

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 127 /09  
File Number: 5149819

BETWEEN                      Selwyn Jenner  
   Applicant

AND                              Griffiths Drilling (NZ) Limited  
   Respondent

Member of Authority:        Denis Asher

Representatives:              Jills Angus Burney for Mr Jenner  
   Sarah le Page for the Company

Investigation Meeting        Wellington, 25 August 2009

Submissions Received        By 3 September 2009

Determination:                4 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1]     Mr Jenner says he was unjustifiably dismissed on 12 January 2009. He seeks reimbursement of all remuneration lost as a result of his dismissal, compensation of \$20,000 for humiliation and costs.

[2]     The Company say Mr Jenner was not dismissed on 12 January but was justifiably terminated on 23 January 2009 for serious misconduct; it 'counter-claims' by invoicing the applicant for \$24,094.51 (figure given at the

Authority's investigation) for damage it says he caused when drilling a water well.

[3] Mediation did not resolve this employment relationship problem.

### **Background**

[4] The Company operates drilling rigs from Upper Hutt.

[5] At the time of his dismissal Mr Jenner was a rig driller with over 6 years service with the Company.

[6] On his return from annual leave on 12 January 2009, unlike other employees, Mr Jenner was told there was no work for him and he was to see the Company director, Mr Mel Griffiths.

[7] A meeting between the two men followed later that same day: Mr Jenner was accompanied by his sister. Mr Jenner says he was dismissed at that meeting; Mr Jenner's sister confirms his account. Mr Griffiths denies dismissing the applicant that day, and says instead he told the applicant he was not taking the matter any further until he, Mr Griffiths, had a representative.

[8] Counsel for the respondent sent the applicant a letter dated 13 January (doc D, statement of problem). It set out alleged serious misconduct allegations and sought a meeting with Mr Jenner.

[9] The parties met on 16 January. A further letter was sent by counsel for the Company to Mr Jenner that day (doc L, respondent's statement in reply). It set out the same allegations albeit in greater detail: the applicant declined to respond.

[10] By letter dated 23 January (doc F, applicant's statement of problem) Mr Jenner was advised he was dismissed with effect that day for serious misconduct.

[11] The applicant filed notice of a personal grievance. Mr Jenner subsequently found fresh employment but at a lesser rate of pay.

**Applicant's Position Summarised**

- [12] The matters raised are not complex law and the case falls to be determined primarily on the facts.
- [13] Section 103 A of the Employment Relations Act requires the Authority to consider objectively what a fair and reasonable employer would have done in all the circumstances at the time.
- [14] On a question of credibility, did the Company summarily dismiss Mr Jenner on 12 January?
- [15] The impact on Mr Jenner of the unjustified dismissal has been profound and includes the breakdown of his relationship with the mother of his youngest child and the real risk of losing his home.

**The Company's Position**

- [16] The Company says it conducted a fair disciplinary process: Mr Jenner elected not to participate actively in that process. At the end of its investigation the Company justifiably dismissed the applicant for serious misconduct.
- [17] The Authority will need to make a credibility finding in respect of Mr Jenner's claim he was dismissed on 12 January.
- [18] A 'snap' decision to dismiss the applicant was inherently unlikely because of the detrimental impact the loss of someone of his calibre would have on the respondent's business and also in light of the extent of assistance extended to Mr Jenner by the Company during his employment
- [19] Because of his experience and having done the same previously, M Jenner would have known the being told there was no work for him meant he would undertake yard duty.
- [20] Mr Jenner's version of events is unreliable because he admitted to being under stress, breaking a coffee cup and walking off the job in 2008.

- [21] The applicant's version of events in respect of the 12 January meeting should be assessed in light of the obvious emotional nature of that meeting: Mr Jenner and his sister clearly misheard Mr Griffith's position.
- [22] The Company's supportive treatment of Mr Jenner before and after 12 January is evidence it is highly unlikely he was dismissed on that date.
- [23] Mr Jenner was justifiably dismissed for serious misconduct because of his failure to furnish his bore log and work books despite repeated requests to provide them or relevant information in another form. The applicant also used his cell phone over the Xmas leave period despite clear instructions to the contrary. A client complaint lead to the Company's investigation which established Mr Jenner was responsible for a well casing being broken.
- [24] Mr Jenner was afforded every opportunity to participate in the Company's investigation but elected not to do so. *"On the face of the information before the Company (in particular his failure to provide log books and causing the respondent over \$15,000 to remedy a well job) Mr Jenner was a liability"* (par 28 of the respondent's submissions received 31 August).
- [25] *"Mr Jenner was a strong and valued member of the team. The evidence of Griffiths Drilling is that he had a number of personal issues and that his employer supported him with those issues above and beyond most employers. The applicant was under stress at times. At one point he said he was relocating to Australia. Mr Jenner's dyslexia and health concerns were accommodated by the employer. \$1000 was expended by Griffiths Drilling for Mr Jenner to complete training. He never started his training"* (par 31, above).

## **Discussion**

- [26] The onus rests on the Company to justify its admitted dismissal of Mr Jenner on 23 January by way of letter of the same date (doc F above). The letter does not cite the reasons for Mr Jenner's summary dismissal.
- [27] The reasons for Mr Jenner's dismissal are therefore best deduced by a close study of the respondent's preceding letters of 13 & 16 January (docs D & L above) and the detail contained therein. They can be summarised as follows:

- Despite repeated requests to do so, a failure to produce relevant records;
- Failing to report a major event, namely a casing failure;
- Knowingly using a portable phone over Xmas when instructed not to; and
- Deliberately damaging a work vehicle.

[28] As is made clear in the respondent's letter of 16 January (above), the Company knew from the meeting that day that Mr Jenner regarded its intended investigation as "*farcical*". It properly made clear that, notwithstanding his absence, it would "*conclude the disciplinary process using the information ... already collated*" (above).

[29] The same letter makes clear the Company knew of Mr Jenner's advice of 17 November that he had lost a log book.

[30] Other than a claim by Mr Griffiths of giving Mr Jenner "*a verbal*" (oral evidence), the date of which he was unsure and which he accepted was not stated as an oral warning, and contrary to the Company's claims, there is no evidence of its concerns as set out in its correspondence being previously put to Mr Jenner as formal warnings. The applicant's supervisor gave evidence that, while he had asked for the records on a number of occasions, he had not warned Mr Jenner and did not know of any others warning him.

[31] Mr Griffiths confirmed during the Authority's investigation that the performance issues he was experiencing with Mr Jenner related to two projects (including the water well) and they in no way reflected his usual performance: i.e. all other tasks undertaken by Mr Jenner during the course of his employment including others during the same period (2008) did not feature these problems, i.e. close to 100 other holes over all.

[32] While the applicant's employment agreement and job description do not expressly refer to the importance of keeping an accurate, up to date log book and bore records the importance of these records was (properly) not challenged by Mr Jenner.

- [33] A witness to the Authority's investigation who was present at the time of damage done by Mr Jenner to his work vehicle supported the applicant's version of events: the witness described it as an accident and not intentional, and that he had reported the same to Mr Griffiths: the Company's apparent investigation leading to the applicant's dismissal does not record or reflect this employee's view. It also does not substantiate its conclusion the damage was deliberate.
- [34] The evidence presented to the Authority creates a clear picture of a working relationship prior to Xmas 2008 largely untroubled by performance issues other than those difficulties Mr Jenner was having on a personal level, whereas – without prior notice and immediately following that break – the applicant was not provided with drilling work (whereas all other employees were) because of the Company's alleged serious concerns about performance matters it says featured throughout 2008. That concern does not account for, or sit comfortably with, the fact the Company – during the same period – utilised Mr Jenner, unofficially, in a supervisory role for at least some of its project work, paid him a Xmas bonus and did not articulate clear oral warnings or put in writing apparently serious performance concerns.
- [35] The evidence before the Authority is that Mr Jenner's supervisor, fairly and reasonably and at the 12 January resumption of work, was not prepared to allocate him drilling work until the records requested of the applicant had been provided. While I accept that requirement was legitimate, despite it being without notice, it does not follow that the Company's subsequent conduct toward Mr Jenner was also fair and reasonable.

## **Findings**

- [36] I am satisfied Mr Jenner was unjustifiably dismissed on 23 January for the following reasons:
- [37] I do not accept that Mr Jenner was on any formal notice in respect of his bore records or log book or any other alleged (non)performance prior to his summary dismissal. Whereas the respondent says it raised its concerns on 'many occasions', Mr Jenner is clear – and the Company agrees (see the letter of 16 January, doc L) – that he had addressed his employer's legitimate concerns by advising he had lost the first records and passed on relevant

information to his supervisor; the Company is unable to dispute Mr Jenner's explanation that he also communicated relevant data to his replacements and told them that second log was in the cab of the drilling rig. Mr Jenner also credibly explained his intention to update his records at the commencement of the working year, from 12 January.

- [38] I did not understand Mr Griffiths to deny Mr Jenner's claim he had spoken to the former about problems he was having with the water well.
- [39] In light of those facts, the Company's representation of year long performance issues regarding Mr Jenner is neither credible nor sustained by any objective evidence. It is too great a gap to cross from questionable claims of work performance issues being put to the applicant over an extended period to a claim that alleged (non)performance amounted to serious misconduct warranting summary dismissal.
- [40] Besides, it is well known that in respect of these performance issues, a fair and reasonable employer would, objectively measured and consistent with the relevant provisions of any applicable employment agreement, clearly communicate its serious concerns to an employee along with standard notice of what it expected him to do, and when it required those actions to be taken: as is clear from the above, there is no record or evidence of the Company undertaking these steps with respect to Mr Jenner.
- [41] The process followed by the Company was abrupt and unfair: it was also unsubstantiated. No evidence was put to the Authority of grounds deduced by the Company's disciplinary process such as to sustain a finding of serious misconduct and its decision to summarily dismiss Mr Jenner. Some of the allegations levelled against the applicant also have the appearance of 'make weights', i.e. they are flimsy, lend themselves to resolution by simpler means and would be ignored or significantly downplayed in a normal employment environment. For example, Mr Jenner said his phone was used over the Xmas period by his son and he accepted his obligation to reimburse the Company the approximately \$50 involved. Mr Jenner's supervisor's requirements the applicant provide the relevant drilling records would only have started from November 2008 as that was when the supervisor commenced his employment with the Company; the Xmas period would have reduced that period of working time significantly.

- [42] Because of my determination in respect of Mr Jenner's dismissal effective 23 January I am satisfied it is not necessary that I determine on a credibility basis the parties' disputed claims about events at their heated meeting on 12 January.
- [43] It also follows from my determination that I do not accept there was anything wilful in Mr Jenner's conduct in respect of the water well as to justify the Company's 'counter-claim'.
- [44] It is sad to have to make these findings as the evidence of the relationship between Mr Jenner and Mr Griffiths up to almost immediately before the dismissal is an impressive one of mutual respect, trust and support.

## **Remedies**

### **Compensation for Hurt**

- [45] Mr Jenner seeks substantial compensation for the distress he says was caused him by his unjustified dismissal. The evidence in support of his claim is compelling: it includes the loss of a relationship; a diagnosis that he was still experiencing stress relating to issues in his workplace dating back to November 2008 for which he had been referred to a counselling service; he is facing the real prospect of losing his home arising out of the financial consequences of living off a much reduced income; and he has found it hard to 'let go' of the way he was sacked and his resulting feelings of anger.
- [46] Mr Jenner's claims of humiliation, including in front of other workers, as a result of the dismissal are unchallenged.
- [47] I am satisfied that in all the circumstances an award of \$15,000 compensation for humiliation, etc is justified.

### **Lost Wages**

- [48] Mr Jenner seeks reimbursement of lost remuneration to the date of the hearing. The evidence is he has mitigated his loss by registering with WINZ, accepting advice from his work broker, seeking work with the 'opposition' and, in particular, accepting the first job that came along (a driving position), in

February. The effect of his dismissal includes an hourly reduction of pay for over 30 weeks of \$7.00.

[49] I am not clear from the evidence of sustained effort by Mr Jenner to find comparably paid work and am therefore not prepared to extend the recovery of lost wages beyond 3-months.

[50] In the event the parties are unable to agree the figure of wages to be recovered for this period leave is reserved for the matter to be brought back to the Authority. I note here Mr Jenner's consent to pay for the Xmas calls on his portable phone: if they have not already been deducted from his final pay they are to be paid for out of those monies.

### **Contributory Fault**

[51] There is no evidence that Mr Jenner's decision not to participate in the Company's disciplinary process or any other conduct contributed towards the circumstances that gave rise to his personal grievance.

### **Determination**

[52] Mr Jenner was unjustifiably dismissed by the Company. The respondent therefore is to pay to the applicant compensation for lost wages for 3-months following 23 January 2009 less any wages earned during that period and less any unpaid telephone account and \$15,000 (fifteen thousand dollars) for distress caused him by its unjustified actions.

[53] As requested by the parties, costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**