

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 35
5431718

BETWEEN RICHARD LINTON
 Applicant

A N D ANYTIME ALUMINIUM
 WINDOWS & DOORS
 SERVICES LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Dave Vinnicombe, Advocate for Applicant
 Uday Sen, Director of Respondent

Investigation Meeting: 30 January 2014 at Auckland

Date of Determination: 31 January 2014

DETERMINATION OF THE AUTHORITY

A Anytime Aluminium Windows & Doors Services Limited (Anytime Aluminium) unjustifiably dismissed Richard Linton. It is ordered to pay Mr Linton:

- (a) \$3,517.81 lost remuneration;**
- (b) \$500 distress compensation;**
- (c) \$3,760.82 unpaid holiday pay.**

Employment relationship problem

[1] Mr Linton claims he was unjustifiably dismissed and that he is owed wage arrears for unpaid holiday pay. Anytime Aluminium denies Ms Linton was dismissed. It says he walked off the job and never returned. It accepts Mr Linton was not paid any holiday pay upon termination of his employment.

[2] Mr Linton was employed by Anytime Aluminium on 28 February 2011. His employment ended on 07 August 2013 after an argument occurred between Mr Uday Sen¹ and Mr Linton whilst they worked together installing windows on a client's site.

[3] Mr Linton claims that Mr Sen became angry with him and told him "*go home I don't need you any more*". Mr Linton says he left the site and later that afternoon received a phone call from Mr Sen which he did not answer. Mr Sen did not leave a message. Mr Linton then received two subsequent texts from Mr Sen.

[4] The first text asked Mr Linton to return the keys of the van he used for work purposes. The second text asked him to return the company fuel card which Mr Linton used solely for work purposes. Mr Linton says it was apparent to him that his employment had ended so he did not return to work.

[5] Mr Sen says that on the day of the incident he was annoyed with Mr Linton. He believes Mr Linton was making basic mistakes which caused serious problems in terms of the window not being weatherproof. Mr Sen felt Mr Linton was not listening to the instructions Mr Sen had given him which had aimed to avoid problems occurring.

[6] Mr Sen admits he told Mr Linton "*if you don't listen then you may as well go home*". Mr Sen said that he thought Mr Linton would just go back to the van and wait there until Mr Sen had finished the job they had both been working on. Mr Sen says when he returned to the van just before 1pm and saw that Mr Linton was not there he called him on his cellphone but Mr Linton did not answer. Mr Sen did not explain why he did not leave a message.

[7] Mr Sen told the Authority he thought Mr Linton was not interested in working any more so he texted Mr Linton asking him to return the van keys and petrol card for the van. Mr Linton did so and they did not have any further communication.

[8] Mr Sen says that Mr Linton was paid cash for some holidays whilst employed, although the information provided to the Authority does not show holiday pay to Mr Linton whilst he was employed. Mr Sen told me no records were kept of the cash payment to avoid the parties having to pay tax.

[9] Mr Sen admits that Mr Linton was not paid holiday pay upon termination so he accepts that some holiday pay is owed.

[10] Anytime Aluminium was ordered to produce Mr Linton's wage and time records to the Authority. It did not do so because they do not exist. It is clear that Anytime Aluminium

¹ Sole director and 99% shareholder of Anytime Aluminium.

has not complied with its obligations under the Employment Relations Act 2000 (the Act) to keep and produce upon request wage and time records for its employees.²

[11] I find that this failure to keep and produce Mr Linton's wage and time records has prejudiced his ability to bring an accurate claim for wage arrears under s.131 of the Act. I therefore accept the evidence Mr Linton gave about the wages actually paid to him (which were based on him reconstructing the payments made to his bank account) and of the hours, days and time worked by him in accordance with s.132(2) of the Act. I also note that Anytime Aluminium did not provide evidence that showed that Mr Linton's evidence was incorrect.

[12] Anytime Aluminium claims that Mr Linton was employed on a casual basis depending on how much work was available. However, there was no supporting documentation to establish that the employment was anything other than permanent ongoing employment. Mr Linton worked every week of his employment although his actual hours each day and week varied in accordance with the work available.

[13] Anytime Aluminium has failed to comply with the requirements of s.65 of the Act which requires an employer to provide an employee with a written employment agreement which must include the items specified in s.65(2) of the Act.

Issues

[14] The following issues require determination:

- (a) Was Mr Linton dismissed?
- (b) If so, was dismissal justified?
- (c) If not, what, if any, remedies should be awarded?
- (d) What holiday pay is Mr Linton owed?
- (e) What if any costs should be awarded?

Was Mr Linton dismissed?

[15] Mr Sen says that Mr Linton abandoned his employment by walking off the job site, not responding to his telephone call, and not calling him later that day or the next morning to find out what time he should start work on 08 August 2013.

² Section 130 of the Act

[16] I do not accept that explanation. Mr Sen's own evidence is that he told Mr Linton to "go home". I therefore do not accept Mr Sen's evidence to the Authority that he thought Mr Linton was just going to go and wait at the van. One of the witnesses produced by Anytime Aluminium told the Authority that Mr Sen said he had told Mr Linton to "get out of his sight while on site working".

[17] A dismissal does not require an employer to tell an employee they are dismissed or write to an employee terminating their employment in order for there to have been a dismissal. A dismissal in law will occur where there has been a 'sending away' of an employee by an employer. The employer's actions in sending away the employee effectively means that the employment ends at the employer's initiative, not as a result of an employee's voluntary actions.

[18] I find that there was a sending away in this case which amounts to dismissal. Mr Sen admits that he was angry and frustrated with Mr Linton. Mr Sen believed that Mr Linton was not following instructions which was causing problems in respect of the work they were doing together. Mr Sen and Mr Linton admit swearing at each other and that matters got heated.

[19] I find on the balance of probabilities that Mr Sen had got to the end of his tether with Mr Linton as a result of a build up of issues that were never properly addressed. These included;

- a. Mr Sen's view that Mr Linton was a poor performer who had cost the business much wasted time and money due to his incompetence;
- b. Concern Mr Linton was smoking on the job instead of working;
- c. A number of client complaints;
- d. Poor quality work which had to be fixed by others causing the business to lose money;
- e. Damaging the work vehicle by not laying a load on properly.
- f. Mr Sen's view that Mr Linton was not worth the \$16.50 he was paid per hour.

[20] None of these concerns were fairly or properly raised with Mr Linton for him to address whilst employed. There was no disciplinary process or any other adequate communication with him about the various issues which Mr Sen says were stressing him out.

[21] I consider that Mr Sen's text request for Mr Linton to return the van keys and petrol card shortly after Mr Linton was angrily told in no uncertain terms to go home supports Mr Linton's view that his employment had been terminated.

[22] If that was not the case then the onus was on Mr Sen (who had done the sending away) to communicate with Mr Linton about returning to work. Mr Sen's failure to do so suggest that on the balance of probabilities he had intended to end the employment relationship.

[23] I find that Mr Linton has discharged the onus of establishing on the balance of probabilities that he was dismissed on 07 August 2013.

Was dismissal justified?

[24] The onus is on Anytime Aluminium to justify its dismissal of Mr Linton in accordance with the justification test in s.103A(a) of the Act. This requires the Authority to objectively assess "*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*".³

[25] In applying this test the Authority must consider the four procedural fairness tests set out in s.103A(3) of the Act. An employer also has an obligation under s.4(1A) of the Act to provide an affected employee with information relevant to their ongoing employment when the employee's employment may be in jeopardy.

[26] It is clear that Anytime Aluminium did not comply with its statutory obligations under s.4(1A) or s.103A(3) of the Act. It dismissed Mr Linton without following any process at all.

[27] I also find that the matters which resulted in Mr Linton's dismissal were matters which should have been raised with him in a performance management context. They were not issues which a fair and reasonable employer could have summarily dismissed an employee for.

[28] Accordingly Anytime Aluminium is unable to justify Mr Linton's dismissal.

What remedies should be awarded?

[29] Section 124 of the Act requires the Authority to consider whether Mr Linton contributed to the situation which gave rise to his dismissal grievance and if so reduce

³ Section 103A(2) of the Act

remedies accordingly. The evidence I heard satisfies me on the balance of probabilities that Mr Linton's work performance was substandard and that he argued back to Mr Sen and did not follow instruction which would have avoided further problems arising with the work they were doing together.

[30] Mr Linton also declined to answer his phone when he saw Mr Sen calling him after he had left the site nor did he attempt to communicate with Mr Sen to clarify his employment status. It was Mr Linton's attitude and actions which caused the incident which led to his dismissal.

[31] I consider that Mr Linton's remedies should be reduced by 50% to reflect his contribution.

[32] Mr Linton obtained new employment on 11 November 2013. He claims 13 weeks lost remuneration of \$7,035.62. I am satisfied that Mr Linton lost remuneration so he is entitled to be compensated for that. Anytime Aluminium is ordered under s.128(2) of the Act to pay Mr Linton \$7,035.62 which reduced by 50% is \$3,517.81.

[33] Mr Linton's evidence in support of his claim for distress compensation was minimal. He was obviously upset that he had to walk back to Mr Sen's house to collect his own vehicle after leaving the worksite. I also recognise it is likely that Mr Linton would have suffered some distress in having to apply for financial assistance to Work and Income New Zealand.

[34] However, an award of distress compensation must be based on evidence, which means that an award in this case must be at the lower end of the scale. Anytime Aluminium is ordered to pay Mr Linton \$1,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his unjustified dismissal. This is to be reduced by 50% (i.e. \$500) to reflect his contribution leaving a balance owing of \$500.

What holiday pay is Mr Linton asked?

[35] I am satisfied that Mr Linton is owed accrued but not taken annual leave upon termination together with the 8% he is entitled to from last anniversary of his start date (i.e. 28 February 2013). Mr Linton was entitled to be paid his outstanding holiday pay upon termination but that has not occurred.

[36] Anytime Aluminium is ordered to pay Mr Linton \$3,760.82 holiday pay.

What if any costs should be awarded?

[37] Mr Linton as the successful party is entitled to a contribution towards his actual costs. If Mr Linton applies for costs he will need to produce evidence to establish that he has in fact incurred costs in respect of this matter.

[38] The parties are encouraged to resolve costs by agreement. If that is not possible then Mr Linton has 14 days within which to file costs submissions, Anytime Aluminium then has 14 days within which to respond, with Mr Linton being given a further seven days to reply should he wish to do so.

Outcome

[39] Anytime Aluminium is ordered to pay Mr Linton:

- a. \$3,517.81 lost remuneration (\$7,035.62 less 50% contribution);
- b. \$500 distress compensation (\$1,000 less 50% for contribution);
- c. \$3,760.82 holiday pay.

Rachel Larmer
Member of the Employment Relations Authority