

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 260
5588699

BETWEEN CHASE WICKS
Applicant
AND SYMONITE PANELS
LIMITED
Respondent

Member of Authority: Vicki Campbell
Representatives: Susan-Jane Davis for Applicant
Giles Brant for Respondent
Investigation Meeting: 16 and 30 May 2016
Submissions Received: 10 June and 1 July 2016 from Applicant
28 June 2016 from Respondent
Determination: 1 August 2016

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Wicks was unjustifiably dismissed from his employment with Symonite Panels Limited.**
- B. Symonite Panels Limited is ordered to calculate and pay to Mr Wicks within 28 days of the date of this determination a sum equivalent to his lost wages plus holiday pay and KiwiSaver contributions for the period 5 October to 25 December 2015 reduced by 25% for contribution.**
- C. Symonite Panels Limited is ordered to pay to Mr Wicks compensation in the amount of \$5,250 (\$7,000 reduced by 25% contribution) within 28 days of the date of this determination.**

D. Costs are reserved.

Employment relationship problem

[1] Mr Chase Wicks claims one or more conditions of his employment were affected to his disadvantage by unjustifiable actions of Symonite Panels Limited (Symonite) and then was unjustifiably dismissed. Mr Wicks also claims Symonite has breached section 130(2) of the Employment Relations Act 2000 (the Act) and has breached section 82(2) of the Holidays Act 2003 (the Holidays Act) as well as its obligations of good faith.

[2] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from Mr Wicks and Symonite but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] Mr Wicks commenced employment with Symonite on 28 July 2014 as a Site Co-ordinator. Mr Wicks terms and conditions of employment were set out in a written employment agreement dated 25 July 2014. Mr Wicks reported to Mr Morne Aucamp, Hamilton Branch Manager.

[4] On Sunday 10 May 2015 Mr Wicks was admitted to Hospital and discharged the following day. Mr Wicks was certified as unfit to resume work for 8 days returning to work on 19 May 2015.

[5] On 18 May 2015 Mr Wicks was certified as fit for work but for light duties only, for a period of four days.

[6] Symonite says Mr Wicks was absent without notification between 11 and 15 May 2015. He provided a medical certificate on 18 May 2015 and also a discharge summary from Waikato Hospital dated 11 May 2015. After Mr Wicks returned to work Mr Aucamp met with him and asked why he had failed to notify Symonite of his absence. Mr Aucamp was not satisfied with Mr Wicks response and told Mr Wicks he was required to be more dependable and to role model good behaviour.

[7] In July 2015 the position of Site Co-ordinator was disestablished. Mr Wicks was offered and accepted alternative employment as a Fabricator/Driver on the same terms and conditions of employment.

[8] Not long after the restructure Symonite appointed Mr Mike Ballard as a Project Manager. Among his duties as Project Manager, Mr Ballard was responsible for the measuring of panels for fabrication.

[9] On 18 September 2015 Mr Colin Fitch, Factory Manager received a complaint that Mr Wicks had verbally abused Symonite staff in Auckland and they did not wish to have him return to the Auckland branch to pick up materials. Mr Aucamp spoke to Mr Wicks who acknowledged his actions and apologised for his behaviour.

[10] On Thursday 24 September 2015 Mr Wicks left work after an incident with Mr Ballard. Mr Wicks was dismissed the following day.

Issues

[11] The issues for determination are:

- a) whether one or more conditions of Mr Wick's employment was affected to his disadvantage by unjustifiable actions of Symonite; and/or
- b) whether Mr Wicks was unjustifiably dismissed;
- c) if the answer to either or both of the first issues is yes, what, if any, remedies should be awarded;
- d) whether Symonite failed to provide wage and time records and if so what, if any, penalty should be imposed;
- e) whether Symonite failed to provide holiday and leave records and if so what, if any, penalty should be imposed;
- f) whether Symonite breached its statutory duties of good faith.

The legal framework

[12] Pursuant to section 103A I must be satisfied on the balance of probabilities that one or more conditions of Mr Wicks' employment were affected to his disadvantage due to the employer's unjustified action. This requires a two-step process, firstly I must be satisfied of the disadvantageous actions and then I must determine whether those actions were justifiable.

[13] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Wintec's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[14] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

(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.

[15] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.¹

[16] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

¹ Employment Relations Act 2000, section 103A(5).

[17] As a full Court observed in *Angus v Ports of Auckland Ltd*²

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

Disadvantage grievance

[18] Mr Wicks claims one or more conditions of his employment were affected to his disadvantage by unjustifiable actions of Symonite when:

- a) Symonite failed to provide him with a new employment agreement which included a new list of duties for his new role after the July restructure; and
- b) Mr Wicks was subject to abuse from Mr Ballard.

Failure to provide job descriptions

[19] Following a restructuring in July 2015 Mr Wicks was redeployed into the position of Fabricator/Driver. There is no dispute that Mr Wicks did not have a signed copy of the new job description. Mr Wicks acknowledged at the investigation meeting that he was given copies of the job descriptions for Factory Delivery and Fabricator during the restructuring process and there was no confusion about the two jobs he was redeployed into.

[20] Mr Wicks says the disadvantage arose as a result of him receiving calls from contractors and having to prioritise panel production which he says was the job of the Factory Forman. Mr Wicks says it was embarrassing.

[21] I am not satisfied that Mr Wicks unhappiness with receiving calls when the contractors were making contact on a cell phone number which they had previously used was a disadvantageous action on the part of Symonite. Mr Wicks referred the callers on to the correct person and over time the calls would naturally come to an end.

² [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

Conduct of Mr Ballard

[22] Mr Wicks says that when he and Mr Ballard visited Placemakers to purchase parts the service counter employee for Placemakers requested the company's car registration for identification for picking the order. Mr Wicks says that Mr Ballard told him "You're the boy, can you go and get the registration number?"

[23] On the way back to the work site Mr Wicks addressed the issue by telling Mr Ballard that he didn't appreciate being called "*the boy*" in front of the counter staff at Placemakers. No further action was taken by Mr Wicks after he raised it with Mr Ballard.

[24] Mr Wicks also points to the incident that led to his dismissal as also contributing to his claim under this heading. As those factors are largely related to the reasons for dismissal I have preferred to deal with them under that heading rather than as part of the disadvantage grievance.

[25] I am satisfied Mr Wicks addressed his concerns directly with Mr Ballard about being called "*the boy*". He chose not to take this any further and it seems to me the matter had been dealt with.

[26] Mr Wicks has not established to my satisfaction that one or more conditions of his employment were affected to his disadvantage as a result of any unjustified actions on the part of Symonite.

Dismissal

[27] Mr Wicks was dismissed without notice on 25 September 2015. The letter of dismissal, dated 24 September 2015 states that he was dismissed for disobeying a lawful and reasonable instruction and without any explanation walked off the job.

[28] There is no dispute that Mr Wicks was asked to make a panel and had queried the measurements and wanted confirmation that the measurements were correct. There was uncertainty about whether the measurement was a face measurement or from the edge of the panel.

[29] Mr Wicks says that when he asked Mr Ballard about the measurement Mr Ballard slammed his hand down on the table and told him in a violent tone to lose his

f****g attitude and if the f****n panels were made wrong the f***n thing would have to be redone.

[30] At the investigation meeting Mr Ballard acknowledged that he had slapped the table and swore but said he did this to get Mr Wicks attention because he was trying to stop Mr Wicks from cutting the panel to the wrong dimensions.

[31] Mr Ballard understood Mr Wicks had told him he was going to “make” the panel whereas Mr Wicks says he told Mr Ballard he was going to “mark” the panel up and remark it if the measurements were not correct.

[32] Mr Wicks says he was so distressed at the way Mr Ballard spoke to him that he decided the best course of action was to leave the worksite and go home. Before he left the worksite Mr Wicks texted Mr Aucamp to let him know he was going home and that he wanted to talk about the incident with Mr Aucamp the following day.

[33] Mr Ballard also made contact with Mr Aucamp. Mr Ballard gave Mr Aucamp his version of events and then contacted Mr Ben Heald, General Manager, and advised him also.

[34] In his evidence Mr Aucamp told me he tried to contact Mr Wicks after he received Mr Wicks first text message but was unsuccessful. He also told me he sent Mr Wicks a text message. Mr Aucamp said that through his messages he had endeavoured to get Mr Wicks to return to work that day. Mr Wicks denied receiving a voice message or text message from Mr Aucamp. I have asked for a copy of the text message but it has not been provided to me.

[35] I accept Mr Wicks must have received a message from Mr Aucamp because Mr Wicks sent a second text 20 minutes after his first text which simply reinforced his advice in his first text that he had been pushed over the edge and would be back the next morning. There can be no other explanation for Mr Wicks needing to send the second text message.

[36] Mr Aucamp was concerned about Mr Wicks walking off the job and sought advice from Human Resources who advised him to meet with Mr Wicks and if a reasonable explanation was not provided he had the authority to dismiss Mr Wicks.

In anticipation of a decision being made to dismiss Mr Aucamp, a letter was drafted which was to be handed to Mr Wicks after a decision was made.

[37] The next morning Mr Wicks returned to work and was required to meet with Mr Aucamp. Mr Wicks says the meeting took approximately 10 minutes. He says he was dismissed without any opportunity to put his side of the story. The decision to dismiss was confirmed in a letter drafted and dated 24 September 2015 which Mr Wicks received about an hour after his employment had ended.

[38] Mr Aucamp says he asked Mr Wicks for an explanation about what had happened the previous day. Mr Aucamp says Mr Wicks explained that Mr Ballard had asked him [Mr Wicks] to make a panel, that Mr Ballard had raised his voice and he was not prepared to be spoken to in that way and left. Mr Aucamp told the Authority that he advised Mr Wicks he simply could not abandon his employment and that the instruction from Mr Ballard not to cut the panel was a reasonable direction for Mr Wicks to follow.

[39] Mr Aucamp concluded there was no good reason for Mr Wicks to walk off the job. Mr Aucamp considered that Mr Wicks belligerent attitude both the previous day and at the meeting was unacceptable. Mr Aucamp determined that Mr Wicks had been abusive towards Mr Ballard the previous day and advised Mr Wicks his employment was terminated. He later gave him the letter dated 24 September 2015.

[40] The process used by Symonite was procedurally and substantively flawed to the extent that the dismissal is unjustified. Mr Wicks was not aware prior to attending the meeting that his employment was in jeopardy. Mr Wicks was entitled to know that dismissal was a likely outcome and was entitled to at least seek the advice of a professional advocate or representative to assist him in the meeting.

[41] Prior to the meeting Mr Wicks had not been given the information Mr Aucamp had received from Mr Ballard and so was not in a position to be able to fully respond. If he had been it is possible that Mr Wicks would have advised Mr Aucamp that Mr Orsana Flavall, a factory worker, was present during the incident and might have been able to shed some light on what had occurred.

[42] Mr Flavell told me during a telephone interview with him, that it was possible, given the noise in the workplace at the time, that Mr Wicks could have said he was going to “mark” the panel and not “make” the panel as reported by Mr Ballard.

[43] Mr Aucamp took into account information that was not put to Mr Wicks. By way of example, Mr Aucamp considered Mr Wicks attitude the previous day and in the meeting to be beligerent and that Mr Wicks had been abusive to Mr Ballard. None of these factors was put to Mr Wicks for his response before taking the action of dismissal. Further the letter sets out the reasons for Mr Wicks’ dismissal was because he had disobeyed a lawful and reasonable instruction and walked off the job without any reasonable explanation. There is no mention in the letter setting out the reasons for dismissal as being for Mr Wicks beligerent attitude or for abusing Mr Ballard.

[44] Symonite did not undertake any form of invesitagtion prior to meeting with Mr Wicks. While Symonite did put to Mr Wicks that walking off job was not acceptable, Mr Wicks was not provided with full information and was not given a reasonable opporutnity to respond to all matters.

[45] In the circumstances of this case the decision to dismiss was based on a flawed process. The decision to dismiss Mr Wicks was not the action a fair and reasonable employer could take in all the cirucmstances of this case. Mr Wicks was unjustifiably dismissed and is entitled to a consideration of remedies.

Remedies

[46] In resolution of his personal grievance Mr Wicks is seeking reimbursement of lost wages and compensation for humiliation, loss of dignity, and injury to feelings.

[47] Mr Wicks found alternative employment approximately two weeks after his dismissal but at wages lower than the wages he earned at Symonite. Mr Wicks as asked me to exercise my discretion under section 128(3) of the Act and award him a sum equivalent to nine months lost wages plus lost benefits of holiday pay and kiwisaver contributions on the lost wages.

[48] I am not satisfied the evidence establishes the claim for more than three months lost wages. I have determined that lost wages should be limited to three

months. Mr Wicks was paid one weeks pay in lieu of notice. This must be factored into Mr Wicks claim.

[49] Mr Wicks also claims an additional payment of compensation for lost benefits being holiday pay and kiwisaver contributions on his lost wages. I agree that in this case it is appropriate to award compensation for the loss of these benefits.

[50] I invite the parties to agree on the calculation of lost wages including holiday pay and kiwisaver contributions from 5 October to 25 December 2015 taking into account my determination on contribution. If they are unable to agree, leave is reserved for the parties to refer the matter back to the Authority for determination.

[51] Mr Wicks is seeking compensation in the amount of \$33,000. While Mr Wicks and his father gave compelling evidence of the impact the dismissal had on Mr Wicks it does not establish an award at that level.

[52] Taking all the circumstances of Mr Wicks dismissal into account an appropriate award for compensation is \$7,000. Subject to my finding on contribution Symonite Panels Limited is ordered to pay to Mr Wicks the sum of \$7,000 pursuant to section 123(1)(c)(i) within 28 days of the date of this determination.

Contribution

[53] Section 124 of the Act obliges me to consider the extent to which Mr Wick's actions contributed towards the situation that gave rise to his personal grievance. If I consider his actions so require I must reduce his remedies accordingly.

[54] On 24 September 2015 Mr Wicks left work and went home. While he texted Mr Aucamp that he was doing just that, he never waited for a response or approval. Mr Wicks pointed me to a similar situation where he had had an altercation at work with Mr Flavell. In that situation Mr Flavell left the worksite but did not get dismissed for it.

[55] The difference between what Mr Flavell did and what Mr Wicks did was that Mr Flavell sat in his car which was parked close to the worksite until he had calmed down and then returned to work shortly afterwards. Mr Wicks did not do that he simply left with no intention to return until the following day.

[56] Mr Wicks actions in leaving the worksite without permission contributed to the actions giving rise to his dismissal. I have assessed his contribution at 25% and his remedies are to be reduced accordingly.

Breach of good faith

[57] In his statement of problem Mr Wicks claims Symonite has breached its obligations of good faith. Symonite and Mr Wicks both owed duties of good faith to each other including the obligation to maintain a constructive employment relationship. Symonite has breached its obligations when it failed to follow a fair process when dismissing Mr Wicks. Mr Wicks breached his obligations when he walked off the job and refused to return until the next day.

[58] The remedy for a breach of good faith is a penalty. No penalty has been claimed by Mr Wicks and given that the facts relied on for his claim of breach of good faith are the same facts as I have found gave rise to a personal grievance it is unlikely a penalty would have been imposed.

Penalties

[59] Mr Wicks seeks the imposition of a penalty against Symonite for its failure to provide full wage and time records and holidays and leave record.

[60] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*³ the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

- a) The seriousness of the breach;
- b) Whether the breach is one-off or repeated;
- c) The impact, if any, on the employee/prospective employee;
- d) The vulnerability of the employee/prospective employee;
- e) The need for deterrence;
- f) Remorse shown by the party in breach; and
- g) The range of penalties imposed in other comparable cases.

³ [2014] NZEmpC 65.

[61] The records were requested on 8 December 2015 and produced on 25 and 27 January 2016. Symonite's failure to provide the wage and time records and holiday and leave records within 14 days of the request being made are breaches of the Act of the kind that would normally attract a penalty. Penalties are designed as a punishment and to deter the wrongdoer and others from breaching their obligations. However, in all the circumstances, including that the records were provided within seven weeks of the request (which included the intervening summer holiday break) I do not consider any real purpose would be served by awarding penalties and I decline to do so.

Costs

[62] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Wicks shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Symonite shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[63] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell

Member of the Employment Relations Authority