

[3] Mr Rudolph expected to be paid during his notice period albeit from his sick leave entitlement; Minemet thought Mr Rudolph's resignation was in fact him resigning without notice and it did not pay him for the two weeks' notice period.

[4] There was one brief exchange of emails between Mr Rudolph and Minemet over him not being paid during his notice period but this did not resolve the issue for Mr Rudolph.

[5] On 13 October 2021 Mr Rudolph raised a personal grievance for unjustified action causing disadvantage and unjustified dismissal, claiming he had been dismissed during the notice period. Mr Rudolph appeared to be asserting that as he was not paid by Minemet during the notice period this amounted to a dismissal.

The Authority's investigation

[6] The parties were unable to resolve Mr Rudolph's personal grievances and he lodged a statement of problem with the Authority on 24 January 2022.

[7] In his statement of problem Mr Rudolph claimed:

(a) he had been unjustifiably dismissed for which he sought compensation and lost remuneration.

(b) he was owed wage arrears and holiday pay relating to his final pay and including the two weeks' notice period he says he should have been paid.

(c) Minemet should pay a penalty for its failure to pay the wages he was owed.

[8] Minemet denied dismissing Mr Rudolph saying he had resigned with retrospective effect on 22 September 2021 and it claimed to have paid Mr Rudolph all of his wage and holiday pay entitlements.

[9] So it is Mr Rudolph's claims that I investigated. I did this by receiving written evidence and documents, holding an investigation meeting on 6 September 2022 and assessing the oral and written submissions of the parties' representatives.

[10] I received witness statements from Mr Rudolph and Mr Black. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral

evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[11] As permitted by s 174E of the Employment Relations Act 2000 I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

What happened?

[12] Mr Rudolph was employed as a labourer and truck driver for Minemet at Annex Metals, a scrap metal processing and recycling business. He commenced employment on 17 March 2021.

[13] On 20 September 2021 Mr Rudolph had an interaction with Michael Black, the General Manager of Annex Metals, over wearing the required uniform in the Annex Metals yard.

[14] Mr Rudolph had returned from collecting metal and as he crossed the Annex Metals yard, he was not wearing the required PPE, a long sleeve hi-vis shirt. Mr Black saw this and asked him where his long sleeve hi-vis shirt was. Mr Rudolph did not respond but simply went to the tearoom. Five minutes later Mr Rudolph came out to the yard wearing a hi-vis polo shirt– this was a short-sleeved shirt with another company's logo on it; not the required Annex Metals PPE shirt with long sleeves. Again, Mr Black spoke to Mr Rudolph about his shirt and that he needed to wear the Annex Metals PPE.

[15] Mr Rudolph's response to his interaction with Mr Black was to go to his truck and call the MBIE employment help line and the Community Law Centre. Mr Rudolph believed Mr Black was being unreasonable about him wearing a short-sleeved shirt and he says the advice he received from both of these sources confirmed this. He also says they told him to leave work for the day given the circumstances and to go and see his doctor.

[16] Mr Rudolph then left work that morning, taking sick leave for the remainder of that day and the following day.

[17] On 22 September 2021 Mr Rudolph saw his doctor and obtained a medical certificate certifying him as being unfit for work from 20 September 2021 for two weeks.

[18] Mr Rudolph dropped a copy of the medical certificate off at Annex Metals after seeing his doctor on 22 September 2021.

[19] Mr Rudolph says that when he was at Annex Metals dropping off the medical certificate he told Mr Black he was resigning; he says he made the decision to resign as he was driving from his Doctor to Annex Metals. Mr Rudolph says Mr Black asked him to confirm that his resignation in writing.

[20] Mr Black says he only spoke to Mr Rudolph briefly and that was only in relation to the medical certificate – Mr Rudolph did not tell him he was resigning.

[21] In any event, approximately two hours after he had dropped off his medical certificate, Mr Rudolph emailed his resignation from Minemet through to Mr Black.

[22] Mr Rudolph's resignation sent by email on 22 September 2021 at 11:01 am simply said:

This is my notice of resignation.
As of Monday 20th of September 2021 i (sic) will no longer be working at
Annex Metals.

[23] Mr Rudolph knew he was required to give two weeks' notice. However, Mr Rudolph did not want to return to Annex Metals after his sick leave ended, to work the balance of the notice period (which would have been two working days), so he says he backdated his resignation from Monday 20 September 2021. Mr Rudolph expected to be paid his notice period as sick pay.

[24] Later on 20 September 2021 Mr Rudolph sent a text message to Mr Black asking him what gear he needed to return as he had PPE provided by Minemet. Mr Black responded advising that none of the gear needed to be returned.

[25] Minemet believed that Mr Rudolph was resigning without notice as he had stated he would not be working at Annex Metals from 20 September 2021 and because he offered to return his PPE on the same day. Minemet concluded that Mr Rudolph was not entitled to be paid the notice period regardless of whether that was sick pay or not.

[26] On 28 September 2021, when Mr Rudolph was not paid for the week commencing 20 September 2021, he contacted Minemet management in Australia and asked about his pay for

the week. Minemet responded saying he had abandoned his employment. Mr Rudolph did not respond to this communication.

Analysis

Unjustifiable dismissal

[27] The issues for Mr Rudolph's unjustifiable dismissal grievance are:

(a) Was Mr Rudolph dismissed; and

(a) If so, were Minemet's actions in deciding to dismiss Mr Rudolph, justifiable?

[28] So, the first step for Mr Rudolph's unjustifiable dismissal claim is to establish whether he was dismissed by Minemet or not.

[29] Dismissal is the termination of employment at the initiative of the employer.¹ It requires an unequivocal act, which amounts to an actual dismissal or a constructive dismissal.

[30] In order to decide that Mr Rudolph was actually dismissed by Minemet, I will need to be satisfied that there was an unequivocal act by Minemet amounting to a sending away or sending apart.²

[31] Mr Rudolph's case appears to rest on two possible actions amounting to a sending away – not paying him during his notice period and/or asserting that he had abandoned his employment.

[32] In the circumstances I am not satisfied that either of these events is a dismissal. In this case not paying Mr Rudolph was not an act of dismissal it was simply Minemet actioning what it believed was Mr Rudolph's resignation without notice. Likewise referring to Mr Rudolph as abandoning his employment was a reference to him leaving without notice – albeit that this was a poor way of expressing this.

[33] Turning to the alternative, in order to decide that Mr Rudolph was constructively dismissed I need to consider if Minemet's actions fall into one of three categories in which a resignation can amount to a constructive dismissal – an ultimatum forcing an employee to

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

² *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC) at 976.

resign; a course of conduct designed to coerce an employee into resigning; or a breach of duty which causes an employee to resign.³

[34] In this case the breach of duty category is the only applicable one for Mr Rudolph's claim as there was neither an ultimatum nor was there a course of conduct designed to coerce him in to resigning.

[35] To establish a constructive dismissal based on a breach of duty I need to be satisfied that:⁴

- (a) There was a breach of duty by Minemet.
- (b) The breach of duty was sufficiently serious, that is repudiatory or dismissive, to warrant Mr Rudolph's resignation.
- (c) It was reasonably foreseeable that Mr Rudolph might resign in response to the breach.
- (d) Mr Rudolph did resign in response to that breach of duty.

[36] The Minemet actions that might amount to a breach of duty are failing to pay Mr Rudolph for the notice period, asserting Mr Rudolph had abandoned his employment or the interaction between Mr Black and Mr Rudolph regarding PPE on 20 September 2021.

[37] None of these three actions can amount to a breach of duty that caused Mr Rudolph to resign. The first two occurred after Mr Rudolph's resignation and the third was not a breach of duty it was, in fact, Mr Black adhering to Minemet's obligations to Mr Rudolph in terms of health and safety and providing him with a safe work environment.

[38] There is no breach by Minemet that can inform a constructive dismissal claim.

[39] My conclusion on Mr Rudolph's unjustifiable dismissal claim is there was no dismissal by Minemet (constructive or actual) and therefore it did not unjustifiably dismiss Mr Rudolph.

³ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA).

⁴ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

Wage arrears

[40] It appears that Mr Rudolph had two bases for claiming wage arrears – that Minemet had not paid him his final pay after he resigned (which was accrued but untaken holiday pay) and Minemet had not paid him for the two weeks’ notice period.

[41] In the investigation meeting Minemet conceded it had not paid Mr Rudolph his final pay and it advised it had made arrangements for his holiday pay to be paid to him (but not the notice pay which it continued to dispute was owing). On 7 September 2022 Minemet forwarded a copy of the final pay slip for Mr Rudolph to the Authority indicating it had paid Mr Rudolph the amount set out. On 13 September 2022, Mr Rudolph confirmed he had received the final pay.

[42] This means the only issue for Mr Rudolph’s wage arrears claim is whether he should have been paid for the two weeks’ notice period or not.

[43] In the circumstances I am satisfied that Mr Rudolph resigned on notice and not with immediate effect. This is because:

- (a) At the time he resigned Mr Rudolph was on two weeks sick leave, with a medical certificate confirming this. Minemet was aware of this as Mr Rudolph had provided the medical certificate to Annex Metals.
- (b) Mr Rudolph’s resignation clearly states it is “notice of resignation”. Both parties knew Mr Rudolph was obliged to give two weeks’ notice in writing – this is set out at clause 13.1 of the employment agreement between Minemet and Mr Rudolph.
- (c) Mr Rudolph’s attempt to back date his resignation to match the notice period with his sick leave entitlement was expressed poorly, but his notice of resignation does not say as of 20 September 2021 I am no longer “employed” it refers to no longer “working” at Annex Metals.

[44] In the context of Mr Rudolph having two weeks sick leave from 20 September 2021, being required to give two weeks’ notice and his resignation referencing not working from 20 September 2021 it follows that Mr Rudolph was giving two weeks’ notice of his resignation effective from 20 September 2021.

[45] I conclude that Mr Rudolph is entitled to be paid for the two weeks' notice period. As Mr Rudolph was medically unfit to work his notice period and as he had sick leave entitlement for those two weeks, Minemet must pay him two weeks wages together with holiday pay on that amount.

Penalty

[46] I accept that Minemet genuinely believed Mr Rudolph was not entitled to be paid for the two weeks' notice period and Mr Rudolph's poor way of expressing his notice of resignation and not following up properly on his pay contributed to the confusion.

[47] Minemet also inadvertently failed to process and pay Mr Rudolph's final pay.

[48] Whilst Minemet was wrong in respect of both sets of wage arrears, its actions were not deliberate in terms of the final pay or particularly blameworthy in terms of the notice pay.

[49] In these circumstances I do not consider it appropriate to award a penalty against Minemet for the wage arrears.

Summary

[50] Minemet did not unjustifiably dismiss Mr Rudolph.

[51] Mr Rudolph is entitled to be paid for the two weeks' notice period. Minemet must pay Mr Rudolph two weeks wages together with holiday pay on that amount.

Costs

[52] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Rudolph may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Minemet will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[53] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁵

Peter van Keulen
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.