

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Andrew Thomson  
**AND** Winger Motors Limited  
**REPRESENTATIVES** Lorne Campbell for the Applicant  
Agnes McKay for the Respondent  
**MEMBER OF AUTHORITY** James Wilson  
**INVESTIGATION MEETING** 14 November 2006  
**DATE OF DETERMINATION** 15 January 2007

**DETERMINATION OF THE AUTHORITY**

**Andrew Thomson's employment relationship problem**

[1] Mr Andrew Thomson was employed as Sales Manager by Winger Motors Ltd in Newmarket Auckland. In early September 2006 Mr Thomson was invited to a meeting to discuss allegations of "fighting, the verbal abuse or intimidation (bullying) of another worker". Following this meeting his employer carried out further investigations regarding the allegations against Mr Thomson. These investigations resulted in several statements from other employees regarding Mr Thomson's alleged behaviour. Mr Thomson was given copies of these statements and at a subsequent meeting was asked to respond to the allegations. Following this second meeting Mr Thomson was dismissed with immediate effect, paid one-month's salary in lieu of notice and allowed to use a company car for that month.

[2] Mr Thomson says that his dismissal was unjustified and is seeking reinstatement, reimbursement for the income he has lost since his dismissal and compensation for the stress, hurt and humiliation that the dismissal has caused him.

**The events which led to Mr Thomson's dismissal**

[3] Mr Thomson was first employed by Winger Motors, as a salesperson in March 2001. In April 2006 he was appointed as Sales Manager with responsibility for three salespeople. Shortly after he took up his new appointment Mr Thomson appointed a new, inexperienced salesperson, Greg. Mr Thomson says that while Greg was "keen and willing" he, Mr Thomson had to spend a lot of time mentoring him and that Greg did not seem to be learning from his mistakes. It was allegations regarding his interaction with Greg that eventually led to Mr Thomson's dismissal

[4] Mr Thomson also says that during this time he was under a substantial amount of personal pressure including having to provide care for his mother (who is an invalid) and a separation from his partner. He says that he drew these personal pressures to the attention of a Director of the company but agrees that he did not directly discuss them with the General Manager, Andrew Betts, to whom he reported.

[5] The General Manager, Mr Betts, says that in or about July 2006 he had occasion to speak informally to Mr Thomson regarding his relationship with Greg. Mr Betts says that the manager of another department had advised Mr Betts that he had witnessed Mr Thomson speaking to Greg in an "out of control way". There is no formal record of this discussion and there is no suggestion by Mr Betts that this discussion constituted any form of warning.

[6] On 29 August 2006 Greg approached Mr Betts to report an incident which he said had happened earlier that day. Greg told Mr Betts that he experienced frequent verbal abuse from Mr Thomson but that he had been afraid to come forward earlier because he was afraid of how Mr Thomson would react. Mr Betts then wrote a letter to Mr Thomson outlining the allegations and inviting Mr Thomson to attend a meeting to give a *full explanation*. The letter strongly suggested that Mr Thomson bring a support person or representative to the meeting and concluded:

*I must advise you that if an allegation of misconduct or serious misconduct is established, disciplinary action under our companies Disciplinary Terms will apply which could result in termination of your employment.*

### **The first disciplinary meeting**

[7] On 5 September 2006 Mr Thomson accompanied by his representative, attended a meeting with Mr Betts and another employee (Mr Robinson) as minute taker. Mr Betts says that during this meeting he struggled to get information from Mr Thomson and it appeared that Mr Thomson and his representative were attempting to soften the magnitude of the allegations and had sidestepped the issues in an attempt to limit the amount of information provided. Mr Betts said that he concluded that his only option was to conduct further investigations.

[8] Mr Thomson's version of this meeting was that it was somewhat tense and, on advice from his representative he had been very careful about what he said having regard to the advice that termination of his employment was a possible outcome of the meeting. Mr Thomson says that on his behalf of his representative had made several points during the meeting including:

- (a) There was no issue of fighting
- (b) Mr Thomson accepted the gist of the words used but did not accept that the words amounted to verbal abuse, intimidation or bullying.
- (c) Only one incident was detailed in Mr Betts' letter and the employer could not rely on vague references to other occasions. He, Mr Thomson, was only at the meeting to answer one complaint and he was entitled to know time, date, place and words spoken if other allegations were being investigated. He noted that any other instances were not sufficiently serious for Greg to complain.
- (d) The matter raised would not justify termination of Mr Thomson's employment.

[9] This meeting also included the discussion of a number of specific incidents involving Greg and Mr Thomson outlined his version of those events. At the conclusion of this meeting Mr Betts indicated that it was his intention to carry out further investigations regarding the allegations against Mr Thomson.

### **Further investigation**

[10] Following the initial meeting Mr Betts and Mr Robinson conducted a series of interviews with Greg and other staff who may have witnessed the various incidents. While it is not necessary to set out all of the detail of these interviews it is appropriate to set out a number of extracts to demonstrate the general tenor of the comments made.

[11] Greg (the victim of Mr Thomson's alleged behaviour) indicated that the behaviour took place frequently and as often as once or twice a day, commenting:

*It's not the swearing it's the yelling, throwing things around, throwing arms in the air, kicking boxes slamming things on desks. It's as if he is very angry like this (Greg at this point apparently gave a graphic demonstration of Mr Thomson's behaviour)*

In response to the question: *How do you feel when that happens in front of everyone else?* Greg said that he felt *like he had let the team down* and felt *stupid and an idiot*. In response to how he felt after a particular outburst by Mr Thomson, Greg said that he was *s###t scared that day*.

Other staff Members spoken to made comments such as:

*(JP) I witnessed (Mr Thomson) yelling/acting aggressively towards Greg and Greg was cowering over and he was getting an earfull ..... witnessed Greg trying to return to the showroom and (Mr Thomson) said "get over here I am not F..ing finished with you yet, get over here" . ... This in my opinion is not an isolated incident. As far as I am concerned he operates (Greg) under fear.*

*(JP) To sum it up (Mr Thomson) just belittling and aggressive towards Greg and it is unacceptable. He is just using verbal abuse, intimidation and belittling him.*

*(CC) Sometimes it's shouting, banging hands on the desk, throwing things. ... Greg cannot reason with (Mr Thomson) so he just sits down and bows his head down.... Yelling and shouting are different. ... he is yelling... he has lost control ... it is not just volume it is body posture, slamming his hands on the desk... to me it looks like he loses control of his temper... I think it is very unhealthy for the department. It makes me so uncomfortable I have to leave the department it brings me down. ... It cannot carry on and I cannot handle it. I would have to move on. I think Mr Thomson could not continue in the role; ... it has come to come to a head.*

[12] Copies of the interview notes were forwarded to Mr Thomson's representative on 8 September 2006 and a further disciplinary meeting arranged for 12 September.

## **Second disciplinary meeting**

[13] The second disciplinary meeting, on 12 September 2006, was attended by Mr Betts and Ms Agnes Mackay for the company and by Mr Thomson and his representative, Mr Lorne Campbell. Mr Thomson was advised that the meeting was specifically to seek his feedback on the comments made by other staff. Mr Campbell made a number of points on Mr Thomson's behalf including:

(a) In reference to the letter of 31 August 2006 Mr Campbell noted that it detailed only one allegation and that other allegations were too imprecise for Mr Thompson to comment on. He noted that any other instances were insufficiently serious for Greg to complain.

(b) He said that the allegations would not justify termination of Mr Thomson's employment and that Mr Thomson had previously explained the circumstances surrounding the specific incident on 29 August.

(c) He noted that Mr Thomson had referred to performance issues with Greg and that Mr Betts knew of those issues. He also noted that Mr Thomson had attempted to resolve the issues with Greg "man-to-man" and that Greg was not following guidance given to him, thereby causing Mr Thomson, and others, frustration.

(d) Mr Campbell said that the workplace was a robust one and that swearing was common but that Mr Thomson accepted that the way he dealt with Greg had to change.

(e) He pointed out that Mr Thomson had 5 1/2 years service with the company, had recently been promoted and that the business was short staffed.

(f) He noted that Mr Thomson had some personal issues, including being sole caregiver for his mother, some financial difficulties and personal issues with an ex-partner but that these were now all resolved.

Mr Campbell also raised a number of other points regarding Mr Thomson's relationship with Greg, the nature and extent of the alleged incidents and the lack of detail in the comments made by other staff. He suggested that the relationship with Greg had not broken down irretrievably, and advised that Mr Thomson recognised he had a problem and had recently commenced an anger management course. He said that Mr Thomson was prepared to give an undertaking that he would not lose his temper and to take steps to repair his relationship with Greg and with other staff.

[14] After some further discussion the meeting adjourned to allow Mr Betts to consider Mr Thomson's responses. Following this adjournment Mr Betts advised Mr Thomson that he had considered all of the points he had made but had reached the conclusion that he had no option but to dismiss Mr Thomson. He then gave Mr Thomson an opportunity to comment on that decision. There being no further response Mr Thomson was advised that he was to be dismissed effective immediately. In discussion subsequent to the meeting it was agreed that Mr Thomson should receive one month's pay in lieu of notice and to continue to use a company car for the period of that notice.

## Legal considerations

[15] In dealing with the question of whether or not an employee has a personal grievance against their employer, the Employment Relations Act at section 103A says:

### **103A Test of justification**

*For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[16] In *Air New Zealand v Hudson*, (2006) 3 NZELR 155 Judge Shaw in the Employment Court set out in some detail how the Court interpreted and would apply this test. In discussing how s103A should be applied the Judge said:

*[132] The section does not to differentiate between aspects of the dismissal process but, because it refers in general to the employer's actions, the test for justification applies at all stages including the employer's decision that misconduct has occurred and the employer's decision to dismiss.*

*[133] Each of these stages are open to scrutiny although this is not to be done in the mechanical way as it is recognised the lines between each stage are often blurred.*

And:

*[138] Again, because the procedures taken by an employee are to be justifiable, s103A requires that the procedures adopted by the employer in investigating allegations against employees are to be objectively judged although the common-law authorities make it clear that the circumstances and resources of the employer's business may influence the nature and extent of investigations undertaken. ...*

And:

*[143] Therefore, a particular employer, having followed proper investigative processes is justified in dismissing for misconduct it reasonably believes has occurred if the Authority or the Court finds that a fair and reasonable employer would have dismissed in all the circumstances.*

[17] In *Fuiava v Air New Zealand* (AC 51/06 12 September 2006; Unpublished) Judge Travis, summarising the Courts findings in *Hudson*, said:

*The Court in Hudson found that the new s103A did not give the Employment Institutions the unbridled license to substitute their views for that of the employer. Their role was instead to ask if the actions of the employer amounted to what a fair and reasonable employer would have done and to evaluate this objectivity. Shaw J. found that the effect of s103A was to separate out the employer's actions for consideration and required the Institutions to consider those actions against what a fair and reasonable employer would have done. The Court concluded that although the amendment does not expressly prevent employers having recourse to a range of options from which they can choose, Parliament has legislated for the Institutions to evaluate the employer's choices against the specified objective standard of what a fair and reasonable employer would have done in the circumstances (paragraph [119]). This approach effectively restored to the institutions what Williamson J. in the Hepi case called the duty of enquiry and the right of judgement. The employer's subjective decision was to be examined against a universal objective test rather than an individualised one, in the light of all relevant circumstances (paragraph [122]). This may mean that the Court can reach a different conclusion to that of the employer:*

*...but provided this is done appropriately that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.*  
(Hudson: Paragraph [120])

### **Were the actions of Winger Motors those of a fair and reasonable employer?**

[18] Turning firstly to the investigative and disciplinary processes followed by Winger's, I find that these were those of a fair and reasonable employer. Mr Betts received a complaint regarding Mr Thomson's behaviour and sought Mr Thomson's reaction to this complaint. Mr Thomson was advised of the seriousness with which his employer regarded the accusations and the possible consequences if they were upheld. He was properly represented throughout the disciplinary process. Having heard Mr Thomson's initial response Mr Betts undertook further investigations and made all of the information produced by those investigations available to Mr Thomson and his representative. Once again Mr Thomson was given a full and proper opportunity to respond.

[19] While Mr Thomson disputes the seriousness and import of his behaviour, he does not dispute that in general terms the behaviour for which he was dismissed did occur. Certainly, having undertaken a full and fair enquiry Mr Betts reached the justifiable conclusion that the behaviour had occurred and that this behaviour constituted serious misconduct.

[20] The final consideration in determining whether or not Mr Thomson's dismissal was justified is to consider whether or not the decision to dismissed was that of *a fair and reasonable employer ... in all the circumstances at the time*. During the investigation meeting I carefully questioned Mr Betts regarding what matters he considered when making this decision. It is clear that Mr Betts did take into account the seriousness of the behaviour, its effect on other staff, the likelihood of recurrence and his, i.e. Mr Betts', lack of confidence in Mr Thomson's ability to guarantee that the behaviour would not recur, Mr Thomson's personal circumstances and his excellent work record and the lack of alternative positions. In his written statement to the Authority Mr Betts said:

*I believe I acted as any responsible and fair employer would have. With the allegation, circumstances of events, meetings, investigation, consideration, options to consider, discussion etc etc ... I was left with no other alternative but to dismiss (Mr Thomson).*

[21] I do not entirely agree with Mr Betts. It may be that under similar circumstances another employer may have taken the risk and continued Mr Thomson's employment. However I accept that to dismiss Mr Thomson was within the range of options open to a *fair and reasonable employer in all the circumstances*. I do not take from the cases cited (*Hudson* and *Fuiava*) that the Authority should overturn an employers decision to dismiss merely because an employer could have decided not to dismiss. Such an interpretation would assume that all fair and reasonable employer's should be lenient. Having reached the justifiable conclusion that an employee should be dismissed it is of course open to any employer to be lenient and give that employee another chance. However not to do so does not make the decision to dismiss unreasonable, unfair or unjustifiable.

[22] As a *fair and reasonable employer* Mr Betts was required to consider all of the circumstances surrounding Mr Thomson's employment and his behaviour. I find that Mr Betts did indeed consider all the circumstances and reached the conclusion that Mr Thomson should be dismissed. Using what the Employment Court in *Hudson* referred to as *the objective standards of a hypothetical fair and reasonable employer to objectively evaluate* Mr Betts actions, I find that his actions in dismissing Mr Thomson were justifiable.

## **Determination**

[23] I have found that Winger Motors actions in dismissing Mr Thomson were justified. Mr Thomson does not have a personal grievance and he is not therefore entitled to any of the remedies he seeks.

## **Costs**

[24] Costs are reserved. The parties are urged to attempt to resolve this issue between themselves in the first instance. If they are unable to do so Winger Motors may file and serve a submission in respect to costs within 28 days of the date of this determination. Mr Thomson will then have 14 days in which to respond.

James Wilson  
Member of Employment Relations Authority