

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 22
5360324

BETWEEN	ANDREW COLEY Applicant
AND	VA ELECTRICAL LIMITED First Respondent
AND	ANDREW LORY Second Respondent

Member of Authority:	P R Stapp
Representatives:	Jills Angus Burney, Counsel for the Applicant Andrew Lory, Company director for the First Respondent and in person acting for himself
Investigation Meeting:	20 December 2011 at Masterton
Determination:	27 February 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On Thursday 8 September 2011 Mr Andrew Coley's son, also employed at the same place as Mr Coley, went home and told Mr Coley's wife, Rachel Coley that he had been verbally abused at work by Mr Lory. After work on 8 September 2011 Mr Coley, accompanied by Mrs Coley, returned to Mr Coley's workplace to discuss with Mr Lory and his partner, Leanne Cox, Mr Lory's alleged verbal abuse of Mr Coley's son the same day. This discussion turned into an argument and Mr Coley suggested that he could swop his job with another employee and would agree to adjust his pay. He also told Mr Lory that he would not work on Saturdays and would not be at work on Friday 9 September. Mr Lory accepted Mr Coley's decision not to work on Saturdays since it was a voluntary choice. However, Mr Lory would not accept Mr Coley's decision not to work on Friday 9 September because Mr Coley had not given any notice. He asked Mr Coley if his decision not to work on Friday meant that he

was resigning. Mr Coley told him to take it whatever way he wanted to, but he would return to work on Monday 12 December.

[2] At 11 am on Friday Mr Lory filled Mr Coley's job with another employee because he decided Mr Coley had decided to walk out. On Saturday 10 September Mr Coley sent a text to Mr Lory with a query about returning to work on Monday. Mr Coley did not receive an adequate reply. On Monday Mr Coley went in to the workplace and was informed by another employee who had contacted Mr Lory that he was not to work and to leave the premises. Mr Coley went to Work and Income for advice and then went to a lawyer. The personal grievance claim is first a claim that Mr Lory's alleged actions and abusive behaviour directed at Mr Coley's son were unjustified and disadvantaged Mr Coley in his employment. Secondly it is claimed that Mr Coley has been unjustifiably dismissed when he was told to leave work. The claims have been denied by Mr Lory.

Issues

[3] The fundamental issue in this matter is at whose initiative was it that caused Mr Coley's employment to end? Does Mr Coley have a personal grievance and if so what is the nature of the personal grievance? Which party is entitled to costs and how much?

The facts

[4] Mr Coley was employed by V A Electrical Limited trading as Scrap Metal Recyclers located in Masterton. Mr Coley worked in the recycling part of the business, starting first as a labourer and later becoming a foreman. Mr Coley was paid \$17 per hour for 40 hours per week. He had chosen to work on Saturdays until 9 September, when he decided not to work Saturdays anymore.

[5] During Mr Coley's employment his son was also employed, but this created difficulties not long after his son started. The difficulties were about his son's attitude at work and particularly, his attitude towards another employee when on one occasion he called that employee "*a nark*". This caused friction between the two.

[6] On 8 September Mr Lory complained about Mr Coley's son's cleaning early at the end of the day. Mr Coley's son went home and complained about being abused by Mr Lory. Mr Coley's son says he was sworn at by Mr Lory, a couple of times (cross examination). The meeting between the Coley's and Mr Lory and Ms Leanne Cox then took place. Mr Lory denied abusing Mr Coley's son personally. Everyone agrees that there was swearing at work.

[7] I hold that there is common ground that on 8 September Mr Lory asked Mr Coley if he was resigning when Mr Coley decided not to work on the Friday 9 September, and Mr Coley replied to Mr Lory to take it whatever way he wanted, and left.

[8] On Saturday 10 September Mr Coley sent a text to Mr Lory querying what would happen next. Mr Coley says that he said to Mr Lory that he would be at work on Monday. He did attend work, but was sent away.

[9] The parties attended mediation. It falls to the Authority to make a determination.

Determination

[10] A fair and reasonable employer could not have reasonably concluded that Mr Coley was resigning. My reasons for this are as follows:

- a. Mr Coley did not resign in writing. Although this is not a requirement, the fact that Mr Coley did not do so is indicative of him being confused about what Mr Lory wanted.
- b. Mr Coley said clearly that he would be at work on Monday. This is supported by the text queries he sent to Mr Lory about working out notice.
- c. Mr Coley had taken time off before this matter and been paid annual leave.

- d. Mr Coley made a suggestion about changing his role.
- e. The only two witnesses were Mr Coley's and Mr Lory's partners.
- f. There is common ground between Mr Coley and Mr Lory about what was said, but their differences are not able to be reconciled.
- g. The meeting was acrimonious. Both parties were swearing. Mr Coley had taken exception to what he believed was Mr Lory's behaviour towards his son.
- h. Mr Lory did not want Mr Coley back at work on the Monday.
- i. Mr Coley was paid out his final pay on 14 September.
- j. Mr Lory's evidence that he was waiting for Mr Coley to contact him by the end of Friday (9 September) was implausible. This is because he filled Mr Coley's job at 11 am the same day. Mr Lory explained that he was waiting for Mr Coley to further the idea that he had raised about changing his job. I cannot reconcile that with Mr Lory filling the job beforehand, not arranging properly to have a discussion with Mr Coley and sending him away on the Monday. Furthermore the comment is implausible because Mr Lory only raised it for the first time at the Authority's investigation meeting. He had every opportunity to raise it in the paperwork earlier.
- k. Mr Coley's reply that Mr Lory could take it whatever way he wanted was open ended and required a proper response and follow up for clarification and certainty. That did not adequately happen.

[11] There can be absolutely no suggestion that Mr Coley abandoned his job because Mr Coley says he said he would be back at work on Monday. He tried on Saturday (10 September) to get confirmation from Mr Lory about what Mr Lory was going to do. He turned up for work on the Monday. Mr Lory sent him away without making any other arrangements to meet with Mr Coley when he properly should have

as a fair and reasonable employer. Mr Lory explained that he was not in Masterton on Mondays and could not have Mr Coley at work unsupervised. I can accept that Mr Lory would have been concerned about Mr Coley being at work when he was not there, particularly given their discussion on the Friday, but the problem is that Mr Lory failed as a fair and reasonable employer to have some planned cooling down period, or arrange to have a calmer discussion with Mr Coley when he could. There were simply no arrangements put in place for that.

[12] Also, for the first time at the Authority's investigation meeting Mr Lory claimed that Mr Coley arrived at work on the Monday not dressed for work. He raised this for me to draw a negative inference about Mr Coley's real intention. However, I hold Mr Lory's claim can not be taken much further given Mr Coley denied it, Mr Lory only raised it for the first time at the Authority's investigation meeting and he did not support his claim with any other independent evidence.

[13] A fair and reasonable employer would have made some arrangement with Mr Coley to have him back and/or to meet again to sort out what they both were going to do in the employment relationship. In essence a fair and reasonable employer would not have replaced Mr Coley after an argument.

[14] As it was Mr Lory's initiative that caused Mr Coley's employment to end by replacing him after one day's absence there has been no justification for the employer's action. Mr Lory has not relied upon giving Mr Coley a lawful instruction to attend work on Friday for any disciplinary action at the time. That was an option open to him at the time and he could have pursued it if he wanted to, but did not do so. Mr Lory has variously claimed that Mr Coley resigned and/or abandoned his employment, which were not the case, I hold. Therefore, Mr Coley has a personal grievance for unjustified dismissal.

[15] Mr Coley has also claimed that Mr Lory's action and abuse in regard to his son were unfair, unreasonable and disadvantaged him in his employment. He claimed that Mr Lory's unfair actions also included:

- i. Refusing to allow him to take special/sick leave on 8 September. There was never any discussion on this and no request actually made.
- ii. Making a comment on Saturday 9 September tantamount to a suspension. Mr Coley had decided not to work on Saturdays. Mr Coley turned up for work on Monday before being sent away.
- iii. Refusing to provide confirmation that he could continue to work.
- iv. Refusing to allow him to work on Monday 11 September.

[16] I hold that the various actions complained about by Mr Coley have more to do with his claim for unjustified dismissal than separate grievances and in any event are better treated globally in the factual matrix and background. Also, Mr Coley cannot bring a personal grievance on his own account in relation to matters affecting his son over his son's employment at V A Electrical.

[17] Mr Coley was seeking reinstatement when he lodged his statement of problem, but he withdrew the claim at the investigation meeting.

[18] I now turn to the other remedies claimed.

Remedies

[19] Mr Coley provided sufficient evidence that he attempted to mitigate his lost wages. He has not been able to find another job. Mr Coley's claim was for 16 weeks lost wages since his dismissal (including notice that he was not paid). This is more than the requirement under s 128(2) of the Act. The sum claimed represents the outer limit able to be claimed under s 128(3) of the Act. I have exercised my discretion to award the amount given the length of Mr Cory's employment, his attempts to mitigate his loss and because of the difficulties he will have in obtaining further employment which will need him obtaining assistance. He is entitled to \$9,040. Because Mr

Coley failed properly to attend work on the Friday and his comments lead to some ambiguity in his intentions I have reduced the amount by 20%. He is entitled to \$7,232.

[20] Mr Coley also established that he had been humiliated and hurt by what happened. I accept that he was upset and stressed with the loss of income and the ability to attend work. I have assessed his compensation at \$5,000, to be reduced by 20% for contribution.

[21] V A Electrical Limited is to pay Andrew Coley:

- a. \$7,232 lost wages.
- b. \$4,000 compensation

[22] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority