

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 105
5424535

BETWEEN WARREN MURCOTT
 Applicant

AND LOADWELL TRAILERS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Stephen McAuslin, Counsel for Applicant
 Len Andersen, Counsel for Respondent

Investigation Meeting: 10 June 2014 at Dunedin

Submissions received: At the investigation meeting

Determination: 17 July 2014

DETERMINATION OF THE AUTHORITY

- A. Warren Murcott was unjustifiably dismissed.**

- B. Loadwell Trailers Limited is to pay to Warren Murcott the sum of \$6,400 gross being reimbursement of lost wages under s 123 (1)(b) of the Employment Relations Act 2000.**

- C. Loadwell Trailers Limited is to pay to Warren Murcott the sum of \$2,500 without deduction under s 123 (1)(c)(i) of the Employment Relations Act 2000.**

- D. I have reserved the issue of costs and failing agreement have set a timetable for an exchange.**

Employment relationship problem

[1] Warren Murcott was employed by Loadwell Trailers Limited (Loadwell Trailers) as a fabricator and welder from 5 February 2013. He was provided with a copy of a written employment agreement on 18 March 2013. It contained both a probation period and a trial period not exceeding 90 days.

[2] On 21 March 2013, Mr Murcott was given a letter from the director of Loadwell Trailers, Angela Ireland, which gave him three days' notice that his employment was to end because the trial period had not worked out. Mr Murcott did not work out his notice period as he said it was too uncomfortable and his last day of employment was 22 March 2013. He says that his dismissal was unexpected and unjustified.

[3] Mr Murcott seeks reimbursement of 12 weeks' lost wages in the sum of \$9,600, compensation in the sum of \$5,000 and costs.

[4] Loadwell Trailers is in the business of manufacturing trailers. It now accepts that the trial period it relied on was unenforceable as it was not recorded in writing in an employment agreement and agreed to before Mr Murcott commenced work. It says that Mr Murcott was always aware, because it was discussed at the time it made the offer to him, that employment was on the basis of a trial period. Loadwell Trailers says that the employment relationship broke down because Mr Murcott repeatedly refused to follow instructions and then attempted to justify what he had done. The company maintains this was financially unsustainable, disrupted business deadlines and staff relationships and that there were health and safety issues.

[5] Loadwell Trailers says that the remedies Mr Murcott seeks are not appropriate because the relationship had already completely broken down at the time he was given notice. It says that this was demonstrated by the fact that Mr Murcott did not work out his notice period and cut into small triangles go-kart chassis plans that he had been asked to draw before he was given notice. Loadwell Trailers says that Mr Murcott contributed to the breakdown in the relationship in that his conduct was such that it disentitles him to any amount otherwise payable.

Issues

[6] The issues for determination by the Authority in circumstances where there is no dispute that Mr Murcott was dismissed from his employment are:

- (a) Was Mr Murcott justifiably dismissed from his employment?
- (b) If Mr Murcott was unjustifiably dismissed from his employment then what remedies is he entitled to and are there issues of mitigation, contribution and later discovered misconduct?

Was Mr Murcott justifiably dismissed?***Trial/fixed term***

[7] Mr Murcott was employed to assist in building trailers under the instruction of Dennis Ireland, the Operations Manager of Loadwell Trailers.

[8] Mr Murcott denied when he gave his evidence any understanding that his employment would be on the basis of a trial period. This though, is inconsistent with earlier correspondence from his solicitor to Loadwell Trailers, statements in the statement of problem and his written statement of evidence.

[9] I find it more likely than not that Mr Murcott was advised at the time he was offered the position that his employment would be on the basis of a trial period. The period discussed was in all likelihood was eight weeks. After eight weeks, if the trial was successful, then it was understood the hourly rate paid to Mr Murcott would increase from \$20 to \$22.

[10] There is no dispute that a written employment agreement was not provided to Mr Murcott until 18 March 2013. Ms Ireland said that Mr Murcott had seen the employment agreement on the computer screen as she was working on it prior to that although I do not find too much turns on that.

[11] The written employment agreement given to Mr Murcott on 18 March 2013 was accompanied by a letter dated 1 March 2013 from Mrs Ireland that offered Mr Murcott the position with the company for a trial period of eight weeks commencing on 5 February 2013. Mr Murcott did not sign the employment agreement before the relationship ended.

[12] A verbal discussion about a trial period or the accepting of a position on that basis does not affect the application of the law relating to dismissal in the way that it does if there is a valid trial period under s 67A of the Employment Relations Act 2000 (the Act). Further a verbal trial period cannot be relied on as agreement to a fixed period of employment because the employer must have genuine reasons for specifying that it will end – s 66 of the Act. Establishing the suitability of an employee for permanent employment is not a genuine reason under s 66 – *Salad Bowl Ltd v. Howe-Thornley* [2013] NZEmpC 152.

[13] Loadwell Trailers is still required to justify Mr Murcott's dismissal in the usual way. It needs to establish that there was good cause for Mr Murcott's dismissal and that it was carried out in a procedurally fair manner.

Justification for the dismissal

[14] Mr and Mrs Ireland, in their evidence, said that difficulties with Mr Murcott arose shortly after his employment began. One of the main concerns that they had was that Mr Murcott repeatedly failed to follow instructions in building trailers. As a result, they say that mistakes were made that had to be rectified and this caused financial issues for the company.

[15] Mrs Ireland, in her evidence, also spoke about Mr Murcott becoming angry on occasions. There was reference to an occasion when he threw his tools on the ground after Ms Ireland explained to him that he had used the wrong brakes on a trailer. She explained that this incident was very upsetting. The evidence from Mr and Mrs Ireland was that Mr Murcott apologised for his behaviour on this occasion. Mr and Mrs Ireland say that their concerns were frequently discussed with Mr Murcott and that he was aware that the situation could not continue. Mr Ireland said that there was no acceptance on Mr Murcott's part that mistakes or errors had been made and he always justified his decision to depart from verbal instructions and the build sheets for the trailers which resulted in expensive mistakes.

[16] Mr Murcott for his part agreed that he had made some mistakes but did not agree that he made mistakes on every trailer on which he had worked. He did not agree that he did not follow instructions but rather said that after discussion he would come to a mutual agreement with Mr Ireland about how things were to be done. He did not accept that he had thrown tools on the ground or apologised and said that

some of the mistakes he made were due to the fact that he was not provided with proper plans. He did not agree that he had an anger problem.

[17] Mr Murcott did agree that he did not follow instructions in relation to preparation of a stock crate when Mr Ireland asked him to use a piece of 40 x 5 flat bar and instead he used angle iron. The angle iron was too tight which meant that the door would not slide. Mr Murcott said that the flat bar was not available and that he had asked for the material but it had not been supplied. He did know on that particular occasion that Mr and Mrs Ireland were upset that he had not used the material he had been instructed to use. In relation to the mistakes made generally though Mr Murcott said that he did not feel they were a big deal and they did not take a long time to fix.

[18] Loadwell Trailers clearly became dissatisfied with Mr Murcott's work performance and particularly what it saw as his refusal to follow instructions in respect of construction of the trailers and other verbal instructions. There were also concerns about Mr Murcott's anger. I accept in all likelihood there were discussions, although not of a formal disciplinary nature with Mr Murcott as the concerns arose.

[19] It was accepted that Mr Murcott had not received formal warnings as Mr and Mrs Ireland relied on the existence of the trial period to terminate the employment. Mrs Ireland in her evidence said that she told Mr Murcott the company would not be able to afford him if he could not follow instructions and that the main concern for the company was that Mr Murcott was not listening, taking instructions and was losing his temper. Having carefully considered the evidence I am not satisfied that it was put to Mr Murcott in a clear way that if he disobeyed another instruction and/or didn't improve his performance his employment could end.

[20] A formal meeting was not held with Mr Murcott before he was provided with the letter of 21 March 2013. The letter of 21 March 2013 refers to the following reasons for giving Mr Murcott notice – *unfortunately you have made a number of mistakes during this period and it has taken time to remedy these errors. The mounting of suspension brackets for example where they were not flat and had to be ground off. In business time is money and meeting delivery dates is very important.*

[21] There was some dispute as to what day Mr Murcott cut the go-kart chassis plans into triangles. Mr Murcott says that he did this on 22 March 2013 after he was

given the letter on 21 March 2013. I find that the go-cart chassis plans were cut after Mr Murcott was given notice of termination.

[22] The Authority is required under the justification test in s.103A of the Act to consider on an objective basis whether Loadwell Trailers actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Section 103A (3) sets out four procedural fairness factors that the Authority must consider. These include whether the employer sufficiently investigated the allegations against the employee, raised the concerns that the employer had with the employee, gave the employee a reasonable opportunity to respond to the concerns before dismissing, and genuinely considered the employee's response. The Authority is not to determine a dismissal unjustifiable solely because of minor defects in the process that did not result in the employee being treated unfairly. A fair and reasonable employer is expected to comply with its good faith statutory obligations and before making an adverse decision about an employee's ongoing employment must provide the employee with all relevant information before making a final decision – s 4(1A) of the Act.

[23] There was no compliance with the factors in subsection (3) of s 103A because of the reliance on the trial period. I do not find that Mr Murcott had a reasonable opportunity to respond to the concerns in the knowledge that his employment could be at risk. It was clear from his evidence that he simply did not accept many of the concerns. Loadwell Trailers could not take into account any explanation or mitigation that he may have advanced in relation to those factors.

[24] Further not all of the matters now relied on to justify the dismissal such as anger problems were communicated to Mr Murcott in the letter of 21 March 2013. I find that the procedural failures in this case could not be described as minor. They were serious failures and caused unfairness to Mr Murcott.

[25] The letter of 21 March 2013 objectively assessed gives the reasons for termination as poor performance rather than misconduct. A dismissal for poor performance requires an employer to identify the specific reasons for dissatisfaction; give a reasonably specific time for measurable improvement and at the end of that time give consideration as to whether progress has been made to the extent that dismissal can be avoided – *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659.

[26] I do not find that the informal meetings where concerns were discussed with Mr Murcott about his performance went far enough so that it can be concluded that Mr Murcott understood what improvement was to be shown, how any improvement was to be measured and that a failure to improve within a particular period may result in the end of his employment.

[27] Mr and Mrs Ireland clearly had concerns about Mr Murcott's angry outbursts and attitude although when the concerns arose they were not treated as misconduct and he was not formally warned. No follow up action was taken in respect of the incident where Mrs Ireland said tools were thrown on the ground and Mr Murcott apologised.

[28] The most significant concern for Mr and Mrs Ireland was the failure to follow instructions which in turn resulted in mistakes. A failure to follow lawful and reasonable instructions can be serious misconduct. Mr Ireland was clearly very experienced in the industry of trailer construction and knew what was required. He explained in his evidence that Loadwell Trailers produced a quality product. Mr Murcott accepts that on at least one occasion he did depart from a clear instruction from Mr Ireland about what material to use on a trailer. Mrs Ireland in her written evidence said that Mr Murcott would justify the departures from plans or instructions and would insist what he did was an improvement and that he was making things better.

[29] In those circumstances a fair and reasonable employer could and should have warned Mr Murcott unequivocally of the importance of following instructions both written and verbal when building trailers and the consequences that were possible if there was a breach of the instructions. There was however I find no clear warning to Mr Murcott during his employment about the consequences if he failed to obey lawful and reasonable instructions about how he should carry out his work. There was also no opportunity for Mr Murcott to be heard about this allegation before he was dismissed.

[30] Loadwell Trailers says that Mr Murcott could not have been surprised by the termination of his employment because concerns were discussed with him and there was a trial period verbally discussed at the outset of the relationship. Mr Murcott said that he was shocked by the termination of his employment. In the absence of any formal warnings and/or formal disciplinary meetings before the letter was provided I

cannot be satisfied about that. The trial period verbally discussed of eight weeks was not specifically referred to in the employment agreement handed to Mr Murcott some three days before notice was given of his termination. The agreement referred to a trial period for a period not exceeding 90 days.

[31] I find that Mr Murcott's dismissal was not what a fair and reasonable employer could have done in all the circumstances and it was both procedurally and substantively unjustified.

[32] Mr Murcott has a personal grievance that his dismissal was unjustified and he is entitled to remedies.

Remedies

Lost Wages

[33] Mr Murcott seeks to recover 12 weeks lost wages in the sum of \$9,600 based on a 40 hour week at \$20 per hour.

[34] He explained that after he was dismissed he went to a job placement agency and received two days' work in April with Speights receiving \$352 gross but has not worked since. He said that he applied for jobs including engineering and forklift positions.

[35] I am satisfied that Mr Murcott took steps to mitigate his loss.

[36] Subject to any findings as to contribution and consideration of any issue of subsequently discovered misconduct the \$9,600 claim for lost wages is appropriate.

Compensation

[37] Mr Murcott seeks \$5,000 compensation. He supports a child and said the loss of his job was difficult because he was not able to get another one. This had financial consequences.

[38] There was not a lot of evidence about compensation and I find, subject to any findings about contribution and consideration of any issue of subsequently discovered misconduct, \$4,000 for compensation is appropriate.

Contribution

[39] The Authority is required under s 124 of the Act where it has determined that there is a personal grievance to consider the extent to which the actions of the employee contributed towards the situation that gave rise to it and if those actions so require it should reduce the remedies that would otherwise have been awarded.

[40] The Authority has to consider the extent to which Mr Murcott's actions contributed to the situation that gave rise to the grievance and if there is a causal connection then determine whether those actions were blameworthy and require a reduction in remedies.

[41] Mr Andersen submits that Mr Murcott's conduct disentitles him to any payment and that his conduct caused \$3,028 loss to Loadwell Trailers.

[42] I do not consider the fact Mr Murcott made errors or mistakes was sufficiently blameworthy to justify a reduction in remedies in circumstances where there was informal discussion about them as they arose but no proper performance process before termination. Mr Murcott, I find in all likelihood, did on occasion behave in an angry manner and once throw his tools on the ground. After he apologised that matter was not taken further. I cannot conclude with any certainty that Mr Murcott's behaviour on that occasion was causative of the situation that gave rise to the dismissal. I say that because whilst it was certainly an incident Mr and Mrs Ireland found unacceptable there was no mention of it in the letter of dismissal or the letter which, although dated 1 May 2013 was not provided to Mr Murcott until 18 March 2013 with the written employment agreement.

[43] I do find though having heard the evidence that it is likely Mr Murcott did not always follow clear instructions from Mr and Mrs Ireland about how to build the trailers and mistakes arose as a result. I find it likely that he knew Mr and Mrs Ireland expected him to listen and build the trailers as instructed. Mr Murcott's inability to follow instructions was causative of the termination of employment because it was linked to the mistakes and errors made. I find the action of Mr Murcott in failing to follow instructions to be causative of the dismissal and blameworthy. There is to be a reduction in the remedies awarded that reflects the failure I have found to follow instructions but moderated by the procedural failings on the part of Loadwell Trailers of 20%. The procedural failings were quite significant because Mr Murcott genuinely

but erroneously felt his way of doing things was better. In those circumstances he should have been clearly and formally told to follow instructions and the consequence of not doing so.

After discovered misconduct

[44] It was not until after Mr Murcott's employment had ended on 22 March 2013 that it was discovered he had cut the go-kart chassis plans into a lot of small triangles during his notice period. It was not therefore an action that could be said to have contributed towards the situation that gave rise to the personal grievance. If it is to be taken into account then it should not be under s 124 but rather should be in determining wage reimbursement and humiliation compensation under s 123 of the Act – Court of Appeal in *Salt v Fell* [2008] ERNZ 155.

[45] Mr Murcott had been asked to draw up the plans by his employer and paid for doing so. Whilst there was some dispute about whether it took him less than three days or not he still undertook the task for his employer. The action by Mr Murcott followed what I have found to be his unjustified dismissal. He was clearly upset by that. It is clear though from looking at the pieces of papers that they were cut deliberately. Cutting the plans into many triangles made the plans unusable. It was an action that could have justified dismissal.

[46] I find that I should take the after discovered conduct into account in determining wage reimbursement and compensation for humiliation under s 123 of the Act.

[47] There has already been a finding of 20% contribution which would reduce the wage reimbursement from \$9,000 gross to \$7,680 gross. From that earning received are to be taken off in the sum of \$352 gross which leaves a balance of \$7,328 gross. Taking the after discovered misconduct into account wage reimbursement is limited to two months (eight weeks) in the sum of \$6,400 gross.

[48] The contribution finding of 20% reduces the humiliation compensation from \$4,000 to \$3,200. Taking the after discovered misconduct into account humiliation compensation is reduced to \$2,500.

Orders

[49] Loadwell Trailers Limited is to pay to Warren Murcott the sum of \$6,400 gross being reimbursement of lost wages under s 123 (1) (b) of the Act

[50] Loadwell Trailers Limited is to pay to Warren Murcott compensation in the sum of \$2,500 without deduction under s 123 (1)(c)(i) of the Act.

Costs

[51] Costs are reserved. I encourage the parties to reach agreement failing which Mr McAuslin has until 8 August 2014 to lodge and serve submission as to costs and Mr Andersen has until 22 August 2014 to lodge and serve submission in reply.

Helen Doyle
Member of the Employment Relations Authority