyttle's services and I consider that likely to have inappropriately influenced Mr Harris' view of his discussion with Mr Lyttle on 15 October.

[31] I find that Mr Harris jumped the gun by unreasonably and inappropriately concluding Mr Lyttle had resigned. Even if Mr Harris had genuinely formed that view the circumstances of the purported resignation warranted further discussion or investigation to ascertain that Mr Harris' impression that Mr Lyttle intended to resign was in fact correct.

[32] Mr Lyttle's employment agreement required him to give two weeks' written notice and that did not occur. Nor did Mr Harris request Mr Lyttle to comply with his contractual notice obligations. There was no good reason for Mr Lyttle to agree to forgo wages he had already worked for or his holiday pay in the event he had wanted to resign. These matters should have been properly discussed at the time.

[33] I also consider the parties' subsequent actions support my view that Mr Lyttle did not resign. RYH Contracting did not record his resignation or send him a final pay advice, it just failed to pay him his wages when they fell due. Upon discovering that Mr Lyttle took immediate steps to clarify to Mr Harris that he did not intend to resign and had not resigned.

[34] Instead of addressing that apparent misunderstanding when it was raised with him Mr Harris asked Mr Lyttle to put it in writing (which he did). Mr Harris then failed to respond to that or to Mr Lyttle's subsequent personal grievance for unjustified dismissal. He did not set out why RYH Contracting believed Mr Lyttle had resigned until a Statement in Reply was filed on 14 January 2014, almost three months later.

[35] I find that Mr Lyttle was dismissed. His employment ended at his employer's sole initiative. RYH Contracting failed to pay Mr Lyttle and then subsequently failed to address his claims that he had not resigned and did not want to resign.

[36] I find Mr Lyttle had no reason to resign. His family was reliant on his wages for its basic living expenses, he had numerous financial commitments he relied on his wages to meet, he had no alternative income generating activities available to him and no alternative employment options. The loss of his employment and therefore wages created serious problems for him and his family.

[37] Mr Lyttle could not meet his family's immediate expenses as he did not have savings and relied on his wages to cover all outgoings. It does not make sense for him to have suddenly and unexpectedly resigned without notice, much less to have agreed to forgo two weeks' wages.

[38] I find that Mr Lyttle acted promptly as soon as he found that his full wages had not been paid into his bank account as expected. He called Mr Harris and when Mr Harris told him he had not been paid because he had resigned without notice Mr Lyttle made it clear he had not resigned. He attempted to engage with Mr Harris over

the apparent misunderstanding but it is obvious that Mr Harris was not interested in getting to the bottom of their difference in view. Instead Mr Harris fobbed Mr Lyttle off by asking him to put it in writing and then not responding to any communications from him.

[39] I am satisfied on the balance of probabilities that Mr Lyttle has discharged the onus of establishing that his employment ended as a result of a dismissal. I find that Mr Lyttle did not resign.

Was Mr Lyttle's dismissal justified?

[40] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether RYH Contracting's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time Mr Lyttle was dismissed.¹

[41] A fair and reasonable employer is expected to comply with its statutory obligations. This includes the good faith obligation in s.4(1A) of the Act which requires an employer proposing to make an adverse decision about an employee's ongoing employment to provide that employee with all relevant information before making a final decision. It also includes the four procedural fairness tests set out in s.103A(3) of the Act.

[42] I find that RYH Contracting failed to comply with any of its statutory obligations which fundamentally undermines its ability to justify its dismissal of Mr Lyttle.

[43] RYH Contracting breached its duty of good faith because it did not provide Mr Lyttle with any information before dismissing him. RYH Contracting is unable to comply with any of the four procedural fairness tests in s.103A(3) of the Act because it dismissed him without following any process at all. That is not the actions of a fair and reasonable employer.

[44] I find that Mr Lyttle's dismissal was substantively and procedurally unjustified. There was no good reason for RYH Contracting to terminate his

¹ Section 103A(2) of the Act.

employment and the way in which it did so was procedurally unfair and in breach of RYH Contracting's good faith obligations to him.

What if any remedies should be awarded?

[45] Mr Lyttle withdrew his claim for lost remuneration on the basis that the period he was claiming for was covered by ACC compensation and then latterly by a sickness benefit. This indicates that Mr Lyttle was unable to work and therefore would not have received remuneration even if he had remained employed.

[46] Mr Lyttle seeks \$10,000 distress compensation. I am satisfied that Mr Lyttle suffered considerable distress.

[47] Mr Lyttle had a dependent partner and children who were totally reliant on his wages to cover their day-to-day basic living expenses. The family had to rely on family, charity and food parcels because they could not meet basic outgoings without Mr Lyttle's wages whilst waiting for ACC payments to start.

[48] Mr Lyttle says that it took many weeks before his ACC claim was processed because Mr Harris did not provide ACC with the required information. Mr Harris claims ACC was responsible for that but was unable to provide the Authority with any evidence (despite being directed to do so) he had provided ACC with the necessary information to enable his ACC payments to start.

[49] Mr Lyttle was extremely distressed during the Authority's investigation meeting, breaking down and crying when giving evidence about the adverse impact his unjustified dismissal had on him.

[50] I am satisfied that Mr Lyttle suffered a range of adverse consequences on his health, finances, relationship and self-worth as a result of his unjustified dismissal. I accept his evidence that his pre-existing medical conditions were exacerbated by the stress and distress he suffered.

[51] I order RYH Contracting to pay Mr Lyttle \$5,000 distress compensation under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered.

Is Mr Lyttle owed wage arrears?

[52] An employee is entitled to be paid their wages without deduction. Deductions may only be made from an employee's wages with that employee's prior written consent. Unlike many employment agreements Mr Lyttle's did not contain a clause in which he gave consent for deductions to be made from his wages. Mr Lyttle also did not consent to any deductions being made from his wages.

[53] RYH Contracting did not give Mr Lyttle any advance notice that deductions were going to be made from his wages. It also failed to notify him that deductions had been made from his wages. RYH Contracting failed to give Mr Lyttle any information about what amount had been deducted, when it had been deducted, why it had been deducted, or how the deducted amounts had been calculated.

[54] Mr Lyttle only discovered he had not been paid as normal after reviewing his bank statement. It was not clear until the Authority's investigation meeting what amounts had been deducted or why.

[55] I am satisfied that Mr Lyttle was short-paid \$47.49 whilst employed. Mr Harris claims RYH Contracting deducted this amount because Mr Lyttle had not worked the hours claimed on his timesheet. That was never raised with Mr Lyttle at the time and the evidence did not establish that allegation to the required standard of proof.

[56] I do not accept that was a genuine deduction because it was not recorded on Mr Harris' payslip. He was also not given an opportunity to respond to the allegation that he had claimed more hours than he had worked on his payslip. RYH Contracting is ordered to pay Mr Lyttle \$47.49 for this shortfall in wages.

[57] I find RYH Contracting unlawfully withheld Mr Lyttle's last week's wages so it is ordered to reimburse him \$640 for that. Even if Mr Lyttle had resigned (and I find he did not) his employment agreement did not provide for RYH Contracting to withhold his wages if he did not give sufficient notice.

[58] RYH Contracting also unlawfully withheld Mr Lyttle's holiday pay which should have been paid upon termination. It is ordered to pay him \$349.76 in unpaid holiday pay.

[59] RHY Contracting also deducted \$186 from Mr Lyttle's final pay for "*gear and equipment*" it claimed he did not return and for dry cleaning gear he did return. I am not satisfied that Mr Lyttle did not return gear. He says he left his work gear on the bench on 15 October as instructed by Mr Harris. I accept his evidence about that.

[60] Mr Lyttle was never been asked to return any additional gear after leaving gear on the workbench on 15 October as instructed. That is odd because his manager visited Mr Lyttle at his (My Lyttle's) home after his employment had ended to uplift company keys.

[61] If gear had not been returned that would have been the opportunity to have requested it back from Mr Lyttle, but no mention was made of missing gear. RYH Contracting's failure to do so undermines its claim that he did not return all of his gear. Mr Harris also failed to identify specifically what gear had allegedly not been returned or how he had calculated the value of it.

[62] There was also no evidence that RYH Contracting had drycleaned the gear Mr Harris returned. I doubt that occurred because I accept Mr Lyttle's evidence that his gear was dirty had had been lying around before it was allocated to him when he started work.

[63] Even if these were genuine expenses (which I do not accept) there was still no contractual right for RYH Contracting to deduct money from these items from Ms Lyttle's final pay and he had not consented to such deductions. RYH Contracting is ordered to reimburse Mr Lyttle \$186 for the deductions it claims it made relating to his gear and/or equipment.

What if any costs should be awarded?

[64] Mr Lyttle as the successful party is entitled to a contribution towards his actual costs. The parties are encouraged to resolve costs by agreement. If that is not possible then Mr Lyttle has 14 days within which to file a costs memorandum. RYH Contracting has a further seven days within which to file its costs memorandum. Mr Lyttle has a further three working days within which to reply.

[65] This timetable will be strictly enforced and any departure from it requires the prior leave of the Authority.

[66] If Mr Lyttle applies for costs then he proof of his actual costs must be provided. The parties are invited to specifically identify any factors they claim should result in the Authority's current notional daily tariff (currently \$3,500) being adjusted.

Rachel Larmer
Member of the Employment Relations Authority