

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Barry Hodges
AND Total Distribution Limited
REPRESENTATIVES David Fleming, Counsel for Applicant
Natalie Fraser, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 24 May 2006
DATE OF DETERMINATION 24 July 2006

DETERMINATION OF THE AUTHORITY

The applicant, Mr. Barry Hodges, says that he was unjustifiably dismissed. The respondent says that Mr. Hodges abandoned his employment.

Mr. Hodges was employed as truck driver by the respondent.

Events of 13 September 2005

Mr. Hodges had an altercation with Mr. James Nikora, who was employed as a warehouseman. Mr. Hodges was about to leave the depot to make a delivery and Mr. Nikora asked him to pick up some freight from the vicinity of the delivery location. Mr. Hodges took exception to this request and yelled at Mr. Nikora saying "You are not my fucking boss, why don't you do it?" Mr. Nikora said he was shocked and asked Mr. Hodges why he was abusing him. Mr. Hodges did not reply so Mr. Nikora took the manifest book from Mr. Hodges and repeated his question. Mr. Hodges replied that no fucking junior was going to tell him what to do. Mr. Nikora's supervisor, Mr. Kris Hood, was present at the time.

Mr. Fonce Sheeran, the managing director, was absent from the depot at that time. When he returned he saw that Mr. Nikora was upset and asked him what the matter was. After Mr. Nikora told him he said that a meeting needed to be held.

Mr. Hodges said he had asked for a representative but Messrs Sheeran, Hood and Nikora denied that such a request had been made. I accept their evidence.

Mr. Sheeran asked Mr. Hodges why he had been abusive towards Mr. Nikora. Mr. Hodges repeated that no fucking junior was going to tell him what to do. During the course of the meeting Mr. Hodges accused Mr. Sheeran of killing his partner's father, who had died of cancer. This was apparently a repetition of a claim made some time earlier, when the then union organiser, Mr. Derek Pickering, had taken the matter up with Mr. Hodges, who had apologised to Mr. Sheeran.

Mr. Hodges said that when he mentioned bringing the union in Mr. Sheeran became abusive and said he hated the union. Mr. Sheeran and his two employees denied this. Mr. Sheeran said he had found the intervention of Mr. Pickering necessary and useful in the past in his dealings with Mr. Hodges. Mr. Pickering's evidence confirmed this. Mr. Sheeran said he had

found the intervention of the union useful when, for example, Mr. Hodges refused to wear the new company uniform, continued to smoke when the anti-smoking legislation came in and would not return to work on the due day after an ACC absence

There are a number of disagreements between Mr. Hodges on the one hand and the other three witnesses as to what else was said at the meeting. I do not accept Mr. Hodges' version of the meeting and I do not accept that he was in any manner threatened or abused during the course of that meeting. A number of matters regarding Mr. Hodges, which he found unpleasant and upsetting, were raised at the meeting and he became upset and angry.

Mr. Hodges claimed that he felt very threatened by what had happened and believed that if he went back to work "there would be another blowup" and he could be assaulted. I am satisfied that Mr. Hodges' problem was simply that a younger and more junior employee had asked him to do something and that he took great exception to that and, on his own admission, abused Mr. Nikora. He did not provide any explanation to Mr. Nikora for his abuse nor did he apologise to him.

I accept the evidence of the company that at the end of the meeting Mr. Sheeran asked Mr. Hodges to do a pick up and that said he wanted to see him when he got back from doing that. Mr. Hodges returned to work at 4.10pm and then departed without asking or telling Mr. Hood that he was going. He was due to finish work at 5.00pm.

14 September

Mr. Hodges telephoned on the morning of 14 September and said he was not coming to work. When asked why, Mr. Hodges said he wanted to see his union representative. Mr. Sheeran said he could see the union at work and that he also wanted to talk to the union about Mr. Hodges. Mr. Hodges refused to come to work. Mr. Sheeran told him that unless he was sick he had to come to work and that Mr. Sheeran wanted to have a meeting with him. Mr. Hodges alleges that Mr. Sheeran told him he was sacked, which Mr. Sheeran denies. Interestingly, Mr. Hodges did not repeat this allegation to the union organiser, Mr. Sydney Keepa, when he contacted him. I find that Mr. Hodges was told that he needed to have a medical certificate if he was sick and that if he didn't get one and didn't come to work then he would be sacked. Mr. Hodges hung up and did not go to work.

Mr. Hodges went to the union office and discovered that his usual organiser, Mr. Derek Pickering, no longer worked for the union.

Mr. Sheeran said he had rung the union several times to see if he could find where Mr. Hodges was and whether he was intending to return to work. Given Mr. Sheeran's past reliance on the union to deal with problems regarding Mr. Hodges I accept his evidence although contact with the union does not appear to have been made until the following day.

15 September

Mr. Hodges did not contact his employer and did not go to work.

Mr. Hodges was contacted by the new organizer, Mr. Keepa. He told Mr. Keepa there had been an argument at work that he felt threatened and stressed and had told his employer he was off sick due to stress. Mr. Keepa and Mr. Hodges discussed whether Mr. Hodges should get a medical certificate but they agreed it was not necessary as three days had not elapsed. I find that Mr. Hodges did not tell Mr. Keepa that Mr. Sheeran had asked for a medical certificate.

16 September

Mr. Keepa said when he and Mr. Sheeran did finally make contact Mr. Sheeran told him that Mr. Hodges had been dismissed on the grounds of abandonment. Mr. Keepa said he did not think Mr. Hodges had abandoned his employment. The two men agreed to have a meeting on the Monday without Mr. Hodges being present. Mr. Sheeran said he told Mr. Keepa that the

employment would be terminated on the grounds of abandonment. I find that he told Mr. Keepa the employment had been terminated.

Mr. Hodges said that when he contacted Mr. Sheeran he was told that his employment had been terminated on the grounds of abandonment.

19 September

Mr. Sheeran and Mr. Keepa discussed a package for Mr. Hodges. Mr. Sheeran said this was at the initiative of Mr. Keepa so he assumed that Mr. Keepa accepted that Mr. Hodges had terminated his contract. A proposal was put and a week later Mr. Sheeran telephoned Mr. Keepa to ascertain whether Mr. Hodges was willing to accept it and told Mr. Keepa that if Mr. Hodges did not accept within 12 hours it would be withdrawn. No agreement was able to be reached.

Abandonment

Abandonment is a situation where the employee absents him or herself from employment "in circumstances which clearly indicate an intention to cease being employed": *Central Clerical IUOW v Pro4mance Computer Solutions Ltd* (1988) NZILR 356, 357. In *E N Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97, 103 the Court of Appeal said the employer should be cautious in assuming that abandonment had occurred and "must face a high threshold if contending that the employment ended on the employee's initiative in that way".

Mr. Hodges had an unsigned employment agreement which contained an abandonment clause. In *Lwin v A Honest International Co Ltd* [2003] 1 387 Travis J said that the absence of an express term did not prevent a term being implied to give business efficacy to a contract, that if an employee abandoned their employment, the contract would be at an end.

Mr. Sheeran could not safely have concluded that Mr. Hodges did not intend to return to work and that he had abandoned his employment. Mr. Hodges had said he was stressed and that he wanted to talk to his union, which he did. Mr. Sheeran knew this. I accept that this was a frustrating situation for Mr. Sheeran but the proper thing to have done would have been to have delayed making any decision until he had spoken to the union and given Mr. Hodges an opportunity to comment. Mr. Hodges' actions may well have been the subject of disciplinary proceedings but Mr. Sheeran preempted that by stating that Mr. Hodges had abandoned his employment.

The respondent dismissed the applicant and the dismissal was unjustified.

Remedies

Mr. Hodges has sought compensation and reimbursement of lost wages from the date of dismissal till the date of the Authority hearing. I can see no reason for extending the period of reimbursement past the three month statutory minimum. An appropriate compensatory award is \$4,000.

Contribution

Section 124 Employment Relations Act 2000 requires the Authority to "consider the extent to which the actions of the employee 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.”

Mr. Hodges became angry with a co-worker who asked him to pick up some goods, a not unreasonable request in a small company. He abused that worker and when he was taken to task about it he left his employment and did not return. Although he was told he should supply a medical certificate if he was ill he failed to do so and did not inform his union organiser of this request.

Had Mr. Hodges not behaved as he did the personal grievance would not have arisen. Mr. Hodges actions were blameworthy. His conduct contributed to the grievance to such an extent that the remedies are to be reduced by 100%.

Costs

If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant’s memorandum.

Dzintra King
Member of Employment Relations Authority