

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 185/08
5131611

BETWEEN JAY SHADBOLT
 Applicant

AND STAR MOVING LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: David Goldwater, Counsel for Applicant
 Stuart Biggs, Advocate for Respondent

Investigation Meeting: 22 October and 27 November 2008 at Christchurch

Determination: 9 December 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Shadbolt) was employed by the respondent (Star Moving) as what is known as an *offsider* and worked in that capacity loading and unloading vehicles and assisting the driver of those vehicles until he alleges that he was unjustifiably dismissed on 17 June 2008.

[2] Star Moving deny that Mr Shadbolt was unjustifiably dismissed and contend that he abandoned his employment.

[3] Mr Shadbolt worked principally with a truck driver called Lenze Pander. Mr Shadbolt says there were difficulties in this relationship and Mr Pander bullied him.

[4] However, Mr Shadbolt was clear in his evidence that he only told his manager Mr Rowe about one of the alleged instances of bullying and Mr Rowe told me in his

evidence that he had dealt with that incident promptly by speaking directly with Mr Pander. I accept Mr Rowe's evidence on that point.

[5] I think Mr Shadbolt now understands that an allegation of bullying supported by a number of instances has little force or effect unless the employer is made aware of all of the allegations and is able to deal appropriately with them, conducting whatever investigations may be required.

[6] On 17 June 2008, the evidence is that Mr Shadbolt was called to Mr Rowe's office and there was a discussion about an allegation that Mr Shadbolt had threatened another employee. Mr Shadbolt told me that Mr Rowe yelled at him and told him that threatening other employees was not appropriate and that Mr Rowe refused to tell Mr Shadbolt who Mr Shadbolt was supposed to have threatened.

[7] Conversely, Mr Rowe told me that he tried to get some information from Mr Shadbolt about the allegation and that Mr Shadbolt simply *nuttet off*, removed his company uniform shirt, threw that on the floor, stormed out of the office and then walked out of the gate. Mr Rowe said that on that basis, he never ever got to find out what if anything Mr Shadbolt had to say about the allegation.

[8] Mr Shadbolt's version of events was that he asked Mr Rowe who he was supposed to have threatened, Mr Rowe refused to tell him, Mr Rowe said instead that Mr Shadbolt ought to be fired and Mr Shadbolt then claims to have said that if Mr Rowe was going to make false accusations he didn't much care. Mr Shadbolt said that Mr Rowe then told him to get his company uniform shirt off and *fuck off*.

[9] This interview happened mid morning and during the balance of the day it is common ground that there would four calls initiated by Mr Shadbolt to Mr Rowe in which the problems between the parties were canvassed again. Mr Shadbolt says that Mr Rowe hung up on him each time and that he (Mr Shadbolt) was forced to ring back. However, Mr Rowe says that Mr Shadbolt knew perfectly well that he was alone in the office and that he had to ring off in order to deal with incoming calls from customers.

[10] Mr Shadbolt's own evidence is that in the first call to Mr Rowe, Mr Rowe continued to refuse to tell him who he was supposed to have threatened but that Mr Rowe denied dismissing Mr Shadbolt and considered that Mr Shadbolt had *walked out*. The second call appears to have been cut short by Mr Rowe's other duties, but in

the third call Mr Shadbolt says that he asked for his job back and Mr Rowe told him to *get your arse back here and clean trucks*. Mr Shadbolt's position was that truck cleaning was not part of his responsibility and so he thought the allocation of this duty was inappropriate.

[11] On the fourth call Mr Shadbolt asked specifically if he could come back as an *offsider* and he says Mr Rowe repeated that he was to get *his fucking arse in and clean trucks or get a lawyer*.

[12] Mr Rowe broadly accepted the evidence of Mr Shadbolt in relation to these calls, but he wanted to make clear in his evidence that cleaning trucks was indeed part of Mr Shadbolt's responsibility. He said that in fact, all staff cleaned trucks from time to time as it was part of the company's enthusiasm for keeping the vehicles looking smart for customers.

[13] There is no completed employment agreement between the parties to verify exactly what Mr Shadbolt was supposed to be doing. Mr Rowe said that Mr Shadbolt was supplied with a copy of the employment agreement but that it was never returned despite reminders. Mr Shadbolt denies ever having received a copy.

[14] In the result, Mr Shadbolt did not return to the workplace and subsequently raised his personal grievance alleging unjustified dismissal.

Issues

[15] The first issue for determination by the Authority is whether Mr Shadbolt was dismissed, or abandoned his employment as Star Moving alleges.

[16] Next, the Authority needs to decide what happened on the day the employment ended, after Mr Shadbolt left the employer's premises.

[17] Finally, the question of whether Mr Shadbolt has a personal grievance or not, needs to be canvassed.

Was Mr Shadbolt dismissed?

[18] I am satisfied on the balance of probabilities that Mr Shadbolt was not dismissed from his employment. Simply stated, I prefer the evidence of Mr Rowe to the evidence of Mr Shadbolt. Mr Rowe's evidence was that he endeavoured to

conduct what amounted to an investigatory meeting on the last day of Mr Shadbolt's employment, in order to establish what Mr Shadbolt had to say about the allegation that he had threatened a co-worker.

[19] Clearly, there was a heated discussion with Mr Shadbolt taking it that he had been dismissed but Mr Rowe being equally clear that he was in no position to contemplate dismissal because he simply did not know what the facts were about the allegation which he was endeavouring to investigate.

[20] Mr Rowe struck me as a straight forward and honest witness and it is disappointing to have to record that the Authority might well have been deprived of the opportunity of hearing from Mr Rowe at all, if Star Moving had had its way. In the result, I summoned Mr Rowe to appear and the effect of his appearance has, as I have just indicated, materially affected the outcome of the case. It is disappointing that Star Moving adopted the aggressive and unhelpful approach to the Authority's investigation, when, as I have just indicated, they had an excellent witness in Mr Rowe.

[21] Even on Mr Shadbolt's own recollection of events, it seems to me that it is more rather than less likely that there was no dismissal at the meeting between the two men on 17 June 2008. In Mr Shadbolt's evidence before the Authority, he said that Mr Rowe told him at that meeting that *he should fire me for it* meaning for threatening co-workers but Mr Shadbolt makes no mention of Mr Rowe actually dismissing him.

[22] Moreover, in his evidence about the subsequent telephone discussions between the parties Mr Shadbolt told me in his oral evidence that in the first of those, Mr Rowe denied dismissing him.

[23] On balance, I think there was an intemperate discussion at the meeting on 17 June 2008 wherein Mr Rowe sought information about the alleged threats and Mr Shadbolt, for whatever reason, did not respond. I do not think that Mr Rowe dismissed Mr Shadbolt at this meeting (based on the evidence I heard) but it is clear that Mr Shadbolt left the office and then immediately thereafter left the workplace.

[24] On the basis of my analysis then, Mr Shadbolt has had a heated discussion with his manager but there has been no termination of the employment and he has left the workplace.

What happened after the meeting?

[25] There is a deal of common ground between the two principal protagonists as to the events after the meeting. It is common ground that there were four telephone discussions between the parties each of which was terminated by Mr Rowe and then reconnected by Mr Shadbolt. Mr Shadbolt says that Mr Rowe hung up in his ear on each occasion; Mr Rowe says that he was forced to terminate each call because he was the only person in the office then, and he was having to deal with customers.

[26] I have already referred to some of the evidence relating to the first call, where even on Mr Shadbolt's evidence, Mr Rowe denied dismissing Mr Shadbolt. Mr Shadbolt records Mr Rowe as adding, in that first conversation, that Mr Rowe considered that Mr Shadbolt had *walked out*.

[27] In the third call, Mr Shadbolt indicates that he *asked for his job back*. Mr Rowe told him allegedly to *get your arse back in and clean trucks*. Mr Shadbolt did not act on that suggestion as he did not consider this part of his duties.

[28] In the fourth call Mr Shadbolt says that he asked Mr Rowe specifically whether he could return as a *offsider* and Mr Rowe repeated the necessity for Mr Shadbolt to come back and clean trucks.

[29] Mr Rowe accepts the thrust of the exchanges between himself and Mr Shadbolt, as expressed in Mr Shadbolt's evidence, as broadly accurate. He makes one correction however. He says that Mr Shadbolt's role did in fact include cleaning the trucks.

[30] On any analysis of the factual matrix, and noting that there is a significant measure of common ground about these four telephone calls, even if I am mistaken in judging that there was no dismissal in the initial meeting between the two men, it is plain that in the third and fourth calls after the meeting, Mr Rowe reiterated, not once but twice that Mr Shadbolt should return to the job and commence working again. By making these statements Mr Rowe deals with any residual doubt that his earlier conduct could be interpreted as intending a dismissal,

[31] The reason that Mr Shadbolt determined not to take this suggestion up was his mistaken belief that the particular duties allocated to him by Mr Rowe were not part of his job description. I am satisfied, based on the evidence I heard, that cleaning

trucks was part of Mr Shadbolt's duties and that, in effect, Mr Rowe was giving Mr Shadbolt an instruction to attend to that particular duty and Mr Shadbolt certainly was in no position to pick or chose what he might or might not do.

Does Mr Shadbolt have a personal grievance then?

[32] I have already decided that Mr Shadbolt was not dismissed from his employment and in fact that he ultimately made the decision to walk away from the employment himself. Clearly it follows from that conclusion that I cannot find Mr Shadbolt having suffered a personal grievance by reason of an unjustified dismissal.

[33] However, I think there are deficiencies in the process used by Mr Rowe in conducting the investigation about the alleged threat to another staff member. In particular, Mr Shadbolt's evidence is that he was understandably anxious to obtain the details about the alleged threat, in particular who it was that he was supposed to have threatened and what the terms of that threat was.

[34] I am satisfied both from Mr Shadbolt's evidence and from Mr Rowe's own evidence that Mr Rowe would not tell him what the nature of the threat was and who the threat was directed at. That is not good enough and despite Mr Biggs' protests on behalf of Star Moving, does not comply with the law. There is no question that an employee who is being accused by their employer of wrongdoing is entitled to have the nature and extent of the wrongdoing clearly and unequivocally spelt out so that they can respond to it.

[35] If Mr Shadbolt had been minded to respond to the allegation about the threat (as he should have), he would need to have been given sufficient particularity about the alleged offence to be able to comment on it appropriately. In the absence of that information, he could not be expected to respond to the allegation. That is an unfair process and of itself produces a personal grievance.

[36] Of course, the Authority has a statutory power to find a personal grievance to be of a different type from the one alleged: s.122 Employment Relations Act 2000. This is such a case. Mr Shadbolt has claimed a personal grievance on the grounds of unjustified dismissal and as I have already made clear, I do not find the existence of such a grievance. However, I am satisfied that Mr Shadbolt has suffered disadvantage as a consequence of an unjustified action by Star Moving.

[37] If Star Moving (through Mr Rowe) had told Mr Shadbolt in clear terms what precisely he was supposed to have done, then it is conceivable that all this unpleasantness may have been avoided. Mr Rowe might have got an answer to his question and Mr Shadbolt might still be in employment. In the result, because Mr Rowe incorrectly refused to give Mr Shadbolt detail about what he was accused of, Mr Shadbolt did not respond to Mr Rowe's inquiries and the relationship of employment came to an end.

Determination

[38] I have made a finding that Mr Shadbolt has not suffered a personal grievance by reason of having been unjustifiably dismissed but conversely, I have decided that Mr Shadbolt has suffered a disadvantage as a consequence of the unjustified action of Star Moving when Star Moving refused to provide Mr Shadbolt with details of the allegation that he was being accused of.

[39] As I indicated, if Mr Shadbolt had been provided with that information, he might well have responded to it and the outcome might well have been quite different for both parties. I am of course not pre-judging the question of what Mr Shadbolt might have said about the alleged threat. However, the point is that even if Mr Shadbolt had pleaded to the allegation, that might have resulted in a disciplinary response short of a dismissal and the parties might well have been able to resurrect their employment relationship.

[40] As it was, the refusal to provide that information to Mr Shadbolt obviously affected Mr Shadbolt's equilibrium (understandably so) and the effect of the failure of Star Moving to provide that information may well have been significant in the scheme of things.

[41] I need to consider the question of whether Mr Shadbolt contributed in any way by his behaviour to the events leading to his personal grievance. I reach the conclusion that he has made no contribution whatever to the circumstances of the personal grievance. It is important to differentiate between the circumstances giving rise to the personal grievance on the one hand (which effectively is the employer's decision to deprive Mr Shadbolt of information about what he is accused of) and the possibility that Mr Shadbolt may have threatened a co-worker. That latter possibility (and it can be no more than that) cannot excuse the employer's failure to act fairly. It

follows that I find there is no contribution from Mr Shadbolt to the circumstances surrounding the personal grievance.

[42] To remedy Mr Shadbolt's personal grievance, I direct that the following sums be paid to him:

- (a) Compensation under s.123(1)(c)(1) of the Employment Relations Act 2000 in the sum of \$2,500;
- (b) Costs of \$750.

[43] I am unable to award lost wages to Mr Shadbolt as I am not satisfied that Mr Shadbolt has *lost remuneration as a result of the personal grievance* as required by s.128(1)(b) of the Employment Relations Act 2000. Having not found the grievance to be one of an unjustified dismissal, and having concluded that Mr Shadbolt has a different kind of grievance, I am not satisfied that the nexus between the grievance that I have found and the lost remuneration exists, in order to make the award requested.

James Crichton
Member of the Employment Relations Authority