New Zealand Employment Relations Authority Decisions

Short v Resource Holdings Ltd WA 143/07 (Wellington) [2007] NZERA 708 (25 October 2007)

Last Updated: 19 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 143/07 5079389

BETWEEN Gavin Short Applicant

AND Resource Holdings Limited Respondent

Member of Authority: Denis Asher Representatives: Graeme Ogilvie for Mr Short

Costas Matsis for the Company Investigation Meeting Wellington, 23 October 2007

Determination: 25 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In his statement of problem filed in the Authority on 22 February 2007 Mr Short said he was unjustifiably dismissed, that the Company had failed to provide reasons for the dismissal and that he was owed wages and holiday pay. He claimed unspecified wages and holiday pay, wages in lieu of notice and payment for wages lost after dismissal, $10,000 compensation for humiliation, etc and costs.

[2] Mr Short subsequently amended his claim to also seek a penalty for the Company's failure to provide him with a written employment agreement, as well as its alleged failure to put in writing the reasons for the termination of his employment.

[3] In its statement in reply filed in the Authority on 12 July the Company said Mr Short's dismissal was justified and if it was not his actions amounted to 100% contributory fault.

[4] The parties underwent mediation but were unable to settle their employment relationship problem.

[5] The parties subsequently agreed to a one day investigation in Wellington on 23 October 2007. They usefully provided witness statements in advance of the investigation. Efforts by the parties during the investigation to settle the matter on their own terms were unsuccessful.

[6] At the conclusion of the investigation the parties agreed to address and attempt to resolve Mr Short's claims for wages owed to him, including arrears.

[7] Later on the day of the investigation and as agreed, and in support of its claim that Mr Short reported late for work on 19 November 2006, the Company provided the Authority and the applicant with computer information recording the arrival times for motel guests picked up from the airport on that day.

Background

[8] Mr Short commenced his employment with the Company on or about 20 March 2006 by way of a job plus subsidy arrangement through the Ministry of Social Development.

[9] Mr Short's roles with the Company included working with a builder, selling billboard space and, finally, that of night porter/motel manager.

[10] The parties agree the applicant was not provided with an employment agreement, job description or code of conduct.

[11] The hours for the motel position were 8.00 p.m. to 2 a.m., 6 nights a week. Mr Short's duties included taking motel enquiries and bookings, greeting guests and showing them to their rooms, making up breakfasts and collecting guests from the airport.

[12] Mr Short was due to begin work at 8.00 p.m. on Sunday 19 November 2006. He played golf during the day and, the applicant says, consistent with his normal practice and at about

5.00 p.m., *"had a couple of beers after the game"* (par 8 of his witness statement). Mr Short says he was at work by 8.00 p.m.

[13] The Company's sole director and majority shareholder, Richard Mazur, says that he and his then-pregnant partner, Sheree Huband, were working as managers at the Company's motel on that day, and were due to finish at 8.00 p.m. when the applicant was due to start. Mr Mazur says Mr Short arrived at 8.10 p.m., that he was acting oddly, was swaying, his eyes were unfocussed, that the applicant had poor comprehension of what was being said to him and that he smelt very strongly of alcohol. Ms Huband had, he says, because of Mr Short's late arrived, already gone to the airport for the first pick up of the night. The company relies on its computer records to support its claim the applicant was late.

[14] An exchange followed between the two men. Ms Huband returned with the guests around that time. Mr Mazur says he then said to the applicant, *"I am sending you home. You are drunk and stink of piss. There is no way I am leaving you in charge tonight"* (par 9 of Mr Mazur's witness statement). I note here the effect of Mr Mazur's direction was to send Mr Short away, because he believed him to be drunk, knowing that he had arrived by car and would almost certainly be departing in the same manner: a responsible employer would have either driven the applicant, or arranged public transport

[15] Mr Short then left. Later that evening Mr Mazur telephoned the applicant's manager, Mr Nick Parkin, and instructed him to carry out a full investigation of that incident and – the witness says – of the previous evening when, on 18 November, according to Mr Mazur, the applicant had reported for work at 8.00 p.m. also smelling of alcohol but without being intoxicated, while acting normal in every way. Mr Mazur said he therefore felt confident in leaving Mr Short in charge of the motel.

[16] Mr Parkin's subsequent investigation included speaking further to Mr Mazur and then to the applicant. Mr Short repeated his advice to Mr Parkin that he – the applicant – had had a few drinks. Mr Short said he was not drunk. Mr Parkin then told the applicant he would not be required for work until the investigation was completed. Mr Parkin says that, while speaking to Mr Short, he confirmed it was *"very likely"* he would be dismissed (par 30 of Mr Parkin's witness statement).

[17] Mr Parkin then spoke to relief managers for the motel: they advised they had noticed the applicant smelling of alcohol on a number of occasions and, once, had stayed until 2.00

a.m. because of their concerns. Mr Parkin spoke to a previous manager who advised Mr Short had once turned up to work under the influence of alcohol.

[18] As Mr Parkin makes clear at paras 18 & 19 in his witness statement, and as recorded in his letter of termination dated 25 November 2006, he reached the conclusion the applicant had turned up for work drunk on 19 November 2006 and that his employment would be terminated for serious misconduct.

[19] Mr Parkin telephoned his advice to Mr Short on 22 November: he did not relay to the applicant the basis of his decision to dismiss, in particular the information he relied on from current and former managers.

[20] Mr Short was advised of the amount of his final pay (up to 19 November plus holiday pay): the applicant disputed the amount and refused to accept it on the (mistaken grounds) he believed to do so would signal his agreement to the amount.

[21] The parties are also in dispute in respect of a set of master keys: the Company alleged Mr Short made it indirectly clear – in various discussions leading up to and following his dismissal – that he had deliberately misplaced them and the respondent would therefore have to rekey the motel at a cost in excess of $2,000. Mr Short agrees that, a *"couple of times I accidentally took them home"* (par 15 of his witness statement) but that he did not do so on this occasion, nor did he admit in any way to being responsible for disappearance of the keys or that the motel would have to be expensively rekeyed. As it happens the Company has not yet made a decision to rekey the motel.

Discussion and Findings

[22] The respondent agreed it was in breach of its statutory obligation to provide the applicant with a written employment agreement: s. 65 of the Act. Properly, the Company did not attempt to excuse its failure and acknowledged that a penalty was likely. The Company is therefore to pay to the Crown the sum of $1,000: s. 135(2)(b) of the Act applied.

[23] The Company does not accept it is in breach of s. 120 of the Act. It says, in response to a request from Mr Short, it sent a statement of the reasons for his dismissal dated 25 November 2006 to an address supplied by the applicant, shortly after his termination (attachment D to the statement in reply). There is no evidence to support Mr Short's claim

that, in effect, the statement is an invention well after the event and was never sent to the address supplied by him. That claim rests largely upon the Company's subsequent failures to copy the same letter to the applicant when it was asked, on a number of occasions, to do so. There is no evidence of Mr Short being disadvantaged by the delay he encountered in receiving written advice of the reasons for the Company terminating his employment. I am therefore not prepared to find that Mr Short's claim has been made out.

[24] Mr Parkin's evidence is that he determined to dismiss the applicant, and advised him of his decision, on 22 November 2006: Mr Short is therefore entitled to wages for the two days during which he was stood down while the respondent undertook its investigation, i.e. for 21 & 22 November. There is also no reason why he should not receive his full pay for his final week's employment. Leave is reserved for the parties to submit the quantum to the Authority in the event agreement is not reached on the same.

[25] Similarly, leave is reserved to the parties to submit the issue of Mr Short's claimed wages arrears to the Authority in the event agreement is not reached on the same and the quantum. The claim is based on Mr Short's argument that he regularly worked 36 hours X 6-days working weeks, but was only paid for 35 hours.

[26] Mr Short's claim for a week's wages in lieu of notice following his summary dismissal is dismissed on the ground of their being no contractual or other lawful entitlement to any such payment. The claim is any way subsumed by Mr Short's entitlement to lost wages arising out of the finding I develop below that he was unjustifiably dismissed.

[27] As was accepted by the Company and its counsel, Mr Costas Matsis, during the investigation, the respondent's investigation into Mr Short's conduct was egregiously defective: the applicant enjoyed little notice of the allegation against him, other than what was conveyed by telephone by Mr Parkin on Monday 20 November. As his witness statement makes clear (pars 13-15 inclusive), this did not include notice that Mr Parkin was investigating an allegation of serious misconduct such that the applicant's employment was at jeopardy, other than by way of the comment it was *"very likely"* (above) that he would be dismissed. As I noted during the investigation, Mr Parkin's comment verges perilously close to predetermination.

[28] Mr Short was also not advised that he was entitled to be represented during his employer's investigation. As is made clear above (par 17), Mr Parkin also failed to report back to the applicant the comments made by relieving and former managers, or seek his response. During the Authority's investigation, Mr Parkin agreed his decision to dismiss was

significantly reliant on accepting those managers' claims (of Mr Short being influenced by alcohol in the workplace on

previous occasions). Crucially, no opportunity was afforded the applicant to address those claims. No opportunity was provided Mr Short to account for his appearance (such as a medical condition, stressful events occurring in the applicant's life, etc) or to address his employer's concerns he was intoxicated, or to make submissions on any appropriate penalty. No opportunity was fairly and reasonably provided Mr Short for him to explain to his employer, as he told the Authority, that – after playing golf and drinking two pints – he showered but put back on the clothes he had been golfing and drinking in.

[29] Mr Short was also denied an opportunity to be fully and fairly informed as to the basis for his employer's (legitimate) concerns about the significance of intoxication in its workplace, and to respond.

[30] In the absence of a full and fair investigation this employer cannot show that its decision to dismiss was, objectively measured, was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred: *Singh* v *Sherildee Holdings Ltd t/a New World Opotik*i, unreported, Couch J, 22 Sep 2005 (AC 53/05), etc.

Remedies

[31] Mr Short seeks lost wages from 22 November 2006 until commencing his current employment on 14 May 2007, i.e. a period of approximately 25 weeks. He says he actively sought employment during this period, including reading the paper, approaching previous employers and undertaking a 6-week long WINZ course (that required the applicant applying for two jobs during each week of the course). I find in favour of Mr Short's claim for lost wages.

[32] Mr Short seeks $10,000 compensation for humiliation, etc. The basis of that claim is set out in an attachment to his witness statement dated 3 September 2007. In it, Mr Short says his dismissal came one day before his 51st birthday and was a *"real shock"* to him: it caused him to experience anger, embarrassment and depression. No medical evidence was advanced in support of the latter claim. While satisfied Mr Short has made out a claim, I am satisfied that the short (8 months) duration of his employment with the Company, while taking the other matters set out above into account, warrant payment to the applicant of

$6,000 compensation for humiliation, etc.

Contributory Fault

[33] I am satisfied that significant fault lies on both parties in this employment relationship problem. My conclusions as to the Company's shortcomings are set out above. In Mr Short's case I reach a similar view because he admits – while disputing the effect – to drinking 2 pints of beer within 3-hours of commencing his normal duty. Good employee obligations are no less real than those required of a good employer: in this instance Mr Short has not met his fair and reasonable obligations to his employer. That is because he was, on the night in question, in a sole-charge capacity. As such he was the 'face' of his employer. His duties on 19 November, as they so often did, included meeting and greeting his employer's clients and also picking them up and driving them from the airport to the motel. Smelling of alcohol not only creates a negative impression, but raises significant perceived and real issues of health and safety, not only for the applicant in the Company's vehicle, but also for guests and other members of the travelling public. While no policy was in place (oral or written), it would not be unreasonable for the Company to require of its employees that they abstain from alcohol for a significant period before reporting for duty. Mr Short's actions undermined his obligations and put his employer's interests at significant jeopardy.

[34] Mr Short's casual handling of his employer's keys is another significant breach of his good employee obligations. Mr Short says he is not responsible for their disappearance. He also denies suggesting – at the time – that he might be: I find that he cannot be certain. That is because he admitted taking them accidentally in the past, and because he was on duty the night before their disappearance.

[35] Having regard to the above, I am satisfied that Mr Short's level of contributory fault is properly measured at 50%, and accordingly reduce the remedies awarded to him.

Determination

[36] For the reasons set out above I find Mr Short was unjustifiably dismissed by the Company and that he is

entitled to the following monies:

a. Two days wages for 21 and 22 November 2006: in the event agreement is not forthcoming from the parties as to quantum leave is reserved for the matter to be returned to the Authority.
b. Mr Short is entitled to be paid in full for his final week of work: in the event agreement is not forthcoming from the parties as to quantum leave is reserved for the matter to be returned to the Authority.

c. Leave is also reserved to the parties to return to the Authority the matter of Mr Short's claim for 36 hours per week of his employment.

d. Mr Short is to be paid wages lost from 22 November 2006 until commencing his current employment on 14 May 2007, less the contributory fault finding of X%: in the event agreement is not forthcoming from the parties as to quantum leave is reserved for the matter to be returned to the Authority.
e. The Company is to pay Mr Short compensation of $6,000 for humiliation, etc less the contributory fault finding of X%.

[37] The Company is also to pay the Crown a penalty of $1,000 (one thousand dollars).

[38] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority
