

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 186  
3092492

BETWEEN

GREGORY CROWE  
Applicant

AND

KAIAPOI COLLISION CENTRE  
2018 LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Robert Thompson and Andrew McInnes, advocates for  
the Applicant  
Anna Oberndorfer, advocate for the Respondent

Investigation Meeting: 31 March 2021 in Christchurch

Submissions Received: On the day, from the Applicant  
On the day, from the Respondent

Date of Determination: 6 May 2021

---

**DETERMINATION OF THE AUTHORITY**

---

- A Gregory Crowe was unjustifiably dismissed from his employment with Kaiapoi Collision Centre 2018 Limited.**
- B Kaiapoi Collision Centre 2018 Limited is to pay to Gregory Crowe:**
- (a) The sum of \$14,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000**
  - (b) The sum of \$2,250 being costs together with reimbursement of \$71.56 being the filing fee.**

## **Employment Relationship Problem**

[1] Gregory Crowe was employed as a panel beater by Kaiapoi Collision Centre 2018 Limited (Kaiapoi Collision) from in or about September 2018. On 27 October 2019 Mr Crowe was involved in a non-work-related accident. He was in hospital from 27 October until 20 November 2019 when he was released to recuperate at home.

[2] The sole director of Kaiapoi Collision is Wayne Donaldson. He used to work with Mr Crowe as an employee in the same business that he then purchased in September 2018. Mr Crowe was a panel beater in that business and Mr Donaldson a painter. Kaiapoi Collision was incorporated in August 2018. When the purchase was completed in September 2018, Mr Crowe signed an employment agreement with Kaiapoi Collision. The relationship between Mr Donaldson and Mr Crowe changed then from one of co-worker to that of employer and employee.

[3] Mr Donaldson visited Mr Crowe in hospital on two or three occasions after his accident. He was concerned about how he would cope with the only panel beater in the business being off work for what he considered may have been a considerable period of time.

[4] On 18 November 2019 he provided Mr Crowe with a letter with a subject line "Medical Details Requested" as below:

Hi Greg

I am sorry to hear of your accident on 27<sup>th</sup> October 2019. As per your contract we are entitled to request relevant medical details and/or reports regarding your condition. This will allow us to consider any information provided, in order to assess your ability to resume your role as Panel Beater in a reasonable timeframe.

Can you please provide this information to us within 7 working days.

[5] The request for information was then given by Mr Crowe to a social worker at the hospital. The social worker sent an email on 19 November 2019 to Mr Donaldson attaching the most up to date ACC medical certificate. The medical certificate provided that Mr Crowe was fit to return to work on 3 February 2020 but that there would be a review closer to that time with Orthopaedics and an ACC case manager. Mr Crowe was not provided with a copy of the email from the social worker until it was provided with the letter of dismissal.

[6] Mr Donaldson considered with the medical information the extent and nature of the injuries and that the period of time within which Mr Crowe remained fully unfit for work until 3 February 2020. He weighed there was then no absolute certainty of a return to work as at 3 February 2020. Mr Donaldson said that he had regard to the key position Mr Crowe held and whether that could be kept open given the uncertainty of recovery within the 11 weeks. He “googled” the injury and recovery times which suggested to him that recovery would be very long and difficult.

[7] Mr Donaldson had been able to secure a panel beater on a casual as required basis. The letter of offer of employment to the new panel beater provides the start date for him as 30 October 2019. Mr Donaldson said in evidence that he was concerned from what he understood that unless he offered the casual panel beater a permanent position he may simply leave and he could not afford two panel beaters. Mr Donaldson said that he hated making the decision to dismiss Mr Crowe but felt there was no other option.

[8] The evidence established that there was no discussion with Mr Crowe between the medical information being provided on 19 November 2019 and the delivery of the notice of termination on 9 December 2019.

[9] On 9 December 2019, Mr Donaldson went to see Mr Crowe with a letter of termination. Mr Crowe was in his car at the time waiting whilst his partner walked their dog. The car was parked in the driveway of a property owned by Mr Crowe. Mr Donaldson said that he tried to talk with Mr Crowe when he handed him the letter of termination but acknowledged that it was uncomfortable for the two of them.

[10] The letter of dismissal provided as follows:

Dear Greg

We refer to our letter dated 18<sup>th</sup> November 2019. In our letter, we requested that you provide medical information relating to your accident on the 27<sup>th</sup> October 2019. This was to determine when you will be fit to return full time to your position of Panelbeater. Thank you for providing a Medical Certificate; we received this on the 19<sup>th</sup> November 2019 from [social worker]. Copy attached.

We have now reviewed the medical report provided and in summary the report states that you have the following injuries:

Closed Fracture (L) Femoral Shaft

Bilateral Closed Pelvic Fractures

The report states that you will be unfit to return to work until the 3<sup>rd</sup> February 2020 and that this date is not definite as you will be reassessed closer to that time.

We have thought long and hard about whether our small business can function effectively and provide the necessary service, without a full time sole charge panel beater on site for the period stated above. You have been unable to work since 27<sup>th</sup> October 2019. This will mean a proposed absence from full time duties for over 3 months and potentially longer.

Greg, this has been a difficult decision to make and unfortunately we have no option but to terminate your employment as you are unable to return to work in a reasonable time frame. From the date of this letter Kaiapoi Collision Centre 2018 Limited provides you with 2 weeks notice of termination of employment.

On termination date, you will be paid any accrued but untaken annual leave.

I thank you for all your dedication and hard work.

[11] Mr Crowe says his dismissal was unjustified or alternatively, that he suffered an unjustified disadvantage. He wants Kaiapoi Collision to pay him a sum of compensation for the unjustified dismissal, or alternatively the unjustified disadvantage together with costs.

[12] Kaiapoi Collision says that Mr Crowe's employment was terminated for medical incapacity and that it was procedurally fair and substantively justified.

### **The Issues**

[13] The Authority needs to determine the following issues in this case:

- (a) What were the material aspects of the employment agreement?
- (b) How should medical incapacity be approached with the test of justification in s 103A of the Employment Relations Act 2000 (the Act)?
- (c) Was dismissal on the grounds of medical incapacity justified?
- (d) If the dismissal was unjustified, then what remedies should follow.

### **The employment agreement**

[14] The employment agreement provided for termination on the basis of medical incapacity:<sup>1</sup>

Ending employment: Medical

If the employer believes on reasonable grounds that the employee is not able to do their job because of a condition, illness or injury, and will not be able to resume their job within a

---

<sup>1</sup> The clauses in the employment agreement and the pages are not numbered.

reasonable timeframe, the employer may end the employee's employment by giving at least 2 weeks notice.

Before doing so, the employer will

- (a) request medical details from the employee about their condition
- (b) consider any information provided within a reasonable timeframe, together with any result from medical examinations they have asked the employee to take
- (c) meet with the employee to discuss their condition and the timeframes for recovery

### **How should medical incapacity be approached with the test of justification in the Act?**

[15] It is settled law that an employer is not required to hold open a job indefinitely for an employee who is unable to attend work. A dismissal for a long term absence will be justified if it can be shown it is substantively and procedurally justified.<sup>2</sup>

[16] Section 103A of the Act requires the Authority to objectively determine whether the employer's action and how the employer acted were what a fair and reasonable employer could have done in all the circumstances.

[17] The Employment Court stated in a judgment about medical incapacity that the procedural fairness factors in s 103A(3) do not sit altogether comfortably with a no-fault-based dismissal such as medical incapacity.<sup>3</sup> A broad framework was set out by the Employment Court when approaching the issue of termination for medical incapacity. The Authority adopts that approach in this case in undertaking its objective assessment. It has considered the following:

- (a) The reasonableness of the time given to recover with reference to the employment agreement, nature of position held by the employee and length of service of the employee.;
- (b) Whether there was a fair and reasonable enquiry before the decision to dismiss about medical information;
- (c) Whether there was a fair and reasonable process including notification of the possibility of the dismissal and input and comment from the employee;

---

<sup>2</sup> *Meena Lal v The Warehouse Limited* [2017] NZEmpC 66 at [30] with reference to *Canterbury Clerical IUOW v Andrews and Beaven Limited* [1983] ACJ 875 at 877, *Motor Machinist Ltd v Craig* [1996] 2 ERNZ 585 (EmpC) at 592 and *Dunn v Waitemata District Health Board* [2014] NZEmpC 201.

<sup>3</sup> At [32].

**Was dismissal on the grounds of medical incapacity justified?**

[18] Kaiapoi Collision is a small business with panel beating at its heart. Mr Crowe was its only panel beater. Mr Donaldson requested and obtained some medical information about Mr Crowe's prognosis and ability to return to work after his accident. Mr Donaldson considered the needs of his business and whether the business could manage without Mr Crowe who was unfit from work until at least 3 February 2020. He concluded it could not and terminated Mr Crowe's employment.

[19] Mr Donaldson said that he had made that clear that termination of employment could be an outcome during visits to Mr Crowe in hospital. Mr Crowe did not accept that but agreed under questioning he was on "heavy medication."

[20] I have placed weight on the fact that there was nothing about the possibility of dismissal as an outcome in the letter of 18 November 2019 requesting medical information. The evidence falls short of establishing to the required standard that Mr Crowe was aware that dismissal was a possibility before 9 December 2019 when he was dismissed.

[21] There was no engagement with Mr Crowe about the medical information provided or googled as required in the employment agreement. Mr Crowe with knowledge of Mr Donaldson's concerns did not have an opportunity to have any input into and make any comment before the decision to dismiss was made.

[22] Mr Donaldson said that he had to make a decision for his business when faced with a potentially long term absence in a key role. He said that because of his background with Mr Crowe they had a reasonably frank and robust communication style and didn't "sugar coat" things. Mr Crowe in his evidence acknowledged that he understood the difficulties for a business faced with an absence.

[23] Even with a robust and frank relationship there still needs to be a fair process before an adverse employment decision such as dismissal is made. This includes engagement and an opportunity for input. Mr Donaldson should have put to Mr Crowe the matters he was concerned about. Mr Crowe said that had he been asked as part of a fair process for his input he would have had things to say. He wanted to retain his role and said he could have discussed options including the possibility of him undertaking light duties and a rehabilitation

plan. There could also have been some discussion about the possibility of temporary cover until he was well.

[24] There was an absence of a fair process in this matter. What occurred does not satisfy the requirements of the test of justification in s 103A of the Act.

[25] The procedural deficiencies were not minor but fundamental. Ms Oberndorfer submits that dismissal was inevitable however the procedural deficiencies are such that they overlap with substantive fairness at the time of the dismissal. The dismissal was unjustified. It was not a decision that a fair and reasonable employer could have reached in all the circumstances at the time.

[26] Mr Crowe has made out his claim that he was unjustifiably dismissed and is entitled to consideration of remedies. The claim of unjustified disadvantage is absorbed in this claim.

## **Remedies**

### *Lost wages*

[27] Mr Crowe has remained on ACC and there is no claim for lost wages.

### *Compensation*

[28] Mr Crowe and his partner Leah gave extensive evidence about the effect of the dismissal. Mr Crowe said he was shocked on 9 December 2019 when he was handed the letter of dismissal and was told he was to be dismissed. Leah said that he essentially shut down for a few days after dismissal and went to bed. She said that he was not talking, sleeping or eating. There was evidence that the dismissal impacted on Christmas with Mr Crowe and Leah making a decision not to spend the day with family because of the distress caused by the dismissal.

[29] Leah said that Mr Crowe was not as social as he had been and did not go out as much as he had in the past after the dismissal. Further that people in the community came up to discuss the fact that Mr Crowe was no longer working and that caused stress. There was some evidence that Mr Crowe was told that his dismissal had been dignified and that hurt him because that was not his view. Mr Donaldson said that the fact he attended in person to deliver the letter of termination was better than a text or a letter in the mail box. I accept that

Mr Donaldson did deliver the letter in person and that can be difficult when it is not welcome news. That could not however mitigate the impact on Mr Crowe of the absence of a fair process when the decision was made without Mr Crowe's involvement and input.

[30] Ms Oberndorfer submits that Mr Crowe's evidence about how much he enjoyed his role and the difficulty for him to find another with similar terms and conditions is overstated.<sup>4</sup> Further that he is highly employable. There was evidence from Mr Donaldson and his partner Michelle that Mr Crowe appeared unhappy in the month or so before his accident.

[31] I accept Mr Crowe was in the round happy with his role at Kaiapoi Collision and his terms and conditions. The location suited him. He had also worked with Mr Donaldson for a few years in the business before Mr Donaldson purchased the business in 2018. In terms of being highly employable, Mr Crowe's written evidence referred to the overwhelming thought of starting over again somewhere new.

[32] Mr Crowe was not heard and his dismissal without any engagement with him after medical information was received had a significant impact on him. I accept that he suffered reasonably significant humiliation, loss of dignity and injury to his feelings. I do weigh that Mr Crowe continued to be in receipt of ACC and that alleviated any immediate financial concerns.

[33] Ms Oberndorfer submits that an appropriate award would be \$2,000 because dismissal was inevitable. I have found the absence of a fair process overlapped with the making of a substantive finding at the time that Mr Crowe was dismissed. Considering similar cases I find that an appropriate award for the unjustified dismissal is \$14,000.

[34] I order Kaiapoi Collision Centre 2018 Limited to pay to Gregory Crowe the sum of \$14,000 without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000.

### *Contribution*

[35] There are no issues of contribution as this was a no-fault dismissal. That means that the above award is not reduced.

### **Costs**

---

<sup>4</sup> Mr Crowe described the role as his "forever job".

[36] Mr Thompson and Ms Oberndorfer asked the Authority to determine costs on the basis of the daily tariff. The matter took half a day. The daily tariff is \$4,500 for the first day of an investigation meeting.

[37] I order Kaiapoi Collision Centre 2018 Limited to pay to Mr Crowe costs in the sum of \$2,250 together with reimbursement of the filing fee in the sum of \$71.56.

**Helen Doyle**  
**Member of the Employment Relations Authority**