

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 35
3000062

BETWEEN Peter Riley
Applicant

AND WHOLESALE CARS DIRECT
(4 X 4) LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Matt Anderson, for Applicant
Steve Bottrill, for Respondent

Investigation Meeting: 2 March 2017

Submissions received: On the day of the investigation on behalf of the
Applicant

Determination: 12 May 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The respondent, Wholesale Cars Direct (4x4) Limited is a car dealership located in Lower Hutt. Mr Gargz Young is the sole director of the respondent.

[2] Mr Peter Riley was employed by the respondent until 29 July 2016. At the time of his dismissal he had worked in its car processing and delivery team for approximately 3 years

although he worked for the business (albeit that it had been owned by several different entities) on and off for approximately 12-13 years.

[3] Mr Riley and Mr Young previously had a long history of friendship.

[1] In the week before his employment ended Mr Riley says he was suspended without pay, and later dismissed. He says his suspension and the dismissal were both unjustified. He seeks wages, compensation and costs associated with these claims.

[2] The respondent denies Mr Riley's dismissal was unjustified. It says Mr Riley's position became surplus to its requirements but accepts the process "*used* [to make that decision] *could have been better*".¹

The Authority's investigation meeting

[3] Having received witness statements and associated documents from both parties, the Authority's investigation into Mr Riley's claim was set down for 2 March 2017.

[4] Unfortunately, no one on behalf of the respondent or any of its witnesses were present when the investigation meeting was due to begin. On contacting the respondent's representative, Mr Steve Bottrill, he discovered he had misread the Notice of Investigation detailing the date and location on which the investigation meeting was scheduled to occur.

[5] Mr Bottrill then obtained instructions. He advised that the respondent was happy to have the Authority conclude the investigation based on the information it had sent and issue a determination on the matter.

[6] As is permitted by s 174E I have not referred to all the issues raised by the parties. Many of those matters are not relevant to the applicant's claims. Where I have been required to make findings these have been made on the balance of probabilities.

¹ Statement in Reply

Summary of relevant information

[10] The events leading to Mr Riley's dismissal are as follows:

[7] On 22 July 2016 Mr Young advised the respondent's employees -13 in total- that over the next few days he and General Manager, Mr Gabriel Smith, intended to meet staff individually and conduct reviews. The email stated:

So this round of reviews is aimed different...

..

Everything is up for discussion, what you do, how you do it, ... could be anything, but whatever it is that we need to achieve a high energy sales team....

[8] Having met with the majority of employees with the exception of Mr Riley who was on his rostered days off, on 25 July 2016 Mr Young sent out a group email rating individual performance. It is clear he was unhappy with the performance of some staff. Amongst other things the email stated:

I can make anyone redundant very easy just by shrinking the business.

...

I will reward the strong and replace the weak as after 10 years I have had enough and I'm tired of green being pulled down ...

[9] Mr Riley returned to work on 26 July 2016 and met with Mr Young and Mr Smith at 7.30am (or thereabouts). Both parties report that the meeting became increasingly hostile, although no evidence was given about what exactly was said, or done, and by whom. Each says the other caused the antagonism. It appears Mr Young presented a hypothetical incident and wanted Mr Riley to describe how he would respond to the matter. Mr Smith's written evidence suggests Mr Riley may have misunderstood the question. The meeting concluded on the instruction that Mr Riley was suspended for three days.

[14] Shortly after Mr Young sent an email to all staff. Amongst other things he said:

Peter has just been suspended for 3 days without pay for incompetence during processing checks, he totally missed the point and [Mr Smith] as Pete walked said "Pete's approach was the most sickening he's ever seen..."

If Pete doesn't come back on Monday, [Mr Smith] and I don't care as we are tired of doing so right and receive mistakes.

This whole process has been the most disappointing I have ever experienced but the largest let down ever ... being Pete just now, along with [another staff member] being a drink delivery boy.

[15] Mr Riley emailed Mr Young on 28 July 2016 indicating he wanted to deal with the issues amicably. He said his suspension was unjustifiable and that he was humiliated by the way his suspension was communicated to other staff. He advised that he considered the performance review to have been conducted unfairly but conveyed his hope that they would discuss matters further and come to a positive outcome.

[10] Mr Riley returned to work the following day and given a letter drafted by Mr Smith. The letter stated that the respondent's systems, processes, and responsibilities had been restructured over the course of the week. His job was said to be surplus to requirements. Mr Riley was informed he would be paid for the time he was suspended and would receive two weeks' wages in lieu of notice from that date.

[11] Mr Young called Mr Riley that evening. The pair quarrelled about whether the redundancy was genuine.

[12] On 8 August 2016 Mr Young obtained a trespass order to prevent Mr Riley coming to the car yard.

[13] It is apparent from the written statements that the relationship between Mr Riley and Mr Young has collapsed.

[14] Mr Riley raised a personal grievance on 25 August 2016 claiming he had been unjustifiably dismissed and disadvantaged.

[21] The parties attended mediation on 28 September 2016 but have not resolved their issues and it is now for the Authority to determine the matter.

The issues

[22] The Authority is required to determine;

- (a) whether Mr Riley was unjustifiably disadvantaged when he was suspended;
- (b) whether Mr Riley's dismissal was unjustified;
- (c) if so, what remedies should be awarded.

The law

[23] As with any claim where an employee alleges an unjustifiable disadvantage and/or dismissal, the obligation rests with the employer to establish that the action that give rise to the claim(s) was justified.

[24] The Authority looks at the employer's reasons for the decision it made and the process taken to reach that decision. Those actions are assessed against what a fair and reasonable employer could have done in all the circumstances at the time the action or dismissal occurred.²

[25] Section 4(1A)(c) of the Employment Relations Act 2000 (the Act) requires at an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees, to provide to the employees affected:

- (i) Access to information, relevant to the continuation of the employee's employment, about the decision; and

² Section 103A Employment Relations Act 2000

- (ii) An opportunity to comment on the information to their employer before the decision is made.

[26] Section 103A(3) sets out minimum standards of procedural fairness that the Authority must consider when it assesses an employer's action.

Was Mr Riley unjustifiably disadvantaged when he was suspended?

[15] It is only in unusual circumstances, for example, where health and safety concerns are prevalent, that an employer may suspend an employee without an employment agreement which allows for the event.³ Even where a written agreement exists and provides for suspension, the process taken to suspend the employee must be fair.⁴

[16] Further, where an employer has suspended an employee without pay, the Court has observed:

...In the absence of express agreement to suspension without pay, either in the applicable employment agreement or by agreement between the parties at the time, suspension without pay will not be justifiable other than in a few truly exceptional circumstances.⁵

[17] There was no written employment agreement between Mr Riley and the respondent, and therefore no contractual authorisation to suspend. On its face, the suspension appears to be a punitive response to the respondent's dissatisfaction with Mr Riley's conduct in the review meeting. The respondent provided no information to dispel that impression. In the absence of violence, or threats of violence, a verbal disagreement is unlikely to give sufficient cause to suspend an employee without his or her agreement or a fair process. There is no evidence of that nature here. The suspension precluded Mr Riley from working and receiving wages. I find he was unjustifiably disadvantaged by that action.

³ *Singh v Sherildee Holdings Ltd t/a New World Opotiki*, unreported EMC Auckland AC53/05 22 September 2005 at [91]

⁴ *Ibid* at [91]

⁵ *Ibid* at [94]

[30] I note Mr Riley was later paid for the days he was suspended and therefore no permanent loss of wages occurred, however, I will return to the effect of the suspension later in this determination.

Was Mr Riley unjustifiably dismissed?

[18] Although the cause for the purported restructure was not overtly expressed, the inference I take from the respondent's material is that it wanted to improve efficiencies and reduce costs.

[19] The statement of reply attached several documents dated mid to late February 2016 that refer to a downscaling of the respondent's business in the following month. The relevance of the material to the events leading to Mr Riley's dismissal 5 months' later was not explained.

[20] Prior to the Authority's investigation I asked the respondent to furnish the Authority with all information relevant to its decision to restructure in July 2016 and listed the kind of material I anticipated I should receive.⁶ Mr Smith's written statement makes brief reference to a work activity analysis, said to have been conducted on 28 July 2016, and a subsequent report to Mr Young. The report was not attached. Nor was I provided with any financial records or accounting information that would ordinarily accompany a restructuring purportedly conducted for cost saving purposes.

[21] It is arguable that Mr Young's email, as regards the impending review of staff activities, indicates a starting point for a future restructuring. I am not persuaded in this instance that this was the case. There is nothing in the 22 July 2016 correspondence that makes any reference to a restructure or redundancies. I further note that the email of 25 July following the review strongly suggests that the focus for WCD was aimed towards improving staff performance as demonstrated by the apportioning of individual performance ratings.

⁶ During a case management conference held on 19 December 2016

[35] Overall, the material provided to the Authority does not demonstrate a genuine basis on which to make an employee redundant or that WCD was contemplating the same at the time it dismissed Mr Riley.

[22] WCD has been unable to establish that there were substantive grounds on which it could genuinely declare Mr Riley's position was redundant.

[23] On balance I do not accept the assertion that Mr Riley's selection for redundancy was unrelated to the meeting of 26 July 2016. I consider the opposite is more likely. Whatever it was that was said or done to cause the ill feelings between Mr Riley and Mr Young, it triggered the decision to terminate Mr Riley's employment. If I were to accept an inference that Mr Riley's attitude and responses at the meeting was unacceptable, [noting that I have insufficient evidence to make that determination], in any event the respondent was obliged under s 4(1A)(c) to put those concerns to him and give him an opportunity to comment before it made the decision to dismiss him. The respondent's process in dismissing Mr Riley was not the action of a fair and reasonable employer in all the circumstances at the time the dismissal occurred. His dismissal was unjustified.

Remedies

Wages

[24] Where the Authority determines that an employee has been unjustifiably dismissed it is obliged to order the lessor of either remuneration proved to be lost or 3 months' ordinary time remuneration.⁷

[25] Mr Young says the respondent should not be liable for loss of wages. He says Mr Riley rejected his offer of alternative employment at another one of his car yards close by. Mr Riley says the offer came two months after he was dismissed. I accept he no longer had trust and confidence in an employment relationship that required him to report to Mr Young.

⁷ Section 128 Employment Relations

Having considered Mr Riley's evidence and the statements made in Mr Young's written evidence I consider it highly unlikely that an employment relationship could have been resuscitated and sustained. I do not consider Mr Young's offer of alternative employment was realistic in all the circumstances.

[40] Mr Riley found another job 12 weeks after his dismissal. Taking into account the respondent's payment of two weeks' wages in lieu of notice I calculate his losses over 3 months (13 weeks) as \$13,724.50.⁸

Compensation and contribution

[26] Mr Riley seeks compensation for the distress, humiliation and loss of dignity he suffered as a result of his suspension and his dismissal.

[27] A considerable portion of Mr Young's written statement is devoted to setting out the assistance he says he has given to Mr Riley over their lengthy friendship. Those matters, however, are not relevant to an assessment as to whether Mr Riley should be compensated for non-economic losses as a result of the actions that gave rise to his grievances.

[28] I accept Mr Riley was both humiliated and distressed by the way in which he was suspended, and then later dismissed. A global award of \$12,000 as compensation is appropriate. I have no doubt that the email advising staff of Mr Riley's suspension due to incompetence exacerbated the unfair process already undertaken. Anyone who received that correspondence would have, almost inevitably, deduced that there was a connection between the purported reason for the suspension and the dismissal shortly after. I accept Mr Riley's testimony that he has also lost the friendship of industry colleagues working for the respondent and also those who work at nearby car yards which he attributes to Mr Young.

⁸ WCD paid 2 weeks' wages in lieu of notice and is therefore entitled to a sum equal to 11 weeks' wages. This equates to 10 weeks at \$1,309.50 per week, plus 1 week's pay of \$629.50 (gross) being the difference between the amount Mr Riley would have earned if he had remained at WCD and the amount he was paid in his new employment.

[44] There is no evidence on which to find that Mr Riley contributed in a blameworthy and causative way to the situation that led to his dismissal. Remedies are not affected by contribution.

Costs

[29] Costs are reserved.

Orders

[30] I order Wholesale Cars Direct (4x4) Limited to reimburse and compensate Peter Riley with the following;

(a) \$13,724.50 (subject to PAYE deductions) pursuant to s 123(1)(b),⁹ and

(b) \$12,000 pursuant to s 123(1)(c)(i).¹⁰

Michele Ryan
Member of the Employment Relations Authority

⁹ Employment Relations Act 2000

¹⁰ Ibid