

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 435
3093192

BETWEEN

SHELLEY O'CONNOR
Applicant

A N D

DUNRITE CONSTRUCTION (2017)
LIMITED
Respondent

Member of Authority: Peter van Keulen
Representatives: James Hobcraft, counsel for the Applicant
No appearance for the Respondent
Investigation Meeting: 20 October 2020
Submissions Received: 20 October 2020 from the Applicant
Date of Determination: 21 October 2020

DETERMINATION OF THE AUTHORITY

This determination is a written record of an oral indication delivered on 20 October 2020.

Employment relationship problem

[1] Shelley O'Connor worked for Dunrite Construction (2017) Limited from October 2017 until 7 May 2018. Ms O'Connor was employed as a Project Administrator and worked, on average, 45 hours per week. During her employment there were no issues raised with Ms O'Connor's performance and other than being late on occasion, Ms O'Connor performed well in her role.

[2] Despite this satisfactory performance, on 4 May 2018 Ms O'Connor arrived at work to find two letters dated 3 May 2018 on her desk. One was a letter recording a verbal warning

for Ms O'Connor being late on 3 May 2018 and five other specified occasions and the other was a letter inviting Ms O'Connor to attend a disciplinary meeting to discuss three concerns - continued lateness, poor performance and a breach of company rules regarding alcohol.

[3] Slightly later in the morning of 4 May 2018, Ms O'Connor was asked to meet with Karen Leslie of Dunrite Construction. In this meeting Ms Leslie told Ms O'Connor that she was going to hire a new employee and there was no longer a job for Ms O'Connor. Ms Leslie then told Ms O'Connor to go home for the day and to return at 9:30 am on 7 May 2018 for the disciplinary meeting.

[4] On 7 May 2018 Ms O'Connor attended the disciplinary meeting. In this meeting Ms Leslie discussed two specific concerns – that Ms O'Connor had been late on the day when Ms Leslie was due to go on holiday and Ms O'Connor had been seen leaving a local bar & bistro during work time.

[5] It appears there was little discussion about any other matters that might inform or explain the concerns raised in the 3 May 2018 letter and by the end of the meeting Ms O'Connor was unsure of what had been achieved or what the purpose of the meeting had been. Therefore Ms O'Connor simply expressed to Ms Leslie, on more than one occasion, that she took it that she had been dismissed in the meeting on 4 May 2018 and there was no ongoing work for her. Ms O'Connor says she did not receive any response to these statements, so taking that as confirmation she made it clear to Ms Leslie that she would just collect her belongings from the office and leave – which she did.

[6] Dunrite Construction subsequently paid Ms O'Connor her final pay which covered payment for work up until 4 May 2018, two weeks' notice pay (paid in lieu of Ms O'Connor working) and accrued but untaken holiday pay.

[7] Ms O'Connor then raised a personal grievance for unjustified dismissal. Dunrite Construction responded stating it did not accept that Ms O'Connor had a grievance, but it did not explain why and only made reference to contribution (if there was a grievance) based on the three general concerns previously raised.

[8] Dunrite Construction then failed to engage in any discussion over Ms O'Connor's personal grievance and Ms O'Connor lodged a statement of problem with the Authority for unjustified dismissal.

[9] I have investigated Ms O'Connor's unjustified dismissal claim and this determination resolves that claim.

Preliminary matter

[10] Dunrite Construction did not lodge a statement in reply to the statement of problem. However, Dunrite Construction through Ms Leslie participated in a case management conference call for this matter on 11 June 2020.

[11] During the case management conference call, I issued directions for an investigation meeting to take place on 20 October 2020. The directions were recorded in a notice of direction and notice of investigation meeting and these were served on Dunrite Construction.

[12] Witness evidence was lodged on behalf of Ms O'Connor and this was served on Dunrite Construction. Despite my directions and follow up by the Authority with Ms Leslie no evidence was received from Dunrite Construction.

[13] I am satisfied that prior to my investigation meeting, Dunrite Construction had received all of the relevant information in respect of Ms O'Connor's claim including the statement of problem, relevant documents and Ms O'Connor's evidence. Dunrite Construction was given the opportunity to lodge witness evidence but it failed to do this. And, finally Dunrite Construction was also aware of the date, time and location of my investigation and could have attended.

[14] Despite all of this Dunrite Construction did not attend the investigation meeting and it did not contact the Authority to explain why it could not or would not attend.

[15] The notice of investigation meeting advised Dunrite Construction that *"If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant."*

[16] Considering all of the above, there was no apparent reason why the investigation meeting could not continue in Dunrite Construction's absence. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Act.

The issues

[17] The issues to be resolved for an unjustified dismissal personal grievance are:

(a) Was Ms O'Connor dismissed?

(b) If so, was the dismissal justified, with the onus resting on Dunrite Construction to show its actions were justified in line with the test for justification and the duty of good faith set out in the Employment Relations Act 2000 (the Act)?

[18] If Ms O'Connor is successful with her claim I must then consider what remedies, if any, she is entitled to. And if she is entitled to any remedies I must consider whether she contributed to her grievances in such a way that any remedies awarded should be reduced.

Unjustified dismissal

Was Ms O'Connor dismissed?

[19] Dismissal is the termination of employment at the initiative of the employer. It requires an unequivocal act, most commonly a statement, amounting to a sending away or sending apart.¹

[20] So, the question is was there an unequivocal act by Dunrite Construction which was a sending away of Ms O'Connor?

[21] I am satisfied that Ms Leslie telling Ms O'Connor that there would no longer be a job for her, in the meeting on 4 May 2018 was a dismissal. In my view this was an unequivocal act amounting to a sending away or sending apart – telling an employee that she is being replaced and there is no longer a job for her must amount to a dismissal.

[22] The only complicating factor in this is Ms O'Connor was sent home on 4 May 2018 and told to come back for the disciplinary meeting on 7 May 2018. It is not clear what the

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

purpose of that was – perhaps Ms Leslie hoped that the threat of a disciplinary process and the advice to Ms O’Connor that there would no longer be a job for her would cause her to resign. However this sending home and requiring Ms O’Connor to come to a disciplinary meeting does not change the fact that Ms Leslie had already dismissed her.

[23] There is one other aspect of the dismissal that is important. If Dunrite Construction did not intend to dismiss Ms O’Connor on 4 May 2018 and wants to assert that in fact it did not dismiss her, then its actions in the 7 May 2018 meeting are problematic for it. I accept Ms O’Connor’s evidence that in light of what had been discussed in the 4 May meeting she took it she was dismissed and she told Ms Leslie this in the 7 May meeting. If Dunrite Construction’s view was that Ms O’Connor was mistaken and it had not dismissed her then Ms Leslie should have corrected this at this stage - allowing Ms O’Connor to treat herself as being dismissed also amounts to a dismissal.²

Was the dismissal justified?

[24] There are two parts to assessing justification for an unjustified dismissal personal grievance:

- (a) Did the employer conduct a fair process before it dismissed the employee, i.e. did it act as a fair and reasonable employer could in the course of the disciplinary process, particularly in light of its obligations under the Act?³
- (b) Was the decision to dismiss substantively justified, i.e. were the employer’s decisions on what occurred and that this warranted dismissal ones that a fair and reasonable employer could have reached in all of the circumstances?

Did Dunrite Construction conduct a fair process?

[25] The procedural requirements for a disciplinary process are not controversial and in this case include the following considerations:

- (a) Did Dunrite Construction properly investigate the concerns it had before it decided the concerns justified a disciplinary process being conducted?

² *New Zealand Cards Ltd v Ramsay* [2012] NZEmpC 51.

³ Sections 4(1A) and 103A of the Employment Relations Act 2000.

- (b) Was Ms O'Connor given information about the concerns?
- (c) Did Dunrite Construction give Ms O'Connor an adequate opportunity to respond to the concerns?
- (d) Did Dunrite Construction consider any responses from Ms O'Connor before it made decisions about the concerns and whether dismissal was an appropriate sanction?

[26] The problem that Dunrite Construction faces in satisfying the test of justification is that there is no evidence to show that it met any of these requirements before it made the decision to replace Ms O'Connor and told her of this in the 4 May 2018 meeting.

[27] In simple terms when I look at the requirements for consultation above and consider the evidence it is clear that there has been a complete failure to consult about any concerns and the decision to dismiss Ms O'Connor.

[28] The disciplinary process commenced by the letter dated 3 May 2018 adds nothing to the justification. There is no evidence to show there was any substance to the concerns raised – it is not even clear what those concerns actually relate to as no information was provided to support the general statement of concern. The meeting on 7 May 2018 was simply a sham, with no substance and nothing for Ms O'Connor to address. And, in any event the decision to dismiss had already been made and conveyed.

Was the dismissal substantively justified?

[29] There is simply no evidence at all to show there were any concerns with Ms O'Connor's performance or conduct at work, which were established by Dunrite Construction - except perhaps Ms O'Connor being late for work on occasion.

[30] Therefore there is absolutely no basis on which Ms O'Connor's dismissal could be substantively justified – dismissal was not a decision a fair and reasonable employer could have come to in all of the circumstances.

Conclusion

[31] Ms O'Connor was unjustifiably dismissed from both a procedural and substantive perspective.

Remedies

[32] Having determined that Ms O'Connor was unjustifiably dismissed I may award any of the remedies provided for under s 123 of the Act. In this regard, Ms O'Connor seeks compensation and reimbursement.

Compensation

[33] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act; compensating Ms O'Connor for the humiliation, loss of dignity and injury to feelings she suffered because of the unjustified dismissal. What I must consider is the effects of the unjustified dismissal on Ms O'Connor and then I must assess the compensatory value of those effects.

[34] Ms O'Connor gave evidence of the impact of the dismissal:

- (a) She was upset, shocked and tearful at the decision on 4 May 2018.
- (b) She was confused by what had happened and did not understand why or how it had occurred.
- (c) She was humiliated and embarrassed by the process and the decision, which impacted her self-esteem.
- (d) She became withdrawn, not going out or socialising and just not functioning.
- (e) She described the whole episode as being absolutely devastating.

[35] There is undoubtedly a loss of dignity, significant humiliation and some injury to feelings shown by Ms O'Connor. I do not think the level of loss of dignity, humiliation and injury to feelings in Ms O'Connor's case is on a par with the cases in which high awards of compensation have been awarded – I view the compensatory level to be below the mid-range of awards. I assess the level of compensation to be \$17,000.00.

Reimbursement

[36] Ms O'Connor seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to s 123(1)(b) of the Act.

[37] I am satisfied that Ms O'Connor has a personal grievance and she has lost remuneration. As a result, pursuant to s 128 of the Act, I must award Ms O'Connor at least the lesser of her actual loss or three months ordinary time remuneration.

[38] In this case I am satisfied that three months ordinary time remuneration is the appropriate award and I calculate this to be \$15,210.00 (gross).

Contribution

[39] As I have awarded remedies to Ms O'Connor, I must now consider whether she contributed to the situation that gave rise to her dismissal.⁴ I must assess if Ms O'Connor behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her unjustified dismissal.⁵

[40] I do not accept that Ms O'Connor's behaviour during this matter was in any way culpable or blameworthy and there is no contribution.

Orders

[41] Dunrite Construction (2017) Limited unjustifiably dismissed Shelley O'Connor.

[42] In satisfaction of Ms O'Connor's personal grievance Dunrite Construction is to pay Ms O'Connor, the following amounts:

- (a) \$17,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) \$15,210.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128(2) of the Employment Relations Act 2000.

⁴ Section 124 of the Employment Relations Act 2000.

⁵ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

Costs

[43] Counsel for Ms O'Connor sought costs based on the daily tariff.

[44] As Ms O'Connor has been successful with her claim, she is entitled to a contribution to her costs. My starting point, as counsel submits, is to apply the daily tariff and then consider whether this should be adjusted based on the principles in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*⁶, and *Davide Fagotti v. Acme & Co Ltd*.⁷

[45] My investigation of this matter took less than one half day, but I am prepared to adjust that amount upward to reflect a half day as there was some additional work for Ms O'Connor's counsel given the way in which Dunrite Construction conducted this case. Half of the daily tariff is \$2,250.00. Ms O'Connor is also entitled to the filing fee of \$71.56.

[46] Dunrite Construction must pay \$2,250.00 plus \$71.56 as a contribution to the costs Ms O'Connor has incurred.

Peter van Keulen
Member of the Employment Relations Authority

⁶ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

⁷ *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135.