

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Andrew Marlow (Applicant)
AND Gorrie Fuel (SI) Limited (Respondent)
REPRESENTATIVES Grant Tyrall, Counsel for Applicant
Ian Thompson, Advocate for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 9 March 2005
DATE OF DETERMINATION 29 March 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] The applicant, Andrew Marlow (Andrew), alleges that he was unjustifiably dismissed by the respondent Gorrie Fuel (SI) Limited (Gorrie).
- [2] Gorrie denies the dismissal was unjustified.
- [3] The parties attended mediation but were unsuccessful at resolving their employment relationship problem.

The facts

- [4] Andrew was employed as a petrol station attendant by Gorrie on and from 15 January 2004.
- [5] At the time of his engagement, Andrew was 14 years old and the purpose of his working was, I was told, to earn some pocket money.
- [6] Andrew worked an average of 12 hours a week and was paid \$4.00 an hour for that work. He was employed pursuant to an employment agreement which Gorrie claimed provided for casual employment. For his part, Andrew says that he regarded himself as a permanent part-time employee.
- [7] I have no doubt that the agreement was not a casual employment agreement. It certainly does not say that it is and the layout of the agreement and the coverage of matters such as performance reviews, remuneration reviews, annual and public holiday leave and other provisions which clearly contemplate a continuing relationship make that contention quite implausible.

[8] I think it would be more accurate to describe the employment relationship as a permanent part-time relationship with no fixed hours. Both parties agreed in the investigation meeting that Gorrie put up a roster on a regular basis which identified when particular workers were working and the uncontraverted evidence of Andrew was that he worked an average of 12 hours a week and that he worked roughly the same span of hours most weeks that he was employed.

[9] Andrew told me that there were no employment or performance concerns during his employment and he said in answer to one of my questions that he had not had a warning in the sense in which we talk about warnings in an employment law context. He admitted that he had had Mr Gorrie tell him to hurry up to do something but he indicated that he was slow to do it not out of lack of willingness but because he had not heard Mr Gorrie's instruction in the first place, the forecourt of a busy service station on a main road being by definition a noisy place.

[10] Andrew was, at the relevant time, and remains a high school student and the purpose of him working was in his mother's words to...*earn some pocket money...and...to give him some independence and experience.*

[11] Andrew had been working just over a month for Gorrie when the incident that led to his dismissal happened. On the 22 February 2004 Andrew was working a 4 hour shift between 1pm and 5pm. 22 February 2004 was a Sunday.

[12] During that Sunday afternoon shift, a female driver pulled up on the forecourt of the service station in a four-wheel drive van. Andrew's evidence, which was unchallenged on this point, was that she initially drove her vehicle to align it to the unleaded petrol pump and then moved the vehicle along and stopped by the diesel pump. Andrew, who had gone out to attend to this customer, was told by the customer to *top it up.*

[13] Critically Andrew's evidence was that he had asked her words to the effect "*how much diesel do you want*". The female driver had responded words to the effect "*until it is full*".

[14] In my investigation meeting, I pressed Andrew on the question of whether he specifically used the word diesel in his questioning of the customer. He assured me that he did. The significance of this will be self evident. Had he not specifically mentioned the word diesel, there could have been some prospect of misunderstanding the customer's instructions which of course would add to his possible culpability.

[15] There was no corroboration offered to me of what Andrew said to the customer and the customer was not produced by either party at the investigation meeting. For the respondent, Mr Gorrie told me that when he became aware of the problem shortly after the matters that I am now describing, Andrew did not confirm to Mr Gorrie that he had specifically asked the customer if she wanted diesel or petrol. It is of course perfectly possible that both Andrew and Mr Gorrie are correct. Given the nature of the discussion between Andrew and Mr Gorrie after the incident, it seems to me highly likely that Andrew would have been stressed and could easily not have answered Mr Gorrie's questions accurately.

[16] In any event, I found Andrew to be a truthful young man and I find as a fact that he did use the word diesel in the question that he asked the customer.

[17] Andrew did as he was asked and the customer and Andrew subsequently met inside the service station at which point the error had become clear. One of Andrew's work mates was operating the till and asked the customer whether she was the diesel purchase and she indicated that

she wanted petrol. Andrew's workmate then promptly summoned Mr Gorrie who was in the afternoon tearoom at the back of the service station and Mr Gorrie emerged.

[18] Mr Gorrie says that he conducted an investigation on the spot. He says his focus was on the customer rather than on Andrew. By all accounts the customer was stressed. Mr Gorrie asked Andrew what fuel had been put in the vehicle and Andrew frankly admitted that he had put diesel in it. Andrew says that this was the only opportunity that he had to explain the situation.

[19] Andrew says that Mr Gorrie then looked at him and said loudly "*I bloody warned about this. Jesus Christ, I fucking warned you, didn't I*". Andrew was quite clear that these were the words that Mr Gorrie used and that he used these words in the reception area of the service station. In his evidence, Mr Gorrie did not deny using what he described as a *robust style of language* which he says was consistent with the industry. Mr Gorrie in answer to a question from me said that he thought that he well could have said something like the words Andrew remembers him saying.

[20] Andrew's evidence is that Mr Gorrie then spoke to the customer and told her that the fuel tank on the vehicle would need to be drained and the customer then left to speak with her husband who was in the vehicle. Shortly thereafter it seems Mr Gorrie told Andrew that he was sacked and this happened after the customer had left but while Andrew's workmate was physically present.

[21] Mr Gorrie then went back to the afternoon tearoom where he had two visitors. Andrew had to go in there in order to pick up his cell phone to leave the premises. Andrew remembers Mr Gorrie saying in front of the two visitors and himself words to the effect that "*Man, people know how to fuck your day up?*" Again, Mr Gorrie acknowledged that while he could not remember his exact words in the smoko room he said in answer to a question from me "*Something along those lines would have been said*".

[22] By all accounts these events unfolded very quickly. Mr Gorrie told me that there would have been a maximum of 5 or 6 minutes between his being summoned to the front counter to the point at which Andrew was dismissed and that in that time he had conducted a brief investigation of the factual circumstances which he said justified dismissing Andrew summarily.

[23] Mr Gorrie accepted that that investigation was very brief and he accepted that his focus was on the customer's needs rather than on Andrew's. He accepted that the dismissal occurred in his words *in the heat of the moment*. He accepted that at the time of the dismissal, he had not seen all the evidence but he was still confident about a summary dismissal notwithstanding that.

[24] Mr Gorrie thought that putting the wrong fuel in a vehicle in a service station context was *as serious as it got* and his reference to having warned Andrew was a reference to the induction process when Andrew started on the job when it is common ground that there was a presentation done by both Mr Gorrie and a senior staff member to Andrew in which the importance of getting the right fuel in a vehicle was emphasised.

[25] The "investigation" that Mr Gorrie was referring to seems to have comprised the asking of perhaps no more than a handful of questions. It is common ground that Mr Gorrie asked Andrew what fuel was put in the vehicle. Mr Gorrie also claimed that he might have asked Andrew whether the vehicle had a sticker inside the fuel department indicating what fuel it took but Andrew has no recollection of that question. Mr Gorrie said that he satisfied himself that it was Andrew that made the mistake and not the customer. He reached that conclusion because, as I mentioned earlier, his recollection is that Andrew did not acknowledge that he had used the word diesel in questioning the customer and Mr Gorrie's view of that was supported by whatever Mr Gorrie asked the customer.

[26] I have already found that I believe Andrew's evidence that he did use the word diesel in the question that he asked the customer and as I said earlier, it seems to be perfectly possible that Andrew would have used the word diesel when talking to the customer but when confronted by Mr Gorrie in a stressful situation minutes later would not appreciate the significance of the question or necessarily recall matters accurately. After all this is a 14 year old high school student in his second part-time job.

[27] Mr Gorrie talked about visual cues which he thought his staff ought to look for in identifying what fuel a customer actually wanted. He thought that a customer hesitating was a classic sign. The unchallenged evidence in this case was that the customer did in fact hesitate and Mr Gorrie thought that that should have put Andrew on notice that the customer may have been confused.

[28] Mr Gorrie told me that there were other visual cues like looking for a sticker inside the fuel compartment of the vehicle and he thought that Andrew had not taken proper steps to satisfy himself that he should put diesel in the vehicle.

[29] However, these visual cues that Mr Gorrie talked about were by common consent not put to Andrew at the time with the possible exception of the issue about the sticker inside the fuel compartment.

[30] Mr Gorrie wanted me to accept that "*the situation did not allow for legal niceties*". In answer to my challenging him on this statement he contended that some other industries did not have the same pressure from customers that the retail fuel industry had.

[31] Mr Gorrie's view was that putting diesel fuel in a petrol driven vehicle in a retail service station context constituted serious misconduct and therefore required summary dismissal by way of a response.

Determination

[32] I do not accept that view of the facts nor do I accept the submission that the legal test that should apply in this industry can be different from that which applies elsewhere. Had Parliament intended that consequence, no doubt it would have legislated to that effect. I also do not accept that we are concerned here with *legal niceties*.

[33] The law has been enacted by Parliament and interpreted by the judges to provide a robust, transparent and fair means of dealing with employment relationship problems. To suggest that because of *customer pressure* a particular industry ought to be excused from getting the process right is not in my view a proposition which is in any way sustainable.

[34] I find that Andrew made a mistake while at work which resulted in a customer being aggrieved and his employer suffering loss but I also think that Andrew did what he could (with his limited experience) to attempt to do the right thing at the time and that the customer might well have inadvertently put Andrew on the wrong track when making the initial request.

[35] In my judgement, even if it can be contended that the dismissal was substantively justified by reason of the offence being evaluated as serious misconduct (a view which, given Andrew's age and experience, I would find difficult to accept) the procedure used to effect the dismissal was so out of keeping with appropriate standards as to make the dismissal unsafe. In particular, I refer in this regard to the frank admission by Gorrie that the dismissal was effected in the *heat of the moment*, the fact that the "investigation" was so perfunctory as to be virtually nonexistent and the fact that the

dismissal was occasioned by what Mr Gorrie referred to as *robust* language but which many would regard as simply abusive particularly when delivered in public and directed at a 14 year old boy.

[36] Given my finding that the dismissal is unsafe for reasons of procedural unfairness I determine that Andrew has been unjustifiably dismissed and in consequence he has a personal grievance against his employer Gorrie.

[37] In considering remedies I have reflected on Andrew's relative youth, the short duration of employment, the fact that the employment was for pocket money rather than economic sustenance and the likelihood of the damage to his self esteem being equivalent to that of an adult worker in similar circumstances.

[38] I have reached the conclusion that an appropriate award of compensation, in the absence of any contribution from Andrew would be \$3,000.00.

[39] Given my factual finding that Andrew referred specifically to diesel in his question to the customer, there cannot be any question of his contribution to the dismissal.

[40] There remains the issue of lost wages. The evidence is that Andrew did not work again for 11 months. While he rightly drew my attention to the fact that some of the reason for that long delay in gaining fresh employment was because of his commitments at school it is nonetheless a long period to be without work when you want to work. He told me that he had applied for 3 or 4 jobs during that period and he is now employed on a similar basis doing similar work. I award him the sum of \$624.00 being 3 months wages being calculated at \$48.00 per week over that 3 month period which represents the average that Andrew would have earned had he continued in Gorrie's employment.

Summary

[41] There will be an order for compensation payable under section 123(c)(i) of the Employment Relations Act 2000 in the sum of \$3,000.00.

[42] There will be an order for lost wages of \$624.00.

[43] Costs are reserved.

James Crichton
Member of Employment Relations Authority