

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 118  
3069772

BETWEEN           LESTER BRETT MARK  
                          ANTHONY ROBINSON  
                          Applicant

AND                   A-Z RIGGING AND  
                          SCAFFOLDING LIMITED  
                          First Respondent

                          DUDLEY REX HOSKIN  
                          Second Respondent

Member of Authority:    Jenni-Maree Trotman

Representatives:        Rachel Anne Webster, counsel for the Applicant  
                              Beverley Edwards, counsel the Respondent

Investigation Meeting:   14 February 2020

Submissions and further   17 February 2020, submissions and further information,  
Information Received:    Applicant  
                              17 February 2020, further information, Respondent

Date of Determination:   13 March 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     A-Z Rigging and Scaffolding Limited is a family owned business that supplies scaffolding to the construction and heavy industries. Dudley Hoskin is the sole director of that Company.

[2]     Lester Robinson commenced employment with A-Z Rigging and Scaffolding in April 2017 as a Mechanic. On 11 December 2018 his position was made redundant. Lester claims his dismissal was unjustified. He further claims that he was subjected to an unjustified disadvantage, that A-Z Rigging and Scaffolding breached its statutory

duty of good faith, breached the terms of his individual employment agreement (IEA), and made an unlawful deduction from his wages. He claims Dudley aided or abetted the alleged breaches of his IEA.

[3] A-Z Rigging and Scaffolding, and Dudley, deny Lester's claims. They maintain that he was not unjustifiably disadvantaged nor unjustifiably dismissed. They claim his employment was terminated by way of redundancy due to an essential and urgent restructure.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The Issues**

[5] The issues identified for investigation and determination are:

- a. Did Lester suffer an unjustified disadvantage to his employment arising from:
  - i. A failure by A-Z Rigging and Scaffolding to address bullying and harassment.
  - ii. A failure to provide a safe workplace.
- b. Was Lester unjustifiably dismissed?
- c. If Lester was unjustifiably disadvantaged, or unjustifiably dismissed, what remedies should be awarded?
- d. If any remedies are awarded, should they be reduced for blameworthy conduct by Lester that contributed to the situation giving rise to his grievance?
- e. Did A-Z Rigging and Scaffolding breach the duty of good faith it owed to Lester? If so, what penalty (if any) ought to be ordered?
- f. Did A-Z Rigging and Scaffolding make unlawful deductions from Lester's wages? If so, should a penalty be ordered?

- g. Did A-Z Rigging and Scaffolding breach the IEA? If so,
  - i. Did Dudley aid and abet that breach?
  - ii. Should a penalty be ordered?
- h. Should either party contribute to the costs of representation of the other party?

### **Background facts**

[6] The relationship between Lester and A-Z Rigging and Scaffolding was relatively uneventful for the first year or so of his employment. However, from Lester's perspective, it began deteriorating after he went into partnership with Zak Hoskin, A-Z Rigging and Scaffolding's Operations Manager, in a business known as Hoskin Racing. He said differences arose that led to the partnership souring and tension overflowing into his workplace at A-Z Rigging and Scaffolding. According to Lester, Zak subjected him to regular verbal abuse and intimidation. He pointed to three occasions where this occurred.

[7] The first occasion occurred on or about 16 October 2018. Zak asked a junior mechanic, Justin, to finish servicing some scaffolding clips. Justin is Lester's step-son. Lester told Zak that that this was not Justin's job. He said that Zak then told him he needed to listen to him and if he did not he would be fired. Zak denies threatening Lester's job. Justin said that Zak told them that they could both "f\*\*k" off if he did not do the scaffolding clips. Lester and Zak each alleged the other was swearing during this conversation.

[8] The second occasion was on or about 19 November 2018. I pause here to note that I did consider, but do not accept, that the events on this day took place on 26 October. A work logbook records the erection of the Christmas tree, which gave rise to the events, took place on 19 November.

[9] On this day, Zak told Justin he needed to go on a scaffolding job. Lester challenged Zak's direction, advising Zak that Justin would not do this as he was working with him and scaffolding was not his job. Lester alleges that Zak then replied that he had no one else and if Justin did not go then he would not have a job. Zak denies giving this ultimatum. Justin said it was just he who was told he would lose his job if

he did not do the work. Justin subsequently went to the job and completed the tasks allocated to him. Lester and Zak each alleged the other was swearing during this conversation.

[10] The third occasion took place around late November 2018. Zak asked Justin to attend a scaffolding job because they did not have enough workers. Lester challenged this decision, advising Zak that Justin would not go as he needed him in the workshop. Zak replied along the lines that he was the boss and Lester needed to listen to him. Lester says Zak also told him that if Justin did not go they would lose their jobs. Zak denies this and Justin did not recall hearing Zak tell Lester he would lose his job. Lester and Zak each allege the other was swearing during this conversation.

[11] On 6 and 7 December 2018 Lester took annual leave to work on Zak's race car. He said he felt loyal to Zak and Hoskin Racing and wanted to keep the partnership going.

[12] On 11 December 2018 Lester was called into a meeting with Dudley and was made redundant. He refused an offer of payment for 40 hours work in lieu of notice and was then paid his wages to the end of that day.

### **Issue one: Unjustified disadvantage**

#### *The law*

[13] Under s 103(1)(b) an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[14] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[15] An employer's failure to provide a workplace that meets health and safety requirements may be a ground for an unjustified disadvantage claim. As an employer,

A-Z Rigging and Scaffolding had a legal responsibility to take all reasonably practicable steps to prevent harm to Lester where it knew, or ought reasonably to have known, about the circumstances giving rise to a risk of harm.<sup>1</sup>

*Disadvantage one - bullying*

[16] Having carefully considered the evidence, I find Lester did not suffer an unjustified disadvantage to his employment arising out of a failure by A-Z Rigging and Scaffolding to address the alleged bullying of Lester by Zak.

[17] Even if Lester was bullied, and I pause here to express doubt that was the case based on the evidence provided, I find it is more likely than not that A-Z Rigging and Scaffolding did not know about the alleged bullying.

[18] In terms of the 16 October incident, Lester said he believed Zak was just venting, as it was a particularly stressful week as they were preparing Zak's race-car for racing season. Under questioning, Lester conceded that he "wasn't phased" by the discussion or the threat that he would lose his job. There was no evidence that he raised this incident with Dudley. In relation to the other two examples, I accept Lester talked to Dudley about the duties that Zak was asking Justin to perform, but find it unlikely that he raised any concern about how Zak was allegedly treating him given his ongoing business partnership with Zak and his desire to remain loyal to him.

[19] I am also satisfied that A-Z Rigging and Scaffolding could not reasonably have known about any risk of harm. As Lester and Justin's superior, Zak was entitled to provide them with lawful and reasonable instructions. A fair and reasonable employer, in the circumstances that were presented to the Authority, could not have foreseen Lester suffering harm through Zak's requests for Justin to undertake the work.

*Disadvantage two - drug and alcohol allegations*

[20] Based on the evidence provided by Lester, I am satisfied that he did not suffer any disadvantage to his employment arising out of a failure by A-Z Rigging and Scaffolding to address the use of drugs and alcohol in work vehicles and on its premises.

[21] Based on the evidence and documentation that I reviewed, I find A-Z Rigging and Scaffolding actions were what a fair and reasonable employer could have done in

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<sup>1</sup> *FGH v RST* [2018] NZEmpC 60 at [201].

all the circumstances at the time. It recognized that alcohol and drug abuse was a potential hazard and took a firm approach to dealing with such abuse to ensure its workplace was drug free. This included undertaking regular drug testing of its workers, reviewing its health and safety policies on an annual basis, and taking action when it became aware of any breach. The examples provided by Lester do not displace this finding.

[22] *Drugs in vehicles* - Lester points to two occasions where drugs were found in vehicles that he was working on. The first occurred in or about the week commencing 15 October 2018. Lester and Justin located a can and a pipe used to smoke drugs. Lester notified Dudley and Zak. Lester said, "I was confident Zak would do something about this. Zak felt terrible drugs had been found in the vehicle". He also confirmed that Dudley told him he would investigate. Dudley's evidence was that he did investigate. He said he checked the vehicle's GPS to find out where it went and who took it. As he was unable to ascertain which employee used the vehicle, he undertook random drug testing of his staff in accordance with the Company's Drug and Alcohol Policy. These tests are supported by the Company's financial records that show drug testing was undertaken.

[23] The second example provided by Lester involved drug paraphernalia located in a crashed work vehicle. Neither Lester nor Justin could recall when this was. Having heard from the witnesses, I was not persuaded that either Dudley or Zak was made aware of any drug paraphernalia being located in this vehicle. Justin said he told Lester but there was no evidence that Lester passed on this information. I do not accept, given the immediate steps taken by the Company to investigate the earlier finding of drug paraphernalia, that it was aware there were drugs in this vehicle.

[24] *Drugs consumed at work* - Lester told the Authority that he viewed drugs being consumed on the road frontage outside A-Z Rigging and Scaffolding's premises. Zak said that he never viewed this for himself, which evidence was mirrored by Dudley and Justin, but nevertheless passed Lester's concern on to Dudley. Dudley said that, as he was not provided with any details about who was smoking drugs and when this had occurred and was therefore unable to investigate further but confirmed he continued to undertake random drug testing of staff.

[25] *Drugs supplied in the workplace* - Lester alleged that he viewed Zak being supplied with drugs in the workplace. Taking into account the evidence of Zak's serious health condition at times material to this allegation, and Zak's reaction to drugs being located in the work vehicle in October 2018, I was not persuaded that this occurred. Even if I am wrong, Lester did not raise this with A-Z Rigging and Scaffolding so as to enable it to investigate and address the issue.

*Disadvantage three - vehicles being repaired in unsafe conditions*

[26] For completeness, although not pleaded, I also considered Lester's complaint that he was unjustifiably disadvantaged by being required to repair vehicles on the side of the road.

[27] For several months prior to Lester's redundancy, the drive leading to his workshop had become blocked by scaffolding. As vehicles and trucks could not access the workshop for repair, Lester was required to repair vehicles on the side of a road adjoining A-Z Rigging and Scaffolding's business. This road was a calder sack that serviced neighbouring businesses.

[28] There can be little doubt that there was a risk of Lester suffering harm by working on the side of a road. However, I find A-Z Rigging and Scaffolding's actions in trying to minimise that risk were what a fair and reasonable employer could have done in all the circumstances at the time. This included making a walkway down the side of the driveway that was used to safely access the road from the workshop and cordoning off the area where a vehicle was being worked on with road cones. A-Z Rigging and Scaffolding also took other steps to mitigate the risk by investigating alternative venues for a workshop and for the storage of scaffolding but, due to the cost, this was deemed unfeasible.

[29] Lester also referred to an occasion where he had to salvage a vehicle that had gone down a bank. I am satisfied on this occasion that all reasonable steps were also taken by A-Z Rigging and Scaffolding to safeguard any risk of harm. For example, by ensuring it had adequate staff on the road to re-direct traffic including someone standing at one end of the road to block traffic and closing the lane where its staff was working. Lester was unable to say what more A-Z Rigging and Scaffolding could have done to safeguard him on this occasion.

*Finding on issue one*

[30] I find Lester did not suffer an unjustified disadvantage to his employment.

**Issue two: Unjustified dismissal**

[31] In order for Lester's redundancy to be justified, A-Z Rigging and Scaffolding must satisfy the requirements set out in s 103A of the Act. This requires an objective assessment of whether its actions, and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[32] To ensure a redundancy process is procedurally fair, employers must comply with their good faith obligations contained in s 4 of the Act. In accordance with these obligations, affected employees should be provided with access to information relevant to the continuation of the employee's employment and an opportunity to comment on that information before an employer makes its final decision. This includes details as to what the criteria for selection for redundancy are and the weight to be applied to those criteria.<sup>2</sup>

[33] An employer is only entitled to terminate an employment agreement due to redundancy if the termination can be genuinely justified based on valid commercial reasons.

*The process followed by A-Z Rigging and Scaffolding*

[34] I am satisfied the test of justification was not satisfied. There were a number of serious defects in the process followed by A-Z Rigging and Scaffolding that resulted in Lester being treated unfairly in terms of s 103A(5) of the Act.

[35] A-Z Rigging and Scaffolding did not meet any of the mandatory considerations set out in s 103A(3), nor did it satisfy the requirements of good faith set out in s 4(1A)(c) of the Act. Lester was not warned of a pending redundancy, he was not provided with any information relevant to the continuation of his employment, there was no consultation or consideration of alternatives, and he was not provided with an opportunity to respond before A-Z Rigging and Scaffolding decided to disestablish his

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<sup>2</sup> *Jinkinson v Oceania Gold* [2010] NZEmpC 102 at [51].

position. In effect his dismissal was immediate and abrupt. These defects were not minor and did result in Lester being treated unfairly.

*The reason for the redundancy*

[36] For completeness, and as it is relevant to remedies, I also record my findings in terms of the genuineness of A-Z Rigging and Scaffolding's decision. For the reasons that follow, I find that the decision to terminate Lester's employment on the grounds of redundancy was based on genuine commercial reasons.

[37] In *Michael Rittson-Thomas t/a Totara Hills Farm v Hamish Davidson*, Chief Judge Colgan stated:

It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer to simply say that this was a genuine business decision and the Court (or Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances. Therefore, while it is still true that the Court cannot substitute in its own judgment, s 103A does require the Court to assess what the fair and reasonable employer could (previously would) have done in the circumstances.

[38] In the last few years A-Z Rigging and Scaffolding has gone from being one of five scaffolding companies in the Hamilton region to one of around sixty companies. The increase in competition has led to it suffering significant financial loss as it lost work due to its prices being undercut. Dudley explained that it had reached the point where on some contracts the cost of work had been reduced to such a level that he was, in effect, buying the contract.

[39] In the lead up to Lester's termination, Dudley explained how he was having weekly meetings with his accountant to try to work through the financial difficulties the Company was experiencing. During these meetings, his Accountant recommended that he outsource the Company's mechanical repairs and make Lester and Justin redundant to save money. He said he did not initially accept this recommendation. He was optimistic that the Company could trade its way out of its financial difficulties and thought he may be able to sell equipment to assist it in the interim. Unfortunately, this was not to be the case.

[40] By December 2018 the Company's income had dropped significantly and its future sales projections looked bleak. During Dudley's weekly meeting with the accountant on 11 December, he was advised that if he did not make Lester and Justin redundant immediately the Company would not make it through Christmas and the early New Year. He was also warned that the Company did not have the money to pay for an alternative workshop, or to pay for storage of the additional scaffolding equipment to clear the driveway to the workshop, to address the safety concerns with Lester and Justin having to undertake work on the side of the road.

[41] Faced with this advice, Dudley said he made the only decision that he felt he could. He went back to his office, convened a meeting with Justin, and then with Lester, and provided them with notice of their redundancy.

[42] Having reviewed the financial records of the Company I accept that a fair and reasonable employer could have reached the commercial decision that Lester and Justin's roles had to be made redundant. By terminating Lester and Justin's employment it saved the cost of their wages and avoided any ongoing health and safety risk with having them work on the side road. Had the Company not made them redundant it is more likely than not that it would have had insufficient funds to continue to operate.

[43] A review of the profit and loss reports show a 50% drop in the Company's income between November 2018 and December 2018. While its income did increase slightly in January 2019, it remained around 35% lower than its November income through until February 2019 before falling further during 2019. The Company's ongoing monthly reports generally show the Company suffering loss for most months between Lester's termination and the Authority's investigation. To survive the Company has had to take out loans that I was told had to be secured in part over Dudley's personal assets.

[44] While I acknowledge that around the time Lester was made redundant Dudley had found out that Lester had incorporated another company, and was allegedly taking clients that belonged to Hoskin Racing, I was not persuaded that this was a motivating factor behind the decision to make his position redundant.

*Finding on issue two*

[45] Lester was unjustifiably dismissed.

### **Issue three: Remedies**

#### *Lost remuneration*

[46] In a situation where there is a flawed consultation process, but the substantive outcome is justified; the lost remuneration that an employee is entitled to should be limited to the amount of time it would take to get the process right.<sup>3</sup>

[47] In this case I estimate three weeks would have been sufficient to complete the consultation process correctly. Therefore Lester is entitled to three weeks' lost remuneration pursuant to s 123(1)(b) of the Act.

[48] A review of Lester's wage records show that his hours of work fluctuated over the duration of his employment. However, in his final 6 months of employment he worked an average of 49 hours per week. Multiplying 147 hours (3 weeks) by Lester's hourly rate (\$30) I reach a figure of \$4,410 gross.

[49] A-Z Rigging and Scaffolding is ordered to pay Lester the sum of \$4,410 gross within 28 days of the date of this determination.

#### *Compensation s 123(1)(c)(i)*

[50] Even if the procedural requirements had been followed by the Company, the result would have been the same. In terms of compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act I therefore limit any award to the humiliation, loss of dignity and injury to feelings which arose as a result of the procedural failures.

[51] Lester says the Company's procedural failures significantly affected him. He explained how his termination came as a surprise and left him in a financially stretched situation over Christmas. Due to the lack of consultation he felt he was being dismissed for other reasons.

[52] In the circumstances I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$5,000.

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<sup>3</sup> *Waitakere City Council v Ioane* [2004] 2 ERNZ 294 (CA).

[53] A-Z Rigging and Scaffolding is ordered to pay Lester the sum of \$5,000 pursuant to s 123(1)(c)(i). Payment must be made within 28 days of the date of this determination.

#### **Issue four: Contribution**

[54] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.<sup>4</sup>

[55] I am satisfied that Lester did not contribute to his personal grievance and for this reason I make no deduction to the remedies I have awarded.

#### **Issue five: Wage deduction**

[56] On 14 October 2018, A-Z Rigging and Scaffolding deducted an amount of \$20 from Lester's pay as "Koha" paid to a scaffolder who had lost his son. It asked its staff verbally if they consented to this deduction prior to making the deduction and had understood Lester had consented. He denies this.

[57] Section 4 of the Wages Protection Act 1983 requires an employer to pay the entire amount of wages to an employee without deduction. Section 5 creates an exception. An employer may make deductions from wages payable to a worker where the written consent of the employee has been provided. This includes consent in a general deductions clause in the worker's employment agreement but only where the employer first consults with the employee.

[27] In the present case, A-Z Rigging and Scaffolding failed to obtain Lester's written consent to the deduction of \$20. I am satisfied the deduction breached s 4 of the Wages Protection Act.

[28] A-Z Rigging and Scaffolding is ordered to repay the sum of \$20 to Lester within 28 days of the date of this determination pursuant to s 11 of the Wages Protection Act.

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<sup>4</sup> Employment Relations Act, s 124.

[58] Taking into account the one-off nature of this breach, the fact that it was unintentional, and there being no evidence of any damage suffered by Lester because of the deduction, I decline to exercise my jurisdiction to order penalty.

**Issue six: Breach of good faith**

[29] Lester claims that A-Z Rigging and Scaffolding breached its statutory obligations of good faith contained at s 4 of the Act. He says it did this by failing to provide him with access to information relevant to the continuation of his employment and an opportunity to comment on that information prior to a decision being made to make him redundant.

[30] I find that A-Z Rigging and Scaffolding did breach s 4 of the Act. However, I do not find that breach was deliberate, serious, and sustained. No penalty is payable for this reason and for the reason that the facts that support the breach have contributed to my finding of unjustified dismissal.

**Issue seven: Breach of the IEA**

[31] Lester claims that A-Z Rigging and Scaffolding breached his individual employment agreement (IEA) by, firstly, failing to comply with the implied term to provide him with a safe workplace. I have already determined this not to be the case. There was no breach.

[32] Secondly, Lester claims A-Z Rigging and Scaffolding breached his IEA by failing to follow the restructure process contained therein and to provide him with two weeks' notice. This second claim is surprising given Lester's evidence to the Authority that he did not have an IEA, did not sign an IEA and, as I understand his evidence, was not bound by the terms of the IEA produced by the Company.

[33] In the circumstances, I find that there was no breach of the IEA. However, even if I am wrong, the facts that support the breach have contributed to my finding of unjustified dismissal and the awards that I have made. I would therefore have declined to exercise my discretion to order a penalty in any event.

[34] Lester's claim against the Company and Dudley for breach of the IEA is dismissed.

## **Issue eight: Costs**

[59] There has been a level of mixed success between the parties. It may therefore be appropriate that costs lie where they fall. For this reason, I reserve costs and encourage the parties to resolve any issue of costs between themselves.

[60] If they are not able to do so, and an Authority determination on costs is needed, the parties may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the opposing party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

## **Outcome**

[61] The overall outcome that I have reached is:

- a. Lester Robinson did not suffer an unjustified disadvantage to his employment with A-Z Rigging and Scaffolding Limited.
- b. Lester Robinson was unjustifiably dismissed from his employment with A-Z Rigging and Scaffolding Limited.
- c. A-Z Rigging and Scaffolding Limited breached s 4 of the Wages Protection Act.
- d. A-Z Rigging and Scaffolding Limited is ordered to pay Lester Robinson the following sums within 28 days of the date of this determination:
  - i. The sum of \$4,410 gross for lost wages;
  - ii. The sum of \$5,000 pursuant to s 123(1)(c)(i) of the Act.
  - iii. The sum of \$20 pursuant to s 11 of the Wages Protection Act.
- e. A-Z Rigging and Scaffolding Limited breached s 4 of the Act but no penalty is ordered.
- f. The claims against A-Z Rigging and Scaffolding Limited and Dudley Hoskin for breach of the individual employment agreement are dismissed.

g. Costs are reserved.

Jenni-Maree Trotman  
Member of the Employment Relations Authority