

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Christopher Webley (Applicant)
AND Grant Ramsley t/a Millennium 3 Marine (Respondent)
REPRESENTATIVES Steve Page, Advocate for Applicant
Brad McDonald, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 27 February 2005 (adjourned)
16 June 2005
DATE OF DETERMINATION 4 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Millennium 3 Marine Limited (M3M) operates a business selling and servicing boats. Michael Ransley and Angela Ransley are two of the principals of M3M. Later, Lance Johnston became involved as a director and shareholder of M3M. Around October 2002, Mr Ransley engaged the applicant, Christopher Webley, to work on a contract basis selling boats and other product for M3M. The relationship between Mr & Mrs Ransley and Mr Webley worked well and about January 2003 they offered Mr Webley an opportunity to purchase shares in M3M, which Mr Webley did. Mr Webley was also appointed as a director. Thereafter, Mr Webley was not remunerated as a contractor to the business. Later, because of the issues that also resulted in Mr Webley's dismissal, he was removed as a director. A significant part of the current problem between the parties relates to a commercial dispute about Mr Webley's rights as a shareholder and a director but they understand that the Authority does not have jurisdiction to resolve those matters.

[2] About February 2004, Mr Webley spoke to Mr Ransley about needing a regular income from his work with M3M. They agreed to employ Mr Webley and to pay him a wage of \$600.00 per week. Mr Webley became an employee from that date.

[3] On 22 June 2004, Mr Webley was dismissed from his employment. He was also given a trespass notice warning him off the premises from which M3M operated. The dismissal followed covert video surveillance of an organised test purchase which indicated that Mr Webley retained the cash from the transaction. In his statement of problem, Mr Webley says that he was unjustifiably dismissed and the procedures followed by M3M were incorrect.

[4] The first issue for the Authority to determine is whether a full and fair investigation disclosed conduct capable of amounting to serious misconduct: see *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448. The Authority must be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. It may be necessary to resolve some major conflicts in evidence between Mr Webley and the M3M's representative (Michael Kyne) who conducted the investigation and conveyed the dismissal to Mr Webley. If the dismissal cannot be justified, it will be necessary to assess appropriate remedies, particularly the extent to which Mr Webley's actions contributed towards the situation that gave rise to any personal grievance.

[5] Mr Webley also referred to several reimbursement claims in his evidence which I will resolve after considering the personal grievance claim.

M3M's investigation

[6] The video surveillance and test buy were arranged because M3M had suspicions that Mr Webley was stealing money. It is not necessary to explain the genesis of those suspicions. The test buy was on Saturday 22 May 2004. Only Mr Webley was present, Mrs Ransley having made an excuse to be absent to ensure that Mr Webley had to serve the customer. Mr Webley sold the customer an item for \$100.00. When Mrs Ransley returned to the shop soon after the test buy, she checked the till to confirm that no sales had been rung-up and no money had been placed in the till. She commented to Mr Webley on her surprise that there had been no customers in and Mr Webley agreed with her that it was unusual. Nothing else was said about the incident at that time. When it was checked, the video footage did not show Mr Webley placing the cash payment in the till. All that confirmed M3M's suspicions.

[7] The suspicions were not raised with Mr Webley for some time, partly because he was overseas from about 11 June 2004 and returned to work on or about Tuesday 22 June 2004. A little while after he started work that day, Mr Webley was taken into the staff room by Mr Johnston who introduced him to and left him with Mr Kyne. There is some disagreement about how long Mr Johnston stayed in the room but that is not significant. Mr Webley accepts that Mr Kyne took him through and he signed a form headed up *INTERVIEW COMPLIANCE FORM*. Hand-written on the form as the reason for the interview is *1 Unauthorised Possession of Company Money, 2 Failing To Account For Cash Sales, 3 Breach of Invoicing Proceses Dishonesty Alleged – Very Serious Misconduct*. I accept that Mr Webley was told such was the reason for the meeting, he was told he might be dismissed and he was offered the opportunity to be represented. Mr Webley declined the opportunity to be represented and agreed to continue with the meeting.

[8] There is a dispute between Mr Webley and Mr Kyne about what was said and whether Mr Kyne made notes during the meeting. Mr Kyne has given me a copy of hand-written notes he says were made during his meeting with Mr Webley. They read in a question/answer format. However, Mr Webley is adamant that no notes were made by Mr Kyne during the meeting. The notes record Mr Webley admitting to taking the \$100.00 from the test buy and other money on 5 or 6 occasions totalling between \$500.00 and \$1,000.00. In evidence, Mr Webley said that he did not admit to taking money on 5 or 6 other occasions and he did not call his actions *stealing*. He accepts that he did admit to keeping the \$100.00 and that he did not at the time offer the explanation later given in evidence that the \$100.00 represented part reimbursement of expenses incurred by Mr Webley on behalf of M3M.

[9] Mr Kyne adjourned the meeting and went to speak to Mr Johnston and Mr Ransley. Mr Kyne's notes read *Discussion with Directors. Decision to dismiss for dishonesty. Request I*

discuss with Chris his shareholding – need to discuss – Directorship etc. Interview recommenced. Mr Webley's evidence is that Mr Kyne came back and told him that if Mr Johnston had his way, Mr Webley would be marched to the police right away but that Mr Ransley felt differently about the situation. Mr Kyne said that they wanted to terminate his employment but they had a deal to offer in terms of his shareholding. He outlined a proposal to repay Mr Webley \$40,000.00 over a period of time and for Mr Webley to resign. Mr Kyne's notes record him advising of the dismissal for dishonesty effective immediately, a police complaint to follow and a trespass warning.

[10] Mr Kyne made a further note of the ensuing discussion. He told Mr Webley that the directors believed him to be responsible for \$30,000.00 in losses so they would not just repay him the money he had invested in the company. Arrangements were made for a further meeting later at Mr Kyne's office.

[11] Mr Webley attended at Mr Kyne's office at about 12.20pm on 22 June with a friend, Lyndon Bunn. In arranging for Mr Bunn to be present, Mr Webley told him that he needed a witness because there had been a falling out over a business transaction and his partners had an offer to put to him. Only Mr Webley, Mr Bunn and Mr Kyne were present during this meeting. There are differences between Mr Bunn and Mr Webley on the one part and Mr Kyne on the other over what happened.

[12] Regarding the events at this meeting, I found Mr Bunn to be a credible witness. I accept therefore that Mr Kyne produced a copy of the Crimes Act, told Mr Webley that he had committed various offences but that M3M had an offer to put to him in return for no further action being taken. There was reference to the video footage of Mr Webley stealing and when asked to show the tape, Mr Kyne said that if he had to show the video footage, there would be a complaint to the police. Because of what was being said, Mr Bunn realised that he should not participate in the meeting and said that he should not be there. Mr Bunn is a serving police officer. The meeting degenerated. I accept that Mr Kyne raised his voice and told Mr Webley that he was dismissed and trespassed from M3M's property.

[13] I find that Mr Webley's recollection of his first meeting with Mr Kyne has been affected by the events at the meeting at Mr Kyne's office. In reliance on Mr Bunn's evidence, I find that Mr Webley has reason to be critical of the way matters were addressed at this second meeting. However, I do not accept that any similar criticism can be made of the conduct of the meeting at M3M's office, which is when Mr Webley was dismissed.

Was the investigation fair?

[14] In *NZ (with exceptions) Food Processing etc IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35 the Labour Court held that minimum requirements for procedural fairness are notice of the specific allegation and its likely consequences, a real opportunity for explanation and an unbiased consideration of such explanation. The Court also explained that an employer's disciplinary process should not be put under a microscope and subjected to pedantic scrutiny.

[15] Over the years, a number of cases have made the point that the employee is entitled to be heard by the decision-maker: see *Quinn v The Bank of New Zealand* [1991] 1 ERNZ 1060 and *Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424. It is of some significance that neither director spoke to Mr Webley about their concerns or heard directly from him about his explanation. Counsel for M3M sought to persuade me that the failure to give Mr Webley the opportunity to speak directly with the directors who decided his fate made no difference to the outcome.

[16] However, both Mr Ransley and Mr Johnston gave evidence about the background from which their suspicions about Mr Webley arose. Only part of that was ever put to Mr Webley even if it is accepted that Mr Kyne's notes are accurate. The dismissal was based on the directors' conclusion that all their suspicions about Mr Webley were well founded and that he had caused losses in the order of \$30,000.00 as a result of criminal conduct. Mr Webley may have been able to satisfy some or a substantial part of the suspicions if the directors had met with him and canvassed all their concerns. After all, the directors themselves acknowledge that the business systems left some significant doubt about what losses there were and who might be responsible. That may have had a bearing on any decision to dismiss, in the light of Mr Webley's status as a part-owner and officer of the business.

[17] As a result, I find that M3M did not conduct a full and fair investigation and it follows that Mr Webley has a personal grievance.

Remedies

[18] Section 124 of the Employment Relations Act 2000 requires the Authority, when deciding both the nature and the extent of any remedies, to consider the extent to which Mr Webley's actions contributed towards the situation giving rise to the grievance and reduce the remedies accordingly if those actions so require.

[19] Mr Webley's evidence is that he took the \$100.00 against a refund due to him for expenditure he incurred on behalf of M3M. He acknowledged that Mrs Ransley had earlier declined to reimburse him out of company funds. That is the best view of the matter from Mr Webley's perspective. Even if I was to accept that perspective instead of finding that he made the admissions recorded in Mr Kyne's notes, the outcome must be that Mr Webley is not entitled to any remedy. Mr Webley must accept full responsibility for the situation which he created.

[20] For the sake of completeness, I record that Mr Webley suffered little in lost remuneration so remedies would have been largely confined to distress compensation if there had been any award.

Reimbursement claims

[21] There is evidence from Mrs Ransley about how the reimbursement of expenses incurred by directors was usually handled, all of which I accept. Some of the claims mentioned by Mr Webley were for expenses incurred before he commenced as an employee so they cannot fall within the Authority's jurisdiction. I find that Mr Webley in expending any funds on behalf of M3M after February 2004 was acting in his capacity as a director and/or shareholder rather than an employee of M3M. Accordingly, I make no award for any of the items of reimbursement canvassed by Mr Ransley. In any event, the expenses incurred after February 2004 amount to only a little more than \$100.00, the sum taken by Mr Webley on 22 May 2004.

Summary

[22] While Mr Webley has a personal grievance, his conduct was such as to disentitle him to any remedy.

[23] The claims for reimbursement of expenses are not within the Authority's jurisdiction.

[24] The substance of this determination is that Mr Webley has been unsuccessful in his claims. The usual approach of the Authority is to require an unsuccessful party to contribute to the costs of the successful party. However, as costs were not argued, I will simply reserve the point for future determination if need be.

Philip Cheyne
Member of Employment Relations Authority