

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 40
3053194

BETWEEN	DEREK WILKIE Applicant
AND	WAYNE BISHOP BUILDER LIMITED Respondent

Member of Authority: M B Loftus

Representatives: Kelly Coley, advocate for Applicant
Nikita Dang, counsel for the Respondent

Investigation Meeting: 9 July 2019 at Palmerston North

Submissions Received: At the Investigation Meeting
with further information on 18 July and 2 August 2019

Date of Determination: 31 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Derek Wilkie, claims he was unjustifiably dismissed on or about 9 August 2018.

[2] The respondent, Wayne Bishop Builders Limited (Bishops), denies Mr Wilkie was dismissed, let alone unjustifiably.

Background

[3] Bishops employed Mr Wilkie as a painter in November 2015.

[4] On 8 December 2017 Mr Wilkie suffered a significant life threatening medical event and was hospitalised. Not sure of the situation Bishops made enquiries by text the next day. That led to telephone discussions with Mr Bishop claiming he was told, by a woman who identified herself as Mr Wilkie's advocate, there was a negligible chance he would ever return and would be lucky to live. Bishops claim the advocate also asked any outstanding wages and holidays be paid which was then done. Mr Wilkie denies authorising the request for final pay but accepts a friend spoke to Bishops.

[5] There was no further interaction between the parties until Messrs Wilkie and Bishop met by chance on the street one day. Mr Wilkie says it was in April while Mr Bishop thinks May but nothing turns on that. They had a brief conversation with Mr Bishop asking about Mr Wilkie's health. Mr Bishop says Mr Wilkie said he was no longer capable of climbing ladders which, in his mind, confirmed the advice Mr Wilkie was unlikely to return as climbing ladders was an integral requirement of the job. That said, the parties agree neither the employment, nor the prospect of Mr Wilkie's return, was specifically discussed.

[6] The parties also discussed a second impromptu meeting when Mr Wilkie visited the work site in May. Mr Wilkie says Mr Bishop pointed at a roofless building and essentially said no roof means no painting. He says Mr Bishop told him to keep in contact with a colleague, James Foster, and advised he would have to provide a medical clearance before he could return. Mr Bishop's recollection of this event is, by his own admission, vague and he cannot say what was said. Mrs Wilkie, who Mr Wilkie says accompanied him, has no recollection of the visit, let alone what was said.

[7] Mr Wilkie says, in his statement of problem, that he was subsequently declared fit to return to work on 28 June 2018.¹ He says that did not result in a return but instead Mr Foster arrived at his home, unannounced, in early July and returned some property and tools that had till then been stored at his place of work.

[8] In his statement of problem Mr Wilkie says he took the visit as an opportunity to show Mr Foster a letter from his surgeon dated 28 June and ask when he could return. He says Mr Foster said he would talk to Mr Bishop and *come back*.² During the investigation Mr Wilkie's oral evidence was Mr Foster told him the tools were being returned as the building

¹ Statement of Problem at 2(c)

² Statement of Problem at 2(d)

in which they had been stored was being demolished and there was no alternate. He did not repeat the claim he had shown Mr Foster a surgeon's letter and Mr Foster denies ever seeing one.

[9] Mr Foster says he explained he was delivering the tools as the building in which they had been stored was being demolished and Mr Wilkie advised some were missing. He says that gave him cause to have another look and he subsequently delivered more tools to Mr Wilkie on 9 August. Mr Foster says it was then Mr Wilkie asked about his job but says he was unable to give an answer as such matters were Mr Bishop's responsibility and he avoided responding. He says he simply advised he would raise it with Mr Bishop.

[10] In this regard Mr Foster states that while he had no decision making powers he and Mr Bishop had discussed the issue on occasions. He says Mr Bishop consistently said Mr Wilkie could return when he had a medical clearance. Mr Foster also observes he felt Mr Wilkie was, on 9 August, angling to have someone tell him he was no longer employed but accepts he has no reason for that view other than intuition.

[11] Mr Wilkie denies asking about his job on 9 August. He says Mr Foster simply announced he and Mr Bishop had discussed the issue the previous day and there was no longer a position for Mr Wilkie. As already said Mr Foster denies this and Mr Bishop says there was no such discussion with Mr Foster in early August or any other time for that matter.

[12] The visit was, however, followed by a text from Mr Wilkie to Mr Bishop. The parties agree it demanded Mr Bishop *explain his actions*. That led to Mr Bishop telephoning Mr Wilkie shortly thereafter. Mr Bishop says the call was not answered. Mr Wilkie agrees and says he saw who was calling, decided not to answer and let the call divert to an answering machine. He says Mr Bishop's message asked what actions was Mr Wilkie referring to.

[13] Mr Wilkie says he again chose not to respond and Mr Bishop accepts he made no further approaches prior to receiving notification of the personal grievance.

[14] That notification refers to Mr Foster's alleged advice of 9 August before stating Mr Wilkie *does not understand why his employment has been terminated* and asks for an explanation under s 120 of the Act. It was sent on 31 August but Bishops failed to reply.

[15] A reminder was sent on 18 September and the reply came three days later. Amidst other things the reply, written by Bishops solicitors, asserts *Mr Wilkie is employed by our client*. It then said that if Mr Foster had acted as alleged he did so without Bishops knowledge or authorisation and advises *Mr Wilkie has never been dismissed from his employment*. It then concludes with questions about Mr Wilkie's ability to perform his work as a painter and, in particular, his ability to use ladders.

[16] Notwithstanding the suggesting Mr Wilkie remained employed he is yet to provide evidence he is fit to do so and the parties differences remain unresolved.

Discussion

[17] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[18] As already said, Mr Wilkie claims he was unjustifiably dismissed. Bishops denies a dismissal has occurred, let alone an unjustified one.

[19] The parties approach raises the issue of where the onus lies. It is for the applicant to establish a prima facie case the respondent must answer. In other words Mr Wilkie must first establish, on the balance of probability, he was dismissed. It is only then Bishops will be required to justify that dismissal.

[20] Bishops approach throughout was consistent. Mr Wilkie was never dismissed, he was a good worker and once he provided evidence he was capable of returning and performing his duties he could do so. Bishops remained true to this approach, both in its initial response of 18 September and then throughout the investigation. It is, however, now apparent Mr Wilkie is not interested in returning. He made that clear during the investigation asserting he was of the view the relationship was irreparably damaged.

[21] Before progressing further I address the fact Bishops paid Mr Wilkie's holiday pay. This raised the spectre of an act, by the employer, that smacked of actioning a termination. As events transpired that is not the case as, putting aside the question of whether or not the payment was requested, Mr Wilkie accepts Bishops operates a Christmas close down and the

payment would have been made regardless within a fortnight or so.³ From that point no further holiday pay became due as Mr Wilkie never returned to work.

[22] Returning to the claim Mr Wilkie was dismissed on or about 9 August. The crux of Mr Wilkie's approach was he was cleared to work yet Bishops refused to allow that to occur. Unfortunately this approach did not survive questioning. In his original statement the claim he was cleared to return to work was based on a surgeon's letter which he says he showed to Mr Foster. Mr Foster denies that occurred. When questioned Mr Wilkie chose not to repeat the claim he had a written clearance which he showed Mr Foster and he cannot produce a document to that effect. Indeed, further answers would strongly suggest it does not exist with Mr Wilkie accepting, via Mr Coley, he still awaits clearance to return as of the investigations date.

[23] Mr Wilkie also accepts the use of a ladder was discussed but says he simply disregarded this as an impediment to his return as he felt capable of using a ladder having done so. It transpires *having done so* was reference to a task he did assisting a friend and he accepts he never told either Mr Bishop or Mr Foster about this.

[24] The foundation upon which Mr Wilkie based his claim was undermined by his vacillation on key points and an inconsistent approach. While that may well be attributable to his medical issues it does not help establishing his claim, especially as the same cannot be said of Bishops witnesses. Their evidence remained consistent.

[25] I have no qualms in saying I prefer the evidence of Mr Bishop and his supporting witnesses. This leads me to conclude the company always considered Mr Wilkie's employment remained ongoing but his return was contingent on his providing evidence he was capable of performing the required tasks and Mr Wilkie was advised accordingly.

[26] I cannot, in the current environment where an employer's health and safety responsibilities have taken on greater importance, criticise Bishops approach. The employer was, given the severity of Mr Wilkie's incapacity, entitled to seek evidence it was no longer an impediment to his return. While he avoided direct answers, Mr Wilkie's evidence strongly suggest he was aware of the Bishops position and they confirm he is incapable of providing any evidence which shows they were addressed.

³ Sections 29 to 35 of the Holidays Act 2003

[27] There was then the final interaction. Essentially Mr Wilkie was accusing Bishops of dismissing him though he did not say so directly. Despite that Mr Bishop replied by asking what are you talking about and it was Mr Wilkie who chose not to engage in subsequent discussion. Then, perhaps understandably, Mr Bishop chose not to pursue it given Mr Wilkie's medical situation as he understood it and the fact he had made his requirements regarding a return clear.

[28] Aside from one last reservation I have to say I prefer Bishops consistent evidence over Mr Wilkie's vacillations. This means Mr Wilkie is incapable of establishing he was dismissed, let alone unjustifiably.

[29] The reservation emanates from the fact Bishops failed to reply to Ms Coley's letter of 31 August and required a prompt. Mr Bishop states he simply dithered given a lack of experience in such matters. Having heard from him I accept that.

[30] In conclusion I note Mr Wilkie's final submission came down to an allegation the problem lay in a lack of engagement attributable to inaction by Bishops who never made it clear a return was contingent on Mr Wilkie producing evidence he was capable of doing so. As already said I conclude the evidence does not support this approach. Yes, there was inaction on Bishops part but given the severity of Mr Wilkie's condition I consider it reasonable Bishops did not pursue him. On the other side Mr Wilkie's oral evidence makes it clear he knew Bishops required evidence of his ability to return and he knew it was over to him to produce it. He accepts he failed to do so and deliberately failed to respond when Bishops, having deduced there was a problem and possible misunderstanding on 9 August, attempted to address it.

Conclusion

[31] For the above reasons I find Mr Wilkie has failed to establish he was dismissed. His claim therefore fails. Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority