

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 94
3020178

BETWEEN MOREHU (MAURICE) ROLLO
Applicant

A N D MARCUS DEAN TRADING AS
DEAN AUTOMOTIVE
Respondent

Member of Authority: T G Tetitaha
Representatives: D. Prisk Counsel for the Applicant
Respondent in person
Investigation Meeting: 22 March 2018
Submissions received: On the day from both parties
0 Determination: 22 March 2018

ORAL DETERMINATION OF THE AUTHORITY

- A. Maurice Rollo was unjustifiably dismissed.**
- B. I order Marcus Dean to pay Maurice Rollo the sum of \$2,500 compensation under s 123(c)(i) and s 124 of the Employment Relations Act 2000.**
- C. I order Marcus Dean to pay Maurice Rollo one week's wages pursuant to s 131 of the Employment Relations Act 2000.**
- D. I order Marcus Dean to pay Maurice Rollo \$1,000 contribution towards his legal costs.**

Employment Relationship Problem

[1] Maurice Rollo was employed as a Yard Assistant by Marcus Dean. Mr Dean operates a car sales business throughout Auckland and following a period of bereavement leave Mr Rollo returned to work on 7 June 2017. Both parties seem to

accept there was some sort of heated discussion. Mr Rollo alleges he was unjustifiably dismissed. Mr Dean says he resigned with immediate effect.

No briefs/witness statements

[2] Both parties had agreed to deal with this matter on the basis they are not required to file briefs/witness statements. All of their evidence is contained in the parties' statements of problem and statements in reply and attachments. Mr Rollo did file a written statement because he is unwell and gave evidence by telephone. This hearing took less than half a day with both parties able to put their respective cases quickly and succinctly.

The Law

[3] Dismissal is "the termination of employment at the initiative of the employer".¹ A dismissal includes a "sending away".²

[4] The duty of good faith requires employers to inquire further after 'heat of the moment' actions by an employee. The Employment Court has held that where an employer is faced with a walk-off by an employee, the good faith obligation in s 4(1A)(b) of the Employment Relations Act 2000 to be "active and constructive in ... maintaining a productive employment relationship" requires the employer to investigate further and ensure that "its response is based on the employee's actual intentions".³

Determination

[5] There was clearly a dispute about whether Mr Rollo had resigned on 7 June or not. Mr Rollo gave evidence he told Mr Dean he was "ripping him off" over bereavement leave because he was entitled to 3 days paid leave. He alleges Mr Dean said to him "well if you don't like it you can fuck off". He then said "ok I'm not going to argue" placed his keys on the desk and left. The next day he received his final pay including leave entitlements and one week's pay in lieu of notice.

¹ *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 103.

² *Actors IUOW v Auckland Theatre Trust Inc* [1989] 2 NZLR 154, (1989) ERNZ Sel Cas 247 (CA).

³ *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164 at [32].

[6] Mr Dean denied saying “fuck off”. He accepted Mr Rollo accused him of ripping him off and he was offended. He accepts he did say “Maurice if you really feel I’m ripping you off maybe you should work somewhere else” but this was at the beginning of a 20 minute heated discussion before Mr Rollo quit.

[7] Mr Dean’s statement alone would be sufficient at law to equate to a sending away or a dismissal. Mr Rollo’s subsequent actions were in reaction to Mr Dean’s sending away. This was not a resignation. At best it was questionable.

[8] Rogan Stone, another worker for Mr Dean confirmed Mr Rollo’s agitated state throughout the 20 minute conversation. He also confirmed Mr Rollo did not say he quit but threw his keys at Mr Dean.

[9] Thidarat Dean, Mr Dean’s wife confirmed she rung Mr Rollo on 7 June looking for Mr Dean. Mr Rollo told her he had quit. Mr Rollo denied any conversation occurred.

[10] Whatever Mr Rollo’s state of mind was at that stage, his employer could not have known if he was resigning or not. It is the employer’s duty to make enquiries of their employees. Mr Dean cannot rely upon his wife’s short conversation as satisfying him about resignation.

[11] Mr Rollo stated in evidence at hearing that if Mr Dean had rung him back he would have come back to work or tried to work something out. Mr Dean’s evidence about why he did not ring Mr Rollo after this altercation is that he was hurt by Mr Rollo’s allegations. This is particularly given Mr Dean had made substantial efforts to support Mr Rollo through his illness.

[12] The evidence showed Mr Rollo exhibited this type of behaviour before and returned to work. I understand from Mr Dean that Mr Rollo worked on another car yard he owned with a business partner. Despite this behaviour which Rogan Stone saw and described as “throwing his toys out of the cot”, Mr Rollo remained employed for some 3 years with Mr Dean. It was clear this is not the first time Mr Rollo has resigned or acted in this kind of manner.

[13] For an employer to accept a resignation from an agitated employee in these circumstances does not meet the tests for showing this resignation was certain or in the heat of the moment. In these circumstances the duty of good faith requires Mr

Dean to allow a cooling off period before discussing what happened. This is to ensure he is well aware whether Mr Rollo has genuinely quit or not. However it is clear no further correspondence has occurred between these parties.

[14] Maurice Rollo was unjustifiably dismissed.

Remedies

[15] Following the finding of a personal grievance Mr Rollo is entitled to seek the remedies of lost wages and compensation.

Lost wages

[16] There is little evidence of mitigation of Mr Rollo's loss. I am also aware Mr Rollo had terminal cancer at the time and he is currently incapable of working the same hours he had with Mr Dean. I am uncertain from evidence as to whether he ever was capable of working those same hours at all since the dismissal. In the circumstances I decline to make any award of lost remuneration.

Compensation

[17] In terms of compensation the evidence was of hurt from the loss of Mr Dean's friendship and his family. Mr Dean made large efforts to support Mr Rollo during his illness including reducing his workload and allowing paid days off to accommodate treatment. This has meant Mr Rollo lost the support Mr Dean provided to ensure he could remain in the workforce.

[18] This evidence would usually result in an award in the lower band of compensation or \$5,000 subject to any reduction for contributing behaviour.

Contributory conduct

[19] An employee's conduct may be relevant to remedies. Section 124 of the Employment Relations Act 2000 requires the Authority "consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance" in deciding the nature and extent of remedies to be provided in respect of a personal grievance.

[20] In order for contributing behaviour to be taken into account in the reduction of remedies, the actions of the employee must be both causative of the outcome and blameworthy.⁴

[21] There is little doubt Mr Rollo's agitated state created this incident. While he may have been grieving due to the death of a relative it was somewhat unwise to seek to take that out on his employer. It is accepted there were raised voices and Mr Rollo was, according to Mr Stone, the main agitator. It is Mr Rollo's actions that caused the dismissal. Those actions were also blameworthy. A reasonable employer would have been entitled to take disciplinary action.

[22] Therefore I have reduced compensation by 50%. I order Marcus Dean to pay Maurice Rollo the sum of \$2,500 compensation under s 123(c)(i) and s 124 of the Employment Relations Act 2000.

Wage arrears

[23] Because I have found Mr Rollo was dismissed he is also entitled to payment of the two week notice period under his employment contract. Mr Dean has paid already one week's notice in lieu. I order Marcus Dean to pay Maurice Rollo one week's wages pursuant to s 131 of the Employment Relations Act 2000.

Costs

[24] After hearing from both parties costs are appropriate to be awarded. The hearing was relatively short due to both parties ability to deal with matters on a no briefs basis and keeping their examination short and succinct. I also take into account the result in terms of proportionality of costs to be awarded.

[25] I order Marcus Dean to pay Maurice Rollo \$1,000 contribution towards his legal costs.

T G Tetitaha
Member of the Employment Relations Authority

⁴ *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49].