

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 130/08
5097173

BETWEEN CRAIG PINCHAM
Applicant

AND GARDEN MAINTENANCE
SERVICES LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: C Pincham, in person
B Spong, advocate for Respondent

Investigation Meeting: 22 February 2008

Additional information 3 March 2008 from Applicant
received: 28 February 2008 from Respondent

Determination: 3 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Garden Maintenance Services Limited (“GMSL”) employed Craig Pincham as a gardener and landscape labourer, commencing in September 2005. It dismissed him for refusing to carry out work he was instructed to do and for the failure to advise of the cancellation of a class he had taken time off to attend.

[2] Mr Pincham says the dismissal was unjustified and has raised a personal grievance.

The employment relationship

1. Previous warnings

[3] Mr Pincham received a written warning dated 30 January 2007 in respect of a number of issues including: refusal to relinquish a company vehicle to another employee for work-related purposes; the unsatisfactory standard of his work on specified properties; failing to advise the employer of problems encountered on specified properties; an unacceptable driving practice; and the display of a negative attitude towards the employer.

[4] Mr Pincham also received a written warning dated 10 June 2007. The warning followed: complaints from customers; requests from three customers that Mr Pincham not attend their properties; reports from other employees of reluctance to work with Mr Pincham; and a concern about Mr Pincham's lack of care in the use of tools and equipment.

2. Events leading to the dismissal

[5] The events leading immediately to Mr Pincham's dismissal arose out of discussions about the roadworthiness of company vehicles used by company employees. At the material time GMSL owned two vans, one 4WD Pajero and two trailers.

[6] On 25 July 2007 the company's sole director and shareholder, Richard Walls, informed Mr Pincham he had been allocated the Pajero to drive the next day. Mr Pincham believed the Pajero's warrant of fitness expired on 25 July. On 26 July he reported for work, and said he would not drive the Pajero because the warrant had expired. Although Mr Walls said at the investigation meeting that the Pajero had been serviced and had obtained a new warrant by 26 July, documents he later produced indicate the vehicle was not serviced until 27 July 2007. A new warrant was issued on that date. He was unable to explain the discrepancy.

[7] On 2 August 2007 Mr Pincham told Mr Walls he was unhappy about the state of the company's trailers. Mr Walls acknowledged that one of them had been backed into something and the rear wiring was damaged. He also acknowledged that one had never been licensed and warranted, while the warrant for the second had expired. On 4 August he took both trailers to On Road New Zealand for testing and was told they

would not pass a warrant of fitness test. He made the necessary repairs on 5 August, and showed Mr Pincham on 6 August that he had done so.

[8] Also on that day, Mr Pincham decided to check the warrant of fitness and registration for the work van in which he had been a passenger. He noticed that the registration (or more accurately the vehicle's licence to use a road) had an expiry date of 6 August 2007.

[9] On 7 August Mr Pincham reported for work, and was instructed to use the same van for the day's run. He checked the licence label and found the licence had not been renewed. He did not wish to drive an unlicensed vehicle because he believed that, as the driver of the vehicle, he would be responsible for it and could receive a ticket if he were stopped by a policeman. He told Mr Walls he would not drive the vehicle.

[10] Mr Walls told him the renewal was being addressed. That was true, as Mr Walls' partner attended to the matter that morning, renewing the licence on-line. Even so, it would be a few days before the necessary label arrived.

[11] Mr Pincham's response was to say Mr Walls could not make him drive an illegal vehicle. He said in evidence that, after viewing a police reality programme on television, he decided he had to make a stand. He also said he was in the right to refuse to drive the vehicle until he 'eye witnessed the newly processed documentation', and that he had 'come to the point where I had to refuse on a health and safety point of view and as a driver on New Zealand's roads; I had to obey the rules in the road code...'.

[12] Mr Walls told Mr Pincham there was nothing wrong with the vehicle and instructed him again to take the vehicle out for the allocated run. There would be no work for Mr Pincham if he refused to drive the vehicle, and Mr Pincham would 'have to go'. There was a further dispute about whether Mr Pincham would be paid, with Mr Walls saying Mr Pincham would not be paid. Mr Pincham told Mr Walls he would take Mr Walls to court for unfair dismissal. Mr Walls told Mr Pincham he was fired.

[13] Mr Walls then added that Mr Pincham was dismissed for 'taking an illegal day off'. Mr Pincham had been given authority to take time off on the previous Friday, 3 August, to attend a class apparently scheduled for the purposes of the National Certificate in Advanced Horticulture - Landscape for which he was studying. However when Mr Pincham arrived for the class he found that another class was going ahead, and he had been wrong in believing his own class was scheduled for that day. He did not return to work or report his error to Mr Walls. Instead he decided to take the time off for study anyway.

[14] Mr Walls found out about this during a conversation with Mr Pincham on 6 August. He was concerned that Mr Pincham had not returned to work, especially as the business had been short staffed that day. Not only that, he had already given Mr Pincham the day off on 4 August. Mr Pincham acknowledged he had decided to spend the time on 3 August 'catching up' for his course, and said he did not advise Mr Walls the class was not going ahead because he did not have his cellphone. In any event, he said Mr Walls knew where he was.

[15] The dismissal was confirmed in a letter also dated 7 August 2007. The letter is a letter of dismissal and is not correctly described as a 'third warning'. The letter said the dismissal was a direct result of failing to carry out a reasonable instruction, and failing to communicate with Mr Walls regarding his attendance at work on 3 August. It also referred to the previous warnings, expressed the view that Mr Pincham had gone out of his way to sabotage his employment with the company, and said that Mr Pincham's negative attitude could no longer be tolerated.

[16] Finally, the letter advised Mr Pincham he would receive two weeks' pay in lieu of notice.

[17] Accordingly Mr Pincham left the premises on 7 August and did not return.

Justification for the dismissal

[18] In the context of this employment relationship overall, Mr Pincham's conduct on 7 August was the last straw for Mr Walls. Mr Walls' tolerance of what I would

describe as Mr Pincham's continual low level unco-operative behaviour was at an end.

[19] Much of the behaviour of concern was detailed in the warning letters. One ongoing problem - relatively minor of itself and in isolation - was Mr Pincham's disingenuous attitude to communicating with the employer particularly by cell phone. This was referred to in the warnings, and was illustrated by Mr Pincham's dismissive attitude to the need to advise that he did not have a class on 3 August as well as other exchanges discussed at the investigation meeting.

[20] Mr Pincham's decision to take time off on 3 August even though his class was cancelled illustrated another aspect of his generally unco-operative conduct. The tone of his evidence was that he was justified in making that decision, and it was sufficient to say that Mr Walls knew where he was. However he was not entitled to act as he did and it was not sufficient to say Mr Walls knew where he was. Further, the provision in the employment agreement relating to abandonment of employment has no application to the issue at all. Mr Pincham's conduct was not acceptable for entirely different reasons.

[21] As for the licensing of the van, Mr Pincham took a risk in making a stand on the basis of incomplete information obtained from a television programme. It is an offence for a person to use a motor vehicle on a road if the vehicle is not displaying a current licence.¹ However there is a defence if, at the time of the offence: the vehicle displayed a licence which expired not more than 7 days previously; the application and necessary fee for renewal had been forwarded before the expiry; and the licence (or label) had not been received.² On the material available to me the defence would probably have failed here because the application and fee were forwarded on the day after expiry, but that is not the basis on which Mr Pincham took his stand. He simply insisted on eyeballing the label before he would drive the van and refused to accept assurances that the matter was being dealt with.

¹ Transport (Vehicle and Driver Registration and Licensing) Act 1986 s 5(2)

² S 5(3)

[22] Matters should not have reached the stand-off they did. Technically, however, Mr Walls was instructing Mr Pincham to use a vehicle which was not displaying a current licence in circumstances where the available defence would probably have failed. That was not a lawful or reasonable instruction. Further, Mr Walls' own ongoing lack of attention to ensuring that warrants and licenses for GMSLs' vehicles were kept up to date left the door open at least to a complaint from any employee who was required to use one of the vehicles.

[23] The second matter invoked in support of the decision to dismiss was Mr Pincham's absence on 3 August. The difficulty for Mr Walls is that he did not raise the matter with Mr Pincham in a disciplinary context. There was no suggestion that the discussion on 6 August was disciplinary, and the matter was raised again with no warning in an apparent afterthought to the discussion about the van licence on 7 August. The way in which it was raised on 7 August leads me to consider it likely the discussion about the licence for the van provoked Mr Walls into raising it again in circumstances where he would not otherwise have done so.

[24] Overall the justification for the dismissal relied on these events as part of Mr Pincham's generally unco-operative conduct. Mr Pincham had been warned about that conduct, but the warnings had no effect. Even so, the incident which ended Mr Wall's tolerance was one in which he was himself at fault. He was not entitled to, in effect, instruct Mr Pincham to commit an offence, no matter how minor.

[25] On balance I conclude that dismissal was not an action an employer acting fairly and reasonably would have taken. The dismissal was unjustified and Mr Pincham has a personal grievance.

Remedies

[26] Mr Pincham showed himself keen to point out his employer's breaches while having a blind spot when it came to his own. He was at fault when it came to his failure to contact his employer on 3 August and the attitude he evidenced towards the need to do so was unacceptable. Secondly although he was correct about the implications of the expiry of the van's licence, the ground on which he based his

stance was misconceived and he was not prepared to consider that possibility. Finally, his conduct during 2007 contributed significantly to the fragile state of the employment relationship by August.

[27] Mr Pincham sought the reimbursement of 1 year's remuneration. However he provided no evidence of any effort to obtain alternative employment. He has an obligation to attempt to mitigate his loss.

[28] He also said he would regard one year's remuneration as a redundancy payment, and seemed to be suggesting he was in effect made redundant as Mr Walls 'has employed other young males to do the heavy lifting and running around.' For his information, had he genuinely and justifiably been made redundant he would have been most unlikely to receive compensation in that amount. However he was not dismissed on the ground of redundancy, and if his duties have been rearranged following his dismissal GMSL was entitled to do that.

[29] Overall, bearing in mind the lack of any evidence of mitigation, as well as Mr Pincham's contributory fault, I order GMSL to pay to Mr Pincham a further four weeks' wages as reimbursement for his lost remuneration.

[30] Mr Pincham is also entitled to compensation for injury to his feelings arising out of the unjustified dismissal. Taking into account his contributory fault, I order GMSL to pay him \$2,000 as compensation for that injury.

[31] GMSL is ordered to pay to Mr Pincham:

- (a) four weeks' wages as reimbursement of lost remuneration;
- and
- (b) \$2,000 as compensation for injury to feelings.

Costs

[32] Costs are reserved.

[33] The parties are invited to reach agreement on the matter, but if they seek a determination from the Authority they shall have 28 days from the date of this determination in which to file and exchange written statements setting out their positions on the matter. If either wishes to reply to anything in the other's statement, there shall be a further 7 days from the date of receipt of the relevant statement in which to file and exchange the written reply.

R A Monaghan

Member of the Employment Relations Authority