

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Fraser James Ray (Applicant)
AND Stephen Rinhold Okeby (First Respondent)
AND Harbour City Tow & Salvage (2003) Limited (Second Respondent)

REPRESENTATIVES R Parton for Applicant
No appearance by or for Respondents

MEMBER OF AUTHORITY G J Wood

INVESTIGATION MEETING DATE OF DETERMINATION Wellington, 15 November 2006
15 November 2006

ORAL DETERMINATION OF THE AUTHORITY

1. The applicant, Mr Ray, was employed by the second respondent (Harbour City Tow & Salvage) between March and May 2006. Harbour City Tow & Salvage's managing director, Stephen Okeby, controls the company as its majority shareholder. Mr Ray claims that he was unjustifiably summarily dismissed on 22 May 2006 when Mr Okeby told him to leave and not come back.
2. Neither of the respondents attended or was represented at the investigation meeting. I am satisfied that the notice of investigation meeting was served on the physical address of Harbour City Tow and Salvage and signed for by Mr Okeby. An Authority support officer tried today to contact Mr Okeby at his work address by telephone without success. His office staff would not, consistent with previous practice, give her any other way of contacting him, such as his cell phone number.
3. This was consistent with the respondents' attitude to the Authority's investigation throughout. Despite being notified of an earlier conference call and of the consequences of not filing a statement in reply, neither respondent attended the conference call or furnished a statement in reply. This was despite them subsequently being referred to the provisions of section 181 of the Act, which require them to facilitate rather than obstruct the Authority's investigation and to act in good faith, and section 182, which provides for certain consequences for not participating in a manner

designed to resolve the issues involved. Similarly, the Authority's direction as to the provision of written statements was not complied with.

4. I was satisfied accordingly that no good cause for either respondent to fail to attend or be represented had been shown. Pursuant to clause 12 of Schedule 2 to the Act I therefore proceeded to act as fully in the matter as if they had been represented.
5. I have determined the facts as set out below on the basis of my acceptance of the evidence of the applicant, Fraser Ray, the only witness in this matter. Having questioned Mr Ray on his written statement of evidence, I have no reason to disbelieve his evidence. I have accepted it in full.
6. Mr Ray was employed as a tow truck driver for Harbour City Tow & Salvage on 27 March 2006. Mr Ray was never provided with a written employment agreement. He was paid each week by Harbour City Tow & Salvage the sum of \$610 net. I am therefore satisfied that Mr Ray was employed by Harbour City Tow and Salvage, not Mr Okeby personally.
7. Throughout his employment Mr Ray did not receive any formal training or induction, other than working alongside other employees. On 20 May 2006 Mr Ray and another employee, responsible for helping show him the job, were sent to tow an all wheel drive car. The badge on the car, however, identified it as a four wheel drive car. All wheel drive cars, unlike four wheel drive ones, can not be safely towed by the vehicle driven by Mr Ray. Early in the course of towing the car Mr Ray became concerned about noises coming from it. He stopped, but after inspection he was directed by his more senior fellow employee to carry on.
8. This clearly caused some damage to the towed car, because when Mr Ray went to work the next Monday (22 May 2006), he was confronted by an extremely angry Mr Okeby, who raised his concerns, using foul and loud language throughout, about accidents Mr Ray had allegedly had.
9. In particular, he told Mr Ray that it was going to cost him another \$3,000 because of a mistake made by Mr Ray with the all wheel drive vehicle. Mr Okeby then informed Mr Ray that he had already told him to be more careful after a previous incident, and asked him what was going on.
10. Mr Ray asked Mr Okeby if he wanted his side of the story. Mr Okeby said that he did not care about that. Mr Ray then said that all he could then say was that he apologised. Mr Okeby said that that was not good enough, and Mr Ray asked Mr Okeby what he wanted him to do. Mr Okeby said that he thought Mr Ray should leave. Mr Ray accepted this and started to walk out. Mr Okeby then told him to "*get out and don't come back*".
11. Mr Ray was very upset about what had happened and felt humiliated in front of his workmates. Clearly, Mr Ray wanted to tell Mr Okeby that he had advised against moving the car, but Mr Okeby refused to listen to any explanation.
12. When Mr Ray received his pay that week it was two days short, consistent with him having been dismissed on the Monday. He was not paid any holiday pay. That

remains the case to this day. Mr Okeby has not sought to contact Mr Ray since 22 May. At least until very recently, it appeared that the other employee involved in the incident remained in the employment of Harbour City Tow and Salvage.

13. Mr Ray did not get another job for six weeks and even then he was paid at a lesser rate than at Harbour City Tow & Salvage.
14. I am satisfied that Mr Ray was employed by Harbour City Tow & Salvage, who paid his wages. I am furthermore satisfied that Mr Ray was dismissed by Harbour City Tow & Salvage. He was told in no uncertain terms to get out and not come back, following abuse by its managing director. Since that time there has been no contact with Mr Ray by Harbour City Tow & Salvage. All of these are clear indicators that Mr Ray was dismissed and did not leave of his own accord.
15. I am also satisfied that this dismissal was unjustified. To justify a dismissal an employer must show that its actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. One of the fundamental requirements on employers is for them to ensure that an opportunity is given to workers to respond to allegations made against them. In this case Mr Okeby was quite entitled to be concerned about the damage to the all wheel drive vehicle. Had he taken the time, however, to hear Mr Ray's explanation, namely that he had counselled against continuing to tow the vehicle in question, Mr Ray's employment may well not have been terminated. After all, the other employee involved appears to have kept his job, despite his greater role in events.
16. I accept that Mr Ray is entitled to claim \$6,137.45 gross for the six weeks and one day's pay he lost before he got another job, as well as unpaid holiday pay of \$628.71 gross, as any worker is entitled to holiday pay when their employment ends.
17. I also accept that Mr Ray has been greatly affected by the fact of and manner of his dismissal, which took place in front of other employees and involved him being subjected to unwarranted abuse. He lost confidence as a result, as well as his family and him suffering greatly financially. Compensation in the sum of \$5,000, as claimed, is appropriate in all the circumstances.
18. Given Mr Okeby's complete absence of proper procedures before deciding that Mr Ray should be dismissed, the fact that Mr Ray had not been trained in proper procedures, the involvement of a more senior worker who kept his job and the fact that Mr Ray counselled against continuing to tow the all wheel drive vehicle, I find that there are no contributory actions by Mr Ray in relation to his dismissal.
19. I accept that Mr Ray has incurred costs of \$1800, plus expenses of \$150, in bringing his claim before the Authority. Given the refusal of either respondent to engage in the process, I find that it is appropriate to award Mr Ray 100% of these costs.
20. I therefore order the second respondent, Harbour City Tow & Salvage (2003) Limited, to pay to the applicant, Fraser James Ray, the following sums –
 - (a) \$6,766.16 gross in lost remuneration;

- (b) \$5,000 in compensation; and
- (c) \$1950 in costs and expenses.

21. After the conclusion of the investigation meeting a telephone message was left with a support officer of the Authority informing her that Mr Okeby was attending hospital for an MRI scan that morning and apologising for not informing the Authority earlier. A facsimile letter then arrived at 11am on Harbour City Tow and Salvage letterhead, written on behalf of Mr Okeby, claiming that he was waiting on a response from mediation and that he could not attend this morning because of ill health and an MRI test.
22. Despite the investigation meeting having been completed a support officer tried to contact Mr Okeby again. His office staff declined, once more, to allow any direct contact with Mr Okeby, indicating on this occasion that his cell phone had been left in the office.
23. In the absence of more detail, the likelihood that any MRI scan would be an appointment of long standing and given the history of the matter, particularly the factors set out in paragraphs two and three of this determination, I determined that the proper course was to issue my determination, as both respondents have had more than ample opportunities to take a full part in the Authority's investigation, but have chosen not to do so.

G J Wood
Member of Employment Relations Authority