

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 36
3082432 and 3082433

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| BETWEEN | CHRISTINA HAIG Applicant in 3082432 |
| AND | DESMOND HARRISON Applicant in 3082433 |
| AND | OLLY'S LOG LINK LIMITED Respondent |

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| Member of Authority: | M B Loftus |
| Representatives: | David Ure, counsel for the Applicants Adam Mapu, advocate for the Respondent |
| Investigation Meeting: | 23 and 24 September 2021 at Gisborne |
| Submissions Received: | At the Investigation Meeting with further input up to and including 30 October 2020 |
| Date of Determination: | 1 February 2021 |

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants, Christina Haig and Desmond Harrison, claim to have been unjustifiably dismissed on or about 4 July 2019.

[2] The respondent, Olly's Log Link Limited (Olly's) accepts it dismissed both Ms Haig and Mr Harrison but is of the view it can justify its decision.

Background

[3] Olly's operates logging trucks and employed the applicants as drivers.

[4] Mr Harrison commenced his employment November 2018 while his fiancée, Ms Haig, commenced in February 2019.

[5] In May 2019 RFV the niece of one of Olly's owners and directors, Stuart Olsen, commenced employment though neither Mr Harrison nor Ms Haig understood this to be the case. They thought she was undergoing some form of voluntary work experience.

[6] As well as being related to Mr Olsen, RFV is the daughter of an ex-partner of Ms Haig's mother. While Ms Haig accepted, when giving oral evidence, there were no real issues between herself and RFV it is clear she holds some very negative views about RFV's father. In her words the very thought of RFV's father caused a lot of anxiety *and the chance of being associated with that family again, through [RFV] brought that anxiety back.*

[7] Ms Haig raised her concerns with Olly's owners and claims she was told they would arrange for RFV to leave. That is denied by Olly's. RFV remained and while not totally satisfied with the outcome decided to try and make things work.

[8] Then, unfortunately came the evening of 15 June 2019. Both Ms Haig and RFV were with separate groups of friends at a bar in Gisborne and an altercation ensued between the two groups. As a subset thereof it would appear there was direct acrimony between Ms Haig and RFV. While each blames the other that is not an issue I need decide. Suffice to say the outcome was a request from Ms Haig that Olly's honour what she claimed was the promise RFV would cease working.

[9] As it transpired that didn't happen with Ms Haig first becoming aware RFV was still with Olly's on Friday 21 June. That morning Ms Haig was in her truck parked on the roadside having just left a forestry site when she saw Mr Olsen pass in his truck with RFV as a passenger. She says this made her distraught, mad and sad and she decided to telephone Mr Olsen's business partner, Karen MacGregor. Ms MacGregor did not answer so Ms Haig sent a long text. Contained therein was the comment that if Olly's *can't let her (RFV) go ... I have to finish.*

[10] Ms Haig says she was very angry but having calmed down she proceeded to Gisborne where she unloaded. That said, she says her distress remained and she concluded she was not in a fit state to continue working that day and she chose to return the truck to its normal park at Mr Olsen's residence.

[11] While on the way there she passed Mr Olsen and RFV. In her own words she then *debated it* (her subsequent actions) *and did*.

[12] It was to give the passing truck the fingers and then key the RT and offer some obscene observations about RFV before stating *its me or her, you gotta choose*. Ms Haig claims Mr Olsen replied in kind but the actual words are disputed with Mr Olsen accepting he did use an obscenity but by way of questioning whether or not that was what Ms Haig had just called him.

[13] Ms Haig then telephoned Mr Harrison and advised her view of events and the belief Mr Olsen had sworn at her. Shortly thereafter Messrs Olsen and Harrison passed each other and another RT conversation ensued. It started with Mr Olsen asking if Mr Harrison was returning to the forest for another load but then degenerated with both yelling and swearing. Mr Olsen says it ended with Mr Harrison uttering another obscenity to which he responded by advising Mr Harrison go home and we will talk about this. Mr Olsen say there was no response and he and Mr Harrison have not talked since. Mr Harrison's evidence about the conversation is consistent with Mr Olsen's.

[14] Both Ms Haig and Mr Harrison then returned the trucks, parked them and left having removed various personal items before doing so.

[15] On 23 June Ms Haig sent a text asking what her start time was the following day. It also advised that she had not resigned but that she intended to leave in the near future. The response, from Ms MacGregor, was that there will be *no work tomorrow* and that Olly's was seeking advice about how to address the earlier events. Further texts followed with Ms Haig also requesting a copy of her employment agreement and leave records.

[16] Formal advice of suspension was given by Olly's on 24 June with it being stated the suspension would continue until *an investigation is completed into your workplace behaviour and conduct*. The oral evidence from both Mr Olsen and Ms MacGregor is that they had concluded it would be unsafe to have either Ms Haig or Mr Harrison in what is a very dangerous work environment in their current frame of mind.

[17] On 24 June both Ms Haig and Mr Harrison formally advised the existence of a personal grievance. They claimed disadvantage with respect to the employer's failure to address the toxic environment that had arisen after the pub incident, respond to the requests for

documentation made on 23 June and offer either work or payment for the 24th. While they do not say they have resigned the remedy sought was payment of outstanding leave in full.

[18] The following day Mr Harrison sent a further email challenging his suspension and the fact he was being treated as an extension of his partner, Ms Haig, as opposed to an individual in his own right.

[19] The response was advice Olly's wished to do things properly and an invitation to meet formally on 28 June was sent on 26 June.

[20] The meeting went ahead as planned with Ms Haig and Mr Harrison being assisted by Mr Ure. Both take issue with the meeting and its fairness - Ms Haig especially. Similarly Ms MacGregor, who represented Olly's and was assisted by her daughter who also works for the company, both expressed dissatisfaction. They complain that neither Ms Haig nor Mr Harrison answered their questions and that the meeting was dominated by Ms Haig's *story* and the appalling treatment she and her mother had suffered at the hands of RFV' father.

[21] Following the meeting the MacGregor's discussed it with Mr Olsen and the decision was made to dismiss. This was conveyed to each by letter dated 4 July 2019.

[22] Ms Haig's letter states the reason to be, but not limited to:

- (a) Safety of the workplace and other employees;
- (b) A constant refusal to engage in prior meetings she had been asked to attend in an attempt to resolve issues before employees behaviour escalated;
- (c) Warnings previously given about her behaviour were not treated seriously and resulted in further issues;
- (d) A refusal to complete work tasks on more than one occasion which resulted in financial loss for the company;
- (e) A pattern of abusive and aggressive behaviour toward another employee; and
- (f) Statements which made it clear Ms Haig would not work with RFV.

[23] Mr Harrison's letter cited his conduct on 21 June, the failure to complete work tasks and statements he could no longer work with RFV.

Discussion

[24] Before proceeding two issues should be discussed. The first is the applicants' suspension was discussed at some length during the investigation meeting. While clearly unjustified given the parties agreement there was no prior discussion this will not be considered as a separate grievance as the claim, as ultimately lodged in the Authority, was one of unjustified dismissal. The suspension was not mentioned though there is a plea in closing submission I consider it by way applying s 122 of the Employment Relations Act 2000 (the Act). I choose not to as no separate remedies were sought. The effect of this will be considered by way of remedies for unjustified dismissal that, for the following reasons, these clearly are.

[25] The second issue is that one of the lines of defence is the applicants intended to resign therefore little or no harm had accrued. This approach has no chance of success for the following reasons.

[26] The evidence tendered in support concentrated on the events of 21 June, the applicants' departure having taken their property from the vehicles and Ms Haig's statement she would have to finish. The problem with this is she subsequently made it clear, by text, she had not resigned. Similarly, and while the remedies sought on 24 June suggested a departure, there was no statement saying that had occurred.

[27] Even if there had been a resignation Olly's would still have struggled given a heat of the moment situation. There is ample precedent to say such resignations should not be accepted but instead there be a cooling down period followed by discussion to ascertain what had actually occurred. That is effectively what happened in any event and this is perhaps the most important point. Olly's acted as if the employment continued and conducted a disciplinary process which led to advice of dismissal.

[28] These were, I conclude, dismissals notified by Olly's via letter dated 4 July and this was confirmed in both statements in reply which open with the words *The Applicant was dismissed for Serious Misconduct ...*

[29] As just said Olly's, in its statements in reply, concedes there were two dismissals. It is therefore required to justify those dismissals. 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.

[30] In determining this 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.

[31] Unfortunately for Olly's it is here they fail. There was considerable evidence and discussion about what occurred during the meeting of 28 June and while both parties have expressed dissatisfaction there is also considerable agreement.

[32] Key amidst these is the applicants' allegation issues were not properly put to them and the MacGregor's concession many of the issues which persuaded them to dismiss and which are referred to in the dismissal letters were never put.

[33] For example it was conceded it was unlikely the issues of workplace safety or prior refusals to perform work were put to Ms Haig. Similarly it was agreed the statement Ms Haig was refusing to work with RFV or the possibility she had already left Olly's employ were never put. It was also accepted Ms Haig was never told RFV was an employee and her demands for RFV's removal therefore faced some difficulty.

[34] With respect to what Olly's says was Ms Haig's failure to answer question which were put it is agreed she was never put on notice a failure to answer could jeopardise her employment.

[35] The situation with respect to Mr Harrison is even worse given it is agreed he was little more than an attendee. He was asked little and answered nothing. He was never told of Olly's concerns beyond advice they related to his actions on 21 June and furthermore one of the reasons it is now said he was dismissed was that he was abusive in the meeting. Again this was not put to him.

[36] Finally I note Mr Olsen participated in the decision making process but was not present at the disciplinary meeting. It is well established

[37] Mr Ure's allegation Olly's failed to investigate properly is, given the evidence, well and truly made out. Both dismissals must therefore be found unjustified.

[38] The conclusion the dismissals were unjustified raises the question of remedies. Each applicant seeks lost wages and \$15,000 as compensation pursuant to s 123(1)(c)(i) of the Act.

[39] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser.

[40] Ms Haig commenced with another trucking firm on 22 July 2019. That is some two and a half weeks after dismissal which is the period for which recompense is now sought. Ms Haig's hours varied but she was paid, on average, 60.875 hours a week. Multiply that by her hourly rate and then 2.5 the total due is \$3,804.69 gross.

[41] Mr Harrison commenced with the same firm on 9 August 2019 with his commencement date being delayed by two weeks due to an inability to pass a drug test. Olly's cannot be held accountable for that which leaves three weeks which is again the period claimed. Mr Harrison was paid an average 67.47 hours a week which mean a wage loss of \$5,059.92 gross.

[42] There is an argument there should then be deduction for leave in advance but this is not possible given the absence of any documents which recognise such leave was taken and authorises a deduction accordingly.

[43] Turning now to compensation. Interestingly, and while Ms Haig spoke at length about the hurt and concern engendered by RFV's presence in the workplace little was said about the dismissal and its effect. Mr Harrison also offered little evidence to support his claim for compensation. Similarly neither commented about any hurt emanating from their unjustified suspension. In such circumstances and accepting hurt must emanate from Olly's unjustified actions, I take cognisance of current trends in respect to compensation and conclude \$5,000 each to be an appropriate sum.

[44] Finally the conclusion the applicant's each has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.¹ With respect to Mr Harrison the answer must be no as while the evidence shows he engaged in an abusive exchange with his employer it also shows both

¹ Section 124 of the Employment Relations Act 2000

participated and blame, if there is any, was shared. With respect to the other things with which he was accused the deficiencies in the investigation process are such there is no evidence which would justify a reduction of remedies.

[45] The same cannot be said of Ms Haig. She engaged in behaviour which she accepts was abusive and inappropriate. Furthermore her evidence is she did so having first considered whether or not to engage in such conduct and it was that behaviour that was the catalyst for all that followed. Having consider the evidence and various precedents regarding contribution I consider her remedies should be reduced by a third.

Conclusion

[46] For the above reasons I conclude both Ms Haig and Mr Harrison were, as claimed, unjustifiably dismissed. As a result I make the following orders:

- (a) The respondent, Olly's Log Link Limited, is to pay the first applicant, Christina Haig:
 - (i) \$2,536.46 (two thousand, five hundred and thirty six dollars and forty six cents) gross as recompense for wages lost as a result of the dismissal; and
 - (ii) A further \$3,333.00 (three thousand, three hundred and thirty three dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.
- (b) Olly's Log Link Limited, is to pay the second applicant, Desmond Harrison:
 - (i) \$5,059.92 (five thousand and fifty nine dollars and ninety two cents) gross as recompense for wages lost as a result of the dismissal; and
 - (ii) A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[47] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority