

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 147
3296959

BETWEEN HARRISON RICHARDS
Applicant

AND LAWNS TREES AND
GARDENS LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Dave Cain, advocate for the Applicant
Michael Fennessy, counsel for the Respondent

Investigation Meeting: 27 November 2024 in Palmerston North

Submissions: Up to and including 11 December 2025

Determination: 10 March 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Harrison Richards commenced employment as a Gardener with Lawns Trees and Gardens Limited (LTGL) on or about 17 December 2022. Mr Richards claims that he was unjustifiably dismissed from his employment with LTGL on 18 June 2023.

[2] Mr Richards seeks compensation for humiliation, loss of dignity, and injury to feelings. He also seeks penalties be imposed upon LTGL for breach of its duty of good faith and for a failure to provide wage and time records upon request.

[3] LTGL asserts that Mr Richards abandoned his employment after failing to return to work or to notify them of an ongoing absence from work in June 2023. It otherwise denies the claims made.

Issues

- [4] The issues identified for investigation and determination, are:
- (a) Was Mr Richards dismissed from his employment?
 - (b) Did Mr Richards abandon his employment?
 - (c) If Mr Richards was dismissed from his employment, was he unjustifiably dismissed from his employment?
 - (d) If Lawns Trees and Gardens Limited's actions were not justified what remedies should be awarded, considering:
 - (i) Compensation for humiliation, loss of dignity, and injury to feelings; and/or
 - (ii) lost wages.
 - (e) Has Lawns Trees and Gardens Limited breached s 4 of the Employment Relations Act 2000 (the Act) by failing to act in good faith? If so, should a penalty be imposed in terms of s 4A of the Act?
 - (f) Has Lawns Trees and Gardens Limited breached s 130 of the Act by failing to provide wage and time records? If so, should a penalty be imposed?
 - (g) Should either party contribute to the costs of representation (if any) of the other party?

The Authority's Investigation

[5] A case management conference (CMC) was held on 25 July 2024 at which timetable directions were issued for the lodgement of written witness statements and the convening of an investigation meeting.

[6] Written witness statements were lodged prior to the investigation meeting from Mr Richards in support of his claims. Kevin Dahm, sole director and shareholder of LTGL, lodged a written statement in support of LTGL. At the request of LTGL a summons was issued requiring the attendance of another former employee of LTGL, Kura Marsden, at the investigation meeting.

[7] An investigation meeting was held in Palmerston North on 27 November 2024. All witnesses attended the investigation meeting and answered questions under oath or affirmation. Written submissions were exchanged following the investigation meeting with directions providing for submissions to be lodged up to 11 December 2025.

[8] 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.

Further background and evidence

[9] Prior to the period of employment relevant to this matter, Mr Richards had worked for LTGL between June 2021 and either February or March of 2022. Mr Richards then ended up working for LTGL again and for the purposes of this employment relationship problem, he commenced employment on 12 December 2022.

[10] There is some dispute as to what the terms and conditions of Mr Richards' employment were. Mr Dahm says that they had a discussion shortly after Mr Richards started during which he told Mr Richards that he would be covered by the individual employment agreement (IEA) signed in relation to his initial employment in 2021. He says Mr Richards agreed to that.

[11] Mr Richards denies being told that the previous IEA would cover his employment. He says he kept asking for an employment agreement, but that Mr Dahm would make excuses and did not provide one. He also says that he referred a friend of his to Mr Dahm and that the friend was provided an IEA.

[12] Mr Richards was involved in a car accident on 8 February 2023 and sustained various injuries. He says that between February and March 2023 he provided LTGL medical certificates confirming he was fully unfit for work. Mr Richards made an ACC claim relating to his injuries.

[13] Mr Richards provided a medical certificate on 15 February 2023 when he attended the LTGL office. On 28 February, ACC requested a record of Mr Richards' earnings and that was provided.

[14] Mr Richards was placed on a return to work programme commencing on 26 March 2023. After commencing that, he had some pain so had some further time off work. He then had further assessment and was again deemed fully unfit for work.

[15] Mr Dahm says that Mr Richards attended work only intermittently between 27 March 2023 and 12 May 2023. He says there was then a discussion, at which Ms

Marsden was also present, on 11 May 2023 where a further medical certificate was provided by Mr Richards saying he was unfit for work between 8 May 2023 and 18 June 2023.

[16] Mr Richards evidence is that he was then told not to return to work until he had a full medical clearance and that he thought he would continue with his rehabilitation until cleared. Ms Marsden says she was present during a discussion in May 2023 between Mr Richards and Mr Dahm. She says that it was explained to Mr Richards that he wasn't cleared for work and that he would need a full medical clearance before he could go back to work. Mr Dahm says that Mr Richards provided a medical certificate dated 11 May 2023 that said he was fully unfit for work from 8 May to 18 June and that Mr Richards had already worked between 8 and 10 May. Mr Dahm was annoyed about Mr Richards having worked and explained a full clearance would be required.

[17] Mr Dahn says that he expected Mr Richards to return to work on 19 June 2023 and that Mr Richards had not provided a medical certificate from that date forward. He also says that Mr Dahn did not contact LTGL. Mr Dahn's evidence is that he tried to contact Mr Richards on three different phone numbers on 19 June 2023. He said he then tried phoning one of Mr Richards' friends, one of his friend's fathers, and also Mr Richards' mother. He says they didn't know where Mr Richards was, although Mr Richards' mother thought he might be in Taranaki.

[18] Mr Richards evidence it that his Occupational Therapist (OT) told him, over the phone on 22 June 2023, that Mr Dahm had told her that he was no longer employed. He says he was upset at his employment being terminated and that it was a horrible and humiliating way to find out. He says Mr Dahm did not contact him about any concerns relating to his time on ACC. The OT apparently sought to contact LTGL and then the following text message exchange occurred between them and Mr Richards:

OT Hi again, I spoke with Kevin. You might want to touch base with him. Kevin said you were meant to see him on 8/5. And as he has not heard from you, he has filled your position [emoji]. So I would highly recommend you start looking for work so you have something to go to once you have made a substantial recovery!

...
Mr Richards Thank you so much for letting me know that's kinda funny considering I was not at work on 8/5

And was even rained off till on the 11th lol

OT Maybe he meant 8/6. I think with you losing your licence too doesn't help! I think he wasn't happy you had not been in touch either, whoops. Maybe you're better off doing something different?!

Mr Richards Yea, that's okay I'm going to be taking him to court now anyways haha as I was on \$21 an hour until I changed in myself to 23 in May and been working now since December without a contract sorry lol you probably don't need to hear all of that haha

....

[19] Mr Dahm's evidence is that he received a call from someone claiming to be from ACC on 22 June 2023. He says they did not identify themselves or verify Mr Dahm's identity. He says he told the caller that Mr Richards "had not provided a clearance for return to work, had not contacted Lawns, Trees and Gardens and had not returned to work. The call lasted less than 90 seconds". At the investigation meeting, he said that he told the caller that Mr Richards had failed to return to work and that there was no current work. He denies having said that Mr Richards' position had been filled or that his employment had been terminated.

[20] Mr Richards did not try to contact Mr Dahm until 27 June 2023 when he sent the following text message:

Hi can you please send me my termination letter as I need it for work and income urgently

[21] There was no response to that text message. Mr Dahm says that he did not see the text message until the second week of July 2023 because he had been in and out of hospital.

[22] Mr Richards sent a text message to Mr Dahm on 19 July 2023. The content of that message was the same as an email sent later, on 25 July 2023:

Hi it has been over 3 weeks and I still have not heard from you and I still do not have a termination letter from you. I am unable to get any assistance from work and income without this. Please send it to me urgently.

[23] Mr Dahm responded on 26 July 2023:

Re Harrison

It is your responsibility as an employee to have supplied a return to work date. Or an expected return to work date or a medical certificate extending your

ACC time off prior to your return to work date.

None of the above were done by you prior to your return Date

It is your responsibility to keep your employer informed not the responsibility of other people to do so especially not a week after your expected return date and certainly not by some Random stranger making a phone call.

Further you are required to have a current drivers licence to perform your work

Your employment ceased on the 18/6/2023 by your own actions and not those of your employer....

[24] Mr Dahm's evidence is that Mr Richards was required to drive as part of his employment, he was provided a vehicle to use, and that it was a condition of his employment that he hold a valid driver licence. He says that after the accident on 8 February 2023 he found out that Mr Richards did not have a valid licence. Mr Richards says that there was no such requirement and that the initial IEA did not apply to his employment at the relevant time.

Was Mr Richards dismissed from his employment?

[25] Mr Richards says that he was dismissed on 22 June 2023 after being informed of the same by his OT. LTGL contends that Mr Richards abandoned his employment and that he was not dismissed.

[26] I find that Mr Richards was ultimately dismissed from his employment, on the basis he had abandoned his employment, on 26 July 2023. I do not consider that Mr Richards was dismissed from his employment on 22 June 2023.

[27] I do not accept that the text message said to be from the OT accurately reflects the conversation that occurred with Mr Dahm. The OT did not attend the investigation meeting, and I am not satisfied that Mr Dahm communicated to anyone on that date that Mr Richards had in fact been dismissed from his employment. I consider there is sufficient evidence to establish, notwithstanding any direct evidence from the OT, that Mr Dahm likely indicated there were issues with the employment and that Mr Richards conduct had been unsatisfactory. However, I conclude that the evidence falls short of establishing that there was a dismissal at the initiative of LTGL at that time.

[28] In cross-examination, Mr Dahm said that at the time he was still expecting Mr Richards to contact him and that LTGL were not at that stage looking at abandonment of employment. I find that Mr Dahm did mention Mr Richards' lack of licence on the call, but not that he indicated Mr Richards' was being dismissed. To the extent Mr Dahm may have commented on the licence and absence of return to work, I do not

consider more can be made of those matters than that Mr Richards' expressed some understandable frustration.

[29] I find the conversation did not amount to a sending away or dismissal at the initiative of LTGL. The brief conversation was not between Mr Dahm and Mr Richards', Mr Richards did not seek to verify what had been communicated to him via text message from the third party, and nor did he otherwise seek to communicate with LTGL or Mr Dahm for another five days.

[30] Mr Richards, not entirely without reason, then sought to obtain confirmation of what he considered to be a termination at the initiative of LTGL. That occurred sometime later and he did not seek to perform his duties or return to work. He did not enquire into the working arrangements or engage with LTGL or Mr Dahm to seek to clarify the status of his employment. Instead, he considered the employment arrangement had been terminated by LTGL. While I find that was incorrect at the time, the employment relationship was ultimately terminated by LTGL on 26 July 2023.

[31] LTGL relied on Mr Richards absence from work and lack of contact as a basis for the employment relationship ending. The position taken, as contained in the email of 26 July 2023, was that Mr Richards had ended the employment relationship on 18 June 2023 by his own actions in not attending work or providing an expected date of return. The employment relationship was terminated as of 26 July 2023 through the actions of LTGL, in effect, in relying on abandonment as the basis for that.

[32] I find that Mr Richards was dismissed from his employment on 26 July 2023.

Did Mr Richards abandon his employment?

[33] Having regard to the other findings I have made I do not consider the issue of whether Mr Richards employment was subject to the terms of the 2021 IEA is critical. However, having seriously considered all of the relevant evidence, I find that Mr Richards continued to be employed on the basis of the terms and conditions contained in the initial agreement.

[34] I find that Mr Richards was aware of those terms and, having regard to there being clear evidence that other employees were provided IEA's, that there is no compelling basis on which to doubt Mr Dahm's evidence. While Mr Richards gave

evidence that he followed Mr Dahm up for a new IEA, on balance, I prefer Mr Dahm's evidence on that point.

[35] The IEA includes an abandonment provision providing that, subject to certain requirements including absence for 3 consecutive days and reasonable attempts being made to contact the employee, LTGL could treat the employment as having been abandoned. In *E N Ramsbottom Ltd v Chambers*¹ the Court of Appeal accepted that an employer is required to be cautious in drawing the inference that an employee has abandoned their employment and that an employer must meet a high threshold in contending that was the case.

[36] LTGL had at least some information about the basis on which Mr Richards was absent; Mr Dahm knew of the medical issues and that Mr Richards had not been cleared to return to work. While Mr Richards had not updated him or provided an updated medical certificate, it was not the case that there was simply no relevant context to the absence from work. Indeed, there was good reason to believe that Mr Richards was absent on account of ongoing injury and that he had not abandoned his employment.

[37] LTGL were required, in accordance with the terms of the IEA and if it were to rely on abandonment, to have made reasonable attempts to contact Mr Richards to clarify the reasons for absence and intentions regarding return to work.

[38] While I accept some attempts were made to contact Mr Richards via phone and by contacting other persons, those attempts were insufficient. One clear means by which such notice could have been given was by email, LTGL having previously communicated with Mr Richards by email. I am also not satisfied that Mr Dahm's evidence that he attempted to contact Mr Richards have been appropriately established having regard to an absence of relevant records relating to those alleged attempts. In any event, the attempts were insufficient.

[39] The dismissal ultimately occurred in circumstances where there was a level of frustration about various matters, including that Mr Richards had not been in contact and was demanding a termination letter. Although it was asserted that he had ended his own employment, I do not consider the reason provided at the time is necessarily consistent with Mr Richards having abandoned his employment. It is also the case that,

¹ *E N Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97.

as at the time the dismissal occurred, it was evidence that Mr Richards was of the impression that he had been dismissed from his employment.

[40] I find that Mr Richards did not abandon his employment.

Was Mr Richards unjustifiably dismissed from his employment?

[41] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether LTGL's actions, and how it acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.² Also relevant to the Authority's consideration are the good faith obligations in s 4 of the Act.

[42] LTGL relied on Mr Richards absence and lack of contact as a basis for the employment relationship ending. The position taken, as contained in the email of 26 July 2023, was that Mr Richards had ended the employment relationship on 18 June 2023 by his own actions.

[43] In terms of s 103A of the Act, I do not consider LTGL could be said to have sufficiently investigated the reasons for Mr Richards absence from work or failure to provide an update as to his likely return. It sought no explanation from Mr Richards, nor did it put any concerns to him prior to the dismissal.

[44] No formal notice was given to Mr Richards indicating a concern as to his absence or the lack of information about a return date. Further to that, LTGL did not seek to provide Mr Richards an opportunity to respond to any concerns it had before dismissing him from employment. To the extent that LTGL rely on any other factors as justification for the dismissal, they were not put to Mr Richards, he had no reasonable opportunity to respond, and the dismissal was procedurally unjustified.

[45] The email of 26 July 2023 referred to Mr Richards having been required to have a current driver licence in order to perform his work. The evidence at the investigation meeting was clear in that Mr Dahm had prior knowledge, albeit following the accident, that Mr Richards did not have a valid licence but was permitted to continue to work. I do not accept in those circumstances that it was a requirement. Regardless, such as the dismissal could in any way be said to be attributable to that issue, the matter was not

² Employment Relations Act 2000, s 103A.

put to Mr Richards before the action was taken and the dismissal was absent procedural justification.

[46] It is also the case that a substantially different approach could have been taken by LTGL once it became aware that Mr Richards was asserting his employment had been terminated. It could have at that point clarified with Mr Richards that his employment had not been terminated, without seeking to rely on the relationship having been terminated by Mr Richards, and instead put its concerns to Mr Richards for response. I find that a fair and reasonable employer could not have relied on Mr Richards as having terminated the employment by his own actions in all of the circumstances at the time.

[47] I find that the dismissal was both procedurally and substantively unjustified.

Is Mr Richards entitled to remedies?

Is Mr Richards entitled to compensation for lost wages?

[48] Mr Richards initially sought compensation for lost wages. However, that claim was withdrawn and I need not deal with it further.

Is Mr Richards entitled to compensation for humiliation, loss of dignity and injury to feelings?

[49] Mr Richards says that the dismissal had a huge impact, that it impacted his family due to the working relationship between his mother and LTGL, and that he had to move towns to find work. He says his earnings from ACC were changed because of the dismissal and that he was embarrassed by having to borrow money from friends and family. In terms of the impact, Mr Richards also says that the dismissal has impacted his confidence.

[50] I accept that Mr Richards was impacted by the dismissal. However, I consider the impact on Mr Richards to have been relatively low level. Such as his relationships have been impacted, I consider that more likely to have resulted from his own actions. Further, I am not satisfied that it was necessary for Mr Richards to have relocated in order to find alternative work.

[51] I order, subject to any reduction on account of contribution, that LTGL make payment to Mr Richards, within 28 days of this determination, of \$12,000 as compensation for humiliation, loss of dignity and injury to feelings.

Contribution

[52] Section 124 of the Act requires that I consider the extent to which Mr Richards' actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.³

[53] I am satisfied that Mr Richards' conduct contributed to the situation giving rise to the personal grievance. Mr Richards failed to communicate with his employer and to provide an explanation for his absence from work. While I have found that LTGL's actions were not justified, I find that those actions were borne out of a somewhat understandable frustration with Mr Richards and his failure to attend work or to otherwise communicate as to his condition. Mr Richards view that ACC would provide the relevant information to his employer was unreasonable regardless of whether such a request was made of ACC.

[54] While Mr Richards was told he could not return to work until he had a full clearance, Mr Richards also failed in my view to be active and constructive in maintaining the employment relationship when he failed to contact LTGL about the situation following his communications with the OT. While he says he considered he was dismissed on 22 June 2023, I have found that was not the case. I also find there was good reason for him to contact LTGL to verify or otherwise find out what the situation with his employment was. Indeed, the OT suggested Mr Richards contact Mr Dahm.

[55] While Mr Dahm was frustrated by various matters, the basis for the dismissal was the alleged lack of communication regarding the return to work. The driver licence issues was effectively an add on and I do not consider the issue one that contributed in any meaningful way to the situation giving rise to the grievance. LTGL were content to proceed with the employment without having taken any disciplinary action regarding that issue and I do not consider there is a sound basis on which it could be said to be relevant to the dismissal, even taking a broad approach.

[56] I consider a reduction in compensation of 20 percent is warranted in all of the circumstances and I order that the LTGL make payment to Mr Richards, within 28 days

³ Employment Relations Act 2000, s 124.

of this determination, of the sum of \$9,600 as compensation for humiliation, loss of dignity, and injury to feelings.

Breach of good faith

[57] I find that, such that any of the actions taken by LTGL, including by Mr Dahm considering the continuation of Mr Richards employment as a “low priority”, were not deliberate, serious and sustained. The actions do not rise to the level for which the imposition of a penalty would be appropriate.

[58] In addition, I record that I would in any event have declined to impose a penalty in terms of s 4A of the Act. I do not consider doing so would be appropriate in circumstances where Mr Dahm’s approach was borne of some understandable frustration with Mr Richards on account of his failure to communicate which was inconsistent with his duty of good faith.

Provision of wage and time records

[59] A letter was sent on behalf of Mr Richards raising a personal grievance on 6 September 2023. The letter asserted that Mr Richards had been dismissed from his employment on 18 June 2023. The letter included the statement “we formally request that time and wage records be sent by return email”. Mr Richards contends that LTGL first provided any records on 4 June 2024 and that even then they were inaccurate. I accept that to the extent the records were provided they were significantly delayed.

[60] I am satisfied that LTGL failed to comply with s 130(2) of the Act in that it did not immediately provide access to or a copy of the relevant records.

[61] I have applied the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*⁴ and had regard to the mandatory considerations at s 133A of the Act.

[62] The maximum penalty in this case for a single breach is \$20,000.⁵ There is only a single breach in relation to which I need to consider further the issue of penalty. The breach is not trivial and compliance with the statutory requirement to provide access to such records is of considerable importance.

⁴ [2016] NZEmpC 143.

⁵ Employment Relations Act 2000, s 135(2)(b).

[63] The request to provide wages and time records should have been responded to much earlier. However, I consider the absence of any follow up for a period of one year is also indicative of there being no pressing basis for the request being made and there being no significant impact on Mr Richards from the non-provision of the records at the time. I also consider the breach to be negligent as opposed to deliberate.

[64] I am not satisfied there is any basis on which any part of the penalty should be paid to Mr Richards.

[65] I order that LTGL make payment, within 28 days, of a penalty of \$1,000 for failing to immediately provide a copy of Mr Richards wages and time record in accordance with s 130(4) of the Act. The whole of that sum is to be paid to the Authority via the Crown account.

Summary of orders

[66] Lawns Trees and Gardens Limited is ordered, within 28 days of the date of this determination, to make payment of:

- (a) to Mr Richards of \$9,600 as compensation for humiliation, loss of dignity and injury to feelings; and
- (b) a penalty of \$1,000 for failing to immediately provide a copy of Mr Richards wages and time record in accordance with s 130(4) of the Act. The whole of that sum is to be paid to the Authority via the Crown account.

Costs

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

[68] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Richards 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 LTGL 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.

[69] 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.⁶

Rowan Anderson
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1