

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 97
3097472

BETWEEN TYLER WARD
Applicant

A N D SAMSON HILL FOREST
HARVESTING LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Naoimh McAllister and Jenny Hamilton, counsel for the
Applicant
Damien Pine and Jessica Hayes, counsel for the
Respondent

Investigation Meeting: 11 November 2020

Submissions and Further
Information Received: 3 December 2020 from the Applicant
10 December 2020 from the Respondent
Further evidence received from both parties up to
24 December 2020

Date of Determination: 10 March 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tyler Ward worked for Samson Hill Forest Harvesting Limited from 28 October 2018 until 13 November 2019.

[2] Mr Ward was employed as a Truck Driver and Forestry Worker. During the course of his employment it appears that Samson Hill had concerns about his performance at work and

it says it worked with him to try and improve his performance and change his conduct. In particular Richard Cairns, a director and shareholder of Samson Hill, worked with Mr Ward providing him with feedback and discussing issues and ultimately gave him various warnings including a final verbal warning before his dismissal.

[3] In the end Samson Hill dismissed Mr Ward by email on 12 November 2019 after it had discovered what it says was a failing by him to torque the wheels of its trailer correctly. The email advising Mr Ward of his dismissal also referred to other alleged failings or concerns with his work performance and it appeared the alleged failure to torque the wheels of the trailer correctly was “the last straw” for Samson Hill.

[4] Mr Ward raised a personal grievance for his dismissal based on an alleged failing by Samson Hill to conduct a correct and fair disciplinary process, an assertion that the allegations regarding Mr Ward’s failings at work were not supported by the facts and an argument that even if the allegations were established they did not provide a basis for dismissing Mr Ward.

[5] Mr Ward and Samson Hill were unable to resolve this grievance and Mr Ward lodged a statement of problem in the Authority based on an unjustified dismissal personal grievance and breach of good faith.

[6] I have investigated Mr Ward’s claims and this determination resolves them.

Samson Hill dismisses Mr Ward

[7] On 12 November 2019 at 9:36 pm Liz Cairns of Samson Hill sent Mr Ward an email. That email started with the words “Are you sitting down [Mr Ward]”. The email then set out various issues that Samson Hill said Mr Ward had caused, premised with the assertion that Mr Ward was perfectly aware of these issues. After setting out the issues Ms Cairns stated “On this basis [Mr Ward], we do not require your services anymore and wish you all the best.”

[8] That Samson Hill dismissed Mr Ward is not disputed; the email is clear and is an unequivocal sending away.

[9] As Mr Ward has established he was dismissed, Samson Hill must prove that the dismissal was justified. Justification is about whether Samson Hill’s actions and how it acted

were what a fair and reasonable employer could have done in all of the circumstances.¹ Justification is considered in two parts, the process of coming to the decision and the substantive basis for the decision.

[10] Samson Hill's position in respect of justifying the decision to dismiss Mr Ward is that:

- (a) During Mr Ward's employment there were ongoing concerns with his performance and conduct; Samson Hill discussed these concerns with Mr Ward as they arose and gave him verbal warnings, two written warnings and a final warning prior to his dismissal.
- (b) Whilst there may have been a lack of formality and/or process in the way in which it dealt with any performance or conduct issues with Mr Ward, he was not treated unfairly as a result – each matter was discussed with Mr Ward and he had the opportunity to respond before Samson Hill made a decision on disciplinary action.
- (c) Mr Ward's failure to torque the wheels on the trailer correctly was serious misconduct; it was a failing that could have caused a major accident resulting in serious injury or even someone being killed and Samson Hill could not risk having Mr Ward working for it any longer.
- (d) Whilst there may also have been some procedural deficiencies in the process of dismissing Mr Ward, these deficiencies were minor and did not result in Mr Ward being treated unfairly and therefore these failings cannot render the dismissal unjustified.²

Relevance of Mr Ward's prior performance and conduct at work

[11] In terms of the substantive justification for Mr Ward's dismissal, Samson Hill says it is not only the serious misconduct that is relevant but Mr Ward's prior performance and conduct; whilst the failure to torque the wheels of the trailer was serious misconduct which, on its own, justified dismissal, the decision to dismiss was informed by Mr Ward's prior

¹ Section 103A of the Employment Relations Act 2000.

² Section 103A(5) of the Employment Relations Act 2000.

performance and conduct.³ The cumulative effect of Mr Ward's poor performance and conduct, including that Mr Ward was on a final warning at the time, made the failing to torque the wheels of the trailer the last straw in terms of Mr Ward's continued employment.

[12] In his evidence Mr Ward accepted that some of the conduct or poor performance complained of by Samson Hill did occur and he accepted he received three verbal warnings. However, Mr Ward said the significance or impact of his performance and conduct was not clear to him in terms of Samson Hill's expectations and possible consequences for his ongoing employment if there was no improvement. In short he said if something happened at work there would be a discussion about what happened at the time and he would be told he was getting a warning but there was never any follow up.

[13] Samson Hill accepts that it did not follow a strict process for each and every conduct or performance concern it had with Mr Ward but it says it did work with him, discussing what occurred and what was expected before giving him a warning. Samson Hill produced two written warnings that had Mr Ward's signature on them – Mr Ward says he never received them and never signed them.

[14] I have considered all of the evidence provided during the investigation meeting and after it, including the evidence about the written warnings and the entries in Mr Cairns' diary. I conclude, there were various incidences of poor work performance by Mr Ward and various failings to follow instructions, particularly instructions from Mr Cairns. Samson Hill did give Mr Ward various warnings including three verbal warnings the last of which was described as being a final warning. Whilst there are two written warnings with Mr Ward's signature on them given the disputed evidence over whether these were signed by Mr Ward and the expert evidence I conclude specifically on the written warnings that on balance Samson Hill has not satisfied me that the written warnings were given and accepted by Mr Ward.

[15] Standing back from these conclusions and reflecting again on all of the evidence I make the following observations. It is clear that there were issues with Mr Ward's performance at work. Samson Hill wanted to work with him to improve his performance and conduct and Mr Cairns in particular tried to do this, spending time with Mr Ward going over

³ Relying on *Emmanuel v Waikato District Health Board* [2019] NZEmpC 81 at [61] – [62].

concerns. However, whilst this was well meaning and Samson Hill showed an enormous amount of tolerance with Mr Ward, it ultimately failed to effect this properly as it lacked clarity; this clarity would have been obtained through a more structured and formal process. Warnings are part of a process that should be used to change behaviour and improve performance not simply set employees up for dismissal. In this case, Mr Ward did not know what was expected in terms of improved performance or conduct and he did not know he was at the last straw point, so the effect of the warnings as part of a process of improvement was lost and all the warnings did was create an environment where Samson Hill believed it could dismiss Mr Ward.

[16] For these reasons Mr Ward's prior performance and conduct at work cannot be relied on to justify his dismissal.

[17] However this is not conclusive of the question of justification. As it stands alone the process of dismissal and substantive justification in relation to the failure to torque the wheels on the trailer needs to be assessed for justification.

Was Mr Ward's dismissal justified?

[18] The events surrounding Mr Ward's dismissal are straight forward and largely not contentious:

- (a) First, Mr Cairns instructed Mr Ward to fit and torque wheels on the trailer. Mr Cairns says he worked with Mr Ward on Thursday 7 November 2019 showing how to fit and torque the wheels and left him to finish this work. Mr Ward says he was instructed to fit and torque the wheels on Friday 8 November.
- (b) Second, no matter the day Mr Ward was told to torque the wheels, by the end of his work on Friday he had not completed torqueing the wheels; Mr Ward says he simply ran out of time as he had to leave early that day.
- (c) Third, over the weekend Mrs Cairns emailed Mr Ward and told him there would be no work for him on Monday, 11 November.

- (d) Fourth, on Tuesday 12 November, Mr Cairns was preparing to take the trailer for a COF inspection and he discovered the wheels had not been torqued; Mr Cairns says when he discovered this he was angry as this was a major failing that would have caused an accident, one that could have been fatal, if he had not noticed the loose wheel nuts.
- (e) Fifth, on the evening of 12 November, Samson Hill decided to dismiss Mr Ward and sent him the email terminating his employment.

[19] Whether these events constitute a fair process, by which Samson Hill came to the decision to dismiss Mr Ward, is informed by sections 4(1A) and 103A of the Act. In summary Samson Hill needs to show that:

- (a) It investigated what occurred with Mr Ward torquing the trailer wheels sufficiently;
- (b) It set out the concerns, provided relevant information and explained the possible implications of an adverse finding, so that Mr Ward could consider all of this and respond;
- (c) It gave Mr Ward a reasonable opportunity to respond to these concerns, before it made its decision on what had occurred and whether this justified dismissal;
- (d) It properly considered the explanations given by Mr Ward before it made its decision on dismissal;
- (e) It gave Mr Ward an opportunity to respond to its decision to dismiss before it imposed that;
- (f) It then considered any responses given by Mr Ward to its decision to dismiss, before it finally decided dismissal was the appropriate sanction.

[20] I have set the steps out in detail as this shows quite bluntly that Samson Hill failed in almost every aspect. There was no investigation, simply Mr Cairn's inspection of the wheel nuts on Tuesday 12 November. There was no discussion or communication with Mr Ward about the failure to torque the wheels, at all. It follows that there was no opportunity for

Mr Ward to explain and address Samson Hill's concerns and Samson could not and did not consider any explanation.

[21] Despite the almost complete failure by Samson Hill it says the defects in its process were minor and did not result in Mr Ward being treated unfairly so I should not find the dismissal to be unjustified. It relies on the fact that after his dismissal Mr Ward admitted that he had not torqued the wheels as instructed so therefore his dismissal was justified.

[22] I do not accept this. It is not the case that an employer can simply assume an employee has failed to do something and this justifies dismissal without any enquiry or any attempt to understand why the employee did what he did. The procedural failings here were not minor, they were significant and a subsequent admission, which Samson Hill says provides substantive justification for the dismissal, does not retrospectively correct those failings. And the failures to engage with Mr Ward at all over the concerns and potential dismissal means he was treated unfairly.

[23] And, it follows that the procedural failings were sufficiently significant that there is not a fair basis to conclude that dismissal was justified. The simple point here is there is no way of knowing if Mr Ward may have been able to influence and change the decision to dismiss had he been given an opportunity to explain his actions and/or address the question of dismissal.

[24] I conclude that Mr Ward's dismissal was unjustified both procedurally and substantively.

Remedies

[25] As Mr Ward was unjustifiably dismissed I may award any of the remedies provided for under s 123 of the Act; Mr Ward seeks compensation and reimbursement.

Compensation

[26] Turning to compensation, this is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act.

[27] I must quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings Mr Ward suffered. In doing this I must consider the effects of the dismissal on

Mr Ward, identifying the harm caused to him and the loss he suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed and where that corresponds to the spectrum of quantum awarded as compensation.⁴

[28] Mr Ward's evidence the loss and harm he suffered as a result of his dismissal by Samson Hill included that he:

- (a) was confused, gutted and angry at being dismissed and by the way in which Samson Hill did it;
- (b) had his self-confidence knocked, and was humiliated and belittled;
- (c) was embarrassed and felt helpless; and
- (d) was stressed by the loss of his job and the financial uncertainty having just purchased his first house.

[29] Based on this evidence, which I accept, I quantify that harm and loss at \$18,000.00 and award this amount as compensation pursuant to s 123(1)(c)(i) of the Act.

Reimbursement

[30] Mr Ward also seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to s 123(1)(b) of the Act.

[31] As I am satisfied that Mr Ward has a personal grievance and he has lost remuneration as a result, then pursuant to s 128 of the Act I must award Mr Ward at least the lesser of his lost remuneration or three months' ordinary time remuneration.

[32] Mr Ward's actual loss is less than three months ordinary time remuneration. He quantifies his loss as \$7,170.39 (net). I accept the calculation and award this amount to Mr Ward.

⁴ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

Contribution

[33] As I have awarded remedies to Mr Ward, I must now consider whether he contributed to the situation that gave rise to his personal grievance.⁵

[34] The approach to assessing contribution including quantifying this has been addressed in *Xtreme Dining Ltd v Dewar* and more recently in *Maddigan v Director-General of Conservation*.⁶

[35] In *Maddigan*, Chief Judge Inglis stated:⁷

[73] The approach to contribution which emerges from recent judgments of the Court can be summarised as follows:

- (a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?
- (b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?
- (c) Third, what is a fair assessment of the extent of the contribution?
- (d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[36] So, applying these four steps I must first consider whether Mr Ward behaved in a manner that was culpable or blameworthy; this behaviour being the various performance and conduct concerns which Mr Ward admitted occurred. I am satisfied that Mr Ward's conduct and performance at work, did at times, fall below an acceptable standard and that he was responsible for this by not considering how he acted at work or by listening and applying himself correctly to the tasks assigned to him. I find that Mr Ward's behaviour in this regard was culpable and blameworthy.

[37] The next step is to assess if Mr Ward's actions contributed to the situation that gave rise to his personal grievance, i.e. is there a causal link between his actions and the situation that gave rise to the dismissal. The answer to this is Samson Hill did respond to Mr Ward's failings by dismissing him. Applying the third and fourth steps, I am guided by Chief Judge Inglis' assessment of appropriate rates of reduction in *Maddigan*,⁸ and conclude that a 25% reduction to the amount of compensation I have awarded is appropriate.

⁵ Section 124 of the Employment Relations Act 2000.

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136; *Maddigan v Director-General of Conservation* [2019] NZEmpC 190.

⁷ *Maddigan v Director-General of Conservation* above n6 at [73].

⁸ *Maddigan v Director-General of Conservation*, above n6 at [75] – [77].

Breach of duty of good faith

[38] In failing to meet the standard required for carrying out a fair process in dismissing Mr Ward, Samson Hill also failed to meet the duty of good faith set out in s (1A) of the Act.

[39] In doing so Samson Hill is liable to a penalty if I am satisfied that the failure was deliberate, serious and sustained or the failure was intended to undermine the employment relationship.⁹ Following the Employment Court decision in *Madigan v Director General of Conservation*¹⁰ I am satisfied that this criteria has been met and a penalty should be imposed.

[40] Assessing the scope of the breach and the nature of the actions as well as the impact on Mr Ward,¹¹ I assess the penalty to be \$8,000.00 and consider it appropriate that 75% of that be paid to Mr Ward.

[41] Counsel for Mr Ward also sought a penalty for the Samson Hill's conduct of its defence to Mr Ward's claim; Counsel submitted that Samson Hill had obstructed or delayed my investigation to such a way that a penalty is appropriate. I have considered this very closely but am not satisfied that Samson Hill's behaviour in defending Mr Ward's claim was sufficiently egregious to meet the threshold for imposing a penalty.¹²

Outcome

[42] Samson Hill unjustifiably dismissed Mr Ward. In satisfaction of this personal grievance it must pay Mr Ward:

(a) \$13,500.00,¹³ without any further deductions, for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

(b) \$7,170.39 (net) for reimbursement pursuant to s 123(1)(b) of the Employment Relations Act 2000.

[43] Within 28 days of the date of this determination, Samson Hill must pay to Mr Ward the sum of \$6,000.00 as part payment of the penalty imposed.

⁹ Section 4(1A) of the Employment Relations Act 2000.

¹⁰ *Maddigan v Director-General of Conservation*, above n6.

¹¹ Applying s 133A of the Employment Relations Act 2000 and *Maddigan v Director-General of Conservation*, above n7 at [55].

¹² *Ahuja v A Labour Inspector* [2018] NZEmpC 31; and *RPW v H & C* [2019] NZERA 121.

¹³ Being my award of \$18,000.00 reduced by 25% for contribution.

[44] Within 28 days of the date of this determination, Samson Hill must pay to the Authority for transfer to a Crown Bank account the balance of the penalty imposed being \$2,000.00.

Costs

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

[46] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority