

**Attention is drawn to  
the order prohibiting  
publication of certain  
information in this  
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 369  
3034892

BETWEEN                      EUGENE CLARK  
   Applicant  
  
AND                                EASTERN BAY MOTORS  
   LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Natalie Bradley for Applicant  
   Stan Austin for Respondent  
  
Investigation Meeting:      19 November 2018  
  
Submissions Received:      19 November 2018  
  
Determination:                26 November 2018

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**DETERMINATION OF THE AUTHORITY**

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- A.      Mr Clark was unjustifiably dismissed.**
- B.      Eastern Bay Motors Limited is ordered to pay Mr Clark the following sums within 28 days of the date of this determination:**
  - a)    \$1,842.27 for reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000;**
  - b)    \$5,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**

**C. By consent, the terms recorded in the settlement document dated 23 November 2018 now become the orders of the Authority.**

**D. Costs are reserved.**

### **Employment relationship problem**

[1] Mr Clark worked for Eastern Bay Motors Limited as an Automotive/Diesel Mechanic from 26 September 2016 until 22 January 2018. The terms and conditions of Mr Clark's employment were set out in a written employment agreement.

[2] Soon after Mr Clark's employment started and throughout his employment he purchased tools through EB Motors. The costs of the purchases were attributed to an account standing in Mr Clark's name with EB Motors. A scheme for payment of the account was arranged between Mr Clark and EB Motors.

[3] In late 2017 Mr Clark required surgery and commenced a period of sick leave that extended to 22 January 2018. Before Mr Clark commenced his sick leave the parties agreed that due to the money still owing for the tools, they would remain at the workplace as security until Mr Clark returned from sick leave. Mr Clark agreed that his tools could be used by others in the workplace.

[4] During his leave Mr Clark attended the workshop on a number of occasions and raised concerns with Ms Katalin Levai, a shareholder and the Parts/Administration Manager about missing tools. Each time Mr Clark raised his concerns he was told the matter would be sorted out when he returned to work.

[5] Mr Clark and Ms Levai had heated exchanges on 8 and 22 January. Mr Clark received a letter on 25 January 2018 which states that his employment had been terminated. EB Motors says the letter was a mistake and says Mr Clark's employment was terminated but as a result of his own actions and not because EB Motors had dismissed him.

[6] In his statement of problem Mr Clark challenged the ending of the employment relationship saying he was unjustifiably dismissed, claimed one or more conditions of his employment were affected to his disadvantage by the unjustified

actions of EB Motors and sought arrears of wages. During the investigation meeting Mr Clark withdrew his unjustified disadvantage claim and subsequently withdrew his arrears of wages claim.

[7] By way of counter-claim EB Motors says Mr Clark still owes it a debt for the tools. This matter has now been settled by agreement and as a result orders relating to this claim have been made by consent.

### **Issues**

[8] In order to resolve these employment relationship problems I must determine the following issues:

- a) Was Mr Clark dismissed?
- b) If the answer to (a) is yes, was the dismissal unjustified and if so what if any remedies should be awarded?

[9] 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 as a result. It has not recorded all evidence and submissions received.

### **Unjustified dismissal**

[10] Mr Clark says he was dismissed from his employment on 8 January and this decision was later confirmed in an undated letter he received on 25 January. Ms Levai says Mr Clark was not dismissed. She acknowledges she wrote the letter in response to demands made by Mr Clark. Ms Levai says the letter was a mistake and was written after an emotional day during which time she had felt threatened to the extent the Police were called and on their advice Mr Clark was trespassed from the property.

[11] At the investigation meeting and during submissions EB Motors raised for the first time a question about whether Mr Clark had raised a personal grievance within 90 days with sufficient specificity. EB Motors has not raised section 114(2) as a barrier to Mr Clark proceeding with his claims in the statement in reply or through its correspondence with Mr Clark between the date the employment relationship ended and the date of the investigation meeting.

[12] Mr Clark wrote to his employer on 30 January raising a personal grievance for unjustified dismissal and seeking remedies for compensation, and loss of earnings. The letter also raised a claim for compensation for replacement tools which had gone missing or been broken during his absence on sick leave.

[13] EB Motors' representative throughout this process has not changed. On 22 February Mr Austin wrote on behalf of EB Motors setting out a full response to the 30 January letter including its response regarding the claim for unjustified dismissal.

[14] I am satisfied the 30 January letter met the requirements of s 114(2) of the Act in that it made known to EB Motors that Mr Clark alleged he had been dismissed and alleged a grievance he wanted EB Motors to address.

[15] If I am wrong about that, through its lack of protest and its active engagement in this matter including attendance at mediation EB Motors has impliedly consented to the grievance being raised out of time.<sup>1</sup>

#### **Was Mr Clark dismissed?**

[16] The key issue that led to the employment relationship problems was Mr Clark's tools. The Parts Manager gave evidence that all mechanics guard their tools "...with their life." He told me that he would never had done what Mr Clark did, that is to leave his tool box for others to use. He would have locked it so that no one could have access to it.

[17] Mr Csaba Levai, Managing Director and Manager of the workshop told me that it was not uncommon for tools to be shared among those working in the workshop. He had tools the others didn't, likewise others had tools that he did not have so they would use each others.

[18] Mr Clark first raised concerns about tools being missing and/or broken in December 2017. At that time Ms Levai told Mr Clark to make a list of missing and/or broken tools and they would be replaced on his return to work.

[19] Mr Clark attended the workplace on three separate occasions in January and again raised concerns about his missing and/or broken tools. Mr Clark says that on the first of those three occasions he was dismissed, that on his second attendance the fact of

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<sup>1</sup> *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381 at [24].

dismissal was confirmed and then on the third occasion he was finally dismissed. This is denied by EB Motors.

### ***8 January 2018***

[20] On 8 January Mr Clark attended his doctor and was cleared to return to work. After his doctor's visit Mr Clark attended the workplace to advise Ms Levai that he had been cleared to work and would be returning on 22 January.

[21] While he was at the workplace, in reliance on Ms Levai's advice, Mr Clark went through his tool box and prepared a list of tools that were either missing or broken. The Parts Manager was meeting with Ms Levai when Mr Clark approached Ms Levai in her office. He advised Ms Levai that he would be back to work on 22 January and asked for his tools to be replaced. Mr Clark told me Ms Levai advised him that his tools would be sorted when he returned on 22 January. Mr Clark became upset, threw the list on Ms Levai's desk and demanded the tools be replaced immediately. The Parts Manager told me that as Mr Clark left he was angry and told Ms Levai she "could stick the f\*%#@ job up your a#\$\*".

[22] Mr Clark agrees he became upset and swore at Ms Levai but says Ms Levai refused to take the list. He accepts he threw the list of tools on Ms Levai's desk and stormed out. Mr Clark told Ms Levai that if the tools were not there on 22 January he would take his tool box and go. At the investigation meeting Mr Clark told me he never intended to work on 22 January if the tools were not there when he got to work. He says that as he left the workplace Ms Levai yelled at him that he was fired.

[23] Ms Levai denies she told Mr Clark he was fired. Ms Levai told me she fully intended to replace all of the missing/broken tools but she did not want the list on 8 January because she did not know if the list would change between 8 and 22 January. She wanted to wait until Mr Clark returned on 22 January and they could go through the list together.

[24] On the balance of probability I find it is more likely than not that Mr Clark was angry about his tools being lost/broken and he misunderstood the reasons why Ms Levai was wanting to wait until he had finally returned to work for the issue to be sorted.

[25] I also find it is more likely than not that Ms Levai did not tell Mr Clark he was fired on 8 January. If Mr Clark believed he had been fired on 8 January there would be

no reason for him to turn up for work on 22 January. Also, when he attended the workplace on 18 January he took no steps to remove his tool box from the workplace.

### ***18 January 2018***

[26] Mr Clark attended the worksite again on 18 January. Mr Clark says he asked the Office Administrator whether his tools had been replaced. Mr Clark told me the Office Administrator told him no new tools had been ordered and that she thought he had been fired.

[27] The Office Administrator gave evidence at the investigation meeting and told me she had numerous discussions with Mr Clark about his tools and her response to him was always the same; that he should speak to Ms Levai. The Office Administrator denies telling Mr Clark that she thought he had been dismissed. She told me it was not her place to say anything like that to Mr Clark and she had not discussed Mr Clark's employment situation with Ms Levai.

[28] I have accepted as being more likely, the evidence from the Office Administrator that she did not have the conversation attributed to her. Both she and Ms Levai deny discussing Mr Clark's employment status between 8 and 18 January and I have no reason to discount their evidence as being untruthful.

### ***22 January 2018***

[29] Mr Clark attended work as scheduled on 22 January 2018. When Mr Levai arrived Mr Clark was already there. On arrival Mr Clark went directly to his toolbox and checked his tools. He noted that the missing/broken tools had not been replaced. He says when Mr Levai arrived he asked Mr Levai if he had been fired on 8 January. Mr Clark told me Mr Levai confirmed he had been fired. Mr Clark told Mr Levai he wanted a letter confirming his dismissal and left the workshop.

[30] Mr Levai told me he went to greet Mr Clark to welcome him back and he asked about his tools. Mr Clark wanted his tools sorted there and then. Mr Levai told me he told Mr Clark his tools would be sorted and reminded him it was not the first time he had started without tools. Mr Levai told me Mr Clark told him he would just take his tool box and he left. Mr Levai denies he confirmed to Mr Clark that he had been fired on 8 January.

[31] Mr Clark said he wanted his tools sorted before he returned because it could take a long time for new tools to be received. I heard evidence from at least two witnesses who confirmed that tools could be ordered and delivered within a few days. Further, when Mr Clark had started working at EB Motors he did not have a full compliment of tools and it was common for the workshop staff to share their tools in those circumstances.

[32] Mr Clark left the worksite and went home. He returned later that day at or about 1pm. Ms Levai was in her office with a customer. Mr Clark attended her office and in front of the customer, demanded a termination letter.

[33] The customer gave evidence at the investigation meeting. She told me Ms Levai told Mr Clark he would not be getting a letter because his employment had not been terminated. Mr Clark became upset and told her she had to write it and then talked about the issue he had with the tools. Ms Levai told him they had already talked about that.

[34] The customer could see Mr Clark was becoming very angry and asked him to leave. Mr Clark refused. According to the customer Mr Clark was swearing at and about Ms Levai and called everyone in the business a thief. Ms Levai told Mr Clark he was supposed to be at work to which Mr Clark responded that she had fired him at the previous meeting. Ms Levai denied firing him and kept telling him he should be at work. The customer rang the Police because she was seriously concerned about Ms Levai's safety.

[35] As Mr Clark left the office Mr Levai invited Mr Clark to bring his tools back and start working. Mr Clark refused, stormed out of the workplace and as he left he swept the contents of a shelf onto the floor.

[36] When the police arrived they discussed the situation with the Levai's and on the advice of the Police Ms Levai signed a trespass order against Mr Clark to prevent him returning to the workplace and causing further damage. Ms Levai told me the Police had advised her that if Mr Clark returned and was calm then they could invite him in and engage with him.

[37] Ms Levai told me she was so traumatised by the incident that she took the rest of the afternoon off work to recover. The Police met with Mr Clark and gave him the trespass notice as well as a warning for his behaviour.

[38] The letter written by Ms Levai was carefully crafted and confirms Mr Clark was dismissed. Ms Levai wrote the letter over a period of some hours in the evening of 22 January. The letter refers to Mr Clark's behaviour on 22 January as constituting serious misconduct. Ms Levai refers to Mr Clark's behaviour on 8 January and says she was willing to overlook that behaviour but could not ignore the behaviour exhibited by Mr Clark on 22 January.

[39] Ms Levai says writing the letter was a mistake and that she had simply done as Mr Clark had asked. She says that even though the letter refers to Mr Clark being dismissed she did not believe he had been dismissed. Rather she says, Mr Clark terminated the employment relationship when left the workplace on 22 January.

[40] Ms Levai was aware Mr Clark had formed a view that he had been dismissed on 8 January. During the confrontation on 22 January Mr Clark referred to being dismissed several times and while his understanding was disputed by Ms Levai he clearly did not hear the message she was sending.

[41] This was a "heat of the moment" situation which cried out for a cooling off period.<sup>2</sup> It is incumbent upon the employer to let such time pass as necessary and then to make enquiries about whether an angry outburst was intended to constitute a resignation. Ms Levai acknowledged at the investigation meeting that she did not take any steps to get in touch with Mr Clark.

[42] Mr Clark wrote to EB Motors eight days later raising a personal grievance for unjustified dismissal. If not on 22 January then at that point it must have been obvious to EB Motors that Mr Clark believed he had been dismissed. Through his letter he invited EB Motors to attend mediation to resolve matters between them but EB Motors refused to engage in mediation.

[43] While all versions of the events of 8 and 22 January are plausible, I have concluded on the balance of probabilities that Mr Clark was dismissed on 22 January when Ms Levai wrote to him informing him that his employment was terminated for serious misconduct. Ms Levai sets out the behaviour which she considered to be serious misconduct and mentions more than once that the relationship was ending as a result of that behaviour.

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<sup>2</sup> *Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union* [1991] 1 ERNZ 502

### ***Was the dismissal justified***

[44] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether EB Motors' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[45] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d). These matters include whether, having regard to the resources available, EB Motors sufficiently investigated allegations, raised the concerns with Mr Clark, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[46] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Clark being treated unfairly.<sup>3</sup> A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

[47] The letter setting out the reasons for the termination of Mr Clark's employment was made at a time when emotions were running very high. The letter is specific about the reasons why the employment relationship had ended. If Ms Levai did not intend to dismiss Mr Clark at that time then she should have let some time pass before then making enquiries of Mr Clark about whether he would return to work or wished to have his departure treated as a resignation.

[48] Before writing its letter EB Motors failed to meet any of the mandatory requirements set out in s 103A(3). EB Motors' actions were not the actions a fair and reasonable employer could have taken in all the circumstances. Accordingly, I find the dismissal was unjustified.

### **Remedies**

[49] Mr Clark is entitled to remedies for his unjustified dismissal. He seeks lost wages and compensation.

[50] Mr Clark found alternative employment within four weeks and seeks lost wages for the period he was out of work. I have calculated Mr Clark's average

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<sup>3</sup> Employment Relations Act 2000 (the Act), s 103A(5).

weekly earnings based on the wages and time record provided by EB Motors as \$921.14 gross. Mr Clark's lost earnings amounts to \$3,684.54 gross.

[51] Mr Clark seeks \$30,000 compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act. Mr Clark gave little evidence of the impact the dismissal had on him. He told me he suffered emotionally, felt depressed and suffered from the financial stress of not have any income to pay outgoings.

[52] The evidence is not sufficient to warrant an award at the level sought by Mr Clark. In all the circumstances of this case an appropriate award is \$10,000.

### **Contribution**

[53] Where the Authority determines an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.<sup>4</sup>

[54] At the investigation meeting Mr Clark acknowledged that his behaviour on 22 January was not acceptable. He agreed that he had yelled and sworn at Ms Levai, an owner and manager in the business. The customer present on the day was so concerned for Ms Levai's safety that she sought the assistance of the Police. Ms Levai had to take time off work to recover from the trauma of the confrontation with Mr Clark. The incident on 22 January was preceded by similar conduct by Mr Clark on 8 January.

[55] I find there was a high level of contribution by Mr Clark to the situation that led to his personal grievance for unjustified dismissal. I have assessed that contribution at 50%. Mr Clark's remedies will be reduced accordingly.

[56] Eastern Bay Motors Limited is ordered to pay Mr Clark the following sums within 28 days of the date of this determination:

- c) \$1,842.27 for reimbursement of lost wages under s 123(1)(b) of the Act;

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<sup>4</sup> Employment Relations Act 2000, s 124.

d) \$5,000 compensation under s 123(1)(c)(i) of the Act.

### **Counter-claim**

[57] EB Motors raised a counter-claim against Mr Clark for money it was owed for the tools Mr Clark purchased during his employment. This matter has now been settled by agreement and as a result orders relating to this claim have been made by consent.

[58] By consent, the terms recorded in the settlement document dated 23 November 2018 now become the orders of the Authority.

[59] The original settlement document is not attached to this determination but will instead be held on the Authority's file and may not be accessed without the Authority's authorisation.

### **Costs**

[60] Costs are reserved. Mr Clark has been in receipt of legal aid so any question of costs is subject to the requirements of sections 45 and 46 of the Legal Services Act 2011. The parties are invited to resolve the matter. If they are unable to do so Mr Clark shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. EB Motors shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[61] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority