

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 254
5353697

BETWEEN

RICHARD LONGSTAFF
Applicant

A N D

PROFINISH PANEL AND
PAINT LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Dave Vinnicombe, Advocate for Applicant
Jhanna Mosa, Director of Respondent

Investigation meeting: 16 July 2012 at Auckland

Date of Determination: 26 July 2012

DETERMINATION OF THE AUTHORITY

A. Richard Longstaff was unjustifiably dismissed by Profinish Panel and Paint Limited (Profinish). Mr Longstaff is not awarded any remedies to reflect his contribution to the situation which gave rise to his dismissal grievance.

B. Profinish is ordered to pay Mr Longstaff:

(a) \$700 wage arrears;

(b) \$56 unpaid holiday pay.

Employment relationship problem

[1] Profinish employed Mr Longstaff through Work and Income New Zealand as a panelbeater. There was a dispute between the parties over the date he started work and over whether or not he was taken on as a trainee.

[2] Profinish said Mr Longstaff started work on 29 April 2011 and that he was not taken on as a trainee because it was a small owner operator business which was so busy it did not have time to train anyone.

[3] Mr Longstaff was unsure what date he started but thought it was sometime within the period 9 to 27 April 2011. He says he had limited experience of panel beating and spray painting so he was expecting to be trained by Profinish.

[4] Mr Longstaff's employment ended on 11 May 2011. Mr Longstaff claims he was unjustifiably dismissed. Profinish says Mr Longstaff *fired himself*. However, Profinish also says that if Mr Longstaff was dismissed (which it denies) dismissal was justified.

[5] Mr Longstaff says he was not paid for the work he did for Profinish. Profinish admits he has not been paid but says it was contractually entitled to deduct two weeks' wages from Mr Longstaff because he left without giving two weeks' notice. It says he only worked for nine days so there was nothing to pay him.

[6] Mr Longstaff claims he has not been paid any holiday pay. Profinish says it has not paid his holiday pay because he cost the business around \$3,000 or \$4,000 to fix his mistakes.

Issues

[7] The following issues require determination:

- (a) What date did Mr Longstaff start work¹;
- (b) Was Mr Longstaff entitled to be paid for the work he did?
- (c) What holiday pay is Mr Longstaff entitled to?
- (d) Was Mr Longstaff dismissed?
- (e) If so, was dismissal justified?
- (f) If not, what if any remedies should be awarded?

¹ This date is necessary in order to determine the amount of his wage arrears claim.

What date did Mr Longstaff start work?

[8] Mr Longstaff gave four different dates on which he thought he may have started work. He also admitted he was not sure what date he started.

[9] I accept Profinish's evidence that Mr Longstaff started work on 29 April 2011. Mr Longstaff's tax code declaration was signed on 29 April 2011; his employment agreement recorded that his employment would commence on 29 April 2011; his new employee form was signed on 29 April 2011; and his payslip showed his first day of work was 29 April 2011.

Was Mr Longstaff entitled to be paid for the work he did?

[10] I find that Mr Longstaff worked on 29 April 2011 and from 2-11 May 2011 (a total of nine days). His gross pay over that period was \$700.

[11] If Mr Longstaff resigned without giving two week's notice then under clause 14.2 of his employment agreement Profinish is entitled to deduct two weeks' wages from him. If Mr Longstaff was dismissed, then Profinish is not entitled to withhold his wages.

What holiday pay is Mr Longstaff entitled to?

[12] Mr Longstaff is entitled to 8% of his total gross pay as holiday pay which should have been paid to him upon termination. He is therefore entitled to \$56 holiday pay which has not yet been paid. Profinish is not permitted to withhold any of Mr Longstaff's holiday pay, regardless of the quality of his work.

Was Mr Longstaff dismissed?

[13] Mr Longstaff bears the onus on the balance of probabilities of establishing that he was dismissed.

[14] On 11 May 2011 Mr Longstaff inadvertently sanded through part of the primer paint on a vehicle which was due to have its final coat of paint that day. Mr Floued Mosa² was angry about the extra time, cost, and inconvenience that would be involved in fixing the mistake. He was also frustrated and annoyed because Mr Longstaff had previously made a number of other costly mistakes.

² Who is Mr Longstaff's boss and one of Profinish's two directors/shareholders.

[15] Mr Mosa said he sent Mr Longstaff home *to relax* so he (Mr Mosa) could cool down before he decided what to do about the mistake. Mr Longstaff claims Mr Mosa told him to “*go home because I’m sick of fixing your mistakes*”. I consider it more likely that Mr Mosa sent Mr Longstaff home because he was angry and frustrated that Mr Longstaff kept making mistakes rather than *to relax*.

[16] When he got home Mr Longstaff’s father asked him if he had been fired and, if not, whether he was going to be paid while at home. Mr Longstaff went back to work to find out. There is a dispute about what occurred when Mr Longstaff returned.

[17] Mr Mosa was using a belt sander at the time Mr Longstaff arrived and he had that in his hand during their exchange. Mr Mosa says Mr Longstaff drove in quickly and was very angry. Mr Mosa said Mr Longstaff asked if he had been fired and he told him he had not.

[18] Mr Mosa claims Mr Longstaff came up close to him screaming, yelling, and swearing so he put his hands up to his face with the belt sander still in his hand because he felt threatened. Mr Mosa said Mr Longstaff made threats against him and his family saying he would get them *kicked out* of New Zealand. It was at this point that Mr Mosa had enough so he told Mr Longstaff *you have fired yourself*³.

[19] Mr Mosa clarified in his evidence to me that although he had not intended to fire Mr Longstaff when he had first sent him home, when Mr Longstaff came back swearing and abusing him and getting up in his face and threatening his family, he was not going to tolerate that.

[20] Mr Mosa says at that point he was not prepared to have Mr Longstaff working for him any longer, which was why he said *you have fired yourself*. Mr Mosa clarified that phrase did not mean Mr Longstaff had resigned. It meant Mr Mosa had ended Mr Longstaff’s employment because of Mr Longstaff’s unacceptable behaviour when he returned to the premises.

[21] Mr Longstaff says he was quite calm when he returned to the premises. He denies screaming, yelling or threatening Mr Mosa. He says Mr Mosa tried to hit him with the belt sander as he was walking away from the premises. Mr Longstaff laid a complaint with the police who investigated but took no further action. Police records

³ English is not Mr Mosa’s first language.

indicate that other business operators in the area confirmed Mr Longstaff had done wheel spins up and down the driveway and had nearly taken out a rubbish bin. I consider that corroborates Mr Mosa's evidence of Mr Longstaff's anger.

[22] I find that Mr Longstaff returned to Profinish on 12 May in an angry mood, again yelling and swearing. Mr Mosa claims that Mr Longstaff thumped the wall and threatened to take Mr Mosa to Court and said he was going to "*take him down and the building would be his*". Mr Mosa says that the next day (13 May) Mr Longstaff kept phoning him angrily demanding his wages and swearing at him and threatening him.

[23] A further incident occurred on 5 June 2011 which ended in a physical altercation between Mr Longstaff and Mr Mosa, which the Police were called to attend. Both parties were arrested for fighting in a public place and each received a warning, but were not prosecuted. There was a dispute about what actually occurred in relation to this incident. I have preferred Mr Mosa's version of events on the basis it is more likely to be correct because elements of Mr Longstaff's story did not ring true.

[24] I find, on the balance of probabilities, that Mr Longstaff was driving near Profinish's driveway when he saw Mr Mosa's van. He did the fingers and shouted and swore out the window at Mr Mosa then drove his car over to the opposite side of the road and reversed into Mr Mosa's van, which meant Mr Longstaff was parked facing the wrong way, against the traffic. When Mr Mosa got out to look at the damage, Mr Longstaff got out of his car and kicked Mr Mosa's van. When Mr Mosa went to stop him he pinned Mr Mosa to the ground and a physical struggle ensued.

[25] I consider it more likely than not that Mr Longstaff was the instigator and aggressor in respect of this incident.

[26] I find there was an actual dismissal at the point that Mr Mosa decided he would no longer employ Mr Longstaff so told him *you have fired yourself*. The initiative for ending the employment came entirely from Mr Mosa, not from Mr Longstaff. It was clear that the employment ended because Mr Mosa sent Mr Longstaff away. Mr Mosa admitted when giving evidence that Mr Longstaff did not freely or genuinely resign. Mr Longstaff has therefore discharged the onus of proving he was dismissed.

Was dismissal justified?

[27] Justification falls to be determined in accordance with the s.103A justification test in the Employment Relations Act 2000 (the Act) as it applies from 1 April 2011. The full court of the Employment Court in *Angus & McKean v. Ports of Auckland*⁴ provides guidance on how the test is to be applied in practice. It also held that failure to comply with any one of the four tests in s.103A(3) of the Act would result in a dismissal being unjustified.

[28] An employer also has statutory good faith obligations which apply if an employee's ongoing employment might be in jeopardy. A fair and reasonable employer can be expected to comply with its good faith obligations under s.4(1A) of the Act to provide an employee with access to relevant information and an opportunity to comment on it before a decision is made to end their employment.

[29] I find that Profinish did not comply with its statutory good faith obligations. It is also unable to meet any of the tests in s.103A(3) of the Act. It did not meet minimum procedural fairness requirements or natural justice obligations. Profinish reacted immediately to summarily dismiss Mr Longstaff without first undertaking any kind of investigation and without giving Mr Longstaff any opportunity to be heard before he was dismissed.

[30] Although Profinish may have had legitimate concerns about Mr Longstaff's performance and conduct, that did not justify its immediate response. Profinish was required under s.103A of the Act to sufficiently investigate⁵; to put its concerns to Mr Longstaff⁶; to give him a reasonable opportunity to respond⁷; and it had to genuinely consider his explanation (if any) before dismissing him⁸.

[31] None of that occurred, so Profinish is unable to justify Mr Longstaff's dismissal.

⁴ [2011] NZEmpC 160

⁵ S.103A(3)(a)

⁶ S.103A(3)(b)

⁷ S.103A(3)(c)

⁸ S.103A(3)(d)

What, if any, remedies should be awarded?

Lost remuneration

[32] Mr Longstaff seeks four weeks' lost remuneration. He was employed for 8.5 hours per day five days a week at \$15 per hour. I find that four weeks' gross pay amounts to \$637.50.

Distress compensation

[33] Compensation must be based on evidence and Mr Longstaff's evidence in support of his claim for distress compensation was almost non-existent. The full extent of his evidence was that he was *extremely disappointed by Mr Mosa's conduct* and was *particularly humiliated at being sworn at*.

[34] I have discounted his alleged humiliation at being sworn at on the grounds it was not credible because Mr Longstaff swore at Mr Mosa many times. That leaves his *extreme disappointment* as the only evidence in support of distress compensation.

[35] I consider the evidence I heard demonstrated that Mr Longstaff was experiencing extreme anger rather than disappointment. I consider that Mr Longstaff became unnecessarily and inappropriately confrontational and aggressive towards Mr Mosa. He threatened Mr Mosa's family, abused Mr Mosa on a number of different occasions, and he even physically assaulted him.

[36] The evidence did not satisfy me that any award of distress compensation was appropriate, so I decline to award Mr Longstaff compensation under s.123(1)(c)(i) of the Act.

Contribution

[37] It is clear that Mr Longstaff substantially contributed to the situation which gave rise to his personal grievance. I find, on the balance of probabilities, that Mr Longstaff threw a string of expletives at Mr Mosa, he shouted and yelled at him in the workplace, he got up in his face in a threatening manner and made threats against Mr Mosa and his family. A few weeks after he was dismissed Mr Longstaff assaulted Mr Mosa and damaged his van.

[38] I consider that remedies should be reduced to nil under s.124 of the Act to reflect Mr Longstaff's contribution.

Outcome

[39] Mr Longstaff has a wage arrears claim for non payment of nine days' wages and holiday pay. Profinish is ordered to pay Mr Longstaff \$700 in unpaid wages and \$56 holiday pay.

[40] I find that Mr Longstaff was unjustifiably dismissed by Profinish. However, Mr Longstaff's behaviour towards Mr Mosa was such that I decline to award him any remedies.

Costs

[41] Mr Longstaff has been successful so is entitled to a contribution towards his costs. He has 14 days from the date of this determination to file a costs application, Profinish has 14 days within which to respond. This timetable will be strictly enforced.

Rachel Larmer
Member of the Employment Relations Authority