

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 156
3030391

BETWEEN JOHNATHON ROLTON
Applicant

AND LANCE THORNE trading as
A1 PANEL AND PAINT
Respondent

Member of Authority: Christine Hickey

Representatives: Ruth Pettengell, Advocate for the Applicant
No appearance for Respondent

Investigation meeting: 13 September 2018

Submissions received: At the investigation meeting and further information
received on 20 and 21 September 2018

Determination: 25 October 2018

DETERMINATION OF THE AUTHORITY

- A. Lance Thorne unjustifiably dismissed Johnathon Rolton.**
- B. Within 28 days of the date of this determination Lance Thorne
must pay Johnathon Rolton:**
- (i) \$10,320 gross in lost wages;**

- (ii) \$10,000 gross in compensation; and**
- (iii) \$2,321.56, being \$2,250 as a contribution to Mr Rolton's costs of representation and \$71.56 to reimburse him for the fee to file his claim in the Authority.**

Employment relationship problem

[1] Mr Rolton claims that Lance Thorne, trading as A1 Panel and Paint, unjustifiably dismissed him from his job as a panel beater in January 2018. He claims lost wages of \$10,320.00, and compensation of \$10,000 for humiliation, loss of dignity and injury to his feelings.

[2] I am satisfied the Statement of Problem (Mr Rolton's application) and a covering letter giving Mr Thorne 14 days to provide a Statement in Reply was delivered to A1 Panel and Paint on 28 May 2018.

[3] I am also satisfied that a process server served the Statement of Problem, a Notice of Direction and the Notice of Investigation Meeting on Mr Thorne in person on 25 July 2018.

[4] The Notice of Investigation Meeting included the following warning:

If the respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant.

...

You are also advised that any legal costs incurred by the other party may be awarded should you not be successful in bringing or defending the claim.

[5] There has been no response from Mr Thorne to the application and he did not attend the investigation meeting. I proceeded to hear Mr Rolton's evidence and submissions made on his behalf. After the investigation meeting, Mr Rolton provided a summary of his earnings from the IRD and copies of some bank statements showing what he was paid fortnightly by Mr Thorne and how much he earns in his new job.

Background facts

[6] Mr Rolton began working for Mr Thorne on 16 January 2017. A1 closed down over the 2017/2018 Christmas and New Year period.

[7] Mr Rolton's evidence is that on 23 December 2017, Mr Thorne asked staff if they wanted to return to work on Monday, 8 January 2018 or on Monday, 15 January 2018. Mr Rolton asked Mr Thorne what suited him. Mr Thorne told him it was up to the staff if they came back on the 8th or the 15th. Mr Rolton told Mr Thorne he was not sure but that he would return when his holiday pay ran out, and, at the latest on 15 January 2018.

[8] Mr Rolton arrived back at work at around 7 am on Monday, 15 January 2018 and unlocked the premises as usual. Mr Thorne came in about 15 minutes later. They chatted about their holidays. Mr Thorne handed Mr Rolton a hand-written letter terminating his employment that read:

As of the 8th-1-18 Johnathon Rolton's Employment Agreement is terminated ... for failing to turn up for work on the 8.1.18 this is 2 weeks written notice as set out on page 6 – 15.1 of the work agreement.

[9] Mr Thorne also asked Mr Rolton if he got his text the previous Monday. Mr Rolton had not heard from Mr Thorne over the holidays. He turned on his phone to check if he had missed a text from Mr Thorne. However, there was no text there. Mr Thorne told Mr Rolton he decided to dismiss him because he did not turn up for work on 8 January 2018, when everyone else came back to work.

[10] Mr Thorne had bought a new phone and changed providers over the break. When he got home after being dismissed, he turned on his old phone. The new provider had not ported his old number as it had undertaken to do. He found a text from Mr Thorne on 8 January that said, "you're fired."

[11] Mr Rolton says that there were several ways Mr Thorne could have got in touch with him on or after 8 January. Mr Thorne had Mr Rolton's physical address and email address. Mr Rolton says that Mr Thorne was aware that their workmates were in touch with Mr Rolton through Facebook while he was on holiday. Mr Thorne could have asked one of their workmates to message Mr Rolton to say he was expected back at work.

[12] Mr Thorne offered Mr Rolton the opportunity to work the last week of the two weeks' notice that Mr Thorne set out in the dismissal letter. Mr Rolston says he was so shocked, stressed and upset by the dismissal that he could not stay and work. He says he urgently needed to get other work and decided his time would be best spent searching for a new job.

Was the dismissal justified?

[13] Section 103A of the Employment Relations Act 2000 (the Act) sets out the test the Authority needs to apply to assess whether the dismissal was justified. The onus is on Mr Thorne to prove that he acted as a fair and reasonable employer could have acted both in the way he dealt with his concerns about Mr Rolton's employment and the decision he made.

[14] Section 103A(3) of the Employment Relations Act 2000 (the Act) sets out the minimum procedural requirements that I must consider in determining whether the dismissal was justified. Factors include whether Mr Thorne:

- Sufficiently investigated the allegation against Mr Rolton, having regard to its available resources;
- Raised his concern with Mr Rolton before dismissal;
- Gave Mr Rolton a reasonable opportunity to respond to his concern before dismissal; and
- Whether Mr Thorne genuinely considered Mr Rolton's responses before making the decision to dismiss him.

[15] I can also consider any other factors I consider relevant. However, I must not decide that a dismissal was unjustified if there were minor defects in the process that did not result in the employee being treated unfairly.

[16] The Employment Court has made it clear that if all four parts of the process set out in s 103A(3) are absent from the employer's process the decision to dismiss is not one that a fair and reasonable employer could make.

[17] Unfortunately, that was the case with Mr Thorne's process. First, Mr Thorne did not sufficiently investigate his concern against Mr Rolton. He did not try to contact him to find out why Mr Rolton was not at work. He apparently assumed that Mr Rolton knew he had to be at work but had chosen to continue holidaying.

[18] Secondly, Mr Thorne did not put his concern to Mr Rolton and tell him his continued absence could attract a disciplinary outcome, including dismissal.

[19] That means that Mr Thorne did not give Mr Rolton a reasonable opportunity to respond to his allegation before it made his decision to dismiss him.

[20] It follows that Mr Thorne could not take Mr Rolton's responses into account when making his decision to dismiss him.

[21] All of the procedural defects were significant and resulted in Mr Rolton being treated unfairly.

[22] Because of Mr Thorne's lack of engagement with this investigation, I am unable to understand why Mr Thorne thought that Mr Rolton knew he had to be back at work on 8 January. However, on 15 January 2018 Mr Thorne told Mr Rolton that while he should have been at work he was "just getting on the piss that week."

[23] Mr Thorne did not act as a fair and reasonable employer could have acted when it dismissed Mr Rolton. Therefore, he unjustifiably dismissed Mr Rolton.

Remedies

Lost wages

[24] Section 123(1)(b) of the Act allows me to order Mr Thorne to reimburse Mr Rolton for the whole or any part of wages or other money he lost as a result of his grievance. Section 128(2) of the Act provides that I must order Mr Thorne to pay Mr Rolton the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration.

[25] Mr Rolton says he applied for about 60 jobs, some of those through door-to-door enquiries. He applied for about 40 jobs through Trade Me. He enrolled with labour hire companies. I am satisfied that Mr Rolton did what he could to mitigate his loss of wages after his dismissal.

[26] Mr Rolton started a new job on 16 April 2018 in the same industry but at a lower rate of pay. That was 12 weeks after his paid notice period ended.

[27] Mr Rolton claims 12 weeks lost wages for the period after his dismissal. That is based on \$21.50 per hour x 40 hours a week = \$860 x 12 weeks = \$10,320 gross. I am satisfied that Mr Rolton was without earnings over that 12 week period and I must order Mr Thorne to pay him \$10,320 gross in lost wages.

Compensation

[28] Mr Rolton has claimed \$10,000 for humiliation, loss of dignity and injury to his feelings from his dismissal.

[29] Mr Rolton says the three months between his dismissal and starting his new job were the worst three months of his life. He says that he was very upset to be fired over a simple misunderstanding.

[30] Mr Rolton initially became very worked up and “wanted to get in my car and drive straight through his wall.” He says he wanted to do a lot of damage to himself and other people.

[31] Mr Rolton says he kept his situation confidential because he prided himself on his work ethic and was very embarrassed to have been fired. He says the worse part of the aftermath of his dismissal was that other people knew he had been fired, although he did not tell them. People were talking about it at the Leeston pub and Mr Rolton’s new employer found out through gossip that he had lost his job through lack of attendance.

[32] Mr Rolton was also very unhappy that he had to sell his motorbike and a Corolla car from his small collection of old Corollas. The car he sold was the most valuable but also his favourite one, which he had spent time and money on restoring.

[33] Mr Rolton says he felt as if he had let himself down by being fired and it affected his confidence when looking for a new job.

[34] I am satisfied that the unjustified dismissal caused moderate distress and humiliation to Mr Rolton. Considering the evidence about the effect on him and the range of awards in cases of this kind Lance Thorne must pay Mr Rolton \$10,000 in compensation.

Costs

[35] The successful party can expect a reasonable contribution from the unsuccessful party towards their costs of representation in the Authority. The Authority usually makes awards of costs based on a nominal daily tariff of \$4,500 for the first day of an investigation meeting. The investigation meeting took less than a day.

[36] The power to award costs is discretionary and arises from clause 15 of Schedule 2 of the Employment Relations Act 2000.

[37] Having had regard to the principles set out by the Employment Court, the time taken for the investigation meeting, and the conduct of the parties, I consider that a contributory award towards the Applicant's actual costs of \$2,250 is reasonable. It is also reasonable that Mr Thorne reimburse Mr Rolton \$71.56 being the cost of the fee to make an application to the Authority.

Christine Hickey
Member of the Employment Relations Authority