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Pounder v Studdard Holdings Limited (Auckland) [2007] NZERA 50 (26 February 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 48/07 5044903

BETWEEN JOHN POUNDER

Applicant

AND STUDDARD HOLDINGS LIMITED

Respondent

Member of Authority: Leon Robinson

Representatives: Bernie McIntyre for Applicant

David Kennedy for Respondent

Determination: 26 February 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr John Pounder ("Mr Pounder") applies to the Authority for an investigation into the termination of his employment. He says he was unjustifiably dismissed and asks that the Authority resolve the problem by making formal orders in his favour for reimbursement and compensation.

[2] The respondent used motor vehicle dealership Studdard Holdings Limited trading as Discount City New Lynn ("Discount City"), says that Mr Pounder was not dismissed, but rather, abandoned his employment.

[3] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[4] Mr Pounder commenced employment with Discount City on 24 February 2006. The parties had signed an individual employment agreement on 23 February 2006 which was expressed to be temporary until 23 March 2006 but which was never superseded by any further agreement.

[5] Mr Pounder was employed as a used car salesman reporting to a sales manager. He was paid a base retainer of \$320.00 per week together with commissions and a bonus on sales.

[6] On Wednesday 3 May 2006, Mr Pounder and his manager Mr David Kennedy ("Mr Kennedy") were in Mr Kennedy's office discussing a particular sale. The intricacies are immaterial but the discussions reached a critical point where Mr Pounder presented Mr Kennedy with a handwritten note of the customer's request for modifications to a vehicle intended to be purchased. Mr Kennedy considered he had concluded the bargaining for the particular sale and declined to accede to the customer's requirements as they were presented to him by Mr Pounder.

[7] Mr Pounder took exception to Mr Kennedy's refusal. He said at the investigation meeting that Mr Kennedy went ballistic and was yelling at him. Mr Kennedy denies this and says he calmly informed Mr Pounder of his position on the matter. Mr Kennedy says he remained calm and it was Mr Pounder who was swearing and yelling. I accept that Mr Pounder would not

have been pleased about losing a sale and it is likely that he conducted himself dissatisfied and unhappy. I accept that he was swearing and angry. Mr Pounder gives much evidence of his dissatisfaction over various commission sales.

[8] Mr Pounder's prepared statement does not attest to Mr Kennedy going "ballistic" and there is no reference to Mr Kennedy being angry or displeased. The written statement gives no hint as to what would have provoked Mr Kennedy to act as Mr Pounder alleges at investigation meeting. Having met with the parties, I am not persuaded that Mr Kennedy lost his temper or engaged in a heated discussion with Mr Pounder. That being so, there is nothing that persuades me that Mr Kennedy was provoked to dismiss Mr Pounder. I consider it very unlikely indeed that Mr Kennedy would have dismissed without any apparent reason or cause. Mr Pounder does not convince me of any such cause or reason.

[9] Another salesman Mr Don Willis ("Mr Willis"), who had worked collaboratively with Mr Pounder on the particular sale, gives evidence on oath that Mr Pounder called him to Mr Kennedy's office door and said to Mr Willis:-

I'm out of here, they can get fucked, you will have to finish the deal on the van, cause I've finished up.

[10] Salesman Mr Mahara Jaye Nye ("Mr Nye") also gives evidence on oath that he heard Mr Pounder tell Mr Kennedy as he (Mr Pounder) left Mr Kennedy's office:-

You can get fucked I'm out of here.

[11] Discount City's General Manager Mr Todd Ewington ("Mr Ewington") provides a signed statement to the Authority declared to be true and correct by virtue of the *Oaths and Declarations Act 1977* before a Justice of the Peace. Mr Ewington's statement says:-

On Wednesday the 3rd of May 2006 I was in my office when I heard raised voices. I looked up to see John Pounder leaving David Kennedy's office, as he crossed the showroom I heard him yell "you can do it your fucking self then "

[12] Mr Pounder denies the above statements. He says that when Mr Kennedy declined to meet the customer's request, he (Mr Pounder) said he would phone the customer and communicate the situation. He says that Mr Kennedy then yelled out:-

Yeah, go on, burn the bastard.

[13] Mr Pounder says that he then called out to Mr Willis to inform the customer and then he went to walk off the yard towards his drive car which was parked on a side street. His prepared statement records he went to retrieve a car part he had left in his drive car, but when recounting events at the investigation meeting without the assistance of his prepared statement, he reported that the car part had been left on his desk.

[14] It is best I quote his prepared statement as to what he says happened next and which he points to as a dismissal:-

On my way back in, Dave came racing out of his office with his hand out, and asked for my keys. I said, "You must be kidding! Are you firing me?" to which he replied, with hand out for the keys, "Yep" I said, "You can't do that" He said, "I just did" I said, "We 'll see " and phoned Bernie McIntyre for advice.

[15] I rely on Mr Nye's evidence when he says that Mr Pounder asked to use the telephone and Mr Kennedy permitted him to do so. I find that before Mr Pounder phoned Mr McIntyre, Mr Kennedy asked Mr Pounder *what are you doing?*. I find too, that Mr Pounder then said *You've sacked me* and Mr Kennedy replied *No John that's your decision*.

[16] It is common ground that Mr Pounder spoke with his advocate Mr Bernie McIntyre and they apparently discussed what Mr Pounder advised him was a dismissal. It is also accepted that Mr Kennedy declined to speak with Mr McIntyre when Mr Pounder invited him to do so.

[17] Mr Nye watched over Mr Pounder as Mr Pounder gathered his personal effects from his desk and Mr Kennedy watched over Mr Pounder as Mr Pounder collected his personal effects from his drive car.

[18] I also accept Mr Nye's evidence that after Mr Kennedy excused him (Mr Nye), Mr Pounder said to Mr Kennedy :-

Now your minder's gone do you want to have a go. [19] Mr Pounder left the premises and did not return to the employment.

The merits

[20] It is necessary first to establish whether there was a dismissal. An actual dismissal is usually easy enough to establish and in essence amounts to a *sending away*. In this instance however, Discount City denies any dismissal and contends Mr Pounder abandoned his employment of his own volition.

[21] Both Mr Nye and Mr Willis give evidence that Mr Pounder declared *I'm out of here*. Mr Pounder denies that evidence. The weight of evidence is that he did make that statement. I prefer the weight of the evidence and find that he did. I also

accept Mr Willis' evidence that Mr Pounder also said *I've finished up*. Contrary to Mr Pounder's evidence I find that he did resign from his employment in the heat of the moment.

[22] That finding provides the context for what is not disputed. Mr Kennedy next asked Mr Pounder for his keys. I find he did so because Mr Pounder had declared *I'm out of here* and *I've finished up*. Mr Kennedy made his request for keys as a result of Mr Pounder's statements.

[23] I have also found that when Mr Pounder asked to use the telephone, Mr Kennedy asked him *what are you doing?* and that he told Mr Pounder he was not dismissed. These findings I conclude are more probable and likely than Mr Pounder's account that Mr Kennedy in a peremptory fashion simply dismissed him. On Mr Pounder's own written evidence I see nothing which is likely to have provoked the responses from Mr Kennedy that Mr Pounder alleges. I find that it was Mr Pounder who was agitated and heated. He was plainly unhappy with Mr Kennedy's position. In this regard, I note that has particularly emphasised other instances where he criticises his employer in relation to his commissions.

[24] I prefer Mr Kennedy's evidence that he denies dismissing Mr Pounder. I find that Mr Kennedy did not verbally dismiss Mr Pounder. I also find that Mr Kennedy's request for Mr Pounder's keys did not constitute a dismissal in the form of a *sending away*.

[25] I conclude that Mr Pounder's statements preceded Mr Kennedy's request for the keys. That request was an affirmation of Mr Pounder's rejection of the contract. Mr Pounder denies that he resigned but I find that he did. That resignation was given in the heat of the moment and consideration is required as to whether it is fair or reasonable for the employer to rely on that resignation in the circumstances in which it is given.

[26] But is it fair that Mr Kennedy should be permitted to take advantage of Mr Pounder's actions which were taken in haste, as a result of a discussion where I have found Mr Pounder was particularly agitated and upset?. Is it fair in these circumstances for Discount City to affirm Mr Pounder's repudiatory conduct?

[27] A cooling off period was called for. These adults had disagreed about a sale. Tempers flared and things were said in the heat of the moment. Cooler heads ought to have prevailed but did not. Neither party sought to reactivate communication and discuss the real issues. There was a complete absence of any dialogue aimed at restoring the relationship.

[28] I accept that Mr Pounder telephoned Mr McIntyre and conducted a conversation with Mr McIntyre that he had been dismissed. He may well have taken Mr Kennedy's request for the keys as a dismissal in denial of his own declaration that he was leaving. I have found that he had not been verbally dismissed by Mr Kennedy and so I infer he conducted this conversation knowing full well he had not actually been dismissed. I prefer to consider he chose to regard Mr Kennedy's affirmation of his declaration of departure as confirmatory of a dismissal.

[29] For these reasons, I conclude then that Mr Pounder was not dismissed. I also conclude that he resigned from his employment. In the circumstances, it was unfair to rely on a resignation given in the heat of the moment. Mr Pounder chooses to maintain he was dismissed when he was not. Equally however, Discount City is not entitled to maintain that he resigned which in my assessment is tantamount to a dismissal. Mr Pounder does not seek to be reinstated and has not asked for his job back.

[30] Having found that to maintain a resignation in circumstances where it is unfair to do so amounts to a dismissal, I must find then that Mr Pounder has established he was unjustifiably dismissed.

[31] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Pounder's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I have no hesitation in finding that Mr Pounder's actions were wholly causative of the situation and he is entirely blameworthy. He is therefore not entitled to any remedies.

Costs

[32] As Discount City was not represented by professional advocate at the investigation meeting, I do not expect to be asked to deal with costs. If it wishes to be heard in this respect it should indicate that to the Authority's support staff not later than 14 days after this Determination so that I may consider the matter further.

Leon Robinson

Member of Employment Relations Authority