

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 28/08
5048503

BETWEEN SHANE HERDMAN
Applicant
AND AUTOGLAS-STIEGER
LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Robert Thompson, Advocate for Applicant
John O'Connell, Counsel for Respondent
Investigation Meeting: 14 and 15 November 2007 at Christchurch
Determination: 19 March 2008

DETERMINATION OF THE AUTHORITY

Identity of respondent

[1] When the statement of problem was lodged with the Authority, it referred to the respondent as Franz Stieger. Mr Stieger is the director of a company, Autoglas-Stieger Limited.

[2] With the consent of the parties, the name of the respondent was amended to Autoglas-Stieger Limited. It was agreed by both parties that Mr Herdman was employed by that company.

Employment relationship problem

[3] Mr Herdman was employed by the respondent company from 1 October 2005 until 7 June 2006 as a windscreen repairer. He says that he was unjustifiably dismissed from his employment with the respondent company following an exchange with Mr Stieger on 7 June 2006 about money that had been deducted from Mr Herdman's wages after damage to a client's vehicle. Mr Herdman also says that

he suffered an unjustified action that caused him disadvantage when the money was deducted from his wages.

[4] Mr Herdman seeks lost wages in the sum of \$2,887.92, compensation in the sum of \$15,000, a penalty for the failure to provide an employment agreement, and costs.

[5] The respondent, Autoglas-Stieger Limited (Autoglas), is a duly incorporated company having its registered office at Auckland and carries out business as windscreen repairers.

[6] Autoglas does not accept that Mr Herdman had personal grievances that he was either disadvantaged or dismissed. It is not accepted that Mr Herdman was dismissed during the conversation between Mr Herdman and Mr Stieger on 7 June 2006. It says that Mr Herdman resigned of his own accord and, in any event, his actions in refusing to carry out a lawful instruction and other actions amounted to serious misconduct and would have entitled it to dismiss Mr Herdman in any event.

The issues

[7] The unjustified disadvantage claim is based on the same facts as the claim for unjustified dismissal and I have not treated them as separate claims if I come to the point of determining remedies. The issues for the Authority to determine are as follows:

- Was Mr Herdman dismissed during the meeting on 7 June 2006 or did he resign;
- If Mr Herdman was dismissed, then was his dismissal unjustified, applying the test in s.103A of the Employment Relations Act 2000;
- Remedies and are there any issues of contribution;
- Should a penalty be imposed for failing to provide an employment agreement?

The deduction of \$145 from Mr Herdman's wages

[8] Mr Herdman was carrying out work, in or about late May 2006, at Avis Rental Cars installing a windscreen. He broke a blade during what he said was a difficult removal of the windscreen. This caused a scratch to the paint surrounding the screen. Mr Herdman informed the manager of Avis and his employer immediately.

[9] Mr Stieger said that on other earlier occasions, about three, Mr Herdman had caused fairly minor damage to customers' cars when he was undertaking his role as a glazier. Mr Stieger said it had got to a point where he had told Mr Herdman that if he continued to cause damage he would have to pay for it. Mr Stieger said that Mr Herdman turned up tired to work on occasion and that he told him he should be responsible for any damage in those circumstances.

[10] Mr Stieger said that after the incident in or about late May 2006 he advised Mr Herdman that he may have to deduct the cost in accordance with earlier discussions. Mr Herdman did not accept that there was any discussions of this nature.

[11] Money was deducted from Mr Herdman's wages that he received on Friday, 2 June 2006 – Autoglas document 4.4. The following Monday, 5 June 2006, was a public holiday.

[12] Having heard the evidence, I find it more likely than not that Mr Herdman was unaware the money for the damage to the vehicle was to be deducted from his wages. Mr Herdman's reaction to the deduction during the meeting on 7 June 2006 was not the reaction of someone who knew that a deduction was to be made from his wages.

Did Mr Herdman resign on 7 June 2006 or was he dismissed?

[13] On 7 June 2006, Mr Herdman approached Mr Stieger in his office with his pay slip in his hand to discuss the deduction. Mr Herdman said that Mr Stieger told him *this is how I will teach you to be more responsible*. Mr Stieger accepted that he had said something to Mr Herdman along the lines that he should be more careful.

[14] Mr Herdman told Mr Stieger that he did not think Mr Stieger could legally deduct money from his wages for the damage. Mr Herdman also wanted to clarify any responsibility he may have for damage in the future when he was working on cars

as part of his role. During the conversation, Mr Stieger received a telephone call to fit some cars at the Avis/Budget worksite. He asked Mr Herdman to go and do the work.

[15] The situation deteriorated somewhat after that telephone call. Mr Herdman wanted to resolve the issue about deductions from his wages there and then, and Mr Stieger thought that Mr Herdman should go and do the work. Mr Stieger recalls Mr Herdman saying something like *I have to think if I go there* [to work], and although he may not have expressed it clearly, I accept that Mr Herdman was essentially saying to Mr Stieger that he would not be able to think if he went to work.

[16] Mr Herdman did accept that Mr Stieger told him to go and do the work and that they would discuss the matter further at a later time. At this stage, Mr Stieger and Mr Herdman thought the other was getting angry and upset. Mr Herdman said that it was important for him to clarify whether he would be liable to damage to other vehicles because he worked on some expensive cars and so he did not leave the office.

[17] Mr Stieger accepted at the Authority investigation meeting that he said something like *if not go out for work go out from the company*. He said that Mr Herdman was aggressive and he just wanted him out of his office. I find Mr Stieger also told Mr Herdman to *get out of his sight*. Mr Herdman also recalled Mr Stieger saying *get out or I'll throw something at you*. I think it likely that Mr Herdman had, prior to the statement from Mr Stieger, become fairly insistent about discussing the matter and that explains in my view Mr Stieger's reaction.

[18] After Mr Stieger advised Mr Herdman to get out, Mr Herdman left the office and as he went slammed the office door hard. This caused the glass in the door to shatter.

[19] I do not find at that point that Mr Herdman wanted to resign and I do not think that Mr Stieger intended to dismiss Mr Herdman. They were both angry and upset and anything that was said or done has to be considered in that light. Mr Herdman was angry about the deduction from his wages and wanted to know whether the deductions would continue, and Mr Stieger was upset that Mr Herdman would not go and do his work as he was asked.

[20] Mr Stieger said that he was very shaken by Mr Herdman's behaviour. He telephoned his wife, Alvina Stieger, who was nine months' pregnant and resting at home. Mrs Stieger was the Christchurch Branch Manager of Autoglas. Mrs Stieger

came into work and there was some discussion about whether a complaint should be made to the Police about the damage to the door.

[21] After Mr Herdman left the office, he went out to the airport worksite to pick up his jacket. Another employee of Autoglas was at the airport at that time, Lee Hinton. Mr Hinton gave evidence at the Authority's investigation meeting.

[22] Mr Herdman said that he told Mr Hinton that Mr Stieger flipped out and asked him to leave before he threw something at him. Whilst Mr Hinton agreed that Mr Herdman told him that he was there to pick up an item of clothing from the van he said in his evidence that Mr Herdman said something like *I've left* or *I quit*.

[23] He said that Mr Herdman did not use the words *fired* or *sacked*.

[24] Mr Stieger said he was telephoned by Mr Hinton who advised him that Mr Herdman had picked up his stuff and quit his job. It seemed at this point that Mr Stieger concluded that Mr Herdman was not returning to work and that he had resigned.

What happened next?

[25] The evidence about what occurred after 7 June 2006 is disputed.

[26] Mr Herdman said that he returned to work on 8 June 2006 expecting Mr Stieger to have calmed down. He said that he was not greeted in a warm way by Mr and Mrs Stieger. Mr Herdman said that he told Mr Stieger that he did not think they could fire him like that and he was not happy. Mr Herdman said that Mrs Stieger told him that he was not fired but that he resigned.

[27] Mr and Mrs Stieger do not accept that this visit took place on 8 June 2006. Mr Stieger said that he did not hear anything further from Mr Herdman until 9 June 2006 when he was telephoned by Mr Herdman wanting payment of wages. It is common ground that there was a telephone call about payment on 9 June 2006. Mr Stieger asked that Mr Herdman put what he wanted in writing.

[28] Mr Herdman sent a facsimile to Mr Stieger on 9 June 2006 as follows:

ATTN FRANZ
**2 FULL WEEKS SEVERANCE PAY*
38 hrs @ \$17

* *FULL HOLIDAY PAY*
 * *LOST WEEKS PAY & 2 DAYS FROM THIS WEEK*
 * *\$145 "DAMAGE TO CAR" REFUNDED*
 * *FRANZ TO PAY FOR DOOR!*
 * *ALL CALCULATIONS FAXED BACK TO FAX ... TODAY.*
UNFAIR DISMISSAL WOULD BE MUCH MESSIER THAN THIS.
I'LL DROP PHONE BACK MONDAY AFTER CHECKING
CALCULATIONS.

[29] There was agreement that Mr Herdman attended at the Autoglas premises on 12 June 2006. Mr Herdman went into the office and talked to Mr and Mrs Stieger together. I find that Mrs Stieger questioned Mr Herdman why they had to pay Mr Herdman anything because he had walked out. Mr Herdman said that he did not resign. I find Mr Herdman told Mrs Stieger that he did not resign and he also told her to *shut up*.

[30] There was a payment made to Mr Herdman for holiday pay and wages for the weeks ending 2 and 9 June 2006. Not all the payments requested in Mr Herdman's facsimile were made to him. Mr Herdman advised Mr Stieger during the meeting that he thought he could get the door fixed for less than the quoted price of \$495. He was given a week to do so.

[31] Having carefully considered the evidence, I find that it is more likely than not that Mr Herdman was confusing the 12 June 2006 visit to Autoglas when he referred in his evidence to an earlier visit on 8 June 2006. I find there was only one attendance by Mr Herdman at the Autoglas premises which was on 12 June 2006. I accept on 12 June 2006 Mr Herdman made it clear that he did not accept that he had resigned.

[32] In his facsimile of 9 June 2006, Mr Herdman made it clear that he considered he had been dismissed. There is a reference to unjustified dismissal being messier. The severance pay sought by Mr Herdman would support that Mr Herdman did not consider he had resigned. I do not find that Mr Stieger, during the telephone call that preceded the facsimile on 9 June 2006, clarified with Mr Herdman how the relationship ended. I have concluded this because otherwise I think it likely that the facsimile would have been written differently.

[33] On 14 June 2006, Mr Herdman received a letter from the solicitor for Autoglas, Garry Thompson advising his instructions were that there were problems with Mr Herdman's work and that when he was confronted he caused damage to the premises and resigned from his employment. Mr Garry Thompson said in his letter

that Mr Herdman was not dismissed but he resigned. There was also reference within the letter to the repair of the door which ultimately was undertaken by Autoglas.

[34] It is clear from Mr Thompson's letter to Mr Herdman that Autoglas knew Mr Herdman did not believe that he had resigned.

[35] Mr Herdman then went to see his representative, Robert Thompson, who wrote to Mr Garry Thompson and raised personal grievances of unjustified dismissal and disadvantage. He said in his letter that Mr Herdman had not resigned and that he was in fact dismissed.

Conclusions

[36] I do not find that Mr Herdman said unequivocally that he was resigning on 7 June 2006. An unequivocal resignation cannot be withdrawn without an employer's consent.

[37] This was a situation where there had been a heated discussion and emotional outbursts. The law recognises that there are situations where an employer simply cannot safely insist that an employee by words or acts has resigned - *Boobyer v Good Health Wanganui* (unrep) Goddard J WEC 3/94.

[38] Mr Stieger relied on Mr Hinton's advice and the fact that Mr Herdman had not commenced work after the exchange to conclude and then maintain that Mr Herdman had resigned. In my view, it was not sufficient for Mr Stieger to rely on second-hand information from Mr Hinton as to Mr Herdman's intentions or the reasons why he was leaving. If anything had been said to Mr Hinton then it would have been still in the heat of the moment and once Mr Herdman had calmed down, then it was necessary to clarify the situation directly with him.

[39] There are obligations in an employment relationship of trust, confidence and good faith. In this case, I find that those obligations required an inquiry to be made directly of Mr Herdman, when he had calmed down, as to his intentions given the heated discussion of 7 June 2006. Mr Stieger said at the investigation meeting that he did not want Mr Herdman *to go* from the company however he did not take steps to clarify if the relationship could be continued. It must have been clear to Mr Stieger in the facsimile of 9 June 2006 and the discussion on 12 June 2006 that Mr Herdman did

not consider he had resigned. There was no attempt to resolve how the relationship between the parties had ended.

[40] I do not accept Mr O'Connell's submission that there was nothing a fair and reasonable employer could have done to repair the relationship. There should have been a meeting and/or at least a discussion and clarification about Mr Herdman's intentions. There were certainly issues between the parties that needed to be discussed and resolved. This situation is one of the categories referred to in *Boobyer* where it was simply not safe to insist, without further inquiry, that Mr Herdman resigned.

[41] There are several distinct types or categories of cases in which an employee is, against his or her will, treated by an employer as having resigned – *Boobyer*. I find that Autoglas, consistently maintaining its position that Mr Herdman resigned after the heated exchange on 7 June 2006, effectively prevented any continuation of the relationship and it was this that amounted to a dismissal.

Was the dismissal unjustified?

[42] Whether the dismissal was unjustified or not must be determined in accordance with the test in s.103A of the Employment Relations Act 2000 which provides:

103A. Test of justification

For the purposes of s.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.

[43] I have not found that Mr Herdman resigned in circumstances where it was safe for Autoglas to simply act on a resignation without further inquiry.

[44] Autoglas has said that it would have been justified in any event in dismissing Mr Herdman because he failed to follow a lawful order to go to work which was given to him by Mr Stieger during the 7 June meeting. Further, it says that Mr Herdman was aggressive during the meeting and he broke the glass in the door when he slammed it shut.

[45] No meeting was held at which the allegations of misconduct were put to Mr Herdman. He did not have an opportunity to respond after a cooling down period. I do not find, as submitted by Mr O'Connell, that this was a case where a fair and reasonable employer would have simply proceeded to dismiss Mr Herdman without any of the usual elements which are considered part of a procedurally fair process. In particular, Mr Herdman did not have an opportunity to explain, mitigate or refute the allegations which is one of the fundamental elements of a fair process.

[46] Mr O'Connell submits that the request to carry out work during the meeting of 7 June 2006 was a lawful and reasonable order and that Mr Stieger had agreed to talk about the issue at a later time with respect to deductions. The Court of Appeal held in *Sky Network Television v. Duncan* [1998] 3 ERNZ 917 at 922 that:

Disobedience of an order which an employer has the lawful authority to give to the employee is a form of misconduct but it did not necessarily follow, at common law, that such an act of disobedience justifies dismissal.

[47] The Court of Appeal in *Sky Network* agreed with the Employment Court findings that the correct test was not whether there had been wilful conduct but whether the employee's conduct justified dismissal.

[48] Mr O'Connell submits that it was not for Mr Herdman to *openly and defiantly demand a resolution of a matter there and then* when Mr Stieger had indicated that it could be subsequently discussed.

[49] Mr Stieger had said he would talk about the deductions at a later time. A fair and reasonable employer would have taken into account that Mr Herdman was genuinely concerned about the possibility of deductions being made from his wages for any damage to cars in the future. A fair and reasonable employer would also have taken into account that Mr Herdman had advised that he did not want to work because he would have to think and there could have been an issue as to his ability to concentrate. A fair and reasonable employer would have taken into account that the deduction of \$145 was in fact unlawful and that there was some basis, therefore, to Mr Herdman's concerns.

[50] With regard to the damage to the door, Mr Herdman accepted that he had slammed the door, in my view with some force, but a fair and reasonable employer would have wanted to reach a conclusion as to whether Mr Herdman intended to

break the glass or whether that was an unintentional consequence of his slamming of the door. Mr Herdman denied in his evidence to the Authority that there was any intention to break the glass. He did offer to repair it, although ultimately Autoglas repaired the damage itself and deducted the cost from any money owing to Mr Herdman. Any other concerns about Mr Herdman's performance and attitude that were mentioned during the investigation meeting also needed to be put to Mr Herdman so that he could fairly have an opportunity to answer them.

[51] In those circumstances, I am not persuaded that had there been a meeting during which the allegations were put to Mr Herdman, dismissal would have been inevitable as Mr O'Connell submits.

[52] In conclusion, I find that Mr Herdman was unjustifiably dismissed.

Determination

[53] Mr Herdman has a personal grievance that he was unjustifiably dismissed and is entitled to remedies.

Remedies

Lost wages

[54] Mr Herdman was in receipt of a sickness benefit from about late June 2006. He said that he had a sore shoulder which could not be attributed to an injury and was caused by the stress of the dismissal. Mr Herdman said that he suffered from depression. There is a medical certificate to that effect.

[55] The evidence about the reason for Mr Herdman being on a sickness benefit and his inability from that point to look for and obtain other employment is insufficient to satisfy me that Mr Herdman's loss of income from 24 June 2006 was attributable to his dismissal from Autoglas.

[56] I find that the only loss of wages that can be attributable to Autoglas is from the time of dismissal until Mr Herdman received his sickness benefit. The evidence suggests that is a period of a little over two weeks but Mr Thompson will have to clarify that. It is not clear from the evidence whether Mr Herdman was paid up to 9 June 2006. I shall leave it to the parties in the first instance given those issues to calculate the lost wages up to the point Mr Herdman was on a sickness benefit. Leave

is reserved for either party to come back to the Authority if there are any difficulties with that. To assist I have averaged out the variable weekly gross amounts paid to Mr Herdman for a period of ten weeks between 3 April 2006 and 26 May 2006. The average weekly gross wage over that period was \$512.45.

Compensation

[57] I heard from Mr Herdman and his partner, Camille Tulett, about the effect the dismissal had on Mr Herdman. Mr Herdman said he sought medical advice and was diagnosed with depression. He said that he was humiliated by the experience in terms of his dealing with family and his partner, given the loss of his job and had considered the opportunity with Autoglas to have been a career path. Ms Tulett said that Mr Herdman withdrew socially and that the loss of his wage meant that they had to borrow money to survive.

[58] Mr Herdman said that he had been an extremely loyal employee to Autoglas and felt that he had no control over what had happened.

[59] I have considered the evidence and in all the circumstances I am of the view that an appropriate award for compensation would be \$6,000.

Contribution

[60] I am required to consider, under s.124 of the Employment Relations Act 2000, the extent to which Mr Herdman's actions contributed to the situation giving rise to his dismissal.

[61] I have found that it was a failure of Autoglas to properly inquire into Mr Herdman's intentions after 7 June 2006 and the continual maintaining that he had resigned gave rise to the personal grievance. I accept that Mr Stieger was shocked by the shattering of the glass in the door and Mr Herdman's manner during the meeting. Mrs Stieger said that she felt quite scared of Mr Herdman as a result of seeing the damage and she did not think she could work with him again.

[62] I have no doubt that those actions would have made it difficult for the parties to deal with one another to maintain a productive working environment.

[63] It is Mr Herdman's manner after 7 June 2006 which in my view contributed though to the personal grievance. I do not consider that Mr Herdman was as

constructive in his approach to the company after 7 June 2006 as he could have been. Good faith goes both way in an employment relationship.

[64] The comment in Mr Herdman's fax of 9 June 2006 about unjustified dismissal being messier was capable of being considered as a thinly disguised threat in the event money sought was not paid. Mr Herdman should have, as part of a constructive and good faith approach to the company, showed some remorse for the damage to the door and I am not satisfied that he did. I have taken into account though that Mr Herdman has paid for that damage by virtue of a deduction from his wages. Mr Herdman also shut Mrs Stieger down abruptly when she asked why he should be paid anything because he walked out. I accept Mr Herdman felt frustrated, but in my view such responses contributed to the difficulties in establishing any sort of productive relationship after 7 June 2006.

[65] I find that Mr Herdman contributed to the grievance to the extent of 25% and the above remedies that I have awarded to him should be reduced by that amount.

[66] Applying the contribution to the compensation award I make the following order:

- I order Autoglas-Stieger Limited to pay to Shane Herman the sum of \$4,500 being compensation without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Penalty

[67] Mr Herdman should have been provided with a written employment agreement and in all probability would have been assisted by that following the events of 7 June 2006. I have taken into account that Mr and Mrs Stieger said that they did not appreciate the requirement of providing an employment agreement and there was, in Mr Herdman's case, some written information setting out hours of work and pay rates.

[68] I am of the view there should be a penalty imposed but that it should be a moderate penalty and be paid to the Crown.

[69] I order Autoglas-Stieger Limited to pay to the Authority, which will then pass it to the Crown bank account, a penalty under s.135 of the Employment Relations Act

2000 in the sum of \$200 for failing to provide Mr Herdman with a written employment agreement.

[70] For completeness, there was no claim for any other penalties. The money deducted for the damage to the car has been refunded.

Costs

[71] I reserve the issue of costs.

Summary of findings and orders made:

- I have found that Mr Herdman was unjustifiably dismissed.
- I have found that Mr Herdman contributed to the situation that gave rise to his personal grievance to the extent of 25%.
- Mr Herdman is entitled to lost wages until the time he was in receipt of the sickness benefit less the contribution assessed. The parties are to attempt to reach agreement about the lost wages failing which leave is reserved for them to return to the Authority.
- Taking contribution into account, I have ordered Autoglas-Stieger Limited to pay to Mr Herdman the sum of \$4,500 by way of compensation.
- I have ordered Autoglas-Stieger Limited to pay to the Authority which will then pay into the Crown bank account a penalty of \$200 for failing to provide Mr Herdman with a written employment agreement.
- I have reserved the issue of costs.

Helen Doyle
Member of the Employment Relations Authority