# Employment Court of New Zealand



## Thorne v Rolton [2019] NZEmpC 171 (22 November 2019)

Last Updated: 26 November 2019

**IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI**

[2019] NZEmpC 171
**EMPC 377/2018**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | LANCE THORNE<br>Plaintiff |
| AND | JOHNATHON ROLTON<br>Defendant |

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| Hearing: | 29 October 2019 (Heard at Christchurch) |
| Appearances: | Plaintiff in person<br>K Murray, advocate for defendant |
| Judgment: | 22 November 2019 |

**JUDGMENT OF JUDGE K G SMITH**

[1] The Employment Relations Authority determined that Lance Thorne had unjustifiably dismissed Johnathon Rolton and ordered him to pay compensation.1

[2] Mr Rolton had been dismissed for not returning to work from an annual holiday on 8 January 2018, the date Mr Thorne considered had been agreed by them for his resumption of work after Christmas.

1 *Rolton v Thorne t/a A1 Panel and Paint* [2018] NZERA Christchurch 156.



[3] The Authority held that Mr Rolton was unjustifiably dismissed because there was no investigation into his absence from work and he was not given an opportunity to explain before the decision was made.2

[4] Mr Thorne challenged the determination and sought to set it aside, on the basis that Mr Rolton was justifiably dismissed, because he had been given the notice required by the employment agreement and had received warnings for unexplained absences previously. Justification for the decision to dismiss was also said to arise because Mr Rolton was allegedly abusive to Mr Thorne's landlord.

[5] In addition to challenging the determination Mr Thorne's statement of claim included a claim against Mr Rolton for $156,000 for lost revenue.

**The Christmas break and dismissal**

[6] In January 2017 Mr Rolton was employed by Mr Thorne as a panel beater. Towards the end of the year, on about 21 December 2017, Mr Thorne and Mr Rolton met to discuss the date when work would resume after the Christmas holiday.

[7] Mr Thorne said the meeting involved all five of his (then) employees. According to him, all of his employees, including Mr Rolton, discussed when they wanted to resume work after the holiday and agreed on 8 January 2018. That version of events was supported by Daniel Cameron, Mr Thorne's only current employee, who was at the meeting.

[8] Mr Rolton's version of events was significantly different. He said that the discussion about resuming work was between him and Mr Thorne, and he was given a choice of returning on 8 January 2018, or a week later on 15 January 2018. He informed Mr Thorne that he would return on 15 January, unless his money ran out in which case he would come back earlier.

[9] There was no record of this meeting and what, if anything, was agreed. Mr Rolton returned to work on 15 January 2018. After a very brief meeting first thing in

2 At [16]-[21].

the morning, Mr Thorne handed Mr Rolton a note dismissing him. The conversation between them that morning did not get beyond a very basic discussion and was not an attempt to find out why Mr Rolton had not returned to work a week earlier.

[10] The note handed to Mr Rolton recorded the employment agreement having been terminated as from 8 January 2018, for failing to be at work that day. It purported to give two weeks' notice, calculated from 8 January. Mr Rolton left work immediately.

[11] The note was not Mr Thorne's first attempt at advising Mr Rolton that he had been dismissed. On 9 January 2018, he sent a text message to Mr Rolton terminating the employment. Mr Rolton had not read that text before presenting himself at work on 15 January 2018.

**Legal test**

[12] Section 103(1) of the Employment Relations Act 2000 (the Act) provides that an employee may have a personal grievance against his employer, or former employer, for unjustified dismissal.3 The test of justification is in s 103A(1) and (2). That section reads:

**103A Test of justification**

(1) 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).

(2) 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.

...

[13] In applying that test s 103A(3) requires consideration of a number of matters.

The section reads:4

(3) In applying the test in subsection (2), the Authority or the court must consider—

3 Section 103(1)(a).

4 The Court may also consider any other factors it thinks appropriate, s 103A(4).

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the

employee before dismissing or taking action against the employee.

[14] The Act requires the Court not to determine a dismissal to have been unjustified under s 103A solely because of defects in the process followed by the employer if they were minor and did not result in the employee being treated unfairly.5

**The issues**

[15] Against that background the issues are:

(a) What, if anything, was agreed about resuming work in January 2018?
(b) When was Mr Rolton dismissed?
(c) Was the dismissal justified?
(d) Is Mr Rolton indebted to Mr Thorne and, if so, for how much?

*Agreed resumption of work*

[16] There was a marked contrast in what was said by Mr Thorne, and by Mr Rolton, about the date work was to resume after the Christmas holiday period in late December 2017 and early January 2018.

[17] I have briefly touched on what happened in December 2017, when arrangements were being made to resume work after the Christmas holiday. Some

5 Section 103A(5).

further elaboration is required to place into context the disagreement that has now emerged. Mr Thorne, and all of his employees except Mr Rolton, were busy on the afternoon of the meeting, delivering cars to customers. Mr Rolton was left in the workplace, presumably finishing tasks in anticipation of work ending for the year.

[18] Mr Rolton acknowledged being keen to finish work so that he could start his holiday but could not do so until Mr Thorne returned to work. Mr Rolton said that the conversation he had with Mr Thorne occurred after everyone returned to the workplace, late in the afternoon, but while he and Mr Thorne were alone in the office. He said that was because the other employees were still making their way to the office when he and Mr Thorne spoke about resuming work in the new year. Conversely, Mr Thorne and Mr Cameron said that the date to resume work was agreed when everyone was present.

[19] The disagreement about what took place in December 2017 was not examined in any detail in the evidence, or cross-examination. However, I consider it was at least possible that Mr Thorne and Mr Rolton were describing the same meeting that happened in stages. It was common ground that Mr Rolton had remained in the workplace and it seems, from what he said, that the conversation began as soon as Mr Thorne returned and before the other employees arrived in the office for the meeting. That situation created an opportunity for confusion where Mr Rolton believed he had reached agreement to return on 15 January and the other staff members had agreed to return a week earlier.

[20] Mr Thorne is seeking to overturn the determination. He has not satisfied the onus on him to establish, on the balance of probabilities, that Mr Rolton knew he was to return to work on 8 January 2018 and, when he did not do so, was absent without permission. Despite what he and Mr Cameron said, I am not satisfied that the arrangement to return to work was as clear-cut as it now appears to them to have been with the benefit of hindsight.

[21] However, for the reasons that follow, the outcome of this challenge does not turn on the date on which work was to resume.

*When was Mr Rolton dismissed?*

[22] Mr Rolton was dismissed by text message on 9 January 2018. The message was unequivocal. The reason given was Mr Rolton's failure to return to work the previous day. Two weeks' notice was given, calculated from 8 January. Mr Rolton did not read that text message when it was received because he had changed his cell phone provider over the Christmas break and messages sent to his previous cell phone number had not been forwarded to his new number. He did not know about the text until he checked his messages on 15 January 2018, after being handed Mr Thorne's note.

[23] I find that Mr Thorne intended to end the employment relationship by sending the text message on 9 January. What happened on 15 January was only a by-product of the message not being read when it was received. I am satisfied that the message was delivered, as intended, on 9 January and it is immaterial Mr Rolton did not read it immediately.

*Was the dismissal justified?*

[24] Mr Thorne's decision to dismiss Mr Rolton does not satisfy ss 103A(3)(a), (b) or (c) of the Act and the dismissal was unjustified. It is difficult to imagine any dismissal being less satisfactorily carried out than this one. Mr Thorne made no effort to investigate his concerns about Mr Rolton's absence. Mr Thorne's concerns were not raised with Mr Rolton in any way before his dismissal. Compounding that problem, and obviously in the absence of concerns being raised, there was no opportunity for a response.

[25] Mr Thorne said he made several attempts to telephone Mr Rolton late in the week of 8 January 2018 to ask about his absence. The evidence about these attempted calls was not very precise, but it appears they were made towards the end of the week. Mr Rolton did not answer Mr Thorne's calls. While I accept the calls were made, and not answered, that evidence does not sit comfortably with the fact that the text message was sent on 9 January 2018. I find that these calls were placed after the text message had been sent. That finding does not explain why it was necessary for a conversation to take place after the decision had been made, but it is likely that one of the reasons

for attempting to phone Mr Rolton was to make sure that the text message had been received.

[26] Two attempts were made to justify the decision to dismiss but they do not assist Mr Thorne's case. The first of them was an unsubstantiated claim that Mr Rolton had been issued with warnings about absenteeism earlier in the year. The implication was that what happened between 8 and 15 January was a repetition of that previous unsatisfactory conduct.

[27] Mr Rolton acknowledged that he had been absent on occasions, but there was no record of what transpired between him and Mr Thorne when work resumed. On each occasion Mr Rolton returned to work he seemed to think his absences had been dealt with and that there were no lingering consequences for him. On the other hand, Mr Thorne thought these absences were sufficiently serious that they resulted in warnings, placing Mr Rolton's employment in jeopardy. I have been left in doubt about whether what Mr Thorne described were actually warnings placing Mr Rolton's ongoing employment in jeopardy. In the absence of a record of what passed between them on those occasions, Mr Thorne has not discharged the obligation on him to prove that he had, in fact, warned Mr Rolton.

[28] In any event, even if Mr Rolton had been warned that would not be determinative, because that would not have excused the failure to comply with s 103A(3)(a), (b) and (c) of the Act.

[29] The second matter was a claim by Mr Thorne that Mr Rolton had been seen on a social media post, sometime during the week of 8 January 2018, seemingly acknowledging that he knew he should have returned to work but being blasé about not having done so. The evidence about this social media post was only second-hand and inconclusive. The post itself was not placed in evidence and neither Mr Thorne, nor Mr Cameron, explained who had been responsible for it. They were not able to recall, except very generally, what was said on it. However, it was apparent that the post, whatever its actual content, was made towards either the middle of the week or perhaps the end of the week. I am satisfied that the decision to dismiss was made

before the post was seen by Mr Thorne. That means, no matter what Mr Thorne thought of it, this information did not form part of the decision to dismiss Mr Rolton.

[30] The evidence about the social media posts does not assist Mr Thorne in demonstrating that he satisfied s 103A(3)(a), (b) and (c). The decision to dismiss, viewed objectively, was not one that a fair and reasonable employer could have reached in all the circumstances at the time of the dismissal.

[31] For completeness a brief comment is needed about a matter raised by Mr Thorne, where he claimed the dismissal was justified because Mr Rolton was abusive to his landlord. The assertion was that Mr Rolton had been disrespectful to the point of being abusive over playing loud music at work disturbing Mr Thorne's landlord. The layout of the business premises meant that where Mr Rolton worked was immediately adjacent to the premises where Mr Thorne's landlord worked. Mr Rolton was said to have been abusive to the landlord, when approached about the radio's volume and the type of music being played. The abuse was said to have reached the point where the landlord considered not renewing Mr Thorne's lease.

[32] Mr Rolton did not accept that he had been abusive, or in any way disrespectful, to Mr Thorne's landlord. He said the volume of the radio and the station it was tuned to was, in fact, controlled from the office where Mr Thorne worked.

[33] This matter does not need to be resolved, because it was irrelevant to the decision to dismiss Mr Rolton. The dismissal was based entirely on Mr Rolton not returning to work and had nothing to do with how the radio was played.

*Indebtedness?*

[34] Mr Thorne made an ambitious claim against Mr Rolton for damages based on an ill-defined assertion that, in some way, the employment agreement had been breached giving rise to damages. Aside from a significant jurisdictional problem confronting the claim, because it had not been made in the Authority, Mr Thorne did not explain what gave rise to it or how the damages had been calculated.

[35] It became apparent, during Mr Thorne's closing submissions, that he was not seriously attempting to claim Mr Rolton was responsible for significant business losses. In an ill-defined way he was attempting to illustrate to Mr Rolton the futility of litigation because neither party could afford to pay what was being claimed by the other party. His elusive point appeared to be that some other resolution of the dispute between them would have been preferable. However, the opportunity for resolving this personal grievance by other means was lost long ago, before Mr Thorne elected not to participate in the Authority's investigation.

[36] There was no merit in Mr Thorne's claim that Mr Rolton had been responsible for damaging his business.

*Remedies*

[37] That leaves the issue of remedies. Mr Thorne concentrated on seeking to overturn the Authority's determination and did not suggest that, as an alternative, there should be any reduction in the remedies that had been awarded. Essentially, his case was put up on an all or nothing basis. Despite that, I have considered, pursuant to s 124 of the Act, whether there are any circumstances where it could be said Mr Rolton had contributed towards the situation giving rise to the personal grievance, and if he had, to reduce the remedies that had been awarded accordingly.

[38] As is apparent from remarks earlier in this decision, I am not persuaded that Mr Rolton's failure to return to work on 8 January 2018 could be seen as conduct contributing to the decision to dismiss him by text message on 9 January 2018. To reach such a conclusion would draw an unwarranted link between the previous unauthorised absences and the decision to send the text on 9 January 2018. It would have involved accepting that Mr Rolton had been previously warned in such a way that he knew, or ought to have known, that a repetition of that behaviour would lead to his dismissal. The absence of any cogent evidence on those subjects precludes a finding of contributory behaviour by Mr Rolton.

[39] Mr Murray, in his submissions for Mr Rolton, sought to increase the orders made in the Authority, but the evidence on that subject was slight and I am not satisfied that such an outcome would be just in the circumstances.

**Outcome**

[40] Mr Thorne's challenge to the determination is unsuccessful as is his claim for damages.

[41] Costs are reserved. If they cannot be agreed Mr Rolton may file a memorandum seeking costs within 15 working days, Mr Thorne can have a further period of 15 working days to respond and any further reply can be provided by Mr Rolton within a further five working days.

K G Smith Judge

Judgment signed at 4.55 pm on 22 November 2019