

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 27
5374496

BETWEEN

DAVID LIM
Applicant

A N D

KERRICK INDUSTRIES
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: M Moncur, Advocate for Applicant
J Clark, Counsel for Respondent

Investigation Meeting: 25 September 2012 at Auckland

Date of Determination: 25 January 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr David Lim, alleges that he was unjustifiably dismissed on 7 November 2011. Mr Lim asks the Authority to find that he has a personal grievance and award him the remedies of reinstatement to his previous position, reimbursement of lost wages and compensation of \$20,000.

[2] The respondent, Kerrick Industries Limited (Kerrick), denies Mr Lim's claims and says that his dismissal was justified because of serious misconduct relating to the property of Kerrick.

[3] The respondent presents several counterclaims:

(a) That Mr Lim breached an implied term of his employment agreement;

- (b) That Mr Lim allegedly failed to comply with the good faith provisions of s.4 of the Employment Relations Act 2000 (the Act) because he was not responsive and communicative during the disciplinary investigation. It is also alleged that Mr Lim was misleading and deceptive in regard to the property at issue: a water blaster; and
- (c) Kerrick incurred financial damages due to the misconduct of Mr Lim.

[4] Kerrick asks the Authority to award various penalties and damages to remedy the alleged actions of Mr Lim.

Background

[5] Kerrick is an industrial cleaning equipment company. It imports, assembles and sells commercial and industrial water blasters, vacuum cleaners and carpet shampoo machines. The company also sells, reconditions, repairs and loans water blasters.

[6] Mr Lim is 66 years of age. He worked for Kerrick for approximately 21 years as a field service technician. Mr Lim was responsible for the servicing and repair of commercial and industrial water blasters and vacuum cleaners. His duties included visiting the premises of Kerrick clients, carrying out work on their sites and collecting and delivering machines. Mr Lim had the use of a company van.

Final warning – 19 August 2011

[7] The evidence before the Authority reveals a series of driving misdemeanours by Mr Lim. Kerrick had received several complaints from other motorists about the manner in which Mr Lim had been observed driving the company's vehicle. At one point, Mr Lim was required to attend a defensive driving course run by the Automobile Association.

[8] The evidence of Mr Warren Clark, the Purchasing and Customer Services Manager for Kerrick, is that on 12 July 2011, he received a call from a person who Mr Clark described as "an irate motorist." The motorist complained about a Kerrick van passing his vehicle on the inside while stopped at a red traffic light; that is, "running" the red light at high speed. The motorist had phoned just minutes after the incident.

[9] The next day (13 July 2011), Mr Clark passed the complaint to Mr Dugald MacBrayne, Kerrick's General Manager. The evidence of Mr MacBrayne is that Mr Lim acknowledged that at the time the complaint was received he was driving the company van. As this was the sixth complaint that Kerrick had received about Mr Lim's driving, Mr MacBrayne deemed it necessary to commence a formal disciplinary process. The outcome being that Mr Lim received a final written warning dated 19 August 2011; the pertinent content being:

Kerrick has considered your written response of 14 August 2011 and has decided that the appropriate sanction for this conduct is a final written warning. Kerrick notes that it considers that your actions amount to serious misconduct, but have decided not to terminate your employment and instead to issue you with a final written warning, taking into account the fact that you have admitted your actions and apologised for your behaviour.

[10] The content of the warning then informs Mr Lim that:

Kerrick hopes that it will not have to revisit these or any other matters regarding your conduct again. However you are warned that any future misconduct of any type, in particular but not limited to breaches of the company vehicle policy and employment agreement, will jeopardise your employment and is likely to result in the termination of your employment without notice. A copy of this final written warning will be retained in your personnel file and will remain in force indefinitely.

The circumstances leading to the dismissal of Mr Lim

[11] The evidence of Mr Clark is that in June 2011, a Kerrick customer, The Shamrock Group Limited (Shamrock), had a water blaster that was not working and Mr Lim was sent to the Shamrock premises to repair it onsite. Because the water blaster could not be fixed onsite, Mr Lim brought it back to the Kerrick workshop in order to identify the fault.

[12] It subsequently transpired that a major repair job was required and parts would have to be sourced from Italy with a consequent time delay. The result was that Shamrock decided to purchase a new water blaster. Mr Clark says that Shamrock never asked for the old water blaster to be returned and it remained in the Kerrick workshop awaiting notification from Shamrock as to what was to happen to it. Shamrock subsequently rang several months later and informed that it wished to have the old water blaster returned to it.

26 September 2011

[13] The evidence of Mr Clark is that on 26 September 2011, because Kerrick had a number of machines in the workshop requiring attention, Mr Clark informed Mr Lim that he should do his outside jobs in the morning but he should be back to work in the workshop for the afternoon to help with the backlog of machines.

[14] The further evidence of Mr Clark is that at approximately 1.30 to 2:00p.m. that afternoon he observed Mr Lim loading a water blaster into his van. Upon Mr Clark asking who the machine belonged to and what he was doing with it, Mr Lim informed that it was Shamrock's old water blaster and he was going to return it. While Mr Clark says that he had informed Mr Lim "at the time" (which I understood to be around the time that Shamrock indicated it wished to have its old water blaster returned) that the machine could be dropped off the next time someone was in the area where Shamrock is located. However, it does not appear that Mr Clark took issue with Mr Lim's intention to return the water blaster to Shamrock on the afternoon of 26 September 2011.

[15] The evidence of Mr Lim is consistent with that of Mr Clark in regard to the discussion that took place when Mr Lim was loading the Shamrock water blaster into his van. Mr Lim says that on the afternoon of 26 September 2011, he left the Kerrick premises and went to the site of another customer to provide services there. Mr Lim says he finished the work at that customer's site after 4:30p.m. and then phoned Shamrock to ensure that the business would still be open when he arrived to drop off the old water blaster. Mr Lim had a discussion on the phone with Mr Ron Bredesen, the Operations Manager for Shamrock, and asked him what was going to happen to the old water blaster. Upon being informed by Mr Bredesen that the machine would be thrown out, Mr Lim asked if he could have it and was told by Mr Bredesen that he could "go for it" so that Shamrock did not have the bother of dumping it¹. Mr Lim subsequently took the water blaster home but he made no mention of this to anyone within Kerrick.

¹ In a letter to Mr Lim dated 25 June 2012, Mr Bredesen confirmed that: "*Shamrock gifted this machine to you as it was no longer required by us for insurance claim*".

The investigation

[16] The evidence of Mr Clark is that by approximately 3:00p.m. on 26 September 2011, given that Mr Lim had not returned to the workshop, he phoned Shamrock and discovered that Mr Lim had not been there to drop off the old water blaster but instead had asked if he could have it. This was when Mr Clark discovered that Mr Lim was in possession of the water blaster and subsequently he informed Mr MacBrayne.

[17] The evidence of Mr MacBrayne is that he was concerned that Mr Lim had potentially diverted a business opportunity from Kerrick. Mr MacBrayne says that as Mr Lim's role included stripping water blasters for parts or to recondition and repair them for loan, he would have been aware that the Shamrock water blaster was of some value to Kerrick.

[18] It appears that Mr MacBrayne spoke to Mr Lim about the water blaster on or about 28 September 2011. The evidence of Mr Lim is that he told Mr MacBrayne that he had been given the water blaster by Mr Bredesen and had taken it home. Mr Lim says that the conversation with Mr MacBrayne lasted for less than a minute and Mr Lim did not perceive that Mr MacBrayne disapproved of his actions.

[19] However, via a letter from Mr MacBrayne dated 4 October 2011, Mr Lim was invited to attend a disciplinary meeting on 7 October 2011. The pertinent content of the letter is:

On 26 September it is alleged that you picked up a water blaster from the workshop belonging to Shamrock Group. Warren Clark, Purchasing and Customer Services Manager, asked you why you were taking it as he wanted you to remain in the workshop to do other duties. It is alleged that instead of following his direction you took off in the company vehicle with the water blaster in it and did not return to the workshop that day.

It is then alleged that you called Shamrock Group to ask whether they wanted the water blaster. Shamrock Group said they did not want the water blaster as they were purchasing a new water blaster instead,² and therefore said "no you can have it". It is then alleged that you took the water blaster home and have kept it. You have acknowledged that you have the water blaster at home.

It is therefore alleged that you have not followed a lawful and reasonable direction of Warren Clark. We are also concerned that you have diverted an opportunity for Kerrick to recondition and utilise a reconditioned water blaster for your own use. You are fully aware

² The evidence is that Shamrock had purchased a new machine some months earlier.

that part of our business is the reconditioning and loan of water blasters that are no longer wanted by our clients. Diverting this water blaster for your use is in conflict with your obligations to Kerrick. In addition, in discussing this with the client you are acting on Kerrick's behalf, and the client agreeing to give you the water blaster is, in our view, giving the water blaster to Kerrick, not you. As a consequence we believe you have taken property that is the property of Kerrick. We need to address these allegations with you formally and wish to provide you with the opportunity to give a response, before Kerrick makes a decision about any outcome.

We are concerned that your actions and conduct may be a serious breach of your employment agreement. If this is the case, this could amount to serious misconduct, and could result in disciplinary action, up to and including termination of your employment without further notice.

[20] Mr Lim was reminded that he had received a final warning on 19 August 2011 for serious misconduct and that any future misconduct of any type could jeopardise his employment.

The meeting 7 October 2011 and outcome

[21] A disciplinary investigation meeting took place on 7 October 2011. Kerrick was represented by its current lawyer, Ms Clark. It appears that Mr Lim chose not to be represented. The general thrust of what was discussed at the meeting is recorded in a subsequent letter from Mr MacBrayne to Mr Lim dated 12 October 2011. It is recorded that Mr Lim was quite candid about why he retained the Shamrock water blaster as set out earlier in this determination. To summarise, Mr Lim's view was that the water blaster belonged to Shamrock and it had been given to him, not to Kerrick. The contrary view expressed by Kerrick is that Mr Lim came into possession of the water blaster during working hours and acting as an employee of Kerrick. Mr Lim also denied that he had been instructed to remain in the workshop for the afternoon of 26 September 2011.

[22] The letter of 12 October 2011 concludes thus:

After considering your response and feedback to the allegations Kerrick concludes that you have breached your employment agreement and your obligations to Kerrick as it believes that you have diverted an opportunity for Kerrick, have acted in conflict with your obligations to Kerrick and have taken property that should have been Kerrick's. Kerrick does not believe that there is sufficient information to conclude that you did not follow a lawful and reasonable direction.

Having reached this conclusion Kerrick considers that your actions and conduct amount to serious misconduct and it is now in the

position of considering the appropriate sanction. While the company has not yet reached a conclusion, it is considering whether to terminate your employment without notice for your conduct in this matter, particularly taking into consideration your final warning.

[23] Mr Lim was advised that before Kerrick made a final decision about whether to terminate his employment, he had the opportunity to provide any feedback that he might wish to have the company consider before finally making a decision, by 3:00p.m. Friday, 14 October 2011, or alternatively, a meeting could be arranged for that purpose, with Mr Lim bringing along a support person or representative if he wished.

[24] The evidence of Mr Lim is that he received the letter of 12 October 2011 but did not read it, as he was feeling unwell at the time. Mr Lim says that he put the letter aside and forgot about it. Given that following receipt of the earlier letter dated 4 October 2011, Mr Lim was well aware that Kerrick regarded his actions as serious and that dismissal was a possibility, it is most surprising indeed if Mr Lim did not read the letter dated 12 October 2011.

[25] Mr Lim says that Mr MacBrayne spoke to him on or about 31 October 2011 and he explained to Mr MacBrayne why he felt free to take the water blaster home. Mr Lim says that he also expressed his confusion about the misconduct allegation. The further evidence of Mr Lim is that he was shocked to receive the letter dated 7 November 2011 terminating his employment. But Mr MacBrayne says that he spoke to Mr Lim at 3:00p.m. on 14 October 2011, as he had not received any response from him regarding the sanction being contemplated, as set out in the letter of 12 October 2011. Mr MacBrayne confirms that Mr Lim told him he had not read the letter and attests to his surprise to discover this; but Mr MacBrayne says that Mr Lim made no mention of being unwell.

[26] Mr MacBrayne says that as he was to go on leave for two weeks from 17 October to 31 October 2011, he gave Mr Lim a further two weeks to consider his response regarding the letter of 12 October 2011. The evidence of Mr MacBrayne is that when he returned from his leave, Mr Lim informed him that he did not think he had done anything wrong and Mr Lim made no comment on the proposed sanction. I found the evidence of Mr MacBrayne to be entirely credible, hence it is difficult to understand why Mr Lim attests that he was been shocked to find that Kerrick subsequently confirmed the sanction of dismissal.

The dismissal

[27] The evidence of Mr MacBrayne is that, having spoken to Mr Lim, he gave consideration to what would be an appropriate outcome, taking into account the various evidence that was available to him; including the fact that Mr Lim had received a final written warning one month before the water blaster incident and the nature of Mr Lim's role where he had contact with property, equipment and machines belonging to Kerrick and clients. Mr MacBrayne also took into account Mr Lim's long service with the company.

[28] Mr MacBrayne says he concluded that he did not have confidence that Mr Lim would not breach his obligations in the future. This was conveyed to Mr Lim in a letter dated 7 November 2011 whereby Mr Lim was dismissed with one week's notice; payment in lieu thereof.

Analysis and conclusions

[29] In determining whether a dismissal is unjustifiable, the test that the Authority must apply is: Whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred³. In applying this test, the Authority must consider:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.⁴

³ Section 103A(2) Employment Relations Act 2000

⁴ Section 103A (3).

[30] And then at s.103A(4):

(3) In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.

[31] Upon applying the test provided at s.103A(2), I am satisfied that Kerrick has appropriately met the requirements of subsection (3). That then takes us to subsection (4), whereby the Authority may consider any other factors it considers appropriate; including of course, the substantive reason(s) for the dismissal.

[32] The submissions or arguments for Mr Lim are quite sparse. However, it is the understanding of the Authority that Mr Lim challenges the decision to dismiss him for serious misconduct, largely on the grounds that he was not aware of any rule or code of conduct existing within Kerrick, that deemed his actions, in relation to his retention of the water blaster, to be serious misconduct.

[33] Effectively, Mr Lim says that because the water blaster belonged to Shamrock, not Kerrick, and the former told him he could have the machine, there are no grounds for Kerrick to treat his actions as serious misconduct warranting dismissal.

[34] On the other hand, Kerrick argues that the dismissal of Mr Lim for serious misconduct was justifiable for several reasons. First, Kerrick says that part of its business involves reconditioning and servicing water blasters and loaning them to clients. Mr Lim had worked for Kerrick for 21 years and his duties included reconditioning and servicing machines for those purposes. Therefore, he was aware that the Shamrock water blaster would have been of some value to his employer.

[35] A further submission for Kerrick is that at the material times, Mr Lim was acting as an agent/representative of Kerrick when he asked for and acquired the water blaster from Shamrock, and that he had no authority or right to make a personal representation in regard to receiving the machine.

[36] Kerrick also refers the Authority to a judgment of the Employment Court; *Craig v. Carter Holt Harvey Ltd* [2008] 5 NZELR 786, and urges that the findings of the Court in this case should be applied to the circumstances involving Mr Lim. The dismissal of Ms Craig was upheld by the Court (and the Authority earlier) largely for the reasons set out at para.[61] of the judgment:

Ms Craig was the person at the Tasman Mill responsible for the handling and administration of CHH provided cellular phones. There were numerous staff provided with these. Many, but not all, conceivable circumstances to do with mobile phones were addressed in policies or procedures of which Ms Craig was aware. There were records kept of mobile telephone transactions and of the whereabouts of those phones by reference to names of persons, ESN numbers, phone make and model, and mobile telephone line numbers. Ms Craig was responsible for ensuring that CHH's policies were adhered to and that it got fair value for the money it expended on these services. She was also responsible for ensuring that employees allocated mobile phones did not abuse the ability by, for example, seeking to obtain upgraded models before that facility became available to CHH at appropriate times on the plans the company had arranged with Telecom.

[37] While the circumstances applying to Ms Craig can certainly be compared with those of Mr Lim, there is a marked difference in regard to the details of the policies and procedures that applied within CHH relevant to the actions of Ms Craig, as compared with those in operation within Kerrick. Therefore, the first question that falls to be determined in regard to the dismissal of Mr Lim is:

Could a fair and reasonable employer conclude that Mr Lim had committed serious misconduct?

[38] Mr Lim had been employed by Kerrick for 21 years. He was well acquainted with the nature of the company's business, particularly the fact that it reconditioned water blasters and used old machines for spare parts. On 26 September 2011, Mr Lim was acting as an employee or agent for Kerrick when he obtained the water blaster. Mr Lim must be taken to have had full knowledge that his actions in taking possession of the water blaster, albeit with the consent of its owner Shamrock, was a conflict of interest, given the nature of Kerrick's business and Mr Lim's role as an employee. While it is established that Shamrock had no further use for the water blaster and was happy for Mr Lim to have it, he was obliged to inform his employer of the circumstances before assuming that he had the right to possession. Further, Mr Lim would have been aware the machine had some value as a source of spare parts, or at the very least, scrap metal. Indeed, the evidence of Mr Clark, supported by the production of a used part value price list, is that the useable component parts of the water blaster had a combined value of \$1,425. Mr Clark also attests to there being other parts of the water blaster that could have been used and that Kerrick: ["...realistically could have recouped between \$1,500 and \$2,000 (excluding GST)"]

[39] I accept the argument advanced by Kerrick that, by taking the water blaster for his own use, Mr Lim deprived Kerrick of the opportunity to utilise the potential value of the machine. It follows that I find that Kerrick was entitled to treat the actions of Mr Lim as serious misconduct. This then leads to the final question to be determined:

Was the dismissal of Mr Lim what a fair and reasonable employer could have done in all the circumstances at the time?

[40] The test under s.103A(2) of the Act by the use of the word “could”, envisages that there may be more than one appropriate action available to the employer when serious misconduct is established. The Authority has to be satisfied that the decision to dismiss was one that a fair and reasonable employer could have taken; bearing in mind that there may be more than one correct response available⁵.

[41] The circumstances that existed at the time were that Mr Lim was in receipt of a final warning (19 August 2011). He had been warned that any future misconduct of “any type” would jeopardise his employment and would be likely to result in the termination of his employment. Taking possession of the water blaster in the circumstances was serious misconduct and by this action Mr Lim placed his employment in jeopardy; the outcome being that his employment was terminated. To some, the dismissal may seem harsh, particularly given the long service of Mr Lim. But I find that the dismissal of Mr Lim was an action that a fair and reasonable employer could take in all the circumstances. It follows that I conclude that the dismissal of Mr Lim was justifiable.

The counterclaims of Kerrick

[42] In regard to the claim that Mr Lim breached an implied term of his employment agreement it has not been explained just what the implied term involved is that applies to this allegation. But in any event, the termination of Mr Lim’s employment has been the ultimate sanction.

[43] In regard to the claims of a breach of various provisions under s.4 of the Act, while it is arguable that Mr Lim’s actions in regard to obtaining the water blaster were misleading or deceptive; it is more likely, I think, that Mr Lim was misguided in his actions. Further, the allegation that Mr Lim was not responsive or communicative during the investigation of his conduct is not proven. But even if it were otherwise,

⁵ *W&H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448 at 457, para.[31].

the circumstances would not warrant the award of a penalty. Indeed, Mr Lim has received the ultimate penalty; the loss of his employment. It seems to me that some of the remedies sought by Kerrick are bordering on “rubbing salt into the wound”.

[44] Finally, there is the claim for damages relating to the residual value of the water blaster to Kerrick. I understand that Mr Lim contemplated using the water heating function of the machine to heat water for his home but he discarded this idea. And, as I understand it, the machine was eventually sold for scrap. However, as at the time that the actions of Mr Lim were being investigated, and most probably up to his dismissal, it was open to Kerrick to request the return of the water blaster, but there is no evidence that this course of action was ever considered. I therefore decline to award any damages accordingly.

[45] In summary, the counterclaims of the respondent are declined in total.

Costs

[46] Costs are reserved. The parties are invited to resolve this issue if they can. In the event that a resolution is not possible, I note that the closing submissions for the respondent include considerable material related to the costs incurred by the company and further submissions are not required, unless Kerrick has a good reason to do so. The applicant has 28 days from the date of this determination to file costs submissions in response.

K J Anderson

Member of the Employment Relations Authority