

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Shan Mohammed Ali (Applicant)
AND AAA Parts & Auto Services Limited (Respondent)
REPRESENTATIVES Applicant in person
Arshad Fayyaz, director, for respondent
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 15 March 2007
DATE OF DETERMINATION 4 April 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant says he was unjustifiably dismissed without warning on 27 November 2006 after returning from a holiday. He says he had worked as a mechanic for the respondent from May 2005 without problems, except for what he called occasional interference from its director, Arshad Fayyaz.

[2] The respondent's business is a suburban garage repairing cars and providing warrants of fitness. Mr Fayyaz is the owner and manager. He says the applicant was dismissed after three warnings for poor performance and after issues over quality of work, working to time, and dealing with customers were raised and discussed with the applicant.

[3] The matter was not resolved at mediation. In investigating this matter I had written witness statements from the applicant; the applicant's wife, Yashmin Mohammed Ali; two other employees, Jitendra Naidu and Avinesh Narain; and from Mr Fayyaz. In the investigation meeting I heard sworn evidence from each of these witnesses as well as the brother-in-law of Mr Fayyaz, Abdul Rahman; and a trainee employed by the respondent, Ravin Prasad.

The issues

[4] In asking whether this dismissal of this kind was justified, the Authority considers on an objective basis whether what the employer did in dismissing the applicant for poor performance, and how the employer carried out the dismissal, were what a fair and reasonable employer would have done in the circumstances.

[5] The standard for dealing with alleged poor performance is well-established in case law: *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, 681. A fair and reasonable employer will put the perceived performance problem or problems squarely to the employee. Measures to address the problems will be discussed, along with any assistance needed by the employee, in order to meet necessary targets or outcomes. An employee will be given an opportunity to improve and progress towards improvement will be reviewed with the employee. If the employee fails to improve, and is given an opportunity to explain why expected outcomes were not achieved but cannot adequately do so, the employee may be dismissed. At each stage of this process, the employee will be provided with specific information about the perceived shortcomings and have the opportunity to be accompanied in

meetings with the employer by a representative or support person.

[6] The issues to be resolved in this case are:

- (i) was the applicant fairly warned of alleged poor performance, with specific information on the problems and clear steps on what was needed to improve?
- (ii) Was his subsequent dismissal carried out in a fair way?
- (iii) If the dismissal was not carried out in a fair way, what remedies is he entitled to?

The warning process

[7] There is a sharp conflict of evidence between the applicant and Mr Fayyaz on whether letters of warning were issued before the dismissal.

[8] Mr Fayyaz says that the applicant was given a verbal warning on 19 April 2006 and was later issued with written warnings on 21 July 2006 and 31 October 2006. He produced copies of letters of warnings bearing these dates and addressed to the applicant at his home address. He says that the last letter was handed to the applicant who refused to take it.

[9] The applicant denies receiving or refusing to receive any such letters. He also denies the truth of allegations made in them about the quality of his work or his attitude to his work.

[10] I do not need to resolve this conflict of evidence, or make credibility findings to prefer the evidence of one man over the other. That is because on the evidence of Mr Fayyaz alone, I find that the warning process – if it were as he describes it – was unfair. That is for the following reasons.

[11] Mr Fayyaz says he talked to the applicant on 19 April 2006 about what he called "*lots of general issues*". He described these to me as being about "*too much mucking around*". He says that he called the applicant to the main foyer of the office and "*told him to behave himself and work properly*". Asked whether he talked with the applicant about any specific problems, Mr Fayyaz could recall discussing the example of one car. He did not discuss specific work problems or measurable targets because the applicant "*knew what was going on*".

[12] In the letter dated 21 July 2006 that Mr Fayyaz says he gave the applicant on that day, Mr Fayyaz referred to the 19 April discussion as a "*first verbal warning ... for non-performance at work*".

[13] The 21 July letter describes itself as a three-month review. It says the performance of the applicant has been watched closely since 19 April. It says that "*so many cars ... have been deregistered waiting to be repaired and the jobs that you take up do not get finished till its time for you to get your wages*". He is told that he is being given one last chance and the warning will be reviewed again in three months. If there is no improvement or change in attitude he will be issued with a second warning, and "*after that it is dismissal*".

[14] Mr Fayyaz told me that he did not have any further meeting with the applicant before issuing the 21 July letter. No specific information was prepared or put to the applicant. No specific measures or targets were discussed and set.

[15] Mr Fayyaz says the applicant refused to accept a further letter of warning on 31 October. The letter says the applicant's performance and attitude had not changed over the previous three months. A specific example is given of the applicant allegedly giving a customer "*an expensive quote*" to have work done through the respondent's garage but then arranging to do the job privately. The letter alleges that the customer was not happy with work done and complained to Mr Fayyaz.

[16] Mr Fayyaz accepted that he did not meet with the applicant or talk with him about specific concerns before issuing the second written warning.

[17] Explaining the law on warnings, the learned authors of *Brookers Employment Law* at 103.8(10) state that:

the purpose of warnings is to give the employee an opportunity to improve or otherwise allay the employer's concerns, rather than create a pretext for a dismissal. It is not a "magic wand" creating a ground for dismissal: it is a step to try to avert dismissal. The warning must be explicit to be fair. It should describe how an employee's behaviour is deemed to be unsatisfactory, give clear information about what improvement will meet the employer's requirements, and how improvement will be measured

[18] Neither the July nor October written warnings meet that standard. Rather they are in the nature of what is colloquially described as a general "dressing down". The applicant is told that his work is not good enough but not what is specifically wrong and what is required to improve. And, on the respondent's own account, the applicant was not given an opportunity to explain or respond to the general allegations before both warnings were issued. I cannot say whether responses by the applicant would have had any substance but the point is that he did not have a reasonable chance to defend himself before his employer took these disciplinary steps against him.

[19] In light of this I find that the warnings on which the dismissal was subsequently based were unjustified.

The dismissal

[20] Similarly I find that how Mr Fayyaz went about dismissing the applicant was also unfair – again on the basis of Mr Fayyaz's own account alone.

[21] The applicant was on leave for two weeks in November 2006. He went to Fiji on family business.

[22] Mr Fayyaz knew the applicant had returned to Auckland and was ready to start work because the applicant called into the garage on a Saturday to say he would be back at work on the following Monday, that is 27 November 2006.

[23] Mr Fayyaz arranged for his father to come into work with him at opening time on the Monday. This was earlier than Mr Fayyaz senior usually came to the garage. Mr Fayyaz account of events continued as follows:

[The applicant] walks into the small entrance of the office, into the foyer. Only me and Dad were there. That's where I told him, sorry Ali you are no longer employed here and it's over. He says: "Is that so". I said: "Yes". At the same time I gave him a piece of paper saying what I owed him. He did not question the amount.

[24] The applicant left the premises without argument. Mr Fayyaz took the applicant's subdued manner as acceptance that his dismissal was expected and accepted. He considered that otherwise the applicant would have "put up a fight" and asked why he was being dismissed.

[25] Mr Fayyaz said that the only subsequent discussion was about the applicant's final pay, which he said was to be three days wages owed and three weeks holiday pay, including pay for two weeks leave just taken but not yet paid. Mr Fayyaz said the applicant agreed to this being paid in instalments over a five week period. Those amounts have not been paid but Mr Fayyaz said he had every intention of paying once he knew the outcome of the present proceedings.

[26] At no stage was the applicant given advance notice of a meeting to discuss his dismissal

or an opportunity to bring a representative. He was neither told the reason that his employer was intending to dismiss him nor given the opportunity to comment on those reasons before the employer took the decision to dismiss.

[27] Because Mr Fayyaz failed to follow the minimum procedural requirements, I find that how the respondent carried out the dismissal was not what a fair and reasonable employer would have done in all the circumstances.

[28] I cannot say that the employer's action in deciding to dismiss the applicant was nevertheless justified because the respondent's evidence did not compellingly establish any of the specific allegations made. Its specific concerns about the applicant amounted to complaints from two customers that repairs had taken too long, another that the applicant had made "negative comments" about the business, another that he did a 'private' job for a customer which was unsatisfactory, and a statement from a young polytech trainee (with no mechanical qualifications) that he thought the applicant was slow and rude. Mr Fayyaz also gave a secondary reason for the dismissal that the applicant took too long away from work under an agreed arrangement that he could pick his son up after school.

[29] Mr Fayyaz's allegations of the applicant's poor performance were supported by the evidence of his brother-in-law Mr Ahmed and the trainee Mr Rahman. Although I did not hear from him directly, Mr Fayyaz senior, an elderly Pakistani gentleman who did not speak English but spent a lot of his time at the garage, was also said by his son to support the respondent's contention that the applicant did not work hard enough and did not deal well with customers.

[30] Against this was the applicant's outright denial of the allegations made, supported by the statements of his two former colleagues who were both still employed by the respondent, Mr Naidu and Mr Narain. Both of these two men were critical of the attitude of Mr Fayyaz to them and the applicant. However I consider that the applicant must have been aware of Mr Fayyaz's general dissatisfaction with his work. He acknowledged what he called "occasional interference". From the evidence given it appears that the applicant and the other employees resented direction by Mr Fayyaz who was a businessman but had no mechanical or other motor vehicle trade training. Mr Fayyaz in turn was frustrated by what he seems to have seen as a lack of deference from his staff to his position as the owner and manager.

[31] While acknowledging this background of general tension, I find that the respondent failed to provide compelling evidence that its specific concerns about the applicant's work justified his dismissal.

Determination

[32] For the reasons given I find that the applicant was unjustifiably dismissed by the respondent on 27 November 2007. He has a personal grievance and is entitled to remedies.

Remedies

[33] The applicant seeks lost wages, holiday pay, and compensation for the hurt and humiliation of dismissal.

[34] Before addressing remedies, I must address a further element of the respondent's conduct following the dismissal.

[35] The applicant, a Fijian citizen of Indian origin, was employed under a work permit which required him to work for a specified employer, the respondent.

[36] Mr Fayyaz told me he did not advise the Immigration Service that the applicant was no longer employed until 4 December 2006. On that date he sent a fax to the Immigration Service asking it to cancel the applicant's work permit. Mr Fayyaz told me that he only contacted the Immigration Service once the applicant "threatened to take me to court" over the dismissal and payment of his outstanding wages.

[37] The respondent was entitled to advise the Immigration Service of the end of its relationship with the respondent. However Mr Fayyaz's motive for doing so in this case was not proper. It was vindictive and intended to hinder the applicant exercising his statutory rights to make a personal grievance application.

[38] It resulted in the Immigration Service issuing the applicant with a notice in mid-December 2006 to leave the country by early January 2007. That deadline was subsequently extended once the applicant was able to advise the Immigration Service of the Authority's timetable for dealing with his claim.

[39] Meanwhile the applicant was able to secure a new position with another company and was issued with a new work permit. He began his new job on 12 March 2006. From 27 November 2006 until 12 March 2007 he had no income. Without a valid work permit he was not able to take paid employment. He, his wife and their children survived during that period on his wife's earnings from a job as a kitchen hand for a catering company.

Lost wages

[40] But for his unjustified dismissal, the applicant would have worked through the 15 week period from 27 November 2006 to 12 March 2007 and received wages and holiday pay. Accordingly, under s123(1)(b) of the Employment Relations Act 2000 ("the Act"), the applicant is awarded lost wages for that 15 week period.

[41] He is also awarded a further three days wages and three weeks annual leave that Mr Fayyaz accepted was due to the applicant, being the balance of his wages and holiday pay owed at the date of the dismissal.

[42] Based on the applicant's gross salary of \$41,184, the combined amount of wages, lost wages and annual leave is 18 weeks and three days for which the applicant is owed \$14,731.20 gross.

Compensation

[43] I am satisfied that the applicant is entitled to a further award in compensation for the humiliation and distress of his dismissal.

[44] His wife gave evidence of sleeplessness suffered by the applicant following his dismissal, particularly after the family was issued with a notice requiring that they leave the country in a fortnight. That distress was greater than it may otherwise have been because of Mr Fayyaz's motive in contacting the Immigration Service.

[45] Under section 123(1)(c)(i) of the Act the applicant is awarded a further \$4000 in compensation for the humiliation, loss of dignity and injury to his feelings occasioned by the actions of the employer.

Contribution

[46] In deciding remedies I must also consider, under s124 of the Act, whether the applicant's actions contributed to the situation giving rise to his grievance and require a reduction of the remedies awarded.

[47] Weighing the evidence of all the witnesses I find there was not enough to satisfactorily confirm that the quality of the applicant's work was such as to amount to blameworthy conduct requiring the reduction of remedies awarded to him.

Costs

[48] The applicant represented himself. There is no order for costs.

Summary of orders

[49] The respondent is to pay to the applicant, the following amounts:

- (i) \$14,731.20 (less any applicable PAYE) under s123(1)(b) of the Act in lost wages, holiday pay and wages owed; and
- (ii) \$4000 (without deduction) under s123(1)(c)(i) of the Act.

Robin Arthur
Member of Employment Relations Authority