

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 463
3191199

BETWEEN

PETER SLOGGETT
Applicant

AND

MODERN TRANSPORT
ENGINEERS LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Dave Cain, advocate for the Applicant
Mark Flyger, advocate for the Respondent

Investigation Meeting: 30 June 2023 in Hamilton

Further information and submissions received: 7 July 2023 from Applicant
10 July 2023 from the Respondent

Determination: 21 August 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Sloggett was employed by Modern Transport Engineers Limited (MTEL) as an auto electrician from January 2019 until 16 June 2022 when he was dismissed for serious misconduct after he removed four bottle jacks from the work site.¹ A bottle jack is a device used for lifting heavy objects, especially one for raising the axle of a motor vehicle off the ground so that a wheel can be changed or the underside inspected.

¹ The parties have a long association. Mr Sloggett had previously been employed by MTEL for over 10 years.

[2] Mr Sloggett says his dismissal was unjustified and he seeks reimbursement of lost wages and compensatory damages and a contribution to the costs of professional representation which he has incurred.

[3] MTEL is a well-established business providing truck servicing and repairs. It says the decision to dismiss Mr Sloggett was one a fair and reasonable employer could make in all the circumstances. It also says Mr Sloggett's use of its property has breached the employment agreement for which it seeks an award of damages.

The Authority's investigation

[4] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Sloggett, Angela Sloggett, Mr Sloggett's wife, Janette Old, Mr Sloggett's sister, Robin Ratcliffe, the owner of MTEL and Kyle Spencer, Mr Sloggett's manager who carried out the disciplinary investigation which resulted in dismissal.

[5] 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. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions.

Issues

[6] The issues identified for investigation and determination are:

- a) Was Mr Sloggett unjustifiably dismissed on 16 June 2022?
- b) If so, is he entitled to a consideration of remedies including:
 - i. Lost wages of \$3,653.85 (gross) under s 123(1)(b) of the Act;
 - ii. Compensation of \$25,000 under s 123(1)(c)(i) of the Act;

- c) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Sloggett which contributed to the circumstances which gave rise to his grievance?
- d) Has Mr Sloggett breached any term of his employment agreement regarding the use of bottle jacks and if so is MTEL able to recover any established loss arising from such breach?
- e) Should either party contribute to the costs of representation of the other party?

The parties' employment agreement

[7] Mr Sloggett's written individual employment agreement provides for matters relating to serious misconduct and includes at clause 38.1 under the heading "Serious Misconduct":

Theft or unauthorised removal of property, being unlawfully in possession of company property or other forms of dishonest or criminal damage in connection with company property or the property of any other employee. The company will exercise its discretion in whether the matter is to be reported to the Police.

[8] Clause 39 sets out the "Warning System" which includes at 39.1 for serious misconduct:

Any employee who violates these rules is liable for automatic loss of his/her job whether or not a warning was issued previously.

[9] It is unlikely "automatic loss of his/her job" will be a lawful action given the statutory obligations in a disciplinary setting as set out below. MTEL may consider necessary a review of this provision in any extant employment agreements.

The Law

The test for justification

[10] When the Authority considers justification for the actions of MTEL including the dismissal decision it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances.

It is required to consider on an objective basis whether the actions of MTEL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[11] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. In a dismissal setting these are whether allegations against Mr Sloggett were sufficiently investigated, concerns were then raised with him, he had a reasonable opportunity to respond to them and his explanations were considered genuinely by MTEL before dismissal. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Mr Sloggett being treated unfairly.

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

Discussion

Was Mr Sloggett unjustifiably dismissed?

[13] There is no dispute Mr Sloggett removed five bottle jacks from the workplace. There is also no dispute that he did not have express authority to do so. The matters for the Authority to consider are whether the actions of MTEL in dismissing him were the actions a fair and reasonable employer could have taken in all the circumstances.

[14] Mr Sloggett said he removed the bottle jacks because a business with which MTEL had a working relationship had asked to borrow them. He said he was happy to accommodate this request and as there were no managers around at the time the request came in, he dropped off the bottle jacks. He says his actions were reasonable and unremarkable. Mr Sloggett said there are other circumstances which are relevant to and explain his actions as reasonable namely, that he is a senior employee who operated day-to-day with a fair degree of autonomy and Mr Spencer was very new to the management role and may not have understood fully the ambit he (Mr Sloggett) operated in in the workshop.

[15] Mr Sloggett says the events leading up to and resulting in his dismissal all occurred on the same day – 16 June 2022 – and he returned his work vehicle to MTEL on the morning of 17 June as directed. He says the dismissal process followed by MTEL was unfair and unreasonable – he did not receive fair notice of MTEL’s concerns or the disciplinary process it wished to undertake and he did not have a fair opportunity to respond to MTEL’s concerns because it did not put them fully and fairly to him to comment on including that he was not provided the opportunity to have a representative present.

[16] MTEL says Mr Sloggett’s undisputed actions in removing its property from the workplace without authorisation was a serious breach of well-established workplace rules. It says the requirements of a fair process are met because Mr Sloggett knew what the concern was and if Mr Sloggett had wished to have a representative present he could have made that arrangement.

[17] On Mr Spencer’s account in his oral evidence to the Authority, the process leading up to Mr Sloggett’s dismissal occurred over the period 15 through 17 June 2022. His evidence is, in broad terms, that over this period Mr Sloggett was asked to comment on the removal of the bottle jacks, having received these comments he was suspended from work on pay while further investigation was undertaken, he was then given the opportunity to comment on all the relevant information, that during this process Mr Spencer took advice and guidance from Mr Ratcliffe and following completion of the disciplinary process the decision to dismiss Mr Sloggett was made.

[18] This version of events is significantly different to MTEL’s response under Mr Ratcliffe’s name dated 7 July 2022 to Mr Sloggett’s personal grievance raising letter of the same date which does not challenge Mr Sloggett’s timeline of events as all occurring on 16 June 2022 and MTEL’s statement in reply lodged 3 October 2022 which concurs with Mr Sloggett’s statement of problem setting out the events as occurring on 16 June 2022. Likewise, Mr Spencer’s witness statement, filed on 29 March 2023 in an affidavit he swore the same day, expressly states the events leading up to and including Mr Sloggett’s dismissal occurred on 16 June 2022 and that Mr Sloggett was directed to return the work vehicle the following morning which he did. Further, when the Authority administered an oath to Mr Spencer at the commencement of the investigation meeting he confirmed the contents of his affidavit dated 29 March 2023.

[19] Mr Spencer was unable to provide a satisfactory explanation as to why his oral evidence before the Authority differed so significantly from the statement in reply and his sworn affidavit dated 29 March 2023. He sought to rely on a date stamp of 14 June 2022 on the CCTV stills which were first provided to the Authority at the investigation meeting. He also said he had reviewed some notes. Those have not been provided to the Authority. For completion, the Authority understands MTEL has sought to provide further support for Mr Spencer's oral account by attaching to its closing submissions Mr Sloggett's work vehicle logbook for the period 14 – 17 June 2023. The logbook was not filed at the investigation meeting which means witnesses, including Mr Sloggett did not have an opportunity to comment or be questioned on it. Notwithstanding, the logbook not being before the Authority as evidence, on its face it does not support Mr Spencer's version of events.

[20] In these circumstances Mr Sloggett's evidence is preferred. The Authority is satisfied on 16 June 2022 Mr Spencer confronted Mr Sloggett with CCTV footage showing the bottle jacks being placed in the vehicle. Mr Sloggett said he had responded to a request for a loan of the bottle jacks but apprehended he was being accused of theft. Mr Spencer then required Mr Sloggett to drive him to the business where the bottle jacks had been dropped off, made inquiries and on returning to the vehicle told Mr Sloggett "your story isn't stacking up". After they returned to the workplace there were two further exchanges between Mr Sloggett and Mr Spencer regarding this matter – Mr Sloggett went to the office and said to Mr Spencer "I guess that I've got the DCM [don't come Monday]" and later that day Mr Spencer told Mr Sloggett he was dismissed and to return the work vehicle the following day and collect his tools.

[21] While it is accepted Mr Sloggett's actions in removing the bottle jacks without express authorisation are, on its face, a breach of well-established work rules, his dismissal and the events leading up to it have occurred in circumstances which were so swift and the process so deficient as to render MTEL vulnerable to questions as to the fairness and reasonableness of its actions.

[22] Mr Spencer did not write to or clearly state to Mr Sloggett at any point during the disciplinary process sign-posting the events or setting out what was being investigated, the information being considered or what was expected of Mr Sloggett in this process. It appears a view was formed from the outset that serious misconduct had

occurred and Mr Spencer has then set out to collect information including during the business visit which may or may not have supported this view. When Mr Sloggett has sought to clarify the situation – which in the circumstances is the most reasonable interpretation of the DCM comment – Mr Spencer has continued with a veiled process which resulted in Ms Sloggett being dismissed with immediate effect later that day.

[23] Even if the Authority had accepted Mr Spencer’s oral evidence of events the dismissal does not meet the statutory test for a justifiable dismissal. The allegation and the basis of the allegation were not fairly put to Mr Sloggett to comment on, for example Mr Spencer did not make clear to Mr Sloggett how or why he had formed a suspicion as to his (Mr Sloggett’s) motivation for dropping the bottle jacks off to the business either before or after he (Mr Spencer) had located them on visiting the business.² Mr Sloggett was not provided a fair opportunity to participate in the disciplinary process for example, Mr Sloggett was first told dismissal was an outcome of the disciplinary process when he was told he was dismissed and he was not provided an opportunity to have a representative or support person present.

Has MTEL complied with the good faith requirements of s 4 of the Act?

[24] Section 4 requires parties to employment relationships to be active and constructive and responsive and communicative. In a disciplinary setting where there may be an adverse effect on the continuation of an employee’s employment MTEL was under a statutory obligation to provide Mr Sloggett access to information relevant to the continuation of his employment and provide him an opportunity to comment before a decision was made.³ Mr Spencer’s comment “your story isn’t stacking up” understandably induced anxiety and apprehension in Mr Sloggett because Mr Spencer appeared to have relevant information which he was not providing to Mr Sloggett. Mr Spencer did not then advise Mr Sloggett in sufficient detail what he had discerned in his visit to the business where the bottle jacks had been taken. The subsequent exchanges between the parties on 16 June were not with prior notice to Mr Sloggett as to their purpose or possible outcome and as stated above Mr Sloggett was not provided an opportunity to bring a support person or representative to any meeting.

² For completion, Mr Spencer left the bottle jacks with the business when he was shown them on those premises.

³ Employment Relations Act 2000, s 4(1A).

[25] MTEL was responsible for and wholly in control of the process which resulted in Mr Sloggett's dismissal. While it is likely MTEL had reasonable grounds to make inquiry about Mr Sloggett's removal of the bottle jacks, the deficiencies outlined above are not minor or technical and mean MTEL is unable to demonstrate its actions were those a fair and reasonable employer could have taken in all the circumstances or that the conclusions as to the allegation and the appropriate disciplinary outcome were fair and reasonable. Mr Sloggett's dismissal on 16 June 2022 was unjustified.

Remedies

[26] Mr Sloggett has established a personal grievance for unjustified dismissal. He is entitled to a consideration of the remedies sought.

Reimbursement

[27] Mr Sloggett seeks reimbursement of earnings lost as a result of his dismissal pursuant to section 123(1)(b) of the Act. He has met the mitigation requirement and is entitled to be reimbursed unpaid wages of \$3,653.85 (gross) for the two-week period between his employment ending and his undergoing scheduled surgery.

Compensation for humiliation, loss of dignity and injury to feelings

[28] Mr Sloggett said he could not believe he was dismissed so suddenly and felt very hurt and let down by MTEL with whom he has had a long association. He has found the allegation of theft and dishonesty extremely embarrassing and people he barely knows have made unwanted comments regarding the ending of his employment at MTEL. The impact of his dismissal has negatively impacted close family members causing them stress and anxiety.

[29] The Authority is satisfied Mr Sloggett has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, an award of \$20,000 under section 123(1)(c)(i) is appropriate.

Contribution

[30] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[31] MTEL submits any remedies awarded to Mr Sloggett should be reduced by 100% due to his contribution to the circumstances of his personal grievance including he was well aware of MTEL's attitude towards unauthorised removal of company property given his long service, he ought to have been scrupulous with regard to compliance with this work rule given Mr Spencer was a new manager and had he not removed the bottle jacks without approval this matter would not be before the Authority.

[32] In *Maddigan v Director-General of Conservation* the court held a reduction of 50% is to be reserved for exceptional circumstances and care should be taken before imposing a reduction of 25%.⁴ Mr Sloggett's actions in removing the bottle jacks from the workplace has no doubt contributed to the circumstances of his personal grievance and was a breach of well-established work rules. These are blameworthy actions for which a reduction of 10% of remedies awarded under s 123(1)(i)(c) is appropriate to reflect the contributory conduct. The reduction sought by MTEL is not appropriate – it bears the responsibility for the deficient disciplinary process it undertook and the outcome implemented.

MTEL's counterclaim

[33] After Mr Sloggett's employment ended MTEL undertook a stock take of bottle jacks and says they are significantly less in number than they should be based on the numbers of trucks throughout the workshop. MTEL says Mr Sloggett is more likely than not to be responsible for this deficit in expected bottle jack stock because of the actions which resulted in his dismissal.

[34] Mr Sloggett made his own inquiries about the bottle jacks and their likely whereabouts discovering that some were sold or moved to different workshops or

⁴ *Maddigan v Director-General of Conservation* [2019] ERNZ 550 at 564.

divisions within MTEL. This was not challenged by MTEL. The allegation implicit in the counterclaim is a serious one and could reasonably be expected to be supported by evidence of equally probative value. There is insufficient evidence Mr Sloggett is responsible for the lower-than-expected bottle jack count. The counterclaim is not successful.

Summary

[35] Modern Transport Engineers Limited must pay Peter Sloggett the following amounts within 21 days of the date of determination:

- (i) \$3,288.47 (gross) wages under s 123(1)(b); and
- (ii) \$18,000.00 under 123(1)(c)(i).

Costs

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

[37] If parties are unable to resolve costs between them and an Authority determination on costs is needed Mr Sloggett may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum MTEL would 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.

[38] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[39] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Marija Urlich
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.