

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Daniel Miller (Applicant)
AND Peter Thompson Tyre & Auto Service Ltd (Respondent)
REPRESENTATIVES Robert Thompson, Advocate for Applicant
William Morgan, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 12 April 2005
DATE OF DETERMINATION 23 May 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant was employed by the respondent as a wheel alignment technician at the company's Moorhouse Avenue site. He commenced work with the company on 17 November 2003. The applicant claims that he was unjustifiably disadvantaged in his employment prior to dismissal and that his dismissal was unjustified.

[2] The respondent denies that it has acted unlawfully in suspending the applicant as he agreed to this action, and in dismissing as it was relying on a clause in the employment agreement which states, "loss of the employee's licence will affect the continuation of the employee's position." It therefore declines to meet the applicant's claim for remedies.

What caused the problem

[3] On 31 March 2004 Mr Miller was convicted of an offence which resulted in him being suspended from driving for six months. He delayed telling his manager, Mr Hale, until 6 April 2004.

[4] Mr Hale contacted the principal, Mr Peter Thompson, advised him of the situation and it was decided to suspend Mr Miller as the respondent was unable to transfer him to a position which did not require a licence. Mr Hale then met with the applicant again and raised the possibility of Mr Miller securing a limited licence. At that point the applicant told Mr Hale that he could not afford the cost of securing a limited licence. Following what Mr Hale calls "a reasonable conversation", the pair agreed that Mr Miller would be suspended while he investigated the possibility of securing a licence and a letter was prepared which both the applicant and Mr Hale signed. The period of suspension was to run until 16 April 2004, and was to be unpaid.

[5] Shortly after the suspension began, Mr Hale had a telephone call from Ms Cherry, the solicitor acting for the applicant in his quest for a limited licence, and emails were also exchanged. Mr Hale says, “it was not until the email from Ms Cherry dated 19 April that I became aware that the time frame for a limited licence was at least the 13th May 2004.”

[6] Ms Cherry emailed a draft affidavit in support of Mr Miller’s applicant to Mr Hale however, Mr Hale was unhappy with some aspects of the document and did not continue the dialogue with Ms Cherry.

[7] Mr Hale contacted Mr Peter Thompson and the discussion resulted in a decision that they “could not continue Daniel’s employment. I tried to contact Daniel on his cell phone to discuss the situation but could not make contact and then wrote to Daniel by letter dated 21st April 2004 terminating his employment.”

Issues

[8] The issues the Authority must decide are:

- the legitimacy of “mutually agreed” suspension without pay; and
- the reason(s) for the applicant’s dismissal; and
- was the dismissal fair in the particular circumstances; and
- what, if any, remedies are appropriate in the circumstances.

The Investigation Meeting

[9] At the investigation meeting I heard from the applicant and Mrs Sue Miller, his mother, and from Ms Cherry. For the company Mr Hale gave evidence. I thank them and the representatives of the parties for their positive and helpful approach which enabled the matter to be heard in the course of a morning.

Analysis and Discussion

[10] There is no major dispute over the facts in this case. A key issue is that the reason given in the dismissal letter is the loss of the applicant’s licence. Had there been any other issue upon which the respondent had relied in effecting Mr Miller’s dismissal, it would have been detailed in that letter.

[11] In this I have considered Ark Aviation v Newton [2001] ERNZ 133 (CA) and also Eniata v AMCOR Packaging (NZ) Limited, Colgan J AC 19/02. In the latter case the Judge noted; “I do not consider that there has been any change to the long established principle that a dismissal justifiable at the time it occurred may not be declared to have been unjustifiable only on the basis of evidence discovered after dismissal and first presented to the Tribunal where justification is challenged as a personal grievance. It is only where such evidence ought to have been discovered by the employer’s reasonable inquiries, but was not, that such evidence can cause the dismissal to be found to have been unjustified or can reinforce such a conclusion.”

[12] The other matter that I must consider is where does the overall fairness lie in this matter. The respondent is a small business operator and does not have the luxury of being able to transfer an employee in circumstances such as this, to alternative work. I accept that the respondent in attempting to deal with this matter found it self caught in a situation of considerable difficulty.

[13] On the other hand I need to bear in mind the seriously flawed procedures it employed in bringing about the dismissal of the applicant.

[14] Finally I need to determine, given that Mr Miller was unrepresented in the initial stages of this matter, that is prior to the suspension being put in place, a *mutually agreed* suspension is lawful.

The Determination

[15] I find that the suspension came about from a situation in which a young man, inexperienced in legal aspects of his employment, sought to preserve his employment. On his own evidence he states that he saw this as a possible way of retaining his job. There is no suggestion that Mr Hale attempted to coerce the applicant into making this arrangement but I need to bear in mind the inevitable experience difference between a manager and a young man.

[16] I find that Mr Miller was disadvantaged in his employment in respect of the suspension.

[17] I find that the dismissal was unjustified because having engaged in a process to assist in gaining a work licence, the respondent essentially went to ground and disengaged from communicating with the applicant's solicitor who was working very diligently to secure a limited licence in the shortest possible time. The effect of sending the letter, as opposed to calling the applicant into the workplace for a further discussion, was to deprive him of an opportunity of persuading his employer to retain him.

Remedies

[18] Having found that Mr Miller was disadvantaged I order the respondent to pay him the sum of \$1,012.00 gross the equivalent of the wages lost during the period of suspension.

[19] On the unchallenged evidence of the applicant prior to finding alternative employment he lost remuneration totalling \$4,048.00 gross. The respondent is to pay this sum less the appropriate tax to the applicant.

[20] In considering the compensation component of the remedies, I am mindful of several matters. Firstly, Mr Miller had been employed by the respondent for a little over five months at the time of the dismissal. Secondly, he delayed informing his employer of the situation in which he found himself and finally, the difficult situation in which the employer found itself.

[21] Having balanced and considered these matters as carefully as I am able, and having ordered that the respondent meet the lost wages in full, I think it just to award a modest sum in compensation. That sum I set at \$1,000.00 to be paid without deduction.

Costs

[22] In order to avoid additional expenses for either party and given that the investigation meeting took a little under three hours, I order the respondent to pay the applicant the sum of \$650.00 as a contribution to his costs.