

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 13  
5468628

BETWEEN CHRISTOPHER PAUL  
Applicant

AND STONECOLD DISTRIBUTORS  
LIMITED  
Respondent

Member of Authority: P R Stapp

Representatives: Johanne Greally, Counsel for Applicant  
Paul May, Counsel for Respondent

Investigation Meeting: 14 January 2015 at Wellington

Determination: 10 February 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Paul claims that he has a personal grievance for unjustified dismissal. He is claiming lost wages from 1 July 2011 to the date of the investigation meeting (14 January 2015) and 3 years future lost wages; compensation for hurt and humiliation in the sum of \$20,000; and costs. He is also claiming the employer's contribution to Kiwi Saver as a lost benefit. He withdrew his claim for reinstatement, at the Authority's investigation meeting.

[2] Stonecold Distributors Limited (Stonecold) denies all Mr Paul's claims. Both parties have requested that costs be reserved.

**Issues**

[3] There are a number of factual issues in the matter, and these will be dealt with where they are relevant in my findings that follow.

[4] Mr Paul's claim is that he has always denied an allegation that he was involved in sexual harassment of a Stonecold customer located in a place out of town where he had to stay over. He has also denied the allegation that he damaged the reputation of the business and brought the business into disrepute. In this regard, the complaint that Stonecold relied upon to justify its decision to dismiss Mr Paul for serious misconduct was a grave allegation, and therefore the evidence that it relied upon has to be as convincing as the allegation is grave.<sup>1</sup>

[5] This is a matter to be assessed under s.103A of the Employment Relations Act 2000 (the Act) that provides for the following test:

**103A Test for justification**

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[6] Section 103A(3) of the Act makes provision for the procedure that has to be followed by an employer. The provision reads as follows:

- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
  - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
  - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
  - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

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<sup>1</sup> *Honda NZ Limited v NZ Boilermakers etc Union* [991] 1 NZLR 392; (1990) 4 PRNZ 330 (CA); *Honda NZ Limited v NZ Shipwrights Union* (1990) 3 ERNZ Sel Cas 855; [1990] 3 NZILR 23; (1990) NZELC 98, 130.

- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
- (b) *did not result in the employee being treated unfairly.*

[7] These provisions were effective in the Act on 1 April 2011.

### **The facts**

[8] Stonecold is a supply and distribution of food products business. It operates from Wellington (Tawa) and involves drivers completing different runs.

[9] Mr Paul was employed as a driver with Stonecold, based in Tawa. He covered the central North Island run. His employment commenced on the date of the employment agreement being signed by the parties, 3 March 2000. Mr Paul was paid \$17 per hour. His hours over 52 weeks of work varied, but on average were 51.089 hours per week.

[10] It is common ground that a complaint was received by Mr Terence Johnston, director and owner of the business, from a customer located in a place out of town. The customer involved was the manager of a restaurant (no last name provided). The complaint was a recorded message left on Mr Johnstone's mobile and it claimed that Mr Paul was *"hitting on all the staff. He is a creep and we don't want him back at all"*. The concern was relayed to Mr Paul at a meeting held on 6 June 2011 where he had in attendance a support person, Mr Danny Faye. Mr Paul says that the person on the recording was unknown to him and he had no idea what could have instigated her allegation.

[11] Mr Paul understood that Terry Northcott, Operations Manager/Sales, would investigate the matter. However, it is more likely than not that Mr Johnston undertook the investigation himself. This is because he was the owner and director of the business and he had the responsibility to hire and fire and his evidence supports that he undertook the investigation. The evidence from Mr Paul does not contradict

this and certainly there is not enough evidence from Mr Paul to uphold that Terry Northcott would investigate the matter.

[12] Part of Mr Paul's responsibilities was to collect money from the restaurant in the payment of the customer's bills. Mr Paul says that this provided difficulties and he heard staff members complaining about the management at the restaurant when it came to the paying of the bills. This allegation was not made in mitigation by Mr Paul at the time, but he has put it forward at the Authority's investigation in his statement of evidence.

[13] After 7 June Mr Paul remained at work.

[14] Mr Johnston says that he contacted by telephone the owner of the restaurant and in his discussion with her; she confirmed verbally the allegation made by the manager. He says that she confirmed that the comments made about Mr Paul were true. Also she stated that the issues had been going on for months and that she and "*the staff*" thought that Mr Paul was stalking them. He says that the owner then went on to say that the "*chef*" at the restaurant had overheard Mr Paul say that he would like to "*f... [Name withheld]*" which resulted in the chef telling Mr Paul to "*f... off*". It is also alleged that the chef stated that Mr Paul had told a number of the staff at the restaurant that he "*likes feisty women*". Another matter was that it is alleged Mr Paul had taken a photograph of the manager in the bar and was trying to show the rest of the staff. Finally, it is alleged that the owner said that Mr Paul hassled her to give him a phone number of a friend of hers (a patron) whom Mr Paul had met once, in the pub, and (the owner) had refused to provide the number.

[15] Mr Johnston also says that he discussed the allegations with Terry Northcott because Mr Northcott's responsibility was sales and he dealt personally with customers on Mr Paul's run. Mr Johnston learned from Mr Northcott that Mr Paul was allegedly not particularly liked by the women in the restaurants he delivered to and that Mr Northcott had heard of other instances where Mr Paul had been trying to ask out the staff of customers for a drink. These matters were not put to Mr Paul. The fact that the matters were in the background are enough to make it appear that they were irrelevant considerations in Mr Johnston's mind. This was unfair

[16] Mr Johnston took the view that at the time this issue may or may not have been thought of by people as a bit of a joke, and that is why he spoke to the people

outlined in his brief of evidence to get a view as to the seriousness or otherwise of the issue. He did not call anyone for the Authority's investigation.

[17] Mr Johnston says that he put Mr Paul on notice at the meeting on 7 June 2011 that the issue was of possible serious misconduct which could be grounds for dismissal. Mr Paul accepts that this concern was put to him at a meeting held in 1 July 2011 because of his lawyer's reference to it in her notes, even although he could not remember it. It is common ground that Mr Johnston and Mr Paul discussed briefly another problem that had arisen a few years ago at another place in a different town at a hotel. In that instance Mr Johnston had to intervene personally, go to the place, and fix the problem with the owner of the hotel to allow Mr Paul to continue to stay there overnight instead of having to make arrangements for him to go elsewhere because of a need to use a power point for the vehicle.

[18] Mr Paul continued with his deliveries between 7 and 11 June 2011. Upon his return to Wellington, Mr Johnston advised him that there was a need to have another meeting and for Mr Paul to have a support person, if he wanted one. Subsequently, Mr Paul went on sick leave between 16 and 28 June 2011 when he returned to work. Mr Johnston gave him a short letter dated 28 June 2011 requesting him to attend the meeting, which actually happened on 1 July 2011.

[19] At the meeting on 1 July 2011, Mr Paul had his lawyer in attendance. Mr Paul has alleged that Mr Johnston said to him before the meeting when they had contact with each other that Mr Paul would not need a lawyer. Mr Johnston denies the claim. In any event, Mr Paul had the opportunity to meet and brief his lawyer on 29 June 2011 and they attended the meeting on 1 July 2011.

[20] Mr Paul also alleges that he was suspended when he was told to go home, and has raised a personal grievance in regard to the unlawfulness of that action. It is common ground that he was sent home and the position taken by Stonecold is that if Mr Paul continued at work with his run out of town he would not have been available for the meeting held in Wellington. His claim that he was suspended has not been corroborated by anyone else and there are no documents to support it happening. The time given to Mr Paul was a fair option, because Mr Paul was able to brief and arrange for a lawyer to attend with him at the meeting on 1 July 2011. He has not been disadvantaged because he was paid and arrangements had been made for the meeting to occur in any event with a representative. Also although there has been a

separate unjustified disadvantage claim raised in regard to the alleged suspension it has more to do with the background because the statement of problem is claiming holistic sums of money focussed mainly on the claim for unjustified dismissal.

[21] When the parties met on 1 July 2011, it is common ground that Mr Johnston handed to Mr Paul and to his lawyer a written summary of findings in regard to Mr Johnston's investigation into the allegation of serious misconduct reported to him on 6 June 2011 by the owner of the business where the complaint had arisen. It is clear that the concern in regard to the report of sexual harassment was brought to Mr Paul's attention on 7 June 2011. However, it was not until 1 July 2011 in the summary of findings that Mr Paul was advised that Mr Johnston had a concern that his action may have damaged the reputation of the business and as a consequence brought the business into disrepute. Indeed, Mr Johnston made a finding that Mr Paul had damaged the reputation of the business and as a consequence brought the business into disrepute. This appears to be based on Mr Johnston believing that "*something must have happened*" (oral evidence at the Authority's investigation meeting) because other than denying the claim outright, Mr Paul did not provide any other explanation. Mr Paul had no opportunity prior to the meeting to prepare to respond to the allegation. In any event, Mr Paul had been continuing with his run between 7 and 11 June 2011. The account was not lost to the business and there does not appear to have been any complaint made by the restaurant in the meantime.

[22] Mr Johnston, in completing his investigation, informed Mr Paul and his lawyer that he concluded that Mr Paul's claim that the owner would support that nothing happened, did not occur. Mr Paul was advised that the owner stated the following, and I quote verbatim:

*[Name withheld] (one of the owners) confirmed that her manager said and also mention it had been going on in one form or another for months. They thought he was stalking them as he always seemed to be around. She said that she was always polite to him and once had to walk away to do something and though she did not hear it her chef told her later that Chris said he would like to f... her which the chef told him to f... off. Apparently Chris told them he likes his women feisty.*

[23] In addition, Mr Johnston made the following finding (verbatim quote):

*Other factors considered included the following:*

- *This was not the first occasion I have had to speak to you about your conduct. As you know I spoke to you about the sexual harassment complaint in the [hotel].*
- *Where I had to go there to make sure that we could stay there as they did not want the driver to stay there.*
- *I gave Chris the benefit of the doubt as it seems there could have been room for a misunderstanding.*

*There is no doubt in my assessment of the circumstances that Chris has broken the rules and did harass a customer of my business.*

[24] The summary of findings indicates that Mr Johnstone's decision, that Mr Paul's conduct constituted serious misconduct, was one of the options available to summarily dismiss him. The summary provided Mr Paul with the opportunity to make any representations that he wanted to be taken into account in determining the appropriate outcome/penalty, including any factors in mitigation. The meeting seems to have been difficult for Mr Johnston because he claims that he did not get the information he needed from Mr Paul.

[25] Mr Johnston dismissed Mr Paul during the meeting, without any adjournment.

### **Determination**

[26] I hold that Mr Johnston had irrelevant considerations in his mind relating to information from Mr Northcott that were not put to Mr Paul, even if it was only to discount them and ensure that Mr Paul understood the essential issue related to the manager's complaint.

[27] In addition, Mr Paul did not know that Mr Johnston was relying on the ground that the events complained about involved him damaging the reputation of the business and as a consequence bringing the business into disrepute, at least until the last meeting. This was a new matter that Mr Paul was entitled to know about in advance and have a proper opportunity to respond to. A fair and reasonable employer could not have come to this conclusion when Mr Paul had continued with his run between 7 and 11 June. Also the account with the restaurant was not lost and the restaurant did not take any action against Mr Paul such as a trespass notice or any other action.

[28] Next, I hold that a fair and reasonable employer could not have come to an honestly held belief that "*something must have happened*" without making some

particular finding about what it was that did happen. In this regard it was not enough to rely only on a telephone recorded message when Mr Paul claimed he did not know the person who left the message, that Mr Paul claimed the message was slurred and that Mr Paul denied the allegation. A fair and reasonable employer should have asked for more information and explored ways to verify the complaint more thoroughly, including whether or not the owner of the restaurant had received a complaint of any harassment and whether or not it had been put in writing as a form of proof for its veracity. Mr Johnston did not take into account that Mr Paul seemed to mix pleasure with business when he travelled and a more robust and probative approach to his enquiries may have disclosed an explanation and/or further information to consider in regard to Mr Paul's denial.

[29] Also, as this was a very serious complaint Mr Johnston could have done more to investigate the matter, especially as he had visited another place on another earlier occasion to fix some other problem involving Mr Paul at a hotel where he stayed. Also Mr Johnston travels regularly between Wellington and Auckland.

[30] In this regard I hold that Stonecold was required to investigate the matter, even though Mr Johnston ran the business and operated it primarily on his own. He says he hired and fired, paid the wages and dealt with problems and relied on an accounting package for wage time and holiday records. There were about 8 employees and an office worker. A fair and reasonable employer could not have relied on a recorded telephone message and telephone calls alone because of the seriousness of the allegations, I hold. Mr Paul may genuinely not have had an explanation when he says that he was at a loss to know what it was about when he denied the matter. There may have been for example, a misunderstanding or falling out as some other reason to explain the matter sine Mr Paul mixed his social and work lives.

[31] Mr Paul did not know that the restaurant owner would not support him. Mr Paul was entitled to this information to reply and make any mitigation. The opportunity to respond was not properly provided before a decision was made.

[32] I hold that the proof relied upon by Mr Johnston at the time was not as convincing as the allegation was grave. Although there was an investigation it was not as thorough as a fair and reasonable employer should have done. Moreover there has not been an adequate explanation for the allegation that Mr Paul damaged the reputation of the business and brought the business into disrepute. Mr Paul was

ambushed at the final meeting where he had no opportunity to properly respond to all matters such as the restaurant owner's reply and to respond to the findings. Mr Johnston has not adequately explained why Mr Paul could not have been given the written summary of findings on the investigation prior to the meeting. Mr Paul had not seen all the information before and not told of the decision likely to be made. Mr Johnston's decision was influenced by these considerations and that his decision had been reached is supported by Mr Johnston deciding on an outcome with any further consideration of the matter and not having an adjournment. This was not therefore a genuine consideration of Mr Paul's reply, and where Mr Johnston believed Mr Paul had not properly replied.

[33] Instead of proceeding and making a decision on 1 July at the meeting as Mr Johnston did, a fair and reasonable employer could be expected to have a short adjournment and have time out to further deliberate. This is especially so where the meeting was difficult. Mr Paul could have been given reasonable time to further consider a reply with the information that was required, especially as the summary of findings was only given to him at the commencement of the meeting.

[34] Mr Paul has a personal grievance that he was unjustifiably dismissed on 1 July 2011. He withdrew a claim for reinstatement during the Authority's investigation. He has claimed lost wages and his claim has been for a total of 41 weeks' pay from the date of his dismissal and any future lost earnings and has claimed up to 3 years pay. He has mitigated his loss by looking and obtaining other work during the time. He has had a number of jobs none of which have been for more than three months. I have not been satisfied that Mr Paul would have worked for Stonecold for the time he has claimed. Indeed the fact that he has been able to obtain various jobs for short periods means that he has not established that Stonecold has a liability for a claim for future lost earnings. He produced neither actuarial evidence, nor any independent evidence to support his claim for future lost earnings based on not being able to get employment at the same income except to rely on his own opinion for the claim on the basis of his age and that he would be unlikely to get work at the same level of pay. I hold that is not enough. There has been a substantial delay by Mr Paul filing a statement of problem in the Authority to have the matter resolved quickly and speedily. He says that this was because he had to pay his earlier legal bills (to another firm), and whilst I accept he had a financial bill to pay, I am not satisfied it adequately explains the delay to make a claim for lost income.

[35] Stonecold did not call any evidence to establish that Mr Paul harassed a customer or anybody else for that matter to mitigate the remedies. Stonecold has relied exclusively on what Mr Johnston says he believed and that boiled down to “*something must have happened*”, which is not enough to establish any blameworthy conduct given the seriousness of the allegation, I hold. I am not satisfied given Mr Paul’s denial that the message (which I have not heard for myself, and there is no transcript of the recording) and Mr Johnston’s phone calls to the owner and the manager are enough to prove any wrongdoing. I conclude that there is no contribution for a deduction under s 124 of the Employment Relations Act 2000.

[36] Mr Paul’s representative has made some calculations as to Mr Paul’s lost wages in net terms, but I have assessed the loss in terms of a gross sum being based on (an average of 52 weeks) his average hours of 51.089 hours per week. He was paid \$17 per hour and I have limited the lost wages to 13 weeks’ pay. This is because the causation for the loss was broken by the alternative work he was able to obtain, even at a lesser rate of pay, and the time delays before the matter was filed in the Authority. His claim for more wages was not supported by any independent evidence that he would never get work at the same or greater rate of pay or that his age was against him finding other work. I assess the loss in the sum of \$11,290.67 gross.

[37] There is also a claim for the lost entitlement to superannuation, but the claim was only raised in the submissions presented to the Authority at the investigation meeting. There was no claim in the statement of problem and insufficient details provided by Mr Paul in his evidence, leaving me to speculate on a total which I am not prepared to do. The claim is dismissed. For completeness Mr Paul’s figures for his wages claim included reimbursing allowances. These are dismissed too, because they were not incurred after the employment ceased and were not allowances as part of his remuneration.

[38] Mr Paul is entitled to compensation for hurt and humiliation and I accept that he says he was shocked and hurt and humiliated by Stonecold’s action. I assess this as \$8,000 compensation based on what he told me he felt like and what happened to him.

### **Summary of orders**

[39] Stonecold Limited is to pay Christopher Michael Paul the following:

- a. \$11,290.67 lost wages; and
- b. \$8,000 compensation for hurt and humiliation.

**Costs**

[40] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority