

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Peter Forde (applicant)

AND Groundworks Limited (respondent)

REPRESENTATIVES Graeme Ogilvie for the applicant
John & Brigid Smith for the respondent

MEMBER OF THE AUTHORITY Denis Asher

INVESTIGATION MEETING Wellington, 5 September 2002

DATE OF DETERMINATION 10 September 2002

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In his application filed with the Authority on 15 April 2002 the applicant said the respondent (the company) unjustifiably dismissed him. Mr Forde claimed reimbursement of lost earnings, \$10,000 for humiliation, etc arising out of the alleged unjustified dismissal and costs.

2. In its statement in reply received on 29 April the respondent said the applicant was not dismissed and was awaiting his advice as to whether he intended returning to his position or not.
3. The parties attended mediation without resolving their employment relationship problem.

Investigation

4. The parties agreed to a one-day investigation for Thursday 5 September 2002. They also usefully supplied statements and relevant material in advance of the investigation.

Background

5. The following is either not in dispute or was disclosed by the investigation.
6. The applicant commenced employment with the respondent on 27 November 2001 as a driver, operator and labourer.
7. While Mr Forde's employment contract was headed "Trial Period Employment Agreement for Groundworks Limited Employees" it also provided for a trial period of three months.
8. On Thursday 31 January 2002 Mr Forde arranged with his employer to attend a funeral on the following day, Friday 1 February. At the end of the Thursday, and at the construction site and so as to secure the vehicle, the applicant locked the vehicle with its key in the ignition. Mr Forde explained that he had done the same thing on previous occasions. It was his expectation that other company drivers would use their keys to access the vehicle. He rejected the otherwise standard practice of hiding the keys in the vehicle's outside toolbox as it did not have a lock.
9. The following morning, 1 February, Mr Forde received a telephone call from the company's receptionist. She asked where the key was. During their conversation Mr Forde overheard a voice, subsequently identified as the company's director, John Smith, say the words, or similar words to the same effect,

“Can we give him a week’s notice?”

10. On the morning of Monday 4 February Mr Forde approached and spoke with Mr Smith. The latter confirmed the applicant had overheard his words and he was giving Mr Forde a week’s notice. When asked why Mr Smith said it was because the applicant did not fit in and other employees were badmouthing him.
11. Mr Forde elected to work out his week’s notice so as, he said, to attempt to find other employment at the different job sites he was working at.
12. On Thursday 7 February he received two letters from the company. Mr Smith signed off both. The first advised:

“We wish to advise that the trial period set out in your employment agreement is due for review on 28 February 2002. We advise that it is our intention at this time to offer you continued employment with the company when we meet on 11 February 2002.

We would also like to apologise for any misunderstanding that may have occurred with regard to your trial period.

On a separate issue we advise that as a result of allegations which arose last week with regard to a company vehicle we wish to hold a formal meeting with you.”

13. The second letter of 7 February advised of, amongst other things, the following:

“Further to my conversation with you on 7 February 2002 concerning your work performance/conduct I wish to meet with you to discuss the matter further ...

The areas of concern are:

1. *Correct filling out of daysheets*

2. *Work conduct*
3. *Recent absence from work*
4. *Plant security ...*

I must advise you that if an allegation of misconduct or substandard work performance is established disciplinary action may be taken and your employment may be in jeopardy.”

14. Mr Forde declined to meet with the company and he finished his employment with it on Friday 8 February.
15. By letter dated 12 February Mr Forde's representative conveyed advice of a personal grievance to the respondent.

The Parties' Positions

The applicant's position

16. Mr Forde's position is comparatively straightforward: he first overheard an indication of his possible dismissal on Friday 1 February. He purposefully raised the matter with the company's director, Mr Smith, on the morning of Monday 4 February. In that conversation Mr Smith confirmed it was he who the applicant had overheard asking if Mr Forde could be given a week's notice. Mr Smith confirmed Mr Forde was being given a week's notice. The grounds for giving notice were that he did not fit in and his work colleagues were badmouthing him.
17. Mr Forde says these matters were without substance, they had never been previously raised with him, there was no investigation, he was given no opportunity to comment, and he was given no opportunity to be represented in respect of his employer's concerns and prior to its decision to terminate his employment.
18. Because of his employer's comments and conduct he had no confidence in Mr Smith's subsequent communications advising he would be offered continued employment. His doubt as to the genuineness of that offer was underscored not only by what had already been said to him by Mr Smith but the fact that the letters

conveying the offer also advised of an impending disciplinary process that could put his employment in jeopardy. As Mr Forde explained during the investigation,

"I didn't accept the apology because of the poor treatment."

Respondents' Position

19. Mr Smith explained to the investigation that Mr Forde's actions in locking the truck with the key inside was not standard practice and it had caused considerable delay to a concrete pour and other work at the project on the morning of 1 February. He was especially concerned as the client affected by the delay was one who provided his company with a lot of its business.
20. Mr Smith confirmed that, during a heated conversation on the morning of 4 February, he gave the applicant a week's notice. He said he explained to Mr Forde he was not being sacked but that the applicant's employment contract permitted him to give Mr Smith a week's notice.
21. The discussions with Mr Forde caused Mr Smith to seek advice about the applicant's employment contract. He says the company then wrote the two letters to Mr Forde *"to put things right"* (investigation). But it was to no avail as Mr Forde's *"shop front was up and I couldn't talk to Peter"* (investigation).

Findings

22. I am satisfied that the company unjustifiably dismissed Mr Forde with effect from Monday 4 February 2002. The applicant's claims must succeed for the following reasons.
23. In respect of a claimed unjustified dismissal the Authority must first establish law there has been a dismissal. In the event of doing so, the Authority must then determine if the respondent's actions were justified.
24. The parties agree the respondent gave the applicant one-week's notice. The respondent then says, in effect, it attempted to put things right. The respondent's stated reasons for it giving Mr Forde a week's notice are hard to follow. The

company says it was relying on his contract. The only applicable provision in the contract appears to be clause 8. It provides, first, that in the event of insufficient work, the company “*may*” terminate the applicant’s employment. In the following paragraph it stipulates that “*employment may be terminated*” by either party giving two-week’s notice or summarily in the case of serious misconduct.

25. This was not a case of insufficient work. Mr Forde was any way not given two-week’s (but only one-week’s) notice.
26. It was also not a case of serious misconduct, which is also provided for in the contract as a basis for summary termination. Mr Forde was not summarily dismissed and not fitting in and being the attention of badmouthing are not defined in the contract as examples of serious misconduct and are not conventional actions that warrant this penalty.
27. It appears the company came to an appreciation that its advice to Mr Forde was precipitate and its position was less than sound. Hence, later in that week, it seems to have attempted to rescind the dismissal. I say ‘seems’ as its stated apology to Mr Forde is in respect of “*any misunderstanding that may have occurred with regard to your trial period*” (above) and does not directly address the week’s notice given him.
28. I am satisfied there was no basis for the respondent to give Mr Forde one-week’s notice on 4 February as the purported termination was both, procedurally and substantively, unjustified. I am also convinced its efforts to put things rights were both too little and too late.
29. When looked at ‘in the whole’ the company’s actions throughout were seriously at odds with what is required by justice and fairness. The apology did not directly address the notice given Mr Forde. It was also strongly qualified by the accompanying advice that a disciplinary process was under way which might result in disciplinary action. Mr Forde’s ongoing employment was clearly at risk.
30. It was unrealistic to expect, in these circumstances and the conspicuous absence of good faith behaviour, that Mr Forde might put to one side his employer’s advice they did not fit in and that their work colleagues were badmouthing them. It was also

entirely implausible to expect the applicant to have confidence in a forthcoming disciplinary process, and that it would put all matters to right.

Contribution

31. I do not accept this is an instance where the applicant's actions have contributed towards the situation that gave rise to the grievance. A finding of contributory fault relies on proven blameworthy behaviour on Mr Forde's part. The initial problem appeared to arise out of the consequences of Mr Forde leaving the key in the ignition in the locked truck. There is no evidence he acted that way in malice. At the time of being given his notice, Mr Smith relied on claims the applicant did not fit in and others were badmouthing him, neither of these claims having been previously raised with the applicant. The key incident therefore in no way contributed to the situation giving rise to the dismissal.
32. Mr Forde's actions never enjoyed the benefit of an investigation: the applicant was therefore denied the legitimate opportunity to put to the employer the reasons for his actions. Instead the evidence discloses that, on the day itself (1 February), and before any discussion with the applicant, Mr Smith had terminated, or was seriously considering terminating, the Mr Forde's employment. Mr Forde's actions in respect of the key therefore cannot be taken into account. The applicant bears no responsibility for his unjustified suspension or the respondents' conduct from which he reasonably concluded he had been dismissed.

Remedies

33. Mr Forde claims 3-month's pay lost between his termination with effect on 8 February until finding work from 6 May. He says he applied for at least twelve jobs and had seven interviews in his efforts to find work. He clarified a matter disputed by the company about casual work immediately following on from his dismissal: the applicant said it was unpaid.
34. The respondent's written reassurance to Mr Forde that he would be engaged after his trial period disposes of any argument that the applicant was ineligible to claim 3 month's lost remuneration. In these circumstances and pursuant to s. 128 of the Act I find that Mr Forde has lost remuneration and order the company to pay him 3 month's

lost remuneration. Leave is reserved to the parties to return this matter to the Authority in the event of their inability to reach agreement on this sum.

35. Mr Forde gave restrained evidence of the impact on him of his dismissal. It proved problematic for him in attempting to find other work and in seeking a benefit (as the company advised the relevant government department Mr Forde had not been dismissed). I am satisfied that, under s. 123 of the Act, an award of \$5000 is appropriate in the circumstances.

Determination

36. Consistent with the findings above I am satisfied Mr Forde was unjustifiably dismissed from his employment. Under s. 128(3) of the Act I direct that he be paid for 3 month's lost remuneration and, under s. 123(c)(i) I direct the respondent to pay to the applicant the sum of \$5000.
37. Costs are reserved so that the parties in the usual way might attempt to settle this matter between them.

Denis Asher

Member of Employment Relations Authority