

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 518  
3089792

BETWEEN JUSTIN BANKS  
Applicant  
AND GOLD STONE MINING GROUP  
LIMITED  
Respondent

Member of Authority: David G Beck  
Representatives: Robert Morgan, advocate for the Applicant  
No appearance from the Respondent  
Investigation Meeting: 11 November 2020 in Christchurch  
Submissions Received: 11 November 2020 for Applicant  
None from the Respondent  
Date of Determination: 15 December 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Justin Banks was employed by Gold Stone Mining Group Ltd (GSM), as a digger operator/labourer at a gold mine at Arahura (located near the West Coast town of Hokitika) until he was summarily dismissed on 15 October 2019. Mr Banks' employment was not the subject of a written employment agreement.

[2] Mr Banks raised a personal grievance by letter from his advocate of 15 October 2019 alleging an unjustified dismissal, an unjustified disadvantage and seeking recovery of wages and holiday pay allegedly owed. GSM did not respond to the grievance letter but the parties

attended an unsuccessful mediation on 15 January 2020. Mr Banks then made an application to the Authority of 31 January 2020 claiming an unjustified dismissal and seeking remedies of lost wages, holiday pay and compensation for distress.

[3] GSM and Mr Banks attended an unsuccessful mediation on 15 January 2020 but GSM did not participate further. GSM filed no statement in reply, did not participate in a case management conference, failed as directed to provide a brief of evidence and did not, without explanation, participate in the investigation meeting of 11 November 2020.

### **The Authority's investigation**

[4] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the submission received from Mr Banks' advocate.

### **Issues**

[5] The issues to be decided are:

- (a) Was Mr Banks unjustifiably dismissed?
- (b) If GSM's actions in dismissing Mr Banks do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering Mr Banks' claims for:
  - i. Lost wages; and
  - ii. Compensation under s 123(1)(c)(i) of the Act in the sum of \$10,000; and
  - iii. Unpaid holiday pay.
- (c) If Mr Banks is successful in all or any elements of his personal grievance should the Authority reduce any remedies granted as a result of any contributory conduct?

(d) An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[6] GSM is a company registered with an Auckland address that has two Auckland domiciled directors, Xiaoqi Lai (aka “Kevin”) and Qida Xue, both using the same address. The company owned and operated an open cast gold mine at Arahura and during Mr Banks’ employment the company was initially developing the site.

[7] The work Mr Banks was engaged on from 11 September 2019, included earthworks using a mechanical digger, an excavator and feeding a gold screening conveyer belt.

[8] Mr Banks was recruited by the site foreman, Shaun, via Facebook and he resigned his position at another mining company where he undertook similar work operating excavation machinery and driving a loader. Mr Banks said he was keen to work with Shaun as he was a friend of his son who also worked for GSM and he regarded and trusted Shaun as an experienced operator.

[9] When Mr Banks commenced work on 11 September 2019 he was not provided with an employment agreement and he says that he asked Kevin for one several occasions. Mr Banks was directly supervised by Shaun and recalls Kevin and his father in law occasionally visiting the work site. Mr Banks was paid \$25 per hour and worked 7am – 5pm. No time sheets were completed and Mr Banks recalls that Shaun who always worked alongside him recorded his hours and he was paid fortnightly.

[10] Mr Banks said the first month went fine in the job but he did notice that in comparison with his previous job that GSM were somewhat disorganised and that he had to provide his own safety gear.

[11] On the morning of 10 October, Mr Banks says he was asked by Shaun to clear trees by utilising his digger to push them over with the digger’s scoop. In doing so, a branch from a tree punctured the digger’s hydraulic pipe and caused the digger to stop operating and the site was closed down awaiting a repair. Mr Banks said Shaun reassured him that it was nothing to worry about. The next day (Friday) he rang Shaun and was told the digger was

awaiting repairs but Mr Banks could come on site and work for 3 to 4 hours on some odd jobs that he would get paid for – he took this offer up.

### **The dismissal**

[12] On 12 October Mr Banks says Shaun Facebook messaged him telling him not to return to work. Mr Banks sought clarification from Shaun by text exchanges of 13 October asking "... is it you who does not want me back. Be honest". Shaun replied "Them not me mate". Mr Banks followed up with Shaun by text "... they can write me a letter saying why they are gonna fire me so I can give it to another employer". Shaun responded:

Ahhhhhh you probably don't want a letter saying thousands of dollars of damage was done to a brand new digger, a future employer would frown at that. I'm more than happy to write a reference letter? If you want?

[13] Mr Banks then inquired why the employer was not going to directly contact him and Shaun replied: "No they won't contact you .unfortunately it goes through me to you. I'm in a position with them that makes me uncomfortable".

[14] Mr Banks did not attend work on 13 October and he said that Kevin rang him on 14 October telling him that: there was no work for him, that Shaun did not want him onsite and that he was upset about the damage to the digger and repair costs.

[15] Mr Banks says he then tried to get hold of Shaun but was getting no response. Kevin then showed up at his house on the morning of 15 October and offered him a sum of money to resolve his disputed termination. Mr Banks said he responded by declining the offer and stating that he was unhappy about the lack of fair process and he wanted to challenge Kevin's decision through a "proper procedure".

[16] Mr Banks then immediately instructed an advocate and a personal grievance letter was sent to Kevin later on 15 October. From this point in time until a mediation on 15 January 2020, GSM did not engage with Mr Banks' advocate.

### **Was the dismissal justified?**

[17] This was a summary dismissal and s 103A of the Act requires the Authority assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A

dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[18] Section 103A details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner; these summarised are:

- (a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- (b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;
- (c) was the employee afforded a reasonable opportunity to respond to identified concerns;
- (d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- (e) any other contextual factor the Authority regards as appropriate to consider.

### **Applying factors identified by the Act**

[19] My initial finding is that although GSM appeared to be a 'start up' company employing up to six workers, I had no evidence before me as to their resources and access to advice or anything to suggest why an investigation was not carried out before Mr Banks was dismissed.

### **Procedural defects**

[20] It is apparent when applying s 103A (b) – (d) of the act that no process whatsoever was engaged in prior to Mr Banks being dismissed. This total lack of recourse to procedural fairness breached good faith obligations owed to Mr Banks.

[21] I easily find that summary dismissal was not a decision open to a fair and reasonable employer in all the circumstances. I do find that a fair and reasonable employer could have approached this more fairly and paused to consider wider factors before making the dismissal decision. Central to this was simply a failure to seek Mr Banks' explanation to the

incident when the digger was damaged. Matters were compounded by Kevin misleading Mr Banks into thinking that his supervisor had concluded that he was at fault for the damage caused.

[22] I also find that the defects in process were not minor as envisaged in s 103A(5) of the Act and they did result in Mr Banks being treated unfairly. Mr Banks was unjustifiably dismissed.

### **The substance of the decision to dismiss**

[23] Given no investigation took place and I heard no evidence from GSM as to whether Mr Banks was operating the digger inappropriately or recklessly I can only conclude from Mr Banks' evidence and the text exchanges with Shaun that Mr Banks was not negligent or reckless in his operation of the digger and that the decision to dismiss him lacked substance.

### **Conclusion**

[24] Having made a finding of unjustified dismissal on procedural and substantive grounds Mr Banks is successful in his personal grievance and is entitled to remedies.

### **Remedies**

#### **Lost wages**

[25] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Banks should I find that he has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[26] Here I find Mr Banks' lost remuneration was attributed to the personal grievance. Mr Banks gave evidence that he did not secure alternative employment until six weeks after he was dismissed and he gave evidence of his attempts to mitigate his loss.

### **Finding**

[27] Given the above and reflecting the unfortunate circumstances of the unjustified summary dismissal, I consider that overall justice is served by awarding Mr Banks six weeks' lost wages. This amounts to a sum of \$6,000 gross. As GSM did not afford Mr

Banks a notice period and he had no employment agreement I fix that at one month and award as claimed, holiday pay (8% of \$6,000) in the sum of \$480.

### **Compensation for hurt and Humiliation**

[28] Mr Banks gave evidence of the significant impact of the summary dismissal, the financial uncertainty it created at a difficult time to find immediate alternative employment and him losing the confidence to apply for jobs on the West Coast and anxiety in working with machinery at his subsequent new job.

[29] Mr Banks described the negative impact upon his self-confidence and general mental well-being including that he would be reduced to tears at times, had difficulty sleeping and had to seek assistance with his general mental well-being. He provided a medical certificate to support his submission.

[30] In giving evidence Mr Banks struck me as a thoughtful and insightful young man not prone to exaggeration and he has now chosen to look at alternative career options whilst residing in Christchurch and is taking active steps to rebuild his confidence and skill base. I commend him and wish him well.

[31] Mr Banks' counsel sought \$10,000 compensation.

### **Finding**

Taking into account the evidence proffered, awards made by the Authority and Court in similar situations and surveying cases, I consider Mr Banks' evidence easily warrants compensation as sought, of \$10,000 under s 123(1)(c)(i) of the Act.<sup>1</sup>

### **Contribution**

[32] Section 124 of the Act states that I must consider the extent to what, if any, Mr Banks' actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy

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<sup>1</sup> See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>2</sup>.

[33] I find that Mr Banks was directed to operate a machine not suited for the purpose he used it for and thus he was not culpable of recklessness or negligence.

### **Finding**

[34] On balance, given Mr Banks' lack of contribution in the events that led up to his dismissal I find this warrants no reduction in all of his remedies.

### **Costs**

[35] Costs are at the discretion of the Authority and here Mr Banks was successful in his claim of unjustified dismissal and has obtained compensatory remedies in an investigation meeting that took half a day at which he was represented. In the circumstances I award Mr Banks a contribution to costs in the amount of \$2,500.

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<sup>2</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

## Summary

[36] I have found that:

- (a) Justin Banks was unjustifiably dismissed by Gold Stone Mining Group Limited.**
- (b) In the circumstances Gold Stone Mining Group Limited must pay Justin Banks the sums below:**
  - (i) \$6,000 gross lost wages pursuant to s 123(1)(b) of the Act;**
  - (ii) \$480 gross holiday pay;**
  - (iii) \$10,000 compensation pursuant to s 123(1)(c)(i) of the Act; and**
  - (iv) \$2,500 contribution to legal costs.**

David G Beck  
Member of the Employment Relations Authority