

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

5098264  
AA 395/07

BETWEEN                      DAVID BUSING  
   Applicant  
  
AND                                AUTOTERMINAL NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Careen Busing for Applicant  
   Andrea Twaddle for Respondent  
  
Investigation Meeting      19 November 2007 at Hamilton  
  
Submissions Received      30 November 2007  
  
Determination:              17 December 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr David Busing was employed by Autoterminal New Zealand Ltd (“Autoterminal”) from 11 August 2005 until he tendered his resignation on 18 April 2007.

[2] Autoterminal is a wholesale car importer. Mr Busing’s original engagement was in compliance but he quickly progressed to become a yard staff member based in Auckland. In 2006 Mr Busing was invited to transfer to Hamilton to take up the position of Yard Manager on an hourly rate of \$14.00 per hour. Mr Busing was also provided with a company cell phone which he was entitled to use for personal calls together with a petrol allowance of one full tank of petrol to the value of \$65.00 per week.

[3] Following his move to Hamilton, Mr Busing was offered an opportunity to take up a permanent sales role with the company, which he accepted. Mr Busing was employed in the sales role in January 2007. A new written employment agreement

reflecting the change in Mr Busing's status as a salesperson, was provided to Mr Busing, however he never signed that agreement.

[4] After working in the sales role for six weeks, Mr Busing asked to be returned to the yard. Mr Busing was moved, however there is a dispute between the parties as to what his role was after 25 February 2007. On 18 April 2007, following a period of sick leave, Mr Busing resigned from his position with Autoterminal.

[5] The nature of Mr Busing's claim is that his resignation ought to be regarded as a constructive dismissal and that his dismissal was unjustifiable. In deciding whether the circumstances of this case gave rise to a constructive dismissal I am guided by the principles enunciated by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

[6] Further, following the approach of the Court in its recent decision *Gorrie Fuel (SI) Ltd v Gittoes*, unreported, 8 November 2007, Couch J, CC21/07, if I find that this was a constructive dismissal, I must then determine whether it was justifiable in accordance with s.103A of the Employment Relations Act 2000.

[7] Applying those principals to this matter, the issues are:

- Was there a breach of duty by Autoterminal to Mr Busing?
- If so, was that breach sufficiently serious to make it reasonably foreseeable that Mr Busing would resign as a result?
- If so, did Mr Busing actually resign as a result of that breach?
- If Mr Busing was constructively dismissed, were the actions of Autoterminal those which a fair and reasonable employer would have taken in the circumstances?

### **Background**

[8] Mr Busing told me that when he commenced employment with Autoterminal in 2005 he worked as a groomer washing cars and moving them around the yard as requested. He said a few months after his engagement he was promoted to the position of "...yardie...".

[9] It was common ground that Mr Busing's duties as a yardie required him to get stock out for sales reps; maintain the cars in a respectable manner for dealers to view which entailed grooming and washing the cars and ensuring mechanical and maintenance work was undertaken; move the stock around as requested; unload cars off transport trucks; put cars where they needed to be; and if customers came in and asked for a particular car, he would assist them with obtaining that car.

[10] Mr Busing says he was took his instructions on his daily tasks from the inventory manager and/or the salespeople. Ms Cindy Crafford, the HR Manager for Autoterminal says that in his role as a yardie Mr Busing was also responsible for maintaining the tracker system and for arranging panel and paint quotes. Mr Busing denies yardies had responsibility in these two areas.

[11] When Mr Busing worked in Auckland, Autoterminal had four or five employees working as yardies plus two yard managers (there were two yards). During that time Mr Busing and Mr Danny Williams, the company purchaser and a salesman in Auckland at the time, established a close friendship which extended beyond their work environment. Mr Busing spent a lot of time with Mr Williams and his family.

### **The move to Hamilton**

[12] Mr Williams was asked by Autoterminal to move to Hamilton and establish a new branch. When asked who he needed to assist him Mr Williams advised that he would like to take Mr Busing as he had developed useful skills and experience in his time at Autoterminal in Auckland and had also demonstrated that he had the necessary potential to develop.

[13] When Mr Williams asked Mr Busing, he agreed to move to Hamilton to take up a new position of Yard Manager. Aside from Mr Busing there was one other person employed in the yard in Hamilton. Mr Busing saw the shift to Hamilton as a career move. As already set out, Mr Busing's terms and conditions of employment in Hamilton included payment at the hourly rate of \$14.00 per hour, provision of a company cell phone which he was entitled to use for personal calls, together with a petrol allowance of one full tank of petrol to the value of \$65.00 per week

[14] The petrol allowance was negotiated in Mr Busing's favour as he had family in Huntly, where he would live on his move to Hamilton, which necessitated him commuting from Huntly to Hamilton for work.

[15] Mr Busing's new role required him to learn and use Autoterminal's tracker system, which he did.

### **The promotion to Salesperson**

[16] In early December 2006 one of the Hamilton based sales people resigned and left Autoterminal. Mr Williams considered Mr Busing had established good relationships with the clients, and invited Mr Busing to think about taking up the vacancy. Having thought about it, Mr Busing decided to take up the opportunity to move into Sales.

[17] At this point the views of what was agreed differ. Mr Busing says he accepted the offer of the salesperson role on the condition that he could return to "...his old job..." meaning his job as yard manager. Mr Williams says it was agreed that if things did not work out Mr Busing could return to the yard, but no promises were made that he would retain his previous position as yard manager.

[18] Not long after his appointment as salesperson, Ms Cindy Crafford, HR Manager, couriered a copy of Mr Busing's new employment agreement to him. The agreement set out his new terms and conditions of employment. Included in the terms were provisions for a probation period and remuneration. For the first three months Mr Busing was to be subject to a probationary period and for that period would be paid a retainer. Following successful completion of his probationary period as a salesperson, the company would commence paying Mr Busing on the basis of commission only.

[19] Mr Busing was not happy with the remuneration package and even though he was asked several times, he never signed the employment agreement and neither did he advise Ms Crafford what it was that was stopping him from signing the agreement.

[20] I found Mr Busing's evidence to be confused in respect of the new employment agreement. The agreement he received was clearly for an ongoing permanent role,

however, at various times during the investigation meeting and in his written statement Mr Busing refers to being employed in a temporary capacity only. Further, Mr Busing told me he received the contract towards the end of the three month probationary period, however, Mr Busing was only employed in the salesperson role for six weeks.

[21] Ms Crafford gave evidence that she had couriered the employment agreement down to Mr Busing during the first week of his engagement as a salesperson. Given the confusion in Mr Busing's evidence I have preferred Ms Crafford's evidence and find that the employment agreement was provided to Mr Busing during the week of 15 January 2007.

[22] Mr Busing says that during the period he was working as a salesperson he also continued with his yard manager duties including doing quotes for panel and paint, moving cars, entering computer locations status, tyre repair, quotations for tyres, weekly scanning dealer yards and weekly scanning of the Hamilton Autoterminal yard. Mr Busing said none of the other sales people did any of these tasks and that the only other person who had done any of these was Mr Williams.

### **The move back to the yard**

[23] In mid February 2007, Mr Busing asked Mr Williams if he could move back to the yard as he did not like the sales environment. Mr Busing says that on 25 February 2007 he returned to his old job of yard manager, however, Mr Williams says Mr Busing was moved back to the yard in a general position, not that as manager.

[24] It was common ground that when Mr Busing approached Mr Williams and requested a return to the yard, Mr Williams agreed to investigate whether it was possible and advised Mr Busing that he would need to get upper management approval. It was also common ground that there were no vacancies in the yard at the time.

[25] Mr Williams says, and I accept, that he negotiated with management to return Mr Busing to the yard staff and to keep him on the rate that had been applicable to his previous position.

[26] During Mr Busing's short stint in Sales, no new yard manager had been appointed. Mr Williams told me there was no requirement for a yard manager, as he himself had taken up some of the work, and everyone in sales had also taken on responsibility for some of the yard duties. Mr Williams said everyone shared the tasks and worked as a team.

[27] Even though Mr Busing acknowledged that Mr Williams had made special accommodations to allow him to return to yard duties, Mr Busing was adamant at the investigation meeting that when he had enquired about moving out of sales he had told Mr Williams that he wanted to go back to his old job as a yard manager.

[28] I am satisfied that it is more likely than not that Mr Busing was not put back into the yard manager position when he asked to be moved out of the sales role. I am supported in my conclusions by a contemporaneous email from Mr Williams to Ms Crafford where he writes:

David is to return to Hamilton's yard staff, as of this Monday (25<sup>th</sup> February). Please return him to his original pay schedule for hourly rates. Also, can you send down his yard uniform to us as well? I will arrange for the return of his fuel card and d plate.

[29] There is no mention in this email that Mr Busing was returning to the position of yard manager. Further, this email which was copied to Mr Busing, Mr Williams states Mr Busing is returning to the "...yard staff..." and not as yard manager. Mr Busing never raised any issues with regard to the wording in this email.

[30] Mr Busing says that about a week after he started back in the yard, he was told that he would no longer be working as the yard manager and that he was being demoted to the position of yardie. I do not accept that evidence. As set out below, a discussion was held with Mr Busing on 27 March 2007, which was a month after he returned to the yard, during which it was discussed that another employee, Mr Artie King would be offered the position of yard manager.

[31] I am satisfied it is more likely than not that the difficulties between Mr Busing and Mr King, on Mr Busing's return to the yard, arose from Mr Busing's misapprehension that he had been returned to the yard manager's role. Mr Busing clearly believed he had authority and control of what, how and when Mr King

undertook certain duties, while Mr King, in all probability, believed he reported to Mr Williams and was not required to undertake instructions provided by Mr Busing.

### **March 2007**

[32] It was common ground that after his return to the yard duties Mr Busing and his fellow employee Mr Artie King did not get on very well. Mr Busing said that he would tell Mr King to do something but he did not like taking instructions from him. Mr Busing put this down to the age difference (Mr King was an older man while Mr Busing was much younger). Mr Busing told me Mr King knew he was the yard manager because he had told him so.

[33] It was common ground that in Mr Busing's absence, Mr King had made changes to the way yard duties were carried out and had generally reorganised things. Mr Busing acknowledged at the investigation meeting that it had been difficult coming back to the yard duties with all the changes.

[34] On 26 March 2007, Mr King advised Mr Williams that he could no longer work with Mr Busing and proffered his resignation. Mr Williams had found Mr King to be a conscientious worker and was reluctant to see Mr King leave his employment. In an effort to persuade Mr King to stay, Mr Williams decided to offer Mr King the option of becoming the yard manager.

[35] Given his close working relationship and friendship with Mr Busing, Mr Williams did not wish to make any offers to Mr King without first discussing the situation with Mr Busing and making him fully aware of what was about to transpire.

[36] On 27 March 2007 Mr Williams approached Mr Busing and told him that Mr King had resigned. Mr Williams explained to Mr Busing that his relationship with Mr King was one of the main reasons for the resignation. At the investigation meeting Mr Busing was insistent that during this meeting he was told he was being demoted. However, in answer to questions Mr Busing accepted that he was not told he was being demoted but rather, that is what he believed was happening.

[37] It was common ground that Mr Williams advised Mr Busing that Mr King was being offered the yard manager position as an incentive for Mr King to remain at Autoterminal.

[38] Mr Williams says Mr Busing's reaction to his news about Mr King does not support Mr Busing's evidence at the investigation meeting that he was shocked with the news. Mr Williams told me Mr Busing asked why Mr King was being offered the position and Mr Williams told him that they did not want to lose Mr King as an employee as he was very good at what he did.

[39] Mr Williams acknowledges that he then had a conversation with Mr Busing about some performance concerns. He said it was no different from other informal chats he had had with Mr Busing where concerns about a work issue were raised and resolved. Mr Williams was adamant that the issues discussed were not being raised in a formal disciplinary sense.

[40] On 28 March Mr Busing met with Mr Williams again at which time he expressed his unhappiness with the decision to offer Mr King the yard manager position. During that meeting Mr Busing asked Mr Williams to bring Mr King into the meeting so that they could sort out their differences. Mr Busing also raised for the first time his feeling that he had been demoted.

[41] The exchange between Mr Busing and Mr Williams continued with Mr Busing asking questions about why Mr King was to be yard manager. Mr Busing expressed his unhappiness with the decision and told Mr Williams that he would have difficulty working for Mr King.

[42] It was common ground that during the discussion on 28 March 2007 Mr Williams offered to investigate a return to Auckland for Mr Busing. Mr Williams told me, and I accept, this was put on the table as Mr Williams was aware Mr Busing had maintained contact with his colleagues in Auckland and had friends in Auckland whom he met up with on a regular basis.

[43] Mr Busing says that at the end of the meeting he was so angry he wanted to hit someone. He says he had been there a long time and he had had enough.

**Mr Busing proceeds on sick leave**

[44] Following the meeting on 28 March 2007 Mr Busing proceeded on a period of sick leave from which he never returned. In a letter dated 29 March 2007 written by Mr Busing, but not received by the company until 18 April, Mr Busing set out his feeling that he had been dismissed.

[45] Mr Busing said he was very upset about the decision. Mr Busing attended his doctor who determined Mr Busing was unfit for work due to work-related stress.

[46] On 30 March 2007 Mr King declined the offer of continued employment at Autoterminal and worked out his notice period. Mr Williams attempted to make contact with Mr Busing and has provided records to the Authority which show Mr Williams rang Mr Busing's cell phone on 2 and 10 April and sent Mr Busing a text message on 2 April 2007.

[47] Contrary to that evidence Mr Busing maintained throughout the investigation process that after he left work on 28 March 2007 he never received any calls or texts from the company. When asked, Mr Busing was unable to explain why he did not go back to work or make contact with the company. At the investigation meeting Mr Busing acknowledged that he knew Mr King had resigned and left.

**Determination**

[48] I find that Mr Busing was not put back into the yard manager's role on 25 February 2007. Autoterminal accommodated Mr Busing's request to return to the yard in a situation where there was no vacancy. He was an additional staff member in that area of the business and was not the manager.

[49] Mr Busing's perception that he had returned to his old position of yard manager was not an accurate perception. However, Autoterminal must take some responsibility for this misunderstanding. There is no evidence that a new employment agreement setting out Mr Busing's new terms and conditions of employment when he returned to the yard were ever provided. Section 65 of the Employment Relations Act requires an agreement to include, among other things, a description of the work to be

performed. Had this occurred in this case I am satisfied it is more likely than not that Mr Busing would have been disabused of his misapprehension early on.

[50] The failure to provide a written employment agreement in these circumstances constitutes a breach of the employer's duty. However, I am not satisfied the breach was so serious that it was reasonably foreseeable that Mr Busing would resign. Further, I find Autoterminal took steps to contact Mr Busing to discuss his situation, but Mr Busing failed to acknowledge or return any calls. Had he done so, Mr Busing would have had an opportunity to raise his concerns and provide the opportunity for Autoterminal to resolve them.

[51] Mr Busing was not constructively dismissed and I am unable to be of further assistance to him.

### **Breach of good faith**

[52] Mr Busing claims Autoterminal breached its statutory obligation to act in good faith during the events leading up to his resignation. I am satisfied the evidence does not support this claim and it therefore fails.

### **Costs**

[53] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority