

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2021] NZERA 463  
3115524

BETWEEN	KAREN WISHNOWSKY Applicant
AND	AARON BRIAN TRITT T/A BUILDING UNLIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Lars Hansen, counsel for the Applicant Steven Rollo, counsel for the Respondent
Investigation Meeting:	29 July 2021 at Hawera
Submissions received:	10 August 2021 from Applicant 19 August 2021 from Respondent
Determination:	20 October 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Karen Wishnowsky was employed as an office administrator by Aaron Tritt, trading as Building Unlimited for approximately 9 months until she was dismissed. Ms Wishnowsky claims her dismissal was unjustified. She seeks lost wages, compensation and penalties.

[2] Mr Tritt accepts he did not follow any legitimate employment process leading up to or during Ms Wishnowsky's dismissal and asserts that Ms Wishnowsky assaulted him and her dismissal could be justified because the assault amounted to serious misconduct. He also refers to two possible dates when dismissal occurred.

## **The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged from Ms Wishnowsky, her friend Graham Walker, Mr Tritt, Lucan Smith who is Mr Tritt's son and Ross Bridson<sup>1</sup>. Witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives provided written submissions after the investigation meeting.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received but given that this issue is intensely fact specific, the evidence has been summarised because there were a number of conflicts in the evidence.

## **Background**

[5] Mr Tritt has been in business most of his life and he had been running Building Unlimited for 12-13 years. His practice was to engage contractors but he employed Ms Wishnowsky to allow him to spend more time on building work rather than administration. Building Unlimited's and Ms Wishnowsky's place of work was also Mr Tritt's home.

[6] Ms Wishnowsky had been out of work for 16 years due to a significant back injury. She signed an individual employment agreement (IEA) on 25 June 2019 and was employed as an office administrator to work 12 hours each week on set days between 9.00am and 1.00pm.

[7] The IEA provided her employment could come to an end by way of a dismissal without notice if, after following a fair process, the employer concludes the employee had engaged in serious misconduct. The employer could also end the employee's job with reasonable cause or the employee might resign. In that case, either party could end the employment by giving 3 weeks' notice.

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<sup>1</sup> Mr Bridson provided a written brief but did not attend the hearing.

[8] From Ms Wishnowsky's perspective, although there had been a couple of issues, on the whole she was enjoying the opportunity to work and learning about the building industry. Mr Tritt had not raised any issues with Ms Wishnowsky about her work.

[9] On 24 March 2020, just prior to New Zealand going into Alert Level 4 lockdown, a series of text messages were exchanged between Mr Tritt and Ms Wishnowsky. Initially the text messages were about arrangements during lockdown and about paint, but they ended up with Mr Tritt advising Ms Wishnowsky that he had "lost all jobs through panic" and saying:

"I will pay you for this and next week. I cannot go any further. I do not concede. I will rest. I will be stronger. You will always be a part of our company you own a percentage."<sup>2</sup>

[10] Ms Wishnowsky took this to mean that her employment had ended but was not entirely sure. After further text messages Ms Wishnowsky decided to go to Mr Tritt's house because she wanted certainty about what was happening with her job and the paint she had paid for in accordance with a private arrangement between them.

[11] Mr Tritt says what he meant by the text messages was that Ms Wishnowsky's job had ceased but he had not given up on the business because he was hoping to revive the business at a later stage. He explained at the investigation meeting that he had wanted to give Ms Wishnowsky a small share in the company but this did not eventuate.

[12] At approximately 6.00pm on 24 March 2020, Ms Wishnowsky and her friend Graham Walker, went to Mr Tritt's house. The detail of what happened next is in dispute between the parties, but it is agreed that Mr Tritt made it known verbally and by his conduct that he did not want Ms Wishnowsky or Mr Walker on the property. Mr Walker retreated to the footpath. Ms Wishnowsky says she continued to try to engage with Mr Tritt until Mr Tritt pushed her twice. Mr Tritt denies this, saying instead that he was assaulted by Ms Wishnowsky. Ms Wishnowsky and Mr Walker called Police and left.

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<sup>2</sup> Mr Tritt's text messages to Ms Wishnowsky on 24 March 2020.

[13] In explanation Mr Tritt said when Ms Wishnowsky and Mr Walker arrived he was interviewing someone called “Paula” who was going to help with computer work that neither Mr Tritt nor Ms Wishnowsky had the skills for. Mr Tritt said he had sent all the workers home because of the need to socially distance and this was also in his mind when he told Ms Wishnowsky and Mr Walker to leave.

[14] Mr Tritt admitted that he was very angry that Ms Wishnowsky was at his house and he just wanted her to go away. He said that Mr Walker threatened him. He said he used words and language that would have made it clear that he wanted nothing more to do with Ms Wishnowsky and, in particular, because of a threat (from Mr Walker) he wanted Mr Walker off his property. During the investigation meeting Mr Tritt provided multiple examples of what he recalled saying to Ms Wishnowsky and Mr Walker.

[15] In his written evidence Mr Tritt said that after Ms Wishnowsky assaulted him and invaded his home, she was no longer employed but at the hearing Mr Tritt confirmed that he considered Ms Wishnowsky’s employment had ended on two occasions. She was dismissed both by text message on 24 March 2020, and after the incident at his house which he formally notified her of by email dated 20 May 2020, after the personal grievance had been raised with him.

[16] Lucan Smith is Mr Tritt’s son. He gave evidence of the impact this has had on his father. Mr Smith returned home to help run the administration side of the business and said that after a historic head injury this incident has taken his father back in terms of his non-building work and has meant that Mr Smith has had to carry out all office and administrative work.

## **Issues**

[17] The issue the Authority must determine is whether Ms Wishnowsky was unjustifiably dismissed? If the answer is yes then consideration will be given to the remedies that are appropriate and to any contribution Ms Wishnowsky may have made to the situation that led to her personal grievance.

### **Was Ms Wishnowsky unjustifiably dismissed?**

[18] The question of whether a dismissal or other action by an employer is justifiable is determined on an objective basis by applying the test at s 103A of the Act. The test

is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal or action occurred.

[19] In applying the test, the Authority must consider four factors in addition to any others it thinks appropriate. The factors are:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[20] The Act also imposes an obligation of good faith on both parties and in particular on employers when they are proposing to make a decision that is likely to have an adverse effect on the continued employment of an employee.

[21] In those circumstances s 4(1A)(c) of the Act states that the employer must provide the employee with access to information relevant to the continuation of the employee's employment and with information about the decision and an opportunity to comment on the information to their employer before the decision is made.

*When was Ms Wishnowsky dismissed?*

[22] Mr Hansen submitted on Ms Wishnowsky's behalf there was no clear dismissal during the events on 24 March 2020 and therefore it was open to the Authority to find that dismissal did not occur until much later on 20 May 2020. This was when Mr Tritt emailed Ms Wishnowsky in response to Ms Wishnowsky's personal grievance being raised with him. At that point, after not communicating with her since 25 March 2020,

Mr Tritt conveyed in that email that Ms Wishnowsky was dismissed on the grounds of serious misconduct, after the incident at his home on 24 March 2020.

[23] Mr Hansen noted there was no communication between Mr Tritt and Ms Wishnowsky after the texts of 25 March 2020 until the email on 20 May 2020 and during that time no concerns were raised with Ms Wishnowsky. He says the text saying “do not contact me” shows Mr Tritt was not interested in following a fair and reasonable process.

[24] Mr Rollo submits that the text messages read as a whole show the parties were in agreement that Ms Wishnowsky had been dismissed at 4.41pm on 24 March 2020 and Mr Tritt accepts that he did not follow any proper employment procedure for terminating Ms Wishnowsky’s employment.

[25] There are several possible dates when dismissal could have occurred. Dismissal is given a wide meaning and should not be construed narrowly. In general terms when there is confusion about whether a particular action amounts to a dismissal what is required is evidence of a “sending apart” or “sending away” or “sending forth”.<sup>3</sup>

[26] I find that Ms Wishnowsky was dismissed by the text messages on 24 March 2020 before she went to see Mr Tritt based on the following:

- The text message conversation amounted to a “sending away”.
- Mr Tritt’s statements that he no longer wanted to employ Ms Wishnowsky.
- The intention to pay her 2 weeks’ notice.
- The incident at the house.
- The assault allegations both parties made against the other.
- Mr Tritt’s text message saying “do not contact me”.

[27] Also indicative that the employment relationship had ended then was the fact Ms Wishnowsky did not work and there was no communication between the parties after the text message on 25 March 2020 until the email on 20 May 2020.

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<sup>3</sup> *Wellington Clerical Union v Greenwich* (1983) ACJ 965 (AC) at 973.

*Was the dismissal justified?*

[28] Mr Hansen submits because Mr Tritt did not follow any process complying with s 103A of the Act the dismissal is unjustifiable. Mr Tritt accepts he did not follow a proper procedure in terminating Ms Wishnowsky's employment and the evidence indicated that the decision he made was abrupt and impulsive.

[29] There was no evidence provided of any process leading up to the decision that Mr Tritt made about ending Ms Wishnowsky's employment. Mr Tritt told me unequivocally that on 24 March 2020, he had had enough of Ms Wishnowsky. The rationale for his decision was described as a need to reduce business costs because of the global pandemic, panic on the eve of Alert Level 4, and high levels of frustration with Ms Wishnowsky.

[30] With no warning, Ms Wishnowsky was left with no opportunity to understand that her employer had an issue with her employment, what that issue was based on or any ability to respond to concerns or proposed changes and have her response taken into consideration. There is a fundamental obligation in the Act on employers to provide these opportunities when an employer is considering making any decision that will have an adverse effect on the continued employment of an employee.

[31] Given Mr Tritt's decision ended Ms Wishnowsky's employment, the steps in the Act set out above were mandatory for him to take. With an absence of any procedure or clear rationale for ending Ms Wishnowsky's employment Mr Tritt's actions do not amount to what a fair and reasonable employer could have done in all the circumstances at the time. This means that on an objective basis the dismissal cannot be justified.

[32] A grievance was raised about the unjustified dismissal in a letter from Mr Hansen to Mr Tritt dated 12 May 2020.

[33] As I result I find that the dismissal was unjustified both procedurally and substantively. Ms Wishnowsky has made out her personal grievance claim that she was unjustifiably dismissed. She is entitled to remedies.

## **Remedies**

### *Lost wages*

[34] The Act permits reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.

[35] Reimbursement of lost wages up until the date of this determination are sought. This is based on Ms Wishnowsky's evidence that she sought new employment after the 20 May 2020 email through Workbridge but due to her disability her employment opportunities are limited. This job was Ms Wishnowsky's first employment for many years due to health issues and Ms Wishnowsky is on the Supported Living Benefit.

[36] I accept that reimbursement is appropriate in circumstances where the manner of dismissal deviated sharply from the statutory obligations on employers and Mr Tritt's communications left room for confusion. I also note that Ms Wishnowsky's underlying health issues impact on her ability to secure work. Ms Wishnowsky finds it difficult to secure work with the limitations of her health issue. I consider that reimbursement of a sum equal to 3 months' ordinary time would be appropriate.

[37] Subject to any issues of contribution Ms Wishnowsky is entitled to reimbursement of the sum of \$2,964.00, gross, (based on Ms Wishnowsky earning \$228 per week) under s 123(1)(b) of the Act.

### *Compensation*

[38] Ms Wishnowsky seeks compensation in the range of \$20,000 to \$25,000. Ms Wishnowsky said having this job boosted her self-esteem, she was wrapped rapt to be getting extra money on top of her Supported Living Benefit. When that was taken away she lost all that.

[39] The dismissal process followed by Mr Tritt was unfair and procedurally and substantively flawed. It is clear Ms Wishnowsky was humiliated and suffered loss of dignity and injury to feelings as a result of how she was dismissed. Subject to any contribution Ms Wishnowsky is entitled to payment of compensation in the sum of \$12,000 under s 123(1)(c)(i) of the Act. In reaching this figure I have taken into account the relatively short period of employment.

### *Contribution*

[40] The Authority is required under s 124 of the Act where it finds that an employee has a personal grievance to consider the extent which the employee contributed towards the situation that gave rise to the personal grievance.

[41] Mr Rollo accepts that if the Authority finds Ms Wishnowsky was dismissed via text message on 24 March 2020 there is no contributory conduct on her part.

[42] I do not consider that Ms Wishnowsky contributed towards the situation that gave rise to the personal grievance. The dismissal appeared to be impulsive on Mr Tritt's part with no reference to or understanding of the obligations on him as an employer under the Act.

### **Penalties**

[43] A penalty for a breach of good faith under s 4A of the Act is claimed because Mr Tritt acted in bad faith in particular he did not respond in a clear way to Ms Wishnowsky leaving room for confusion and being dishonest.

[44] Non-compliance with an IEA or any obligations under the Act, can amount to a failure to comply with the duty of good faith. In the circumstances of this matter because of uncertainty about the intention involved and how intertwined the claimed good faith breaches are to the personal grievance for the dismissal, I decline to order a penalty.

### **Orders made**

[45] Aaron Tritt is ordered to pay Karen Wishnowsky the following amounts:

- (a) The sum of \$2,964.00 (less tax) being reimbursement for lost wages under s 123(1)(b) of the Act.
- (b) The sum of \$12,000 without deduction being compensation under s 123(1)(c)(i) of the Act.

## **Costs**

[46] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

Sarah Kennedy  
Member of the Employment Relations Authority