

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2020] NZERA 68
3051192

BETWEEN	WPY Applicant
AND	J B ROOFING MAINTENANCE AND REPAIR LIMITED Respondent

Member of Authority: Michael Loftus

Representatives: Graham Ogilvie, advocate for the Applicant
David Lunn and Nicholas Lunn, for the Respondent

Investigation Meeting: 1 August 2019 at Wellington

Submissions Received: At the Investigation Meeting

Date of Determination: 17 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, WPY, raises a number of claims. He claims he was unjustifiably suspended on 14 November 2018 and then unjustifiably dismissed either actually or constructively at a later date. WPY claims he is due unpaid wages and holiday pay and seeks the return of tools he claims the respondent (JB) has improperly retained. Finally, WPY seeks the imposition of a penalty for JB's alleged failure to provide an employment agreement.

[2] JB states it dismissed WPY on 14 November 2018 and believes it can justify the dismissal. JB denies it unjustifiably suspended WPY if only because that which he portrays as a suspension was in fact a dismissal. JB accepts it retained WPY's final pay though there

is a dispute about the amount. JB considers this legitimate restitution for petrol WPY stole, as well as partial recompense for other losses he caused.

[3] In its Statement in Reply JB also raised significant counterclaims for loss of reputation and consequential loss. At the commencement of the investigation JB's principals indicated that while those claims remained live they would, if pursued, be addressed in another jurisdiction. They therefore need not be considered further.

Background

[4] WPY was employed as a roofer by JB on 1 March 2016. The employment ceased in November 2017 with WPY saying he resigned to establish his own business. JB claims he simply disappeared as a result of private pressures. Notwithstanding that, this difference need not be resolved for the purposes of this determination. On 24 July 2018 WPY returned and JB chose to treat the period of absence as one of unpaid leave. It therefore arranged for WPY's outstanding leave balance, which had not been paid on cessation, to be credited to his account.

[5] WPY claims he never received an employment agreement. JB disagrees saying all employees, including WPY, are provided with a written agreement but he never signed and returned it. Contained in the agreement, and pertinent to this claim, is a provision that states the employee would be provided with a vehicle which was only to be used for work purposes. Notwithstanding that provision both parties agree there is an allowance for what is termed reasonable private use though they differ about what that means in practice. That said, and once again, the issue need not be determined as WPY accepted, when giving oral evidence, his private use was both excessive and contrary to JB's rules as he understood them.

[6] In late October there occurred an event which would have later significance. It was the discovery of a methamphetamine pipe in the glove box of WPY's work vehicle. When questioned by Nick Lunn WPY denied knowledge, or use, of the pipe. He attributed its presence to the forgetfulness of a friend of his brothers who had been in the vehicle the night before. At the time the issue was taken no further but it later influenced JB's views of WPY's subsequently discovered conduct.

[7] Shortly thereafter Mr Lunn went overseas. While away he was contacted by a foreman about two issues. The first was that WPY's fuel card was not working and the

second was a claim monies attribute to the sale of scrap metal had been used to purchase fuel for his vehicle. Mr Lunn was perplexed by this being of the view both scenarios were odd.

[8] On his return Mr Lunn looked at some of the firm's fuel usage records and found discrepancies in those attributable to WPY's vehicle which were concerning.

[9] At 7:20 p.m. on 13 November he commenced a text chain with WPY by querying where the latter was. On being told WPY was at home Mr Lunn texted:

Why are you spending money on my fuel card? Who are you filling up \$65.30 for?

[10] WPY replied:

Your van and your van only. Give me a call.

[11] WPY states that during the resulting telephone call Mr Lunn asked *are you stealing my petrol, whose cars are you filling and are you selling my petrol for meth?*

[12] Mr Lunn cannot remember his exact words but accepts that is probably correct. Notwithstanding that WPY and Mr Nunn met later that evening. Their evidence suggests it was cordial and the petrol issue was not discussed till the end of the evening when there was an exchange along the lines of Mr Lunn saying *we have to get to the bottom of these fuel bills.*

[13] The following morning Mr Lunn went to work early. He examined more fuel records and reached a conclusion there was evidence of possible theft. In what turns out to be one of only two factual disagreements between the two, Mr Lunn says he then printed some of the records, highlighted some discrepancies and gave the records to WPY when the latter arrived. In his brief WPY denies he was advised of the details of the purchases causing concern or shown any documentation.¹ However when questioned about what happened during the investigation meeting he said he was shown both documents and data on a computer screen. He also said at another point he was at least presented with some post-it notes with various figures on them.

[14] That disagreement aside, both agree WPY was asked to explain the significant fuel usage and replied it was the result of excessive driving and the use of his fuel card by other

¹ Brief of evidence at [9]

employees when theirs didn't work. Mr Lunn then cited specific discrepancies including significant amounts of fuel being charged within a short space of time and again the parties agree the explanation offered was the same; excessive driving and use by other employees. The conversation then turned to questions about why some of the entries recorded the vehicle being fuelled at odd times such as 2.00am and the response remained consistent; excessive driving and possible use by other employees.

[15] It was at this point Mr Lunn says he reached a decision. He says he advised WPY *you haven't given me an explanation*. WPY agrees. Mr Lunn says he then went on to tell WPY *you have to go home*. Again, WPY agrees. Mr Lunn states he closed by saying *and you won't be working for JB*. It is on this point the second disagreement arises. WPY denies that was ever said and is of the view Mr Lunn said *he would get back in touch with me and we would have further discussions with him providing specific details*.² It is that view which gives rise to the suspension claim.

[16] On this I prefer Mr Nunn's recollection. WPY's view of events is predicated on his original evidence he was not given specifics and that necessitated the later offering of detail and an opportunity to respond. As already said he resiled from that position and I have other concerns about WPY's evidence I shall discuss later.

[17] On 23 November, and having heard nothing, WPY sent Mr Lunn an email advising he was raising a personal grievance in relation to what he perceived as an unpaid suspension. He also sought professional advice and Mr Ogilvie emailed the company the same day about the non-payment of wages during suspension. JB denies receiving WPY's email but accepts it got Mr Ogilvie's. JB did not respond.

[18] The lack of response and lack of pay led both Mr Ogilvie and WPY to conclude the employment had ended and, as a result, they added a grievance for unjustified dismissal on 21 December 2018. In the letter raising the grievance time and wage records were requested. Again, there was no response.

[19] With respect to the wages, and as already said, JB accepts payment has not been made. As to amount there is agreement WPY's final eight working days were not recompensed but disagreement over the amount of outstanding holiday pay.

² Above n 1.

[20] The final issue is WPY's tools. He says that notwithstanding various attempts to repossess them not all have been returned. JB has an opposing view saying WPY was given tools and as far as it is concerned he has everything.

Discussion

[21] 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 existed to allow a written determination of findings at a later date.

[22] As already said WPY has raised five claims. They are that:

- (a) He was unjustifiably suspended on 14 November 2018;
- (b) He was then unjustifiably dismissed either actually or constructively at a later date;
- (c) He is due unpaid wages and holiday pay;
- (d) He is due tools retained by JB; and
- (e) JB should be penalised for failing to provide a written employment agreement.

Unjustified Suspension

[23] The unjustified suspension claim fails for one crucial reason. Even if he did not understand what occurred it is clear WPY was dismissed and not suspended. JB accepts that to be the case and in doing so accepts the requirement it justify its actions. More importantly it acted as if a dismissal had occurred. At its simplest an employment relationship requires an exchange of labour for remuneration. Here the employer ceased to provide the required consideration, namely remuneration, thereby bringing the relationship to an end.

Unjustified Dismissal

[24] Turning to the unjustified dismissal claim. As just said, JB concedes there was a dismissal and is therefore required to justify it. With respect to justification s 103A of the Act states the issue:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[25] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and a procedural perspective. Whilst it is clear issues of substance and process overlap and there is no firm delineation, separation provides a useful means of analysis.

[26] Considering process first. In essence the Act requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[27] The evidence leads to a conclusion that notwithstanding its size and lack of resources, JB will fail to establish it can meet the procedural criteria above. With respect to putting its concern I conclude JB failed to adequately explain the situation and, in particular, accurately contextualise the meeting of 14 November. The parties agree that while the preamble, which occurred on 13 November, commenced with pointed queries as to whether there had been theft, it most likely ended with nothing more than a statement along the lines of *we have to get to the bottom of these fuel bills*. Neither party suggests WPY was put on notice the meeting was disciplinary and dismissal might result, though WPY accepts he assumed that to be the case. Given WPY's oral evidence I do however accept he was given details about what JB considered discrepancies in respect to both the timing and amount of various purchases. Despite his initial assertion to the contrary he accepted he was shown both screen entries and copies of various documents. Indeed he said he was advised of specific dates and times.

[28] Turning to whether or not WPY was allowed an adequate opportunity to explain and have that explanation properly considered. Again I have to conclude the answer is no. Mr Lunn states that having been given two explanations, excessive driving and use by colleagues, he simply said you haven't given me an answer and have to go home and won't be working for JB roofing. With the exception of the comment about no longer working WPY agrees with this evidence.

[29] That means WPY was not given a chance to respond to the fact his explanation was deemed inadequate and the evidence clearly portrays a somewhat brief and deficient consideration of the explanation. The explanation, even if doubted by the employer,

suggested others, namely those who had allegedly used the petrol cards, should have been questioned. They weren't with Mr Lunn simply rejecting the explanation.

[30] That Mr Lunn perhaps prejudged the outcome is reflected in the written brief. It was said *He offered no excuse which we considered to be an admission of guilt.*³ The problem with this is that an excuse was offered and one thing that is clear from the evidence is WPY denies the accusations of theft.

[31] The above, when considered in light of the Courts comment in *The Salad Bowl Ltd v Howe-Thornley*⁴ that all-encompassing procedural failure as has occurred here is neither excusable nor minor⁵ leads to a conclusion WPY will establish he has a personal grievance for unjustified dismissal even if only on procedural grounds.

[32] Turning now to the substantive justification and for reasons which shall become apparent I shall consider that simultaneously with remedies.

[33] WPY was dismissed for *abusing his rights as a driver of our vehicles and using the fuel card without authorisation for personal use outside of work hours around various suburbs and petrol stations throughout the Wellington region.*⁶ There were also concerns WPY has been using drugs, possibly at work, and that raised safety concerns, legal issues given the presence of drug paraphernalia in a work vehicle and the possible nullification of insurance should there be an accident with such items in the vehicle.

[34] Dealing with the petrol account first. There can be no doubt the fuel records show some inordinate activity. For example on 24 October 2018 there were two substantial purchases at different locations an hour apart with another two over the next two days. Another example saw two significant purchases on 8 September again at different locations and again with less than an hour between them. There were also two purchases on 20 September. There are further examples which suggest the vehicle was being driven large distances in a day – for example and according to the manufacturer's specifications the vehicle would have travelled well over 500 kilometres on 3 September.

³ Brief of Nick Lunn at [2]

⁴ [2013] NZEmpC 152 at [94] and [95]

⁵ The possible exemption under s 103A(5) of the Employment Relations Act 2000

⁶ Above n 3 at [1]

[35] As said WPY's explanation when discussing this with his employer was excessive private use and use by other employees. Unfortunately for WPY these answers did not survive the evidence with the employer convincing me each vehicle had a fuel card and there had been no reports of issues from others. The real damage was however done when WPY was asked to explain some of the transactions referred to above during the investigation meeting. In doing so he resiled from the approach he took with JB on 14 November, excess use and other using the petrol card, and tried to provide explanations which defied credibility.

[36] For example when asked about the distance travelled on 3 September WPY said he might have been traveling from place to place preparing quotes. That is not credible. Given the driving is in a largely urban environment it would suggest little time left to perform any work whether it be quoting or anything else. Even if there had been quoting, and as JB convinced me, the purported mileage was inordinate and unnecessary. Even if WPY had travelled to the extremes of the greater Wellington area in which the company operates (Kapiti and Upper Hutt) and returning to Wellington between 200 kilometres would have been about it. 500 hundred is unimaginable especially if he had been stopping to perform work functions as he says he was.

[37] Another example was a purchase at Miramar at 2.00am. When asked to explain WPY said he was picking up a passenger from Wellington airport. When it was pointed out this was almost impossible given the airports curfew⁷ he changed his answer to *seeing the views* at Moa Point. As said WPY's answers dented his credibility and lead to a conclusion the employers evidence should be preferred to his. To this I add earlier changes and inconsistencies in his evidence ([16]above) and an admission WPY knew and accepted the vehicle should not have been used after hours and especially in the small hours of the morning. Despite that he chose to blatantly ignore the rules.

[38] Essentially the dismissal is attributable to JB's belief WPY was stealing petrol. In an employment setting JB need only establish that on the balance of probability and not to the criminal standard. The documentary evidence of impropriety is strong and the answers provided by WPY during the investigation did nothing to allay a view the employers concerns had substance. I have no doubt on what I heard JB would have been entitled to conclude its concerns founded had it completed a proper investigation. Another point is WPY's admissions, along with the unconvincing way he now tries to explain them, is totally

⁷ Refer paragraph 11.1.1.1.5 (Night Flying Operations) of the Wellington City District Plan

destructive of the employment relationship. The conclusion I reach having heard the evidence and WPY's answer is he was, on the balance of probability, stealing petrol as alleged.

[39] Turning to the allegations regarding drug use I have to note that when asked to explain why the dismissal occurred Mr Lunn stated it was about the petrol. The drug allegations were only pertinent to the extent Mr Lunn felt they might explain why WPY needed money. Here I simply have to note that other than the meth pipe there is no evidence WPY was either consuming or under the influence of illegal substances while at work.

[40] In *Xtreme Dining Ltd t/a Think Tank Steel v Dewar* a full bench of the Employment Court considered circumstances where the Authority or Court might conclude it should not award remedies to an applicant notwithstanding the fact s/he has successfully established s/he has a personal grievance.⁸ The Court said:

We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience". The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[41] It is clear from *Dewar* that this assessment is not limited to misconduct discovered after termination as was the case in *Salt v Fell*.⁹

[42] In a subsequent decision, *Lawson v New Zealand Transport Agency*, Judge Corkill applied this assessment and concluded:

That misconduct, together with the misconduct of which the Agency had knowledge prior to dismissal, leads to a conclusion that the totality of inappropriate behaviour was sufficiently egregious as to warrant a finding there should be no remedies under s 123 of the Act.¹⁰

[43] A similar approach was taken in *Emerson v Northland District Health Board*.¹¹

⁸ *Xtreme Dining Ltd t/a Think Tank Steel v Dewar* [2016] NZEmpC 136 at [216]

⁹ *Salt v Fell* [2008] NZCA 128

¹⁰ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165 at [320]

¹¹ *Emerson v Northland District Health Board* [2019] NZEmpC 34

[44] Based on this case law it is clear I must assess the conduct about which JB complains and assess whether the totality of inappropriate behaviour, both known before and discovered after the dismissal, is sufficiently egregious so that no remedies should be granted.

[45] Egregious behaviour can be defined as that which is *outstandingly bad or flagrant*.¹²

[46] As already said I have concluded, on the balance of probability and given the contradictory and non-credible answers he offered during the investigation that WPY did, as alleged, steal from his employer. To that I add the fact he chose to act in a manner he acknowledged as being contrary to the employers' expectations and rules with respect to vehicle usage. This is conduct which, I conclude, is sufficiently egregious as to deprive WPY of any remedies notwithstanding the fact he has established he has a personal grievance.

Wages claim

[47] WPY claims he is due unpaid wages and holidays. JB accepts that is correct though the amount is in dispute. JB attempts to justify non-payment on the grounds it is owed money in order to offset losses occasioned by WPY's conduct.

[48] Irrespective of whether or not WPY stole from JB this approach is indefensible. Money can only be removed from wages due with the employees' written agreement or via some form of judicial intervention.¹³ Irrespective of who is correct about why there is no written employment agreement the parties agree it doesn't exist. Similarly there is no evidence of any other written agreement allowing the deduction, or more correctly, retention of money by the employer. Indeed, Mr Lunn states he simply chose to retain the money and there was no prior discussion.

[49] I also note that while JB may take future action seeking payment from WPY that is yet to occur (refer [3] above).

[50] In other words there is no justification for JB having retained this money and it remains payable in accordance with the Wages Protection Act.

[51] Turning to the amount. It is agreed WPY was not paid for the last eight days worked. To that he adds a claim for 224 hours of outstanding leave. The total is \$8,030.76.

¹² Collins English Dictionary

¹³ Sections 4 and 5 of the Wages Protection Act 1983

[52] JB is of a view it retained payment for 119.38 hours leave which was the amount shown as outstanding on WPY's final payslip. WPY's belief he was due 224 hours is attributable to the fact 104.62 hours was deducted from the pay period ending 14 August 2018 despite the fact he took no leave at that time. JB accepts the deduction occurred but when asked to explain why its witness said he *didn't know*.

[53] For two reasons there will be an order WPY be paid the amount sought. The first is the evidence shows WPY sought a copy of his time and wage record but it was not forthcoming. Mr Lunn expressly agreed that was the case. In such circumstances s 132 of the Employment Relations Act 2000 permits acceptance of the claim as quantified by the applicant unless the respondent can show it is incorrect. That leads to the second reason which is JB's inability to explain the disputed amount.

Tools

[54] WPY claims JB has retained some of his tools. JB disputes this saying it asked him to list everything he thought it had. It advised a pickup location but it then took WPY a month to collect his belongings. JB says WPY then advised there was more. A further list was provided by WPY's partner and those items were collected on 9 January 2019. JB is adamant it has looked again and nothing further remains. It also claims WPY removed or retained some of its tools when he left but that is part of the claim it seeks to pursue elsewhere.

[55] When asked about this WPY accepts there were two deliveries but claims more is yet to be returned. In saying that he referred to a list he had prepared but offered no further evidence. I have already commented on WPY's credibility and, as a result, remain unconvinced the claim has validity.

Employment Agreement

[56] WPY claims JB failed to provide a written employment agreement. JB says it did but WPY failed to sign and return the agreement. For two reasons I conclude the claim is not made out. The first is once again my concern about WPY's evidence and its veracity. The second is the remedy. WPY seeks the imposition of a penalty. A penalty is essentially a fine for wanton disregard of a party's obligations. Here there is no evidence of a wanton breach –

indeed WPY does not even say he queried the lack of an agreement while employed and ask one be produced.

Name suppression

[57] Finally there was a request from Mr Ogilvie that I suppress the publication of anything that might identify WPY. This was on the grounds there remains the possibility of criminal action with regard to both the allegation of petrol theft and a claim WPY, while holding himself out as an employee of JB, took money from a client as a deposit for work that has not been performed. It is alleged the money has not been returned and JB was never told of the job.

[58] The application was not opposed by JB.

[59] Having considered the issue I consider the request warranted. That is because my findings will be seen as an affirmation WPY stole from his employer but it must be remembered that has only been concluded on the balance of probability and not to the criminal standard. I therefore consider it inappropriate WPY be stigmatised by an accusation of criminal wrongdoing when the allegation has not been proved to that level, especially as criminal proceedings remain a possibility and it would be inappropriate the outcome here influence that deliberation should it proceed.

Conclusion and Orders

[60] For the above reasons I conclude:

- (a) WPY was not unjustifiably suspended on 14 November 2018. He was in fact dismissed that day;
- (b) The dismissal was unjustified but WPY is not eligible for remedies by reason of egregious behaviour;
- (c) WPY is due unpaid wages and holiday pay;
- (d) WPY has failed to establish JB has retained his tools: and
- (e) WPY has not established JB failed to provide a written employment agreement and even if he had no remedies would have accrued.

[61] As a result I order the respondent, J B Roofing Maintenance and Repair Limited, pay the Applicant, WPY, \$8,030.76 (eight thousand and thirty dollars and seventy six cents) gross being unpaid wages and holidays. Payment is to be made no later than 4.00pm, Monday 16 March 2020.

[62] There is an order prohibiting the publication of anything which identifies the applicant, WPY.¹⁴

[63] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

¹⁴ Clause 10 of schedule 2 of the Employment Relations Act 2000