

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 289  
3236499

BETWEEN                      AMBERLEY BIRCH  
Applicant

AND                              RELENTLESS HAWKES BAY  
LIMITED (IN LIQUIDATION)  
Respondent

Member of Authority:        Sarah Kennedy-Martin

Representatives:              Applicant in person  
No appearance for the Respondent

Investigation Meeting:        9 May 2024 by AVL

Submissions Received:        9 May 2024 from the Applicant

Determination:                 16 May 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Birch was employed by Relentless Hawkes Bay Limited (RHBL) (trading as Premier Insulation Hawkes Bay), as a Senior Account Manager from 1 March 2023. Ms Birch says that she was unjustifiably dismissed on 30 March 2023 when she received an email from Len Park, the sole director and shareholder of RHBL, terminating her employment without notice.

[2] Ms Birch claims compensation for hurt and humiliation in the amount of \$25,000.00, lost wages, costs and penalties for failing to provide wage and time records, breach of the employment agreement in not providing paid sick days for two days.

[3] RHBL is in liquidation and the liquidator consents to proceedings continuing under s 248 of the Companies Act 1993.

## **The Authority's investigation**

[4] For the Authority's investigation written statements were provided and I heard oral evidence under oath or affirmation from Ms Birch and Sarah Rupe. The hearing was held by AVL.

[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:

- (a) Was the dismissal of Ms Birch's employment and how it was carried out, what a fair and reasonable employer could have done in all the circumstances at the time?
- (b) If RHBL is found to have acted unjustifiably by dismissing Ms Birch, what remedies should be awarded to her, considering:
  - Lost wages (subject to evidence being provided); and
  - Compensation under s 123(1)(c)(i) of the Act.
- (c) Should penalties be awarded?
- (d) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Birch that contributed to the situation giving rise to her grievance?
- (e) Should either party contribute to the costs of representation of the other party?

## **Ms Birch's employment with RHBL**

[7] Ms Birch was employed by RHBL as a Senior Account Manager for approximately 30 days when she received the following email from the sole director and shareholder of RHBL:

Crystal payroll got it wrong as most new employees have no sick days till six months in. I have rectified that today so that you will get paid. However your conduct in dealing with my manager Byron is unacceptable due to your

bullying tactics to get what you want, I removed myself as you were trying to play Byron, myself and Rob off against each other to get what you wanted.

So in summary go find yourself another job I don't want you back, return all of PILS property to Byron which will go back to PIL. I really thought you were best based on your past performance however I think even Rob didn't realise what your MO was. This is no reflection on Rob and has not been discussed he has only been totally endorsing of you. I am totally pissed off with you and we cannot work with you. Further you are on sick leave but you have been scoping out EECA opportunities the word on the street is you are working for Andy at Brighter. Please read your contract over this if I prove it's true then I will take it to the letter of the law.

[8] In the short time that Ms Birch had been employed, in the first week she had had Covid, but worked some days from home, in the second week she continued but made requests for her commissions structure and asked for assistance with an induction and further information on things she was unsure about. In the third week she was still waiting for her commission structure and some training on getting out onto sites and speaking with commercial clients as opposed to residential premises she had been used to in her previous role.

[9] Having not had any responses back she sought some assistance with how to raise issues with her employer and in the fourth week sent a document setting out her concerns which included not being paid for two days sick leave. The document was headed up "Employment concerns that are impacting on my health and safety, and wellbeing."

[10] The concerns arose from what Ms Birch has described as a difference in perspectives between Ms Birch and her manager. The three broad categories in Ms Birch's document are a lack of training and support, conflicting information about the role, in particular whether she had the flexibility to work at home and whether or not door knocking was considered to be part of her position description. Thirdly, how her manager's conduct in not replying, talking over her and at the meeting on 17 March telling her the spreadsheet needed updating and that she had not improved in the time she had been there, and threatening her with needing to go door knocking for leads had impacted on her.

[11] Her evidence was also that she had negotiated with Mr Parker, managing director, to have her sick leave entitlement apply from the start of her employment but her manager refused to agree to her being paid for two sick days. Mr Parker in the final email to Ms Birch accepts that she was entitled under the employment agreement to paid sick leave but goes on to dismiss her.

[12] The concern about conflicting information arises from the fact that during Ms Birch's interview with Mr Parker, she says she was assured that her role would offer the same flexibility as her previous position. However, despite these assurances, she says her manager threatened to require her to be in the office from 8am to 5pm, Monday to Friday. And she also says that her role description changed when she was informed she might need to engage in door knocking, which was a task that she felt most uncomfortable with. Her understanding had been that she picked up leads from the sales force after others had loaded them into that system. She was previously unaware that cold calling or door knocking for work was going to be part of her job description. She requested her job description to ensure that it remained consistent with what she initially agreed to.

[13] After sending the document setting out her concerns, there was no response from her manager or Mr Parker. A meeting was planned to talk about commission structure but events overtook this. Ms Birch took sick leave on 20 March and was willing to return to work on 21 March but requested that she be able to work from home because she was not feeling comfortable with her manager, and no response had been forthcoming. Ms Birch saw her doctor on 23 March and was unfit for work until 31 March.

[14] When Ms Birch emailed her manager about payment for sick leave, the response she received told her she was not entitled to it and included the words "so more excuses from you; you're really milking this for all you can get. Not impressed.". Then later that day she received the email above from Mr Parker, accepting she was entitled to paid sick leave and agreeing to rectify that but terminating her employment in a peremptory manner with no process as would be expected of a fair and reasonable employer.<sup>1</sup>

### **Unjustified dismissal**

[15] The final email to Ms Birch appeared to indicate RHBL had concerns, however, the employment relationship was of such short duration, the matters of concern to Ms Birch were reasonable things for an employee and employer to communicate about especially at the start of an employment relationship. Ms Birch's employment agreement did in fact provide for 10 days sick leave from the start of her employment.

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<sup>1</sup> Employment Relations Act 2000, s 103A.

[16] When I compare the test in s 103A of the Act and how the employer acted towards Ms Birch, it is my conclusion that even if RHBL had concerns at that time, a fair and reasonable employer could be expected to raise concerns with Ms Birch, give her an opportunity to respond and genuinely consider any response from Ms Birch before making a decision to dismiss her. If asking questions and providing the document she did was the issue of concern to the employer, this would not have reached the level of serious misconduct and dismissal could not be justified.

[17] In any event the lack of any process by RHBL means I find the decision made was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[18] Ms Birch's dismissal is unjustified and she is entitled to consideration of remedies.

### **Remedies**

#### *Lost wages*

[19] Ms Birch seeks lost wages. The Act permits reimbursement to the employee of lost wages in an amount that is the lesser of the sum equal to lost remuneration or to three months ordinary time remuneration. Ms Birch's employment ended on 30 March 2023 and she commenced new employment on 24 April 2023. With an annual salary of \$75,000.00, I calculate her lost wages to be \$4,615.36 for the 16 workdays between her dismissal and starting new employment. I accept that reimbursement in that amount is appropriate in circumstances where there has been an unjustified dismissal and the loss is a consequence of that.

#### *Compensation*

[20] Ms Birch seeks compensation for humiliation, loss of dignity and injury to feelings caused by the grievance. Ms Birch gave evidence of the humiliating impact and distress caused to her by the summary dismissal and the effect on her confidence and health. Ms Birch explained that she had previously been employed in the same role in a different but connected company and derived a good deal of satisfaction from the role and she had come well recommended. Ms Birch gave evidence of the need to seek medical advice to help with stress related symptoms that came about at the same time

as the issues with RHBL and continued for some time after the dismissal. I accept her evidence in relation to the impact on her and that of her support person Sarah Rupe.

[21] Given the suddenness of the employer's actions with no warning and no process, with dismissal conveyed in an email, referring to concerns that had never been raised, and the general range of awards in similar cases, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act to be \$20,000.00.

### *Contribution*

[22] Under s 124 of the Act, Ms Birch's contribution to the situation that gave rise to the personal grievance must be considered. Ms Birch's requests of her employer were reasonable. She was a new employee asking for her commission structure, induction to work sites, and more information about what was expected of her. RHBL provided no evidence. I therefore find Ms Birch has not contributed to her personal grievance.

### **Penalties**

[23] I was asked to award penalties for breach of the employment agreement and the Wages Protection Act 1983 arising from the failure to provide paid sick leave and for failing to provide the wage and time record under s 132 of the Act. Having not heard any evidence from RHBL, noting RHBL is in liquidation and taking into account the purpose of penalties and the matters I must consider when awarding penalties, I decline to award penalties in this case.

### **Costs**

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

[25] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Birch may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Relentless Hawkes Bay Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[26] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>2</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>2</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)