

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 41
3068032

BETWEEN ADAM PICKERING
Applicant
AND PROJECT WORX 2020
LIMITED
Respondent

Member of Authority: Rachel Larmer
Representatives: Ross France, counsel for the Applicant
No appearance by the Respondent
Investigation Meeting: On the papers
Submissions and further Information Received: 13 and 20 January 2020 from the Applicant
Date of Determination: 31 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Adam Pickering worked for Project Worx 2020 Limited (Project Worx) from 18 May 2018 until his dismissal on 13 May 2019.

[2] Mr Pickering claimed that his dismissal was procedurally and substantively unjustified. He also claimed a penalty for Project Worx's failure to provide him with a written employment agreement, in breach of s 65 of the Employment Relations Act 2000 (the Act).

No mediation

[3] Despite multiple attempts by Mr Pickering to resolve his claims in mediation, and notwithstanding repeated direction from the Authority for mediation to occur including within a specified period and even on a particular day, mediation did not occur.

[4] The Authority finds that Project Worx is responsible for mediation not occurring.

[5] Project Worx's actions, in connection with multiple attempts by Mr Pickering, Mediation Services and the Authority to get it to actually attend mediation, have unnecessarily and inappropriately increased Mr Pickering's actual legal costs. That conduct by Project Worx will therefore be addressed when costs are assessed, later in this determination. In the meantime, attempts to arrange mediation are discussed below.

[6] On 23 July 2019 Mr Pickering filed a Statement of Problem with the Authority. He also sought a direction to mediation and attempted to arrange mediation himself through Mediation Services.

[7] Mr Pickering initially arranged for mediation to occur on 6 August 2019. Although Mr Pickering had confirmed his attendance, Project Worx failed to do so. That resulted in Mediation Services cancelling mediation on 6 August 2019.

[8] The cancelled mediation on 6 August was replaced by Mediation Services with an earlier mediation date of 1 August 2019. Although Mr Pickering and his lawyer attended mediation in person on 1 August, an hour before it was due to start Project Worx informed Medication Services that it would not be attending.

[9] Mr Pickering then agreed to attend mediation on 19 August 2019, but Project Worx rejected that date.

[10] On 25 September 2019 Mr Pickering's lawyer sought a direction that mediation occur on 4 October 2019, on the basis that Project Worx had previously cancelled scheduled mediation and had not agreed to a new date.

[11] The Authority emailed Project Worx on 1 October 2019 asking for its response to Mr Pickering's request for directed mediation. Project Worx failed to reply to the Authority.

[12] Project Worx's failure to engage meant that mediation could not occur on 4 October 2019.

[13] The Authority then directed the parties to attend mediation on 21 October 2019.

[14] Once again Project Worx again waited until the morning of the mediation on 21 October 2019 to advise Mediation Services that it would not be attending mediation that day. Once

again Mr Pickering faced time off work. And unnecessary travel and legal costs due to Project Worx's actions.

[15] On 1 November 2019 the Authority issued another direction that required the parties to attend mediation within 30 days. Mediation was scheduled in accordance with that direction for 18 November 2019.

[16] For the third time, on the morning of mediation Project Worx advised Mediation Services that it would not be attending due to a supposed medical issue involving a family member.

[17] Project Worx was then non-responsive to Mediation Services repeated attempts to arrange an alternative mediation date.

[18] The Authority also directed Project Worx to provide a medical certificate to support this claim. Project Worx has ignored that direction.

[19] Project Worx's failure to provide any evidence (such as a medical certificate) to support its claim that it was unable to attend mediation on 18 November due to a medical emergency, undermines the credibility of its last minute excuse.

[20] Mr Pickering agreed to attend mediation on 27 November 2019. Project Worx failed to respond to Mediation Services about that date.

[21] Mr Pickering agreed to attend mediation on 3 December 2019. Project Worx again failed to respond to Mediation Services regarding its ability to attend mediation on that date.

[22] On 26 November 2019 the Authority directed the parties to attend mediation on 3 December 2019.

[23] Project Worx was also (again) directed to provide medical certificate by 2 December 2019, relating to its late failure to attend mediation on 18 November 2019.

[24] Once again Project Worx ignored both directions. No medical certificate has been provided.

[25] Although Mr Pickering and his lawyer attended mediation on 3 December 2019, for the fourth time Project Worx failed to turn up. Project Worx also failed to respond to Mediation Services' attempts to contact it that day.

[26] Mr Pickering agreed to attend mediation on 1, 6 and 19 August, on 4 and 21 October, on 18 and 27 November and on 3 December 2019. Project Worx is clearly entirely to blame for mediation not having occurred.

[27] On 14 January 2020 the Authority advised the parties that, given the way Project Worx had conducted itself, there was no point in making any further direction to mediation, so the matter would be determined on the papers.

Service has occurred on Project Worx

[28] Mr Pickering lodged his Statement of Problem with the Authority on 23 July 2019.

[29] Mr Pickering's Statement of Problem was served by track and trace courier on Project Worx, at its registered office at 4 Howith Street, Flat Bush on 26 July 2019.

[30] It was signed for by "*R Khan*". This is the address that Project Worx's sole director, Mohammed Sameer Khan, had registered with the Companies Office as Project Worx's registered office.

[31] Mr Pickering's Statement of Problem was also served on Project Worx at Unit 2, 37 Sir William Avenue, East Tamaki on 26 July 2019. It was signed for "*L Leo*". This is the address for service that Project Worx has registered with the Companies Office as its address for service.

[32] Project Worx was required to file its Statement in Reply within 14 days of service of the Statement of Problem. That meant Project Worx's Statement in Reply was due to be filed by 9 August 2019.

[33] That did not occur.

No Statement in Reply

[34] Project Worx has not filed a Statement in Reply.

[35] On 12 August the Authority emailed Sam Khan at Project Worx, alerting it to the fact that no Statement in Reply had been filed and asking it to do so by 13 August 2019. Mr Khan was advised that failure to file a Statement in Reply could result in the Authority proceeding to determine the matter in Project Worx's absence.

[36] Project Worx was given a number of opportunities to apply for leave to file a Statement in Reply out of time, but it elected not to do so.

[37] On 14 August 2019 the Authority sent a reminder letter to Project Worx explaining that because it had failed to file a Statement in Reply by 9 August 2019 it was required to seek leave from the Authority to file a Statement in Reply out of time, if it wanted to defend Mr Pickering's claims.

[38] The Authority gave Project Worx additional time, until 22 August 2019, to file an application for leave to file a Statement in Reply out of time. The Authority set out the information that Project Worx needed to provide in a leave application.

[39] Project Worx failed to apply for leave by 22 August 2019.

[40] On 3 September 2019 the Authority emailed Project Worx to remind it to seek leave to file a Statement in Reply out of time. Project Worx failed to respond. The Authority followed this up with phone calls on 4 September that went to answerphone.

[41] Despite the Authority's multiple attempts to get Project Worx to engage in its investigation process, Project Worx failed to apply for leave to file a Statement in Reply out of time. It therefore elected not to participate, having been forewarned of the consequences of not engaging.

No employment documentation

[42] Despite being directed, multiple times, to provide the Authority with Mr Pickering's employment records and relevant documentation, Project Worx has elected not to do so.

[43] On 14 August 2019 the Authority directed Project Worx to provide specific employment records and relevant employment documentation, regardless of whether or not it wanted to defend Mr Pickering's claims against it.

[44] Project Worx breached this direction.

[45] On 7 November 2019 the Authority again directed Project Worx to provide relevant employment documentation to it, regardless of whether or not it wanted to defend Mr Pickering's claims, by 21 November 2019.

[46] Project Worx breached that direction.

[47] On 26 November 2019 the Authority directed Project Worx to provide a medical certificate to support its failure to attend scheduled mediation on 18 November 2019.

[48] Project Worx breached that direction.

[49] On 14 January 2020 the Authority advised the parties that Project Worx's repeated breaches of directions, and failure to provide any relevant employment records and documentation was deliberately hindering Mr Pickering's ability to have his claim determined.

[50] The Authority therefore advised the parties that Mr Pickering's claims would now be dealt with on the papers, as a formal proof matter. That decision was made so that Project Worx was not given further opportunities to waste more of Mr Pickering's time or to increase his legal costs and unpaid time off work.

[51] As it currently stands, Project Worx has still failed to provide any of the employment documentation that it has been directed to provide.

Lack of good faith

[52] Project Worx has demonstrated an ongoing lack of good faith regarding the manner in which it has elected to conduct itself in connection with Mr Pickering's claims.

[53] Project Worx failed to file a Statement in Reply. It failed to attend voluntarily arranged mediation. It failed to engage with Mediation Services over proposed mediation dates. It failed to attend directed mediation. It failed to give Mr Pickering adequate advance warning of last

minute decisions it made not to attend scheduled mediation on the day of mediation, thereby causing Mr Pickering to incur unpaid time off work and travel and legal costs unnecessarily.

[54] Project Worx failed to comply with any of the Authority's directions. It has not engaged constructively with the Authority. It failed to provide any employment records or relevant documentation, despite being repeatedly directed to do so.

[55] Project Worx failed to seek leave to file a Statement in Reply out of time, despite repeated warnings that failure would prevent it from defending Mr Pickering's claims.

[56] The Authority is satisfied that Project Worx has been put on notice of Mr Pickering's claims and has had a reasonable opportunity to engage with the Authority and respond to Mr Pickering's claims, had it wanted to do so.

Material facts

[57] Mr Pickering's sworn affidavit dated 10 January 2020 was uncontested. It is therefore accepted as unchallenged and accurate evidence.

[58] On 23 April 2019 Project Worx gave Mr Pickering a disciplinary letter instructing him to attend a disciplinary meeting on 30 April 2019. Attached to the disciplinary letter was a final written warning letter that was dated 11 December 2018 for "*non-performance*".

[59] Mr Pickering said in his affidavit that he had not seen the warning letter before 23 April 2019.

[60] Mr Pickering attended a meeting with Project Worx on 30 April 2019 that lasted around five minutes. During this meeting Project Worx suspended him pending an investigation. Mr Pickering said he was not given an opportunity to respond to the allegations against him but was instead suspended on the spot.

[61] On 12 May 2019 Mr Pickering phoned Project Worx to ask when he could return to work. He was told he could not return to work because he was no longer employed by Project Worx.

[62] The next day (13 May) Mr Pickering received a dismissal letter, advising that his employment had ended without notice, that same day.

[63] Mr Pickering raised a dismissal grievance with Project Worx on 17 June 2019. Project Worx failed to respond to that.

Was Mr Pickering's dismissal unjustified?

[64] In the absence of any evidence contradicting Mr Pickering's affidavit evidence, the Authority has concluded that Mr Pickering's dismissal was procedurally and substantively unjustified.

[65] Project Worx has failed to discharge its burden of establishing on the balance of probabilities that its dismissal of Mr Pickering was justified.

[66] Justification has been objectively assessed in accordance with the justification test in s 103A(2) of the Employment Relations Act 2000 (the Act).

[67] Fair and reasonable employers are expected to comply with their statutory obligations. These include the good faith requirements in s 4(1A) of the Act, to provide access to relevant information and an opportunity to comment on it, before an employee is dismissed and the four minimum procedural fairness tests in s 103A(3) of the Act.

[68] Failure by an employer to follow a fair and proper process may fundamentally undermine its ability to substantively justify a dismissal. That is what has occurred in this case.

[69] Mr Pickering was deprived of an opportunity to respond to disciplinary allegations. He was not provided with any relevant information, in breach of Project Worx's good faith obligations under s 4(1A) of the Act.

[70] Project Worx has failed to meet any of the basic procedural fairness obligations it had under s 103A(3) of the Act. It also relied on a final written warning that Mr Pickering had never seen before.

[71] There was also no evidence of a disciplinary process having been conducted in association with the purported final written warning dated 11 December 2018.

[72] The lack of fair process and the breach of good faith obligations have fundamentally undermined Project Worx's ability to justify its dismissal. Mr Pickering was deprived of an opportunity to understand the disciplinary allegations against him or to respond to them before he was dismissed.

[73] It is not clear from the disciplinary allegations set out in the letter dated 23 April 2019 that Mr Pickering had engaged in any misconduct, poor performance or serious misconduct that would have warranted summary dismissal. Mr Pickering has also denied any wrongdoing.

[74] Project Worx's dismissal letter of 13 May 2019 refers to misconduct and "*lack of performance*", neither of which are grounds for summary dismissal.

[75] The process defects that occurred were fundamental and serious. These defects were not minor and they did result in substantial unfairness to Mr Pickering. Section 103A(5) of the Act therefore does not prevent the Authority from finding that Mr Pickering has a dismissal grievance.

[76] Project Worx's summary dismissal of Mr Pickering was procedurally and substantively unjustified.

What remedies should Mr Pickering be awarded?

Mitigation of loss

[77] Mr Pickering appropriately mitigated his loss. He moved out of town to obtain new employment.

Lost remuneration

[78] Mr Pickering was paid \$25 an hour for a 35-40 hour work week. He has provided six weeks of pay statements to the Authority that show his average weekly wage was \$896.70 gross per week.

[79] He was out of work for three months, and did not earn any income over that period.

[80] Project Worx is ordered to pay Mr Pickering \$10,760.40 gross lost remuneration under s 128(2) of the Act. This represents 12 weeks x \$896.70 gross per week.

Distress compensation

[81] Mr Pickering's summary dismissal without notice was a big shock to him.

[82] Mr Pickering gave evidence in his affidavit that he has found the entire situation overwhelming and stressful. He struggled to find new employment.

[83] This had a seriously adverse effect on him because he has a young family and he suddenly found himself unable to provide for them.

[84] That situation required him to move his family out of Auckland in order to find alternative employment. He has had to take unpaid time off work as well as incurring the cost of travel to Auckland to attend mediation that Project Worx has failed to turn up to.

[85] Project Worx is ordered to pay Mr Pickering \$12,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings his unjustified dismissal has caused him.

Contribution

[86] Having determined that Mr Pickering has a successful unjustified dismissal claim, s 124 of the Act required the Authority to assess the extent to which (if any) Mr Pickering contributed to the situation that gave rise to his successful grievance.

[87] Contribution denotes blameworthy conduct that has been proven on the balance of probabilities.

[88] Project Worx's failure to engage in the Authority's investigation process and its repeated failure to comply with the Authority's directions to provide relevant documentation regarding its disciplinary concerns and disciplinary processes (including those related to the supposed final written warning) has fundamentally undermined its ability to establish that Mr Pickering has engaged in any blameworthy conduct.

[89] In the absence of credible evidence of blameworthy conduct, it is not appropriate for Mr Pickering's remedies to be reduced under s 124 of the Act on the grounds of contribution.

Should a penalty be imposed for Project Worx's failure to provide Mr Pickering with a written employment agreement

[90] Project Worx breached s 65 of the Act when it failed to provide Mr Pickering with a written employment agreement. It is appropriate for a penalty to be imposed on Project Worx under s 64(4) of the Act for that breach.

[91] Having regard to each of the factors specified in s 133A of the Act, the Authority imposes a penalty of \$2,000 on Project Worx for its failure to provide Mr Pickering with a written employment agreement.

[92] Project Worx is ordered to pay Mr Pickering \$1,000 of the total \$2,000 penalty imposed on it with it being required to pay the remaining \$1,000 of the total penalty imposed on it directly to the Crown Bank Account.

What costs should Mr Pickering be awarded?

[93] Mr Pickering as the successful party is entitled to a contribution towards his actual legal costs.

[94] The Authority adopts its usual notional daily tariff based approach to costs. The current starting tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.

[95] Because this matter was dealt with on the papers, it is appropriate for a slightly lower notional starting tariff to be adopted, namely \$3,000 (instead of \$4,500).

[96] There are no factors that warrant a reduction in this notional starting tariff.

[97] It is appropriate to increase the notional starting tariff by \$2,000 to reflect that the manner in which Project Worx has elected to conduct itself has unnecessarily increased Mr Pickering's actual legal costs.

[98] Project Worx is therefore ordered to pay Mr Pickering \$5,000 towards his actual legal costs plus \$71.56 to reimburse his filing fee.

Outcome

[99] Within 28 days of the date of this determination, Project Worx is ordered to pay Mr Pickering \$28831.96 consisting of:

- (a) \$10,760.40 lost remuneration under s 128(2) of the Act;
- (b) \$12,000 distress compensation under s 123(1)(c)(i) of the Act;
- (c) \$5,000 contribution towards his actual legal costs;
- (d) \$71.56 to reimburse his filing fee;

(e) \$1,000 of the total penalties awarded.

[100] Within 28 days of the date of this determination, Project Worx is ordered to pay the Crown Bank Account \$1,000 of the total \$2,000 penalty imposed on it, for its failure to provide Mr Pickering with a written employment agreement.

Rachel Larmer
Member of the Employment Relations Authority