

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 72  
3117996

BETWEEN

PAUL WOODS  
Applicant

AND

ADVANCED SOLUTIONS  
GROUP 2020 LIMITED  
Respondent

Member of Authority: Sarah Kennedy

Representatives: Mike Harrison, advocate for the Applicant  
No appearance for the Respondent

Investigation Meeting: 23 February 2022 by Zoom

Submissions Received: At the investigation meeting

Date of Determination: 7 March 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Paul Woods was employed as a builder/handyman by Advanced Solutions Group 2020 Limited (Advanced Solutions) from 29 March 2020 until he was dismissed by text message on 15 July 2020. Advanced Solutions is a duly incorporated company with its registered office in Pahiatua and it carries on the business of building and house construction.

[2] On 15 July 2020, Mike Robb, Advanced Solutions sole director, sent a text message to Mr Woods as follows:

The client has been keeping track of the time you are there and so have I. On one of those days you said you started at 9am. I was there until 10.30am and you were not. You get paid for working and not driving to work. It was your choice to move out of town and I will not pay travel time that on some days

where more than the hours actually worked and I have no obligation to. I removed the van from you because you were abusing the perk and even with it you weren't doing full days or weeks and now it has gotten worse. You have bought things on the company account without asking and have still not paid for them even though you told me you would by the 20<sup>th</sup> of last month. A two week bathroom will now take over four weeks meaning a big loss on this job, I'm running a business and I can't afford any of this. It is for these reasons that I'm terminating your employment with Advanced Solutions Group effective immediately. You will get the official termination letter emailed to you tomorrow. You will need to return all company property including uniform tools phone and cards etc to Aaron or Barry and send Emily your hours for today so you can get your final payments including holiday pay. I'm sorry this is being done by text but I am still working to make up for the lack of work done in the last few weeks and have bad reception where I am so can't call. I would have liked to tell you not text. I wish you all the best moving forward.

[3] Mr Woods says the dismissal was unjustified and seeks lost wages, compensation and costs.

[4] Mr Robb lodged a statement in reply saying Mr Woods was terminated for serious misconduct including theft from the workplace, and falsifying documents. He stated that Mr Woods was terminated after not turning up for three scheduled meetings and the text message (above) does not show the whole conversation on private phones. He says theft from the workplace can result in instant dismissal, so no further action is required.

### **The Authority's investigation**

[5] Mr Robb attended the case management call on 10 November 2021, an investigation meeting was set down and the evidence timetabled. The in-person investigation meeting scheduled for 23 February 2022 was held via Zoom after no evidence was filed on behalf of Advanced Solutions and Mr Robb did not respond to the Authority's communications about Covid-19 arrangements for in-person hearings.

[6] I am satisfied the notice of investigation meeting was served to Advanced Solutions' address for service as advised to the Authority. Included in that notice, was advice that if the respondent did not attend the investigation meeting, the Authority may, without hearing the evidence from the respondent, issue a determination in favour of the applicant.

[7] There was no attendance from Advanced Solutions at the investigation meeting. The Authority has the power to proceed if any party without good cause fails to attend and may act

as fully in the matter before it as if that party had duly attended or been represented. The investigation meeting proceeded on this basis.<sup>1</sup>

[8] For the Authority's investigation a written witness statement was lodged from Mr Woods and he answered questions from the Authority in accordance with the affirmation he gave. Mr Harrison gave oral closing submissions.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **Background**

[10] Mr Woods started working for Advanced Solutions under a permanent contract for service on 29 March 2020. Prior to that he had been employed by Advanced Solutions on a casual basis. Initially he says a work van was provided for him to travel to and from jobs. At some point the work van was taken back for signwriting. He received the vehicle back briefly until Mr Robb informed him the vehicle needed servicing. Mr Woods says that the vehicle never came back to him and he was never told there was a concern that he was abusing the "perk".

[11] Mr Woods says that because he was working on a job in a rural location near Pahiatua, he then had to use his own vehicle, pay for his own petrol and he was expected to take another employee of Advanced Solutions with him. He was clearly unhappy about this and said that he dropped lots of hints to Mr Woods but did not raise the issue directly with him.

[12] The statement in reply and text message traverse several issues an employer could legitimately have concerns with, including abusing a perk (the work van), a job running over time, not working required hours, purchasing items on the company account and serious

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<sup>1</sup> Employment Relations Act 2000, schedule 2 clause 12.

misconduct including theft from the workplace and falsifying documents. Mr Robb records that theft in the workplace is grounds for instant dismissal.

[13] Mr Woods had no evidence to give about any performance concerns being raised with him or issues to do with him about a job running over. He said that he never received any negative feedback from Mr Robb. In relation to the suggestion that there had been serious misconduct, his evidence was that he had no knowledge of what that was.

[14] In response to the reference in the text to personal use of company property, Mr Woods' evidence was he only took home the tools he was using on the job. In addition, he said when the work van was taken away, he had to use his own personal tools.

[15] In relation to purchasing personal items on the company account, Mr Woods accepts that he did do that. However, he says a verbal agreement was made with Mr Robb and another employee when he first started working for Advanced Solutions. The arrangement was they were permitted to purchase items on that account, and they had 28 days to pay it back.

[16] Mr Woods also says that the amount outstanding referred to in the statement in reply was payment for a drop saw that Mr Woods accepts he purchased. The arrangement was that it was paid off weekly. He accepts he may not have paid it within the month, but he says it is now paid off.

[17] Mr Woods also says the remainder of the allegations in the text are incorrect. In terms of hours worked, Mr Woods says that he was employed to work 36 hours per week but the start and finish times were flexible. He accepts that when he was working in Pahiatua he started work from the time that he reached Palmerston North, which meant 45 minutes of travel time was included in the workday. He says he attended work regularly.

[18] There is reference in the text message to it being Mr Woods' choice to move out of town. Mr Woods says that he has not moved and did not move during his employment with Advanced Solutions.

[19] Mr Woods provided a letter to him from Mr Robb dated 14 July 2020, two days after the text message dismissing him was sent. That letter sets out that termination was for serious misconduct, performance issues and repeated misconduct. There was an assertion at the investigation meeting the letter was in fact, drafted on 10 November 2021, when the letter

properties were checked electronically. While that letter confirms there was a dismissal, the Authority cannot take that issue any further.

### *The employment agreement*

[20] The individual employment agreement (IEA) between the parties provided for a trial period (which had expired), and “36 +” hours of work on Monday to Saturday, between 7:00am and 6:00pm. The employer was to repay any authorised and reasonable work-related expenses, a vehicle was provided with some conditions but could only be removed after reasonable consultation with the employee.

[21] The employer could end the employment by way of dismissal without notice if, after following a fair process, it concluded the employee had engaged in misconduct. Theft was listed as an example of serious misconduct.

[22] If the employee had any concerns about their employment the first step was to talk to the employer and if the problem could not be resolved there were several options listed providing both parties with options about where they could seek further help.

[23] The employer was also able to end the employment with “reasonable cause” if it followed a fair process. Three weeks’ notice was required if employment was terminated under this clause.

### **Test for justification**

[24] The Authority is asked to determine whether Mr Woods was justifiably dismissed. It is required to apply the justification test which is set out in s 103A of the Act. In applying the test, the Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Advanced Solutions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[25] The Authority must consider the four procedural fairness factors set out in 103A(3) of the Act. These are whether the allegations against Mr Woods were sufficiently investigated, concerns raised with him, whether he had a reasonable opportunity to respond to the concerns and whether such explanations were genuinely considered by Advanced Solutions before dismissal.

[26] Advanced Solutions could be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

[27] Remedies may be reduced where blameworthy conduct by the employee contributed to the situation giving rise to the employee's grievance.

*Justification for dismissal - substantive?*

[28] In the statement in reply the employer asserts it had several concerns, with the most serious being theft from the workplace and falsifying documents which could be grounds under the IEA to conclude there had been serious misconduct. That would give the employer the ability to consider dismissal without notice if they followed a fair process. A fair process would mean raising and investigating the concerns in the first instance before making any decisions.

[29] While there were additional concerns that could have resulted in dismissal "for cause", it is disputed these existed and the justification in the statement in reply was that the conduct involved theft, suggesting the dismissal was for serious misconduct.

[30] It appears there were some issues between the parties, for example, Mr Robb was concerned about lateness and Mr Woods about his entitlement to a work vehicle.

[31] Under the employment agreement Mr Woods was entitled to a work van that could only be removed after "reasonable consultation". Mr Robb was entitled to raise issues such as the number of working hours completed but with neither of them raising issues, and none of those concerns grounds for serious misconduct, any dismissal in relation these matters would be substantively unjustified.

[32] The employer did not participate in the investigation beyond the case management call, and the Authority has not had the benefit of Advanced Solutions' evidence, however, based on what is before the Authority, there is insufficient evidence of any serious misconduct that might have justified "instant dismissal".

*Justification for dismissal – procedural?*

[33] There is an obligation in the Act on both parties to be responsive and communicative. If either party had concerns this means they should have been raised in a timely way with each other.

[34] There is no information available beyond Mr Woods' evidence about the lack of process other than the assertion from Mr Robb that Mr Woods did not turn up for three scheduled meetings.

[35] Mr Woods denies not turning up to scheduled meetings or that any concerns were raised with him.

[36] In these circumstances I am not satisfied, the procedural steps set out in s 103A of the Act, and the IEA occurred. When an employer does not raise issues of concern or misconduct, investigate concerns and provide opportunities for the employee to respond to those concerns, a dismissal for serious misconduct is not able to be justified procedurally.

[37] In these circumstances, I find that Advanced Solutions has failed to justify its actions and the dismissal is unjustified both substantively and procedurally.

### **Remedies**

[38] Given that I have found the dismissal has not been justified, Mr Woods is entitled to have remedies considered.

#### *Lost remuneration*

[39] Mr Woods claims lost wages calculated at a rate of \$30.00 an hour for a 36-hour week. This is a weekly sum of \$1,080.00. Mr Woods claims 13 weeks because he says that it took him even longer than this to find full time employment. He says he applied for various jobs, but that time coincided with Covid-19 lockdown which made it very hard, if not impossible to find work.

[40] An award for lost remuneration for 13 weeks in the amount of \$14,040.00 is available to Mr Woods under s 128 of the Act.

#### *Compensation for humiliation, loss of dignity and injury to feelings*

[41] Mr Woods has worked in the building industry for about eight years. He told me that his father is also a builder. He gave evidence that the loss in income had a detrimental effect on his self-confidence and his mental health.

[42] Mr Woods says he felt humiliated, and he felt that he had worked very hard for Mr Robb. He was dumbfounded and felt humiliated by the tactic of Mr Robb requiring him to

accept being dismissed over text message. He also said he fell into a depressed state and did not want to get out of bed. It was a difficult time for him to get new employment as the timing coincided with the end of COVID-19 lockdown period.

[43] Mr Woods said he has never had an opportunity to speak to Mr Robb because it all happened so fast there was no time to plead his case. He said that it was clear Mr Robb did not want to see him because he was required to return all his tools and work-related equipment to another employee.

[44] The Authority is required to consider any contributory conduct by the employee that may have led to the personal grievance under s 124 of the Act. In circumstances when the employer's concerns have not been raised with the employee, there can be no contributory conduct by the employee.

[45] When the employer has not been able to justify the dismissal, and the steps taken have deviated sharply from both s 103A of the Act and the IEA, an award of compensation in the amount of \$15,000.00 is considered to be appropriate. This is consistent with other cases of a similar nature.

### **Orders**

[46] Advanced Solutions Group 2020 Limited is ordered to pay Paul Woods the following:

- (a) Reimbursement for lost wages in the amount of \$14,040.00 (less tax) under s 123(1)(b) of the Act; and
- (b) Compensation in the amount of \$15,000 under s 123(1)(c)(i) of the Act.

### **Costs**

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

**Sarah Kennedy**  
**Member of the Employment Relations Authority**