

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 374  
5373402

BETWEEN                      LEIGH POWRIE  
   Applicant  
  
A N D                              TE PUKE PARTSWORLD  
   LIMITED  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              David Flaws, Advocate for Applicant  
   Ali Khan, Advocate for Respondent  
  
Investigation meeting:        18 September 2012 at Te Puke  
  
Date of Determination:        16 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Mr Powrie, alleges that he was unjustifiably disadvantaged by unjustified actions of his employer the respondent (Te Puke Partsworld) and unjustifiably dismissed by Te Puke Partsworld as well.

[2]     Mr Powrie was employed in early March 2011 having effectively been recruited through a personal association between himself and the partner of Te Puke Partsworld's Manager Mr Tofts. There had been a private message sent to Mr Powrie by Mr Tofts at the end of February 2011 in which Mr Tofts offered Mr Powrie employment at Te Puke Partsworld as a mechanic starting on \$15 per hour. The position offered was a full time permanent position.

[3]     Mr Powrie accepted the position as offered and commenced his employment on 7 March 2011. It is common ground that Mr Powrie was not provided with a written employment agreement.

[4] For the first month of the employment, or thereabouts, Mr Powrie was occupied principally in helping the business shift premises. For some months, Te Puke Partsworld had traded from two sites and once Mr Powrie joined the firm's employment, the processes of consolidating on to one site was well advanced. Trading exclusively from the new site commenced from April 2011.

[5] Despite Mr Powrie being engaged as a mechanic, his evidence to the Authority was that he did very little mechanical work and that, Te Puke Partsworld never fully established an operational workshop.

[6] As a consequence, Mr Powrie was engaged in other work principally in stripping out useable parts from wrecked vehicles, a task which the Authority heard required mechanical aptitude in any event.

[7] Mr Powrie told the Authority that he got progressively more and more frustrated in the work place and he recalled having his pay rate reduced twice during the employment, perhaps because he was not doing mechanical work.

[8] Mr Powrie said that he was a mechanic by experience and had worked as a mechanic since leaving school at aged 16. He had commenced an apprenticeship but that remained unfinished at the time that he was engaged by Te Puke Partsworld. By the time the Authority investigated the employment relationship problem, Mr Powrie was able to confirm that he would complete his apprenticeship at the end of 2012.

[9] The relationship between Mr Powrie and the Director of Te Puke Partsworld, Mr Kahn, was tense. One of the areas of difficulty revolved around the question of whether Mr Powrie was legally able to certify vehicles for Warrant of Fitness purposes. This was an area of work which Mr Khan told the Authority he sought to diversify into and that was, he contended, one of the reasons that Te Puke Partsworld had hired Mr Powrie.

[10] Mr Khan told the Authority that he had been told by Mr Tofts that Mr Powrie could do Warrants of Fitness but Mr Powrie's evidence was different. First he indicated that he was never asked by Mr Tofts if he had the legal authority to issue Warrants of Fitness and Mr Tofts evidence to the Authority was that he could not remember if he asked that question or not. The only evidence that that was a term of the engagement is Mr Khan's contention that he was told by Mr Tofts (his Manager) that Mr Powrie could do Warrants of Fitness. Mr Powrie was adamant he was never

asked that question and Mr Tofts could not remember whether he had asked him or not. On balance, the Authority prefers Mr Powrie's recollection of events; Mr Khan was not in any way involved in Mr Powrie's recruitment and so, at best, his evidence is second-hand.

[11] Once the employment relationship commenced, Mr Powrie was asked by Mr Khan if he could do Warrants of Fitness. Mr Powrie was uncertain and thought that he might be able to issue Warrants of Fitness. Mr Khan wanted to establish whether that was the position or not and had Mr Powrie make various inquiries with the New Zealand Transport Agency and the industry training organisation to establish what the position was. In the result, Mr Powrie was able to establish that he could not issue Warrants of Fitness because in part, he had not finished his apprenticeship.

[12] There was some disputation between the parties about whether Mr Powrie was entitled to make the inquiries the Authority has just referred to, during work time or not. Mr Khan apparently insisted that those calls should be made during Mr Powrie's time; Mr Powrie thought that they were of benefit to the employer and therefore should have been made during working hours. The Authority would comment that it is not unreasonable for an employee to seek to use the employer's time to make inquiries of the sort referred to here, when the benefit accrues to the employer as much as to the employee. This is particularly the case when the Authority has accepted Mr Powrie's evidence that it was not a term of his employment that he issue Warrants of Fitness.

[13] There was also a dispute between Mr Khan and Mr Powrie about whether Mr Powrie accepted Mr Khan's suggestion that the business would pay for Mr Powrie to attend the appropriate courses to enable him to issue Warrants of Fitness. Mr Powrie's evidence, which the Authority accepts, is that he tried to explain to Mr Khan that there were no such course. The problem was that Mr Powrie had not completed his apprenticeship and as a consequence, until he had, he could not seek the appropriate endorsement to enable him to issue Warrants of Fitness. So, contrary to Mr Khan's contention, Mr Powrie was not reluctant to obtain further qualifications, as Mr Khan alleged, but simply trying to make clear to Mr Khan there was no appropriate qualification that Te Puke Partsworld could sponsor Mr Powrie to obtain, which would enable Mr Powrie to issue Warrants of Fitness.

[14] Then Mr Khan suggested to Mr Powrie that the latter might obtain a heavy trade motor drivers licence to enable him to drive a tow truck so that Te Puke Partsworld could diversify into that area. Mr Powrie told Mr Khan that he could not afford to do the licence and again was told by Mr Khan that the business might be prepared to help him. Further, Mr Khan suggested to Mr Powrie that the latter seek some assistance from Work and Income New Zealand. Mr Powrie told the Authority that he had an appointment with WINZ two days after he was dismissed to discuss their giving him a grant to enable him to obtain the requisite licence.

[15] Then there was a dispute between the parties about the use of petrol taken from wrecked vehicles belonging to Te Puke Partsworld. Mr Khan told the Authority that petrol was extracted from these vehicles as part of the deconstruction process. He indicated that the petrol was given to Mr Tofts, the Manager, as part of his remuneration package.

[16] But Mr Powrie said that a number of staff took advantage of the availability of petrol to top up their own vehicles (not just Mr Tofts) and that on two occasions, Mr Powrie himself sought to use the petrol for his own vehicle when he was short of money. He says that he asked Mr Khan on both occasions and on the first occasion Mr Khan gave him the petrol but on the second Mr Khan insisted on the petrol being paid for later.

[17] In the investigation meeting, Mr Khan accused Mr Powrie of attempting to steal the petrol. There is no evidence whatever of theft. Despite what Mr Khan says, the evidence is plain that Mr Powrie sought Mr Khan's permission on each occasion although Mr Khan says that that permission was only sought grudgingly. In any event, like all the other complaints that Mr Khan made about Mr Powrie, save for the circumstances around the dismissal itself, none of these other matters were ever raised with Mr Powrie as a basis for the dismissal.

[18] On 27 July 2011, Mr Powrie had a parcel of his own to get out via the courier. The parcel contained a car part which he himself owned and which he had sold privately. He parcelled it up during work time and arranged for it to be couriered from Te Puke Partsworld to its eventual recipient. Mr Khan, discovering that this had happened during work time, docked Mr Powrie's pay by 15 minutes.

[19] But Mr Powrie protested that he had worked extra time in order to cover the time that he spent preparing the parcel for transmission and he also said that he had asked the staff member responsible Ms Tofts (the mother of the Manager) if he could use the firm's courier system and his evidence was that Ms Tofts had said that she would create an account for him. His evidence was also that he had done this on previous occasions. Ms Tofts could not remember if Mr Powrie had asked permission or not.

[20] The following day, Mr Powrie discovered that his pay had in fact been docked by Mr Khan and there was an altercation between the two men which led to the dismissal. When Mr Powrie received his pay slip and found that his pay had been docked he confronted Mr Khan about the matter. It is common ground that Mr Powrie came into the front office, where Mr Khan's desk was, with Mr Khan working at it, and Mr Powrie threw the pay slip at Mr Khan where it landed on Mr Khan's keyboard. The pay slip consisted of A4 paper stapled in half. Mr Khan claims that the pay slip was aimed at his head but there is no evidence to support that. Nor can it be said the missile was particularly deadly given its constitution. However, Mr Powrie acknowledges throwing the pay slip at his employer and that is a plainly inappropriate action for an employee to take in any circumstances.

[21] The evidence the Authority heard was that Mr Powrie was very angry; indeed, Ms Tofts, who was sitting in the adjoining desk to Mr Khan at the time, described Mr Powrie as being so angry as to be virtually incapable of speaking. She also thought that Mr Powrie was aiming at Mr Khan's head when he threw the projectile but given that the projectile did not land anywhere near Mr Khan's head, that evidence cannot be taken any further.

[22] Mr Khan himself acknowledges becoming angry and Ms Tofts confirms that that was the case too.

[23] Mr Khan claims to have tried to calm Mr Powrie down (although that is not Mr Powrie's evidence and nor is it consistent with Ms Tofts' recollection) and when he failed to do that Mr Khan said to him something to the effect that he was not allowed to do his own work during work time and that if Mr Powrie did not like his decision, then he should remove his overalls, take his tools and leave.

[24] Even on Mr Khan's evidence to the Authority, Mr Powrie continued to try to try to explain to Mr Khan (correctly as it happened) that Mr Khan could not dismiss him in this precipitate way but when he got no response from Mr Khan he apparently said something like *fuck you then* and walked off.

[25] Later Mr Powrie returned and demanded his final pay. Mr Khan undertook to attend to that as soon as he could but in the result it took him until 22 November to attend to that absolutely legitimate request.

[26] Mr Khan wanted the Authority to know that his firm had suffered serious difficulties at around the same time as Mr Powrie had been employed, particularly because of dramatic stock damage caused by a flash flood on January 29<sup>th</sup> 2011. A consequence of this event was significant financial loss and the juxtaposition of this event with the 22 February 2011 Christchurch earthquake meant that the insurance response to the Te Puke event slowed dramatically. Because Te Puke Partsworld's insurance claim took much longer to settle than would normally have been the case, the business was under serious financial strain. Even at the time of the investigation meeting, some eighteen months after the event, all of the outstanding claims made by Te Puke Partsworld had still not been met. The Authority is asked to take this situation into account. While the Authority cannot help but be sympathetic to such a predicament, financial stress does not justify employer behaviour which is not in conformity to the law.

### **Issues**

[27] The two questions the Authority needs to answer are:

- (a) Was Mr Powrie's dismissal unjustified; and
- (b) Did Mr Powrie suffer disadvantage?

*Was Mr Powrie's unjustifiably dismissed?*

[28] The Authority has no hesitation in concluding that Mr Powrie was unjustifiably dismissed. It is difficult to see how a decision made in the heat of the moment without the barest consideration of the proper process, can meet the test required by the law. That test, enunciated by Parliament and set out in s.103A of the Employment Relations Act 2000 requires the Authority to consider on an objective

basis whether the employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In the Authority's opinion, no fair and reasonable employer could have concluded that a dismissal in the heat of the moment, notwithstanding the provocation, could possibly fall within the terms of the section. This was not a minor deficiency of process but a complete failure to properly reflect on the circumstances and to take a measured and considered stance thereafter.

[29] There was no evidence at all of any inquiry, any consideration of the facts leading up to the dismissal or any other opportunity which might have given both parties a chance to cool off and consider the matter in a more temperate environment. Mr Khan, by all accounts, completely ignored Mr Powrie's attempts to draw his attention to his obligations as a good and fair employer and despite the fact that Mr Powrie was angry about the way he was treated, in respect to the observations he made about the employer's obligations, he was quite right.

[30] Certainly, nothing in the facts before the Authority suggests that Mr Khan took any time to reflect on what he had heard or indeed to reflect on the decision that he had taken to arbitrarily dock Mr Powrie's pay. In those circumstances, the dismissal must be an unjustified one.

[31] In reaching this conclusion, the Authority discounts altogether the history of disputation between these parties. By virtue of the completely inadequate process adopted by Te Puke Partsworld, none of the firm complaints about Mr Powrie were ever put to him and so Mr Powrie had no opportunity to respond. As will be evident from the analysis in the previous section of this determination, Mr Powrie rejected the employer's allegations about him, or at the very least had an explanation for his complained of conduct. But the short point is that none of those matters were brought to bear on the dismissal. Had they been, and had Mr Powrie been given the opportunity to explain himself which the Authority's investigation gave him, a more reasoned and less abrupt outcome would have been inevitable. At the very least, time to reflect might have resulted in a decision that the behaviour of Mr Powrie which led to the dismissal, while aberrant, was not, of itself, justification for dismissal.

[32] Having established that there was an unjustified dismissal, the Authority is required by s.124 of the Act to consider whether Mr Powrie contributed in any way to the circumstances giving rise to the personal grievance. It is difficult not to conclude

that Mr Powrie was a major contributor to the circumstances giving rise to the grievance. By all accounts, including his own, he was very angry when he confronted Mr Khan. No doubt the two men had had a poor relationship ever since the employment commenced but entering into a confrontational environment without some good humour is a recipe for disaster and Mr Powrie must be seen to be, to a very large extent, the architect of his own misfortunes.

[33] The Authority must conclude that it is difficult to imagine how Mr Powrie would have been dismissed from his employment if he had not first thrown his pay slip at his employer (itself a totally inappropriate action) and second confronted his employer with ill humour and abusive language. No employer should have to put up with that sort of behaviour no matter how wrong the employer plainly was. The Authority considers that Mr Powrie's contribution to the events leading up to his dismissal is 70%.

*Was Mr Powrie subjected to a disadvantage action?*

[34] The Authority is satisfied that Mr Powrie did suffer disadvantage the consequence of unjustified actions of the employer both in the failure to provide a written employment agreement and the subsequent arbitrary reduction in the rate of pay. The law is clear that an individual employment agreement must be in writing: s.65(1)(a) of the Employment Relations Act 2000. The failure to provide a written employment agreement, in the Authority's opinion, contributed to the subsequent breach by Te Puke Partsworld in its failure to maintain Mr Powrie on his negotiated rate of pay. If the employment agreement had been reduced to writing, it would have been more difficult for Te Puke Partsworld to contemplate an arbitrary reduction in Mr Powrie's rate of pay. There is simply no basis for the employer doing this unilaterally; the Authority is satisfied that Mr Powrie did not agree to the reduction and indeed he protested it because it placed him under financial pressure.

[35] As to that reduction, there is dispute between the parties about how many reductions there were. The Authority prefers the view that there was only one reduction and that was from \$15 an hour down to \$13.25 an hour which Te Puke Partsworld erroneously claim Mr Powrie agreed to. The Authority is satisfied, as indicated above, that Mr Powrie did not agree to have his wages reduced by almost \$2 an hour.

[36] There can be no doubt that the unilateral reduction in a rate of pay is an unjustified action by an employer and there is equally no doubt that the same reduction creates a disadvantage to the receiving employee. The Authority is satisfied then that, in relation to the reduction in wage rate, Mr Powrie has suffered an unjustified disadvantage.

[37] The Authority does not propose to take the failure to provide a written employment agreement any further save to emphasize the point already made that in the Authority's view, it contributed to the failure of Te Puke Partsworld to maintain Mr Powrie's hourly rate at the rate agreed when he was engaged. If Te Puke Partsworld had wanted to have the flexibility to change Mr Powrie's hourly rate, then that is a matter for negotiation between the parties and could well have been provided for in an written employment agreement, if Mr Powrie was minded to give the employer that latitude. But without agreement, it cannot be right for an employer to simply arbitrarily reduce a rate of pay by almost \$2 an hour.

[38] The Authority must now consider whether Mr Powrie contributed in any way to the circumstances giving rise to this personal grievance. The Authority concludes that Mr Powrie is blameless in this regard having had nothing whatever to do with the circumstances giving rise to this grievance.

### **Determination**

[39] The Authority has found that Mr Powrie has a personal grievance first by reason of unjustified dismissal and second by reason of having suffered a disadvantage because of unjustified action of the employer. Because the issues of contribution are different in each case, the Authority will now make orders in respect to each of those personal grievances separately.

[40] Mr Powrie claimed compensation under s.123(1)(c)(i) in the sum of \$7,500 together with three months wages from the date of his dismissal and costs. In relation to wages, the evidence the Authority heard was that Mr Powrie was able to obtain employment in two months post dismissal and, on the evidence the Authority heard, he took extensive steps to obtain fresh employment, for which he is to be commended. The Authority proposes to calculate the wages due and owing at Mr Powrie's proper rate of \$15 an hour but subject to the contribution figure already identified.

[41] Accordingly, in respect to the proved unjustified dismissal, Mr Powrie is entitled to the following sums:

- (a) Compensation under s.123(1)(c)(i) in the sum of \$2,000.00 net;
- (b) A contribution to lost wages in the sum of \$1,620.00 gross;
- (c) The Authority's filing fee in the sum of \$71.56.

[42] In respect to the proved unjustified action causing disadvantage, the Authority awards Mr Powrie the sum of \$3,500.00 as compensation under s.123(1)(c)(i) of the Employment Relations Act 200.

**Costs**

[43] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority