

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 421
5377188

BETWEEN ADRIAN PETERSEN
 Applicant

A N D SB AUTO LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Danny Gelb, Advocate for Applicant
 Steve Boyle, Director of Respondent

Investigation Meeting: 26 October 2012 at Auckland

Date of Determination: 27 November 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Adrian Petersen’s dismissal by SB Auto Limited (SB Auto) on 28 December 2011 was unjustified;**
- B. Taking contribution into account, SB Auto is ordered to pay Mr Petersen the sum of \$4,104 gross being reimbursement of wages lost by Mr Petersen as a result of the dismissal pursuant to s.123(1)(b) of the Employment Relations Act 2000 (the Act);**
- C. Taking contribution into account, SB Auto is ordered to pay the sum of \$2500 compensation to Mr Petersen pursuant to s.123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings suffered by him as a result of his unjustifiable dismissal;**
- D. Costs are reserved.**

Employment relationship problem

[1] The applicant, Mr Adrian Petersen, claims he was unjustifiably dismissed by the respondent, SB Auto Limited, on 28 December 2011.

[2] Specifically, Mr Petersen claims:

- His dismissal was unjustified in that he was not guilty of dishonesty or theft of the ignition module part (the part) as alleged by SB Auto;
- The procedure undertaken by SB Auto in dismissing him was not fair and reasonable.

[3] Mr Steve Boyle, the Managing Director of SB Auto denies that Mr Petersen's dismissal was unjustified. Mr Boyle claims that Mr Petersen deliberately purchased the part using SB Auto's trade account at Repco without his knowledge or permission. When the part was unable to be fitted to Mr Petersen's car and he was unable to return the part to Repco because it was used, he attempted to hide the purchase in order to avoid payment. Mr Boyle says such conduct was dishonest and amounted to serious misconduct for which dismissal was justifiable.

Issues

[4] The following issues require determination:

- Did Mr Petersen require Mr Boyle's permission before purchasing the part on SB Auto's trade account at Repco?
- Did Mr Petersen dishonestly attempt to hide his purchase of the part on SB Auto's trade account at Repco, on Wednesday 21 December 2011 in order to avoid payment?
- If so, does such conduct amount to serious misconduct for which he could be dismissed?
- Did SB Auto follow a fair and reasonable procedure in dismissing Mr Petersen?

Background

[5] Mr Steve Boyle is the sole director and shareholder of SB Auto Limited, the franchise owner of Pit Stop, an auto repair business located at Botany Downs, Auckland.

[6] On 1 May 2011, SB Auto purchased the business as a going concern from Chris Nell, trading as Pit Stop (The Hub) ("Pit Stop"). As part of the arrangement, SB Auto employed Pit Stop's employees namely Jacques Nell, brother of Chris Nell, Workshop Manager, and Mr Petersen, qualified technician. James Steiner was subsequently employed to provide support in the workshop. Mr Petersen signed an individual employment agreement with SB Auto dated 1 May 2011. Business continued as usual and in the same manner as with Pit Stop.

[7] Pit Stop had a trade account with one of its suppliers, Repco. Repco was located close to Pit Stop and staff at Repco knew the staff at Pit Stop. Pit Stop staff charged items necessary for the business on Pit Stop's trade account at Repco in order to get the trade discount. Pit Stop staff also charged personal items for their own vehicles on the trade account such as tyres, batteries and electrical parts.

[8] Mr Petersen says the first time he purchased a part for his own personal vehicle using Pit Stop's trade account at Repco, he asked Chris Nell, the owner of Pit Stop what the process was. Chris told him when charging the account for personal items, he was to give Repco staff the registration number of his car so that the part he was purchasing could be tracked back to him. He was then required to give Chris the invoice and cash for the part purchased. Mr Petersen says if he made a personal purchase on the trade account on a Tuesday or Wednesday before his wages were paid, he would give Chris the cash once his wages came through.

[9] Following this discussion with Chris, Mr Petersen says he continued following that process and there was no requirement that he seek Chris's permission on each occasion. Mr Petersen says this practice continued in the same manner when SB Auto took over Pit Stop's business. Mr Boyle did not introduce any new procedures, verbal or otherwise, in relation to the operation of the business or the manner in which the trade account was to be used.

[10] Mr Russell Dolan, a friend of Mr Petersen says he came in to SB Auto and asked Mr Petersen to purchase a battery for him from Repco so that he could obtain

the trade discount. Mr Petersen did so without seeking Mr Boyle's permission and returned with the invoice and cash which were given to Mr Boyle, in Mr Dolan's presence. Mr Boyle made no comment to him or Mr Petersen about the way in which the trade account had been used to purchase the item by Mr Petersen. Mr Boyle cannot remember the transaction with Mr Dolan but agrees the invoice of \$177 was for the battery in question.

[11] The workshop manager, Mr Jacques Nell agrees staff could use the SB Auto trade account to purchase personal items in the same way as occurred with Pit Stop. However, Mr Jacques Nell says it was common courtesy both at Pit Stop and at SB Auto for staff to seek permission before using the trade account.

Issue One

Did Mr Petersen require Mr Boyle's permission before purchasing the part on SB Auto's trade account at Repco?

[12] A few issues developed between Mr Petersen and Mr Boyle following the purchase of the business by SB Auto. Mr Petersen says Mr Boyle pressured him to work weekends and refused to give him a pay rise. Mr Boyle denies this and says Mr Petersen smoked in the workshop and in customers' cars, worked on his own vehicles in the workshop during work time without asking for permission, was rude to customers on the phone and purchased personal items on SB Auto's trade account without permission.

[13] Mr Boyle says he decided to introduce regular monthly meetings with Mr Boyle to discuss these issues, the first of which was on 8 December 2011. At that meeting Mr Boyle says he told Mr Petersen not to smoke in the workshop or in customer's cars and to ask for permission to work on his personal vehicles during work hours. Mr Boyle says he made notes of the meeting.

[14] Mr Petersen says the use of SB Auto's trade account by staff was never discussed at any time with Mr Boyle.

[15] This is an important issue and it is a matter about which I must make a finding as to credibility. Mr Boyle's evidence was inconsistent. The statement in reply filed on behalf of SB Auto was comprehensive but made no mention of a meeting with Mr Petersen in December 2011. In paragraph 11 of Mr Boyle's witness statement he referred to a meeting with Mr Petersen on 8 December 2011 at which a number of

matters were raised with Mr Petersen. Staff use or Mr Petersen's use of SB Auto's trade account was not mentioned. This is a surprising omission.

[16] Shortly after the investigation meeting, Mr Boyle produced a typed note which he says was a record of the notes he made at the December meeting with Mr Petersen. The note records the meeting taking place on 9 December not 8 December 2011 as stated in paragraph 11 of Mr Boyle's witness statement. The note records Mr Boyle instructed Mr Petersen to ask for permission before purchasing personal items on SB Auto's trade account. I have concerns over the authenticity of the note. It was referred to for the first time at the investigation meeting and produced after the meeting had concluded.

[17] It is my finding that a meeting did occur on 8 December 2011 and a number of matters were discussed with Mr Petersen but the purchase of personal items on the SB Auto trade account was not one of them.

[18] It is my finding that Mr Petersen followed the same process when purchasing items on SB Auto's trade account at Repco as he had followed when at Pit Stop. That process did not require he seek Mr Boyle's permission each time he charged personal items to the trade account. Mr Boyle did not introduce any changes to the process or instruct staff of any changes to the process when SB Auto purchased Pit Stop. The answer to the first issue is Mr Petersen did not need to ask permission before purchasing the part on SB Auto's trade account at Repco.

Issue Two

Did Mr Petersen dishonestly attempt to hide his purchase of the part on SB Auto's trade account at Repco, on Wednesday 21 December 2011 in order to avoid payment?

[19] Mr Petersen has three vehicles, a Toyota Caldina, a Nissan Serena, a Holden Commodore with the registration plate WEFIXM, a boat trailer and a box trailer. Mr Petersen would work on his own vehicles when there was insufficient work in the workshop.

[20] On Wednesday, 21 December 2011, Mr Petersen discussed with Mr Nell and Mr Steiner a problem he was having with his Holden Commodore. Mr Nell recalls the discussion and says he told Mr Petersen he thought there was a problem with the vehicle's ignition which may need a new ignition module.

[21] Mr Petersen decided to try and fix the vehicle's ignition problem by purchasing an ignition module part from Repco. Mr Petersen was served at Repco by Ms Julie Glass. He says he gave Ms Glass the registration number of his car, "WEFIXM" and ordered the part which was not in stock.

[22] Mr Petersen took the invoice from Ms Glass and put it in the invoice tray at SB Auto along with other invoices for spare parts. The part arrived at Repco on 22 December 2011 and Mr Petersen took it home to fit to his vehicle. However, the part did not fix the ignition problem as he had hoped.

[23] On Friday, 23 December 2011, Mr Petersen brought the part back into work and put it in the office. While at Repco on another matter, Mr Petersen spoke with a staff member, Mr Dean Campbell to see whether he was able to return the part. The other staff member present, Ms Julie Glass said he was unable to return the part and get a refund because it was an electrical part and had been used. Mr Campbell told Mr Petersen to bring the part in for him to look at and he would see if a refund was possible. Being the Friday before Christmas, Mr Petersen became busy at work and was not able to go back before he finished that day to show Mr Campbell the part to see if he could get a refund.

[24] There was a conflict in the evidence at the investigation meeting between the two Repco staff, Ms Julie Glass and Mr Dean Campbell about the process to be followed when SB Auto staff were making purchases on the SB Auto trade account. Ms Glass says personal items could be purchased on the SB Auto trade account by SB Auto staff. The process was that SB Auto staff provided an order number or car registration details so that the purchase could be tracked.

[25] However, Mr Campbell says personal items could not be purchased on the trade account. I prefer Ms Glass's evidence which is consistent with the evidence of Mr Jacques Nell and Mr Petersen. However, the conflict does highlight the fact that the system for using SB Auto's trade account at Repco was not clearly spelt out to SB Auto staff or to Repco staff.

[26] Mr Petersen went on his Christmas break on 23 December 2011 and did not return to the office until 8am on Wednesday, 28 December 2011.

[27] On 24 December, Mr Nell was at work and while going through the tray of invoices in the office discovered the invoice from Repco for the ignition module part.

Mr Nell knew that this must be an invoice for a part that Mr Petersen had purchased on the trade account because he, Mr Steiner and Mr Petersen had discussed the ignition problem Mr Petersen had with his Holden Commodore. Mr Petersen had not written anything on the invoice. However, the registration details of Mr Petersen's car, WEFIXM is noted as the order number. Mr Nell decided he would bring the invoice to Mr Boyle's attention. When Mr Nell raised the matter with Mr Boyle, Mr Boyle told Mr Nell he did not know anything about the purchase and said to Mr Nell "*don't you think he's trying to steal from me?*". Neither Mr Nell nor Mr Boyle telephoned Mr Petersen to discuss the matter.

[28] Mr Boyle says when Mr Nell showed him the invoice and where it had been placed in the pile of invoices, he felt it was "*fairly obvious*" that Mr Petersen had deliberately placed the invoice out of order in the pile of invoices. Mr Boyle says he believed Mr Petersen had done this to hide the invoice so that he did not have to pay for the part charged to the trade account.

[29] It is my finding that Mr Petersen did not attempt to hide the part dishonestly to avoid paying for the part. It is not disputed that Mr Petersen discussed the ignition problem with Mr Nell and Mr Steiner. He then ordered the part from Repco, giving Ms Glass his vehicle registration details so the part could be tracked to him. Mr Petersen's registration plate, WEFIXM is memorable. Mr Petersen placed the invoice in the invoice tray in SB Auto's office on 21 December 2011 and it was discovered by Mr Nell on 24 December 2011. The fact that the invoice was in the middle of the pile of invoices is not unusual and was not sufficient for Mr Boyle to assume Mr Petersen had dishonestly hidden the invoice to avoid paying for it.

[30] The part and the invoice for the part were in SB Auto's office. The invoice had the details of Mr Petersen's car registration on it which identified Mr Petersen as the purchaser of the part. Mr Petersen did not dishonestly attempt to hide his purchase of the part on SB Auto's trade account at Repco, in order to avoid payment.

Issue Three

If so, does such conduct amount to serious misconduct for which he could be dismissed?

[31] Mr Petersen did not attempt to hide the invoice for the part. Mr Petersen's conduct did not constitute serious misconduct.

Issue Four

Did SB Auto follow a fair and reasonable procedure in dismissing Mr Petersen?

[32] Mr Boyle drafted a termination letter prior to Mr Petersen returning to work on 28 December 2011 as follows:

28 December 2011

NOTICE OF TERMINATION OF EMPLOYMENT

Adriaan

This notice is to advise you of your dismissal from Pit Stop the Hub on the grounds of THEFT AND DISHONESTY.

While working through paperwork during the Christmas break, it was discovered that you have purchased from Repco, an ignition model for your Holden Commodore, and charged the part to SB Auto Ltd on 21 December 2011. The packing slip for the purchase was found half way down in the basket among other packing slips. The module was found in a cardboard box, randomly paced in the office shelves.

No permission was asked, nor given for this purchase to be charged to SB Auto Ltd. It is believed that other purchases have been made and charged in a similar fashion, also other items have been removed from the shop without permission. These issues are being investigated now. If this is proven to be the case, it is my intention to involve the police.

Section 12.2 of your Employment Agreement(which you have acknowledged with your signature) regarding Termination for Serious Misconduct, provides for “summary and without notice termination” in the case of (among others)(1) theft, or (2) dishonesty.

Your dismissal is effective immediately.

You are requested to remove any personal belongings immediately.

*Steve Boyle
Franchise Owner*

[33] Mr Petersen returned to work at 8am on 28 December 2011 following his Christmas break. Mr Boyle arrived at about 9am and asked Mr Petersen to meet with him and Mr Jacques Nell in the lunchroom. Mr Boyle did not say what the meeting was about. The details of what occurred at the meeting are largely not in dispute. Mr Boyle placed the box containing the ignition module on the table and asked Mr Petersen for an explanation. Mr Petersen told Mr Boyle and Mr Nell that the part was his, he had purchased it. Mr Boyle asked who had told him he could charge the

part to the trade account. Mr Petersen replied that nobody had given permission as he had never needed to ask for permission in the past.

[34] Mr Petersen says it was at this meeting he first became aware Repco was not going to refund him for the part. Before he was able to pay for the part, Mr Boyle dismissed him for dishonesty and theft. Mr Petersen was instructed to take his possessions and to leave.

[35] Mr Boyle says he determined Mr Petersen was guilty of dishonesty and gave him the letter he had drafted prior to the meeting, terminating his employment immediately.

[36] Section 103A of the Act, as amended, sets out the test of justification:

Section 103A – Test of justification

- (1) *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 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 of dismissal or action occurred.*

[37] Section 103A was considered by a full court of the Employment Court in *Angus v Ports of Auckland* [2011] NZEmpC 160. The test requires the Authority in this matter, to determine whether on an objective basis Mr Petersen's dismissal was within the range of responses open to a fair and reasonable employer. If the dismissal was within the range then it will be justified.

[38] It is my finding that Mr Boyle predetermined the outcome of the meeting on 28 December. Mr Boyle had already formed a view on 24 December 2011 that Mr Petersen was "trying to steal" from him and had communicated that sentiment to Mr Nell. He then wrote a termination letter which was issued to Mr Petersen shortly into the meeting on 28 December. Mr Boyle had predetermined the outcome of the meeting on 28 December.

[39] The test in s.103A of the Act is concerned with the employer's actions. On an objective basis was SB Auto's action in dismissing Mr Petersen justifiable in the circumstances? Mr Boyle, for SB Auto, determined Mr Petersen's conduct to be

dishonest, and constituted theft. On that basis, Mr Boyle concluded that the conduct amounted to serious misconduct. I have found this to be erroneous.

[40] Section 103A(3) of the Act requires consideration by the Authority of a number of factors in determining whether a dismissal has been implemented in a procedurally fair manner. Factors include whether the employer:

- Sufficiently investigated the allegations, having regard to available resources;
- Raised its concerns with the employee before dismissal;
- Gave the employee a reasonable opportunity to respond to the employer's concerns before dismissal; and
- Genuinely consider the employee's explanation before dismissal.

[41] Mr Boyle did not comply with any of these factors. He did not sufficiently investigate his suspicions, rather he formed a view when Mr Nell showed him the invoice on 24 December. He did not telephone or discuss the matter with Mr Petersen before his return to work on 28 December 2011. Mr Boyle asked Mr Petersen to attend the meeting without telling him what the meeting was going to be about and did not give Mr Petersen a reasonable opportunity to respond to his concerns before dismissing him. Mr Petersen gave an explanation that he did not require permission to use the trade account and at that point was dismissed by Mr Boyle. The dismissal was unjustified substantively and procedurally.

[42] Mr Petersen is entitled to reimbursement of lost wages pursuant to s.123(1)(b) of the Act as a result of his dismissal. Mr Petersen's hourly rate of pay was \$18 gross and he worked 8 hours a day. Mr Petersen was unable to obtain further work for 57 working days following his dismissal. Mr Petersen has calculated lost wages of \$8,208.00 gross

[43] Mr Petersen gave evidence of the stress he suffered and the impact on his wife and young family as a result of his dismissal. In such circumstances compensation of \$5,000 under s.123(1)(c)(i) for the humiliation, loss of dignity, and injury to feelings suffered would be appropriate.

Contribution

[44] Before making an order as to remedies, I am required to consider, pursuant to section 124 of the Act, whether or not Mr Petersen contributed to his dismissal. Mr Petersen did not tell either Mr Nell or Mr Boyle that the part he had charged to SB Auto's trade account had not fixed his car's ignition problem and that he was trying to get a refund. Mr Petersen put the invoice in the office along with the part, which he hoped to return to Repco. Normally, Mr Petersen would have paid Mr Boyle cash for the part or paid for it from his next wage payment. However, on this occasion Mr Boyle hoped to return the part and get a refund. Mr Petersen did not get the chance before the Christmas break to go in to Repco, show the part to Mr Campbell to see if he was able to return the part and get a refund. If Mr Petersen had told Mr Boyle and Mr Nell what he was doing and his reasons for doing so they may not have made an assumption that Mr Petersen was trying to hide the invoice to avoid paying for the part. I find Mr Petersen contributed to the circumstances giving rise to his grievance. I reduce the remedies by 50%.

[45] Applying the contribution as assessed, I order SB Auto to pay Mr Petersen the sum of \$4,104 gross being reimbursement of lost wages pursuant to s.123(1)(b) of the Act.

[46] Applying the contribution as assessed, I order SB Auto to pay Mr Petersen the sum of \$2,500 pursuant to s.123(1)(c)(i) of the Act for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his dismissal.

Costs

[47] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination from the Authority, the applicant is to file and serve a memorandum on the matter within 14 days from the date of this determination and the respondent has 14 days within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority