

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Shailendra Maharaj (Applicant)
AND Hi-Tech Irrigation Services Limited (Respondent)
REPRESENTATIVES Boris Samujh, for Applicant
Simon Menzies, for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 13 December 2005
SUBMISSIONS 19 December 2005, 20 December 2005
DATE OF DETERMINATION 22 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] Mr Maharaj arrived in New Zealand in late 2003. He is a qualified tradesman (a fitter and air conditioning and refrigeration engineer.) Within a couple of weeks he was offered work by Hi-Tech Irrigation Services Limited. In reliance on the offer, he applied for and got a work permit which was expressed to be for employment with the respondent only. He started work on 24 January and soon after, his wife and daughter joined him here.
- [2] On 18 July he was dismissed for poor performance. The respondent informed the New Zealand Immigration Service (NZIS) of this and as a result, his work permit was revoked, as was that of his wife, who has had to leave her job as well. Mr Maharaj has attempted to mitigate his loss and has received two offers of employment however because he was dismissed for poor performance, NZIS has declined to provide a fresh work permit. Mr Maharaj has challenged that decision. In the meantime, he and his family are able to remain in NZ but are without any means of support except assistance from relatives.
- [3] Mr Maharaj says that this dismissal was unjustified, with terrible consequences for him given the financial difficulties he and his wife are now facing. The respondent says however that almost from the outset of the employment, Mr Maharaj's work failed to meet the standard expected of a tradesman. It says that it followed a proper disciplinary process and gave Mr Maharaj an opportunity to improve his work but he did not. It says therefore that a dismissal for "*performance reasons*" was justified.
- [4] The issues for me therefore are whether the dismissal was procedurally fair and substantively justified.

Was the dismissal justified?

- [5] Between March and May 2005 there were a series of four meetings at which the respondent's managers outlined their performance concerns to Mr Maharaj. Although Mr Maharaj recalls receiving only one, I have accepted the respondent witnesses' evidence that two formal written warnings were presented as part of this process. The second warning, which was signed by Director Rob Sweet, was given to Mr Maharaj on 5 May and reads as follows:

“Review meeting 3 May, 2005

We met again on the Tuesday, May 3rd. I asked you whether you had anything further to add to the previous day's meeting. You explained that you had told your wife about our meeting and that you were still shocked that you had not completed the chopper housing properly.

I then explained that Brian and I had discussed the previous day's meeting and had agreed that a second and final warning was merited. I again emphasised how important it is that you achieve the required standard of workmanship for the workshop.

This is a second formal warning to you that to retain your job you must lift your standard of workmanship, reduce the amount of re-work and become more efficient at what you do.

I explained that we will try to help you get better, but if you are unable to achieve the required standard of workmanship we will have to terminate your employment.

You asked Brian whether there were things that he could say which were good about what you were doing. He agreed that there were a number of things which he is pleased about – your welding had improved, you are using the grinder less often and your work speed has improved.

We finished the meeting by agreeing to meet again in two weeks time.”

- [6] Despite being told here that he would receive fortnightly feedback and follow up on his progress, Mr Maharaj heard nothing further from the respondent throughout May, June and the early part of July.
- [7] Then on 12 July he was in the respondent's workshop when he received a call to say that his uncle in Fiji had passed away. Mr Maharaj had a particularly close relationship with this uncle and was considering whether to go to Fiji to assist with preparations for the funeral. He told the workshop supervisor, Brian Crowe of this and with Mr Crowe's agreement, left to go home and discuss arrangements with his wife. Mr Crowe told me, and I accept, that before Mr Maharaj left he told him to let him know his plans and in particular, how long he would be away.
- [8] Mr Maharaj left and did not return to work until 15 July. He made no attempt to contact the respondent in the meantime. Mr Crowe tried ringing him at home but was not able to get hold of him.
- [9] On 15 July after he returned to work Mr Maharaj was called to a meeting with Mr Crowe and a director of the respondent, Mr Surendran. He was told that the respondent saw his absence and failure to get in touch with Mr Crowe as another performance failing. Mr Maharaj responded by saying that he thought Mr Crowe would understand the situation. He was told that this explanation was not accepted.

[10] On 18 July Mr Crowe and another director of the respondent, Mr Sweet met with Mr Maharaj. Mr Sweet ran over the issues relating to Mr Maharaj's recent absence as well as what he said were recent non-performance issues including:

- *“on-going unexplained damage to workshop equipment;*
- *complaints from other staff members about your work output when working with them;*
- *ongoing faulty manufacturing of pump columns;*
- *workshop inefficiency created through the loss of your driver's licence.”*

[11] With regard to his absence, Mr Maharaj gave the same response as before. As for the other issues he:

- responded that he did not believe he was responsible for damaged items;
- asked who had complained about him, but Mr Crowe would not disclose this information;
- pointed out that someone else could have been sent on the errand which required a driver's licence (Mr Maharaj had lost his licence in May and felt it was the trigger for the May warning.)

[12] He was then asked to leave the office while Mr Crowe and Mr Sweet considered the matter. Upon being asked to rejoin the meeting he was dismissed, effective immediately. The termination of his employment was confirmed to him by letter of 19 December as follows:

“As advised yesterday, Hi-Tech Irrigation Services has terminated your employment with the company for performance reasons.

A copy of our meeting notes is attached to this letter.

Your final pay will be deposited into our bank account today. You will note that we have deducted 2.5 hours for sick leave paid in advance.”

[13] Mr Maharaj had already been paid up to and including 12 July. His final pay contained his wages for Friday 15 and Monday 18 July, along with outstanding holiday pay. Mr Maharaj's employment agreement provides:

“20 Termination of Employment

- a. The employee may terminate this agreement on not less than two weeks notice in writing to Hi-Tech. Where the correct notice is not given or worked salary shall be paid or forfeited as the case may be.*
- b. Hi-Tech may terminate this agreement following due investigation but without further notice if the Employee is guilty of neglect of duty or misconduct which in the opinion of Hi-Tech is serious enough to justify summary termination.”*

Determination

[14] At various points the directors and workshop manager have described Mr Maharaj's absence from work as an abandonment of employment. For the record I do not consider that it was accurate to describe what Mr Maharaj did as an abandonment of employment since he sought and obtained permission to leave the workshop on 12 July and it was understood by Mr Crowe that he would take at least some bereavement leave. Despite their use of the term, the

respondent's managers appear to be of essentially the same view since the notes of the meeting of 18 July record that the issue of concern was his failure to come back to Mr Crowe with further information, rather than the taking of leave in itself.

- [15] In any event, the respondent does not now seek to justify the dismissal on the basis of serious misconduct. Instead, as recorded in the letter of dismissal and attachment, it says it dismissed him on performance grounds, after following what it says was a disciplinary process conducted properly and in good faith.
- [16] The series of meetings between March and May was, I accept, conducted in a proper manner which put Mr Maharaj on notice of problems with his workmanship which could jeopardise his employment if they were not rectified. He was given enough detail to understand what he had done wrong and given time to address those problems under the guidance of Mr Crowe.
- [17] However, there were no fortnightly reviews between 5 May and 15 July and nothing to signal to Mr Maharaj during this period that his workmanship continued to be a problem. Despite the fact that other performance concerns were raised on 18 July, I have no doubt that the trigger for the dismissal was Mr Maharaj's failure to call Mr Crowe on 12 July. Had those other concerns been of sufficient concern as to finally lead to dismissal, I would have expected them to be raised as and when they came up, according to the fortnightly programme which had been put in place. Earlier matters involving poor workmanship had been dealt with that way, so that Mr Maharaj knew just which work was considered faulty and could respond properly. He was not able to do so when they were belatedly raised on 18 July. It must also be noted that the respondent knew that Mr Maharaj had lost his license prior to the May 5 warning and so cannot rely on it as a new matter as of 18 July.
- [18] Mr Maharaj knew his employment was at risk if his workmanship did not improve, and he had every reason to believe (due to the absence of reviews) that the respondent was satisfied with his improvement in this area. The failure to call Mr Crowe was an altogether different type of concern. Mr Maharaj could not be said to be on notice that something of this sort could lead to dismissal. It was not reasonable to expect him to foresee that this could cause his termination in all the circumstances including his bereavement.
- [19] The respondent has not been able to show that the dismissal was justified on the performance grounds (poor workmanship) about which it had put Mr Maharaj on notice.
- [20] It must also be noted that Mr Maharaj received neither notice nor pay in lieu of notice. I advised the parties' representatives that it would be helpful if this issue were addressed in submissions but neither did so. Only serious misconduct can justify a summary dismissal. The failure to pay notice in this case is a further breach on the part of the respondent.
- [21] It follows for these reasons that the dismissal has not been justified.**

Remedies

- [22] The following remedies are claimed in this case:
- Reinstatement;
 - Lost earnings;
 - Compensation for hurt and humiliation.

- [23] I make no reduction in remedies for contributory conduct. As indicated already the immediate cause of the termination was Mr Maharaj's failure to call Mr Crowe and in the circumstances I do not consider this so serious a matter as to warrant a reduction in remedies.
- [24] I am however unwilling to reinstate Mr Maharaj because of the small size of the respondent's enterprise and the difficulties the parties would inevitably encounter in re-establishing a satisfactory working relationship. **The remedy of reinstatement is declined.**
- [25] The issue of monetary remedies has been somewhat complicated by the fact that Mr Maharaj has been refused a new work permit at the discretion of NZIS. Much of Mr Maharaj's difficulties, both personal and financial, have arisen because he had been unable to mitigate his loss by taking up the perfectly good job offers he has received since the termination. (Mr Maharaj received a job offer as early as 10 August 2005, to start on 15 August.) The respondent was apparently under an obligation to advise NZIS if the employment was terminated, but did more than this. It advised NZIS that the termination was for performance reasons related to the workshop tasks Mr Maharaj was required to perform. As far as Mr Maharaj is aware, this advice is the reason he has been declined a permit.
- [26] The respondent must therefore bear some responsibility for the fact that Mr Maharaj has not been able to get a work permit. On the other hand it cannot be expected to meet Mr Maharaj's losses indefinitely when his ability to work is under the control of another agency.
- [27] I therefore approach remedies as follows. Mr Maharaj should receive a mid-range award of compensation which reflects the distress he experienced arising out of the dismissal itself and not the ongoing problems associated with the loss of his work permit.
- [28] **I therefore order the respondent to pay to Mr Maharaj the sum of \$6,000.00 compensation for hurt and humiliation pursuant to s.123 of the Employment Relations Act.**
- [29] As for the claim for reimbursement the respondent must pay to Mr Maharaj the sum of three months' (thirteen weeks) lost remuneration pursuant to s.128 of the Employment Relations Authority. He was on an hourly rate of \$12.50 and worked forty-five hours per week. **Hi-Tech Irrigation Services Limited is therefore ordered to pay Mr Maharaj the sum of \$7,312.50 gross lost earnings.**

Costs

- [30] This issue is reserved. If the parties cannot reach an agreement on costs, they may request that it be determined by the Authority. Any submissions must be lodged within 28 days of the date of this determination.

Y S Oldfield
Member of Employment Relations Authority