

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 456
3159443

BETWEEN	HAYDEN BRUCE Applicant
AND	THREE65 NEW ZEALAND LIMITED First Respondent
AND	CONTINUOUS SPOUTING WELLINGTON LIMITED Second Respondent

Member of Authority: Michael Loftus

Representatives: Paul Mathews, advocate for the Applicant
No appearance for the Respondents

Investigation Meeting: 12 September 2022 at Wellington

Submissions Received: At the investigation meeting

Date of Determination: 12 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Hayden Bruce, claims he was unjustifiably dismissed by the respondents on 26 March 2021.

[2] While the respondents have failed to participate meaningfully in the Authority's process and supplied the Authority with no answer to the substantive claim, there is correspondence sent to Mr Mathews on their behalf that accepts the fact of dismissal and attributes it to Mr Bruce's alleged serious misconduct.

Absence of the Respondent

[3] Notwithstanding the respondent's failure to participate meaningfully in the Authority's process the sole director of both, Scott Johnston, did take part in a telephone conference during which the investigation meeting was scheduled. During the call, he said the claim "doesn't worry me" and advised neither respondent intended taking any further part in the Authority's process or defending the claim given it was a waste of time as both were about to be closed and neither was trading or had any assets.

[4] This repeated advice contained in the only document forwarded to the Authority on the respondents' behalf which was a letter from their accountant dated 22 January 2022. It advised Three65 New Zealand Limited (Three65) had ceased trading and Continuous Spouting Wellington Limited (Continuous Spouting) had been sold May 2021. It goes on to say:

All assets in the companies were distributed as applicable (sic) on shutdown and neither company has any assets left.

[5] Here it should be noted that according to the companies register Continuous Spouting was not sold, though its business might have been. Notwithstanding that, Mr Johnston was advised that should the respondents change their mind and choose to defend the claim they could do so by lodging and serving statements of evidence along with any relevant documents.

[6] Furthermore, I am satisfied that the above advice, along with a notice of investigation meeting, was properly served upon the respondents at their registered address. In the circumstances and absent any further communication from the respondents or an appearance on their behalf today, I conclude the consciously expressed decision not to participate or defend the claims has remained unaltered. Given the lack of further communication from the respondents I know of no reason why I should not continue and choose to do so.¹

Identity of the Respondents

[7] As has already been noted there are two companies identified as respondents. It is Mr Bruce's evidence that the two were indistinguishable and he was effectively employed by both, with the revenue from which his pay was sourced coming from either depending on the job he was tasked to do. There is an identical shareholding and directorship and I also note Mr Bruce's evidence that both operated from the same premises and that the manager

¹ Note 2 to Form 8, Notice of investigation meeting, of the Employment Relations Authority Regulations 2000

supervising the interests of both was the same individual, Stu. Finally, I note that while the employment agreement was in the name of Three65, PAYE was forwarded to the Inland Revenue Department under the name of Continuous Spouting.

[8] Given these circumstances, I accept Mr Bruce's assertion that the difference was immaterial and the two indistinguishable from his perspective. He worked for both and it follows that any findings shall be made against both jointly and severally and they shall be liable for any remedies attained by Mr Bruce accordingly.

Background

[9] Mr Bruce was engaged by the respondents at the end of October 2020 and it is fair to say, from this evidence, there was some tension between himself and Stu.

[10] One event is of note given what later occurred and that is Mr Bruce's evidence that in December some fellow workers told him that their employment agreements were going to change. They would cease to be salaried employees, as Mr Bruce's employment agreement states he was, and go onto an hourly wage. Mr Bruce says his colleagues all met with management, but he did not and nothing was said directly to him. That said, he says his pay reduced by \$30 a week, though he did not notice that for a while. He says that when he did, he chose to "bite his tongue" and has not challenged the reduction.

[11] The tensions came to a head in late March 2021. The first incident of note occurred on either Tuesday 23 or Wednesday 24 March. Mr Bruce says he returned to the depot for materials and when he did so, Stu was interviewing a prospective employee to whom he made a comment along the lines of "Here's an example of what not to do by coming back to the yard".

[12] It was also around this time, probably Thursday 25 March, that Mr Bruce was at a job site and noticed the back tyres of the work utility vehicle were bald. He sent a text to Stu asking where to go to get them changed as they were not safe. Mr Bruce says the response was a text from Stu asking, "Where's your timesheet, otherwise you won't get paid". Mr Bruce accepts that that cavalier approach to safety annoyed him, and he replied with an expletive. There was no further exchange and the texts are not available as they were on a work phone which was taken from him when he was dismissed.

[13] Mr Bruce's evidence is that the next day he went to work, albeit a little late. He says upon arriving, Stu challenged him but when he explained his lateness, he was told that was not the issue. The issue was the tone of the texts about the tyres.

[14] That led to an escalating argument with Mr Bruce taking exception to both the response to the tyres and the interview incident. He accepts he swore at Stu and says that while the latter did not respond in kind, his replies were derogatory, demeaning and equally unacceptable. Mr Bruce says the initial exchange ended with Stu simply saying, "You're fired".

[15] Mr Bruce says he questioned the dismissal before stating he was going to use the work vehicle to take his tools home. Stu's response was to remove the keys from the vehicle, saying "No you won't as this is Three65's property and you no longer work here."

[16] Mr Bruce says he then left, found his way home, and picked up a vehicle to return and collect his tools. He says upon arriving back at the yard he saw Mr Johnson, who expressed surprise Mr Bruce was in the yard and not attending a regular end-of-month social function. Mr Bruce says he explained the situation to Mr Johnson, who simply replied that he supported Stu.

[17] Mr Bruce then sought assistance and formally raised a personal grievance on 9 April 2021. The response, from Stu, came on April 13 and states amidst other things that "The reason Hayden was summarily dismissed was because his actions were considered serious misconduct". It is then asserted he was threatening and abusive in a way that warranted dismissal.

Analysis

[18] Before proceeding I note I have had a chance to question Mr Bruce and test his evidence. Having done so I record that I accept it in its entirety and in doing so note his willingness to concede points that do not necessarily reflect well upon him such as the way he spoke to Stu.

[19] Essentially all Mr Bruce need do is establish a cause of action which requires a response. In other words all he need do is establish he was dismissed. That he has done given the respondents' acknowledgement of that fact in Stu's letter of 13 April.

[20] Thereafter, the onus turns to the respondents to justify the dismissal. Their absence today and their failure to provide any evidence to support the accusation of serious misconduct means they have failed to do so. The dismissal is therefore unjustified.

[21] The conclusion the dismissal is unjustified raises the question of remedies with Mr Bruce seeking lost wages, compensation for hurt and humiliation² and costs.

[22] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser. Given Mr Bruce attained new employment and went only three working days without a job it is obvious the lesser applies. Another issue, however, arises given Mr Bruce now earns less than he did with the respondents and he also seeks the differential for the remainder of the three months.

[23] In my view that is appropriate as the evidence, largely in the form of statements from the Inland Revenue Department, confirm reduced earnings and this must be considered a loss resulting from the dismissal.³

[24] Three days is 3/5th of a week. At Mr Bruce's contracted salary of \$60,000 that is \$692.31 gross. There is also a 3% kiwisaver contribution payable on both that and the reduced earnings.

[25] While an exact calculation of the reduced earnings is not possible given the records before me, those I have suggest Mr Bruce earned \$1,028.16 less over the next three months in his new employ than he would have had he remained with the respondents. As already said, that is also payable.

[26] Turning now to compensation. In support of his claim and notwithstanding the fact Mr Bruce was quick to obtain replacement employment both his evidence and that of a supporting witness show he suffered considerable hurt. The evidence illustrated emotional and financial harm that impacted on both his domestic and social relationships. There was a feeling of abandonment and confusion given the employers disregard of the safety issue which resulted in negative consequences for some time and the hurt was further amplified by what Mr Bruce considers the denigrating and belittling response to his claims.

² Section 123(1)(c)(i) of the Employment Relations Act 2000

³ Section 123(1)(b) of the Employment Relations Act 2000

[27] Standing back and considering the evidence which supports a significant award along with a review of current precedent, I conclude \$15,000 is appropriate.

[28] The conclusion Mr Bruce has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.⁴ While the respondents' correspondence to Mr Mathews indicates they believe that to be the case their failure to attend means there is no evidence to support that contention. The only possibility is Mr Bruce's own admission he swore at Stu but having considered his evidence, which I have already noted I accept, I consider it falls short of supporting a reduction of remedies let alone the dismissal which resulted, especially given the case law that suggests in a heated argument the required course of action is to cry halt and allow a cooling period.⁵ It is definitely unwise to simply reply with a pre-emptive dismissal.

[29] Finally, there is the issue of costs with Mr Bruce seeking a contribution toward those he incurred pursuing his grievance claim and Mr Mathews raising the Authority's normal tariff approach.⁶ While the investigation meeting was over in less than an hour I had earlier made it clear that should the respondents appear I would allow them to defend the claim. This meant Mr Bruce had to prepare accordingly and that, in turn, warrants an award that recognises a time commitment which exceeds that which eventuated. After discussing this with Mr Mathews I determined a half day to be appropriate.

Conclusion and Orders

[30] For the above reasons I conclude Mr Bruce has a personal grievance in that he was unjustifiably dismissed. As a result I order the respondents, Three 65 New Zealand Limited and Continuous Spouting Wellington Limited, pay Mr Bruce:

- (a) \$1,720.47 (one thousand, seven hundred and twenty dollars and forty seven cents) gross as recompense for wages and other benefits lost as a result of the dismissal plus a 3% Kiwisaver contribution which is to be paid on that amount; and

⁴ Section 124 of the Employment Relations Act 2000

⁵ For example, albeit in a constructive dismissal setting, *Kostic v Dodd* EMC Christchurch CC14/07, 11 July 2007 Judge Couch

⁶ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

- (b) A further \$15,000.00 (fifteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act;
and
- (c) \$2,250.00 (two thousand, two hundred and fifty dollars) as a contribution toward the costs Mr Bruce incurred pursuing his personal grievance.

[31] Liability for the above payments is joint and several with payment to be made no later than Friday 7 October 2022.

Michael Loftus
Member of the Employment Relations Authority