

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 249
3039011

BETWEEN EDWARD WILLIAM
 ROBINSON
 Applicant

AND DON SIMPSON LIMITED
 First Respondent

 DON SIMPSON (OAMARU)
 LIMITED
 Second Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
 Phillip de Wattignar, advocate for the Respondent

Investigation Meeting: 1 February 2019

Submissions Received: On the day

Date of Determination: 29 April 2019

DETERMINATION OF THE AUTHORITY

- A Edward Robinson was unjustifiably dismissed from his employment.**
- B Don Simpson Limited and Don Simpson (Oamaru) Limited are jointly and severally ordered to pay to Edward Robinson taking contribution into account:**
- (a) The sum of \$11,682.83 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.**
- (b) The sum of \$6,800 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- (c) Reimbursement of the filing fee of \$71.56.**

Identity of the respondent

[1] The applicant and respondent were party to an individual employment agreement dated 11 December 2014. The employment agreement referred to the employer as Simpsons Flooring Xtra.

[2] The applicant commenced his claim against Don Simpson Limited, a duly incorporated company having its registered office in Timaru. The sole director of Don Simpson Limited is John Simpson. Don Simpson Limited lodged a statement in reply, participated in mediation and at the Authority investigation meeting. Mr Simpson gave evidence as Managing Director at the Authority investigation meeting. He confirmed that the General Manager of the two Simpsons' Flooring Xtra stores in Timaru and Oamaru reported to him.

[3] Following the investigation meeting and a query from the Authority, Mr de Wattignar advised that the correct employer was Don Simpson (Oamaru) Limited trading as Simpsons Flooring Xtra.

[4] Mr Simpson is also the sole director of that company. Although it has a different registered office I conclude that Don Simpson (Oamaru) Limited has been notified of the claim.

[5] The application was lodged against Don Simpson Limited and the matter proceeded on that basis without any issue that it was not the correctly identified employer. I consider the best approach is to join Don Simpson (Oamaru) Limited on my own motion using the powers under s 221 of the Employment Relations Act 2000 (the Act) as a second respondent.

[6] If the Authority gets to the point of making an award then the respondents will be able to decide which company should meet that award.

[7] For future reference it is important that a company that employs staff is correctly identified in the employment agreement. That is something that the respondents should ensure occurs in the future.

[8] I shall refer to both the first and second respondent as DS Ltd from hereon.

Employment relationship problem

[9] Mr Robinson commenced his employment with the Oamaru branch of DS Ltd on 8 December 2014 as a store person and measurer/quoter.

[10] DS Ltd owns and operates two stores trading as Simpsons Flooring Xtra in Timaru and Oamaru. These stores provide services to the public that include measuring and fitting carpets and other floor surface types. The stores also have showrooms and retail operations.

[11] In or about 1 June 2018 Mr Robinson asked for a review of his salary/wages under clause 7.2 of his employment agreement. An issue was then raised with Mr Robinson about the loss of a customer and this led to a disciplinary process and eventually termination of Mr Robinson's employment on 27 June 2018.

[12] Mr Robinson says that his dismissal was procedurally and substantively unjustified.

[13] He is seeking firstly what he expresses to be a reversal of his dismissal. Whilst the Authority cannot reverse the dismissal it can make a finding about the justification of the dismissal.

[14] Mr Robinson also seeks reimbursement of lost wages and compensation for humiliation and loss of dignity.

[15] DS Ltd does not accept that the dismissal was unjustified, either procedurally or substantively.

[16] The parties attended mediation but were not able to resolve the matter.

The test of justification

[17] The Authority has been asked in this case to consider the justification of Mr Robinson's dismissal. Matters involving justification require the application by the Authority of the justification test in s 103A of the Act. The Authority does not determine justification by considering what it may have done in all the circumstances. It is required under the test to consider on an objective basis whether the actions of DS Ltd and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal.

[18] There are four procedural fairness factors set out in s 103A(3) of the Act. These are whether, before dismissing Mr Robinson, the allegations he was facing were sufficiently investigated. Further, whether concerns were raised with him and he had a reasonable opportunity to respond to them and have his explanation considered genuinely by DS Ltd before dismissal. The Authority may take into account other factors as appropriate and must not determine a dismissal unjustified solely because of defects in the process if they were minor and did not result in Mr Robinson being treated unfairly. DS Ltd could be expected, as a fair and reasonable employer, to comply with good faith obligations set out in s 4 of the Act.

The issues

[19] The Authority is required to determine the following issues in this matter:

- (a) What are the material documents?
- (b) What were the reasons for dismissal?
- (c) What was the nature of the earlier warnings given to Mr Robinson?
- (d) Was there a full and fair investigation into the allegations that formed the reasons for dismissal?
- (e) Could a fair and reasonable employer have concluded that the conduct was misconduct in all the circumstances?
- (f) Could a fair and reasonable employer have reached the decision to dismiss?
- (g) If the dismissal was not justified, then what remedies should be awarded and are there issues of mitigation and contribution?

What are the material documents?

The employment agreement

[20] Mr Robinson was offered an updated employment agreement in November 2017 but did not sign the agreement. He did sign an employment agreement dated 11 December 2014.

[21] Clause 13.2 of that agreement provided that the employer may at its discretion pay remuneration in lieu of some or all of the notice period.

Job description

[22] There were separate position descriptions in the Oamaru store for measurer/quantifier, store person and sales person. Mr Robinson accepted that he was provided the job descriptions on 12 May 2017 and that he undertook most of the physical measures for the Oamaru branch.

What were the reasons for dismissal?

[23] Mr Robinson was dismissed at a meeting on 27 June 2018 and a letter of the same date confirmed the dismissal.

[24] The decision makers were the General Manager of Simpsons Flooring Xtra Ross Weaver and Mr Simpson.

[25] The concern for DS Ltd was that a customer had not been contacted for three weeks after their contact details and information about what the customer wanted had been put in the measure book.

[26] There was a finding that the responsibility to contact the customer fell to Mr Robinson with reference to his job description and that Mr Robinson refused to accept responsibility for the job not being measured.

[27] A final written warning was also referred to as being relied on. The letter of dismissal referred back to the initial letter dated 18 June 2018 in the process and stated:

We noted that at the time you were on a final warning, and that should your explanation not prove satisfactory it might leave us with no option but to terminate your employment.

[28] Mr Robinson's dismissal was on notice although it was paid out in lieu of it being worked.

What was the nature of the earlier warnings?*The first warning*

[29] A final written warning issued to Mr Robinson on 27 October 2017 was referred to as part of the disciplinary process and findings for the dismissal on 27 June 2018. Preceding the final written warning was a first written warning.

[30] The first written warning was contained in an email from the General Manager of Simpsons Flooring Xtra Ross Weaver to Mr Robinson dated 4 September 2014. It was also copied to the Manager of the Oamaru Flooring Xtra store Bruce Percy.

[31] There were two issues in the email. The first was team work and cooperation with other staff. There was an expectation in the warning letter that Mr Robinson had time to help others. The second matter broadly described as “time keeping” was in relation to lunch hours where examples were given on three days about the lunch break times being in excess of the specified one hour. There was also reference to private use of the computer during work time. The email stated that Mr Robinson acknowledged the issues of the lunch breaks and computer use concerns, and it was set out that any further instances of exceeding lunch hour breaks or private computer use during work time would be treated as serious misconduct which may lead to disciplinary action including dismissal.

[32] There was no grievance raised about that warning. I accept that Mr Robinson had an opportunity to provide an explanation to the concerns.

Final written warning 27 October 2017

[33] The outcome of a disciplinary meeting in October 2017 was that a final written warning was given to Mr Robinson.

Preliminary findings about conduct leading to warning

[34] An email from Mr Weaver to Mr Robinson dated 25 October 2017 about preliminary findings provides that the conduct of concern was a statement made by Mr Robinson in front of a customer that gave rise to a complaint from a customer. There was reference to this falling within one of the examples of serious misconduct in the employment agreement being *actions which seriously damage the Employer’s reputation*. There was a finding of a loss in confidence in Mr Robinson’s ability to maintain appropriate and compatible relationships with other team members and especially his manager. The first written warning and the reference to team work and co-operation with other staff was set out in the preliminary findings email.

Final written warning

[35] The final written warning letter dated 27 October 2018 provided the following about the first warning. It provided as follows:

We also discussed with you why you are on a final written warning and referred you to the email I sent to you on 4 September 2017. The email 4 September 2017 constitutes a written warning. In that email, I concluded that any future instances of breaches could lead to serious misconduct.

[36] The reliance on the first written warning in the 4 September 2017 email in the preliminary findings appears to have been extended to support the findings and disciplinary outcome of a final written warning. The first written warning contained an expectation about team work and co-operation but it was further instances of private computer use or lunch breaks exceeding time that would be treated as serious misconduct and the conduct on this occasion was different. DS Ltd was, I accept, dealing with the matter without legal advice or human resource assistance at that stage.

[37] The conclusion in the final written warning was that it was necessary for Mr Robinson to manage his actions in the future and communicate problems when they occur in an appropriate manner.

[38] There was reference to catching up with Mr Robinson and Mr Percy about expectations of improved communication and workings and that the final written warning would remain in effect for 12 months from 27 October 2017.

[39] Mr Robinson had an opportunity during this process to give an explanation and provide submissions as to outcome. No grievance was raised about the warning within the statutory timeframe.

Were expectations of improved communication and working discussed with Mr Robinson?

[40] Mr Robinson says that they were not and he continued to have concerns about his workplace, communication and unequal workloads. Mr Weaver set out in his written and oral evidence that he did address communication concerns after the 27 October 2017 meeting. He provided information about arranging a meeting on 13 November 2017 and provided a copy of an appointment in his Outlook calendar and an email to the staff in both offices to

advise that he would be down in Oamaru the afternoon of 13 November 2017. He also provided some notes headed meeting with “Bruce and Edward.”

[41] Mr Robinson has no recollection of that meeting and places emphasis on the mention in the notes of an email dated 7 November from him as something that it seems was discussed. He says in his written evidence that was in fact was responded to directly by Mr Percy on 6 December 2017.

[42] I conclude that the information provided by Mr Weaver does support that a meeting more likely than not took place and that the timing was more likely as follow up from the final written warning.

[43] Mr Robinson is correct that there was no evidence of follow up after the meeting in November 2017.

[44] Mr Weaver said that he called into the store on ten occasions between 27 October 2017 and 14 June 2018 although the evidence supported he did not meet with Mr Robinson on 14 June 2018. He said that whilst not formal meetings there was opportunity for feedback on performance and to talk one to one and request feedback. Mr Robinson said that Mr Weaver was generally visiting Oamaru and surrounding areas to help out with customer and contractor concerns which took priority over meeting with staff.

[45] Mr Robinson considered his concerns remained unresolved. It was Mr Weaver’s view that Mr Robinson constantly questioned Mr Percy’s role and claimed there was uneven workload distribution between them. He had concerns that Mr Robinson was difficult to work with rather than Mr Percy. He considered appropriate steps were taken to attempt to resolve matters. This included explaining to Mr Robinson the importance of relationships in the business and team work.

[46] There was common ground that there was a meeting with Mr Robinson, Mr Weaver and Mr Simpson on 16 May 2018, and during that time there was a meeting with Mr Robinson individually to discuss the atmosphere in the workplace and relationships with contractors. Mr Robinson said that was the only one on one meeting he had in 2018.

[47] It is common ground that there was no mention at that meeting about the loss of customer A. The evidence supported however that Mr Percy knew about the loss at this stage

or shortly thereafter. Mr Weaver said that the loss of customer A was not known to him until after the request for a pay review.

Was there a full and fair investigation into the allegations that formed the reasons for dismissal?

Request for a review

[48] As set out earlier the disciplinary process followed a request by Mr Robinson for a pay review under clause 7.2 of his employment agreement that provided as follows:

The Employer agrees to review the Employee's salary/wages on the 12 month anniversary of this employment agreement and every 12 month anniversary thereafter. The parties agree that the Employee shall not have any necessary entitlement to an increase, but, the Employer agrees to conduct this review in good faith and to consult with the Employee during the review.

[49] Mr Weaver responded verbally and in writing to Mr Robinson's request for a pay review. He said that during a review into Mr Robinson's work performance for the purpose of the pay review, the loss of customer A was discovered.

18 June 2018 invitation to a disciplinary meeting

[50] What followed then was an invitation to Mr Robinson in a letter dated 18 June 2018 to an investigation meeting on 21 June 2018 expressed to be a meeting to discuss review and work performance. I set out the material parts of the 18 June 2018 letter below:

Communication and productivity

We have concerns about your communication and willingness to participate in supporting the team and you not following directions from Bruce. We seek an explanation for not following Bruce's instructions in relation to work Bruce asked you to attend and complete. We have attached a statement of the relevant facts that Bruce has set out. The loss of a customer due to staff failing to act and follow directions is serious misconduct. We view this as a serious matter that could have consequences for your employment. Especially so since we previously had to raise concerns with you about your work performance and attitude back in 2017 and put you on a final warning.

[51] There was also reference in the letter of 18 June to Mr Robinson claiming about his work performance that he had provided effort beyond what is practical and a concern this had been taking a toll on his health and job satisfaction. It was stated in the letter that neither Mr Percy nor Mr Weaver recalled him informing them of that.

[52] There was reference to the situation being very serious and also about the final warning. It was stated that in that warning they had “explained that any proven case of behaviour that was inappropriate and unacceptable would lead to disciplinary action up to and including dismissal”. In fact a statement to that effect was not in the final warning except when there was reference back to the 14 September email. The letter stated that because Mr Robinson was on a final warning and should his explanation not prove satisfactory it may leave no option but termination. Mr Robinson was encouraged to bring a support person to the meeting and the attendees on behalf of DS Limited were set out in the letter.

[53] Mr Percy’s account was attached to the letter of 18 June 2018. It can be summarised as follows. On 24 April 2018 the office administrator Karen took a call from A and entered the measure in the measure book for A. She then informed Mr Robinson that the customer needed this job measured quickly. On 3 May 2018 Mr Percy wrote that he added a job to the measure book in Twizel and reminded Mr Robinson that the A measure needed to be done and asked him to do that in conjunction with the Twizel measure. On 15 May 2018 Mr Robinson called A to arrange a measure of her home and was advised the job was lost to a competitor due to delay in the measure being undertaken. It was noted that in the meantime A had called concerned that she had not heard from Mr Robinson about her measure and that the carpet she was looking at was only on special until May 2018.

[54] Although the raising of this issue was unfortunate as it coincided with Mr Robinson’s request for a pay review DS Ltd was entitled to raise its concern. It had lost a client for whom it had undertaken work previously and needed to investigate the reasons for that. The meeting was recorded and the recording supports that the two matters being disciplinary and pay review were discussed separately.

First disciplinary meeting 21 June 2018

[55] Mr Robinson attended this meeting without representation. Mr Weaver and Mr Simpson attended with Mr de Wattignar.

[56] Mr Robinson had an opportunity to provide an explanation to the allegations and was appropriately questioned further on his explanation. There was also an opportunity for Mr Robinson to refer to his performance after the questioning about the loss of the customer had been undertaken and he also made reference to experiencing high levels of anxiety and also having a high workload take a toll on his health and job satisfaction.

Mr Robinson's explanation to the loss of A's job

[57] Mr Robinson said that he did not recall being advised about the urgency of the measure directly. He said that he noticed it in the measure book and talked to colleagues and that he believed a builder was to send through a plan. He thought he was advised of this by Mr Percy. He referred to the original entry in the measure book dated 24 April and 5 May being without details as to urgency and that ASAP was only added on 15 May 2018.

[58] He did not accept that the discussion with Mr Percy happened as it was described or that it took place on 3 May 2018. He said the only conversation with Mr Percy would be along the lines of "if you were doing the Omarama measure [for A] maybe you could do the Twizel measure at the same time." Mr Robinson explained he had put the Twizel measure in the Timaru measure book for a measurer who undertook measures at the Timaru branch to do as Mr Robinson had never measured out as far as Twizel.

[59] Mr Robinson said that he then entered the information about A in the measure book "lost to competitor due to delay" because he was led to believe until 15 March 2018 the builder was sending a plan or measurement and that was not true and he hoped there could be some reflection on the events.

[60] He also explained that it was a very busy period over that time and he denied that he did not follow the directions from Mr Percy. He said that he did not believe Mr Percy to be the type to give directions. He also questioned if the measure was urgent, why did Mr Percy not cover the measure when Mr Robinson was unwell and there were measures booked in for Mr Percy for Duntroon/Kurow. Mr Robinson's explanation was that many people shared responsibility for the loss of the customer.

22 June 2018 letter – outcome from meeting 21 June 2018

[61] Mr Weaver wrote to Mr Robinson on 22 June 2018. The letter provided that time had been taken to consider responses during the meeting.

[62] It was stated that at no time did Mr Robinson take responsibility for the job not being measured. Neither did he try to make contact with the customer despite having contact

details. It was stated that if there was a belief that the builder was sending a plan¹ Mr Robinson did not follow up with the builder or any staff member to make sure this happened.

[63] The letter stated that the responsibilities to contact the customer or follow up on the floor plan were Mr Robinson's and he refused to accept them. Further that DS Ltd could not accept this poor work performance, lack of communication and no acceptance of responsibilities. As Mr Robinson was already on a final written warning from 27 October 2017 it was stated that there appeared no alternative other than to make a decision to terminate employment. A further meeting was proposed to give Mr Robinson a further opportunity to be heard. The proposed date for the final meeting was extended from 25 June to 27 June 2018 at Mr Robinson's request in the event he wished to organise a support person or representative.

[64] I note that the concerns had shifted and changed from the 18 June letter of allegations about not following Mr Percy's direction/instruction.

27 June 2018 meeting

[65] A further meeting was held on 27 June 2018. Mr Robinson attended with Mr Simpson and Mr Weaver. The evidence supported that no new information was provided. Mr Robinson was advised of his dismissal at the end of the meeting.

[66] I am satisfied that Mr Robinson had a further opportunity to make submissions as to why his employment should not be terminated.

Conclusions about procedural fairness

Further investigation

[67] Following the 21 June 2018 meeting the main concerns were about the failure by Mr Robinson to make contact with the client within the three week period to organise a measure usually within two weeks and the failure to accept responsibility for the need to do so. The concern that Mr Robinson had failed to follow a direction/instruction from Mr Percy was not a reason for dismissal although I accept provided overall context.

¹ It was noted that this was not company policy to have a builder measure for an existing house.

[68] The communication styles of Mr Percy and Mr Robinson are different. Mr Percy communicates in a more relaxed informal manner. When questioned at the Authority investigation meeting he indicated that he understood Mr Robinson needed things set out for him in a specific way. This was often by email and the impression that I had was that communication of an informal nature was somewhat problematic and that there were issues at the Oamaru store with communication and workplace relations. Mr Weaver when questioned by Mr Robinson accepted that Mr Percy's communication style is not always black and white and "leaves the door slightly ajar."

Workload and communication issues

[69] There were concerns expressed about unequal workload by Mr Robinson at the 21 June meeting.

[70] Mr Weaver said that he thought the uneven work load issues had been remedied through role mapping undertaken in May 2017 and the employment of an additional staff member in July 2017. His view was that Mr Robinson struggled to grasp the aspect of working as a team and could or would not appreciate other staff roles. He said that investigation carried out into role mapping did not show that in fact the workloads were uneven as Mr Robinson had suggested in his letter.

[71] It was also concluded by Mr Weaver and Mr Simpson that there was only a marginal increase in measures in April/May 2018 being less than one a week since the same period in 2017.

[72] I do not find that further investigation of those matters was required of a fair and reasonable employer because objectively assessed the concern was that no contact had been made with A in a timely manner to arrange a date/time for a measure. It was not a situation where the date for the measure was set too far out because it had not been set at all. It had not got to that point. For that reason although I accept that Mr Percy's leave may have been longer than Mr Weaver and Mr Simpson understood it to be I do not find further investigation about that was required.

[73] There was further investigation into Mr Percy's actions on 8 May 2018 when Mr Robinson called in sick and Mr Percy undertook some of his measures as to why Mr Percy did not undertake A's measure. It was concluded, I find not unreasonably, that Mr Percy

would not have had time to book other measures for that day. Further that A's measure should have been booked for this trip by Mr Robinson but he had not contacted A. 8 May 2018 was two weeks after the measure had been in the book.

[74] Mr Percy was not asked if he had told Mr Robinson that a builders plan or measure was expected. The view of Mr Weaver and Mr Simpson was that even if Mr Robinson was not clear that the measure was urgent or thought a builder may need to undertake measures or provided a plan, three weeks was still too long a period to not make some contact. I am not satisfied that further investigations would have assisted about that matter. Mr Percy when questioned about that matter said that he did not mention to Mr Robinson about a builder in relation to A's measure.

[75] Mr Robinson did have an opportunity to provide a full explanation which I accept, having heard the recording, was listened to and that there were appropriate questions asked and further consideration given.

[76] There was an opportunity for Mr Robinson to provide a further explanation to the preliminary findings particularly about a failure to accept responsibility.

[77] Mr Robinson expressed some concern that he was asked to attend a meeting having said that he was experiencing stress related symptoms. I acknowledge that however there was no medical certificate to state that Mr Robinson was too unwell to attend a meeting. Mr Robinson was also offered paid time off during the disciplinary process.

[78] I find the process adopted by DS Ltd was that a fair and reasonable employer could have been expected to undertake.

Did Mr Robinson's conduct amount to misconduct?

[79] The allegation in the 18 June letter of failing to follow a manager's instruction was not maintained following the first disciplinary meeting.

[80] As a measurer in the Oamaru store the normal physical responsibility for measurements fell to Mr Robinson and a fair and reasonable employer could conclude that included the first contact after the measure was put into the book/spreadsheet to organise a measure. In this instance Mr Robinson's explanation was that there was confusion on his part about a builders plan and when that had not been received he called customer A but she

had gone elsewhere for her floor coverings. He did not accept he was told that the matter was urgent until 15 May 2018. I accept that there was no evidence a fair and reasonable employer could conclude he was. He said that others were involved and there was a shared responsibility.

[81] There is a very fine line in this case whether the failure to contact A in a timely manner was a performance concern or negligence. For example in a 2017 performance review undertaken by Mr Weaver one of the comments for Mr Robinson was to continue working on having quotes out within 24 hours.

[82] Mr Weaver confirmed that it was not concluded Mr Robinson had acted intentionally. A fair and reasonable employer could also have been expected to weigh that it was Mr Robinson who set out in the measure book that the client had gone to a competitor and why. He did not attempt to hide the client loss or the reasons for it although I accept did not raise it with Mr Weaver at the 16 May 2018 meeting. Equally however he may well have considered it enough that Mr Percy was aware of the loss and that Mr Percy would have escalated the matter.

[83] DS Ltd considered the matter to be other than a performance concern because of the failure to accept responsibility and the final written warning. The failure by Mr Robinson to accept responsibility for the loss of a valuable client was concerning to DS Ltd. That has to be seen within the context of Mr Robinson's explanation about confusion about a builders plan and a busy period.

[84] Standing back and considering the conduct objectively a fair and reasonable employer could conclude misconduct in the nature of negligence and communication concerns. A fair and reasonable employer could not conclude the nature of conduct or the failure to accept sole responsibility was deeply impairing of trust and confidence.²

Could a fair and reasonable employer have reached the decision to dismiss?

[85] Prior warnings can be considered under s 103A of the Act as part of the circumstances at the time the decision as to disciplinary outcome decision was reached. They can mean that establishing misconduct after warning for similar misconduct is sufficient rather than proving serious misconduct.

² *Northern Distribution Union v BP Oil NZ Ltd* Court of Appeal [1992] 3 ERNZ 483

[86] Mr Robinson had not been spoken to about performance concerns since the final written warning which, Mr Weaver accepted when questioned at the Authority investigation, was for different conduct to that which was of concern at the time of the dismissal. The final written warning was expressed to be in force for a period of 12 months. A fair and reasonable employer could be expected in considering a disciplinary outcome to revisit the final warning to be confident that it was very clear about what was expected of Mr Robinson about his behaviour, performance and the consequences if expectations were not met.

[87] In this case the final written warning was not for similar conduct. It was not sufficiently explicit about performance, behaviour or consequence so that a fair and reasonable employer could conclude it could be relied on to reach a decision to dismiss in the circumstances of this case where there was misconduct. Mr Robinson I find had no knowledge that a failure to contact customer A in a timely manner would result in his dismissal.

[88] A fair and reasonable employer could have been expected to have considered other outcomes such as a specific warning about timeliness and/or a resulting impact on any review of salary/wages.

[89] I find that the dismissal was unjustified.

[90] Mr Robinson was unjustifiably dismissed and is entitled to consideration of remedies.

Remedies

Lost Wages

[91] Mr Robinson said that he undertook a wide job search through Work and Income New Zealand, Trade Me and online. He said that he was getting interviews but had difficulty in describing how he had left his last place of work.

[92] Mr Robinson had not found employment as at the time of the investigation meeting. He was looking after his children and said that the job search was less of a focus for him when his wife obtained full time employment in early November 2018. He was then looking for employment to fit around his family commitments and that was not necessarily full time.

[93] I am satisfied that Mr Robinson made sufficient attempts to mitigate his loss until 5 November 2018. After that date the loss was not related to the personal grievance.

[94] Section 128 of the Act provides for reimbursement. It states that if the Authority determines an employee had a personal grievance then it must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to pay 3 months ordinary time remuneration. It may under s 128(3) in its discretion order an employer to pay a sum greater than that.

[95] In this case Mr Robinson's actual loss is greater than 3 months. The letter of dismissal provides that he was paid three weeks in lieu of notice from 27 June 2018 and that would reduce actual loss by three weeks being payment in effect to 18 July 2018. The period from 18 July 2018 to 5 November 2018 is 15 weeks and 2 working days.

[96] I find it appropriate to exercise my discretion under s 128(3) and award reimbursement of lost wages for a period of 15 weeks and 2 working days.

[97] I have calculated that based on an hourly rate of \$21 for ordinary time of 42.5 hours per week as set out in clause 6 of the employment agreement. The weekly payment is \$892.50 gross multiplied by 15 which equals \$13,387.50 gross. The daily rate for calculating two days' pay is \$178.50 multiplied by two is \$357. \$13,387.50 plus \$357 = \$13,744.50.

[98] Subject to any issue of contribution I find that an award for lost wages is the sum of \$13,744.50 gross.

Compensation

[99] Mr Robinson said that he felt undervalued and he was distressed by the disciplinary process and outcome.

[100] He took medication through the process and became very anxious.

[101] Some of the distress that Mr Robinson spoke about was about his employment and what he considered a failure by his employer to investigate his concerns. I accept that Mr Robinson was distressed about that however the employment relationship problem was one of dismissal and it is from that any remedy for humiliation, loss of dignity and injury to feelings must flow.

[102] I find that an award subject to any issue of contribution where there was moderate evidence about the effect of the dismissal itself is \$8000.

Contribution

[103] The Authority is required under s 124 of the Act because it has found Mr Robinson has a personal grievance to consider the extent to which his actions contributed towards the situation that gave rise to the personal grievance. If it concludes that the actions did contribute then it must reduce the remedies that it would otherwise have awarded.

[104] This is the point where the Authority must consider the actions of Mr Robinson. Whilst Mr Robinson was critical of Mr Percy's failure to communicate I find on the balance of probabilities that Mr Robinson did not properly communicate with Mr Percy about customer A. There was an opportunity to do so when Mr Percy suggested Mr Robinson undertake A's measure with the Twizel measure. He could have at that point clarified about the builders report. In that way he contributed to the length of time before A was contacted.

[105] Mr Robinson was entitled to explain that the team at the Oamaru store had some shared involvement in A's contact with DS Ltd and therefore the measure. In his role however Mr Robinson had ultimate responsibility to make the contact with A and undertake the measure or seek help and clarification from the team. When a concern about the failure to recognise this was specifically raised in the letter of 22 June 2018 he did not accept responsibility.

[106] I find for the above reasons that Mr Robinson's actions contributed towards the situation that gave rise to the personal grievance and awards are to be reduced accordingly by 15%.

Orders

[107] Taking contribution into account I order Don Simpson Limited and Don Simpson (Oamaru) Limited jointly and/or severally to pay to Edward Robinson:

- (a) Reimbursement of lost wages under s 123(1)(b) of the Act in the sum of \$11,682.83 gross.

- (b) Compensation under s 123(1)(c)(i) of the Act in the sum of \$6,800 without deduction.

Costs

[108] Mr Robinson was unrepresented but he is entitled to reimbursement of the filing fee of \$71.56.

[109] I order Don Simpson Limited and Don Simpson (Oamaru) Limited jointly and/or severally to reimburse Edward Robinson for his filing fee in the sum of \$71.56.

Helen Doyle
Member of the Employment Relations Authority