

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 563  
3171242

BETWEEN CONNOR ROBERT SCOTT  
Applicant

AND TOPCATCH LIMITED  
Respondent

Member of Authority: Leon Robinson

Representatives: Stephen Langton, counsel for the Applicant  
Lawrence Ponniah, counsel for the Respondent

Investigation Meeting: 29 September at Auckland

Determination: 1 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Connor Scott (Mr Scott) claims that he was unjustifiably dismissed from his employment with TopCatch Limited (TopCatch) as Store Manager. TopCatch responds maintaining its decision to dismiss was justifiable.

[2] The parties were unable to resolve the problem by the use of mediation and Mr Scott now asks the Authority to resolve it by finding he has a personal grievance for unjustifiable dismissal and granting him formal orders for reimbursement, compensation, and penalties.

**The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged from Mr Scott, his mother Ms Jane Allpress, Mr Chris O'Neil TopCatch's General Manager (Mr O'Neil), and Mr Chris Schofield TopCatch's Operations Manager (Mr Schofield).

All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also made closing submissions to the Authority.

[4] As permitted by s 174E of the *Employment Relations Act 2000* (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[5] The issues requiring investigation and determination were:

- (a) should there be a penalty against the TopCatch for breach of s27(2) of the *Holidays Act 2003* and if so, in what amount?
- (b) should there be a penalty against TopCatch for breach of s60(2)(b)(ii) of the *Holidays Act 2003* and if so, in what amount?
- (c) should there be a penalty against TopCatch for breach of clause 7(c) of the employment agreement and if so, in what amount?
- (d) was that dismissal what a fair and reasonable employer could have done in all the circumstances at the time as prescribed by the test of justification set out at section 103A of Act?
- (e) if TopCatch is found to have acted unjustifiably what remedies should be provided to Mr Scott:-
  - (i) reimbursement of lost wages (subject to evidence of reasonable endeavours to mitigate loss)?;
  - (ii) compensation of \$30,000.00 under s123(i)(c)(i) of the Act?
  - (iii) loss of holiday pay (on any award of reimbursement);
  - (iv) loss of Mr Scott's Kiwisaver contributions (on any award of reimbursement);
- (f) should either party contribute to the costs of the other party?

### **The facts**

[6] TopCatch owns and operates a number of retail stores selling fishing-related equipment and products throughout the North Island. From 16 July 2019 Mr Igor Ivanov was the sole director of TopCatch.

[7] Mr Scott commenced employment with TopCatch on 28 February 2018 at its Whangaparaoa store as a store person. On 21 March 2018 Mr Scott succeeded to a store manager role of the Whangaparaoa store.

[8] On 1 July 2021 by agreement between the parties Mr Scott returned to a store person role on a part-time basis. A written employment agreement dated 14 June 2021 and signed by Mr Scott on 15 June 2021 recorded the terms of that employment. Mr Scott was paid a wage of \$26.00 per hour and was contracted to work 27 hours over three days per week.

[9] An inventory stocktake was undertaken of the Whangaparaoa store by an external auditor on 30 June 2021. That stocktake identified a discrepancy in stock of \$26,822.42 (the discrepancy) which TopCatch diagnoses as a stock shortfall. The discrepancy is said to represent half of the store's annual profit or about one quarter of stock instore for sale. It says that there has never in its history been such a shortfall in any of its stores. Mr O'Neil says the discrepancy raised concerns about missing stock and Mr Scott's stock management.

[10] On 8 July 2021 Mr O'Neil invited Mr Scott to attend a meeting with Mr O'Neil and Mr Schofield to discuss the discrepancy. There was agreement that the stocktake was not wholly accurate. Mr Scott explained the reasons why he believed the stocktake was inaccurate and repeated concerns he had raised about the stock recording system and process he had raised with TopCatch during his time as store manager. These reasons included lack of security cameras, no access to historical stock reports, transfers between stores, lack of proper line counter to accurately measure out fishing line sold, guides for fishing rod repairs, decants i.e the breaking up of rod and reel set to sell individually, bait write-offs, receipting, lack of training on new stock system, and lack of head office support/responses to queries.

[11] Mr Scott stated that the discrepancy was not correct and he could locate various stock items towards correcting the discrepancy. Mr Scott and Mr Schofield attended at the Whangaparaoa store with the store manager and they reviewed the stock-take system and the procedures to check the discrepancy. They identified errors and as a result of adjustments, the discrepancy was revised to \$25,990.67.

[12] On 6 August 2021 Mr Scott received an email inviting him to a meeting with Mr O'Neil that proceeded on 13 August 2021 as follows:-

Hey Connor

We need to catch up and go through this stocktake from TopCatch Whangaparaoa. As you know the total stocktake write off value was as per below:

|                      |             |
|----------------------|-------------|
| Full stocktake       | -\$34375.00 |
| Squid Jig correction | +\$7541.41  |
| Stock correction     | +\$ 841.33  |
| Total                | -\$25992.67 |

The total write off for each category can be seen in the attached spreadsheet. You will notice there is a worrying amount of stock missing, stock that it is the Manager's responsibility to keep track of. The really worrying one is the bait write off of over \$5,000, which was supposed to of been counted two weeks before your stocktake.

I would like to catch up with you this coming Friday the 6<sup>th</sup> at 10.00am at TopCatch HQ in New market to discuss the attached.

Let me know if this time suits you. If not happy to shift this around.

Cheers

Chris O'Neil

[13] At the meeting on 13 August 2021 Mr O'Neil told Mr Scott that he (Mr Scott) had deliberately breached TopCatch's stock keeping procedures, had failed to complete requested stock checks throughout the year, that his behaviour was inconsistent with his position as manager and that his behaviour was conduct which was dishonest. Mr O'Neil then informed Mr Scott that he was dismissed without notice because of his serious misconduct and his employment would end immediately.

[14] A letter dated 13 August 2021 confirms the termination of Mr Scott's employment. Mr Scott says the letter was pre-prepared and was handed to him at the meeting. TopCatch says it was prepared during the meeting and Mr O'Neil slipped away briefly to attend to it. I accept Mr Scott's evidence that he did not open the letter when it was given to him. I also accept it had been pre-prepared.

### **An unjustifiable dismissal**

[15] No notes were taken of the two meetings held with Mr Scott in relation to the discrepancy.

[16] While Mr O'Neil gave evidence that the meeting of 8 July 2021 was the commencement of a disciplinary process, I do not agree that Mr Scott was given to understand the same. I am not persuaded of Mr O'Neil's evidence that he informed Mr Scott of the seriousness of concerns he was facing relating to the discrepancy and that it could lead to his instant dismissal. While I accept that in the meeting of 13 August 2021 Mr Scott may well have apprehended a serious tone to matters, that was not

because his employer overtly and expressly communicated to him his continuing employment was in jeopardy. It was obliged to do so but I find it did not.

[17] I am not persuaded by Mr O'Neil's evidence that he invited Mr Scott to respond to the following specific concerns:-

- a. that Connor's conduct was a serious breach of TopCatch stock keeping procedures
- b. that Connor failed to complete the requested stock checks throughout the year
- c. that Connor's conduct was in breach of the requirement that as manager he was to maintain and monitor stock, amongst other things
- c. that in the circumstances Connor's continued employment could be untenable

[18] I find it unlikely that Mr O'Neil did so because his email of 6 August 2021 made no reference to these specific concerns. It ought to have if they had actually been discussed at the meeting on 8 July 2021. I consider that if they had been put to Mr Scott, Mr O'Neil would not be referring to a "catch up" meeting with Mr Scott to discuss them. For the same reasons, I am not persuaded that Mr Scott was given to understand that his employment was at risk and liable for termination. The tenor of a "catch up" meeting is very different to a meeting the outcome of which could be dismissal. The documentary evidence establishes to my satisfaction that Mr O'Neil merely notified Mr Scott of a "catch up" type meeting and not a "disciplinary" type one as a precursor to dismissal.

[19] The letter of 13 August 2021 confirming Mr Scott's termination stated:-

- As discussed during the meeting, your conduct leading to this huge stock loss:
- was a deliberate breach of our stock keeping procedures
  - failed to complete required stock checks throughout the year
  - behaviour by you that is inconsistent with your position as Manager, which is to maintain and monitor your stock amongst other things
  - was conduct which was considered to be dishonest, and in the circumstances your continued employment during a notice period would be unreasonable.

[20] I am not persuaded that there was any conversation or engagement with Mr Scott on anything other than the discrepancy situation itself.

[21] I do not accept that there was any discussion with Mr Scott that he had deliberately breached stock keeping procedures. I find that no such allegation was put to him and I am not persuaded there was any specific stock keeping procedures identified to him that he had breached in relation to which his feedback was sought.

[22] As well, Mr O'Neil does not refer to an allegation of acting deliberately. Yet Mr Scott was dismissed for that type of conduct as is clear from the termination letter. I find there was no such allegation put to him in advance for him to answer, and further, there was no evidence of the same entitling TopCatch to dismiss. The evidence of improper actions that are deliberately motivated required very cogent evidence to justify any finding of the same.

[23] I find too that there was no allegation or evidence put to Mr Scott that he had failed to complete required stock checks throughout the year. The evidence before the Authority was that he had in fact completed his stock checks. No evidence was put to Mr Scott that he had failed to do so for him to respond to.

[24] I find that there is no evidence to support TopCatch's finding that he behaved in such a way that was inconsistent with his duty to maintain and monitor stock. There was no specification of any behaviours or specification of duties in relation to maintenance and monitoring of stock. I find that there were no particulars or evidence of this allegation put to Mr Scott for him to respond to. I find the allegation could not have been upheld.

[25] The termination letter states that Mr Scott was considered to have been dishonest. TopCatch was not entitled to make that finding. I find it had not put any such allegation to Mr Scott in advance for him to answer. I find that it had no evidence of the same and it did not put any evidence to Mr Scott for him to respond to in order for it to make such a finding. It is a very serious allegation to accuse an employee of acting dishonestly. It requires cogent evidence convincing to a commensurate high standard. I find that TopCatch was not entitled to reach any conclusion that Mr Scott had been dishonest for it had no evidence of the same.

[26] At no time was Mr Scott informed that he could have a representative with him in the two engagement meetings he had with TopCatch following which it terminated his employment. I find that was unfair to Mr Scott and not the actions of a fair and reasonable employer.

[27] Mr Scott was not given the opportunity to provide input to a proposal that he be dismissed. Mr Scott did engage about the stock discrepancy. But he was not provided an opportunity to give feedback on whether or not he should be dismissed.

[28] It was not for Mr Scott to prove his innocence. I conclude that TopCatch simply concluded that Mr Scott was responsible for the discrepancy. While he proffered possibilities, it was not for him to prove he was not responsible. It was for his employer to establish that it had reliable cogent evidence entitling it to reach a conclusion that he had acted improperly. It did not have to prove that he had in fact misappropriated stock, rather, it was required to have conducted a fair process gathering evidence entitling it to believe on reasonable grounds, and it did genuinely believe, that he had done so.

[29] There was nothing in Mr O'Neil's email of 6 August 2021 that would have alerted Mr Scott to the eventual termination of his employment. It conveys an entirely different tone and complexion to a disciplinary meeting the outcome of which was dismissal.

[30] It was made crystal clear to the Authority that TopCatch has a clear view that Mr Scott is responsible and had misappropriated the stock represented by the discrepancy. It says it decided not to involve the Police out of consideration for Mr Scott. I have a very clear view TopCatch is not entitled to reach a view Mr Scott had misappropriated the stock represented by the discrepancy. I consider that view wholly without foundation and unreasonable.

[31] For the reasons stated above, I find that TopCatch's actions in terminating Mr Scott's employment and the way in which it proceeded to reach that decision in all the prevailing circumstances were not the actions of a fair and reasonable employer. Accordingly I find that Mr Scott has a personal grievance for unjustifiable dismissal.

### **Resolving the personal grievance**

[32] Mr Scott is entitled to formal orders to resolve the personal grievance I have found.

[33] I must first consider whether there was any blameworthy conduct on Mr Scott's part which contributed to the situation that led to the personal grievance I have found. I find that there was no such blameworthy conduct on Mr Scott's part and there is no basis to reduce either the nature or the extent of any remedies to be provided.

### *Compensation*

[34] Mr Scott and his mother gave evidence that other people quickly learned he had been dismissed. Mr Scott says the Mangawhai store operator phoned him within hours

of his termination and advised he heard that Mr Scott had been 'fired'. Mr Scott says the New Lynn TopCatch store manager also phoned him to see if he was ok. He also received a call from an ex TopCatch employee who had also learned of his termination.

[35] Mr Scott gave evidence he is "pretty quiet and reserved person" when it comes to personal circumstances, but he said he found it embarrassing to get calls out of the blue about his dismissal. He said he told hardly anyone about being let go because I didn't want everyone to know, mainly his parents, a close mate and a close fishing buddy/neighbour and that was not until late in the afternoon/early evening on the day he was dismissed.

[36] Mr Scott says he enjoyed his job at TopCatch. It wasn't just a job for him, his passion is fishing so working in the industry surrounded by like minded people was really important to him. He said that having all that taken away from him in the space of a day was really difficult. He also recounts how he went straight into lockdown within a week of it all happening. He had to cut straight into his savings as he had no income for months. He was gutted that he had to apply for an unemployment benefit.

[37] Mr Scott points out that TopCatch delayed paying his holiday pay. It was not until his lawyers got involved that it was eventually paid to him some ten weeks after it was supposed to have been paid. He was not eligible he says for the benefit because of the outstanding holiday pay due to him. Consequently, he couldn't go to work, get a new job or get any support. He says he just had to sit at home and do nothing. He says he was very annoyed and stressed out and found the financial stress really hard. He said he had to consider everything he wanted to do and consider if it would cost him money. Reluctantly he had to use his savings and that made him even more stressed as it had taken him two years to build up. He had intended to continue to work at TopCatch alongside his skipper work. He knew other skippers who worked at TopCatch part time too. He said he needed that steady income to supplement the erratic skipper work.

[38] Mr Scott was already living at home when his employment with Topcatch ended, but he needed even more support from his parents to get through to summer without any income. This was also embarrassing for him he says.

[39] Mrs Scott's mother Ms Jane Allpress gives evidence to the Authority that Mr Scott isn't very forthcoming with his emotions, and he keeps things pretty close to his chest. She says he does not like any kind of confrontation and goes out of his way to

avoid it. She says too that he will easily step forward and stand up for others without a thought.

[40] I find that Mr Scott has suffered embarrassment, loss of dignity, hurt and humiliation. Having regard to the evidence I award Mr Scott \$10,000.00 as compensation. I order TopCatch Limited to pay to Connor Robert Scott the sum of \$10,000.00 (Ten thousand dollars) as compensation and to do so within 28 days of the date of this determination.

#### *Reimbursement*

[41] Mr Scott gives evidence that loss of his job was extremely inconvenient over winter because there was no skipper work available. He passed his skippers ticket in November 2021 and slowly picked up a few contracts on a self-employed, contractor basis, as summer started, but it was sporadic. He gives evidence of his total earnings in the seven months after he was dismissed from TopCatch. He also gives evidence of his earnings in the part-time store person role. He gives evidence too that he did not earn anything until 28 December 2021. He claims three months lost remuneration despite the fact that he was out of work for more than three months. He calculates his loss at 13 weeks x \$607.80 = \$7,901.40 (gross). I order TopCatch Limited to pay to Connor Robert Scott the gross sum of \$7,901.40 (Seven thousand nine hundred and one dollars and forty cents) as reimbursement and to do so within 28 days of the date of this determination.

[42] Mr Scott received 3% employer KiwiSaver contributions on top of his wages, so he claims those lost contributions too. I order TopCatch Limited to pay to Connor Robert Scott the gross sum of \$237.04 (Two hundred and thirty seven dollars and four cents) as loss of employer kiwi-saver contributions on the award of reimbursement and to do so within 28 days of the date of this determination.

#### *Penalty*

[43] Mr Scott seeks a penalty in respect of TopCatch's failure to pay his holiday pay in the pay run after it became due. I understand it was only pay as a result of his lawyers' intervention some ten weeks after it should have been paid.

[44] I am satisfied that a punitive response is appropriate in order to denounce and deter conduct blatantly contrary to clear statutory requirements. Holiday pay must be

paid when it is due so that the clear objects of the Act rest and recreation are met. I order TopCatch to pay a penalty of \$2,000.00 (Two thousand dollars) to Connor Robert Scott and to do so within 28 days of the date of this determination.

**Costs**

[45] Costs are reserved. The parties are encouraged to resolve any issue of costs between them but if they are unable to do so, Mr Langton is to lodge and serve a memorandum on costs within 14 days of the date of this determination. Mr Ponniah will have 14 days after the date of service to lodge and serve any reply memorandum. I will not consider any memorandum out of time without leave.

Leon Robinson  
Member of the Employment Relations Authority