IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 299
3098614

	BETWEEN	TAHAE MATENGA Applicant
	AND	DRYMIX CEMENT LIMITED Respondent
Member of Authority:	Philip Cheyne	
Representatives:	Dan Jarden, advocate for the Applicant Russell Moore and Gordon Crossman, advocates for the Respondent	
Investigation Meeting:	28 July 2020 at Christchurch	
Date of Determination:	3 August 2020	

DETERMINATION OF THE AUTHORITY

A. Drymix Cement Limited is to pay Tahae Matenga $6,825.00 (gross), pursuant to s 123(1)(b) of the Employment Relations Act 2000.

B. Drymix Cement Limited is to pay Tahae Matenga $12,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

C. Drymix Cement Limited is to pay Tahae Matenga costs of $71.56.

Employment relationship problem

[1] Mr Matenga worked in a business called Drymix Concrete Solutions. On 13 January 2020 a dismissal letter was delivered to Mr Matenga. Mr Matenga says that the dismissal is unjustifiable and that he has a personal grievance against his former employer. He claims

reimbursement and compensation as remedies for his grievances and to be reinstated "if possible".

[2] The respondent did not lodge a statement in reply.

[3] A company called Drymix Cement Limited was placed in receivership on 21 April 2020. One of the receivers is Russell Moore. Mr Moore at his request participated by phone in the case management conference and the investigation meeting. During the investigation meeting, Mr Moore was joined on the call by Gordon Crossman, a director of Drymix Cement Limited. Mr Crossman is based in Auckland.

[4] The claim as lodged did not include a sworn or an unsworn statement by Mr Matenga, but there was a summary of events. There was an undertaking in relation to an application for interim reinstatement. The undertaking showed Gordon Crossman as the respondent. A second version of an undertaking showed the respondent as "Dry Mix Limited". From other documents which accompanied the application, I formed the view that the employer and therefore correct respondent was probably Drymix Cement Limited. I later directed Mr Matenga, if he wished to continue with the interim reinstatement application, to lodge an undertaking naming Drymix Cement Limited as the respondent because an interim reinstatement application not accompanied by an enforceable undertaking correctly naming the employer would have to be dismissed. Mr Matenga did not lodge a signed undertaking showing the respondent as Drymix Cement Limited. I treat the present proceedings as Mr Matenga seeking a determination on his personal grievance claim.

[5] While Mr Crossman participated in the investigation meeting, he did not give evidence on oath. He said that another director, Simon Trower, was more directly involved but Mr Trower was apparently unwell and not available. I was not asked to adjourn the meeting. I grant Drymix Cement Limited leave to reply to Mr Matenga's claims but only to the extent necessary to recognise the limited participation by Mr Moore and Mr Crossman.

Background

[6] Mr Matenga produced a written employment agreement dated January 2016, signed by Simon Trower but unsigned by Mr Matenga. Mr Matenga's evidence is that he started work in November 2015 but was not given an employment agreement until 90 days later. He says that he later signed and initialled a written agreement but does not have a copy of it. The agreement produced is branded "Drymix Cement" and refers to the employer as "Drymix Group", so does not correctly identify the employer. Correspondence to Mr Matenga referred to below does not show a company name. However, Mr Matenga produced a computerised payslip with "Drymix Cement Limited" printed on it. That together with a screenshot showing the direct payment of wages to Mr Matenga in the name of "Drymix Cement Limited" is sufficient for me to find that Mr Matenga was employed by the company Drymix Cement Limited at the time his grievances arose. Neither Mr Moore nor Mr Crossman suggested that Drymix Cement Limited was not the employer.

[7] It is undisputed that Mr Matenga's place of work was at the business premises of Drymix Concrete Solutions in Christchurch. He was paid $21.00 per hour by the time he was dismissed. Hours of work depended on the tasks that had to be completed, so varied each week.

[8] Mr Matenga holds an authority from a Government Department which entitles him as part of his work to open containers which have been delivered to his employer. Mr Jarden for Mr Matenga raised what he says is an irregularity about the circumstances in which Drymix Cement Ltd had this work done. The point is outside the ambit of the present proceedings and I make no findings on that issue.

[9] In evidence there are letters dated 5 November and 28 November 2018 from Mr Trower to Mr Matenga, the latter expressed as a written warning. Mr Matenga disputes what is asserted in these letters. He is also critical about the process by which his employer came to the views expressed in the letters and how the written warning letter was given to him. There is no evidence from Drymix Cement Limited to support the assertions in the letters or to explain the processes which led it to issue the letters. The present proceedings do not

include personal grievance claims based on the 2018 written warning or the other letter so it is not necessary at this point to make findings about the assertions and Mr Matenga's responses.

[10] Mr Matenga produced a letter dated 25 November 2019 headed "Serious Warning Letter". It is unsigned but in the name of Mr Trower. Referring to work on the previous Saturday, the letter states that Mr Matenga had said that he had checked all 4 containers. It says "After a discussion with Gordon you admitted that you had merely checked one of the four containers and left the rest …". It refers to this as a breach of the certification rules and as Mr Matenga lying to his workmates and the managing director. It finishes by saying "This warning will be on your file for 12mths and if you have any incidents or warning of any type within 12 mnths, your agreement with Drymix will be terminated."

[11] Mr Matenga's evidence, which I accept, is that he received a phone call from Mr Crossman while on his lunch break and was told that there would be a letter for him when he got back to the office. His evidence is that he did not know that the company was considering warning him over issues from the Saturday work until he received the lunchtime phone call. Mr Matenga denied that there had been an earlier conversation with Mr Crossman about the Saturday issue and claimed that the one call from Mr Crossman was on the Saturday. That led him to claim that the letter was wrongly dated 25 November as an explanation for the reference in the letter to a discussion with Mr Crossman. I do not accept Mr Matenga's evidence that the letter was wrongly dated. It is more likely that it was correctly dated. I infer from the text of the letter that there had been an earlier conversation between Mr Crossman and Mr Matenga, before the call alerting him to the final warning letter having been sent. However, there is no evidence that the company told Mr Matenga that it had disciplinary concerns before Mr Crossman spoke to Mr Matenga.

[12] In evidence Mr Matenga disputes that he "admitted" only checking one container, leaving the rest. He says that he checked them all, but that one of the other workers had opened one of the containers without his consent as the worker was in a rush to get away, being a Saturday. His evidence is that he told this to Mr Crossman. Mr Crossman questioned Mr Matenga, putting to him that he had "admitted" checking only one container as asserted in the letter. Mr Matenga rejected that.

[13] Mr Matenga did not raise a personal grievance about the 25 November 2019 warning letter within 90 days of its receipt, although the circumstances are referred to in the Statement of Problem. If necessary, I will return later to the assertions in the warning letter.

Dismissal of Mr Matenga

[14] It is undisputed that Mr Matenga started a period of annual leave on Monday 6 January 2020. Mr Matenga says that he had applied for and been granted annual leave for two weeks by his previous manager (Dave Allen) in about March 2019. Mr Matenga says this was written up on a wall planner, as was usually done for leave at the Christchurch worksite. He also says that it was known amongst other workers at the Christchurch site that he would be on leave for two weeks. In an unsworn outline of events, it is said that Mr Matenga told Mr Crossman before Christmas that he would be taking two weeks off in January as arranged in May with the previous manager. In evidence, Mr Matenga says that he informed Mr Crossman that he had been given leave.

[15] Mr Matenga's evidence is that on Monday 13 January he went into work to introduce himself to a new manager, even though he was on leave. In a letter dated 13 January 2020, the company says that Mr Matenga introduced himself to a new worker at the worksite on 13 January. It is therefore undisputed that Mr Matenga went to the worksite that day. Mr Matenga did not work that day and he left the premises. An employee came to Mr Matenga's home later that day and delivered an envelope. Mr Matenga's evidence is that he did not open the envelope because he regarded it as a work matter which could wait until he was back at work. There is no basis to doubt Mr Matenga's evidence about the delivery and him not opening the envelope.

[16] Mr Matenga was away from work for the reminder of the week. On Friday 17 January, when in Queenstown, he received a phone call in the early evening from a work colleague. Mr Matenga's evidence is that the colleague informed him of the dismissal. Mr Matenga says he had no prior knowledge about his dismissal. There is no reason to doubt the evidence about the call and the lack of prior knowledge.

[17] Mr Jarden for Mr Matenga phoned Mr Crossman the next morning. Nothing was resolved.

[18] When Mr Matenga returned to Christchurch he opened the envelope and read the letter. It is dated 13 January and signed by Mr Trower. I summarise it as follows. The heading is "Termination letter – Effective Immediately". It refers to the warning letter from seven weeks earlier. It says that Mr Matenga in January requested a week's leave starting 6 January 2020 which Mr Crossman approved. It says that Mr Matenga came into work on 13 January and told another worker that he would be taking another week off. The letter goes on to say that the leave was not approved, it affected the company's business, it was in breach of company house rules and Mr Matenga's employment was terminated effective immediately. Mr Matenga was instructed to return company property, following which his final pay would be processed.

[19] Mr Jarden on 20 January attended the Christchurch worksite to deliver a letter to Mr Matenga's employer. Mr Jarden apparently experienced difficulties with several of those who were present, but I put that to one side. The 20 January 2020 letter addressed to Mr Crossman raised Mr Matenga's grievance of an unjustified dismissal, the lack of any fair process, took issue with another employee notifying Mr Matenga of the dismissal and referred to bullying and harassment by Mr Crossman. Reinstatement and an apology were sought and mediation was proposed. There were then some exchanges with a representative acting for the employer, but the claim was not resolved.

Justification for the dismissal

[20] I find that Drymix Cement Limited dismissed Mr Matenga. To justify that decision, it must show its actions and how it acted were what a reasonable employer could have done in all the circumstances at the time of the dismissal.[1]

[21] There is no evidence about steps taken by Drymix Cement Limited to investigate its allegation that Mr Matenga breached house rules by taking unauthorised leave for the week starting 13 January 2020. No issue about resource limitations was raised by Drymix Cement

[1] Employment Relations Act 2000 s 103A(2).

Limited with the Authority. I find that Drymix Cement Limited did not sufficiently investigate the allegations. Drymix Cement Limited did not raise its concerns with Mr Matenga before it dismissed him. Drymix Cement Limited did not give Mr Matenga an opportunity to explain or consider any explanation before it dismissed him. The company's actions and how it acted were not those of a fair and reasonable employer in the circumstances at the time.

[22] I must not determine a dismissal to be unjustifiable solely because of defects on the process followed by the employer if those defects were minor and did not result in the employee being treated unfairly. The defects were not minor and did result in Mr Matenga being treated unfairly.

[23] Understandably, Mr Matenga objected to the manner in which he came to learn of the dismissal.

[24] I find that the dismissal of Mr Matenga is unjustifiable and that Mr Matenga has a personal grievance.

What remedies apply?

[25] Mr Matenga seeks an apology from Drymix Cement Limited. I am limited to the remedies set out in the Act, which do not extend to ordering an employer to apologise to an employee.

[26] Receivership on 21 April 2020 affected the possibility of reinstatement. During the case management conference, Mr Moore advised that the receivers had terminated the employment of employees and rehired some employees on different terms. Mr Matenga did not press his reinstatement claim. Given the receivership, I find that reinstatement would not be practicable.

[27] There is a claim for reimbursement of lost remuneration. Mr Matenga says he has had no income from employment since the dismissal. There is no reason to doubt that evidence. Drymix Cement Limited questioned Mr Matenga about a delay in applying for a benefit. While Mr Matenga received some benefit payments, such payments are not offset against lost

remuneration for current purposes.[2] There is limited evidence about Mr Matenga's efforts to find replacement employment, but Drymix Cement Limited did not put in issue whether he had failed to mitigate his loss. Mr Matenga initially sought reinstatement and Drymix Cement Limited's failure to engage with the Authority until after Mr Moore's appointment as a receiver delayed the investigation. These circumstances cause me to find that Mr Matenga is entitled to an order under s 128(2) for the lesser of the remuneration lost or three months' ordinary time remuneration. Mr Matenga provided no evidence to support an award covering a longer period so I do not exercise the discretion under s 128(3).

[28] The employment agreement produced in evidence by Mr Matenga describes his position as "part-time with a minimum of 25 working hours per week". While Mr Matenga's evidence is that there was a signed agreement, he did not dispute that he was employed part-time. Mr Matenga's evidence was that he was working 51 hours per week at the time of his dismissal. However, the holiday pay he received on 15 January 2020 for the previous week, probably based on his average weekly earnings, does not reflect a pattern of those working hours. In the absence of better evidence about earnings, I find that Mr Matenga's ordinary time remuneration was his weekly minimum 25 hours by $21.00 equals $525.00 per week. Three months' ordinary time remuneration is $6,825.00.

[29] Mr Matenga gave compelling evidence about the hurt, humiliation and injured feelings which he has experienced due to the dismissal. It has been a financial burden causing him to rely on his savings. He had to seek a benefit. He described himself as "devastated" and being "set back". He said he has never been dismissed before, has been very withdrawn and could not speak to anyone. I accept this evidence.

[30] The only additional information was from Mr Jarden who described Mr Matenga's state when after the dismissal. It reflects and is supportive of Mr Matenga's evidence. There is no evidence to indicate that Mr Matenga required medical or professional counselling support. I find that the loss suffered by Mr Matenga described above is remedied by an award of $12,000.00 pursuant to s 123(1)(c)(i) of the Act.

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[2] *Davidson* v *Christchurch City Council* [1995] 1 ERNZ 172.

[31] In deciding the nature and extent of remedies for the grievance, I must consider the extent to which Mr Matenga's actions contributed to the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies accordingly.

[32] Drymix Cement Limited did not provide any sworn evidence. The only grounds for thinking that Mr Matenga contributed in a blameworthy way to the situation giving rise to his grievance are the assertions in the letters and the dismissal letter.

[33] A letter dated 28 November 2018 with the heading "Working together" refers to an incident between Mr Matenga and another employee, both of who apparently gave conflicting accounts of the incident. Nothing links the circumstances referred to in this letter to the circumstances more than a year later giving rise to Mr Matenga's grievance. It is not necessary to make any findings about the incident.

[34] There is a warning letter dated 5 November 2018. Mr Matenga is critical about the lack of any fair process before he received the letter. Mr Matenga's evidence is that he was unwell and off work on the two days referred. There is no evidence to the contrary and I accept Mr Matenga's evidence on these points. His evidence provides a complete answer to the concern expressed in the warning. There is no basis for a reduction in remedies arising from this letter.

[35] Regarding the 25 November 2019 final warning letter, proven conduct which led to it might result in a reduction of remedies for the unjustified dismissal grievance if that conduct was both causative of the dismissal and blameworthy.[3] However, the company provided no sufficient basis for me to reject Mr Matenga's sworn evidence that he checked all the containers. I find that there was no blameworthy conduct by Mr Matenga in relation to the warning.

[36] There are no grounds to question Mr Matenga's evidence that his absence for two weeks' starting 6 January was approved annual leave arranged in about March 2019 with his manager. His absence from work for the week from 13 January 2020 was not blameworthy conduct.

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[3] *Goodfellow v Building Connexion Ltd* [2010] NZEmpC 82

[37] I find that there are no grounds under s 124 of the Act to reduce the remedies as assessed.

Summary and costs

[38] Mr Matenga was unjustifiably dismissed and has a personal grievance. He is entitled to reimbursement of $6,825.00 (gross) to cover lost wages and $12,000.00 in compensation.

[39] Mr Jarden who assisted Mr Matenga is not a professional advocate and did not charge a fee for his assistance. The only costs incurred by Mr Matenga are the lodgement fee of $71.56. There will be an order to cover that fee.

Philip Cheyne
Member of the Employment Relations Authority