

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 1
3143964

BETWEEN ZACHARY MARCHAND
 Applicant

AND TYRES 2 GO BLENHEIM ROAD
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: David Cain, advocate for the Applicant
 John Taylor for the Respondent

Investigation Meeting: 2 September 2022 at Christchurch

Submissions Received: 31 October 2022 from the Applicant

Date of Determination: 6 January 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] John Adam Taylor was a shareholder in Tyres 2 Go Blenheim Road Limited and now manages its business based in Blenheim Road, Christchurch. I will refer to the respondent as the company or Tyres 2 Go. Zachary Marchand was employed by the company as a Tyres & Wheel Alignment Technician, from December 2019 until the employment ended in March 2021.

[2] By letter dated 30 March 2021 Mr Marchand raised a personal grievance claim of unjustified dismissal. Mr Marchand said that on 8 March 2021 Mr Taylor sent him away from the workplace. When Mr Marchand returned the next morning, Mr Taylor again sent

him away from the workplace. Mr Marchand sent a txt message to Mr Taylor on 11 March 2021 but did not receive a reply. Mr Marchand received his final pay on 23 March 2021. Mr Marchand claimed that he was dismissed without procedural or substantive justification.

[3] Mr Marchand applied to the Authority to investigate and determine his personal grievance. Some relevant documents were included with the application. Compensation and reimbursement of lost wages was sought as remedies for the personal grievance.

[4] Mr Taylor on the company's behalf lodged a statement in reply on 6 July 2021. The company said that Mr Marchand was dismissed when the company found out that he had lost his driver licence. Mr Marchand was not able to perform a core part of his job description. No documents were included in this reply.

[5] In October 2021, Mr Marchand lodged an amended statement of problem. Mr Marchand sought payment of the contractual notice period if that amount was greater than the claim for lost remuneration. A claim for minimum entitlements for wages and holiday pay was added. Penalties pursuant to s 13 of the Wages Protection Act 1983 and s 130 of the Employment Relations Act 2000 were sought. Later, the claim for arrears of wages and holiday pay was discontinued. Penalty claims were not pursued.

[6] What remains for determination is Mr Marchand's personal grievance claim of unjustified dismissal.

[7] The problem was not resolved, despite mediation.

The Authority's investigation

[8] There was a case management conference on 13 April 2022. It is not necessary to mention the directions, except as follows.

[9] Tyres 2 Go was directed to provide wages and time records and holidays and leave records. The company was also directed to provide notes, memos and documentation from any meetings between it and Mr Marchand.

[10] On 26 April 2022 Tyres 2 Go lodged a document headed "Statement in reply". The amended reply referred to letters the company said it gave to Mr Marchand before the

dismissal. Unsigned letters dated 18 February 2021, 24 February 2021 and 01 March 2021 were attached. The company also outlined the circumstances it says led to Mr Marchand being told to leave the workplace on 8 March and 9 March 2021. A pay history report was included.

[11] Mr Marchand later amended his claim to confirm that no wages or holiday pay owed were owed.

[12] Mr Marchand lodged a statement of evidence on 11 August 2022.

[13] On 1 September 2022 Tyres 2 Go lodged a document headed "Statement in reply 2". In effect it was Mr Taylor's statement of evidence, but it was not comprehensive.

[14] Both Mr Marchand and Mr Taylor appeared at the investigation meeting. Each confirmed the truth of their earlier written statements, gave further evidence and answered questions under oath.

[15] Because of the disputed evidence about the three letters lodged in April 2022, the company was given leave to provide expert evidence to confirm that the letters were created and printed on the dates shown in each letter. Mr Taylor later sought and was granted an extension to the time for this to be provided. Dates for written submissions were also enlarged. The company was allowed a further extension to 19 October 2022, and other dates were adjusted. However, the company did not provide the expert evidence. Mr Marchand's advocate lodged and served submissions within the adjusted time. The company did not lodge any submissions in reply. I will determine the problem based on the evidence and submissions before the Authority.

[16] The issues are:

- (a) Was Mr Marchand given the letters dated 18 February 2021, 24 February 2021 and 01 March 2021 before the dismissal?
- (b) What happened on 8 March 2021?
- (c) What happened on 9 March 2021?
- (d) Was the dismissal justified?

(e) If not, what remedies are appropriate?

[17] It is first helpful to set out how the problem arose.

How the problem arose

[18] Although the written employment agreement identifies the employer as Tyres 2 Go Limited, it is common ground that the correct employer was the respondent, Tyres 2 Go Blenheim Road Limited. A copy of an agreement signed by both sides was not produced in evidence, but it is accepted that the copy attached to the statement of problem bearing only Mr Taylor's signature and a date reflects what had been agreed. Mr Marchand's evidence is that he started on 20 December 2019, but a payslip shows wages were paid for the period ended 15 December 2019. The point is not material.

[19] It is common ground that Mr Marchand's work included driving customers' cars to confirm customers' descriptions of problems and then to check whether services provided had resolved the problems. This driving included use of public roads. Mr Marchand also drove customers' cars from parking areas near the business premises into the premises onto hoists or similar devices to work on the cars. Sometimes Mr Marchand drove company vehicles, for example to collect tyres for customers. Despite the driving, the job description does not state that a valid driver licence is required.

[20] In August 2020, Mr Marchand was charged by police with a driving offence. His vehicle was impounded but the fact of the charge did not affect his driver licence at the time. Mr Marchand's evidence is that he told Mr Taylor that he faced the driving offence charge. In its replies (6 July 2021 and 26 April 2022), Tyres 2 Go says that Mr Marchand had not informed the company that he could lose his driver licence. However, Mr Taylor said in evidence that "Zach indicated that he was going to Court for some traffic related issue".

[21] There is a txt message from Mr Marchand to Mr Taylor. It was sent sometime before Monday 15 February 2021. It is apparent from the message that Mr Marchand had earlier told Mr Taylor that he needed time off to attend Court. It is likely that Mr Marchand told Mr Taylor why he had to attend Court. I prefer Mr Marchand's evidence to the company's position described in its replies. Mr Marchand was due to appear in Court on 16 February 2021. However, the charge was withdrawn at some point.

[22] Unrelated to the intended Court appearance, Mr Marchand learnt from his mother that Police would come to his workplace to serve a notice on him. Mr Taylor's evidence is that "Zach told me Police coming to take his licence". Police arrived, Mr Taylor directed them to Mr Marchand and a police officer then served Mr Marchand with a notice of driver licence suspension for excess demerit points. The notice records 10.20am 11 February 2021 as the date of service. That time and date will be correct. On the morning of 11 February 2021, Mr Taylor knew that Police had taken Mr Marchand's driver's licence.

[23] What happened in the following weeks before the dismissal is in dispute.

Was Mr Marchand given the letters dated 18 February 2021, 24 February 2021 and 01 March 2021 before the dismissal?

[24] Tyres 2 Go included with its amended statement in reply lodged on 24 April 2022 unsigned copies of three letters. The letter dated 18 February 2021 is an invitation to an "investigation meeting" on 23 February 2021 to discuss three issues. The letter refers to Mr Taylor's attempts to ask Mr Marchand about the status of his licence, met with a refusal to provide information. The second letter (24 February 2021), headed "Final decision", is an account of the "investigation meeting on 23 February 2021". It sets out the company's "preliminary decision" to terminate Mr Marchand's employment on notice, based on his refusal to give any information about the status of his licence, causing the company to assume it had been suspended "indefinitely". It offers Mr Marchand until "26 February 2021" for a response before Mr Taylor makes a "final decision". The third letter, headed "Termination of your employment by dismissal on notice", is dated 1 March 2021. It gives an account of events since the Police came "onto our premises and physically uplifting your driver's licence" from Mr Marchand. It states that Mr Marchand had not responded to the "preliminary view" and Mr Taylor's final decision was to dismiss him on notice of two weeks, with employment to end on "Saturday 13 March 2021". Final pay would be paid on 23 March 2021.

[25] Mr Taylor's evidence is that he wrote these letters, using templates he had received in the post from MTA and the company's computer. Mr Taylor says he had phoned MTA to seek advice before 18 February 2021. Mr Taylor says that he gave each letter to Mr Marchand and that he met with Mr Marchand on 23 February 2021. No-one else witnessed these actions.

[26] Mr Marchand says he never received these letters during his employment and first saw them when his advocate showed them to him in preparation for the Authority's investigation meeting. Mr Marchand says there was no "investigation meeting with Mr Taylor" on 23 February 2021 or during his employment.

[27] Mr Marchand sent a txt message to Mr Taylor at 1.11pm on 11 March 2021. Mr Marchand asked, "Can I have a termination letter, and can you let me know when I receive my final pay?" Mr Taylor did not respond. The 11 March 2021 txt message supports Mr Marchand's evidence that he did not receive the 01 March 2021 dismissal letter. Mr Taylor gave evidence that Mr Marchand might have left the 01 March 2021 letter at work, by way of explaining why Mr Marchand asked for a termination letter and the date for his final pay. However, Mr Taylor told me that he had not found the letter at the workplace.

[28] On 30 March 2021 Mr Marchand's representative wrote to Mr Taylor raising a personal grievance claim. The letter cites the txt message and the lack of a response. The letter states:

Mr Marchand was never invited to a meeting to discuss any concerns. He was never consulted about the proposal to terminate his employment nor was he given an opportunity to have a support person at any such meetings discussing the proposal of termination. He was not given the opportunity to provide feedback to a proposal of termination. He was not provided with a notice period or a termination letter.

[29] Tyres 2 Go did not reply to the 30 March 2021 letter. If the 2021 letters existed at the time, one would expect an employer to have replied and sent copies to the representative to answer the 30 March 2021 assertions.

[30] A statement of problem, repeating the 30 March 2021 assertions, was lodged in June 2021 and was served on Tyres 2 Go. Mr Taylor for the company lodged a statement in reply on 6 July 2021. The reply sets out the company's view in relation to the problem, its account of relevant facts and its comments under the headings of Form 3. There is no mention of the three letters, the 23 February 2021 meeting or the company's process leading up to the dismissal. The letters are not attached to the statement in reply. Mr Taylor's evidence, when asked why the letters were not mentioned or attached, was that he did not go into detail as he thought the loss of the driver licence was sufficient. I find that evidence unconvincing. The reply includes some detail. In addition, the 30 March 2021 grievance letter and the statement of problem emphasised the lack of any process. Form 3 specifically

requested relevant documents. If the letters had been given to Mr Marchand at the time, one would expect the company in its reply to have referred to them and/or attached them. The same point applies to a pre-dismissal meeting.

[31] The company did not produce expert evidence to establish that the letters were created and printed on the dates shown.

[32] To summarise, Mr Marchand denies receiving the letters while Mr Taylor says he gave them to Mr Marchand. Apart from Mr Taylor's statements, there is no evidence that they existed any earlier than April 2022, but there is evidence to support Mr Marchand's account.

[33] I prefer Mr Marchand's evidence that he was not given the letters and did not attend an "investigation meeting" with Mr Taylor. Mr Marchand continued to work after 11 February 2021 without any significant adjustment to the way he performed his duties, despite Mr Taylor's knowledge that Police had taken Mr Marchand's licence.

What happened on 8 March 2021?

[34] Mr Marchand and Mr Taylor both give an account of events on 8 March 2021. Mr Marchand says that the store was not busy, he was taking a break on the shop floor and was scrolling through his phone. Mr Taylor approached him and in an aggressive tone told him to get off his phone, put it in his car and to start tidying the tyre racks. Mr Marchand asked why he needed to put his phone in his car. Mr Taylor then told him to "Fuck off". Mr Marchand asked why, and Mr Taylor said it was because he was on his phone, had no licence and was arguing. Mr Marchand's evidence is that he thought it best to leave the store for Mr Taylor to "cool off", as had happened several times during the employment on unrelated matters. Mr Marchand went home.

[35] Mr Taylor's evidence is that he drove a car into the workshop because of Mr Marchand's licence status. He asked Mr Marchand to work on the car. Mr Marchand was scrolling through his phone. Mr Taylor asked him to stop scrolling, repeated the job instructions and asked Mr Marchand to put his phone aside or in his vehicle. Mr Marchand replied, "Fuck this, make me". Mr Taylor ignored this and walked towards reception. Mr Marchand started throwing tools around. Mr Taylor asked him what he was doing. Mr Marchand replied aggressively "I am trying to find a socket in this fucking place".

Mr Marchand was “waving an extension bar”. Mr Taylor asked Mr Marchand to leave the premises before he called the police. Mr Marchand left. This account was given in the 26 April 2022 reply. Mr Taylor confirmed it in evidence.

[36] In evidence, when answering questions, Mr Taylor said Mr Marchand was “threatening” him with the extension bar. He had initially described it as Mr Marchand “waving an extension bar”.

[37] In the 11 March 2021 txt message, Mr Marchand described the 8 March 2021 exchange as “To be yelled to F Off on Monday”. The fuller account in the 30 March 2021 letter reflects Mr Marchand’s evidence, as does the June 2021 statement of problem. Mr Marchand’s accounts have been largely consistent.

[38] The company’s 6 July 2021 reply does not include an account of events on 8 March 2021, despite Mr Marchand’s account set out in the 30 March 2021 letter and the statement of problem. The account of Mr Marchand not performing work, being insubordinate, throwing equipment about, waving an extension bar and being told to go before the police were called was not given until 26 April 2022. Mr Taylor’s explanation for the account not being part of the July 2021 reply, was that he did not go into detail as he thought the loss of the driver licence was sufficient. As before, I find that evidence unconvincing. An employer, confronted with a personal grievance claim, would probably mention such conduct. If the employee had been “threatening” the employer as is now claimed, it is even more likely to have been mentioned in the first response.

[39] Again, I prefer the evidence of Mr Marchand about the events on 8 March 2021. His account is much more likely than that of Mr Taylor.

[40] To summarise, on 8 March 2021 Mr Taylor approached Mr Marchand and told him in an aggressive manner to put his phone away. Mr Marchand asked why and was told to “Fuck off”. Mr Marchand asked “why” and was told that it was because he was on his phone, had no licence and was arguing get off his phone. Mr Marchand left, for Mr Taylor to cool off.

What happened on 9 March 2021?

[41] Mr Marchand’s evidence is that when he returned to the workplace on 9 March 2021, Mr Taylor told him that he was not wanted there and to go home. Mr Marchand left. Mr Marchand’s evidence is consistent with his description in the 11 March 2021 txt message.

[42] Mr Taylor says that before he arrived, Mr Marchand returned to work as normal on 9 March 2021. Mr Taylor told Mr Marchand to leave as his violent attitude was not acceptable and would not be tolerated. Mr Taylor's evidence reflects the April 2022 amended reply. That account had not been given earlier, despite Mr Marchand's request for a "termination letter". Again, I prefer Mr Marchand's evidence. An employer who told an employee to leave due to their "violent attitude" would probably have given that account when the employee raised a personal grievance and as soon as an action was commenced in the Authority.

Justification for the dismissal

[43] In both its statements in reply, Tyres 2 Go accepted it had dismissed Mr Marchand. That also reflects Mr Taylor's evidence.

[44] Although Mr Marchand asked for a "termination letter", the company did not provide written reasons for the dismissal. Mr Marchand did not behave in a threatening manner on 8 March 2021, either before or after the exchange with Mr Taylor. The substantive reasons for the dismissal are apparent from what Mr Taylor said to Mr Marchand that day. Mr Taylor angrily told Mr March that it was because he was on his phone, had no licence and was arguing.

[45] Whether the dismissal was justifiable must be determined on an objective basis by assessing whether the company's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. I must consider whether Tyres 2 Go sufficiently investigated the allegations, considering available resources; whether Tyres 2 Go raised its concerns with Mr Marchand before deciding to dismiss him; whether Tyres 2 Go gave Mr Marchand a reasonable opportunity to respond to the concerns before dismissing him; and whether Tyres 2 Go genuinely considered Mr Marchand's responses before deciding to dismiss him.

[46] Tyres 2 Go is a small business, managed by Mr Taylor. It would have limited resources available. Even taking account of that factor, it did not sufficiently investigate the concerns mentioned by Mr Taylor on 8 March 2021.

[47] Mr Marchand's lack of a licence was not raised as a concern before 8 March 2021, even though Mr Taylor had been aware of it since 11 February 2021. Mr Marchand's use of

his phone was not raised as a concern before it was mentioned on 8 March 2021 as a reason for the dismissal. The same applies to Mr Marchand “arguing”. I find that Tyres 2 Go did not raise its concerns with Mr Marchand before it dismissed him.

[48] It follows that Tyres 2 Go did not give Mr Marchand an opportunity to respond to its concerns. It also follows that Tyres 2 Go did not genuinely consider any response.

[49] Provisions in the employment agreement required Tyres 2 Go to follow disciplinary procedures prior to a dismissal, but it did not follow those procedures.

[50] Not investigating, not raising concerns, not giving an opportunity to respond and not considering a response were not what a fair and reasonable could have done in the circumstances at the time.

[51] The foregoing defects were not just defects in the process followed by Tyres 2 Go. They were not minor. Mr Marchand was treated unfairly because concerns were not raised, and he did not have any opportunity to respond. There were matters of substance which Mr Marchand could have raised.

[52] I find that Mr Marchand was unjustifiably dismissed and has a personal grievance.

What remedies are appropriate?

[53] In deciding the nature and extent of remedies for Mr Marchand’s personal grievance, I must consider whether Mr Marchand contributed to the circumstances giving rise to the personal grievance in a blameworthy manner and if so, reduce remedies accordingly.

[54] Mr Marchand was using his phone. I accept Mr Marchand’s evidence that it was not busy and that he was taking his break while on the shop floor. No express workplace rule prohibited use of personal phones in the workplace in any event. This conduct does not require a reduction in remedies.

[55] Mr Taylor told Mr Marchand he was “arguing”. That was an exaggeration. Mr Marchand asked “Why?” when he was told to put his phone in his car and again when he was told to “Fuck off”. By asking for a reason, Mr Marchand did not contribute in a blameworthy manner to the circumstance giving rise to the personal grievance.

[56] Mr Marchand's licence was suspended for three months from 11 February 2021. Mr Taylor knew then that police had taken Mr Marchand's licence but might not have known the specific reason or duration of the suspension. The comprehensive employment agreement and job description did not include a requirement for a licence, but in practice some of Mr Marchand's tasks involved driving on public roads. However, Mr Taylor did not ask about the duration of the suspension and he did nothing to stop Mr Marchand from doing that work, prior to the dismissal. The company did not consider whether work could be reallocated to other staff to accommodate Mr Marchand's licence suspension or give him an opportunity to investigate a limited licence. In these circumstances, I do not accept that the loss of Mr Marchand's licence requires the reduction of remedies for the personal grievance.

[57] Mr Marchand's evidence is that he was devastated about losing his job, it was stressful, he was confused and felt let down by Mr Taylor. The lack of an explanation made Mr Marchand feel like he was "nothing", and that his work for Mr Taylor did not mean anything. Mr Marchand did not understand why he was dismissed so abruptly. He still feels anxious and is less trusting of employers. I accept Mr Marchand's evidence. These effects were not immediately ameliorated by Mr Marchand's success in finding replacement income from 24 March 2021.

[58] The harm suffered by Mr Marchand was not insignificant. I assess it as falling in the mid-range of such harm. The claim is for \$25,000.00 compensation but in submissions Mr Marchand considered that an award in the region of \$20,000.00 would be appropriate. However, that sum of compensation was ordered in *Waikato District Health Board v Archibald*.¹ The harm to Mr Marchand is less extensive. Compensation of \$15,000.00 is sufficient to remedy the harm to Mr Marchand.

[59] Reimbursement for lost remuneration is claimed. Mr Marchand was paid a day's wage for 8 March 2021 but lost two week's remuneration starting Tuesday 9 March 2021. Mr Marchand's ordinary hours of work were 45 per week at the rate \$20.00 per hour. I find that Mr Marchand's lost remuneration totalled \$1,800.00 gross.

¹ *Waikato District Health Board v Archibald* [2017] NZEmpC 132.

Summary

[60] Mr Marchand was unjustifiably dismissed, and he has a personal grievance. To settle that personal grievance, Tyres 2 Go Blenheim Road Limited is to pay Zachary Marchand:

- (a) \$15,000.00 compensation, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000, and
- (b) \$1,800.00 (gross) reimbursement, pursuant to s 123(1)(b) of the Employment Relations Act 2000.

[61] Costs are reserved. A claim for costs may be made by lodging and serving supporting submissions within 14 days of this determination. The other party may lodge and serve submissions in reply within a further 14 days. I will then determine costs, taking account of those submissions in the context of the Authority's approach to costs.

Philip Cheyne
Member of the Employment Relations Authority