

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 516
3164721

BETWEEN

BRODIE NEAL
Applicant

AND

**TAS MARINE CONSTRUCTION
PTY LIMITED**
Respondent

Member of Authority: Michael Loftus

Representatives: Kirsten Westwood, advocate for the Applicant
Tom Wilcox and Tom Cox, for the Respondent

Investigation Meeting: 7 October 2022 at Blenheim

Submissions Received: At the investigation meeting

Date of Determination: 10 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Brodie Neal, claims he was unjustifiably dismissed by the respondent, Tas Marine Construction Pty Limited (TMC), on 21 January 2022.

[2] TMC accepts it dismissed Mr Neal but is of the view it can justify its actions. In doing so it raises two points. They are that Mr Neal was employed on a trial period and that his dismissal was justified given performance that was less than acceptable.

The Investigation and this Determination

[3] In support of his application the Authority heard evidence from Mr Neal along with a supporting witness.

[4] TMC's presentation was less orthodox. On two administrative telephone conferences it was represented by an Australian based manager, Tom Wilcox. He later advised TMC would not provide briefs of evidence but instead rely upon a somewhat sparse statement in reply and the oral evidence of its local manager, Tom Cox, who attended in person.

Background

[5] TMC is based in Hobart, Australia and provides maritime related construction services. It has a branch in Picton.

[6] It employed Mr Neal with effect 23 September 2021 as a construction labourer and, as already said, TMC says it was agreed the employment was subject to a trial period. Mr Neal agrees and to that I shall return.

[7] A second key issue, and one that concerned Mr Neal, was that he did not have a written employment agreement and this concerned him for a number of reasons which he outlined. Mr Cox agrees a written employment agreement was never provided.

[8] Mr Neal repeatedly sought an agreement and these approaches came to a head, at least as far as what then occurred, on the morning of Thursday 20 January 2022. At 11.20 Mr Neal sent Mr Cox a text reading:

Hi Tom, I have written to you a number of times asking for an employment agreement and you have either ignored me or brushed me off for later. I am uncomfortable at still not having one and I am starting to think you do this to make me leave. This is not behaving in good faith and it's causing me stress.

[9] To that he received the following reply:

Hi Brodie,
Sorry for not replying, I've got quite a lot going on here.
All of the guys have asked me about employment contracts, I understand you don't have one yet and I have asked our office in Tasmania to get onto it.
I don't do the contracts, I'm just the site manager and working ...

[10] It is Mr Neal's evidence that that was followed by a telephone call from Mr Cox around 8 pm the following evening 21 January 2022. Mr Neal says Mr Cox said: "*I've spoken to the other bosses etc regarding your contract*" and that he went on to say something like "*Sorry mate, I'm going to have to let you go, all the best. You will be paid 8% of your gross earnings.*" Mr Cox accepts that is essentially correct.

[11] Mr Neal asked advice of his dismissal be confirmed in writing which led to the following from Mr Cox:

Hi Brodie,

As discussed on the phone tonight, Tas Marine Construction thank you for your contribution and help with the Waikawa project so far but TMC management is making some changes to the work site and your help is no longer needed at this time, as such, TMC will be ending your employment as of today. I know you have a lot going on in your life right now and hope you can find some work in Blenheim to save on fuel and be a bit easier for you. Your last pay will be next week on Monday, you will be paid for the amount of leave you have accrued which is calculated by 8% of your gross earnings, so just over \$900 before tax.

I hope you can find something that works out for you and I wish you all the best, ...

[12] Mr Neal replied by saying:

Hi Tom, I'm a bit confused by your email from Friday. I just asked you for an employment agreement because I haven't had one since starting, and then you fire me? But I guess without an employment agreement you can do whatever you like.

[13] There was no response and it is Mr Neal's view the dismissal came "out of the blue" and caused considerable angst. He challenged it forthwith but his claim remained unresolved hence this investigation.

Discussion

[14] As already said Mr Neal claims he was unjustifiably dismissed and, essentially, all he need do is establish a cause of action which requires a response. That he has done as TMC accepts it dismissed Mr Neal.

[15] Thereafter, the onus is on TMC to justify the dismissal and, as already said, the statement in reply offers two justifications. The first is Mr Neal was subject to a trial period and the second is Mr Neal's performance warranted dismissal. Mr Cox agreed this was the approach TMC was taking.

[16] The trial period defence faced an initial hurdle in that no-where was it identified what trial period TMC relied upon and the lack of an employment agreement did nothing to clarify the issue. In the statement in reply it simply states "Mr Neal was employed on 23rd September

2021 on a trial period...” and comments made by Mr Wilcox during one of the telephone conferences confirmed a view the trial period’s existence permitted the dismissal.

[17] The lack of specificity as to what trial period raised two possibilities. The first was a trial period pursuant to ss 67A and 67B of the Employment Relations Act 2000 (the Act) which would preclude the taking of this grievance. That approach has no chance of success given the lack of a written employment agreement.

[18] The second possibility was the more traditional probationary approach applied prior to the enactment of ss 67A and 67B of the Act. It requires performance deficiencies be addressed via discussion along with warnings of the consequences of non-improvement but allowed performance faults take on a greater significance and a lax approach to normal procedural requirements. The evidence suggests it is this approach that is being relied upon here.

[19] Mr Neal agrees Mr Cox advised, during his interview, that his engagement would be subject to a trial period but he cannot remember the details there-of.

[20] Mr Cox, in his evidence, states the trial he proposed would only have been of a few weeks duration. It was a case of “see how you go and if ok then full time”. Mr Cox also states Mr Neal had “passed” his trial and would have done so even if it had been of the longer three month duration envisaged by the current statutory provisions. Given this I conclude TMC’s own evidence precludes the possibility of a defence to this dismissal based on the existence of a trial period as Mr Neal had successfully completed it.

[21] That leaves the argument Mr Neal’s performance warranted a dismissal which can be justified. Here 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.

[22] In determining this, the Act requires I consider, having regard to its resources, whether the employer conducted an adequate enquiry into its concerns. An adequate enquiry requires, as a bare minimum, that the employer put its concerns to the employee, allow an opportunity to reply and consider the response with an open mind.

[23] Traditionally and while issues of substance and process overlap and there is no such thing as a firm delineation, separation has often been used for analytical purposes especially as the requirements described in [22] above are enshrined in statute and have a procedural focus.¹

[24] There are two deficiencies which TMC alleges. One is performance which was said to fall short of TMC's expectations. The other was poor attendance and timekeeping which, TMC says, saw Mr Neal work an average of only 28 hours a week.

[25] The evidence simply does not support a contention Mr Neal's performance was less than adequate with Mr Cox being unable to provide any examples. He also concedes any perceived deficiencies were never raised and says it was more a case of Mr Neal simply not fitting in with TMC's expectations. To the contrary, the evidence suggests otherwise. Appearing for Mr Neal was an ex-colleague who was responsible for supervising a fair portion of Mr Neal's day to day activities. His evidence was that when present Mr Neal was a good worker who did everything asked of him to an acceptable standard.

[26] Turning to the absenteeism and timekeeping. Mr Neal accepts he was occasionally late but states this was not a frequent occurrence and Mr Cox accepts that was essentially correct. The real issue, which the evidence suggests led to the decision to dismiss, was Mr Neal's absenteeism and he accepts TMC's estimate regarding his attendance was fairly accurate. He attributes this to serious health issues at the time. He states his absences were usually supported with medical certificates and Mr Cox accepts that. That acceptance raises a serious question as to whether Mr Neal's absences could justify dismissal given medical evidence they were justified. Absent due process the answer is inevitably no.

[27] There are then the procedural requirements of s 103A which, as already said, requires concerns be raised and discussed in a relatively formal manner which also puts the employee on notice of the consequences of continuing deficiency. Mr Neal say there was no such discussion about either performance or absenteeism and, again, Mr Cox agrees. Mr Cox concedes there was never anything resembling a formal raising of concerns, though he does say there was the odd low level comment about attendance. There is also evidence Mr Cox actually tried to assist Mr Neal address a couple of things which might have contributed to lateness, such as providing fuel at TMC's expense.

¹ Employment Relations Act 2000 at ss 103A(3)(b) to (d)

[28] Indeed, the lack of due process perhaps become worse for TMC as the evidence is the decision to dismiss was actually made in Australia by people who never spoke to Mr Neal.

[29] The absence of any process, especially when combined with serious questions about the substantive justification for the dismissal, must render it unjustified and TMC's lack of resource does not excuse it. That is because of the Court's conclusion in *The Salad Bowl Ltd v Howe-Thornley* that all-encompassing failures are neither excusable nor minor (s 103A(5) of the Act).²

[30] The conclusion the dismissal is unjustified raises the question of remedies with Mr Neal seeking lost wages, compensation for hurt and humiliation along with costs.

[31] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser, though in this case the claim is for 11 weeks wages given Mr Neal obtained a replacement job.³ The evidence also shows Mr Neal was actively searching for employment, albeit in a different industry though one he had worked in before, which means there will be payment for the period sought.

[32] In calculating the amount I note Mr Neal's claim is based on the scheduled 43 hour week but that is undermined by his acceptance in both written and oral evidence that he worked, on average, significantly less. That said, his written evidence attributes the reduced weekly hours to weather related issues while both TMC's evidence and Mr Neal's oral concessions primarily attribute it to his health issues. Given that, the absence of an entitlement to sick leave⁴ and the fact those issues were beyond TMC's control, I will accept and use TMC's figure of 28 hours a week which means 11 weeks pay amounts to \$8,316.

[33] Turning to compensation. In support of his claim Mr Neal offered strong evidence which suggested considerable hurt. He spoke of going into an "emotional hole" and a distrust of the industry in which TMC operated which limited his subsequent job search to another he already knew though his registration with WNIZ meant the search was not so restricted. He

² [2013] NZEmpC 152 at [94] and [95]

³ Applicant's closing submission at [36]

⁴ Section 63(1) of the Holidays Act 2003

also spoke of issues which resulted from extreme financial pressures along with a feeling of loss and bewilderment given he had no understanding as to why he had been cast adrift.

[34] That said his evidence in this regard must be balanced against the fact it also suggested his hurt might have been exacerbated by personal issues well beyond TMC's control and the effects of which cannot be visited upon it.

[35] Standing back and considering the evidence, along with a review of current precedent, I conclude \$12,000 appropriate.

[36] The conclusion Mr Neal has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.⁵ The same reasons which led to the conclusion Mr Neal's dismissal was unjustified also lead to a conclusion there was no contribution, at least to an extent that might justify a reduction in remedies.

Conclusion and Orders

[37] For the above reasons I conclude Mr Neal has a personal grievance in that he was unjustifiably dismissed. As a result I order the respondent, Tas Marine Construction Pty Limited, pay Mr Neal:

- (a) \$8,316.00 (eight thousand, three hundred and sixteen dollars) gross as recompense for wages lost as a result of the dismissal; and
- (b) A further \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[38] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are unable to do so and a determination is needed Mr Neal may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date TMC will have 14 days to lodge any reply memorandum.⁶

Michael Loftus
Member of the Employment Relations Authority

⁵ Section 124 of the Employment Relations Act 2000

⁶ www.era.govt.nz/assets/Uploads/practice-note-2.pdf