

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 11/10  
5089782

BETWEEN OSCAR SPEMANN  
Applicant

AND HIREQUIP LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Mark Ryan, counsel for Applicant  
Ralph Webster, advocate for Respondent

Investigation Meeting: 30 June 2008 and 1 May 2009

Submissions Received 19 and 27 May 2009

Determination: 18 January 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The Authority has investigated the suspension and dismissal of Mr Oscar Spemann by Hirequip Limited. As Mr Spemann's claim is a personal grievance, it falls to be determined under s 103A of the Employment Relations Act 2000.

[2] In applying that provision the Authority must consider the actions of the employer and how the employer acted, and determine objectively whether they were what a fair and reasonable employer would have done in all the circumstances at the time of the suspension and dismissal.

[3] The Authority acknowledges that attempts were made by the parties to resolve the employment relationship problem by mediation.

[4] To remedy his grievance Mr Spemann has sought from the Authority orders requiring Hirequip to reimburse him lost wages of three weeks (\$2,640) and compensate him for hurt feelings, humiliation and distress.

[5] The actions of the employer Hirequip giving rise to the grievance followed a complaint made about Mr Spemann by his supervisor Mr Bernie Snelgar. He sent an email to Mr Martin Potter, the Manager of the workshop in which Mr Spemann was employed as a Field Service Mechanic along with about 20 others.

[6] Mr Snelgar complained that Mr Spemann had refused a request he had made for some work to be carried out and had told Mr Snelgar to *"fuck off"* more than once. When asked, Mr Spemann had confirmed that he was refusing to do the work requested, and when asked to finish work and leave the workshop Mr Spemann had said he would not and had told Mr Snelgar to *"just go away."*

[7] Mr Snelgar finished his email to Mr Potter by emphasising that he was not at work to be spoken to in the way he complained of, at any time and in front of work colleagues.

[8] The complained of conduct of Mr Spemann occurred on Saturday 24 March 2007. An inquiry into what had happened was commenced by Hirequip's Northern Regional Manager, Mr Gary McLean, on Monday 26 March. Mr McLean interviewed Mr Snelgar to find out whether there was anything in his complaint to warrant proceeding to a formal disciplinary process, and he also spoke to Mr Spemann and got his version of events. Mr Spemann confirmed that he had sworn at Mr Snelgar and that he had also refused Mr Snelgar's request to shift a vehicle off a trailer.

[9] Mr McLean interviewed another worker, Mr John Wirepa, who said he had heard the pair *"just going off at each other."*

[10] Mr McLean, I find, reasonably considered that as feelings were running high between Mr Snelgar and Mr Spemann, for the safety of both and to maintain workplace harmony it was appropriate to suspend Mr Spemann on pay until a formal investigation was conducted. Mr McLean advised that one would commence the following morning.

[11] When advised of his suspension Mr Spemann had no comment to make about it.

[12] On Tuesday 27 March the formal investigation meeting began. Although Mr Spemann attended on his own he confirmed that he was happy to proceed.

[13] Mr McLean found it established that the sequence of events leading to Mr Snelgar complaining had begun on Friday 23 March when a request was made of Mr Spemann by his supervisor to load a car onto a trailer and then tie it down securely. Mr Spemann had not strapped the vehicle down as directed but had just left the workplace and gone home.

[14] Mr McLean found that the following day, Saturday, Mr Snelgar again asked Mr Spemann to tie the vehicle down and the latter had again refused arguing that it was the driver's responsibility. They had discussed that particular view before Mr Snelgar asked Mr Spemann to take the car off the trailer. At this point, Mr McLean found, Mr Spemann had refused to carry out the instructions of his supervisor and had become aggressive and abusive, telling Mr Snelgar to "*fuck off*" several times.

[15] Mr Snelgar then told Mr Spemann to pick up his tools and go home but the latter did not comply with that request either.

[16] I find that Mr Spemann confirmed to Mr Mclean the sequence of events as found by him and as set out in his meeting notes produced to the Authority. Mr Spemann also confirmed that Mr Snelgar, his supervisor, had always been polite to him and that their relationship had been good, and that the swearing at his foreman surprised him.

[17] After further discussion with Mr Snelgar, Mr McLean accepted that Mr Snelgar had been polite at all times and was upset by what had happened on the Saturday.

[18] The file note records the deliberations then made during the meeting by Mr McLean and Mr Potter, as follows:

***Martin/Gary.***

***Key Points:***

- *The task was a very simple job to complete, ie tie down the car and then remove when requested.*
- *Bernie didn't provoke Oscar.*
- *Oscar's response was aggressive and abusive.*
- *Oscar refused to carry out the task when asked to again.*
- *Oscar refused to leave work site.*
- *Oscar had enough experience to tie down the vehicle safely but refused to do so.*

*Mitigating Factors:*

- *Possible work load issues – considered less stress on Saturday morning.*
- *“Off the cuff” swearing.*
- *Length of service 21 years with Projex-Hirequip.*

*10.45am Oscar returned to the meeting.*

*Explained findings:*

- *The task of strapping down the car and removing it was well within his capabilities.*
- *Bernie's requests were not unreasonable.*
- *Oscar has enough experience to tie down the car safely but accepted the driver still had a responsibility to check the load is secure.*
- *Oscar's behaviour was aggressive, refusing to do basic tasks and became abusive telling Bernie to “F-Off” on several occasions.*

*Hirequip Disciplinary Procedures. Clause 22.a(x)*

*Using offensive language or behaviour at the place of work is deemed to be serious misconduct.*

*Oscar has been a senior mechanic and workshop foreman and knows the process if there is some issue. His behaviour was unacceptable and disappointing.*

*Determined to dismiss Oscar.*

*Oscar's response – he didn't agree with dismissal and “this could have been dealt with differently”.*

*“I think Bernie has a problem”*

*Discussed Oscar collecting tools and lift home.*

[19] In the statement in reply provided by Hirequip, the employer began its account of the relevant facts with an assertion that Mr Spemann had been a “*problem employee*” and that he had received several warnings over a number of years for his misconduct.

[20] In June 2005 Mr Spemann had received the most recent of those, a final warning to do with misrepresenting his employer by making inappropriate and disrespectful remarks about Hirequip to a customer. No expiry date had been expressed on that warning given nearly two years before the conduct for which Mr Spemann was dismissed in March 2007. The statement in reply then detailed problems that had arisen with Mr Spemann since 2003. They included what was referred to as calling him to account for “*an act of theft.*”

[21] I am satisfied from the evidence given by Mr McLean and Mr Potter that although they knew of Mr Spemann’s recent history in his employment with Hirequip they nevertheless based their decision to dismiss substantially, if not entirely, on his actions and on the events that had occurred on 23 and 24 March 2007, and not on earlier problems as the statement in reply seemed to imply from the way it was drafted.

[22] It is also clear that Mr Spemann was dismissed not simply because he directed several times the expression ‘fuck off’ at his supervisor but because of his deliberate disobedience and insubordination in response to a lawful and reasonable request by Mr Snelgar.

[23] Mr McLean, as is obvious from his notes of the investigation he carried out, took into account the long service Mr Spemann had had with the company, including a period where he had been in the same position Mr Snelgar held as a supervisor, and he took into account the degree to which the behaviour had been uncharacteristic of Mr Spemann.

[24] Viewed objectively, I find that in reaching a decision to dismiss Mr Spemann, the actions of Hirequip and how it acted were what a fair and reasonable employer

would have done in all the circumstances. Hirequip was entitled to regard the situation as a serious one where there had been, through no apparent fault of the supervisor, a serious breakdown between Mr Snelgar and Mr Spemann in their day-to-day working relationship. Mr Spemann had clearly and blatantly rejected the authority of his supervisor and demonstrated an attitude that was incompatible with the trust and confidence required to be maintained in the employment relationship.

[25] As to the suspension of Mr Spemann the previous day, I find this too was an action that a fair and reasonable employer would have taken in all the circumstances. The disadvantage to Mr Spemann was slight, as the suspension lasted just a few hours, and it was also on pay, as required under the employment agreement. The employment agreement required that an employee was to be asked for comment upon being advised of suspension, and that is what happened. Although Mr Spemann was not consulted before being suspended, in the circumstances where he had plainly rejected the authority of his supervisor, it seems to me the employer was entitled to defuse the situation by having Mr Spemann removed from the workplace until the disciplinary inquiry could take place. It was a reasonable conclusion of Hirequip that there was a safety and maintenance of order aspect to the need for suspension.

[26] I therefore determine that Mr Spemann has no sustainable personal grievance arising from either his suspension or dismissal.

[27] In final submissions, it was accepted for Mr Spemann that he had contributed to his dismissal and that under the Act the Authority is required to take that into account in assessing remedies. It was submitted that the greater blame for what happened lay with Hirequip for not considering a lesser sanction than dismissal. A reduction of 10% to 15% in remedies awarded was submitted as reasonable in the circumstances. Had the Authority found that the suspension or dismissal was unjustified, the level of contribution is more likely to have been set at 60% or more.

[28] This is because Mr Spemann had chosen to act the way he did towards his supervisor without any provocation. His supervisor had given a reasonable instruction which Mr Spemann challenged over a side issue as to a driver's responsibility to check that a load is secure on a vehicle before driving it. There is no dispute that Mr Spemann was not asked to drive the vehicle but only to place a load on its trailer and to tie down the load securely. As he was not the driver Mr

Spemann therefore had no responsibility to check security of the load before the trailer was towed away.

[29] Mr Spemann deliberately swore his foreman in a workplace where others too were required to be directed and supervised by Mr Snelgar and accept his authority. Mr Spemann had been employed by Hirequip for a long period, a factor the employer weighed up when considering the penalty, so ought to have known better than to blatantly disobey his supervisor over a relatively simple request.

[30] Costs are reserved. If asked to make an order the Authority may consider whether the parties should bear their own costs in the circumstances. This is largely because of the conduct of Hirequip during the Authority's investigation and before then when an employment relationship problem was first raised in writing on behalf of Mr Spemann. Hirequip was reasonably requested to provide copies of the personnel file and other material but failed to do so. The investigation meeting had to be suspended after it began, so that the company could produce its records and comply with the reasonable request made much earlier by Mr Ryan for that information.

[31] If an application for costs is to be made by Hirequip it is to be in writing filed and served within 14 days of the date of this determination. Mr Spemann is to reply to the application within a further 14 days.

A Dumbleton  
**Member of the Employment Relations Authority**