

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: CA 27/08

File Number: 5091399

BETWEEN            David Smith  
                                 Applicant

AND                    Blighs Road Service Station (1989)  
                                 Limited  
                                 Respondent

Member of Authority:    Denis Asher

Representatives:        Robert Thompson for Mr Smith  
                                 David Caddick for the Company

Investigation Meeting    Christchurch, 11 March 2008

Determination:            14 March 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]    In his statement of problem filed on 21 August 2007 Mr Smith said he had been unjustifiably dismissed. He sought reimbursement for unspecified lost wages, compensation of \$10,000 for humiliation, etc, a penalty for failure to provide an individual employment agreement and costs.

- [2] By letter dated 7 September the Authority acknowledged the Company's statement in reply which denied the allegation.
- [3] A directions conference call was held on 30 October during which an investigation on 11 March 2008 was set down.
- [4] The parties underwent mediation on 12 February 2008 but their employment relationship problem remained unresolved.
- [5] In advance of the investigation both parties provided witness statements and documentary evidence. By letter dated 10 March the applicant withdrew his claim of a penalty as he accepted he had been given an employment agreement before commencing his employment. During the investigation the parties were unable to settle this problem on their own terms. It was agreed the Company had until 13 March to make final written submissions, and that Mr Smith had until the following day to respond: as it happened the respondent advised it had no written submissions it wished to make.

## **Background**

- [6] From the evidence presented to the Authority I am confident as to the following background events.
- [7] After approximately two-years unemployment Mr Smith secured the position of forecourt manager with the Company, commencing 19 March 2007. His duties included receiving payment for petrol purchases.
- [8] While seeking this employment Mr Smith explained to Mr David Caddick, one of the Company's two directors, and its manager, that he suffered from a disability that resulted from bleeding to his brain. The disability affects Mr Smith's eyesight insofar as it inhibits his vision both at the peripheries and within the inner quadrant. Mr Smith has severely limited peripheral vision.
- [9] Before commencing employment Mr Caddick gave Mr Smith an employment agreement for him to take home and consider.
- [10] Mr Smith agrees that he made errors, in particular by failing to accurately record Eftpos transactions, which resulted in financial losses to his employer.

- [11] The parties differ in their versions of relevant events on or shortly after 9 April.
- [12] At par 1.9 of his witness statement Mr Smith says that, on 9 April 2007 during his 3<sup>rd</sup> week of employment, his immediate manager Mr Tim Knott, telephoned and literally told him not to bother coming in to work any more as it was not working out. It is agreed by the parties that the applicant had, as at that date, not been given any disciplinary warnings as to his performance.
- [13] During my investigation Mr Smith expressed less certainty as to the date of the call and accepted it may have been on the following day, Tuesday 10 April.
- [14] Mr Smith says that, following the telephone call, he went to the workplace, spoke further to Mr Knott, and – amongst other things – conceded his errors while expressing a strong desire to continue working for the respondent and his willingness to arrange money from Work & Income to undergo a new eye test and to purchase new corrective lenses, so as to address the problem causing his errors. His representations were to no avail.
- [15] Mr Smith gave evidence during the investigation of Work & Income approving the grant on 13 April, and that he underwent an examination on the same day. The applicant was confident that, had he not been dismissed, his new lenses would have cured the problem causing the errors he made with Eftpos transactions, etc. Mr Smith could not recall when he received his new lenses but it appears he did not have them before he termination of his employment, i.e. he was unable to demonstrate whether they would resolve his disability/error problems.
- [16] As set out in his statement of problem, Mr Smith says that – during his discussions with Mr Knott at the workplace – Mr Caddick arrived and confirmed Mr Knott's advice that he could no longer stay employed as he was making too many errors. Mr Smith says that the respondent did agree to him working out one further week, pumping petrol on the forecourt but with no responsibility for payment transactions, so that he might better manage his finances.

- [17] The applicant says the dismissal impacted painfully on him, particularly as he had told his wife and friends about his new job and had committed himself to a new hire purchase arrangement as a result of his fresh employment.
- [18] Mr Knott says he did not call Mr Smith on Easter Monday, 9 April 2007, as that was his day off and the tills were – consistent with usual practice – not balanced until the following day when the extent of the errors became clearly apparent. He says he called the applicant on 10 April, at Mr Caddick’s behest, to put the applicant on notice of the problems but not in any disciplinary sense: Mr Smith was simply being alerted that one of the day’s tasks was to correct the errors of the long weekend. He denies saying to Mr Smith that he was finished or using words to that effect.
- [19] Mr Knott says that, when his errors were put to him, Mr Smith replied he could not handle the position, that it was placing him under a lot of stress and he wanted a new position pumping petrol only. Mr Smith was told the Company could not afford employing only in that capacity; it did agree to him working out a final week. The respondent produced, and Mr Smith did not contest, time sheets that showed from 10 to 18 April, the applicant’s last day of employment, his duties exclusively consisted of pumping petrol.

### **Discussion and Findings**

- [20] At issue are the parties’ competing claims as to what was said on either 9 or 10 April 2007. A credibility determination, including a balance of probabilities finding, is required.
- [21] Mr Smith says he was told not to bother coming into work. If I accept the applicant’s version of events and find in his favour then clearly Mr Smith was unjustifiably dismissed as he was given no prior warning of his employer’s concerns, nor opportunity to address and attempt to correct any legitimate performance issues, or to be represented in discussions about these matters and whether termination was what a fair and reasonable employer, objectively measured, would decide in all the circumstances, as is required by s 103A of the Act: see *NZ Food Processing IUW v Unilever* [1990] 1 NZILR 35, at 46; *White v Auckland District Health Board*, unreported, Colgan CJ, AC 10/07, 23 February 2007, at par 97, etc.

- [22] The respondent says the applicant was not dismissed, but that instead he admitted his errors, said the job was too much for him and asked if he could undertake a less stressful position. The Company explained it could not afford to employ Mr Smith in a lesser position and – as is implied in its letter of 4 May 2007 (incorrectly recorded at the time as 4 April) – it understood that Mr Smith accepted that situation and that he effectively resigned his employment consequent on his appreciation he could not meet the requirements of his position.
- [23] Was Mr Smith dismissed or did he give up his position as he could not meet its requirements? One parties' version must be preferred over the other's. That is because we cannot time travel and there were no cameras in place providing various slow motion action replays of the disputed events. Making a determination is hampered by the reality that much of the credibility evidence and argument advanced by one party in support of their central position was equally disputed by the other and thus failed to resolve their central credibility competition. A decision in this matter is all the harder because all involved impressed as sincere and genuine individuals who were adamant their recollection of key events was the correct one.
- [24] However, in all matters before the Authority I prefer the respondent's evidence. I reach this conclusion for the following reasons.
- [25] Mr Smith's recollection of events was patchy and it shifted. For example, his original claim included an allegation the Company had not provided him with a draft individual employment agreement. That claim was advanced as early as 30 April 2007 in a letter by his advocate, Mr Robert Thompson, to the Company. A copy of the draft employment agreement document was subsequently provided by the respondent: the applicant then properly conceded that, on viewing the copy, he remembered it being provided to him during an interview with Mr Caddick in March 2007.
- [26] During the investigation Mr Smith also conceded that Mr Knott's telephone call may have been made to him on 10 and not 9 April 2007 (consistent with Mr Knott's explanation that till balancing is always done on the following day).

- [27] These concessions are sufficiently significant evidence of Mr Smith's changing recollection of key events and contribute thereby to a finding in favour of the respondent's version of events.
- [28] Before the Authority is a document signed off by a then co-worker of the applicant's, dated 11 April 2007. The document is not in affidavit form and its author did not attend the Authority's investigation to swear or confirm its contents. However, its content was not challenged by the applicant.
- [29] It is a detailed record of Mr Smith's difficulties over the long weekend including 9 April when "*things went very wrong*" (11 April statement) with processing credit cards, Eftpos sales and in reading the respondent's computer screens.
- [30] It also records that, notwithstanding repeated instruction to him of the tasks he was required to perform, Mr Smith was unable to meet the basic requirements of the job.
- [31] As is made clear already, Mr Smith agrees he made mistakes over the weekend.
- [32] The document is evidence I find in support of a conclusion that Mr Smith's difficulties in coping with the demands of his position – as evidenced by his errors – were extensive and likely to cause him significant stress. It is, I find, indirect evidence in support of the respondent's claims that Mr Smith admitted to being unable to perform the position and that he found it stressful.
- [33] On a balance of probabilities basis, I also find that the Company's agreement to employ Mr Smith in only a petrol pumping capacity for a week is not consistent with the actions of an employer who – it is claimed – had advised the employee he was not to bother returning to work.
- [34] Having regard to the above I am satisfied Mr Smith was not dismissed but that he instead effectively resigned a position he found himself unable to perform.

**Determination**

[35] I find against Mr Smith's allegation that he was unjustifiably dismissed by the Company.

[36] As requested by the parties, costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**