

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 22  
5620115

BETWEEN KYLE FORSTER  
Applicant

A N D JASON HILL t/a JL  
CONTRACTING  
Respondent

Member of Authority: T G Tetitaha

Representatives: W Reid, Counsel for Applicant  
D Jacobson, Counsel for Respondent

Investigation Meeting: 18 January 2017 and 19 January 2017 at Tauranga

Submissions received: 19 January 2017 from both parties

Date of Oral Determination: 19 January 2017

Date of Determination: 24 January 2017

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Kyle Forster alleges he was dismissed unjustifiably by Jason Hill trading as JL Contracting.

**Relevant Facts**

[2] Mr Forster was employed as a machinery operator/tractor driver on 10 August 2015. Jason Hill is a sole trader carrying on an agricultural business.

[3] This matter revolves around the events that occurred on 4 February 2016. Mr Hill discovered damage to a wooden gate by a shed on his property. He sent a text message to Mr Forster asking about it. Mr Forster replied he may have gotten too close when turning one of the trucks. Mr Hill replied: *“fuck ur an idiot. Did you get*

*out and use ur eyes?” Mr Forster then replied: “Look hea Jason. That’s the last fuckn time you talk to me like that. I’m not your wife or one of your children. Best idea you rethink how you fuckn speak to me”.*

[4] Both parties accept that swearing is commonplace in this workplace. However, Mr Forster took issue with Mr Hill’s text message. He thought it was abusive because it was directed at him as opposed to generally. Mr Forster refused to speak to Mr Hill. He would not take his phone calls or answer any messages. As a result, Mr Hill called another co-worker who was with Mr Forster at the time, Jessie McLean. He asked him to tell Mr Forster to return to the workshop. Mr Hill wanted him to work there for the day. Mr Forster believed he was being asked to meet Mr Hill to discuss what had occurred.

[5] On his way back Mr Forster texted Jason Hill’s wife, Claire. He asked if she was available to attend a meeting. Mrs Hill initially said yes. She then recalled that they had an important personal appointment in town. She rang Mr Forster and told him about the appointment and asked if they could meet later or another day. Mr Forster replied that he had been told to return to the workshop. Mrs Hill told him to do as Mr Hill had asked.

[6] When Mr Forster returned to the workshop there was no one there. He then continued up the driveway to the Hill’s house. When he arrived, Mr and Mrs Hill were on their way into town. They were in the process of putting their children in the rear of their car and leaving.

[7] Mr Forster and Mr Hill had a heated argument. At or near its conclusion, Mr Hill asked Mr Forster to return his work keys, the work vehicle he had driven back to the property and his phone. He was also asked to leave the property.

[8] Mr Forster returned the phone and keys and work vehicle. He then left by foot to collect his own car from the workshop further down the driveway.

### ***Workshop Incident***

[9] Upon arriving at the workshop, Mr Forster then decided he wished to retrieve certain tools that he had left in the workshop. He waved down Mr and Mrs Hill as they were driving past. They stopped. Mr Forster asked Mr Hill if he could go into the workshop. Mr Hill said no. Mr Forster asked again if he could go into the

workshop to retrieve a pressure gauge. Mr Hill said no again stating he wanted all the work keys returned by Mr Forster first. Mr Forster still had other keys in his possession.

[10] Mr Forster then took out some bolt cutters. It is accepted he then threatened to make his way into the workshop. Mrs Hill intervened, got the workshop key from Mr Hill and opened the door. Mr Forster retrieved his property and then left.

### ***Disciplinary Process***

[11] Mrs Hill later texted Mr Forster that same day. She asked him to return to work on 9 February for a meeting. That evening, Mr Forster also met with his co-worker Mr McLean. There is some dispute about what Mr McLean and he discussed that evening.

[12] Both parties met on 9 February 2016. It is accepted that the Hills read out a letter dated 9 February and two documents labelled "*Previous Benefits*" and "*Future Expectations*". Both parties accepted they wished to find a way to continue their employment relationship. Both Mr Hill and Mr Forster apologised, shook hands then left.

[13] However, subsequent to that meeting, Mr Forster took advice from a local employment advocate, Rachel Rolston. He then sent an email to the Hills denying that he had committed any serious misconduct.

[14] Despite this email, the Hills wrote to Mr Forster on 11 February 2016. This letter set out in some detail the discussions that occurred at the 9 February meeting and offered two options. The first option involved a written warning for Mr Forster's behaviour on 4 February and an offer to pay for counselling to address his anger management issues. The second option was to continue the disciplinary process with the possibility of termination. Mr Forster again replied through his legal representative, Ms Rolston, denying any fault. No specific reply to the options or any alternative option was given.

[15] Mr Hill then engaged a lawyer, Trudy Marshall. Together they compiled a letter dated 16 February 2016 replying to Mr Forster in some detail. This included Mrs Hill's fears for her safety due to Mr Forster's actions. They gave Mr Forster a further opportunity to reply.

[16] On 22 February 2016, Mr Forster replied again through his legal representative denying all allegations including accusing the Hill's of fabricating the events on 4 February.

[17] Mr Hill replied on 23 February 2016. He noted there was a preliminary decision to dismiss Mr Forster and sought input on that proposed outcome.

[18] The following day, a short response was received from Mr Forster's legal representative again denying responsibility and dismissal as an outcome. On 24 February 2016, Mr Hill confirmed Mr Forster's employment was to be terminated without notice.

### **Determination**

[19] There are several factual disputes in this matter that occupied at least a half day of hearing time but make little difference to the determination. There was a dispute about when Mr Forster returned a fuel card. There was a dispute about whether he threw keys and a phone onto a driveway. There was a dispute whether Mr or Mrs Hill approached Mr Forster at the workshop. There was a dispute about what was said by Mr Forster to a co-worker Jesse McLean. There was a dispute about what was said by Mr Hill to two subsequent employers of Mr Forster, Adam Moffatt and Martin Forster. None of those factual disputes were pivotal to this determination. The matters that were pivotal were either accepted as having occurred or logical conclusions of agreed facts. This is a matter for costs.

### **Issues**

[20] There are two issues that I must determine to resolve this application. Firstly was there sufficient evidence before Mr Hill to conclude that there had been serious misconduct? Secondly were the actions of Mr Hill leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

### **Law**

[21] The fact Mr Forster's employment was terminated is accepted. The onus falls upon Mr Hill to justify whether his actions leading to dismissal *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or*

*action occurred.*<sup>1</sup> In applying this test, I must consider matters including having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.<sup>2</sup>

[22] A dismissal may be justified if the defects were minor and did not cause unfairness.<sup>3</sup>

### **Was there serious misconduct?**

[23] Both parties confirmed the serious misconduct, if any, was what occurred between Mr Forster and the Hills on 4 February 2016. There were two preceding events that led to a confrontation at the workshop.

#### ***Text messaging***

[24] The first event was the text messaging early on 4 February 2016. The text messaging itself indicates both parties are prepared to resort to swearing to make their point. Neither party in my view can take the high road about the nature or tone of their language. Both appear to be at fault in terms of the way they deal with each other. I do not take the text messaging as being the genesis or the reason for the later confrontation at the workshop. I accept it may have contributed to the party's feelings of annoyance towards each other that day. It is not reasonable to conclude this text messaging led to Mr Forster's actions at the workshop sometime later.

#### ***House altercation***

[25] I take a similar view of the altercation that occurred when Mr Forster arrived at the house. That was not a one sided argument attributable to Mr Forster. Both Mr Hill and Mr Forster were annoyed with the other for various reasons. There was evidence today that both men were tired. They had both been doing 11 to 14 hour days, 70 to 80 hour weeks.

[26] There was some confusion about Mr Forster's presence at the house. He believed there was going to be a meeting. He wanted it to occur then and there. Neither of the Hills' thought any meeting was going to occur then or if at all. Mr Hill

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<sup>1</sup> Section 103A(2) Employment Relations Act 2000 (Act).

<sup>2</sup> Section 103A(3) of the Act.

<sup>3</sup> Section 103A(5) of the Act.

in particular had no time because he had an important personal appointment he had waited two weeks to attend to in town. He wished to leave.

[27] Given the circumstances it is logical to conclude there was an argument between Mr Hill and Mr Forster. Both parties had until this point a close friendship. Although Mr Forster may have used a raised voice, it did not scare the Hill's. I accept Mrs Hill was shocked by this behaviour. The argument took place in a very short amount of time. It may have been misconduct but was not sufficiently serious to justify dismissal.

[28] Mr Hill tried to impose "a cooling off" period on Mr Forster. It was not unreasonable for Mr Hill to ask Mr Forster to leave the property following their argument. It was an appropriate response given there was a lot of tension and anger shown at this point between the parties. However, the removal of his work property in the form of keys, phones, work vehicles etc did not seem to be so reasonable and may have disadvantaged him. However this is not an application before me for determination nor has it been raised with his employer. This behaviour supported an inference both Mr Forster and Mr Hill were not behaving rationally and were becoming angry.

### ***Workshop confrontation***

[29] After flagging down Mr and Mrs Hill and asking for access, it is refused not once but twice by Mr Hill. This does not help the situation. On the one hand Mr Hill told me in his evidence that his wife left the car first to deal with Mr Forster as a peacemaker. Despite this he intervenes not once but twice to refuse access to the workshop for Mr Forster instead of leaving his wife to resolve Mr Forster's concerns.

[30] However, Mr Hill's intervention does not justify the next act by Mr Forster. It is this act that I view as serious misconduct.

[31] Mr Forster accepted in his evidence that he said, "*if you won't let me in I will make my own way in*". He accepted he was threatening to damage the Hills' property. He also accepted that he went and retrieved his bolt cutters from his vehicle and had them in his hands the entire time, albeit he held them below his waist. He told me that he had the bolt cutters to "*give the illusion of me being able to smash the [workshop] glass door*". It is when Mrs Hill intervenes and gets the workshop keys from Mr Hill that his behaviour stops.

[32] I do not accept Mr Forster's submission that he did not intend to do this at the time, that it was a "mere illusion." That is not a reasonable or logical conclusion. Mr Forster had the means and opportunity to carry out his threats. His anger and behaviour at the time strongly suggested he would have done so if Mrs Hill had not intervened.

[33] I do not accept his submission that particular act was primarily brought about by Mr Hill. Mr Hill did not act in any way to justify those bolt cutters being in Mr Forster's hands. This was not a case of self-defence. These were not idle threats or said in jest. More importantly there were a number of alternatives Mr Forster could have followed to retrieve his property. He could have left and gone to the Police. He could have asked others to retrieve the property on his behalf. His sister, Aimee Forster. His uncle, Martin Forster. His partner who is with him today. Resorting to threats of violence was not reasonable or logical or legal in the circumstances.

[34] I also accept his acts would have scared Mrs Hill and their children. It did not matter whether they were in the car at the time of the threats or not. Mrs Hill was present with two of their very young children. Mrs Hill reasonably perceived she may be hit by Mr Forster. He had the means and opportunity to do so – he retained possession of the bolt cutters even when she let him into the workshop. This was an intimidating and frightening act by Mr Forster. It is logical to conclude this intimidation was to get the Hill's to do what he wanted. I accept Mrs Hill's evidence that she did what he wanted to prevent harm to their property, her family and herself.

[35] In my view, there was sufficient evidence before the employer at the time to conclude there had been serious misconduct for which Mr Forster may be dismissed.

**Was the process leading to dismissal fair and reasonable?**

*Were the concerns investigated having regard to resources?*

[36] This is a small employer without any human resources. It is a business being run by a sole trader husband supported by his wife. The requirement for them to have an independently appointed investigator is unrealistic and unnecessary. The test requires having regard to this employer's resources. Mr Hill had limited resources given the small scale of his business.

[37] No further investigation of the concerns was required. Both parties were present during the acts of misconduct. The acts giving rise to the serious misconduct were accepted as having occurred. The parties simply disagreed about whether it was serious. An independent investigator would have added very little.

*Were the concerns raised?*

[38] Mr Forster confirmed under examination he understood the serious misconduct alleged was his behaviour on 4 February. That was the focus of his replies from 9 February onwards. There can be little doubt from the exchange of correspondence both parties were well aware of what were the concerns giving rise to serious misconduct prior to dismissal.

[39] The 9 February letter was intended to raise the serious misconduct but also sought to deal with other general misconduct issues at the same time. I accept the letter on its surface was a little confusing to anyone whom were not the parties involved. I bear in mind this is a letter written by a non-legally trained person. At that stage, Mr Hill had taken no legal advice. He was attempting to communicate his concerns about Mr Forster's behaviour generally and was seeking input on how to retrieve their employment relationship. Mr Forster confirmed this was his intention at the meeting as well. If there was any defect it was minor and did not cause any unfairness.

[40] While I accept Counsel's submission that a fair process requires the employee to be advised at the outset of the particulars of the wrongdoing, I do not accept there was unfairness here. Mr Forster complains he did not know until 16 February how scared Mrs Hill was by the threats. Her feelings were a logical and obvious conclusion from his actions that day. He had threatened to damage her property, was holding bolt cutters in his hands when she intervened and could have caused more damage if he was so minded. In any event he was well aware of her fears 10 days prior to dismissal and had an opportunity to comment thereon.

[41] While the parties may disagree about the majority of his conduct on that date, Mr Forster accepted he made threats to damage the Hills' property. He was well aware this was the principle concern. There was no unfairness to Mr Forster about the way the concerns were raised. He just did not accept the seriousness of his misconduct.

*Was there opportunity to be heard?*

[42] There can be no concern about the opportunity to be heard. There was a meeting on 9 February. There was also an extensive exchange of correspondence between Mr Hill and Mr Forster's legal representative, Ms Rolston.

*Was there genuine consideration of Mr Forster's responses?*

[43] The principal issue of concern around the process appears to be the genuineness of the employer's consideration of Mr Forster's replies.

[44] It was submitted the dismissal decision was unfair because the decision-maker was the complainant and witness. It is well-established law employers are not required to be impartial. They are not judges. They are not required to engage in a judicial process. This is especially where there are small employers less resourced such as here. They will always approach decision-making with partiality. The test is whether the decision to dismiss was fair and reasonable in all the circumstances.

[45] It was submitted it was improper for this employer to provide options for an employee to accept warnings for serious misconduct as an alternative to a continuation of the disciplinary process. The Court has confirmed an employer is not required to approach an investigative and disciplinary process with a completely blank mind given the realities of many workplaces. Nor is it objectionable to form a tentative view during the course of the disciplinary process.<sup>4</sup>

[46] It is commonplace for parties to attempt to settle disciplinary matters with by offers usually on a without prejudice basis. It is not uncommon for employers or employees to put forward a proposal to settle without needing to complete a disciplinary process. This is not an indication of unfairness.

[47] The option was also not an unreasonable outcome given the agreed facts. It was a warning and a requirement to attend anger management counselling paid for by the Hills. Mrs Hill had undertaken some research into an appropriate counsellor who could teach Mr Forster techniques for de-escalation of situations. No other option was put forward to address Mr Forster's anger issues. His apology was insufficient – especially when he denied any serious misconduct had occurred.

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<sup>4</sup> *Ritchie's Transport Holdings Ltd v Merennage* [2015] NZEmpC 198; [2016] NZCA 191

[48] I do not accept Mr Forster's submission it is the employer's process and for the employer to make all proposals, decisions and decide outcomes without any proposal or counter-offer from an employee. The duty of good faith requires employers and employees to be active and constructive in maintaining their employment relationship. Mr Forster's lack of substantive reply to address his anger issues in the workplace left little option other than termination.

[49] Mrs Hill's evidence was she was unhappy to have him in her house unless his anger was addressed. It was accepted Mr Forster had a serious conviction for wounding with intent to injure. He had served a sentence of home detention. Mr Forster used the Hill's home daily for toileting facilities and as an occasional lunchroom. Mrs Hill felt unsafe having Mr Forster in her house around her children unless he could reassure her he would not take similar action in future. Mr Hill was his immediate supervisor and business owner. He could not and did not offer any other solution to how he could continue his working relationship in a safe way. There was a factual foundation for the Hills' concerns about his ability to remain non-violent in the workplace.

[50] The correspondence between the Hills and Mr Forster's legal representative showed no insight into what had occurred. It simply denied any responsibility.

[51] The process leading to termination was fair and reasonable. Mr Forster was justifiably dismissed.

[52] The application for personal grievance is dismissed.

### **Costs**

[53] Costs are reserved. If the parties are unable to agree on costs, the respondent is to file its applications for costs by **26 January 2017 at 3pm**. The applicant is to file any reply by **29 January 2017 at 3pm**.

**T G Tetitaha**  
**Member of the Employment Relations Authority**