

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 214
3027977

BETWEEN SAMUEL NEWMAN
Applicant

A N D SOLID ROOFING LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
Peter Vandenberg, Director of Respondent

Investigation Meeting: 3 July 2018 at Auckland

Date of Determination: 12 July 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Mr Samuel Newman was issued with a written warning and suspended from his employment by the Respondent, Solid Roofing Limited (Solid Roofing), both without justification, and carried out in a procedurally unfair manner. These actions amounted to unjustifiable disadvantages under the Employment Relations Act 2000 (the Act).**
- B. In order to settle Mr Newman’s unjustified disadvantages, Solid Roofing is to pay to him the following sums, within 21 days of the date of this determination:**
- (a) \$3,500 compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings in respect of his unjustified**

disadvantages (\$1,500 in respect of the unjustifiable warning, and \$2,000 in respect of the unjustifiable suspension from employment).

- C. Mr Newman, was unjustifiably dismissed from his employment by Solid Roofing.**
- D. In order to settle Mr Newman's personal grievance claim of unjustified dismissal, Solid Roofing is to make payment of the following sums to him within 21 days of the date of this determination:**
- (b) \$15,000 compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings;**
 - (c) \$4,375 gross in lost remuneration under s 128 of the Act.**
- E. A penalty is ordered against Solid Roofing for its failure, when requested, to provide information to Mr Newman under the Act. A penalty of \$5,000 is ordered. The penalty is to be paid by Solid Roofing into the Authority within 21 days of the date of this determination. The penalty is then to be paid by the Authority into the Crown Bank Account.**
- F. Costs are reserved.**

Employment Relationship Problem

[1] The applicant, Mr Samuel Newman, was employed by Solid Roofing as an Assistant Roofing Technician/Health and Safety Supervisor until his dismissal on 16 January 2018. Mr Newman says the dismissal was unjustified and he seeks remedies in respect of it.

[2] Mr Newman also says that he received a verbal warning from his supervisor, Mr Jamie Cameron, in October 2017 for failing to provide a job safety environmental analysis (JSEA) for a particular job he was working on. He was not given any notice that he was going to be given a warning and was given the verbal warning in a carpark in Takapuna. Mr Newman says that there were reasons for his failure to provide the JSEA at the time but he was never given the opportunity to explain those reasons.

[3] Mr Newman says he received a written warning on 15 January 2018 following a complaint by a customer in respect of painting and damage to property which it was alleged he and his supervisor, Mr Cameron, were responsible for.

[4] Following receipt of the written warning, Mr Newman had a telephone discussion with Mr Vandenberg, director of Solid Roofing, which became heated. Mr Newman says the meeting ended with Mr Vandenberg putting the phone down and telling him he was stood down until further notice. Mr Newman says the warning was not justified and that the instruction that he was stood down amounted to an unjustified suspension from his employment.

[5] Mr Vandenberg disputes acting unjustifiably towards Mr Newman. Mr Vandenberg says there were numerous complaints about Mr Newman and his work. Mr Vandenberg says that Mr Newman was justifiably warned about his work performance and that following a serious complaint by a customer, his employment agreement was terminated. Mr Vandenberg says he was justified in ending the employment relationship.

Authority's directions at the case management conference on 11 June 2018

[6] Mr Vandenberg failed to file a statement in reply on behalf of Solid Roofing as required by the Employment Relations Authority Regulations 2000. On 7 June 2018, the Authority directed the parties to attend mediation. A case management conference was scheduled to take place with the parties on 11 June 2018. Mr Newman's then lawyer participated in the case management conference and Mr Vandenberg participated. Mr Vandenberg informed the Authority that he would not be attending mediation, despite the direction by it to do so.

[7] At the case management conference, Mr Vandenburg was directed to file a statement in reply on behalf of Solid Roofing by Monday, 18 June 2018. The investigation meeting was scheduled for 3 July 2018 and Mr Vandenburg on behalf of Solid Roofing was directed to file all relevant documents, including the wages and time records for Mr Newman, prior to the investigation meeting.

[8] A form of statement in reply was filed by Mr Vandenberg on behalf of Solid Roofing. However, the other documentation directed by the Authority was not produced by Solid Roofing.

Investigation meeting

[9] Mr Newman filed a witness statement as did his flatmate, Mr Gregory Steunebrink. Mr Vandenberg relied on his statement in reply. Witness statements were filed by Ms Sarah Bayly, Administration Manager for Solid Roofing, and Ms Michal Levi, who was responsible for management of Solid Roofing's accounts. Ms Levi did not attend the Authority's investigation meeting. No reason was given for this.

[10] Each of the witnesses attending the investigation meeting swore on oath that their evidence was true and correct. As allowed under s 174 of the Act, this determination does not set out all of the evidence. Rather, relevant facts and legal issues are set out, along with the Authority's conclusions.

First issue**Was Mr Newman unjustifiably disadvantaged by the actions of Solid Roofing?**

[11] Solid Roofing is a small residential and commercial roof repair contractor. Mr Newman was employed by Solid Roofing pursuant to an individual employment agreement dated 28 June 2017. The employment agreement was signed by both Mr Vandenberg and Mr Newman.

Verbal warning – October 2017

[12] In October 2017, Mr Newman was given a verbal warning by his supervisor, Mr Cameron. This was because he had failed to produce a JSEA as requested. The verbal warning was given to him in a carpark in Takapuna. Mr Newman was not given any notice that he may be given a verbal warning.

[13] Mr Vandenberg says he was extremely embarrassed by Mr Newman's failure to provide the JSEA at a meeting with a customer. Mr Vandenberg says Mr Newman's actions put Solid Roofing's relationship with an important client into jeopardy. This was the reason for the verbal warning. Mr Vandenberg was not present when the verbal warning was issued to Mr Newman by Mr Cameron. Mr Vandenberg was not aware of what was said to Mr Newman or what the details of the warning were.

[14] At the Authority's investigation meeting, Mr Vandenberg said a further verbal warning was supposedly given to Mr Newman in October 2017 which related to "numerous complaints about numerous situations". When questioned about what the complaints were, Mr Vandenberg said they included "tardiness, lateness, and not carrying out tasks as expected". Mr Newman was not aware of this warning. Mr Vandenberg was unclear as to what a warning meant and informed the Authority that he told Mr Newman that he needed to "pull up his socks". There was no mention by Mr Vandenberg of what his expectations of Mr Newman were or what the consequences may be if he failed to meet Mr Vandenberg's expectations.

Meeting on 12 January 2018

[15] Mr Newman says that he was requested by Mr Vandenberg to attend a meeting with him 12 January 2018. He was not told why. At the meeting, Mr Vandenberg spoke with Mr Newman about a residential roofing job that he and Mr Cameron had been working on in Cockle Bay in December 2017 ("Cockle Bay job").

[16] Mr Vandenberg explained to Mr Newman that the customer was not happy with the end result. The customer complained about the unevenness of the paint spray on the roof and that in some areas of the roof it was too thin. Mr Vandenberg also asked Mr Newman about the customer's actions towards him. Mr Vandenberg told the Authority there was a lot of joking at Solid Roofing's Christmas party about Mr Newman's interactions with this customer.

[17] Mr Newman told Mr Vandenberg that he had found the customer to be flirtatious with him. Mr Newman explained that the customer had offered him ham and cheese croissants, a drink and asked him to come inside her house. Other than accepting a glass of water, Mr Newman said he refused the customer's other requests.

[18] At the Authority's investigation meeting, Ms Bayly and Mr Vandenberg both say that the customer and her husband rang Solid Roofing to complain about the quality of work of the Cockle Bay job. Mr Vandenberg told the Authority that Mr Cameron had told him about the sexual innuendo and banter between Mr Newman and the female customer. This is denied by Mr Newman and was not put to him by Mr Vandenberg at the meeting on 12 January 2018. When asked by the Authority about the alleged flirtation between Mr Newman and the customer, Mr Vandenberg

accepted that Mr Newman rejected offers of food and to go inside the house. The meeting ended.

Written warning – 15 January 2018

[19] On the morning of 15 January 2018, Mr Newman received an email from Mr Vandenberg asking him to attend a meeting with him. There was no indication as to what the meeting was to be about. At the meeting, Mr Vandenberg explained to Mr Newman that Solid Roofing was struggling with labour costs and losses and he was informed that wages were going to be cut. Mr Vandenberg informed Mr Newman that he was considering reducing Mr Newman's wage by \$2 an hour and reducing the maximum number of hours he was to work each week.

[20] At the conclusion of the meeting, Mr Vandenberg slid an envelope across the table to Mr Newman and said to him "I am forced into giving you this written warning, please have a read and call me later". When Mr Newman got home, he opened the letter and was upset at what had been written. The letter stated:

10th January 2018

[Address]

WRITTEN WARNING

This serves as a written warning for serious misconduct while in the employment of Solid Roofing.

It has been brought to the attention of Peter Vandenberg as the owner of Solid Roofing Limited that during work hours on a client site in Cockle Bay – there was unprofessional and unacceptable behaviour with the client's wife. The client has phoned Solid Roofing and laid a serious complaint. This is taken very seriously and is considered Serious Misconduct and therefor [*sic*] the written warning has been issued. Your behaviour has detrimentally affected the integrity of Solid Roofing and caused damage to Solid Roofing's reputation.

This behavior [*sic*] is not to be displayed at work. You are not to have any further contact with clients or their wives unless asked to by your manager.

We were recommended to this job by one of our suppliers, therefore Solid Roofing is not likely to receive any further recommendations due to this complaint.

Regards

Peter Vandenberg

SOLID ROOFING

[21] No details of the alleged “unprofessional and unacceptable behaviour with the client’s wife” had been provided to Mr Newman at the meetings with Mr Vandenberg on 12 and 15 January 2018.

[22] At the Authority’s investigation meeting, it became clear that Mr Vandenberg had not fully investigated the alleged “serious” complaint about Mr Newman’s conduct. Mr Newman explained to the Authority that he and Mr Cameron both worked for a short period of time with their shirts off as it was very hot. However, he had not initiated any flirtatious behaviour with the customer’s wife, and indeed had rejected her offers of food and for him to come into the house.

[23] I accept Mr Newman’s version of events. He was a credible witness whose version of events has not changed throughout the Authority’s process.

[24] Mr Vandenberg wrote the warning letter on 10 January 2018, two days before meeting with Mr Newman. Mr Vandenberg said he had received a “serious complaint” from the customer’s wife about Mr Newman’s flirtatious behaviour. He had not. Rather, the customer’s husband was annoyed by the attention his wife was paying to Mr Newman and Mr Cameron working with their shirts off.

[25] I consider the written warning issued on 15 January 2018 was not only substantively unjustified, but procedurally unfair. It was written before the meeting was held with Mr Newman, and Mr Newman was not provided details of the “serious complaint”. Mr Vandenberg did not adequately investigate the complaint before issuing Mr Newman the written warning.

[26] Section 103A of the Act sets out the test of justification. Under the test the question of whether the warning was justifiable must be determined on an objective basis, by considering whether Solid Roofing’s actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[27] In applying s 103A of the Act, the Authority must also consider four particular factors, relating to the procedure and manner of issuing the warning as set out in s 103A(3) of the Act, as well as any others it thinks appropriate.

[28] In my view, the reasons and the manner of the written warning were not the actions of a fair and reasonable employer. Mr Newman spoke about the impact Mr

Vandenberg's actions had on him. He says he suffered physically, mentally and went from being a confident person to being apprehensive.

[29] I consider an appropriate remedy in the circumstances to be compensation of \$1,500 for the hurt and humiliation suffered by Mr Newman as a result of this unjustifiable action.

Telephone conversation on 15 January 2018

[30] Mr Newman telephoned Mr Vandenberg after reading the written warning to discuss it with him. The discussion became heated. Mr Newman's flatmate, Mr Steunebrink arrived home and seeing Mr Newman pacing and in a heated conversation, asked him to put the call on to speaker phone. Mr Steunebrink says he heard Mr Vandenberg swearing angrily at Mr Newman and concluding the conversation by saying "That's it Sam, I've had enough. Don't bother showing up for work tomorrow, I'm standing you down until further notice". Both Mr Newman and Mr Steunebrink say Mr Vandenberg ended the phone conversation by hanging up on Mr Newman.

[31] I consider the statement to Mr Newman by Mr Vandenberg amounted to a suspension. Clause 22.11 of Mr Newman's employment agreement provides for suspension where it is considered "likely that you have engaged in serious misconduct". I do not consider the suspension was fair or reasonable. I consider it amounted to an unjustifiable action by Solid Roofing. I consider an appropriate remedy in the circumstances to be compensation of \$2,000 for the hurt and humiliation suffered by Mr Newman as a result of this unjustifiable action.

Second issue

Was Mr Newman unjustifiably dismissed?

[32] Following Mr Newman's suspension, Ms Bayly contacted him to ask if he could come into the office later in the day to pick up a letter. Initially, Mr Newman agreed but then asked if she could email the letter to him to save him travelling all the way from Ellerslie to the North Shore. Ms Bayly did not say what the letter was about.

[33] At 4:13pm on 16 January 2018, Mr Newman received the following email from Mr Vandenberg:

Hi Sam, could you please read the attached letter and give me a call regarding the next few weeks, when you have had a chance to digest the information.

Regards
Peter Vandenberg

[34] The attached letter read as follows:

16 January 2018

Dear Sam

RE: NOTICE OF TERMINATION OF CONTRACT

This letter is to advise you of the termination of your contract between yourself and Solid Roofing Limited as per your contract page 22 clause: Notice period for termination of employment (general). This is served as of Tuesday 16th January 2018 and will be effective as of Tuesday 30th January 2018.

Yours sincerely
Peter Vandenberg
Manager

[35] When asked about the letter, Mr Vandenberg agreed that he had sent a letter to Mr Newman terminating the contract as he said he was entitled to do under clause 22 of the individual employment agreement.

[36] At 9:23pm on the same evening, Mr Newman sent an email back to Mr Vandenberg as follows:

Hi Peter

I have received your email/letter and I am informing you that I will be seeking legal representation on this matter. Regarding work I have been advised that because of the way this matter has been handled, it has grounds for a constructive dismissal. I feel this because I'm not comfortable coming back to work whilst I am pursuing legal action against Solid Roofing and will be having a lawyer working on my case.

Regards
Samuel Newman

[37] At the point of writing his letter, Mr Newman had already been dismissed by Mr Vandenberg.

[38] The dismissal was carried out in a substantively and procedurally unfair manner. Under the test in s.103A of the Act, the question of whether Mr Newman's dismissal was justifiable must be determined on an objective basis, by considering whether Solid Roofing's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[39] In my view, the reasons for and the manner of Mr Newman's dismissal were not the actions of a fair and reasonable employer. Mr Newman gave evidence of the impact the dismissal had on him. Mr Newman says he felt betrayed by Mr Vandenberg and humiliated by the way he was treated. Mr Newman lost his appetite, had difficulty sleeping and was stressed that he would not be able to pay his bills.

[40] I consider an appropriate remedy in the circumstances to be compensation of \$15,000 for the hurt and humiliation suffered by Mr Newman as a result of his unjustifiable dismissal.

[41] Mr Newman suffered an immediate loss of income following his dismissal. Mr Newman found work for a friend in Christchurch for 20 hours a week for a short period of time. Mr Newman calculated his losses at \$4,375 gross. I order Solid Roofing to pay Mr Newman \$4,375 gross in lost remuneration under s 128 of the Act.

Contribution

[42] I am required by s124 of the Act to consider whether Mr Newman contributed to the circumstances leading to the unjustifiable disadvantages, being the written warning and the suspension, and to the unjustifiable dismissal. I do not consider Mr Newman did contribute. Accordingly, the remedies will not be reduced.

Penalties

[43] Mr Newman is seeking penalties for breaches of good faith under s4 of the Act by Solid Roofing and for failures by Solid Roofing to provide wages and time records requested by him under s130 of the Act.

[44] Mr Vandenberg acted in careless disregard of his obligations as an employer to Mr Newman. Mr Vandenberg failed to treat Mr Newman in good faith and failed to provide him with wages and time records when requested.

[45] Mr Vandenberg, in my view, also failed to respect the Authority's investigation process. He refused, despite being directed to do so, to attend mediation, which may have resolved matters between the parties. Mr Vandenberg refused, despite being directed to do so, to provide all documentation to the Authority prior to the investigation meeting. Mr Vandenberg failed to provide wages and time records as directed by the Authority. These breaches, in my view, were deliberate and it is appropriate in all the circumstances for a penalty to be ordered.

[46] I consider the alleged good faith breaches to have been largely related to the unjustifiable treatment of Mr Newman and this has been dealt with under s103A of the Act.

[47] I consider there has been a breach of s130 of the Act, the failure to provide wages and time records.

[48] The leading case on penalties in the employment jurisdiction is *Borsboom (Labour Inspector) v Preet PVT Limited & Ors*¹.

[49] In that case, a full bench of the Employment Court considered the approach to be taken by the Authority and the Court when considering penalties for breaches of minimum employment entitlements. The Court in *Borsboom* set out the objectives of penalties in employment law generally at paras [61] to [63] of its decision. To summarise, they are to:

- (a) Punish those who breach statutory obligations;
- (b) Deter deliberate breaches;
- (c) Compensate the victim of the breach;
- (d) Eliminate unfair competition in business.

[50] The Court applied a four step process to the assessment of penalties by the Authority and the Court in order to provide a "uniform, reasonably predictable result". The four step process is to ensure that "fixing the amount of a penalty, or penalties, is consistent and transparent".

¹ [2016] EmpC 143

Step 1 – nature and number of breaches

[51] Solid Roofing failed to provide wages and time records as requested by Mr Newman under s 130(2) of the Act. Solid Roofing, through Mr Vandenberg, was also directed by the Authority to provide this information. The maximum penalty available for a breach of s 130(2) is \$20,000 under s 135 of the Act. Under s 130(4) of the Act, every employer who fails to comply with any requirement of s 130 is liable to a penalty imposed by the Authority. I consider there has been one breach by Solid Roofing.

Step 2- Assessment of the severity of the breach in each case to establish a provisional penalty starting point and consider both aggravating and mitigating factors.

[52] Factors to be taken into account by the Authority include the assessment of the severity of the breach, and taking into account both aggravating and mitigating factors. Mr Vandenberg gave no reasons for failing to provide Mr Newman with his wages and time records and had no reason for failing to produce the records when directed by the Authority. I do not consider the failure prevented Mr Newman making out his claim for losses. However, a penalty is needed to act as a deterrent not only to Solid Roofing but also to the wider community of employers. The level of the penalty should be to punish Solid Roofing for its failure to comply with its statutory obligations.

[53] The Authority was not presented with any evidence that Solid Roofing has previously breached its statutory obligations in this regard. I consider a provisional penalty of \$5,000 to be appropriate.

Step 3- Means and ability to pay the provisional penalty

[54] Mr Vandenberg claimed that Solid Roofing is a small roofing company and is in financial difficulties. No financial records or other evidence was provided as to Solid Roofing's means and ability to pay. Therefore, it is not appropriate to reduce penalties.

Step 4- Proportionality of outcome

[55] Penalties for similar breaches range between \$3,000 and \$6,000. I consider a penalty of \$5,000 to be appropriate in all the circumstances and consistent with other Authority determinations.

[56] Solid Roofing had ample opportunity to comply with its statutory obligation, it deliberately chose not to, this was despite the Authority's direction that it do so.

[57] A penalty of \$5,000 is to be paid by Solid Roofing to the Authority, for transfer to the Crown Bank Account within 21 days of the date of this determination.

Costs

[58] Costs are reserved. Mr Newman has 14 days in which to file a memorandum as to costs and Solid Roofing has 14 days in which to reply.

Anna Fitzgibbon
Member of the Employment Relations Authority