

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 45  
5452400

BETWEEN            PAUL MOSES  
                                 Applicant  
  
AND                    ORORA PACKAGING NEW  
                                 ZEALAND LIMITED  
                                 Respondent

Member of Authority:      Trish MacKinnon  
  
Representatives:            Gordon Paine, Counsel for Applicant  
                                 Richard Harrison, Counsel for Respondent  
  
Investigation Meeting:      27 November 2014 at Napier  
  
Submissions Received:      27 November 2014 from the Applicant  
                                 and from the Respondent  
  
Further Documents  
Received:                      2 December 2014  
  
Determination:                30 April 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Paul Moses was dismissed from his position of Depot Manager at Orora Packaging New Zealand Limited's Whakatu packaging plant on 5 February 2014. Mr Moses claims his dismissal was unjustifiable and he seeks remedies for his personal grievance.

[2] Orora Packaging New Zealand Limited (Orora) rejects Mr Moses' claim and says its decision to terminate his employment was justified in the circumstances.

## Background

[3] Mr Moses was originally employed in Brisbane in 2003 by Amcor. In 2010 Amcor relocated him to manage its Whakatu depot in Hastings. During his period of employment the company changed its name to Orora.

[4] In October 2013 Mr Moses applied for 22 days annual leave from 12 December 2013 to 17 January 2014. The reason he gave for requiring that leave was the impending birth of his daughter. In his leave application Mr Moses noted:

*I will probably not require parental leave as I have enough annual. Apple season starts mid Feb, so I need to be back in time to prep for the season. Bub is due early Jan, but Mum has gone four weeks early on average with the last three. These dates requested will cover all scenarios. Please approve.*

[5] Mr Moses' direct manager, Charles Russell, approved the leave.

[6] On 19 November 2013 Mr Moses sent an email to a number of people within Orora, including his direct reports and Mr Russell, setting out the arrangements that would apply to the Whakatu depot over the Christmas break and for the period of his absence on annual leave in December and January. Included in the email was the following statement:

*For those of you who are not aware, Toni and I are expecting a little girl late December, early January. I will be taking leave two weeks prior to the Christmas break, and returning two weeks after the Christmas break. During my absence, Patrick Matapo and Jamie Fox will be coordinating the depot, and Charles Russell will obviously assume overall responsibility.*

[7] The email provided contact details for depot coordinators, and noted that Mr Moses would be contactable by mobile and email if required.

[8] Mr Moses was due back at work on Monday 20 January 2014. It was known to his employer that he and his wife and children were in Australia where they wished the baby to be born.

[9] On Friday 17 January Mr Moses sent an email to Lyal Graham, the Group HR Manager for Orora, notifying him that his wife had "*experienced some complications with her labour, and is now overdue but yet to give birth*". He said they had been in and out of hospital all that week and his wife expected to be induced in the coming

days. As a result he would not be able to return on Monday 20 January and would require at least another fortnight off work.

[10] Additionally, Mr Moses notified Mr Graham of feedback he had received from some of his team at Whakatu about comments another manager had made concerning docking money from Mr Moses and "*getting rid of him*". He set out a number of concerns about what he saw as victimisation and bullying and the effect this was having on him.

[11] Mr Moses asked for Mr Graham's help in this situation, stating that he was very *stressed out* and regretted relocating to New Zealand. He requested Mr Graham's advice and support, ending that he would be in contact soon and asking Mr Graham to reply via work email which he could access "*every couple of days*".

[12] Mr Graham responded the same day by email expressing sympathy over the complications with Mr Moses' wife's labour and expressing his hope that all would go well in the next few days. He then wrote:

*If you are in agreement, you can take your entitlement of two weeks of paternity leave to cover the next fortnight. If you are not aware, paternity leave is available to the partner of the person giving birth for up to a continuous period of two weeks (unpaid). Could you please confirm back to Charles and Karina (as I am on leave next week) that you wish to invoke this entitlement.*

*Because you have no more leave entitlement, we are not in a position to grant you extended leave and therefore if you don't exercise your paternity leave entitlement, we would then request that you return to work on Monday 20th January as per the original leave application.*

[13] Mr Graham's email ended by referring to the other issues Mr Moses had raised and stating that he would contact Mr Moses on his return to discuss those matters in further detail and to initiate an investigation if required.

[14] Orora says Mr Moses did not respond to the offer of taking his two weeks' unpaid paternity leave entitlement. Mr Moses says he thought he had responded by reply email to Mr Russell. However, he had no evidence of that because he had no access to his work email account after his employment was terminated.

[15] In any event Mr Moses says, if he did not respond it would have been because his focus was on his wife and the problems with her labour. He also noted that one of

the two people with whom he had been asked to confirm his paternity leave was the person whose conduct towards him he had expressed concerns about to Mr Graham.

[16] On 29 January 2014 Mr Graham again contacted Mr Moses by email expressing his concern that, having just returned from his leave, he had learned Mr Moses had not responded to his email of 17 January and had not informed Charles or Karina of his intention to take a further two weeks' leave. He said:

*As you have not responded to state that you wish to use paternity leave, we can only assume you are AWOL.*

[17] He noted that he and Mr Russell had made a number of attempts to contact Mr Moses by phone and email and that Mr Moses had not responded or answered his work phone. Mr Graham went on to say he understood that Mr Moses' baby had not been born as yet, expressing surprise at this in view of the information Mr Moses had conveyed on 17 January that his wife was overdue and about to be induced.

[18] Mr Graham asked Mr Moses to provide medical evidence of the expected date of birth of his baby or the birth certificate when the baby was born. His email ended by noting his concern that Mr Moses had failed to make any contact with his employer since 17 January and he asked Mr Moses to contact either Mr Russell or himself to "*advise us of your intentions regarding your ongoing employment*".

[19] Mr Moses says he understood he was on paternity leave from Monday 20 January to Friday 31 January 2014. He spoke by telephone with Mr Russell on Friday 31 January to advise he was unable to return to work on Monday 3 February and might require a small amount of extra time off. Mr Moses says Mr Russell had no issue with this and asked him to respond the following week.

[20] Mr Russell's account of the telephone conversation differs. He says Mr Moses had asked him what his options were and that he had advised Mr Moses this was now an HR matter and that he needed to contact Mr Graham directly. According to Mr Russell, when he explained to Mr Moses that he had exhausted all available paid leave, Mr Moses replied that he would do the right thing by the business and resign as he would not be able to return to work on 3 February. Mr Moses denies that he ever resigned although the next email he sent to Mr Graham shows that he at least considered doing so.

[21] On Monday 3 February 2014 Mr Moses emailed Mr Graham at 12.18 pm stating that his wife had now hit 40 weeks, which was 4 weeks longer than his other three children. Although she was having contractions, there was no sign of the baby yet. Mr Moses said in the email that, after discussions with Mr Russell and a weekend to consider his options, he would be returning to work on 17 February. He said he would need to take sick leave that day and the following day "*and then consume whatever entitlements I have for parental leave or carers leave*".

[22] Mr Moses said in his email that his wife was unable to look after their other three children and needed full care herself because of her current state. He offered to obtain a medical certificate to cover any other days off between 3 and 17 February if required but he did not provide the medical certificate Mr Graham had requested. Mr Moses apologised for the inconvenience and stated:

*I feel I am obligated to return to Whakatu and not to abandon my current team. I will reconsider my resignation on my return to work on the 17th. I also would like to return to cover off and discuss issues I raised on a previous email.*

[23] Mr Moses' email ended by thanking Mr Graham for his support and consideration "*during this very complicated time for me*".

[24] Mr Graham's response was dated 3 February at 11.47 am which appears to be approximately half an hour before Mr Moses' email. The discrepancy in time can be explained by the two hour time difference between Australian Eastern Standard Time and New Zealand Daylight Saving time. The response informed Mr Moses that Orora could not accept a further extension to his absence. Mr Graham noted that Mr Moses had already had seven weeks off and another request for two weeks was unacceptable. He referred to the frustration around business planning when there was so much uncertainty around Mr Moses' return.

[25] Mr Graham stated the company's tentative view that Mr Moses' extended time off had been "*somewhat abused*". He said Orora required Mr Moses' immediate return to work, stating that the following issues would be addressed with him:

1. *Not responding in a timely manner and general lack of communication.*
2. *Failure to return to work when required.*

[26] Mr Graham's email went on to say:

*If you are not able to return immediately, then you are to respond to us with your concerns by 4pm Wednesday (NZ time). It is our intention to initiate a serious misconduct disciplinary meeting, based on the above and that we are considering the termination of your employment. You may like to seek legal advice or representation in this matter. As requested before, we seek medical evidence of your expected delivery date and birth date (potential or actual) of your baby.*

[27] Mr Moses responded by email on Wednesday 5 February 2014 shortly after midday. He began with an update on the baby situation noting that, although labour had begun, there was still no baby. However, they were expecting the child to be born that day. Mr Moses stated his key concern at that time was his family and he would not be returning to work until his wife was home from hospital.

[28] He responded to Mr Graham's notification of a *serious misconduct* meeting stating the allegations had no substance. He noted he had been denied mobile email access and that he had advised his employer verbally and by email he would not be contactable during this leave. He referred to his difficulty in contacting Mr Graham and Mr Russell by email. He also referred to the lack of support, compassion and understanding which he wished to be a key topic in the meeting Mr Graham had indicated they would be having. Mr Moses' email concluded as follows:

*This discussion will continue on my return to work, if you wish to continue to hold a gun to my head like I feel you are doing, then fire me and I will seek legal advice as per your below email.*

[29] At 2.34pm that day Mr Graham sent Mr Moses the following email:

*Because of your inability to return to work as requested, we are not prepared to keep your job open any further and I hereby notify you that your employment with Orora Kiwi Packaging has been terminated.*

*You are not required to return to work, but we do request that you return all company property, such as keys and phones. Any outstanding moneys will be paid to you by 14 February.*

*Due to the above decision, there will be no requirement to conduct any further meetings.*

[30] Mr Moses says he had no further contact with the company and no money was deposited into his account by, or after, 14 February, as advised. He says his daughter was born on 11 February 2014.

### **Issues**

[31] The main issue for the Authority to determine is whether Orora was justified in dismissing Mr Moses on 5 February 2014.

### **Applicable Law**

[32] Whether or not a dismissal is justifiable must be determined on an objective basis by applying the test set out in s.103A of the Employment Relations Act 2000 (the Act). The test, applied to this situation, is whether Orora's actions, and how Orora acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal of Mr Moses occurred.

[33] The Act requires me to consider<sup>1</sup>:

- (a) Whether, having regard to the resources available to it, Orora sufficiently investigated the allegations against Mr Moses before dismissing him; and
- (b) Whether Orora raised its concerns with Mr Moses before dismissing him; and
- (c) Whether Orora gave Mr Moses a reasonable opportunity to respond to its concerns before dismissing him; and
- (d) Whether Orora genuinely considered Mr Moses' explanation (if any) in relation to the allegations against him before dismissing him.

[34] In addition to the factors listed above, I may consider any other factors I think appropriate. However, I must not determine Mr Moses' dismissal to be unjustifiable solely because of defects in the process followed by Orora if the defects were –

- a. minor; and
- b. did not result in Mr Moses being treated unfairly.<sup>2</sup>

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<sup>1</sup> S.103A (3) of the Act.

**Discussion**

[35] Mr Moses had been granted 22 days' annual leave from 12 December 2013 to 17 January 2014. Orora says this was a busy time of year for the business and the leave was granted on the basis of the information Mr Moses had given regarding the expected date of birth of his child. He had said the baby was due early January, but that his wife had given birth an average of four weeks early with his other three children. The inference his employer could draw from that was that Mr Moses anticipated the baby would be born in the first half of December 2013.

[36] However, the information Mr Moses gave regarding the due date of birth was inconsistent with the information in his statement of problem which records the expected date of birth as 4 February 2014. It is also inconsistent with the information given in Mrs Moses' Maternity Record, which Mr Moses provided to the Authority, where the expected date of delivery was given as 6 February. It is difficult to avoid the conclusion that Mr Moses deliberately misled his employer about the date his new baby was due.

[37] On 17 January 2014, which was Mr Moses' last day of approved annual leave, he advised Mr Graham his wife was experiencing some complications in her labour and was now overdue but expected to be induced in the coming days. As this was almost three weeks' before the expected date according to the maternity record, it was inaccurate to describe his wife as "*overdue*". I found Mr Moses' explanations regarding this to be unconvincing.

[38] Orora's response to Mr Moses' advice was to offer him two weeks' unpaid paternity leave and to ask him to confirm that he wished to take up the entitlement. While Mr Moses gave evidence that he thought he had emailed Mr Russell accepting the offer, I find it unlikely that he did. I prefer the evidence of Mr Russell on this matter. Mr Russell said he sent emails to Mr Moses on 21, 29 and 30 January following up on Mr Graham's offer of paternity leave. He had no response until 31 January, after Mr Graham emailed Mr Moses on 29 January to the effect that he was assumed to be AWOL. At that point Mr Moses contacted Mr Russell by telephone.

[39] I also prefer Mr Russell's account of that telephone conversation to that of Mr Moses. I find it likely Mr Moses did talk about resigning from his employment when

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<sup>2</sup> S. 103A (5).

Mr Russell told him he had exhausted all paid leave. That is borne out by the reference Mr Moses made in his email to Mr Graham of 3 February about "*reconsidering*" his resignation. If he had not already discussed resigning it would make more sense for him to refer to "*considering*" it in the email. Mr Moses' recollection of the telephone conversation, which was that Mr Russell had no problem with his taking a small amount of additional leave, is not credible.

[40] It is unsurprising that Orora had concerns over Mr Moses' lack of communication following the expiry of his annual leave. It was reasonable for it to convey the tentative view Mr Graham referred to in his email of 3 February that Mr Moses had "*somewhat abused*" his extended time off work. It was also reasonable for Orora to put Mr Moses on notice that it wished to address issues relating to his absence and lack of communication when he returned to work.

[41] In the same email of 3 February Mr Graham notified Mr Moses that, if he could not return to work immediately, he was to notify his employer of his concerns by 4pm NZ time on Wednesday 5 February. Mr Moses was informed of Orora's intention to initiate a serious misconduct disciplinary meeting based on the issues it had raised, and he was told his employer was considering the termination of his employment.

[42] Mr Moses met the deadline by emailing Mr Graham shortly after midday on 5 February as referred to in paragraphs 27 and 28 above. Orora's response, the same afternoon, was to notify him of the termination of his employment for his "*inability to return to work as requested*". I find this was not the action of a fair and reasonable employer.

[43] Mr Graham had told Mr Moses on 3 February he could expect to face a serious misconduct disciplinary meeting. He had suggested Mr Moses may like to seek legal advice or representation. What Mr Graham did not do was give Mr Moses any indication his employer was considering dismissing him without such a disciplinary meeting taking place.

[44] In his written evidence to the Authority Mr Graham said he was satisfied that Mr Moses' conduct, in relation to his lack of candour over his daughter's birth date and his poor communication and lack of responsiveness, amounted to serious misconduct. He said he had lost trust and confidence in Mr Moses and had notified

him of this decision in his email of 5 February. I do not accept that he notified Mr Moses of any loss of trust and confidence: his email terminating Mr Moses' employment made no reference to trust and confidence or to serious misconduct.

[45] In terminating Mr Moses' employment before conducting the disciplinary meeting it had notified him would take place, Orora denied him the opportunity to respond to its concerns and to explain his actions. The company clearly had suspicions about his truthfulness regarding the expected date of birth of his daughter. However, it did not put those concerns to Mr Moses, other than obliquely by referring to its tentative view that he had "*somewhat abused his extended time off*". That is insufficient notification of the employer's concerns and, in any event, was not noted as one of the matters to form part of the intended disciplinary meeting.

[46] I find Orora's action in dismissing Mr Moses was not one that a fair and reasonable employer could have made in all the circumstances at the time. The absence of a proper disciplinary procedure rendered the dismissal unjustifiable.

### **Remedies**

[47] Mr Moses originally sought reinstatement but chose not to pursue that and seeks only financial remedies for his grievance.

[48] He says he did not obtain alternative employment, despite strenuous searching, until 30 June 2014. He provided evidence of applying for positions in a range of occupations during that time before succeeding with his final application made on 5 June 2014. I am satisfied that Mr Moses made reasonable attempts to mitigate his losses.

[49] The Act provides that, where the Authority determines an employee has a grievance and has lost remuneration as a result, it must order the employer to pay the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration. At its discretion the Authority may order the employer to pay a greater sum.<sup>3</sup>

[50] I find it appropriate in this instance that Orora pay Mr Moses a sum equal to three months' ordinary time remuneration.

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<sup>3</sup> Section 128 Employment Relations Act 2000.

[51] Mr Moses' statement of problem did not seek compensation under s.123(1)(c)(i) of the Act, an omission which his counsel sought to rectify on the day of the investigation meeting. Counsel for Orora objected to the late addition of this remedy.

[52] I have considered that objection and have decided it would not be appropriate to deprive Mr Moses of an award of compensation because of an omission by his legal representative. It would have been obvious to counsel for Orora that it was highly unusual for a claim for unjustifiable dismissal not to include a claim for compensation and the late claim should have come as no surprise.

[53] I am satisfied the loss of Mr Moses' employment and the manner in which it was conveyed would have been hurtful and humiliating at a time when Mr Moses was awaiting the birth of his fourth child. I award him the sum of \$7,500.

### **Contribution**

[54] Where the Authority determines an employee has a personal grievance it is required by s.124 of the Act to consider the extent to which the employee's actions contributed towards the situation that gave rise to the grievance and, if those actions so require, to reduce the remedies accordingly.

[55] I find Mr Moses did contribute to the situation that gave rise to his grievance by giving his employer inaccurate and misleading information about the expected birth date of his daughter. During the investigation meeting he insisted he had always had 14 January in mind for the birth date. That is at odds with his leave application in which he told his employer the baby was due early January but implied his expectation that the birth would be up to four weeks earlier.

[56] In view of that, and his misleading assertion to his employer on 17 January that his wife was now overdue, I assess Mr Moses' contribution at 40% and the remedies I would otherwise have made are to be reduced accordingly as noted below.

### **Determination**

[57] Orora Packaging New Zealand Limited is to pay the following sums to Mr Moses:

- a. The sum of \$10,825.51 gross, under s.128 of the Act, calculated as three months' salary at \$6,014.17 per month less 40% contribution; and
- b. The sum of \$4,500 under s.123(1)(c)(i) of the Act, being payment of \$7,500 compensation less 40%.

**Costs**

[58] The issue of costs is reserved.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**