

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Lee William Barnett (Applicant)

AND Simon McCloud, trading as European Wholesale Cars at 830 Great South Road, Penrose, Auckland (Respondent)

REPRESENTATIVES Francis Sabbineni for Applicant
No appearance for Respondent

MEMBER OF AUTHORITY Robin Arthur

INVESTIGATION MEETING 28 March 2007

DATE OF DETERMINATION 29 March 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant says he was summarily dismissed on 5 September 2006 without reason or opportunity to respond to any concerns his employer may have had.

[2] The respondent has not lodged a statement in reply. Neither did he attend the investigation meeting.

[3] I am satisfied that the respondent received the statement of problem because he was faxed a second copy at his request on 1 November 2006. Two days later an Authority support officer spoke with the respondent who said he would not lodge a statement in reply because the applicant was a casual employee who worked only as required.

[4] I am also satisfied that the respondent was properly notified in January 2007 of the investigation meeting. The notice was delivered by courier post to his business address and signed for, according to track and trace records, by "Simon".

[5] Shortly after the appointed time for the investigation meeting I had an Authority support officer telephone the respondent. The respondent advised that he was in Queenstown and would not attend the meeting. He repeated his view that the applicant had been a casual employee only and could not therefore have been dismissed.

[6] As advised in the statutory form of the investigation meeting notice, if the respondent does not attend the investigation meeting, the Authority may issue a determination in favour of the applicant without hearing evidence from the respondent. That is the potential consequence of the respondent in this matter choosing not to take his opportunity to respond to the applicant's claim.

The facts

[7] The applicant provided a written brief and gave sworn answers to questions at the investigation meeting. Having listened carefully to the applicant's answers, I find his evidence, more likely than not, fairly describes his employment and dismissal by the respondent.

[8] He previously worked as a car painter but needed to change jobs because paint fumes aggravated health problems, specifically asthma.

[9] He answered a newspaper advertisement for a job as a car groomer at a business called European Wholesale Cars where a friend also worked. He was interviewed by the floor manager and offered a six-day-a-week job working 9am to 6.30pm but could not work weekends or evenings due to family commitments. It was agreed he would work Monday to Friday, 9am to 5.30pm and occasional Saturdays.

[10] During a two week notice period for his previous job he worked two days in the first week and two days in the second week at his new job. On the third week, in late July, he started full time at the cargrooming job. The job involved washing cars, taking cars for service and warrants, and arranging license plates for cars that had been sold.

[11] His starting pay rate was \$12 an hour. During the third week the respondent told the applicant he was impressed with his work and would increase his hourly rate to \$14 an hour.

[12] The applicant asked for a written agreement which had been promised by the floor manager at the job interview. The floor manager had since left the job. The respondent said that a "contract" was being prepared and would be given to the applicant later.

[13] On two occasions in August the applicant was either not paid his wages or short paid. This resulted in the applicant incurring dishonour fees with his bank for automatic payments which were not able to be processed.

[14] The applicant asked the respondent to contribute to the \$60 cost of the dishonour fees and to ensure his wages were paid. The respondent told the applicant he would take care of it.

[15] On 4 September the applicant was paid wages. The following morning he spoke with the respondent about whether this included a contribution to the dishonour fees. He was told to get on with his work.

[16] While washing cars in the yard he and a salesman were asked by builders working at the neighbouring property if they would move some cars to allow access for a cherry picker. They began moving cars but stopped with the respondent came out of the office. The respondent demanded to know what was going on. He swore at the salesman and told the builders to get off his property. He then told the applicant to move the cars back.

[17] Shortly after the applicant went to the respondent's office to return keys. The applicant asked the respondent about a cheque for a paint job that he had arranged a car painter to carry out some weeks earlier.

[18] The respondent then told the applicant to "get the f*** off my property". The applicant was told to pack his belongings and leave within five minutes.

[19] The applicant says that the respondent also said not to come back or telephone and watched him until he left the premises.

[20] Later during the day the applicant rang the respondent's office a number of times and managed to speak with the respondent twice. On one occasion he asked why he had been dismissed. He says the respondent replied: "Because you pissed me off. Don't ring me again". The respondent then terminated the call.

The merits

[21] Against the respondent's allegation that the applicant was a casual employee, I prefer the applicant's evidence that he was employed to work full-time for the respondent on an ongoing basis. He had a prior job which he is not likely to have left for the uncertainty of casual work.

[22] The applicant was sent away from his job on 5 September 2006 in a manner which was unequivocally a dismissal.

[23] Under section 103A of the Employment Relations Act 2000 ("the Act") the question of whether a dismissal is justified is to be determined objectively by considering whether what the employer did and how he did it was what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[24] It may be that the applicant questioning his pay, seeking a contribution to his dishonour fees, asking for the paint job cheque or moving cars in the yards without checking with the respondent first did raise some legitimate concern or issue for the respondent. A fair and reasonable employer with concerns would have stated them and asked for the employee's comments or explanations before deciding whether any disciplinary or other action was required. This respondent did not do that. Rather he summarily and abruptly dismissed the applicant in circumstances where, on the basis of the evidence available to me, there appear to have been no real issues of poor performance or misconduct.

[25] On that basis I find that the applicant's dismissal on 5 September 2006 was unjustified. He has a personal grievance and is entitled to remedies.

[26] Before addressing the type and quantity of remedies, I deal with the legal status of the respondent who is liable for such remedies.

[27] The applicant filed his claim against "Simon McLeod trading as European Wholesale Cars".

[28] I have not been able to confirm the legal status and ownership of the business trading under the name European Wholesale Cars at 830 Great South Road, Penrose.

[30] The applicant provided me with a business card for European Wholesale Cars with the name of "Simon McLeod" over the letters "CEO". It carries the same mobile phone as that on which the Authority Support Officer spoke to the respondent.

[29] The business has a website which refers to "a CEO". It does not name the CEO or any registered company associated with the business. The website address is www.autoways.co.nz.

[31] It is not clear whether this business is associated with a registered company called Autoways Limited (579123). The respondent is not a director or shareholder of that company. The director of that company is Anthony Steven Radisich. Mr Radisich is also a director of RAS International Limited which has another director called Simon James McLeod.

[32] The applicant's bank statements show he was paid by direct credit on two occasions in August 2006 from an entity called "Autoways LMVD".

[33] The Motor Vehicle Traders Register lists Autoways LMVD as a trading name, along with European Wholesale Cars, of Ron McDonald Limited (68165), a company of which Mr Radisich is also a director.

[34] The applicant was not provided with a written employment agreement, in breach of the employer's obligations under s65 of the Act. A function of such an agreement is to identify the party entering the agreement as the employer.

[35] In the absence of such written information, the applicant should not be disadvantaged because his employer has breached its statutory obligations. His evidence, in answer to questions at the investigation meeting, was that his employer was Simon McLeod. He had heard the respondent describe the business as belonging to him. He understood that the floor manager employed him on behalf of Mr McLeod as the owner of the business. Accordingly I

am satisfied that the named respondent was the applicant's employer and must bear the personal obligation of any remedies ordered.

Remedies

[36] The applicant was without work for four weeks following his dismissal. I am satisfied he took adequate steps to mitigate his loss of wages, including attending a WINZ seminar which resulted in him securing a new job at \$12 an hour and led to his present job with a courier firm. Immediately following his dismissal he also looked for local jobs by walking from business to business asking if they had vacancies.

[37] It is not clear to me that the applicant was paid for all the days that he worked or any or all of his entitlements under the Holidays Act 2003. There was no sufficient information to confirm and quantify such shortfalls and order reimbursement.

[38] Under s123(1)(b) the respondent is ordered to reimburse the applicant for four weeks wages lost as a result of the personal grievance, that is the sum of \$2240 (less applicable PAYE).

[39] The applicant says he was humiliated by being abruptly dismissed within hearing distance of the salesman and an accountant on the premises. He subsequently suffered sleepless nights worrying how he would pay bills, including rent and food for his young daughter and his wife. His wife was pregnant at the time. He was unable to borrow money from the bank without a job. He relied on his parents to feed him, his wife and children until he was able to get a new job.

[40] I am satisfied that the abrupt manner of the dismissal caused humiliation, loss of dignity and injury to feelings of the applicant which warrants compensation.

[41] Under s123(1)(c)(i) of the Act the respondent is ordered to pay the applicant \$4000 in compensation for humiliation and injury to feelings.

[42] I have considered whether any actions of the employee contributed towards the situation giving rise to the personal grievance and warrant reduction of remedies. I am satisfied that no such reduction for contribution is required.

[43] The applicant is entitled to his costs in bringing this claim. The investigation meeting took one hour. The applicant had lodged a statement of problem and a witness statement. I consider an appropriate award of costs is \$500 and reimbursement of his filing fee of \$70.

Summary of orders

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

- (i) \$2240 (less applicable PAYE) in lost wages under s123(1)(b) of the Act; and
- (ii) \$4000 (without deduction) under s123(1)(c)(i) of the Act; and
- (iii) \$500 costs; and
- (iv) \$70 in reimbursement of his filing fee.

Robin Arthur
Member of Employment Relations Authority