

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 394
5385829

BETWEEN JASON ROWLAY
 Applicant

A N D CONTRACT WAREHOUSING
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: May Moncur, Advocate for Applicant
 Rod Giles, Managing Director of Respondent

Investigation Meeting: 16 October 2012 at Auckland

Date of Determination: 13 November 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Rowlay was dismissed by Contract Warehousing Limited on 31 May 2012.**
- B. Mr Rowlay's dismissal was justified.**
- C. Costs are to lie where they fall.**

Employment relationship problem

[1] Mr Jason Rowlay says that his former employer, Contract Warehousing Limited (Contract Warehousing), dismissed him unjustifiably from his position as dispatch coordinator. He seeks compensation and reimbursement for lost wages.

[2] Contract Warehousing says that Mr Rowlay was not dismissed, he made it clear he no longer wished to be employed by Contract Warehousing and agreed to leave following payment of wages in lieu of notice.

Issues

[3] The following issues require determination:

- (a) Was Mr Rowlay dismissed?
- (b) If Mr Rowlay was dismissed, was the dismissal justified?

Background

[4] Contract Warehousing is a warehousing and distribution specialist located in East Tamaki. Mr Rodney Giles is its sole director and the managing director.

[5] In February 2011, Mr Giles was approached by Mr Rowlay's stepmother, Lisa Rowlay, who was employed by Contract Warehousing as account manager in the administration office. Ms Rowlay asked Mr Giles whether there were any jobs at Contract Warehousing for Mr Rowlay who was unable to obtain employment at the time.

[6] As a result of this conversation, Mr Rowlay was interviewed by the warehouse manager, Bert Riley, and offered employment. Mr Rowlay was initially employed as a part time general storeperson within Contract Warehousing's third party warehousing operation. Mr Rowlay was provided with an individual employment agreement which he signed and returned on 14 February 2011.

[7] Mr Rowlay gained experience in the various aspects of Contract Warehousing's warehouse and packing operation and Mr Giles found him to be very good at his job. Mr Rowlay was subsequently offered and accepted a permanent position as freight coordinator within the warehouse.

[8] In a letter dated 30 June 2011, Mr Giles confirmed Mr Rowlay's appointment to the new role and his new rate of pay effective from 21 July 2011. The letter also said:

Please be assured should you need support or assistance in this role in any manner then you are free to contact myself or Kevin and discuss matters as required. Further to this I do wish to thank you for your past efforts and look forward to working with you in this role in the future.

[9] Kevin McMahon was employed in June 2011 as Branch Manager, and Mr Rowlay reported to him.

[10] From Mr Giles' perspective, he was happy with Mr Rowlay's work performance and believed the employment relationship to be working well.

[11] Mr Rowlay says he enjoyed the work because it was busy and challenging but says there were a number of issues which concerned him. Mr Rowlay says he was promised the opportunity to train for and obtain his forkhoist licence which he needed for his job. However, after he was unable to attend the course in March 2012 because his mother was hospitalised, he claims he was not allowed to go on another course. Mr Rowlay was concerned that there were no health and safety kits, described the kitchen and bathrooms as disgusting and that a pillar racking was not securely grounded. Mr Rowlay says he raised these matters repeatedly with Mr McMahon but nothing was done.

[12] Mr McMahon denies Mr Rowlay raised these matters with him repeatedly. Mr McMahon says that about a month after Mr Rowlay was unable to go on the forkhoist training course, there was another opportunity for him to do so. Mr McMahon had arranged for a new employee Ben to go on the course and for an existing employee Adrian to do a refresher. Mr McMahon intended all 3 employees to go on the course together. However, Mr McMahon says Mr Rowlay decided he did not need to attend the course as he was not required to use a forkhoist in his role. The other two employees attended the course.

[13] Mr McMahon says Mr Rowlay raised the issue of health and safety kits with him and he ensured there were sufficient kits available. Mr McMahon has no recollection of Mr Rowlay raising any concerns about the bathroom and kitchen or pillar rackings being unsecure. None of these matters were raised by Mr Rowlay with Mr Giles despite the invitation by Mr Giles in his letter to Mr Rowlay of 30 June 2011, to discuss matters with him "*as required*".

[14] While Mr Rowlay says he enjoyed the work he was doing at Contract Warehousing, his goal was to obtain employment at Air New Zealand. Mr Rowlay had undertaken a 4 month course in flight attending and this was where his real interest lay. In about February 2012, Mr Rowlay applied for a position in the call

centre at Air New Zealand but was unsuccessful. This was no secret and he informed Kirsty Giles, Mr Giles' PA of this in an email dated 10 April 2012.

[15] In mid April 2012, Mr Rowlay had an accident at home and injured his back. Mr Rowlay took sick leave from 17-24 April 2012 for which he received accident compensation. Upon his return to work, Mr Rowlay attended physiotherapy sessions on two afternoons a week and then his doctor required that his work hours reduce to six hours per day, rather than 8. This situation continued until 31 May 2012 which was Mr Rowlay's final day of work.

[16] During April/May 2012, some relevant events took place. The first of which was Mr Rowlay's concern over health and safety at Contract Warehousing. In late April/early May 2012, unbeknown to Mr Giles or Mr McMahon, Mr Rowlay lodged a complaint with a Health and Safety Inspector (Inspector).

[17] Another matter was Mr Rowlay's employment agreement and his request to meet with Mr Giles to discuss it. On 21 May 2012, Mr Giles and Mr Rowlay met and Mr Rowlay requested that his new job description be inserted into his employment agreement along with his new pay rate. The meeting went well and there was no disharmony. Mr Giles immediately made the necessary changes to the employment agreement and gave it to Mr Rowlay who took it away and returned it signed on 23 May 2012. This meeting would have been an opportune time for Mr Rowlay to raise any health and safety or employment related issues with Mr Giles, but he did not do so.

[18] On the morning of 23 May 2012, Mr Giles received a phone call while in a meeting to say an Inspector wished to meet with him because of a complaint that had been made about health and safety issues. This was the first Mr Giles had heard about the complaint. The Inspector attended Warehouse Contracting offices and met with Mr Giles and Mr McMahon but would not disclose who had complained. Mr Giles says there were a couple of relatively minor matters relating to the lunchroom and toilets discussed and which he attended to, to the satisfaction of the Inspector.

[19] Other relevant issues during April and May 2012 included Mr Giles' concern about the amount of time off three staff members were taking, including Mr Rowlay and the financial situation of Contract Warehousing. Mr Giles asked Mr McMahon to

talk to the three staff members concerned, which he did. Mr Rowlay was spoken to on 28 May 2012.

[20] On 29 May 2012, Mr Giles held a staff meeting and talked about a number of issues including the state of the company financially and the importance of work attendance given the service nature of the business. Mr Rowlay says this comment was aimed at him. Mr Giles denies targeting Mr Rowlay and says the issues involved all staff and it was appropriate that he raise these at the meeting.

[21] The other relevant matter was that Mr McMahon had received reports from two staff members, Amanda and Joel that Mr Rowlay was not being as helpful as he could be in dispatch and was saying he did not want to be “*stuck doing freight*”. Mr McMahon added this matter to his weekly report of 18 May 2012, for Mr Giles’ information. Mr McMahon noted in his report as follows:

Jason – seems to be stirring things up a bit and wants his role defined in his contract, and is making noises about not wanting to do freight.

[22] On 31 May 2012, Mr McMahon and Mr Giles were discussing a number of issues including the issue that Mr Rowlay was “*stirring things up*” and did not wish to be “*stuck doing freight*”. Mr Rowlay had not raised these matters with Mr Giles at their meeting a week prior to update his employment agreement. Mr Giles decided to ask Mr Rowlay up for a chat so that he could get to the bottom of the matter. The meeting was to get to the bottom of why Mr Rowlay had been making comments to other staff about his contract and not wanting to work in freight.

[23] According to both Mr Giles and Mr McMahon, the meeting began well but deteriorated rapidly. Mr Giles says that Mr Rowlay “*opened a floodgate of personal abuse*” “*he hated his job, hated working for me in fact I do not recall anything that he said that he did like*”.

[24] Mr McMahon says that Mr Rowlay began saying how much he disliked the job, disliked working for Mr Giles and made strong statements that he really did not want to be there. According to Mr McMahon, Mr Rowlay used words to the effect that if he had an opportunity elsewhere he would be leaving. Mr McMahon was very surprised.

[25] Mr Rowley says that he was asked by Mr McMahon to attend a meeting with Mr Giles in the board room on 31 May and was not asked if he could bring a support person. Mr Rowley says he felt “*bullied and intimidated*” as it was two on one and his views were not being listened to. Mr Rowley says an “*out of control argument*” ensued. After telling Mr Giles he had made a complaint to the Inspector about health and safety, Mr Rowley says Mr Giles informed him that he would “*lay him off*” in any way he could. Mr Rowley says he protested that he had done nothing wrong and the only way Mr Giles could make him leave was to make him redundant. Mr Giles denies this and says Mr Rowley told him he wanted to leave and wanted redundancy. Mr Giles says he responded that he could not make Mr Rowley redundant as he was in a key role and would have to be replaced. Clearly, the meeting became very heated.

[26] The evidence of Mr Rowley on the one hand and Mr Giles and Mr McMahon on the other about what was said at the meeting is in conflict. I prefer the evidence of Mr Giles and Mr McMahon.

[27] Mr Rowley did not present as a credible witness. When questioned about Mr Giles’ evidence that he wanted to leave and get redundancy, Mr Rowley denied this saying he “*loved*” his job. However, Mr Rowley was looking for another job and had recently applied for and been unsuccessful for a position at Air New Zealand.

[28] Further, during the investigation meeting, Mr Rowley said he did not like Mr Giles’ management style and accepted he had spoken about him in derogatory terms to staff in dispatch. Joel Hilton, with whom Mr Rowley worked, said Mr Rowley often spoke about Mr Giles badly and would talk about how he could take Mr Giles to “*the Labour Department*” and “*get money out of him.*” Mr Rowley’s insistence that he “*loved*” his job is unconvincing.

[29] The health and safety issues raised by Mr Rowley were relatively minor and were dealt with immediately by Mr Giles to the satisfaction of the Inspector. During the investigation meeting Mr Rowley informed the Authority that half the staff with whom he worked in dispatch “*are druggies*”. However, Mr Rowley said it did not occur to him that this could be a serious health and safety issue he could have raised with the Inspector. This is hard to believe from someone so concerned about health and safety and who knew the avenues in which to raise such matters.

Was Mr Rowlay dismissed?

[30] It is my finding that, at the first meeting on 31 May 2012 attended by Mr Giles, Mr McMahon and Mr Rowlay, Mr Rowlay became angry and told Mr Giles that he did not like his job, did not like working for Mr Giles and that if he could leave he would as he no longer wanted to work at Contract Warehousing.

[31] Following this first meeting on 31 May 2012, Mr Giles says that because Mr Rowlay was very clear and explicit that he no longer wished to work for Contract Warehousing or with Mr Giles, he was given very little choice but to come up with a proposal to enable Mr Rowlay to leave. Mr Giles informed Mr Rowlay that he would reflect on what he had said and get back to him. About 2 hours later, a further meeting was held at which time Mr Giles provided Mr Rowlay with a letter stating:

I wish to confirm that following the meeting held between yourself, Kevin McMahon and myself this morning during which time you stated that you were unhappy in my employment and wished you could be made redundant as you did not wish to continue in my employment, I have decided to accept your request to cease employment by my company. Under terms of your contract of employment there is a two week notice period of resignation or redundancy as is shown in your employment contract as you are aware having recently asked for a copy of your contract in your current position. I understand that currently you are being treated for a back injury that occurred offsite and as part of your treatment are currently able to work 6 hours per day. Due to this injury I have chosen to suspend you for the two week stand down period at the paid work hours allowed as per the attached medical certificate. Your final day of employment will be Thursday 14 June 2012.

*Yours faithfully,
R H Giles
Managing Director*

[32] Mr Rowlay read the letter and asked if he could receive the payment in one lump sum, to which the response was that he could not. Mr Rowlay returned his uniforms, packed up his possessions and left.

[33] Approximately two hours later, Mr Giles received an email from Mr Rowlay saying:

Rod,

I am writing to you in regards to the letter I received from yourself this morning. I have been reading through the letter and in discussions with the Labour Department I have been advised that this letter titled (redundancy/resignation request) is not valid as it must be one or the other. I wish to confirm at this point that I did not request resignation. You told me that you would be making me redundant

and this letter is not justifiable. I am requesting another letter to confirm my redundancy. Any correspondence in regards to this please send me via this email address.

*Thanks,
Jason Rowlay*

[34] The question now is whether Mr Rowlay was dismissed at the second meeting on 31 May 2012.

[35] Mr Rowlay did not resign at the first meeting on 31 May 2012, he told Mr Giles and Mr McMahon in no uncertain terms he no longer wished to work at Contract Warehousing. Mr Giles formed the view that the working relationship was no longer tenable. Mr Giles presented Mr Rowlay with a letter stating what he would pay Mr Rowlay and confirming Mr Rowlay's final day of employment.

[36] It is my finding that the letter from Mr Giles to Mr Rowlay at the second meeting on 31 May 2012, although Mr Giles termed it an offer was in reality notice of termination of employment.

[37] It is my finding that Mr Rowlay was dismissed at the second meeting on 31 May 2012.

Was the dismissal unjustified?

[38] Section 103A(2) of the Employment Relations Act 2000 (the Act) states:

The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[39] Section 103A requires the Authority to consider the employer's conduct against a range of responses open to a fair and reasonable employer on an objective basis. If the decision to dismiss Mr Rowlay falls within this range, then the dismissal will be justified.

[40] What are the outcomes open to a fair and reasonable employer in all the circumstances, given Mr Rowlay's conduct? In this case, Mr Rowlay's misconduct was the clear statement to Mr Giles that he did not like Mr Giles, did not like working for Mr Giles and did not like the job and it was only because there were no other opportunities available to him that he still remained there. The employment

relationship had become untenable, Mr Rowlay's conduct had destroyed the basic confidence or trust that is an essential element of an employment relationship¹.

[41] For the above reasons I conclude Mr Rowlay's dismissal on 31 May 2012 was justified.

[42] If I am wrong and the termination of Mr Rowlay's employment is deemed unjustified, I am required to consider Mr Rowlay's contribution under s124 of the Act. Mr Rowlay was entirely responsible for the events giving rise to the personal grievance and any remedy to which he may have been entitled would be reduced accordingly and no order for remedies made.

Costs

[43] I order costs to lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations Authority

¹ *Northern Distribution Union v. BP Oil NZ Ltd* [1992] 3 ERNZ 483