

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 206/09
5154932**

BETWEEN HAYDEN MILLER
 Applicant

AND CARSON RACING GROUP LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Justine O'Connell for Applicant
 No appearance for Respondent

Investigation Meeting: 9 June 2009

Submissions Received: 19 June 2009

Determination: 25 June 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Hayden Miller ("Mr Miller") claims he was unjustifiably dismissed. He further claims arrears of wages, holiday pay and penalties. The respondent Carson Racing Group Limited ("Carson") has taken no steps to defend Mr Miller's claims against it.

The facts

[2] Mr Miller was employed by Carson as its Workshop Manager. He commenced that employment in April 2008. At that time, the terms of the employment were not recorded in a written individual employment agreement. Mr Miller signed an employment agreement in October 2008.

[3] By letter dated 17 November 2008 Carson's managing director Mr Tony Yan ("Mr Yan") wrote to Mr Miller as follows:-

On Thursday 13th of November, you were verbally abusive to, and threatened members of staff. These incidents are clearly visible on security footage. As outlined in your employment contract [clause 33], this action amounts to misconduct. We believe this behaviour to be of a serious nature.

You have been verbally warned on previous occasions concerning your continual lack of performance, absence from you duties, poor time keeping, abusive behaviour and lack of respect for fellow employees.

The purpose of this letter is to confirm the action taken by Carson Racing Group in dismissing you from employment for Serious Misconduct, effective immediately.

Any outstanding monies owed to you by the company will be paid to you account no later than 24 hours hence.

You are further requested to return any and all company property in your possession immediately and leave the premises.

*Tony Yan
Managing Director
Carson Racing Group*

(the “dismissal letter”)

[4] Attached to the dismissal letter was a list of car parts Carson claimed Mr Miller owed to it in the sum of \$10,173. Mr Miller had been repairing a Mitsubishi car in his own time (“the car”).

[5] Mr Yan told Mr Miller to leave and return the car. Mr Miller said he would return the car when he had been paid all his wages, notice, holiday pay, and compensation for his work on the car.

[6] Subsequently, Mr Yan telephoned Mr Miller and asked that he return to discuss matters. Mr Miller returned on 19 November 2008. He was handed a document entitled “Employment Dissolution Agreement”. The discussion that followed did not result in a resolution and Mr Miller left.

[7] Mr Yan telephoned Mr Miller again to invite him to return to discuss matters further. Mr Miller attended on Mr Yan at Carson’s workshop on 10 December 2008.

Mr Miller was handed a further document purporting to be a settlement agreement and which stated that Mr Miller had resigned. There were other stated conditions including acknowledgements by Mr Miller that he was indebted to Carson's. There was also a severance payment to Mr Miller. Mr Miller refused to sign the settlement document.

[8] Mr Miller discussed the situation with his father. He returned to Carson's workshop on 11 December 2008. He signed the settlement document but endorsed it "under duress". He also returned the car. He was paid cash of \$2,000 and later a payment of \$2,120.

The merits

[9] Mr Miller says he was unjustifiably dismissed. The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. 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.

[10] Mr Miller was dismissed by the dismissal letter. He says there was no discussion whatsoever with him about the contents of the letter. He denies that he was ever verbally abusive or threatening to staff. He says he never received any previous warnings.

[11] Carson's failure to take any steps to defend Mr Miller's claim means that Mr Miller's sworn evidence is unchallenged. Having seen and heard Mr Miller I find him a credible witness and I accept his evidence. Carson fails to justify its decision to summarily dismiss Mr Miller.

The determination

[12] I find Carson's actions in summarily dismissing Mr Miller were not the actions of a fair and reasonable employer. **I find that Mr Miller was unjustifiably dismissed and he has a personal grievance for unjustifiable dismissal.**

[13] I find the settlement document signed by Mr Miller "under duress" is not an accord and satisfaction such that Mr Miller is estopped from pursuing this present claim. The document states that Mr Miller resigned, but that is a misrepresentation. Mr Miller had not been paid his final wages or holiday pay and Carson owed him for his work on the car. Carson was withholding from Mr Miller his lawful entitlements. It refused to pay Mr Miller his entitlements until he acknowledged his indebtedness to it. In such circumstances and in this equity and good conscience jurisdiction, I do not hold Mr Miller to that purported settlement and Mr Miller is not prevented from pursuing his present claim.

[14] I further determine that Mr Miller is owed arrears of wages and holiday pay.

The resolution

[15] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Miller's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I have no foundation to make any finding of blameworthy conduct on Mr Miller's part. There will be no reduction in either the nature or extent of any remedies to be granted to Mr Miller.

Reimbursement

[16] Mr Miller gives evidence that as a result of his dismissal, he has been unable to work. Following his dismissal, he was granted a sickness benefit. He remains unable to work. He produces a letter from his doctor which advises:-

Mr Millar(sic) presented on 3 December 2008 reporting low mood, poor sleep. He displayed clinical features of dysthymia and irritability which he felt were related to a dispute with his employer causing the loss of his job.

As a result Mr Millar(sic) has been psychologically unable to engage in alternative work resulting in him being placed on a medical sickness benefit from 3 December 2009 until the current time.

[17] I accept that Mr Miller's continued entitlement to a sickness benefit is sufficient evidence that he remains unable to work. I accept his evidence, and I have no reason to doubt it, that he is unable to work because of his dismissal from Carson. That dismissal I have found is unjustifiable. I am satisfied that Mr Miller therefore suffers loss caused by Carson's unlawful actions. Mr Miller is entitled to recover that loss from Carson and on that basis I award him reimbursement.

[18] Mr Miller claims loss of income from the time of his dismissal until the Authority's investigation meeting. That is said to be 31 weeks @ \$448 gross per week in the total gross sum of \$13,888.00. I consider that sum represents his actual loss. I am satisfied that Mr Miller has lost income as a result of the personal grievance I have found and I exercise my discretion to award him his actual loss. **I order Carson Racing Group Limited to pay to Hayden Miller the gross sum of \$13,888 as reimbursement.**

Compensation

[19] Mr Miller claims compensation of \$15,000.00. It was obvious to me, having seen and heard Mr Miller, that he was previously a motivated and successful young man with. It was equally clear to me, that he is deeply affected by the termination of his employment with Carson and that he continues to remain affected many months later. Fortunately he remains keenly interested in high performance motor cars. I accept he continues to suffer. I am satisfied that Mr Miller has suffered hurt and humiliation, embarrassment, loss of dignity and injury to his feelings as a result of the personal grievance I have found. Having regard to his evidence, his length of service and the nature of his personal grievance, I award him compensation in the sum of \$8,000.00. **I order Carson Racing Group Limited to pay to Hayden Miller the sum of \$8,000 as compensation.**

Arrears of wages

[20] I have inspected Mr Miller's bank account statements. He was not paid regularly. I accept his evidence that he is owed arrears of wages in the gross sum of \$3,157.21 and holiday pay of \$436.72. **I order Carson Racing Group Limited to pay to Hayden Miller the sum of \$3,593.93 as arrears of wages.**

Overtime hours

[21] Mr Miller claims further arrears of wages for overtime hours. I am not persuaded that such a situation was authorised or approved and I decline to make any orders in relation to this claim.

Contractual notice

[22] Mr Miller through his representative, claims reasonable notice of termination in the amount of four weeks gross wages due upon termination. That claim has not been specified in the statement of problem and even though Carson takes no steps, it was never on notice that such a claim would be made. It would not be fair or just to consider that claim and I therefore decline to make any order in relation to it.

Penalties

[23] I am satisfied that Carson failed to produce the wage and time record when it was formally requested to do so by Mr Miller's representative. Pursuant to section 130(4) of the Act, I exercise my discretion to impose a penalty. **I order Carson Racing Group Limited to pay a penalty of \$500.00 for a breach of section 130(2) of the *Employment Relations Act 2000*, such penalty payable to the Crown.**

[24] I accept that Carson failed to provide Mr Miller with an employment agreement at the commencement of his service. It did however subsequently and Mr Miller signed one in October 2008. Mr Miller now claims a penalty because he was not advised that he was entitled to seek independent advice about that agreement. I accept his evidence. Pursuant to section 63A(3) of the Act, I exercise my discretion to impose a penalty. **I order Carson Racing Group Limited to pay a penalty of \$500.00 for a breach of section 63A(2) of the *Employment Relations Act 2000*, such penalty payable to the Crown.**

The costs

[25] In the event that costs are sought, Ms O'Connell is to lodge a memorandum as to costs within 14 days of the date of this Determination. As Carson takes no part in this investigation, the memorandum need not be served on it.

Leon Robinson
Member of Employment Relations Authority