

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 406
5623626

BETWEEN RONALD MILLIN
 Applicant

A N D INTERTRUCK DISTRIBUTORS
 (NZ) LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Ken Usmar, Advocate for Applicant
 Alexandria Till, Counsel for Respondent

Investigation Meeting: 22 November 2016 at Tauranga

Submissions Received: 15 and 22 November 2016 from Applicant
 16 and 22 November 2016 from Respondent

Date of Determination: 12 December 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Mr Ron Millin, claims that he was unjustifiably dismissed by the Respondent, Intertruck Distributors (NZ) Limited (Intertruck) on 26 February 2016.

[2] Mr Millin further claims that he was unjustifiably disadvantaged by Intertruck denying him the opportunity for a gradual return to work programme after it had agreed to do so, and by failing to provide him with time and wage records when requested to do so.

[3] Intertruck denies that Mr Millin was unjustifiably terminated and claims that he was justifiably terminated in accordance with the provisions of the individual employment agreement under which he was employed, and further denies that he was unjustifiably disadvantaged.

[4] The issues for determination are whether or not Mr Millin was unjustifiably:

- dismissed by Intertruck

- disadvantaged by Intertruck denying him the opportunity to return to work on a gradual return to work basis after agreeing to do so
- disadvantaged by Intertruck failing to provide him with time and wage records when requested to do so

Background facts

[5] Intertruck engineers and assembles truck parts. Its operations include a truck manufacturing plant, an engineering workshop, and a paint shop. It has six workshops over four locations and employs 50 employees in total. Mr Comer Board and Mrs Robyn Board are the directors and sole shareholders of Intertruck.

[6] Mr Millin commenced employment with Intertruck on or about 9 September 2013 as a fitter/welder. In that position, he reported to Mr Thomas Barber, who supervised a team of approximately four employees.

[7] Mr Millin had been supplied with an individual employment agreement (the Employment Agreement) which he had signed on 9 September 2013. The Employment Agreement at clause 42: "*Termination of Employment*", stated:

42.1 *Subject to clause 38, this agreement may be terminated by either party on not less than one week's notice in writing to the other party.*

42.2 *The Employer may elect to pay salary in lieu of notice.*

...

42.5 *If the employee sustains an illness/injury and is unable to perform his or her full duties, the employer will hold the job open for 30 days to enable the employee an opportunity to recover. However if the employee continues to be incapable of performing his/her full duties, it is at the employer's discretion to terminate the employment relationship.*

[8] Mr Millin injured his back on 31 December 2015 as the result of a non-work injury. He sought immediate medical advice by consulting his doctors and advised Intertruck of the injury. He subsequently contacted ACC which arranged a rehabilitation treatment plan for him. He was certified as unfit for work and supplied a medical certificate to Intertruck covering the initial period of his absence from work. Mr Millin was also in touch with Mr Barber and kept him advised of his absence.

[9] Mr Board, Managing Director, said that on or about 12 February 2016, he had a team meeting with Mr Barber relating to the engineering workload projected for the following six months. Mr Board said there were many projects that needed to be completed and he needed

to know whether or not Mr Barber's team had the capacity to carry out the work. He said it became apparent that Intertruck would need a full time fitter/welder engineer to be working at the Mt Maunganui site to ensure that Intertruck could satisfy the projected work programmes.

[10] At that meeting, Mr Board asked Mr Barber when Mr Millin would be returning to work given that the last medical certificate held by Intertruck had ended on 17 January 2016. Mr Barber said Mr Millin had given no indication of when he could return at that stage.

17 February 2016 Meeting

[11] On 17 February 2016, there was a meeting between the ACC case manager assigned to Mr Millin's case, Mr Millin and Mr Barber. During that meeting, a Gradual Return To Work (GRTW) plan was discussed.

[12] Mr Millin's recollection was that Mr Barber, on behalf of Intertruck, had agreed to the GRTW. Mr Barber disagreed, stating that his understanding had been that following the meeting, ACC would be in touch with Intertruck's head office with its recommendation, and that it was for Intertruck to accept or decline that recommendation and determine when Mr Millin was to return to work.

[13] Mr Millin said he delivered the GRTW Report to Intertruck on or about 23 February 2016. Mr Barber confirmed that he had received the GRTW Report and had forwarded it to the Intertruck Head Office for Mr Comer's attention.

[14] Under section 7 of the GRTW Report entitled "*Return to work*", there was a weekly plan detail set out which included a period of light duties commencing on 7 March 2016 and concluding on 28 March 2016 when the GRTW report stated that Mr Millin was expected to return to pre-injury duties.

[15] The GRTW report also noted on p.4 that:

Mr Barber has reported they are still willing to support Mr Millin in a GRTW, however duties were dependent on what is available at the time. The assessor recommendation was that "Mr Millin commenced work under an ACC supported work trial, so he is able to work on a supernumerary basis and complete light work by assisting others without affecting the company's productivity".

[16] Mr Millin had also provided a medical certificate to Intertruck on or about 23 February 2016 which extended his inability to resume full duties until 31 March 2016.

[17] Mr Board said he did not consider the GRTW report to be a binding document on Intertruck.

[18] A conversation took place between Mr Board and Mr Barber on 25 February 2016 during which Mr Barber informed Mr Board that when Mr Millin had delivered the GRTW Report a few days earlier, he had told him that he was leaving Intertruck in March to move to Whakatane, however he would be returning to Intertruck for one or two weeks while he sold his home.

[19] Mr Board said he had contacted the EMA which had confirmed his understanding that in accordance with clause 42.1 of the Employment Agreement Mr Millin's employment could be terminated with one week's notice, and that in accordance with clause 42.5, since Mr Millin had sustained an injury whereby he was unable to perform his full duties for more than 30 days, Intertruck was able to terminate the employment relationship.

[20] He had considered the situation during the evening of 25 February 2016 and reached the decision to terminate Mr Millin's employment in accordance with clause 42.5 of the Employment Agreement.

Termination Process and events 26 February 2016

[21] Mr Board said he was aware that Mr Millin could be confrontational and therefore he decided to communicate his decision to terminate Mr Millin's employment by email which he sent on the following day, 26 February 2016. The emailed termination letter to Mr Millin stated:

Dear Ronald,

This letter is regarding your employment with Intertruck.

You sustained your injury during the Christmas holidays past and not returned to work since. We have kept your job open for 45 days. ACC rehab personnel have viewed our regular engineering duties and agreed you are still unable to perform these duties. We are unable to provide "other duties" due to regular heavy manual work requirements. Therefore we are now at the point where your absence from work is severely affecting our workshop capability.

I refer you to clause 42.5 in our employment agreement which states ...

The company has come to the decision it can no longer keep this position open for you. Therefore this is formal notice that we are to terminate your employment as of today. You are given one week's notice, however as you are in ACC there is no notice paid. Your final pay will be calculated with a payment advice emailed to your current email address.

Within a week of this letter I will provide a work reference to assist you in finding other employment after you have fully recovered from your injury.

Thank you for your time spent with Intertruck. Please arrange a time with Thomas to collect your personal belongings.

[22] Mr Millin said he had been extremely upset when he had opened the email on his computer that morning. He thought the method of communication was callous on Mr Board's part and felt that he should have been entitled to a meeting to discuss the dismissal decision prior to it being issued. He emailed Mr Board later that same day, 26 February 2016, stating:

*After talking to Thomas have decided to come to work next week as per ACC plan and will finish one week from today as prior notice.
Thanks,
Ron Millin*

[23] Mr Board responded shortly afterwards stating:

*Ron please understand I am your employer.
By calling Thomas and stating you are coming back to work your weeks notice in an attempt to get paid after receiving my instructions is unacceptable behaviour.
The medical certificate you have supplied is not a full clearance and does not allow full work duties.
As per your prior email, please uplift your personal belongings today.
You are terminated on receiving my notice.
You are not an employee when on our premises, we provide 15 minutes for you to uplift your tools.*

[24] Later during that day when Mr Millin was uplifting his personal belongings from the Intertruck site, he had encountered Mr Board and there was an altercation between them.

[25] Mr Board said that Mr Millin had approached him aggressively shaking his fist and swearing at him.

[26] Mr Barber said he had witnessed the encounter between Mr Millin and Mr Board. He described Mr Millin shaking a clenched fist in a threatening manner and saying in a raised voice:

*If you had only f***ing waited I was going to leave anyway. You can go and get f***d. I have talked to Labour Department and will be putting a grievance against you, you will be sorry.*

[27] Mr Millin agreed that he became irate when he saw Mr Board, accusing him of being a weak person for not having talked to him first, but he denied threatening or shaking his fist at Mr Board or using the language which Mr Barber had described.

[28] During the Investigation Meeting, Mr Barber said when questioned that he had not been able to hear what was being said by Mr Millin, and in cross-examination he confirmed

that he had been at least 8 metres distant from what was occurring across a workshop in which there was machinery operating. He confirmed that there was not loud shouting by Mr Millin, and that Mr Board had spoken quietly.

[29] Following the altercation, Mr Millin had uplifted his personal belongings and subsequently left the Intertruck site.

Determination

Was Mr Millin unjustifiably terminated by Intertruck?

[30] The emailed letter of termination sent to Mr Millin by Mr Board on 26 February 2016 stated that: “*we are to terminate your employment as of today*”. Although that email referred to a one week notice period which would not be paid by Intertruck since Mr Millin was receiving monies from ACC, it is clear it was to be in lieu of notice. The later email sent that same day by Mr Board to Mr Millin confirmed that dismissal was effective from 26 February 2016: “*You are terminated on receiving my notice*”.

[31] Mr Millin’s employment with Intertruck was terminated on 26 February 2016

[32] The test of justification in s 103A Employment Relations Act 2000 (the Act) states:

103A Test of justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. 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.*

[33] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. Intertruck must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[34] Mr Millin had sustained an injury and was unable to perform his full duties for a period which extended beyond 30 days as indicated by the GRTW completed by ACC which stated his expected return date to full duties as 28 March 2016, and by the medical certificate which stated the date when Mr Millin would be fit to return to work as 31 March 2016.

[35] Mr Board reviewed the situation on the evening of 25 March 2016 and decided that, balancing the requirements of Intertruck against the expected return date of Mr Millin, and the fact that the Employment Agreement permitted Intertruck to terminate an employee who was unable, by virtue of illness or injury, to perform his or full duties for 30 days, to terminate Mr Millin's employment.

[36] Although the GRTW envisaged Mr Millin returning to work sooner than the end of March 2016, this was to light, not full, duties and only in the event that light duties were available.

[37] I find that there was substantive justification for the decision to terminate Mr Millin's employment.

[38] However a decision to dismiss must be procedurally fair. I note as relevant that Mr Board had also taken into consideration in making the decision to dismiss Mr Millin, Mr Barber's report of a conversation he had had with Mr Millin on or about 23 February 2016. As a result of that discussion with Mr Barber, Mr Board understood that Mr Millin had an intention to move away from Tauranga and to thereafter leave his employment at Intertruck.

[39] In accordance with s 103A (3) of the Act, Mr Board was required to carry out a fair investigation and follow a fair procedure. The Authority must also consider whether:

- (a) ... *the employer sufficiently investigated the allegations against the employee ...*
- (b) ... *the employer raised the concerns that the employer had with the employee ...*
- (c) ...*the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*
- (d) ... *the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[40] I find that Intertruck failed to follow a fair procedure in terminating Mr Millin's employment. In particular Mr Board:

- did not meet with Mr Millin and ask him to explain the comments he made to Mr Barber or to respond to the allegation that he intended to leave Intertruck after his return to full duties;
- did not discuss with Mr Millin the fact that he was proposing to terminate Mr Millin's employment and give him an opportunity to respond to the concerns giving rise to that proposal of Intertruck prior to its implementation; and

- there was no genuine consideration of Mr Millin's explanation since no opportunity was given for him to provide one.

[41] I determine that Mr Millin was unjustifiably dismissed by Intertruck.

Unjustifiable Disadvantage

[42] Mr Millin is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[43] The elements of s103 (1) (b) are twofold:

- An unjustifiable action by the employer, which
- Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[44] Mr Millin must therefore establish that there was some unjustifiable action or actions by Intertruck which affected his terms and conditions of employment to his disadvantage.

Was Mr Millin unjustifiably disadvantaged by Intertruck denying him the opportunity to return to work on a gradual return to work basis after agreeing to do so?

[45] The GRTW set out the date when Mr Millan would commence light duties as 7 March 2016.

[46] Mr Millin's employment with Intertruck was terminated on 26 February 2016.

[47] I find that Mr Millin was not an employee at the date when the GRTW was due to commence, and consequently his terms and conditions of employment covering the period 9 September 2013 to 26 February 2016 were not affected to his disadvantage by Intertruck denying him the opportunity to return to work on a GRTW basis.

[48] I determine that Mr Millin was not unjustifiably disadvantaged by Intertruck denying him the opportunity to return to work on a gradual return to work basis

Was Mr Millin unjustifiably disadvantaged by Intertruck failing to provide time and wage records when requested to do so?

[49] I find that because Mr Millin was dismissed on 26 February 2016 no longer an employee when the requests for the time and wage records were made on 14 and 23 March 2016 and consequently his terms and conditions of employment covering the period 9 September 2013 to 26 February 2016 were not affected to his disadvantage by Intertruck failing to provide the time and wage records as requested.

[50] I determine that Mr Millin was not unjustifiably disadvantaged by Intertruck failing to provide time and wage records when requested to do so

Remedies

[51] Mr Millin has been unjustifiably dismissed and he is entitled to remedies.

Notice Period

[52] Pursuant to clause 42.1 and clause 42.2 of the Employment Agreement, Mr Millin was entitled, upon the termination of his employment with Intertruck to one week's notice.

[53] In the absence of contractual notice having been given by Intertruck, Mr Millin was entitled to wages equivalent to the length of that notice. In other words due to the absence of the contractual notice having been given by Intertruck, the payment is equal to the amount of wages to which Mr Millin would have been entitled but for the termination of his employment.

[54] As such I find that a payment of this nature is reimbursement of: "*the whole or any part of the wages*" to which Mr Millin would have been entitled had he remained in employment. It is remuneration which is taxable and payable under Mr Millin's Employment Agreement.

[55] Accordingly I determine that the payment falls under s 123)(1)(b) of the Act which includes both wages and "*other money*" which has been lost "*as a result of the grievance*".

[56] I find that Mr Millin is entitled to 1 week's wages payment of \$1,000.00 gross for the period 26 February 2016 to 4 March 2016 pursuant to s 123)(1)(b) of the Act.

ACC Payments

[57] In the letter advising Mr Millin of the termination of his employment sent on 26 February 2016, Mr Board stated that the notice period would not be paid: “*as you are on ACC*”.

[58] In *Scissor Platforms (1997) Ltd v Brien*¹ the Employment Court held:²

The Tribunal was correct not to have deducted earnings related compensation insurance payments from compensation for lost remuneration. The liability for repayment of a benefit was a question to be determined between the individual beneficiary and the government department concerned. The same principles for non-deduction from remuneration compensation of unemployment benefits applied to earnings related accident compensation insurance payments.

[59] As also observed in that judgment:³ “*Avoidance of double recovery is a matter to be dealt with between insurer and insured*”. Accordingly I anticipate that Mr Millin will be advising ACC of this determination and pursuing this matter directly with ACC.

[60] I order Intertruck to pay the sum of \$1, 000.00 gross to Mr Millin in respect of one week’s notice.

Reimbursement of Lost Wages

[61] Mr Millin commenced his new employment on 11 April 2016 which was after the date when the last medical certificate he provided to Intertruck stated he would be fit return to work, which date was stated to 31 March 2016.

[62] I order Intertruck to pay Mr Millin the sum of \$1,000.00 gross as lost wages in respect of the period 4 to 11 April 2016 pursuant to s 128(3) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[63] Mr Millin was dismissed on 26 February 2016. He received the notice of termination by email and stated that he had been very upset when he received it and he believed it to have been a callous action.

¹ [1999] 2 ERNZ 672

² Ibid at 673

³ Ibid at 682

[64] Although Mr Board's evidence was that he had elected to email Mr Millin rather than holding a face-to-face meeting because his manner could be confrontational, there was no evidence that Mr Millin's behaviour had been the subject of disciplinary action during his period of employment with Intertruck.

[65] I accept Mr Millin's evidence that he experienced distress as a result of the notification of dismissal,

[66] Mr Millin also gave evidence that although he had intended to sell his house; this had been with the intention of finding an alternative property in Tauranga which would be more suitable for his family situation. However as a result of the termination of his employment by Intertruck, he had been obliged to purchase a property outside Tauranga which was more affordable, and commute from Whakatane to his new employment in Tauranga.

[67] I find that the termination of his employment has had an adverse financial impact on Mr Millin which has added to his feelings of hurt and humiliation.

[68] I order Intertruck to pay Mr Millin the sum of \$7,500.00, pursuant to s 123(1) of the Act.

[69] I also order Intertruck to pay Mr Millin the sum of \$71.56 in respect of the filing fee.

Costs

[70] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[71] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority