

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 39  
5541692

BETWEEN            SONNY NGERENGERE  
                                 Applicant  
  
AND                    PUKEKO FREIGHT LIMITED  
                                 Respondent

Member of Authority:    Michele Ryan  
  
Representatives:        Tania Allen, Advocate for the Applicant  
                                 Gary May, on behalf of the Respondent  
  
Investigation Meeting:    3 February 2016 at Napier  
  
Determination:            31 March 2016

---

**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

---

**Employment relationship problem**

[1]    Mr Sonny Ngerengere was employed as a full time truck driver with Pukeko Freight Limited (PFL) for almost two years until his employment was terminated on 14 December 2014. He was dismissed for destroying company information and unauthorised absences from work.

[2]    The statement of problem lodged with the Authority accepts that Mr Ngerengere left the workplace on 12 December 2014 without advising PFL. All other alleged misconduct is denied. Remedies are sought for the dismissal which was said to be unjustified.

**Background events**

[3]    Amongst other things PFL provides on-site transport services to Heinz Wattie's Limited (HW) in Hastings. Mr Gary May is PFL's sole director.

[4] Mr Ngerengere's role involved transporting produce within and between HW's factory and distribution centre. The work phone allocated to Mr Ngerengere was the primary mechanism by which HW and PFL communicated. It exclusively held information critical to HW's delivery schedules, work timetables and contact numbers.

[5] Early in his employment Mr Ngerengere transferred information stored on the work phone to his personal Google email account (the g-mail account) which could be accessed using the work phone. PFL was unaware that Mr Ngerengere had altered the method of access and location of its information.

[6] The events that triggered Mr Ngerengere's dismissal occurred on Friday 12 December 2014. Mr Ngerengere began work that day at 5am. He was scheduled to work until 5pm. At 8am or thereabouts he received a text message from his sister stating that she was thinking of him.

[7] After receiving his sister's text Mr Ngerengere sent a message to Mr May, stating he was "*not in a good mood*". Mr May replied "*lucky you*". Mr Ngerengere responded: "*fuck you this would have been my mum's birthday if she hadn't been killed*". Shortly after he called his partner and left HW.

[8] Mr May says at the time he received Mr Ngerengere's message he viewed the content as "*another of Sonny's tall tales*".

[9] Mr Ngerengere advised the Authority that in 2000 his mother was killed by her husband. He was unable to recall whether he had told Mr May of the circumstances of his mother's death, but says the issue must have come up at some point.

[10] On balance I accept Mr May's evidence that he was unaware of the event leading to the death of Mr Ngerengere's mother or of the significance of the date to Mr Ngerengere.

[11] There is no real dispute that over the ensuing 6 to 7 hours Mr May called and left Mr Ngerengere "*at least half a dozen times*" on the work phone as well as his personal and home phones but that these too went unanswered. Mr Ngerengere agrees he was aware that Mr May was trying to reach him but says he was too angry and upset to engage.

[12] Between 2-3pm Mr May formed a view that Mr Ngerengere was unwilling to respond to his calls. He obtained HR advice and at 3pm sent a text message to Mr Ngerengere asking him to return the work phone and all security cards and advised he was suspended<sup>1</sup>.

[13] On receipt of Mr May's request to return the work phone Mr Ngerengere dismantled the work phone's ability to access the g-mail account and reformatted the phone back to the original factory settings. He then sent Mr May a text message advising his partner would return the work phone to HW. There was no further contact between the parties that day.

[14] The following morning Mr May informed Mr Ngerengere by email that he wanted to discuss the events of 12 December early next week. He retrieved the truck phone from HW in the afternoon and found all company information had been removed. At 2.54pm he sent the following message to Mr Ngerengere:

*I have discovered your destruction of company property. I don't need to hold a meeting. You have committed a gross breach of company policy. So you have been dismissed...*

[15] On 14 December 2014 Mr May sent a letter to Mr Ngerengere setting out the events of Friday and his earlier invitation to discuss those matters and stated:

*Our goal at that time was to meet with you and find a way forward allowing you to explain your actions with the end goal of your return to work. It was disappointing the only contact with you after you walked off the job was a text message saying you would leave the phone at Watties security. Upon uplifting the phone it was disappointing to find that you had deleted all contacts and email addresses along with other company information.*

[16] The letter further advised that PFL had become aware (in addition to Mr Ngerengere's absence from work on Friday) of further recent unexplained or unauthorised absences from the workplace, although no detail was furnished as to when PFL considered those instances occurred. The letter then stated:

*These actions are wilful or deliberate behaviour by you that is inconsistent with the continuation of your contract of employment. We consider that your actions constitute serious misconduct warranting summary dismissal.*

[17] Mr Ngerengere was paid his final wages and entitlements shortly thereafter.

---

<sup>1</sup> No grievance was raised or claimed as to the way the suspension was conducted and I decline to make findings on the matter.

**Issues**

[18] The particular issues to be determined in the matter are:

- whether Mr Ngerengere was unjustifiably dismissed;
- if Mr Ngerengere's dismissal was unjustified, what remedies should be awarded.

**Was Mr Ngerengere unjustifiably dismissed?**

[19] Whether a dismissal is justifiable is determined by the Authority inquiring into the employer's actions, both as to whether there were reasonable grounds for the dismissal and whether the process taken to reach that decision was fair. The Authority is required to objectively assess whether those actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.<sup>2</sup>

[20] Turning first to the substantive grounds for the dismissal, as noted Mr Ngerengere acknowledged in his written statement to the Authority that he had left HW on 12 December 2014 without advising PFL. During the investigation meeting Mr Ngerengere conceded he would occasionally leave HW before the end of his shift. He says he would get permission from the relevant HW manager but accepts that he had been instructed<sup>3</sup> to obtain Mr May's agreement before leaving work early.

[21] It was clear that the decisive event for PFL was the removal of information from the work phone. PFL refers to Mr Ngerengere's employment agreement which states that deliberate destruction of the employer's property may result in summary dismissal.<sup>4</sup> Mr Ngerengere advanced an argument that any updates on HW's information had been undertaken by him, that he had placed the information of his g-mail account paid for by him, and therefore information was personal to him. I do not accept Mr Ngerengere's position on this matter.

[22] It is well established that information provided to an employee whilst undertaking duties for his employer is information that the employer is entitled to. Mr Ngerengere had no right to transfer PFL's information to his g-mail account without

---

<sup>2</sup> Section 103A employment Relations Act 2000

<sup>3</sup> written instructions dated 21 September 2014

<sup>4</sup> Clause 13 Termination of Employment

its knowledge or permission, nor was he entitled to exclude PFL's access to the information.

[23] Without a satisfactory explanation in regards to the allegations made against him it may have been open for PFL to dismiss Mr Ngerengere for each of the above actions alone. However I must also have regard to the procedure PFL adopted when it dismissed Mr Ngerengere.

[24] Mr Ngerengere first became aware that PFL was considering terminating his employment when he was advised of his dismissal by email. The decision was confirmed in a letter the following day. PFL acknowledges it gave no prior warning to Mr Ngerengere that it was contemplating his dismissal, and did not afford him an opportunity to comment on the matter. At a very minimum, procedural fairness requires an employer to properly advise an employee of its concerns and provide an opportunity for the employee to explain or respond to those matters before a dismissal is effected. I accept PFL is a very small business without sophisticated employment processes but that does not excuse its failure to implement statutory requirements for procedural fairness<sup>5</sup> I am further unwilling to accept an inference that there was nothing Mr Ngerengere could have said, to justify PFL's disregard of its obligations in this way. I must find that Mr Ngerengere's dismissal was unjustified because the absence of a fair process was not a minor defect. He was not given an opportunity to explain his actions and advise of the context in which these occurred.

### **What remedies should be awarded?**

#### *Reimbursement of wages*

[25] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee "*as a result of the grievance*". Mr Ngerengere seeks reimbursement of lost wages between his dismissal and 19 February 2015 when he commenced alternative employment with a produce exporting company.

[26] PFL strongly contests Mr Ngerengere's assertion that he did not obtain work until 19 February 2015. Evidence was produced to establish that Mr Ngerengere was engaged in courier duties relatively soon after his dismissal.<sup>6</sup>

---

<sup>5</sup> Section 4(1A)(c) and s 103A(3) Employment Relations Act 2000

<sup>6</sup> Access activity reports from HW

[27] On questioning, Mr Ngerengere acknowledged he helped his partner with her courier duties particularly in the lead up to Christmas 2014 when it was busy, but says in January and February his assistance was only required for two days a week. He was not paid for this work. He agrees that between mid-December and late January to early February he contemplated getting permanent courier work and thought the work experience would be helpful.

[28] Having examined the evidence and Mr Ngerengere's testimony I am satisfied that Mr Ngerengere's engagement with his partner's business was greater than that initially portrayed to the Authority.<sup>7</sup> I consider it likely that his involvement with her activities alongside the tentative plans for future courier work were of such an extent that he was unavailable for alternative work to mitigate his losses. He is not entitled to a remedy of lost wages in these circumstances and I decline this aspect of his claim.

#### *Compensation*

[29] Mr Ngerengere's evidence in respect to the effect of his dismissal was negligible. Nevertheless I accept that he has felt embarrassed when picking up or delivering parcels to HW during the period he was assisting his partner with her courier duties. Subject to an assessment as to contributory behaviour I assess that an award of compensation of \$1,000 is appropriate.

#### *Contribution*

[30] Section 124 provides that the Authority must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[31] There is an inference throughout Mr Ngerenge's evidence that if Mr May had properly inquired about his wellbeing following his text message instead of responding with an "*insulting*" message then none of the events that occurred on 12 December 2014 would have occurred.

[32] I accept Mr May's reply "*lucky you*" may have been flippant, but I am not persuaded the response can be fairly characterised as offensive or callous in the way Mr Ngerengere seeks me to find. This is particularly so where Mr Ngerengere does

---

<sup>7</sup> In an email dated August 31 2015 and provided to the Authority as evidence Mr Ngerengere said he helped his partner "for a few weeks".

not dispute he would often report his frustrations to Mr May about workplace matters in circumstances where nothing further was required from PFL. I do not consider Mr May's response was so provocative that it should absolve Mr Ngerengere's subsequent conduct.

[33] As noted, there is no dispute that the events for which Mr Ngerengere was dismissed did occur. I am confident his conduct directly contributed to the situation that led to his personal grievance. He further (albeit reluctantly) conceded that the removal of information from the phone was deliberate and calculated to have an immediate detrimental impact on PFL's operations with HW. That action alone is exceptionally blameworthy and warrants a 100% reduction to remedies. I have however, taken into account the unique circumstances in which the events leading to the dismissal occurred. I consider it likely that Mr Ngerengere's heightened emotions brought on by the significance of the date impaired his judgement. A 50% reduction in remedies is appropriate in all the circumstances. The sum awarded as compensation for distress and humiliation is reduced to \$500 as a consequence.

### **Orders**

[34] Pursuant to s.123(1)(c)(i) Pukeko Freight Limited is ordered to pay Mr Ngerengere the sum of \$500.

### **Costs**

[35] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority