

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Abdul Saleem Hussein (Applicant)
AND Premier Autos Limited (Respondent)
REPRESENTATIVES Brian Spong, Advocate for Applicant
Graeme Norton, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 2 June 2005
SUBMISSIONS RECEIVED 23 and 27 June 2005
DATE OF DETERMINATION 11 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Abdul Saleem Hussein was employed by Premier Autos Limited (“Premier Autos”) as a vehicle stripper and fitter from December 2001 until January 2003. On 17 January 2003 Mr Hussein tendered his resignation, giving two weeks notice, as required under his employment agreement. Following his resignation Mr Hussein was suspended. Mr Hussein says this suspension unjustifiably disadvantaged him in his employment and that his employer’s subsequent actions during the two week notice period further disadvantaged him in his employment. He seeks compensation for hurt and humiliation pursuant to section 123(c)(i) of the Act to the sum of \$15,000. In addition Mr Hussein seeks a declaration from the Authority that a clause of his employment agreement entitled “restraint on sponsorship” is unconscionable and unenforceable, and penalties in relation to breaches of contract for failure to pay wages and unlawful suspension.

[2] Premier Autos says its suspension of Mr Hussein on 17 January 2003 and actions to locate the missing employment agreement were fair and reasonable in the circumstances.

[3] The Authority must determine:

- (i) the lawfulness of the suspension;
- (ii) whether Mr Hussein forfeited his right to paid notice; and
- (iii) whether there are grounds for a declaration and award of penalties.

Background

[4] On 17 January 2003 Mr Hussein decided to resign following a discussion with Latchman Gounden, Premier Autos' general manager, regarding when he took his lunch breaks and cell phone

use at work. Mr Hussein said he had been thinking about resigning to focus on his spare parts business, that the suggestion he was acting inappropriately crystallised his thinking in this regard and he prepared his resignation letter that day during his lunch break.

[5] On Mr Hussein's return from lunch Gianeshwar Naidu, Premier Autos' manager administration, meet with him to give him a letter recording the issues raised in the earlier meeting. Mr Hussein then handed Mr Naidu his resignation letter, giving two weeks notice as required by his employment agreement. Mr Naidu then went to retrieve Mr Hussein's employment agreement. He found it was the only one missing from the filing cabinet.

[6] Mr Naidu telephoned Mr Gounden who instructed Mr Naidu to meet with Mr Hussein with a witness present and give him a letter advising his resignation was not accepted and discuss the missing employment agreement. Mr Gounden told me he thought Mr Hussein must have taken the employment agreement. I asked him why he thought this and he said Mr Hussein had access to the office and would want to take the employment agreement because of the sponsorship on restraint clause.

[7] At about 4.30pm Mr Hussein was called into a meeting with Mr Naidu and another employee, Rakish, who was there as a witness for the respondent, and advised he was suspended and given the following letter:

"Dear Sir

Subject: RESIGNATION

I acknowledge receipt of your application for resignation and wish to advise that it is not accepted, however you are requested to proceed on leave without pay on receipt of this letter pending investigation of missing documents from your personal file.

Yours faithfully

..."

[8] Mr Hussein was not advised of the purpose of the meeting prior to it or given an opportunity to have a representative present, he was not given an opportunity to comment on the appropriateness of suspension or the grounds upon which he was being suspended.

[9] Mr Gounden, having returned from Premier Autos' Penrose office, joined the meeting and the investigation into the missing employment agreement continued. Mr Gounden threatened Mr Hussein that he would report the missing document to immigration and the police. This did not occur. Mr Hussein offered to sign a new employment agreement. This offer was not accepted. The parties then agreed Mr Hussein would return to work on Monday with his copy of the employment agreement. A letter to this effect was drafted by Mr Naidu which Mr Hussein signed. Mr Hussein then left work for the day. It was about 6.30pm. Mr Hussein said he intended to return to work on Monday and work out his two weeks notice.

[10] On Monday 20 January Mr Hussein did not attend work. Deepak Sharma, an employee of Premier Autos, says he took a telephone call from Mr Hussein between 8.30 and 9am that day. He says Mr Hussein told him he was not coming back to work. Mr Hussein said he rang Premier Autos at about 11am that day to advise he would not be back until "the issues had been sorted out".

[11] That same day Mr Hussein met with his representative who wrote to Premier Autos:

- (i) all correspondence should be directed to the representative;

- (ii) the employment agreement provided for two weeks notice of resignation and it was not open to Premier Autos to refuse to accept Mr Hussein's resignation;
- (iii) there was no legal justification to suspend Mr Hussein without pay;
- (iv) Premier Autos should advise of any specific allegations regarding the missing documents;
- (v) a copy of the employment agreement would be posted to Premier Autos; and
- (vi) Premier Autos should advise if Mr Hussein would be paid two weeks notice if he was not required to work out his notice.

[12] This letter was received by Premier Autos on 21 January the same day Mr Naidu wrote to Mr Hussein advising Premier Autos would take steps to recover the missing document. I accept Mr Naidu's evidence he had not yet received Mr Hussein's representative's letter when he wrote this letter.

[13] On 22 January Premier Autos solicitors wrote to Mr Hussein's representative advising instructions were being taken.

[14] At 9pm on 29 January a private investigator, Hugh Thomson, acting on behalf of Premier Autos, visited Mr Hussein's. Mr Hussein and his family were preparing to retire for the evening. Mr Thomson explained he was investigating the missing document and Mr Hussein invited him in and cooperated with his questions. Mr Thomson left Mr Hussein's home at 1am. He wrote Premier Autos a report advising he was satisfied Mr Hussein did not have the missing document. Mr Hussein said he and his family were very upset by the visit.

Determination

[15] It is well established that suspension is a drastic disciplinary step which requires consultation with the effected employee prior to any decision being made¹. No consultation was carried out with Mr Hussein. Mr Hussein said he did not agree to the suspension and was not asked if it was necessary. I do not accept these were circumstances where suspension was inevitable. These were quite clearly circumstances where consultation prior to advice of the decision would have been desirable; if discussion had occurred prior to advice of suspension then it is highly unlikely there would have been any reason to suspend.

[16] However, I accept Mr Norton's submission that the suspension was never implemented; Mr Hussein was paid for a full day on 17 January, and the parties agreed Mr Hussein would return to work on 17 January with the employment agreement. There was no lawful basis to suspend Mr Hussein without pay, but this was not implemented. While the notice of suspension was in breach of obligations owed to Mr Hussein to consult him over the decision the suspension was never implemented. In these circumstances Mr Hussein did not suffer any disadvantage as a consequence of the breach. There are no grounds for a personal grievance in relation to the events of 17 January.

[17] I have found threats were made to Mr Hussein on 17 January to report the missing document to the police or immigration. There do not appear to have been any reasonable grounds upon which to make such threats and from the account of the meeting they were made in the midst of a heated discussion. The meeting ended in agreement and the threats were not carried out. Given the circumstances I am satisfied there are no grounds for a disadvantage personal grievance in relation to the threats. However, it is not appropriate for an employer to make groundless threats to an employee and the making of the threats constitutes a breach of the good faith obligations owed to Mr Hussein by Premier Autos.

¹ *Tawhiwhirangi v Attorney-General* [1994] 1 ERNZ 459

[18] Mr Hussein did not return to work at his usual time on Monday 20 January. The agreement reached with Premier Autos on the afternoon of 17 January was that Mr Hussein would return to work on 20 January. Mr Hussein's failure to return to work is not explained by his recollection of the telephone call to Mr Sharma. It is unclear what issues remained outstanding between the parties at 20 January; agreement as to a way forward had been reached on 17 January and any breach on the part of Premier Autos did not suspend Mr Hussein from his obligations under his employment agreement. Mr Hussein did not work out his notice period and no agreement had been reached with Premier Autos for payment in lieu of notice. Mr Hussein has forfeited his claim to payment of the notice period.

[19] The visit of the private investigator to Mr Hussein's home occurred on 29 January. Was the employment relationship extant? Mr Hussein did not attend work on Monday 20 January contrary to the agreement reached with his employer. There was no reasonable basis for Mr Hussein not to attend work; the parties had agreed he would attend work on Monday 20 January and nothing had changed in the intervening period. Mr Hussein's actions in not attending work on Monday 20 January ended the employment relationship.

[20] Mr Hussein seeks a declaration that the restraint of sponsorship clause in his employment agreement is unenforceable and unconscionable. Mr Gouden advised the Authority Premier Autos has taken advice on the enforceability of the clause, understands the clause is unenforceable and will not take any action to enforce it.

[21] Notwithstanding the assurance given by Mr Gouden on behalf of the respondent, I accept that the possibility of enforcement proceedings being taken remains, albeit unlikely.

[22] The clause at issue provides for damages of \$60,000 to be paid to Premier Autos in the event Mr Hussein is employed by another employer within 36 months of his employment with Premier Autos. Mr Gouden told me the \$60,000 represents a sum equivalent to wages he expected to pay to Mr Hussein over the three year period. This clause is a restraint on Mr Hussein's ability to sell his labour and such restraints are prima facie unenforceable unless it can be established they are reasonable. There is no reasonable basis upon which damages of \$60,000 could be assessed as having been suffered by Premier Autos as a consequence of Mr Hussein leaving its employment; Premier Autos agreed to sponsor Mr Hussein's immigration application because they were unable to recruit suitably skilled employees from New Zealand residents and Mr Hussein received wages in exchange for work he performed. The restraint of sponsorship clause is unenforceable.

[23] The final issue concerns Mr Hussein's claim for a penalty. Mr Hussein's holiday pay due on termination was paid 6 months after he left the employment of Premier Autos. Premier Autos has paid Mr Hussein interest on this sum which goes some way to mitigating this breach. However, the failure to pay holiday pay due was a clear and deliberate breach of the employment agreement and in these circumstances a penalty is appropriate. I set the penalty at \$300, half to be paid to the Crown, half to Mr Hussein.

Costs

[24] Costs are reserved. I am of the view this is a situation where costs should lie where they fall. However, if the parties wish they may apply to the Authority to determine this issue.

Marija Urlich
Member of Employment Relations Authority