

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 287
3137981

BETWEEN

RORY MCCORMACK
Applicant

AND

MARIN CONSTRUCTION
LIMITED
Respondent

Member of Authority: Alex Leulu

Representatives: David Fleming, counsel for the Applicant
Ray Parmenter, counsel for the Respondent

Investigation Meeting: 14 February 2024

Submissions received: 14 and 16 February 2024 from the Applicant
14 and 15 February 2024 from the Respondent

Determination: 15 May 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Rory McCormack was employed by Marin Construction Limited (Marin) as a carpenter. On 30 June 2020 he was dismissed by Marin because he no longer held a valid work visa.

[2] Mr McCormack claimed he was unjustifiably dismissed by Marin. Mr McCormack also claimed he was unjustifiably disadvantaged by Marin during his employment.

[3] Marin denied Mr McCormack's claims and said its actions towards him were justified. These are the claims he had brought before the Authority for determination.

The Authority's investigation

[4] For the Authority's investigation, written witness statements were lodged from Mr McCormack, and his former Marin work colleague, Jay Sneddon. For Marin, written witness statements were lodged by Marin site manager, George Hardie and Marin company director, Craig Blaikie. All four witnesses attended the investigation meeting and answered questions under oath or affirmation from me and the parties' representatives. The representatives also submitted written closing submissions.

[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.

The issues

[6] The issues requiring investigation and determination were:

- (i) Was Mr McCormack unjustifiably disadvantaged by Marin during his employment due to Marin's alleged:
 - (a) failure to properly address information requests and complaints made by Mr McCormack in respect of an altercation with another Marin staff member in 2018;
 - (b) action of unreasonably requiring Mr McCormack's return to full time work after his ankle injury in April 2019;
 - (c) failure to properly address Mr McCormack's allegations of threats and abuse on 18 and 19 November 2019; and
 - (d) failure to properly address Mr McCormack's allegations of bullying in his workplace and Marin allowing the alleged bullying and abuse to continue?
- (ii) Was Mr McCormack unjustifiably dismissed from his employment with Marin?
- (iii) If Mr McCormack is found to have been unjustifiably dismissed and/or disadvantaged, to determine whether he is entitled to:

(a) Lost wages pursuant to s 123(1)(b) of the Act; and

(b) Compensation pursuant to s 123(1)(c)(i) of the Act;

(iv) Should one party pay the costs of representation to the other party?

Context

Mr McCormack's initial employment

[7] Marin carries on business as a commercial construction company. Mr McCormack started working for Marin on 5 March 2018. While working for Marin, Mr McCormack held a temporary work visa.

[8] On 30 May 2018 Mr McCormack suffered an ankle injury while at work. His ankle injury became an ongoing issue for him throughout his employment.

The 2018 altercation

[9] In June 2018 Mr McCormack was involved in a physical altercation with another Marin employee (the 2018 altercation). As a result of the altercation, Mr McCormack suffered a thumb injury.

[10] As an interim measure, Mr Hardie arranged for Mr McCormack to work at another work site. However, because of his thumb injury, Mr McCormack was off work for three weeks. Marin carried out an investigation into the altercation and decided to issue both Mr McCormack and the other Marin employee with a warning.

[11] Mr McCormack was unhappy with how Marin addressed the 2018 altercation. As a result, Mr McCormack and Marin attended mediation to address the issues between them in July 2018. The issues were not resolved at mediation and the parties disputed whether Marin had promised Mr McCormack an apprenticeship during these mediation discussions.

Mr McCormack's ankle injury

[12] Mr McCormack's ankle injury became increasingly worse during his employment. As a result of his injury, Mr McCormack was placed on sick leave in April 2019. He was due to return to work on 2 September 2019. The parties dispute the circumstances around Mr McCormack's return to work including whether Mr

McCormack was to gradually return to full work duties. Mr McCormack eventually returned to work in late September 2019.

Personal grievances

[13] On 17 November 2019 Mr McCormack raised a personal grievance against Marin by letter. His personal grievance covered a number of claims against Marin for unjustified disadvantage. His claims also included issues arising from the 2018 altercation.

[14] On 18 November 2019 Mr McCormack said he was threatened by another Marin employee (the 2019 altercation). On 19 November 2019 Mr McCormack also said Mr Hardie had accused him of lying in his personal grievance letter and accused him of racism.

[15] In response to the 2019 altercation and the interaction with Mr Hardie, Mr McCormack sent a text message to Mr Blaikie. In his message Mr McCormack referred to both interactions and requested an apology from Mr Hardie. If he did not receive an apology, he said these interactions would be added to his personal grievance claims. No apology was made to Mr McCormack.

Further sick leave

[16] Marin began investigating the 2019 altercation on 21 November 2019. As part of the investigation Mr McCormack and two other Marin employees were interviewed to determine their recollection of what occurred. Mr McCormack also provided his written account of what occurred.

[17] On 22 November 2019 Mr Blaikie arranged to meet with Mr McCormack. During this meeting Mr Blaikie handed Mr McCormack a letter (the 22 November letter) which outlined Marin's concerns about Mr McCormack's 'mental state'. Marin's concerns arose from its observations of Mr McCormack's interactions during its investigation and Mr McCormack's written account of the 2019 altercation. The letter also referred to Mr McCormack's difficulties in forming work relationships with other Marin staff members.

[18] The 22 November letter also confirmed Marin's requirement for Mr McCormack to take sick leave and to obtain a psychologist report to confirm his ability

to return to the workplace. Marin offered to pay for any costs associated with obtaining his clearance to return to work. Marin also confirmed it was still investigating what occurred during the 2019 altercation.

[19] Mr McCormack went on sick leave on 22 November 2019. This was the last time Mr McCormack was physically at work for Marin. While on sick leave he was able to see a psychiatrist and was cleared to return to work on 23 December 2019. Due to complications with his ankle injury, he was not able to return to work. He remained on unpaid sick leave up until the end of his employment (but receiving ACC compensation).

Mr McCormack's work visa

[20] Mr McCormack's work visa was due to expire on 13 February 2020. Mr McCormack said he approached Marin on a number of occasions during 2019 and early 2020 about renewing his work visa.

[21] As Mr McCormack's employer, Marin was required to complete an Immigration New Zealand Employer Supplementary form (supplementary form) if it intended to support Mr McCormack's application for a visa renewal.

[22] On 14 January 2020 Mr McCormack sent an email to Mr Blaikie reminding him about the pending expiry date of his work visa. On the same day, Mr Blaikie assured Mr McCormack that Marin would complete the supplementary form. At the same time, Mr Blaikie invited Mr McCormack to a disciplinary meeting in relation to the 2019 altercation.

[23] On 4 February 2019 Mr McCormack contacted Marin again about completing the form. On 6 February 2019 Marin sent Mr McCormack a completed supplementary form. This was a week before Mr McCormack's work visa was due to expire. Immigration New Zealand was unable to process Mr McCormack's work visa in time and as a result Mr McCormack had to apply (and was granted) a special visitor visa from the Minister of Immigration.

[24] From February to June 2020 Mr McCormack remained on unpaid sick leave and receiving ACC compensation for his ankle injury. On 29 June 2020 Marin contacted Mr McCormack to confirm whether he held a valid visa to work. Mr McCormack disputed whether he had received the email.

[25] On 30 June 2020 Marin terminated Mr McCormack's employment because he did not hold a valid work visa to allow him to be employed by Marin. On 29 June 2021 Mr McCormack lodged his statement of problem with the Authority.

Was Mr McCormack unjustifiably disadvantaged?

Ankle injury

[26] Mr McCormack said he asked Marin for a copy of the incident report in relation to his ankle injury. In the end he did not receive the report. During the investigation meeting, Mr Blaikie said the incident reports were available to all employees and Mr McCormack would have been provided it.

[27] There is little other evidence to confirm when Mr McCormack asked for the report, whether the report existed or why Mr McCormack was not provided a copy. As a result, the Authority makes no finding in respect of this aspect of Mr McCormack's claim.

The 2018 altercation

[28] The 2018 altercation initially arose from a workplace disagreement which escalated to a physical fight between Mr McCormack and another Marin employee. The matter was investigated by Marin, and it concluded that Mr McCormack had started the altercation. Because the Marin employee had caused an injury to Mr McCormack, he was found to be culpable for his actions. Both parties were issued a warning by Marin.

[29] Marin's investigation into the 2018 altercation appeared to be sound. It had sought views from all Marin staff who witnessed or were part of the altercation. Based on the evidence it was reasonable for it to reach its decision to issue a warning to Mr McCormack. Accordingly, Mr McCormack's claim for unjustified disadvantage in respect of the 2018 altercation was not established.

Mr McCormack's return to work

[30] As a result of his ankle injury, Mr McCormack was on sick leave in April 2019. During this time, he was on ACC. Mr McCormack claimed he was unjustifiably disadvantaged by Marin alleging it:

- (a) Failed to meaningfully engage in a return-to-work programme for him;
- (b) Required him to work his full hours of work immediately upon his return from injury (rather than allowing him to build up his time at work); and
- (c) Took a simplistic approach by saying it had “no light duties” rather than properly ascertaining what gradual work could be done by Mr McCormack (leading up to a full return to work).

[31] Marin opposed Mr McCormack’s claims and said he should not have been cleared to return to “full work” by his occupational therapist. Upon returning to work on 16 September 2019, Marin observed Mr McCormack was not 100 per cent fit and could see he was in considerable discomfort.

[32] On 23 September 2019 Mr Hardie emailed the following to Mr McCormack’s occupational therapist outlining his concerns:

Rory has been at work all of last week and had an appointment with his specialist on Thursday and been advised to limit his hours of work. As you are well aware we do not want him back until he is 100% right for the simple reasons that if his injury is aggravated then he is back to square one.

[33] There was no evidence before the Authority to confirm what Marin’s health and safety policy was in respect of staff who returned to work after a workplace injury. During the investigation meeting both Mr Hardie and Mr Blaikie said Marin was unable to provide light duties to Mr McCormack. Due to the nature of Marin’s commercial construction work and Mr McCormack’s ankle injury it was reasonable to accept there were no light duties available for Mr McCormack.

[34] Prior to Mr McCormack’s return to work, Mr Hardie also said he was involved in meetings together with an ACC case manager and another Marin representative to discuss his return to work. The discussions showed Marin was actively invested in Mr McCormack’s positive return to work. It was also likely Marin was able to discuss with ACC what type of work was available.

[35] Marin’s ongoing discussion with ACC and its reliance on the occupational therapist email on 9 September 2019 were sufficient reasons for it to believe Mr McCormack was able to return to work fully. Mr McCormack’s return to work claims against Marin were unsuccessful.

Threats and abuse on 18 and 19 November 2019

[36] The 2019 altercation arose from a conversation Mr McCormack had with a fellow work colleague about a prior work social event. The conversation escalated to the point where Mr McCormack alleged he was abused by the other staff member and called a racist.

[37] Mr McCormack's interaction with Mr Hardie on 19 November 2019 resulted from a conversation between them as Mr McCormack was starting work. Again, there were allegations against him for being racist and they dispute whether Mr Hardie called him a liar.

[38] Mr McCormack said Marin failed to properly investigate both the 2019 altercation and his interaction with Mr Hardie. He also accused Marin of treating his complaints as if he was the person to blame for complaining.

[39] Marin had properly addressed the 2019 altercation. Similar to its approach to the 2018 altercation, Marin sought views of those involved with the altercation (including Mr McCormack). It also produced an investigation outcome report which was also lodged as evidence for the Authority's investigation. As a result, it reached an outcome of issuing a warning to Mr McCormack and the other Marin employee. Its actions were reasonable both from a procedural perspective and in terms of its outcome. Mr McCormack's unjustified disadvantage claim in respect of the 2019 altercation was unsuccessful.

[40] Mr McCormack's claim in respect of the 19 November interaction with Mr Hardie is addressed further as part of his bullying claims.

Mr McCormack's bullying claims

[41] Throughout his employment for Marin, Mr McCormack said he had made numerous complaints to Marin about being bullied by other employees. He said he made these complaints on a weekly basis. Mr McCormack complained about several different matters including being:

- (a) ostracised and abused by other Marin staff for his role in the 2018 altercation; and
- (b) accused by other Marin staff as being racist.

[42] Mr Hardie confirmed Mr McCormack did complain to him about various different workplace situations. At the investigation meeting, Mr Hardie's description of Mr McCormack's complaints appeared to be classed more as passing comments or remarks as opposed to formal complaints. Mr Hardie said he tried on several occasions to query further into some of Mr McCormack's complaints. He said Mr McCormack would either decline for the matter to be looked into or he would not identify who he was making a complaint against.

[43] Mr McCormack's claims about the ongoing complaints to Marin were difficult to assess because of the generalised nature of his claims. Outside of Mr McCormack's own evidence, there was insufficient evidence to show other workers were continuously bullying Mr McCormack.

[44] However, the evidence showed Mr McCormack had ongoing workplace issues with other Marin employees. Marin was aware of this. Marin's report into the 2019 altercation confirmed its prior views about:

- (a) Mr McCormack's alleged use of racist language,
- (b) His perceived hate towards other workers,
- (c) Him talking "trash" about the company; and
- (d) Marin addressing his behaviour by separating him from other workers.

[45] Based on its knowledge of Mr McCormack's ongoing behaviour and interactions with others, Marin should have properly considered and addressed Mr McCormack's complaints and his behaviour. Marin's failure to do so led to Mr McCormack being involved in further conflict with other Marin staff who in turn responded in an inappropriate manner. This was made worse by Mr McCormack being separated from other Marin workers which isolated him.

[46] An example of further conflict was Mr McCormack's interaction with Mr Hardie on 19 November. During this interaction Mr Hardie admitted to making a race related allegation to Mr McCormack. At the investigation meeting Mr Hardie accepted how his comments could have made Mr McCormack upset. This appeared to be a one-off interaction with Mr Hardie and there was no evidence to show there were other instances of this type of interaction with Mr Hardie.

[47] Although Mr McCormack had not established his claim for bullying, he was adversely affected by Marin's failure to properly address both his complaints and his work relationship with other employees. For this reason, Mr McCormack was unjustifiably disadvantaged by Marin's inactions. I accept this was not a specifically claimed ground by Mr McCormack for unjustified disadvantage. The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.¹

Unjustified dismissal claims

Mr McCormack's unjustified dismissal claims

[48] Mr McCormack alleged he was unjustifiably dismissed by Marin because Marin failed to provide him with reasonable assistance in both obtaining a valid work visa and addressing his visa situation (after losing his work visa). He also said Marin failed to follow a proper process leading up to termination of his employment. This included Marin failing to provide adequate notice in accordance with his employment agreement.

[49] Marin opposed Mr McCormack's claims saying it had completed the supplementary form as required and cannot account for why INZ had refused Mr McCormack's visa application. It also said it had correctly followed up with Mr McCormack about his visa status on 29 June 2019 and had acted accordingly when it terminated his employment.

Mr McCormack's visa renewal

[50] Marin indicated on Mr McCormack's supplementary form it was not advertising for carpenters and the company was waiting for further work to eventuate before it could advertise. Mr McCormack said this meant his visa would not be renewed by INZ. He also said Marin's delay in completing the supplementary form meant there was little time for him to "try and fix things up."

[51] At the investigation meeting Mr Blaikie said Marin relied on new work coming in to help it determine what workers it needed. He said leading up to February 2020, Marin had not been advertising for carpenters. He also said Marin employed a

¹ Employment Relations Act 2000, s 160(3).

considerable number of migrant workers. Ordinarily it addressed staff visa matters around three months before expiry of staff visas. He could not explain why it did not happen for Mr McCormack in this instance.

[52] Marin's reasons for not hiring carpenters were legitimate which meant Mr McCormack's visa application was always likely to be refused by INZ. Mr McCormack was a permanent employee and as a responsible employer of migrant employees, Marin should have taken appropriate steps to notify Mr McCormack of its business situation and the potential impact on his employment. Marin's failure to do so meant Mr McCormack was unable to arrange his affairs to address what was likely to be a significant change to his work circumstances.

Marin's approach to terminating McCormack's employment

[53] There had been little contact between Mr McCormack from 6 February 2020 up until Marin contacted Mr McCormack by email on 26 April 2020 and 29 June 2020. On both occasions Marin had requested an update on Mr McCormack's visa status.

[54] After not receiving a response, Marin terminated Mr McCormack's employment on 30 June 2020. In dismissing Mr McCormack, Marin referred to the INZ employer guide which provided general information about the obligation of employers. The guide also said it was an offence to employ a person who is not entitled to be in New Zealand.

[55] In an email reply on the same day, Mr McCormack said he had not received the previous emails and claimed he was constructively dismissed by Marin. Given Mr McCormack had replied from the same email address where Marin had sent its previous communications, the evidence showed he had received the previous emails.

[56] Mr McCormack said a proper process was not followed by Marin when it decided to terminate his employment. He was given no opportunity to seek advice and to comment on the grounds of the termination of his employment. Mr McCormack also did not have an opportunity to respond to whether the grounds for his dismissal warranted an immediate dismissal without notice.

[57] Mr McCormack's position is accepted. Putting aside Mr McCormack's inability to work and not having a work visa, he was entitled to be properly informed by Marin of the potential change to his employment situation and later, Marin's

intention to terminate his employment. He was entitled to consider the grounds for the proposed termination of his employment and to seek legal advice. Marin's actions were not those of a reasonable employer.

[58] Together with Marin's failure to consult with him during the pending expiry of his visa, Mr McCormack was treated unfairly by Marin in how it terminated his employment. Mr McCormack has established his personal grievance for unjustified dismissal.

Is Mr McCormack entitled to a remedy?

[59] Mr McCormack had established a personal grievance for both unjustified disadvantage and unjustified dismissal. He is entitled to an assessment of remedies to address his grievance.

Reimbursement for lost wages

[60] Mr McCormack acknowledged the difficulty in assessing an award for lost wages given it was unclear whether Mr McCormack would still be employed even if Marin had met its obligations. In addressing this difficulty Mr McCormack sought an award equivalent to 12 months earnings as reimbursement for lost earnings.

[61] Marin disagreed and claimed Mr McCormack was not entitled to any loss earnings because he did not have the appropriate visa to work, and he was unable to work due to his ankle injury.

[62] Due to his ankle injury, Mr McCormack was unable to physically work from 22 September 2019 up to the time of the investigation meeting. At the investigation meeting he confirmed he was still unable to work and was receiving ACC payments.

[63] Marin's position is accepted because at the time Mr McCormack was dismissed, he was unable to work for two reasons. Firstly, he did not have an appropriate visa to allow him to continue working. Secondly, he physically could not work because of his ankle injury. During and after his termination he was also compensated by ACC. He should not be recompensated through an award for reimbursement for lost wages. No award is ordered to Mr McCormack for lost wages.

Compensation for hurt and humiliation

[64] Assessing how much distress Mr McCormack suffered during and after his employment for Marin was also difficult. This was because much of his evidence of distress included difficulties associated with his ankle injury and inability to work.

[65] Mr McCormack did suffer some distress because of Marin's actions and inactions. This was evident in the complaints he made to Marin throughout his employment and his distress in trying to renew his visa.

[66] In considering the harm Mr McCormack experienced and considering his circumstances alongside other cases, the appropriate compensation award in this case is the sum of \$10,000 for his successful unjustified disadvantage claims and \$7,000 for his successful unjustified dismissal claim.

Should the remedy be reduced for blameworthy conduct by Mr McCormack?

[67] The Authority must consider whether any remedies awarded should be reduced due to any actions of the worker which contributed to the situation giving rise to the personal grievance.²

[68] During his employment Mr McCormack's behaviour showed a pattern of inappropriate conduct which should have been addressed by Marin. Although ultimately Marin was at fault in not addressing this behaviour, Mr McCormack's own conduct contributed to ongoing conflict in the workplace with other Marin employees.

[69] As a result, a moderate reduction of 20 per cent should be made to Mr McCormack's awarded remedy of \$10,000 for his unjustified disadvantage claim. This leaves a remedy award of \$8,000 for his unjustified disadvantage claim. Together with his awarded remedy for unjustified dismissal Marin is to pay a total remedy of \$15,000 to Mr McCormack within 28 days of this determination.

Costs

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

²Employment Relations Act 2000, s 124.

[71] If the parties are unable to resolve costs between them and an Authority determination on costs is needed Mr McCormack may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Marin would then have 14 days to lodge any reply memorandum.

[72] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[73] 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.³

Alex Leulu
Member of the Employment Relations Authority

³For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.