

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 458/09
5282213**

BETWEEN DAMODARAN CHETTY
 Applicant

AND NZ QUALITY AUTO SERVICES
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Tina Wang, Counsel for Applicant
 No appearance for Respondent

Investigation Meeting: 17 December 2009

Determination: 17 December 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Damodaran Chetty ("Mr Chetty") claims arrears of wages and a personal grievance for unjustifiable dismissal. The respondent NZ Quality Auto Services Limited ("the Company") does not defend the application.

The facts

[2] Mr Chetty commenced employment with the Company in September 2004. He was employed as a mechanic/WOF Inspector. The terms of the employment were not recorded in a written individual employment agreement.

[3] On the morning of 5 November 2008, Mr Chetty says that the wife of the Company's director Ms Zhenling (Jenny) Zhang ("Ms Zhang") asked him to pass a motor vehicle for a WOF inspection that had had its number plates swapped. Mr Chetty says that he told Ms Zhang that what she had asked him to do was illegal and that he would not do it. He says Ms Zhang then told him if he was not prepared to

pass the motor vehicle then he should leave the premises and go home. Mr Chetty regarded his employment as being terminated.

[4] Mr Chetty says that at lunchtime that same day, the Company's director Mr Liu Jian (Sam) Xion ("Mr Xion") phoned him. He says Mr Xion invited him to lunch to talk and asked him not to take any further action. Mr Chetty says that he said he was not going to work for Mr Xion.

[5] At about 6.00pm that evening, Mr Chetty says that Ms Zhang arrived at his home uninvited. He says she knocked on his door for about five minutes but he did not answer. He says she left after ten minutes and leaving two bags of fruit on his doorstep.

[6] Mr Chetty says that the following day on 6 November 2008, he telephoned Ms Zhang and asked for his final pay and holiday pay. He says Ms Zhang told him to come in to the garage the following day to pick up his wages.

[7] Mr Chetty was unable to attend the garage until 10 November 2008. Mr Chetty says that he asked Mr Xion for his wages and said that he considered his dismissal was unfair and that he intended to pursue matters with the Labour Department, the LTSA and the court. He says at that point, Mr Xion ordered him off the premises.

The merits

[8] As a result of the Company's failure to take any steps to defend the application, Mr Chetty's sworn evidence is unchallenged. His evidence is accepted by the Authority.

The claim for recovery of wage arrears

[9] The Authority is satisfied that Mr Chetty is owed arrears of wages being outstanding wages for his final week's work in the gross sum of \$815.00 and holiday pay in the gross sum of \$2,673.00. The total gross sum owed to Mr Chetty is \$3,488.00. **NZ Quality Auto Services Limited is ordered to pay to Damodaran Chetty the gross sum of \$3,488.00 as arrears of wages.**

[10] As Mr Chetty has stood out of the sum due to him, I think it fit he should have interest on it. **NZ Quality Auto Services Limited is ordered to pay to Damodaran Chetty interest on the judgment sum of \$3,488.00 at the rate of 4% per annum from 5 November 2008 to the date of payment.**

The claim for unjustifiable dismissal

[11] Mr Chetty claims that his dismissal is unjustifiable. The test of justification is prescribed at section 103A of the Employment Relations Act 2000 ("the Act"):-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[12] Mr Chetty says that on 10 November 2008 he told Mr Xiong he was not happy with his dismissal and that he would pursue the matter further through the Department of Labour. I accept that evidence as the raising of a personal grievance by Mr Chetty. I further note that Mr Chetty was not provided with a written individual employment agreement at any time during his four years of service with the respondent Company.

[13] I find that when Mr Chetty refused to carry out the request Ms Zhang asked of him because he considered her request illegal, Ms Zhang told Mr Chetty to leave the premises and go home. I find that Mr Chetty was entitled to regard that direction as sending away amounting to a termination of his employment. Mr Chetty elected to affirm the respondent's repudiatory conduct and regarded his employment as at an end.

[14] I consider that no fair and reasonable employer would summarily dismiss an employee because that employee refused to commit an illegal act.

[15] I find that this dismissal does not meet the test of justification prescribed at section 103A of the Act because on an objective basis, the Company's actions and

how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

The determination

[16] **I determine that Mr Chetty was unjustifiably dismissed and he has a personal grievance for unjustifiable dismissal.**

The resolution

[17] Mr Chetty is entitled to remedies in settlement of the personal grievance found.

[18] Having made the above findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Chetty's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[19] I find that Mr Chetty did not contribute to the situation that led to the personal grievance and there is no basis to reduce either the nature or extent of any remedies to be provided to him.

Reimbursement

[20] Mr Chetty says that he was unable to find work until February 2009 because at the time he was dismissed the holiday vacation was approaching and employers were not taking on new employees.

[21] Mr Chetty claims eleven weeks lost wages as reimbursement. I am satisfied that Mr Chetty has lost wages as a result of the unjustifiable dismissal. I am further satisfied that he took steps to find alternative employment. I award him lost wages in the sum of \$8,965.00. **NZ Quality Auto Services Limited is ordered to pay to Damodaran Chetty the gross sum of \$8,965.00 as reimbursement.**

Compensation

[22] Mr Chetty says that he suffered humiliation as a result of his dismissal. He says that he was depressed and had to go to his doctor to get medication because he was unable to sleep. He says he was stressed because he had no income.

[23] Mr Chetty claims \$10,000.00. I accept that Mr Chetty has suffered hurt and humiliation, loss of dignity and injury to his feelings. His evidence does not justify an award at the level sought. Having regard to his evidence, his length of service and the circumstances of the personal grievance, I award Mr Chetty \$5,000.00 as compensation. **NZ Quality Auto Services Limited is ordered to pay to Damodaran Chetty the sum of \$5,000.00 as compensation.**

The costs

[24] In the event that costs are sought, I direct Mr Chetty's counsel to submit a memorandum on costs within 28 days of the date of this Determination. As the application is not defended, there is no need to serve that memorandum on the respondent.

Leon Robinson
Member of Employment Relations Authority