

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Amigo Main (Applicant)
AND Interior Developments Limited (Respondent)
REPRESENTATIVES Ken Nicolson for applicant.
Tony Kelly & Chris Kelly for respondent.
MEMBER OF AUTHORITY Ken Raureti
INVESTIGATION MEETING 26 April 2007.
DATE OF DETERMINATION 30 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem.

[1] Interior Developments Limited (trading as Interno) is a cabinet making, kitchens, furniture and shop fitting business. Mr Tony Kelly is a Director of Interior Developments Limited. His father, Mr Chris Kelly provides support and assistance to Tony not only as a father, but also as a business mentor. Mr Amigo Main had worked for Interno for about two years when he was summarily dismissed. He says his dismissal was without cause and was unjustified. Mr Kelly absolutely refutes the allegation.

Background to the dismissal.

[2] On Friday 17 February 2006, Mr Main and a work mate Mr Adam Stephens went off to a job site for the day in the work van, while Mr Kelly and Mr Joel Leeder stayed back and worked in the workshop. At around 3.00pm Mr Kelly and Mr Leeder started packing up for the day and cleaning the workshop. Mr Kelly said it had been a tough day and by about 3.30pm, both of them felt the need for at least a few beers and they went up to R.J.Dons smoko room for a few with some of their workers. R.J.Dons is a panel beating and spray painting business. It is owned by Mr Chris Kelly. Both R.J.Dons and Interno are in the same yard. The yard is a secure compound with a big gate that is closed each night for security of the premises.

[3] Mr Main says that they would normally finish work at around 3.30pm on Fridays and have a beer at work, but on this day, they never got back to the yard until about 5.30pm. When they arrived back, the gate was closed. Adam jokingly said to Mr Main that he shouldn't bother about getting out of the van to open the gate and they should just push the gate open with the van. Mr Main said that he approached the gate at an incredibly slow speed until it just touched the front of the van, and then he slowly pushed the gate with the van until the gate opened about 50 or 60 centimetres. He said that Mr Kelly yelled at them from R.J.Dons' smoko room with a beer in his hand and said "*Oyez!!!! Don't do that,*" so Adam jumped out and opened it the rest of the way, he then drove through; Adam closed the gate and jumped back in the van.

[4] Mr Kelly described the incident as one he will never forget. He says the van pulled up in front of the gate, paused for a while and then proceeded to drive straight into the gate. He says everyone in the smoko room made sounds of amazement as the van continued to push

the security gate open. He said that once it became obvious that Mr Main was going to try and force the large security gate open all the way, he opened the window and yelled at them pleading with them to stop and have some respect for other people's property. He says he felt helpless and embarrassed that his van was being rammed into his father's property.

[5] Mr Kelly followed the van to the workshop to ask him why he so blatantly disrespected his, and his father's property. He went down to the factory where Mr Main and Adam were unloading the van. Mr Main described Mr Kelly's disposition as being angry, he says that *"Tony stormed up to me and says How dare you disrespect my father's property you little shit, why don't you just f... off!!"* Mr Kelly described the emotions he was feeling at the time as *anger, disappointment and disbelief*. He said he was mildly confrontational and he told Mr Mains to *F... Off and he should have some f...en respect for his property*. There was a short, heated exchange between between them where they both used colourful language. After Mr Main unloaded the van he left the yard and went home.

[6] Mr Kelly said he was seeking an explanation from Amigo as to why he had done such a thing, but Mr Main replied with a string of profanities. He said after he had taken a moment to fully understand the situation, he told Mr Main he wanted to talk about this as it was a serious issue. He said Mr Main told him to *F... Off and that he was being a Nazi*. Mr Kelly said he pushed the matter with Mr Main and informed him that as per his contract the matter was serious misconduct and he could lose his job over it. He said he suggested to Mr Main that they meet the next day to discuss it, and he should bring a support person.

[7] Mr Kelly said that the next day after Mr Main failed to show for work, he got R.J.Dons to quote on fixing the damage to the van which looked quite minimal. He said that Rob told him that the damage was actually quite bad and the van would be out of action for a few days. R.J.Dons' estimate to repair the van was \$2165.63. Mr Kelly said he then went and got another quote from Action Panel beaters just to be sure. Action Panel beaters estimated the total cost of repairs at \$2053.13.

[8] Mr Kelly said that at around 2.00pm that Saturday, after it was obvious that Mr Main wasn't showing, he and his father undertook an investigation into the incident of the previous afternoon and without any evidence to suggest otherwise, they deemed Mr Main to have acted in an unacceptable manner and those actions could only be described as serious misconduct, and it was decided that Mr Main's employment would be terminated.

[9] Mr Kelly packed Mr Mains' tools to save him from being embarrassed in front of the other staff, and when Mr Main arrived at work on Monday morning he informed him of the meeting and the outcome, and handed him a letter of termination of his employment.

Legal Considerations

[10] The legal considerations for this matter arise out of s.103A of the Employment Relations

Act 2000 Test of justification

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[11] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[12] At paragraph 144 the Court said in respect of the case before it:

“The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company’s policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her”.

[13] Of importance to a consideration of any personal grievance claim are the minimum requirements for a fair procedure to be followed by an employer in cases of dismissal. These have been concisely stated by the Labour Court in *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35, to be the following;

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct;*
3. *An unbiased consideration of the worker’s explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*

[14] The Court also observed in *Unilever* that in examining the procedure followed by an employer, what is looked for is ... *substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.*

Discussion and findings.

[15] The reasons for Mr Main’s dismissal are contained in the letter of dismissal, advising him that an investigation was launched to look into the Friday incident after several serious complaints were received from the owners of the buildings and after Mr Kelly had reflected on Mr Main’s actions and attitudes. It says he was found guilty of serious misconduct and therefore his employment was terminated immediately.

[16] The following extracts are from the letter of termination.

“As a company, we have deemed your actions of ‘ramming’ the work van into a closed gate intentionally serious misconduct, not to mention the abuse you took out on myself immediately after. Telling me or anyone else for that matter to ‘fucking leave me alone, I’m just trying to finish my day’ is not acceptable.....

On Sunday 19th February 2006 after speaking to several witnesses including owners of surrounding companies and their staff we have found you guilty of serious misconduct. As per your contract section 16.5 we have no option apart from terminating your contract immediately. I offered you the chance to explain your action shortly after the incident but you opted to abuse me rather than explain to me what had happened. The damage you have caused to the work van as well as the damage to the gate is going to be well over \$500.00.....

[17] The termination letter says that several serious complaints were received about the incident, and after speaking with several witnesses, Mr Kelly was found guilty of serious misconduct. Mr Kelly’s investigation could have been managed better. It was incumbent on

him to put the complaints and his concerns to Mr Main to afford him an opportunity to explain his actions.

[18] As part of a full and fair investigation, natural justice requires that Mr Main be given a proper opportunity to comment on the complaints made against him, and the 'ramming' incident. Such an opportunity has been categorised in *Unilever* above as the elements of procedural fairness being a real opportunity as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct, and an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.

[19] Mr Main was not afforded any such opportunity. He left work at about 5.45pm on Friday after an argument with his boss. When he turned up for work at about 6.50am on Monday, his tools were all packed up waiting at the front door. Mr Kelly called him into his office and informed him that his employment had been terminated and handed him the letter. What happened between Mr Main leaving work on Friday evening and being dismissed early on Monday morning is devoid of any process or procedure. Mr Kelly did not carry out a full and fair investigation into the incident.

[20] Standing back and objectively considering all of the evidence available to me, Interno's actions are not what a fair and reasonable employer would have done in all the circumstances.

Mr Main was unjustifiably dismissed; he has a personal grievance and is entitled to remedies in settlement of that personal grievance.

Remedies.

[21] Having concluded that Mr Main was unjustifiably dismissed, it follows that consideration must be given to the remedies available to him under sections 123, and 128 of the Employment Relations Act 2000. I am bound by s.124 of the Act to consider the extent to which Mr Main's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies accordingly.

[22] What started out as a *joke* on a Friday afternoon, a bit of fun, ended with serious consequence. Mr Main's action of opening the gate with the van was described as ramming and repeatedly ramming, to gently pushing it at an incredibly slow speed to nudged. Mr Main admitted that opening the gate with the van was disrespectful and dumb. That incident, combined with Mr Main's engagement in exchange of swearing at each other gave rise to his dismissal.

[23] I prefer the evidence of Mr Main, Stephens and Leeder in respect of the force used to open the gate. I find that it is more likely that Mr Main drove up to the gate, paused for a while and then inched the van forward nudging the gate until Mr Kelly yelled at him from the smoko room rather than ramming or repeatedly ramming the gate.

[24] I agree with Mr Main that what he did was dumb and he had little or no regard for his employer's property, or the property of R.J.Dons. What Mr Main did was lacking in good sense or judgment, it was not serious misconduct, but it is in my view blameworthy conduct to such an extent that the remedies available to him be reduced by 20%.

[25] Mr Main has lost wages as a result of the grievance. He said it took him 3 ½ months before he finally got a full time job. Mr Main indicated that during that period he got two casual jobs where he received about \$2000.00 net. I understand that there is no shortage of work in the cabinet making, kitchen/shop fitting industry. Mr Leeder gave evidence that it took him about 1 ½ months to find work after he had handed in his notice, and Mr Kelly indicated that there is plenty of work available. Mr Main said that during the initial stages after he was dismissed he just hung around home and he didn't apply for any jobs in the industry because of his employer.

[26] Mr Main had a responsibility to mitigate his losses. While he made some efforts, gauging by some of answers to my questions to that end, I am not satisfied that he pursued new work as actively as perhaps he could have. I have taken that into account, and have also factored in a reduction for his blameworthy conduct, **Interior Developments Limited is ordered to pay Mr Main \$5000.00 as lost wages under s.123 (1) (b) of the Employment Relations Act 2000.**

[27] I am also satisfied on the evidence that Mr Main has suffered some humiliation, loss of dignity and injury to feeling as a result of his personal grievance. **Interior Developments Limited is ordered to pay Mr Main \$3200.00 under s.123 (1) (c) (i) of the Act.** I have already reduced the total amount by the 20% blameworthy conduct factor.

Costs.

[28] Costs are reserved. The parties are requested to attempt to resolve that matter themselves. In the event that costs are not resolved, Mr Nicolson is invited to file submissions with the Authority and copy to Interior Developments Limited within 28 days of this determination. Mr Kelly will have a further 14 days to respond and copy to the Authority and Mr Nicolson.

Ken Raureti
Member of Employment Relations Authority