

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Joel Pullen (applicant)
AND	Panorama Auto Limited (respondent)
REPRESENTATIVES	Gerard Dewar and Clare Stanley for the applicant Barbara Buckettt for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 1 February 2005
DATE OF DETERMINATION	4 February 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The applicant, Joel Pullen, says the respondent (the Company) was in breach of s. 65 of the Act by failing to provide him with a written employment agreement, that it unlawfully deducted money from his wages, breached his privacy and unjustifiably summarily dismissed him – amended statement of problem received on 12 November 2004. He seeks a penalty for the failure to provide him with a written agreement, the

return of the deduction from his wages, compensation for lost wages arising out of his unjustified dismissal, compensation for humiliation, etc and costs.

2. The Company says amongst other things that it is in the process of providing staff with written employment agreements, that money was deducted in ignorance from the applicant's wages, it concedes it did advise the applicant's mother that her son was being interviewed by the Police and that the applicant resigned before it could have dismissed him for serious misconduct – amended statement in reply received 24 December.
3. The parties underwent mediation but their employment relationship problem remained.

Investigation

4. During a telephone conference held on 8 October the parties agreed to a one-day investigation in Wellington commencing on Tuesday 1 February 2005. The parties usefully provided written statements in advance of the investigation and bundles of documents.
5. At the commencement of the investigation on 1 February the applicant, through his counsel Mr Gerard Dewar, confirmed he accepted the Company was his employer and that his claim against the respondent's director, David Speirs, was withdrawn. Mr Pullen also confirmed he was seeking a penalty in respect of the Company's alleged breach of s. 65 of the Act.
6. Extensive efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful. Agreement was reached at the conclusion of the investigation on a timetabling of closing comments.

Background

7. I am satisfied from the evidence that the key background details can be summarised as follows.

8. The applicant was employed by the Company from August 2002 until June 2004. Mr Pullen was initially employed to 'trim' cars, i.e. to remove internal lining so that the structure of the vehicle could be inspected. At a later point, according to his uncontradicted evidence, Mr Pullen began doing more mechanical work as well as recording registration details and chassis numbers and recording the standards of lights, tyres, seat belts, etc.
9. On Monday 1 June the Police, accompanied by Mr Speirs, conducted a search of the property of one of the applicant's co-workers, someone with whom he had become friendly during the course of their working together. Company property, including a trade (i.e. temporary number) plate as well as items belonging to other workers employed by the respondent, was apparently located. The Police later turned up at the respondent's workshop to interview, firstly, the co-worker and, later that day, Mr Pullen: the applicant was initially interviewed at the Company's workshop and then at a Police station. A record of the applicant's Police statement was produced (document 3 in the applicant's bundle). That record was first seen by Mr Speirs on 20 October – oral evidence to the Authority.
10. At around the same time as the applicant was being interviewed in the Police station Mr Speirs telephoned the applicant's mother and advised her that her son was assisting the Police with their inquiry: the applicant alleges Mr Speirs' initiative amounted to a breach of his privacy. The parties also agree that, during the telephone conversation, Mr Speirs asked for one of the applicant's parents to contact him the following day.
11. Notwithstanding Mr Speirs' evidence that, as the applicant was being taken to the Police station to be interviewed, a Police officer told him Mr Pullen had admitted to taking the trade plate from the respondent, the Police did not charge Mr Pullen at that time with any offence and have not done so since. A fax on Police letterhead from a Constable R Brown, Lower Hutt, dated 31 January 2005, was produced during the investigation. It says that,

... Joel Pullen is not to be charged with any offence against Panorama Autos Ltd.
12. Criminal convictions were successfully brought against the co-worker.

13. It is agreed that the applicant reported for work the next morning, 2 June 2004, at the normal time. It is also agreed that the applicant and Mr Speirs then had a conversation. The content of that conversation is disputed: the applicant says that David Speirs told him he did not want to talk to him as he did not like liars and that he would call the applicant later. The applicant says he asked Mr Speirs if he would call him at his home and that Mr Speirs confirmed he was to go home. The applicant says he understood he was being directed not to return to work but instead to leave. He says that, as a result of their conversation, he then went home to wait for a call that – the parties agree – never came.
14. Mr Speirs disputes telling the applicant to go home. He also denies telling Mr Pullen that he would call him later. He says instead he told Mr Pullen to “*call up later*” (oral evidence – Mr Speirs lived above the applicant’s workplace). Mr Speirs agrees the applicant did not call back that day. He agrees he was aware Mr Pullen was absent from the workplace and that he did not attempt to contact the applicant as he was “*not in a hurry to see him*” (oral evidence to the investigation). Mr Speirs said that in fact he was relieved by the applicant’s absence because of the tension in the workplace resulting from some of the Company’s staff’s property being found at the home of the co-worker.
15. The parties agree that, around midday on the same day, 2 June, there was a telephone conversation between Mr Speirs and the applicant’s father, David Pullen. The two men agree it was a lengthy conversation but, again, the content is disputed: the applicant’s father says that Mr Speirs refused his request for a meeting and said that the applicant no longer worked for the respondent and used words to the effect, ‘I’ve had to let him go’. Mr Speirs denies using those or similar words but does agree he said he did not like liars and had no wish to be drawn into a “*mediation*” (oral evidence).
16. The applicant says he understood from what David Speirs had said to both himself and his father, his being sent home and the fact that the respondent had not called him, that he had been sacked. A discussion then took place between the applicant and his parents and, accepting their advice and so as to best protect his re-employment prospects, he says he wrote a letter of resignation (document 4). It reads:

Dave

Thank you for employing me over the last 2 years.

You last spoke to me on Tuesday 1st of June 2004 and advised me to go home and that you would call me. I am still waiting for your call.

Today is Friday the 4th of June and as I have not received your promised phone call yet, and due to the events of this week, I hereby notify you of my resignation effective immediately as of now.

Sincerely

Joel Pullen

17. The letter contains an error: it refers to Tuesday 1 June – the correct date is clearly Wednesday 2 June. The parties agree that it was on the morning of 2 June that Mr Speirs last spoke to the applicant, following the Police search and investigations on the preceding day.
18. The letter is timed: 07.00. It is also dated in two places as 04/06/2004. It refers to today being Friday the 4th of June. Mr Pullen says he and his aunt (who has since returned to Australia) then drove, on Friday 4 June, to the respondent's workshop where, at his aunt's insistence and so as to avoid any risk of confrontation, the letter of resignation was handed in by her.
19. The respondent disputes the applicant's claim as to the timing of the delivery of his resignation letter: the Company says that it received the hand delivered letter on Thursday 3 June (par 16 of Mr Speirs' statement). Amongst other things, Mr Speirs says he reacted to the letter by instructing his staff to stop the automatic payment of the applicant's wages and to write a final letter recording his resignation and final pay (document 1 in the applicant's bundle). Mr Speirs says the resulting letter was erroneously dated 3 June (pars 18 & 19 of his statement): he says it was in fact prepared and posted to the applicant on 8 June 2004 together with Mr Pullen's final pay (par 19 of his statement).

20. Mr Speirs concedes that, at the same time as receiving Mr Pullen's letter of resignation, he unilaterally directed his office staff to deduct from Mr Pullen's final pay the monies owed by the applicant to the Company on the former's staff account. As it turned out, the respondent calculated the money owing as greater than the final pay total and no wages were paid to the applicant. During the investigation Mr Speirs agreed he had no authority to make the deduction.
21. The respondent initially declined the applicant's requests to undertake mediation, saying it was awaiting the outcome of the Police investigation before it commented further (documents 6 & 7 in the applicant's bundle). It also sought a month's extension on filing a statement in reply for the same reason (fax to the Authority dated 29 September 2004): that application was declined.

Discussion and Findings

Breach of s. 65 of the Act

22. I find that this claim is made out as the respondent admits there was no written employment agreement provided to the applicant. However, as the awarding of a penalty is discretionary, and as the respondent has assured me it is in the process of writing up employment agreements for its current staff and as I am satisfied that the nub of this employment relationship problem relates almost entirely to the circumstances of Mr Pullen's termination, and as I find for the applicant in respect of his substantive claim (see below), I decline to determine a penalty against the Company. In light of this decision and its undertaking the Company will almost certainly not escape a significant penalty in the event of continued non-compliance with s. 65 of the Act.

Unlawful Deduction from Wages

23. I similarly find that as the respondent conceded in its amended statement in reply that \$794.95 "*was deducted in ignorance*" and, during the investigation, that it had no authority to do so, this claim is also made out.

24. I also accept Mr Dewar's submission of 2 February that interest on this sum of 7.5% from 2 June to date of payment should apply, i.e. a daily rate of \$0.16.
25. I strongly urge the parties to reach agreement on the other sum (currently disputed) owed by the applicant to the respondent on his staff account, as well as a repayment regime consistent with that previously in place and Mr Pullen's present ability to pay.

Breach of privacy

26. This matter was not pursued with any enthusiasm by the applicant during the investigation for the simple reason, I believe, that Mr Speirs' initiative in contacting his mother was – if not actually valued by the Pullen's – of little or no concern to the applicant at the time. Evidence for this conclusion is found in the delay by Mr Pullen to protest his employer's initiative. In fact it was agreed by the applicant and his family that Mr Pullen senior would respond to Mr Speirs' invitation to telephone him on 2 June. There is no evidence of any disadvantage suffered by the applicant in respect of this alleged breach. There is considerable evidence that the applicant actively relied on his parent's assistance, in respect of his predicament. I am therefore satisfied there has been no breach of the applicant's privacy such as to warrant a finding, and certainly not any damages.

Unjustifiable Summary Dismissal Claim

27. The relevant question is, I am satisfied, did the applicant jump or was he pushed? Did Mr Pullen resign or was he first dismissed? At the risk of stating the obvious, the Authority has no way of knowing if David Speirs sent the applicant away, or whether Joel Pullen's 4 June letter of resignation arrived before or after the respondent sent its advice (erroneously, it says) dated 3 June 2004. A proper conclusion can only be reached on a balance of probabilities basis by a disinterested, but informed objective approach to all of the relevant facts. Adopting that approach and after having regard to the following evidence, I am satisfied that the respondent unjustifiably summarily dismissed the applicant:
28. Mr Speirs admits that the evidence unearthed by the Police search and the advice from a Police officer on 1 June, that the applicant had admitted to taking the plates

made him “angry” (oral evidence during the investigation). He also admits to feeling frustrated by staff (including the applicant) previously denying knowledge of missing property when – in his view – the applicant must have known some of the property was at the co-worker’s premises. He says he was also under pressure by his clients to effectively deal to the problem of items going missing from their vehicles. Until the Police search he said he had no reason to regard Joel Pullen with any suspicion. His says his view changed, at that time. Mr Speirs’ evidence and demeanour support a conclusion that his view changed significantly.

29. I find that, because of the respondent’s changed (and agitated) state of mind, and – despite failing to conduct his own investigation in respect of his concerns – Mr Speirs reached seriously adverse conclusions about the applicant’s involvement in the missing property. Because of those adverse views, and because they were never put to the applicant so that he might give his version, I am satisfied that Joel Pullen’s account of his conversation with Mr Speirs and his description of the subsequent exchange of correspondence between the parties are to be preferred.
30. My conclusion is strengthened by the fact that Mr Pullen’s version as to what happened on the morning of the 2nd of June is reflected in the detail of his letter of 4 June, i.e. within two days of the actual event. Mr Speirs did not take the opportunity to challenge that version in his letter dated (erroneously, he says) 3 June. In fact, prior to his presenting his evidence to the Authority, Mr Speirs ignored the specificity of the comments set out in Mr Pullen’s letter of 4 June. I find that failure to be further evidence in favour of the applicant’s account of what happened on the 2nd of June.
31. Alternatively, in the event that Mr Speirs relied on the letter of resignation from the applicant, before sending his letter (erroneously, he says) dated 3 June, then I find that the respondent was in breach of its good faith obligation to correct the applicant’s confusion before accepting his resignation. That failure would have amounted to an unjustified, constructive dismissal.
32. Mr Speirs denies telling the applicant, on the morning of 2 June 2004, that he did not want to talk to him and that he did not like liars. He similarly denies confirming he would call the applicant at home. I am satisfied on a balance of probabilities basis that he clearly communicated those matters to Mr Pullen. I reach this conclusion

because – as is made clear above – Mr Speirs admits to being in an angry state of mind. He also admits to having a change of view of the applicant, as a result of the Police search. He also admitted to feeling relief that the applicant was off the premises: this was because of staff tension arising out of the material unearthed by the Police search. Mr Speirs accepts he made no effort on that day or subsequently to contact the applicant despite knowing Joel Pullen was absent from the workplace, and despite the clear advice in the latter's letter of 4 June – which the respondent claims was received on 3 June – of the applicant's understanding of events; that the applicant believed he had been told by David Speirs on the Tuesday to go home and that he was still waiting, on the following Friday, for his employer's call.

33. I am satisfied that general support for my conclusions can also be found in Mr Speirs accepting he said to the applicant's father, during their conversation on the 2nd of June, that he did not like liars and that he refused the meeting proposed by Mr Pullen senior. I am also satisfied that Mr Pullen senior's recollection as to the content of their conversation, in particular that the applicant no longer worked for the respondent, is – on a balance of probabilities basis – more likely to be correct than Mr Speirs' version.
34. I am also satisfied that other evidence clearly points to the respondent acting on 2 June to effect the illegal wages deduction, i.e. to terminate Mr Pullen's employment by sending him "(his) *final payslip*" (document 1 in the applicant's bundle). This is because Mr Pullen was paid weekly, usually on either the Wednesday evening or, no later than, the Thursday morning (refer to the bank statements recording 12, 19 & 26 May – document 8 from the applicant's bundle; document 9 from the respondent's). His next pay was due to him on the following Wednesday, 2 June. He did not receive that pay – it did not go into his account on either the evening of the 2nd or, at the latest, the morning of the 3rd of June. That was because of Mr Speirs' initiative to effect an illegal deduction. That deduction must have been actioned – I am satisfied – during the 2nd of June. Despite his accounts person claiming she took the initiative, I am satisfied it was at the behest of Mr Speirs and that it is evidence of the respondent's director determining to end the applicant's employment. Mr Speirs admits to making the instruction (par 18 of his statement) but – he says – only after receiving Mr Pullen's letter of resignation. That cannot possibly be so as Mr Speirs'

evidence was that the letter was received on the 3rd of June by which date it would have been clearly too late to stop payment of Mr Pullen's wages.

35. There is, I find, abundant evidence that Mr Speirs had resolved to dismiss the applicant without conducting an investigation and without providing Mr Pullen with an opportunity to hear of, and respond to, his employer's concerns.
36. No coherent explanation was provided by the respondent in respect of its claim that its letter to Mr Pullen was incorrectly dated 3 June (document 1 – applicant's bundle). I note also that the respondent has used an identical letter in respect of the termination of Mr Pullen and his co-worker (documents 1 & 9 in the applicant's bundle). I am satisfied that, while worded ambiguously, the advice of "*your final payslip*" (above) is clear notice of termination. The use of a generic letter in the context of criminal charges having been brought successfully against the co-worker tends to indicate the given date of the correspondence was the correct date, i.e. 3 and not 8 June 2004.
37. Finally, under close questioning, Mr Speirs' evidence as to the sequence of events was less certain than the applicant's: while he said he was "*positive*" he also qualified that claim by saying his version "*seemed to make sense*". At one point Mr Speirs said he could not be sure about the sequence of relevant events and that his recollection was to "*the best of (his) knowledge*".

Remedies

38. The applicant gave compelling evidence of the impact and effects on him of his termination. Commendably, Mr Pullen promptly set about finding new employment, albeit at a lesser hourly rate of pay. Any concern the applicant had as to his re-employment prospects were mitigated by his success. It is pleasing for the applicant's sake to read his new employer's very positive reference in support of Mr Pullen and that he has been offered an apprenticeship. However, it needs to be recorded that Mr Pullen's humiliation has been ongoing. The respondent has not denied the applicant's evidence that car parts suppliers had been informed that he had stolen from his employer, despite its failure to carry out the required investigation. The respondent also took the unusual step of instructing its counsel to

contact Mr Pullen's current employer to ask what if anything had he told his new employer about the circumstances of his leaving his old employer. Contact was made as recently as 25 January 2005. It is difficult to see this as a genuine effort to obtain relevant information so close to an investigation that was scheduled as far back as 8 October 2004. I also fail to see the relevance of this line of inquiry: the fundamental issue between the parties throughout has been whether Mr Pullen resigned or was summarily dismissed. In the event of the latter then his dismissal would inevitably have been unjustified because of the egregious absence of process. The respondent's instruction reinforces my conclusion that Mr Speirs had reached the view – despite the absence of an investigation – that the applicant was dishonest and was searching, very late in the piece, for information to support that allegation. I therefore accept the submissions on behalf of the applicant that this gratuitous initiative has unnecessarily deepened and prolonged the applicant's humiliation, etc

39. Having regard to the applicant's evidence of the humiliation, etc that he experienced arising out of his unjustified summary dismissal and the respondent's unacceptable after the event conduct I accept counsel for the applicant's submission that an award of \$14,000 is an appropriate level of compensation: ss. 123(c)(i) of the Act applied.
40. Because of his unjustified summary dismissal, the applicant is also entitled to recover wages for the intervening period of unemployment. I accept Mr Dewar's calculation of 2 February that this amounts to \$1,120.00 (i.e. 80 hours x \$14.00 an hour). I do not accept that Mr Pullen should enjoy compensation for the differential pay rates for six months but instead limit his loss to three months. I understand from Mr Dewar's calculation that that sum totals \$1,040.00. The two sums combined are to be paid to the applicant, i.e. \$3160.00: ss. 128(2) of the Act applied.
41. As is made clear above, the respondent is also to pay to the applicant his final wages of \$794.95.

Contributing Behaviour

42. I do not accept Mr Pullen's counsel's submission that there has been no contributory fault. The investigation disclosed clearly that Mr Pullen had possession of the trade plate without authority. That was because he elected to rely on the advice of his co-

worker that authority had been given; which is denied by the respondent. That was his evidence to both the Police and the Authority's investigations. Seeing the plate on Mr Pullen's car was one of the reasons for Mr Speirs adopting a very different, and strongly negative attitude, toward the applicant. While the Company's policy about the use of its trade plates is disputed by the parties I am satisfied that the applicant's actions nonetheless significantly contributed towards the situation giving rise to the personal grievance. I reach this finding notwithstanding the Company's failure to – like its failure to provide written employment agreements – formally record its own policies, thereby leaving itself open to confusion and doubt but because Mr Pullen could not say with any certainty that he enjoyed the Company's approval to use the plate in a private capacity. His retaining of the plate was also inconsistent with his acceptance during the investigation that it was Company policy to lend its tools to staff provided they were returned during working hours. It is therefore appropriate to offset all of the remedies awarded the applicant, other than the reimbursing of the applicant's final wages of \$794.95, by the extent of his contribution. I set the level of contribution at 50%: s. 124 of the Act applied.

Determination

43. For the reasons set out above I find in favour of Joel Pullen's claim that he was unjustifiably summarily dismissed by the respondent, Panorama Auto Limited. Taking account of the applicant's contributory behaviour, I therefore direct the respondent to pay to the applicant \$14,000.00 (fourteen thousand dollars) compensation for humiliation, etc less 50% contribution, i.e. \$7,000 (seven thousand dollars).
44. As is already made clear above, the respondent is also to pay to the applicant within 7 days of the issuing of this determination the wages illegally deducted from Mr Pullen's final pay, i.e. \$794.95 (seven hundred and ninety four dollars and ninety five cents) plus interest at \$0.16 (sixteen cents) per day from 2 June 2004 until the sum is paid.
45. The respondent is also to pay to the applicant the sum of \$3160.00 (three thousand one hundred and sixty dollars) being wages lost to Mr Pullen less 50% contributory fault, i.e. \$1,580.00 (one thousand and five hundred and eighty dollars).

46. As was agreed during the investigation, costs are reserved. However, I can reiterate what I have already advised the parties that a contribution to the successful party's costs could expect to be found between \$1,500 and \$3,000. While I have yet to hear from the respondent on this matter, the costs submissions already advanced by the applicant have all the appearance of being entirely realistic as does the actual costs claimed by the applicant.

Denis Asher

Member of Employment Relations Authority