

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number  
WA95/07

File Number 5071557

BETWEEN

Brian Morgan  
Applicant

AND

Maxcon Building Contractors  
Limited  
Respondent

Member of Authority: G J Wood

Representatives: Nathan Bourke for Applicant  
John Grinlinton, for Respondent

Investigation Meeting: 22 May 2007 at Wellington

Determination: 2 July 2007

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**DETERMINATION OF THE AUTHORITY**

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Employment Relationship Problem

[1] The applicant, Mr Brian Morgan, claims that he was unjustifiably dismissed by the respondent ("Maxcon"). Maxcon claims that Mr Morgan was justifiably dismissed following a week's sick leave and his failure to account for monies advanced by Maxcon to him to pay for parking a company vehicle that were retained by Mr Morgan.

**The Facts**

[2] Mr Morgan had worked for Maxcon's principal Mr John Grinlinton on a number of occasions. His employment with Mr Grinlinton's company Maxcon commenced in October 2005. He was employed as a labourer on construction sites Maxcon was contracted to work on.

[3] No written individual employment agreement was entered into. The basic terms of Mr Morgan's employment were, however, well understood.

[4] Towards the end of July 2006 Maxcon had a contract at Fletcher Building's maritime site. Mr Grinlinton decided that Mr Morgan would drive one of Maxcon's vans from Upper Hutt to the site each day, taking with him other of Maxcon's employees. There was parking available on site, but only for a limited number of vehicles. It allocated on a first come first served basis.

[5] Mr Grinlinton was aware from previous experience that parking would not always be available on site, but that parking was available in close proximity, on a casual basis, at a cost of \$10 per day. Mr Grinlinton therefore gave Mr Morgan enough cash to pay parking for each day of the week on a weekly basis. Each week Mr Morgan would either specifically ask for an additional \$50 and/or would accept the money without questioning why it was being paid.

[6] In fact from the end of July Mr Morgan was only paying for parking once every second day or so. Furthermore, Mr Morgan had taken to circling the streets looking for a free car park if one was not available on site. The other workers in the van thought at the time that that made sense, because they thought it was saving Maxcon money.

[7] This situation came to Mr Grinlinton's attention about a month later when he asked one of Mr Morgan's co-workers about what difficulties having to shift gear from the car park to the site was creating.

[8] Mr Grinlinton's son also worked for Maxcon. On Friday 18 August he went to collect the van from Mr Morgan at the end of the day, as he or his father did at the beginning of each weekend, and was asked by Mr Morgan for another \$50.

[9] Mr Grinlinton was very concerned about these events and accordingly wrote to Mr Morgan about them on 21 August. That letter states:

*"From information I have received to date there appears to be a discrepancy with the amount of parking money you have claimed from the company and the amount you have spent.*

*It is my decision to give Andrew [surname deleted] the van and parking responsibilities until this matter is sorted out. Andrew will pick you up from outside McDonalds at the same time you picked him up as from the 22nd August.*

*If it can be proven that you stole money from the company you may be given one weeks notice and your employment terminated."*

[10] Even although Mr Morgan and Mr Grinlinton lived in the same street there was no contact between them about this matter. This was despite Mr Grinlinton expecting Mr Morgan to explain what had happened and to pay the money back and apologise - and Mr Morgan expecting Mr Grinlinton to approach him about the matter. Mr Morgan never discussed the matter with any of his co-workers, including the worker who had taken on responsibility for driving the van, either.

[11] Mr Morgan subsequently took the next week off as sick leave. Again there was no contact between Mr Grinlinton and Mr Morgan until the following Sunday night, when Mr Morgan went to Mr Grinlinton's house to give him a doctor's certificate for the sick leave for the past five working days. Mr Grinlinton did not believe that Mr Morgan had been ill for that week, despite the medical certificate, principally because he had seen him out and about on a couple of occasions that week and he felt that he was trying to get paid for not working when he was likely to be dismissed for keeping the parking money.

[12] Mr Grinlinton determined to dismiss Mr Morgan. On Monday 4 September he gave him a letter of dismissal, which he backdated to 25 August in order to not to have to pay him the week's notice that had been referred to in his previous letter. That letter states:

*"After talking with Wi, Andrew and Dale there seems to be no doubt that you have claimed for parking expenses that you were not entitled to.*

*As this was clearly intentional on your part it has left me no choice but to terminate your employment.*

*I will be claiming back the \$90-00 that you over claimed from me from your termination pay; therefore I see no need to involve the Police. However I will not be providing you with a reference.*

*I am offering you 1 weeks notice. Your final day will be Friday 1st September 2006. Your termination pay will be calculated and paid as soon as you return the Company's Safety Equipment supplied to you when you commenced employment with the company."*

[13] Mr Grinlinton then decided not to pay Mr Morgan for his last week's pay, which was the period he was on sick leave. Mr Morgan went to see Mr Grinlinton about this the day after he found out about it. He returned the monies he had kept for parking and not used, having put holes in a number of banknotes and threaded them through a piece of string, together with receipts for the parking that was paid for. He also asked Mr Grinlinton for his job back. Mr Grinlinton declined to pay the sick leave and refused to give Mr Morgan his job back at that time because he was not convinced with Mr Morgan's explanation that he had not known what to do with the money.

[14] After being approached by a Labour Inspector Mr Grinlinton did pay Mr Morgan for the five days sick leave for his last week.

[15] Much later Mr Grinlinton offered Mr Morgan his job back but Mr Morgan declined the opportunity, even though Mr Grinlinton guaranteed that it would be a fresh start and that he would not discriminated against because of the previous problems. Mr Morgan remains unemployed. The matter has not been resolved despite mediation and attempts by the parties at the Authority's investigation meeting. It therefore falls to the Authority to make a determination.

## Credibility

[16] On every occasion where there is a dispute over what occurred the Authority must determine what happened on the basis of the balance of probabilities, i.e. what was more likely to have occurred than not. I had a great deal of difficulty assessing credibility in this case because of gaps in the evidence of most witnesses other than Maxcon's employee who was taken to work in the van driven by Mr Morgan. These difficulties may be a reflection of the passage of time and/or the communication difficulties that contributed to the employment relationship problem itself. In any event I have preferred the evidence of Maxcon's witnesses in general, despite Mr Grinlinton's back-dating of the dismissal letter, because of Mr Morgan's vagueness and his inability to explain why he would drive around in the mornings looking for a free park when he had been given money to pay for parking.

## Determination

[17] Under the Employment Relations Act the parties to an employment relationship are required to deal with each other in good faith. This requires them to be active and constructive in establishing and maintaining productive employment relationships in which they are, amongst other things, responsive and communicative.

[18] Clearly there were significant failings by both parties here to be responsive and communicative. It is simply extraordinary that for two weeks neither party made a positive effort to communicate with the other about the issue of the parking money. Both parties must take responsibility for this. While Mr Grinlinton wrote a letter raising his concerns he took no further action. Mr Morgan simply made no comment to anyone about the issue, even his fellow workers.

[19] In determining whether this dismissal was justified I must consider on an objective basis whether Maxcon's actions and how Maxcon acted were what a fair and responsible employer would have done in all the circumstances at the time the dismissal occurred. How Maxcon acted was not how a fair and reasonable employer would have acted. A fair and reasonable employer would have done more than simply give notice to Mr Morgan of the specific allegations of misconduct and the likely consequences of this if established. Instead a fair and reasonable employer would have subsequently given Mr Morgan a real opportunity to attempt to refute the allegation or explain or mitigate his conduct, which is the minimum requirement in all but the most obvious cases - *NZ with exceptions Food Processing etc IUW v. Unilever NZ Limited* [1990] 1 NZILR 35 applied.

[20] Had he had this opportunity Mr Morgan might possibly have come up with an explanation that may have led to Mr Grinlinton deciding not to dismiss him after all. At the time Mr Grinlinton

was merely looking for an apology and repayment of the money. Had that occurred he said the penalty he would have applied would have been a warning.

[21] Such a clear failing in how a fair and reasonable employer would have acted means that a dismissal in these circumstances can not be justified. This is particularly so when it was as much for Mr Morgan's alleged feigning of illness (which Mr Grinlinton was never in a position to fairly conclude) that led to Mr Morgan's dismissal (as the final straw), as much as the issue over the parking money.

[22] On the other hand a fair and reasonable employer would have been entitled to conclude, following two weeks without any explanation proffered by Mr Morgan, or the money repaid, that he had no acceptable explanation for why he had retained the money. That is not to necessarily conclude that Mr Morgan had stolen money from the company, as was referred to in Maxcon's letter of 21 August.

[23] Given that the dismissal was unjustified I turn to look at the issue of remedies. In seeking lost remuneration Mr Morgan is under a duty to mitigate his loss. I am not satisfied that he has done so. He has been unemployed for around 10 months, yet has only applied for a small number of jobs. It is well known that there is a raft of employment opportunities available in the construction industry in the Wellington region now and that this has been so for the preceding 10 months. An obvious source of employment for Mr Morgan would have been one of the recruitment agencies offering temporary and/or contract work in the construction industry. Mr Morgan declined to seek work through these companies because they require workers to have a telephone number at which they can be contacted. While Mr Morgan has good personal reasons for not wanting to have a telephone, I do not accept that he has mitigated his loss by refusing to seek readily available work simply on the basis that he does not want a telephone. In life people often have to make choices that are personally difficult for them in order to pursue employment. Mr Morgan's failure to do so, combined with his minimal efforts at finding other types of alternative employment and his refusal to consider reinstatement, mean that he has not mitigated his loss and is not entitled to lost remuneration.

[24] Mr Morgan gave extremely limited evidence of any loss of dignity and injury to his feelings that resulted from his dismissal, despite several opportunities to do so. Similarly, his failure to actively look for work shows that he was not too upset about not having paid employment. I do accept, however, that he was aggrieved by Mr Grinlinton's treatment of him. Taking all those matters into consideration I find that an appropriate award of compensation subject to contribution is \$1,000.

[25] In assessing contribution I must consider the extent to which the actions of Mr Morgan contributed towards the situation that gave rise to this personal grievance. What Mr Morgan can not be held responsible for is Maxcon's failure to give him a real opportunity to attempt to explain his conduct. What he can be held to account for are his requests for and acceptance of additional parking money that was not required and his failure to explain his conduct, despite living in the same street as Mr Grinlinton and having received a letter highlighting the apparent discrepancy, for a full two weeks before his employment was terminated. This is quite inconsistent with his duty to be responsive and communicative. I also take into account the fact that Mr Morgan would drive around looking for a free park when he had the money to pay for the parking, which was either wasting time that Maxcon was paying for or wasting the free time of his fellow workers.

[26] In all the circumstances of this case I find that Mr Morgan was, for the reasons given above, the author of his own misfortune to a significant degree. Given that there is insufficient evidence for me to conclude that Mr Morgan was guilty of stealing the money, however, and the failure of Maxcon to give him a proper opportunity to explain, I conclude that his contribution must be set at 50%.

[27] I therefore order the respondent, Maxcon Building Contractors Limited, to pay to the applicant, Mr Brian Morgan, the sum of \$500 in compensation.

### **Costs**

[28] Costs are reserved.

**G J Wood**

**Member of the Employment Relations Authority**