

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 142/08
5101258

BETWEEN WAYNE JAMIESON
 Applicant

AND AUTOTERMINAL NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Tony Kurta for Applicant
 Andrea Twaddle for Respondent

Investigation Meeting: 14 February 2008 at Auckland

Submissions Received: 14 and 18 February 2008 from Applicant
 22 February 2008 from Respondent

Determination: 17 April 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Wayne Jamieson was employed by Autoterminal New Zealand Limited ("Autoterminal") as Inventory Manager from August 2004 until he was dismissed on 14 June 2007. Mr Jamieson's dismissal followed a period of leave he had taken without the approval of his manager. Mr Jamieson claims the dismissal is unjustified and seeks remedies including reinstatement.

[2] Pursuant to section 103A the Authority must scrutinise Autoterminal's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[3] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[4] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*X v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

Relevant terms and conditions of employment

[5] Mr Jamieson was subject to a written employment agreement. The agreement includes a clause specifically dealing with annual leave and requires Mr Jamieson to provide at least two weeks notice in writing of his intention to take annual leave.

[6] The employment agreement also sets out items which constitute misconduct and serious misconduct. Clause 13(c) of the agreement states:

The following acts and failures that may after an appropriate warning in accordance with clause 14 of this agreement lead to dismissal:

[7] The listed acts and failures include unauthorised absence from duties as being in this category of less serious misconduct.

[8] The employment agreement also provides for suspension on pay and sets out the procedure to be followed where an employee may have been guilty of misconduct or serious misconduct. The procedure is in accord with the principles of natural justice.

Mr Jamieson's authorised leave

[9] On 24 April 2007 Mr Jamieson made a written application for leave for the week commencing 28 May 2007. Mr Jamieson needed the leave to enable him to complete the framing, walls and roof of an extension to his house which he had already started. Before Mr Jamieson could complete the building he needed to remove the exterior cladding on the existing part of the house.

[10] On 24 May 2007, prior to departing on his leave, Mr Jamieson had made contact with Ms Cindy Crafford, the then Administration Manager for Autoterminal, and advised her that he may need to take a second week off work as well as the week he had applied for. Mr Jamieson was to discuss the additional leave requirements with Mr Mike Smith, the general manager, but that discussion never occurred.

[11] It was common ground that cell phone reception in Piha, where Mr Jamieson lives, is poor. During his annual leave when Mr Jamieson needed to make contact with employees at Autoterminal, he would generally do so using his land line.

[12] Mr Jamieson was due to return to work on 5 June 2007, however it started raining and it became crucial for Mr Jamieson to complete the work on the house.

Unauthorised leave

[13] When Mr Jamieson realised he was not going to get his house completed he rang work on 5 June and was diverted to a call centre, which is located in the Philippines. Mr Jamieson says he got frustrated at not being able to get his message across to the person answering the call centre line and gave up without leaving a message for Mr Smith. Consequently neither Mr Smith nor Ms Crafford was aware Mr Jamieson would not be at work for that week.

[14] Upon realising Mr Jamieson was not at work on 5 June, Mr Smith made enquiries of Ms Crafford to ascertain if she knew Mr Jamieson's whereabouts. Ms Crafford told Mr Smith about the dialogue she had had with Mr Jamieson on 24 May regarding his possible need to take additional leave. Ms Crafford advised Mr Smith that she thought Mr Jamieson had checked with Mr Smith about taking the leave.

[15] Mr Smith then attempted, with no success, to make contact with Mr Jamieson. The telephone account records provided to the Authority show a call was made to Mr Jamieson's cell phone number from the office number at 2.44pm.

[16] The next contact was by Mr Jamieson on Thursday 7 June when he rang to speak with Mr Smith. This was prompted by a message left on Mr Jamieson's home phone from Ms Crafford who asked Mr Jamieson to return her call. When Mr Jamieson called, Mr Smith was on another call and so he spoke with Ms Crafford and explained that he would be back the following Monday. It was agreed that if there was a problem with that Ms Crafford would have Mr Smith ring him.

[17] Mr Smith did attempt to ring Mr Jamieson back immediately, however, his phone was already engaged as Mr Jamieson was already on another call.

[18] In answer to questions at the investigation meeting Mr Smith told me he did not attempt to make contact with Mr Jamieson on the Wednesday, because he was aware that Mr Jamieson was okay, and he knew Mr Jamieson was working on his house.

Disciplinary process

[19] On his return to work on 11 June 2007 Mr Jamieson met with Mr Smith and Ms Crafford. During a brief meeting Mr Jamieson was advised his actions from the previous week were being investigated as either misconduct or serious misconduct. Mr Jamieson was advised of his right to representation and that dismissal was a possible outcome. Mr Jamieson was suspended on pay pending an investigation.

[20] Mr Jamieson was invited to provide an explanation in writing to the allegation that he had not provided Autoterminal with adequate notice of his non attendance at work from 5-8 June 2007.

[21] Mr Jamieson provided his written explanation on 13 June 2007 as requested which states:

In response to your letter dated 11th June 2007, which resulted in my suspension from work duties from 11th to 13th June. I agree my actions were not to procedure, but will point out that the leave I took was due on September 2006. I took this leave as you know in building on at home and decladded my house. I had weather conditions against me and for the fact of health and safety for my family I had to at least close this building in. I did call in to Cindy in HR Dept and I did ask her to pass message on and if a problem to please call. I don't know what else to say but will go with your decision.

[22] On 14 June 2007 Mr Jamieson was dismissed for serious misconduct. The letter of dismissal states:

As discussed at the meetings held with the Company, the employee was absent from work without authorisation or notice from the 5th June to 8th June 2007.

...

The employee's actions have seriously damaged the relationship of trust and confidence between the parties and based on the employees responses, the company does not have confidence the employee would not do the same in the future.

The conduct in the circumstances has been deemed to be serious misconduct, warranting dismissal.

Determination

[23] Mr Jamieson acknowledged he did not follow the correct procedure when advising Autoterminal that he needed to take an additional weeks' leave from 5-8

June 2007. Both Mr Smith and Ms Crafford were aware of the reason why Mr Jamieson had taken the week off. The week before he went on leave, Mr Jamieson was with Mr Smith repossessing cars when he told Mr Smith about the building project he was embarking on. Mr Jamieson explained to Mr Smith that the completion of the project would be weather dependent. However, Mr Jamieson did not suggest he might need any extra time off work.

[24] The records produced to the Authority show Mr Jamieson and Ms Crafford entered into a dialogue during which Mr Jamieson advised Ms Crafford he may need to take a second weeks leave. Ms Crafford advised Mr Jamieson that was fine. Mr Jamieson told me he assumed that conversation would be relayed to Mr Smith. The message was relayed, but not until late on Tuesday 5 June.

[25] Mr Jamieson was aware he was required to apply for leave using a written application form.

[26] In submissions the respondent relied on *Ashton v PMP Print Limited*, unreported, Christchurch, CA104/07, Member Arthur, as support for the proposition that Mr Jamieson's conduct amounted to serious misconduct which fatally undermined the respondents trust and confidence in him.

[27] I have distinguished that case on its facts. The applicant had applied for leave of 24 days but was granted only 15 days. Prior to commencing his leave the applicant had been warned that if he proceeded to take 24 days leave, instead of the 15 days approved, the respondent would consider his actions to be serious misconduct.

[28] In this matter, Mr Jamieson had alerted Mr Smith that he was working on his house during his leave and that the work was weather dependent. He had alerted Ms Crafford to the possibility that he may need to take extra time off depending on the weather and she had advised him that was fine.

[29] In considering the seriousness of Mr Jamieson's conduct I have taken into account the employment agreement between the parties which specifically defines absences without authority as misconduct. The agreement contemplates dismissal for misconduct after warnings have been issued. Ms Crafford acknowledged at the investigation meeting that Mr Jamieson had not been issued with any warnings.

[30] Mr Andrew Hill, the current general manager for Autoterminal, gave evidence as to the importance of Mr Jamieson's role and its affect on other aspects of the business if it is not undertaken. This evidence was to demonstrate the seriousness of Mr Jamieson taking unauthorised leave. However, there was no evidence that Mr Jamieson's absence from 5-8 June inclusive actually caused any disruption. Mr Jamieson's uncontested evidence is that things ran smoothly while he was away and he was in regular contact with employees so that issues could be resolved. At the investigation meeting Mr Smith told me that his primary concern was that Mr Jamieson had not followed the correct process.

[31] Looking at the situation objectively, a fair and reasonable employer would not have regarded Mr Jamieson's conduct as serious misconduct. I am satisfied that the foundation of trust and confidence that is essential in an employment relationship was not undermined to such a significant degree so as to justify the summary dismissal of Mr Jamieson.

[32] It was open to a fair and reasonable employer in this case to have concluded that there was misconduct by the failure of Mr Jamieson to seek prior approval to take additional annual leave, the penalty for which, in accordance with his employment agreement, should have been a warning.

[33] I find that in all the circumstances Mr Jamieson's dismissal is unjustified and he is entitled to remedies.

Remedies

Reinstatement

[34] To remedy his grievance Mr Jamieson seeks reinstatement to his former position. Reinstatement is strongly opposed by Autoterminal on the basis that Mr Jamieson conducted himself in an unacceptable manner during his employment and since his dismissal Mr Jamieson's position no longer exists as a result of a restructuring carried out by the respondent.

[35] Firstly, with regard to Mr Jamieson's conduct at work, there are no warnings recorded on Mr Jamieson's file and if there were issues with his conduct, they were never raised in a disciplinary setting.

[36] Secondly, Mr Hill's evidence was that following Mr Jamieson's dismissal Autoterminal has restructured. The result of that restructuring is that Mr Jamieson's job no longer exists, and therefore there is no role to be reinstated to.

[37] In spite of reinstatement being a primary remedy I am satisfied there are good reasons not to order reinstatement. It is simply not practicable for Mr Jamieson to be reinstated given that his position has been disestablished. Even if Mr Jamieson were reinstated, it would only be a matter of time before the respondent had worked through a process which will more likely than not, result in Mr Jamieson being made redundant.

Lost wages

[38] Mr Jamieson claims reimbursement of lost wages from the time of his dismissal. Mr Jamieson's evidence of the attempts he had made to find alternative employment shows that he did very little to mitigate his loss, contrary to his duty at law to do so. Further, in the current environment in New Zealand where unemployment is at an all time low, it is surprising that after eight months Mr Jamieson remained unemployed.

[39] On that basis Autoterminal is not to be held responsible for his entire loss since his dismissal on 14 June 2007. I award Mr Jamieson three months lost wages which will be reduced by his contribution. Lost wages has been calculated on the basis of three months at an annual salary of \$45,000.

Compensation

[40] Mr Jamieson's evidence with regard to his claim for compensation was remarkable for its paucity. Having regard to what evidence there was, his length of service, and subject to my finding on contribution, I would, in all the circumstances award Mr Jamieson \$7,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

Contributory conduct

[41] I am bound by section 124 of the Act to consider the extent to which Mr Jamieson's actions contributed towards the situation that gave rise to his personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. The Authority may regard as a matter of contribution any blameworthy conduct of the employee that is causally connected to the situation that gave rise to the personal grievance.

[42] Mr Jamieson was a senior employee with Autoterminal. He had responsibility for the management of employees which includes an obligation to ensure employees under his supervision abided by all company policies and procedures.

[43] As I have stated earlier, Mr Jamieson was aware of the company policy that leave was approved prior to taking it. He had also undertaken to discuss the possible need to take additional leave, with Mr Smith prior to commencing his approved leave. He failed to do this.

[44] Rather curiously, Mr Jamieson rang the office to speak with Mr Smith on Tuesday 5 June at a time when he knew the telephone would not be answered in Auckland, but by a call centre located in the Philippines. At the investigation meeting Mr Jamieson could not explain why, after he had become frustrated with the call centre, he did not ring back during normal working hours, at a time when he knew his call would be answered in Auckland.

[45] The evidence supports a finding that Mr Jamieson contributed to the situation that gave rise to the personal grievance which I have assessed at 25%.

Summary of Remedies

[46] Taking into account his contribution Autoterminal New Zealand Limited is ordered to pay to Mr Jamieson, within 28 days of the date of this determination:

- **Reimbursement of lost wages of \$8,437.50 gross pursuant to section 123(1)(b) of the Employment Relations Act 2000.**
- **Compensation in the amount of \$5,250 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

Costs

[47] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority