

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**AA 140/09  
5137268**

BETWEEN      BRUCE RAYMOND DOUGLAS  
                         Applicant

AND             GODFREY HAULAGE LIMITED  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:          Tony Snell, Counsel for Applicant  
                                 Kim Stretton, Advocate for Respondent

Investigation Meeting:      15 April 2009

Submissions Received:      24 April 2009

Determination:              5 May 2009

---

**DETERMINATION OF THE AUTHORITY**

---

**The problem**

[1]    The applicant Mr Bruce Raymond Douglas ("Mr Douglas") claims that he was unjustifiably dismissed. He asks the Authority to resolve the problem by making formal orders for reimbursement and compensation.

[2]    The respondent Godfrey Haulage Limited ("Godfrey") says that Mr Douglas was employed on a one week trial basis that was not successful.

[3]    The parties were unable to resolve the problem between them by the use of mediation.

[4]    I record that the respondent's advocate accepts personal responsibility for failing to provide the respondent's witness statements as directed.

## The facts

[5] In or about September 2007 Godfrey advertised for drivers. Mr Douglas submitted an application to Godfrey. Eventually he was telephoned and invited to interview.

[6] I find that on 18 September 2007 Mr Douglas travelled from Hastings to Mount Maunganui for an interview. Prior to the interview he attended a medical examination as previously agreed, with Godfrey's contracted occupational health nurse at about 1.00pm. Mr Douglas was also drug tested. Following the examination Mr Douglas made the short journey to Godfrey's depot for interview.

[7] At the conclusion of the examination the occupational health nurse telephoned Godfrey's management to inform it of the result of the examination. The nurse communicated concern about Mr Douglas' work readiness and urged Godfrey to proceed with caution. These concerns included his obesity, a leg ulcer and knee injury. I find that at about 2.20pm the examination agency emailed to Godfrey a "Pre-employment Medical Report" which materially states:-

*Work fit (recommended for position). To be a good employee he really needs to lose weight. His right knee causes him a lot of pain which requires twice daily pain medication.*

[8] I interpret that statement as constituting a recommendation from the examining medical professionals that, subject to the stated concerns, Mr Douglas was recommended for employment and that he was found to be work fit. That interpretation is consistent with what Mr Douglas tells the Authority that he "passed the test".

[9] I find that Godfrey likely received the Pre-employment Medical Report at the time it interviewed Mr Douglas. But I further find it was likely not read by Godfrey before or during interview with Mr Douglas and there was no discussion of its precise contents with Mr Douglas. I also find that the report was not at any stage prior to the Authority's investigation meeting provided to Mr Douglas and he saw it for the first time at the investigation meeting.

[10] Mr Douglas was interviewed by Godfrey's managing director Mr John Dynes ("Mr Dynes") and its operations manager Mr Paul (Butch) Hopecroft ("Mr Hopecroft"). In reference to his obesity, I find that Mr Douglas was asked if he would have problems getting up a ladder on the trucks. He said he would not.

[11] Because I accept that he had never seen the pre-employment medical report before, I accept Mr Douglas' evidence that there was no discussion at interview of his health as reported in the medical report. Mr Douglas had no prior knowledge of the report's content whatsoever. That would not be so if it had actually been discussed with him previously.

[12] I find that Mr Douglas was informed the driving position was full-time based in Rotorua. It involved driving and loading/unloading. Mr Douglas was informed of what the job involved. He was asked if he thought he could do the job and he replied that he could. At the conclusion of the interview, Mr Douglas was advised he would be contacted again as to whether the job was his.

[13] As Mr Douglas was driving out of Mount Maunganui returning to Hastings, Mr Hopecroft telephoned him. I accept Mr Douglas' evidence that Mr Hopecroft told him the job was his. I find Mr Douglas accepted the offer of employment. Mr Hopecroft told Mr Douglas to come back to the depot to sign papers. I do not accept Godfrey's oral evidence that there were two interviews with Mr Godfrey and that it was after the second interview that Mr Godfrey was offered employment. The witness statements to the Authority make no reference whatsoever to such a situation.

[14] When he arrived back at Godfrey's depot, Mr Douglas was given an induction package which included Godfrey's Drivers conditions of employment & induction handbook, and also the Godfrey Haulage Limited Collective Employment Agreement 2006-2008 ("the collective"). The documents requiring signature were signed on 19 September 2007.

[15] Mr Douglas was advised he would be trained for one week by Mr Steve Newman and Mr Ross Zohs. Mr Douglas commenced employment on Monday 24 September 2007 and continued a weeks training to Friday 28 September 2007. He worked again on Monday 1 October 2007.

[16] On Tuesday 2 October 2007 Mr Douglas arrived at work at 2.30pm. At 2.45pm Mr Dynes phoned him while he was in the smoko room. Mr Dynes enquired of Mr Douglas as to how he was getting on with the job. Mr Douglas told him it was different to long haul and that he was enjoying the job and all was well. I find that Mr Dynes then told Mr Douglas "I've got a problem, I think you should finish up". When Mr Douglas asked why, Mr Dynes told him he should look at joining a gym and hiring a personal trainer to assist him in losing weight. He also asked whether Mr Douglas was a member of Southern Cross as they would subsidise a stomach stapling operation costing \$15,000.00. Mr Douglas protested that he had done nothing wrong. He asked why Mr Dynes wanted him to leave. Mr Dynes told him "You've done nothing wrong, you're too big for the job". Mr Douglas said he needed the job, that he had debts and a mortgage. He repeated that he had done nothing wrong and that he had passed the medical examination and his training with "flying colours". Mr Dynes said Mr Douglas was to finish immediately. He was asked to hand back his ID card. He then left Godfrey's depot. I accept Mr Douglas' evidence that he cried as he drove home.

## The merits

[17] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

*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.*

[18] Godfrey says that Mr Douglas was employed on a one week trial basis that was agreed and was not successful. Mr Douglas is adamant there was no such agreement.

[19] Section 67 of the Employment Relations Act 2000 (“the Act”) provides<sup>1</sup>:-

67 *Probationary arrangements*

(1) *Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation after the commencement of the employment,—*

(a) *the fact of the probation period must be specified in writing in the employment agreement; and*

(b) *neither the fact that the probation period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation period.*

(2) *Failure to comply with subsection (1)(a) does not affect the validity of the employment agreement between the parties.*

(3) *However, if the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation if the employee elects, at any time, to treat that term as ineffective.*

[20] Godfrey refers the Authority to the collective which has this provision:-

23 *PROBATIONARY PERIOD*

*The Employee shall be employed on the basis that he/she is employed initially for a probation period of three (3) months, at the end of that period his/her employment is terminated.*

*The Company shall assess the performance of each employee during the period of probation and if satisfactory, may offer full-time employment to take effect following the expiry of the initial period of employment.*

[21] At the investigation meeting, Mr Dynes stated candidly that with such a contractual provision, a trial period could be ended at any time during the stated three months. I do not accept that at all. Three months means three months and not one day less. Mr Dynes' statement in this respect was a telling one that I consider he did not appreciate the true significance of.

[22] I find that Mr Douglas was offered employment and accepted employment before Godfrey was aware of the precise details of the Pre-employment medical report. I do not accept the respondent's position that it received the medical report and then asked Mr Douglas to return.

---

<sup>1</sup> The section has been recently amended by the enactment of sections 67A and 67B.

[23] Mr Dynes says that he told Mr Douglas he would be given a one week trial and Mr Douglas agreed. Mr Douglas denies this.

[24] I find that by the operation of sections 62 and 63 of the *Employment Relations Act 2000*, the probationary period at clause 23 of the collective applied as a term of Mr Douglas' employment. This establishes that there was a written probationary period. But as I have said, the duration of that period was three months.

[25] I find that Godfrey was not entitled to terminate Mr Douglas' employment before the end of the three month trial period. Mr Douglas was entitled to the whole three month period and not one day less. He was not given that period and so it must follow that his termination is not justifiable.

[26] For completeness, I deal with Godfrey's response that a one week trial period was agreed and was not successful. This is denied by Mr Douglas but I do not need to make a finding as to whether that was so. Firstly, there was no such agreement in writing for a one week trial period. Secondly, by the time Mr Douglas reported for work on Monday 1 October 2007 and the day of his dismissal on Tuesday 2 October 2007, any such one week trial period as alleged had expired. By permitting Mr Douglas to continue to attend work after the first week there was no operative probationary period. Godfrey cannot justify the termination on this basis either.

### The determination

[27] I find that Mr Douglas was unjustifiably dismissed over the telephone by Mr Dynes on Tuesday 2 October 2007. **I find that dismissal was unjustifiable. Mr Douglas has a personal grievance for unjustifiable dismissal. He is entitled to formal orders in settlement of that personal grievance.**

## The resolution

[28] Having made those 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 Douglas' 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. I find there was no blameworthy conduct by Mr Douglas and therefore there is no basis to reduce either the nature or the extent of the remedies to be provided to Mr Douglas.

### *Reimbursement*

[29] Mr Douglas tells the Authority that it was three and a half months before he was able to obtain alternative employment. He says his lost income is the sum of \$10,500.00. I am satisfied that Mr Douglas took active steps to obtain employment. I am satisfied that he has lost income as a result of the unjustifiable dismissal. I award Mr Douglas the sum of \$10,500.00 as reimbursement. **I order Godfrey Haulage Limited to pay to Bruce Raymond Douglas the gross sum of \$10,500.00 as reimbursement.**

### *Compensation*

[30] Mr Douglas says he was absolutely stunned by what Mr Dynes said to him on the telephone in the smoko room on Tuesday 2 October 2007. He says he was stunned by how he was treated. He says he was tearful in the smoko room where others were present while he took Mr Dynes' telephone call. He says he was humiliated and upset and was reduced to tears out of sheer frustration and humiliation.

[31] Mr Douglas says that as a result of his dismissal, he experienced financial hardship because he had no income to service his liabilities. He says he lost his stockcar and both of his vehicles because he defaulted on the payments. He says that because of the situation he found himself, it was necessary to place his house on the market for sale. To sustain himself, Mr Douglas borrowed money from his family and his sister lent him a substantial sum.

[32] Mr Douglas says Mr Dynes' comments caused him particular distress. He says he felt "totally worthless" and that nobody had ever spoken to him and "put him down" like that before. While Mr Dynes says his comments were intended to be supportive of Mr Douglas and founded out of genuine concern for him, I accept that Mr Douglas found them offensive, distressing and humiliating. There was always a risk that whatever his intentions, Mr Dyne's comments would not be received by Mr Douglas favourably. Mr Dynes ought to have appreciated that. Whether Mr Dynes' comments were misconstrued or not, I am satisfied they aggravated the distress of the situation for Mr Douglas. I also accept being dismissed over the telephone aggravated the distress for Mr Douglas.

[33] I am satisfied that Mr Douglas has suffered hurt and humiliation, loss of dignity and injury to his feelings. Having regard to his evidence, the nature of his personal grievance and the fact that he this employment proceeded over six whole days together with the aggravating features I have found, I award him compensation in the sum of \$4,000.00. **I order Godfrey Haulage Limited to pay to Bruce Raymond Douglas the sum of \$4,000.00 as compensation.**

### Costs

[34] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Snell is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Stretton is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. **I will not consider any application or submission lodged outside that timeframe without leave.**

Leon Robinson  
**Member of Employment Relations Authority**