

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 140/09  
5132010

BETWEEN                      HAYDEN McMICHAEL  
Applicant

AND                              RENTOKIL INITIAL  
LIMITED  
Respondent

Member of Authority:      G J Wood

Representatives:            Ian Hard for the Applicant  
Sara Eddington for the Respondent

Investigation Meeting:     16 July 2009 at Wellington

Submissions:                Due by 31 August 2009

Determination:              21 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Mr McMichael claims that he was unjustifiably dismissed by the respondent, Rentokil, from his position as a Pest Control Worker because his Operations Manager, Mr Eric Rawlings, did not wish him to take extended leave for an operation, and that his dismissal for serious misconduct on other grounds was simply a pretext.

[2]     By contrast, Rentokil claims that Mr McMichael was justifiably dismissed for falsifying an accident report, putting its clients at risk over the laying of excess gel at a particular client's premises, gross neglect for non-servicing of a major client and giving conflicting explanations over his lateness to work one day.

## The Facts

[3] Mr McMichael was employed by Rentokil in December 2006 to attend on client's premises to prevent and control the infestation of pests. In 2007 he came to report directly to Mr Rawlings.

[4] Throughout the period of Mr McMichael's employment he complained about the size of his run, which Mr Rawlings promised to look into. However, the issue was not resolved before Mr McMichael was dismissed. I accept that while Mr McMichael thought the run was too large, Rentokil had issues with the level of his productivity, which was lower than that required by it. It never, however, took the matter up formally in any performance management or disciplinary process, such as the invoking of warnings, before the termination of Mr McMichael's employment.

[5] Mr McMichael has had long standing problems with his feet. Mr McMichael informed Mr Rawlings that he would probably soon need surgery on the one foot that had not been operated on to date. In February 2008 Mr McMichael told Mr Rawlings that surgery would take place on 7 April. Mr Rawlings wanted written proof of this, which was provided to him on 25 February.

[6] On 28 February Mr Rawlings told Mr McMichael that if he went ahead with his operation he would *suffer the consequences*. He also commented that in their employment agreement there was a clause about employees who had too long off work, as that could have a serious effect on the efficiency of Rentokil's service. In addition, he mentioned that Rentokil had ways of getting around these sorts of situations and that this had happened to previous employees.

[7] Mr McMichael's response was that he needed to put his health first, to which Mr Rawlings replied that if he let Mr McMichael go for this operation what would stop any other employee wanting three months off with depression and then taking a holiday in Fiji. The comparison was disputed by Mr McMichael. The pair then argued about the propriety of him having the operation, given Mr McMichael's financial responsibilities.

[8] Mr McMichael wanted a formal response to his request in writing, but Mr Rawlings declined. Mr McMichael regularly asked Mr Rawlings for a decision over whether he could or would be stopped from having his operation but received no response.

[9] However, on 24 March Mr Rawlings spoke to Mr McMichael, stating that he was under scrutiny over issues that might constitute serious misconduct and therefore could lead to his dismissal. Mr McMichael suggested that if that were the case he should pursue the matters formally, as he had nothing to answer for. Mr Rawlings then asked Mr McMichael to postpone his operation for a few months as a personal favour to him, as he had not found a replacement. When Mr McMichael stated that he would consider postponing the operation, Mr Rawlings told him that if he did so then the allegations against him would be dropped. The operation was subsequently deferred from 7 April to 27 May.

[10] On 28 March Mr Rawlings informed Mr McMichael that he had been phoned by Mr McMichael's surgeon to state that it would not be a problem to defer his operation. Mr McMichael queried this, as he had never given Mr Rawlings the right to call his surgeon and he did not believe that the surgeon would call Mr Rawlings off his own bat. At that point Mr Rawlings commented that if Mr McMichael was calling him a liar he would be *opening a can of worms*. In fact the surgeon was returning a call from Mr Rawlings.

[11] The next event of relevance occurred on 22 April. Mr Rawlings discussed the state of Mr McMichael's run with him and indicated that he could not have his operation, because of its poor state. Mr Rawlings concluded by stating that the next few weeks' productivity would determine whether or not Mr McMichael would be able to have his operation.

[12] About two weeks later Mr Rawlings raised with Mr McMichael the serious issues he had discussed with him a few months earlier, stating that he needed to address them formally, as well as some new allegations. He stated that the reasons for the delay in raising them was that he had been too busy, but that the main issue was the state of Mr McMichael's run.

[13] When Mr McMichael queried whether he should postpone his operation again, Mr Rawlings replied that he was too professional to answer that, but thought it would be a very good idea. Mr McMichael made it clear that he needed to have his operation at the time that it had been rescheduled for.

[14] On 12 May Mr McMichael was informed of a formal disciplinary meeting covering the four issues raised in the introduction to this determination, plus other

performance issues such as misuse of the company phone during work hours, poor treatment standards, damage to customer property, not filling in company records properly and making inappropriate comments to a customer.

[15] On the same day another person, who was ostensibly employed to replace Mr McMichael for the duration of his absence for surgery, was employed on a fixed term contract for three months. Mr Rawlings told Mr McMichael that the person was arranged to help him out on his run, but he never met the new worker.

[16] Mr McMichael attended the planned meeting with his union representative. The meeting took two hours during which Rentokil's issues were discussed in some detail.

[17] On 22 May Mr McMichael was called to another meeting. Mr McMichael was appropriately given the opportunity to comment on the Rentokil's conclusion that dismissal on notice was an appropriate penalty. Mr McMichael was then dismissed with effect from 29 May 2008. A letter confirming the dismissal sets out the four grounds of serious misconduct Rentokil believed justified dismissal, together with other findings of misconduct.

[18] Mr McMichael had in fact had the operation by that date and he was off work because of injury for the next four of five months. It was then another month before he found work.

### **Credibility**

[19] There can be no certainty over what happened over a year ago. The Authority is required to make its determination on the basis of what it believes happened on the balance of probabilities, i.e. what is more likely to have occurred than not. In this case there was a clear conflict over almost all the evidence between the two main protagonists, Mr McMichael and Mr Rawlings. Put simply, one man's evidence can not stand with that of the other. I have preferred the evidence of Mr McMichael throughout, for the following reasons, even though there are in effect serious allegations made against Mr Rawlings and therefore there needs to be sufficient proof of them, given their inherent unlikelihood.

[20] Mr McMichael, on the advice of his mother, took handwritten notes at or soon after the time of events, once he started having difficulties with Mr Rawlings over his

proposed surgery. He produced those records to the Authority. Mr Rawlings provided no such records.

[21] One of the main reasons for summary dismissal was a conclusion that Mr McMichael had lied when filling out his accident report. The evidence does not support any such strong conclusion. Mr McMichael may have been inaccurate when he stated that he reversed into a power pole when in fact it was a pole attached to a gate, but that is, at worst, a mis-description. There was no element of gain to Mr McMichael in making such a mistake deliberately. Instead it gives powerful support to Mr McMichael's evidence that Mr Rawlings only pursued the disciplinary process in order to punish him for insisting on taking leave to have his foot operated on. Similarly, Mr Rawlings' evidence that Mr McMichael had approved Mr Rawlings having direct contact with his surgeon and the surgery nurse is implausible.

[22] Mr Rawlings' evidence also involved some cases of exaggeration, such as where he claimed that Mr McMichael texted throughout the disciplinary investigation meeting, rather than paying full attention. I do not accept that any employer would tolerate one of its employees texting throughout a disciplinary meeting. Mr McMichael's explanation that he was completing a text before the disciplinary meeting formally commenced is far more plausible.

[23] By contrast to Mr Rawlings' evidence, Mr McMichael was open in his evidence about his mistakes, such as his over-applying paste to a client's premises and his offhand attitude at the disciplinary meeting (because he felt his dismissal was predetermined), which were not necessarily in his own interests.

[24] I have therefore determined the facts above upon my acceptance of all of Mr McMichael's evidence over that of Mr Rawlings, wherever they are in conflict.

### **Determination**

[25] This dismissal was effected in a procedurally proper manner. However it was unjustified because the motivation for the dismissal was not the claims of serious misconduct, but rather because Mr McMichael wanted to take time off for a necessary operation. Put simply, to dismiss an employee for other actions of alleged serious misconduct, when the real reason was because they wished to take time off for a necessary operation is not what a fair employer would do, or how it would act. Instead it is the antithesis of an employer's duty to act in good faith.

[26] The genuine issues that Rentokil did have about Mr McMichael's behaviour could have been taken up in a performance management and/or disciplinary context involving warnings, if necessary, but were not, at least in the main until much later. Furthermore, some of the claims were simply makeweights, such as the claim of lying on an accident form.

[27] It follows as a matter of law and fact that Mr McMichael's' dismissal was unjustified and he is entitled to remedies accordingly.

### **Remedies**

[28] Mr McMichael was off work for approximately a month after his four months recuperating and I conclude that he is entitled to 4½ weeks pay accordingly. I calculate this sum, on the basis of 40 hours per week, as \$3,328.83 gross.

[29] Somewhat ironically, it is Mr McMichael's reasonableness that must temper any award of compensation. He struck me as a well balanced person who had the internal fortitude to bear up to the treatment meted out to him by Rentokil through Mr Rawlings in a very mature manner. He was, however, treated appallingly and this has had a lasting impact on him, as displayed in his evidence. For example, Mr McMichael stated that he has been greatly humiliated and distressed by the actions and attitude of Rentokil at a time when he had an operation coming up, which he had postponed at its behest. He further stated, in his oral evidence, that he did not think employees should be treated like this, that he had a young baby at the time and that he had bills to pay and had little savings. He felt threatened by Rentokil and did not like the feeling that he would still have a job if he had done what it wanted.

[30] I therefore conclude compensation in the sum of \$10,000 is appropriate. This sum would have been much greater had Mr McMichael not have been of such a positive disposition.

### **Contribution**

[31] I accept that the productivity records show that Mr McMichael regularly did not reach the productivity standards set by Rentokil, although he was at work for the required number of hours. I conclude, however, that this was not sufficiently serious for Rentokil, who had previously not sought to discipline Mr McMichael, to justify dismissal, particularly as it was not the reason for his dismissal. It was something that

Rentokil could have taken up with Mr McMichael properly under a performance management and/or warning system, if it so chose, which at the time it did not. It was therefore not blameworthy behaviour that contributed to his dismissal. Turning to the specifics of the ostensible reasons for dismissal, Mr McMichael merely made an honest mistake in mis-describing the gate post extension as a power pole, an error of no import whatsoever. He accepted that he misapplied the paste to a client's premises, but that was not the reason he was dismissed, and it was a genuine error rather than serious misconduct. I accept that another client was not properly serviced by Mr McMichael, but also that this was because of a genuine misunderstanding between him, Rentokil and the client. I also accept Mr McMichael's evidence that his explanations for his failure to attend a meeting on time did not involve him lying to or misleading Rentokil. There is therefore no blameworthy conduct by Mr McMichael warranting a need to reduce the remedies awarded to him.

### **Conclusion**

[32] Mr McMichael was unjustifiably dismissed by Rentokil. I order the respondent, Rentokil Initial Limited, to pay to the applicant, Hayden McMichael, \$10,000 compensation under s.123(1)(c)(i) and \$3328.83 gross in lost remuneration.

### **Costs**

[33] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**