

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 438/08
5123181

BETWEEN GRANT DEMPSEY
Applicant

AND WAIKATO DRYCLEANERS
(1983) LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Martyn Chambers for Applicant
Agnes Mackay for Respondent

Investigation Meeting: 14 October 2008 at Hamilton

Determination: 23 December 2008

DETERMINATION OF THE AUTHORITY

[1] In December 2007 Mr Dempsey applied for and was offered the position of Driver/Customer Service with Waikato Drycleaners (1983) Ltd (Waikato Drycleaners).

[2] Mr Dempsey's first day of work was to be 7 January 2008. Just prior to Christmas 2007 a client of Waikato Drycleaners, discussed Mr Dempsey's appointment with Mr Lynton Cooke, a manager of Waikato Drycleaners. At that time the client advised Mr Cooke that Mr Dempsey would not be given access to the client's site. The same client later provided information to Mr Warren Massey (a Director of Waikato Drycleaners) that Mr Dempsey had a criminal record, was taking action against a former employer, and had been interviewed for another position just recently.

[3] On 7 January 2008 Mr Dempsey arrived at work ready and willing to carry out his duties for the day. After being supplied with his work uniform he was called into Mr Massey's office. Mr Massey had Mr Cooke with him in the meeting. The two

men asked Mr Dempsey about information they had obtained relating to an arrears of wages action being taken against his former employers, the fact that he had attended an interview for another job while awaiting his commencement date with Waikato Drycleaners, together with information that a client did not wish to have Mr Dempsey on their worksite.

[4] Mr Dempsey says he was then dismissed for being dishonest, untruthful and lying to Waikato Drycleaners. Mr Dempsey claims that dismissal was unjustified. He seeks remedies including reimbursement of lost wages, compensation and costs.

[5] Waikato Drycleaners denies Mr Dempsey was dismissed, instead it says Mr Dempsey never commenced work and therefore he was not an employee. In the alternative, Waikato Drycleaners say if Mr Dempsey is found to be an employee, the dismissal was justified.

[6] The issues for determination are whether:

- Mr Dempsey was an employee of Waikato Drycleaners;
- If the answer to that question is yes, was Mr Dempsey dismissed and if so, whether his dismissal was unjustified; and what, if any remedies should be awarded.

Was Mr Dempsey an employee of Waikato Drycleaners?

[7] Sections 5 and 6 of the Employment Relations Act provides that a person is an employee, if they are intending to work. The act defines intending to work as including a person who has been offered and accepted work as an employee.

[8] Mr Dempsey was interviewed for the position of driver on 14 December 2007. That same day Mr Dempsey completed an Application for Employment Form which asked Mr Dempsey to disclose any criminal convictions and asked whether he was awaiting the hearing of any charges in a civil or criminal court of law. Mr Dempsey answered “No” to both questions.

[9] Further, when Mr Dempsey completed the section of the form which requested information relating to current and previous employment, Mr Dempsey left a gap in the information and did not disclose to Waikato Drycleaners his employment for the period April 2007 to November 2007. With regard to another gap in his employment history between February 2006 and October 2006, Mr Dempsey had indicated on the form that he had been overseas.

[10] On 20 December, Mr Dempsey was offered employment by way of a written employment agreement which had already been signed by Mr Massey. In addition to the employment agreement, Mr Dempsey was provided with copy of a job description and a Company Vehicle Policy.

[11] Mr Massey says he offered Mr Dempsey employment subject to “everything checking out ok”. This is denied by Mr Dempsey who says he was offered the job and given the employment agreement and other documents to sign. I accept Mr Dempsey’s evidence in this regard. The covering letter attached to the employment agreement makes no mention of the fact that the offer was subject to everything checking out. The only limitations as to the commencement of employment related to the signing and returning of the employment agreement.

[12] At the investigation meeting Mr Dempsey says he signed the employment agreement on the same day he received it, that is, 20 December 2007, and had returned the signed document to Mr Massey. At the investigation meeting it became apparent that the original signed document has never been returned to Waikato Drycleaners as it was held on file by Mr Dempsey’s representative.

[13] I am satisfied Mr Dempsey was offered and accepted employment with Waikato Drycleaners. Notwithstanding the failure to return the signed employment agreement to Waikato Drycleaners, I find that Mr Dempsey was a person intending to work and was therefore an employee of Waikato Drycleaners. I am supported in my conclusions by the evidence of both parties that an agreed start date had been confirmed, being 7 January 2008. And, in anticipation of him commencing on 7 January Mr Dempsey had been sized for a company shirt, to ensure one was available on the day he commenced his employment. It is doubtful that exercise would have

been undertaken if Mr Dempsey had not indicated his acceptance of the offer of employment.

Was Mr Dempsey dismissed, if so was the dismissal unjustified?

[14] When Mr Dempsey signed the employment application form on 14 December, he attested to the fact that he was aware that he was being employed in reliance on the answers he provided to the questions in the application form and that if, in the company's opinion, he had not answered truthfully or completely, his employment could be terminated without notice.

[15] The written employment agreement, which Mr Dempsey says he accepted, under the heading of Employee Acceptance & Warranty, states:

I have not deliberately failed to disclose any matter (including any injuries or illnesses previously suffered that may affect my ability to carry out my duties effectively) that may have materially influenced the employer's decision whether to employ me.

[16] Just prior to Christmas 2007, while he was making a delivery at the Hamilton Workingmen's Club, Mr Cooke, was advised Mr Dempsey would not be allowed onto the Club's site to make deliveries or pickups.

[17] Mr Cooke passed this information on to Mr Massey who undertook further enquiries. He spoke to the Manager of the Club who advised him that Mr Dempsey had a previous conviction, was taking a claim against a former employer, and had been interviewed for another job. Crucially, Mr Massey did not enquire as to where the Club Manager had received the information. Had he done so, Mr Massey would have discovered that Mr Dempsey was a long time member of the Club and consequently a regular attendee on the clubs premises.

[18] On 3 January 2008, Mr Massey attempted to contact Mr Dempsey, who was on holiday, to discuss the information he had received. A message was left on Mr Dempsey's cell phone. Mr Dempsey did not return Mr Massey's phone call.

[19] On 7 January Mr Dempsey arrived at work to commence his new employment. Shortly after he arrived, Mr Dempsey was asked to attend a meeting

with Mr Massey and Mr Cooke. During this meeting the information received from the Workingmen's club was relayed to Mr Dempsey.

[20] Mr Cooke put to Mr Dempsey that he had not been honest when listing all his previous employment situations for the prior year. Mr Dempsey acknowledged that he had held another job which had not been listed. Mr Dempsey also acknowledged that at the time he had completed his application form he was taking action against this current employer for unpaid wages.

[21] Had Mr Massey or Mr Cooke taken the time to check the information provided by Mr Dempsey in the Application Form on 14 December, they would have seen the gap in the information pertaining to his employment. This is not a situation where Mr Dempsey had provided false dates of employment. The gap in the information was there for all to see and was something Mr Massey could have asked questions about prior to making the offer of employment to Mr Dempsey.

[22] Further, Mr Massey has wrongly concluded that Mr Dempsey's claim of arrears of wages against his previous employer is the same as Mr Dempsey awaiting the hearing of charges in a criminal or civil court. He has therefore taken the view that as Mr Dempsey did not supply that information at the time he completed the application form, that he had lied. I am satisfied Mr Dempsey correctly acknowledged on the application form that he was not awaiting the hearing of any charges against him in either a civil or criminal court.

[23] Mr Dempsey was advised that Mr Cooke and Mr Massey were aware he had failed to disclose a previous criminal conviction. Mr Dempsey explained his understanding that as the conviction was more than 9 years old he was not required to disclose it pursuant to the Criminal Records (Clean Slate) Act 2004. I have no doubt, having interviewed Mr Dempsey during the investigation meeting, that this was a genuinely held belief at the time he completed the application form.

[24] I am satisfied Mr Dempsey did not knowingly withhold relevant information from Waikato Drycleaners when he mistakenly believed his criminal conviction was covered by the Criminal Records (Clean Slate) Act 2004, and therefore did not have to be disclosed on his application for employment form. That explanation was not

accepted by Mr Massey, although Mr Massey acknowledged at the investigation meeting that he took no steps to check whether Mr Dempsey was correct in his understanding.

[25] When asked about attending a job interview with another company after being offered the position with Waikato Drycleaners, Mr Dempsey acknowledged that he had attended an interview as he had always been keen to work for that particular employer and the pay rate was higher than the rate at Waikato Drycleaners. Mr Cooke says that at the job interview in December 2007 he had asked Mr Dempsey if he was committed to a long term engagement with Waikato Drycleaners. Mr Dempsey had acknowledged that he was. After hearing Mr Dempsey's response on 7 January Mr Cooke felt he had been lied to about Mr Dempsey's intentions to stay with Waikato Drycleaners.

[26] Mr Cooke then put to Mr Dempsey the information they had received from a major client that the client would not allow him onto their site to do his work. Neither Mr Cooke nor Mr Massey disclosed the name of the client, even though Mr Dempsey requested it. Without the name of the client, Mr Dempsey was not in a position to know that he should advise Mr Massey that he was a long standing member of the client's club and regularly attended the site for social reasons.

[27] I find that the actions of Waikato Drycleaners in dismissing Mr Dempsey on 7 January 2008 in the manner and for the reasons given at the time, were not the actions of a fair and reasonable employer in all the circumstances of this case. An employer acting fairly and reasonably in this case would have checked whether Mr Dempsey was required to disclose his conviction before rejecting his explanation. Further, it was contingent on Mr Massey to check the information disclosed by Mr Dempsey on his application form and to ask questions to fill any "gaps" in the information before making any offers of employment. If that had happened, it may well be, that Mr Dempsey would not have received the offer of employment.

[28] Finally, there was a lack of procedural fairness on the part of Waikato Drycleaners, in that Mr Dempsey attended work on 7 January not knowing what awaited him. He went into a meeting not understanding that his dismissal was imminent, and without the opportunity to seek advice or representation.

Remedies

Contribution

[29] I am bound by section 124 of the Act to consider the extent to which Dempsey's actions contributed towards the situation that gave rise to his personal grievance of unjustified dismissal, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[30] When Mr Dempsey completed the application form, he was under an obligation to provide full and complete details as requested on the form. He failed to do this with respect to his employment details.

[31] Further, Mr Dempsey wrongly believed he did not have to disclose a previous criminal conviction. It would have been prudent for Mr Dempsey to check his legal obligations before deciding not to disclose the information. As discussed at the investigation meeting it seems Mr Dempsey's conviction was not covered the Criminal Records (Clean Slate) Act 2004, and he was, therefore obliged to disclose the information to his potential employers. The conviction related to Mr Dempsey's honesty and it is likely that had Mr Massey been aware of it in December 2007 he would not have made the offer of employment to Mr Dempsey as the position Mr Dempsey was appointed to required him to handle cash on behalf of Waikato Drycleaners.

[32] Mr Dempsey was dismissed as a result of his failure to disclose full information to his prospective employer. An offer of employment was made and accepted by Mr Dempsey on the basis of the information he had provided. After discovering that the information was incomplete, Waikato Drycleaners dismissed Mr Dempsey. Mr Dempsey must be found to have contributed towards the situation that gave rise to his personal grievance.

[33] I am satisfied it is just to reduce the remedies available as a result of Mr Dempsey's conduct and I assess that contribution as 50%.

Lost wages

[34] Mr Dempsey's evidence is that he was unemployed for two months. Mr Dempsey's rate of pay was \$13.50 per hour with hours of work to be 40 per week which equates to \$540.00 per week. Mr Dempsey is to be reimbursed for the loss of wages for two months, subject to a reduction for contribution of 50%.

Waikato Drycleaners Limited is ordered to pay to Mr Dempsey \$2,160 pursuant to section 123(1)(b) of the Employment Relations Act within 28 days of the date of this determination.

Compensation

[35] Mr Dempsey gave compelling evidence as to the hurt and humiliation he suffered as a result of his dismissal. In the particular circumstances of this case, and in light of the range of awards in similar cases, I consider an award of \$2,000 under s.123(1)(c)(i) is the appropriate level of compensation for the loss of dignity and injury to feelings of Mr Dempsey arising from Waikato Drycleaner's unjustified actions. This award will be reduced by 50% to take account of Mr Dempsey's contribution.

Waikato Drycleaners Limited is ordered to pay Mr Dempsey \$1,000 without deduction pursuant to section 123(1)(c) of the Employment Relations Act 2000, within 28 days of the date of this determination.

Costs

[36] 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