

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN James Wilson (Applicant)
AND Smith's Painting Contractors Limited (Respondent)
REPRESENTATIVES Brent Climo, Advocate for Applicant
Robin Smith, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 18 October 2005
DATE OF DETERMINATION 21 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] James Wilson was employed by Smith's Painting Contractors Limited from about 6 September 2004 until his dismissal on Tuesday 9 November 2004. He says that he has a personal grievance because the dismissal is unjustifiable. The company says that it justifiably dismissed Mr Wilson.

[2] There is no dispute that Mr Wilson was employed for a three month probationary period with that being included in the written employment agreement. There are other terms of the employment agreement that the company says are relevant, more of which later. The company says that Mr Wilson was not dismissed because of any dissatisfaction with his work performance during the probationary period but because *James took it upon himself to verbally and in a threatening manner intimidate [the company] site foreman*. Robin Smith is the managing director of the company. He says that Mr Wilson's behaviour amounted to serious misconduct. Mr Wilson denies any intimidating behaviour and says that he was told by Mr Smith that he was dismissed because of work performance concerns. He says that the dismissal is procedurally unfair and he had no warnings or opportunity to improve before the dismissal.

[3] To resolve the problem, I need to resolve some conflicting evidence about what happened on Monday 8 November during two exchanges between Mr Wilson and the company foreman, Barry Dale. There is evidence from Mr Smith and others about his investigations later on Monday evening which should be set out. There is then a dispute between Mr Wilson and Mr Smith about their exchange on Tuesday morning which also must be resolved. Once it is clear what happened, I will apply the law relating to dismissal for serious misconduct to assess whether the company justifiably dismissed Mr Wilson.

Events on Monday 8 November

[4] The company had a painting contract for work on a building site where Anchor Construction Limited was the main contractor. Mr Smith had become dissatisfied about some aspects of his crew's work on the site so he arranged for one of his foremen, Mr Dale, to hold what they called a *toolbox meeting* first thing on Monday morning. Mr Dale spoke to the crew about tidying up the job at the end of the day, timekeeping, wearing of headphones and similar issues.

[5] Mr Dale's evidence is that Mr Wilson was argumentative and verbally abusive towards him during the *toolbox meeting*. However, given the passage of time, Mr Dale struggled to be specific about precisely what Mr Wilson said that was abusive. He did recall him swearing (*the f... word*) and being argumentative. Mr Dale could not recall what the argument was about. Mr Wilson says that he did not swear, that there was some discussion about a discussion between Mr Dale and Mr Wilson from the week before about smoko times and that he was asked but could not work an extra half-hour that Monday. After the *toolbox meeting* Mr Wilson went in search of his copy of the employment agreement to check out some points canvassed in the exchange between himself and Mr Dale.

[6] At afternoon smoko, Mr Wilson went outside to have a smoke. Mr Dale was there with another employee (Vanessa) and two Anchor employees. He remained sitting with Mr Wilson standing about 2 metres away throughout the exchange that ensued. That much at least is agreed. Mr Wilson says that he wanted to discuss what was in his agreement about working additional hours but Mr Dale was not interested. Mr Dale told him to take it up with Mr Smith. He then asked why the company had stopped picking up Vanessa to give her a ride to work. Again, Mr Wilson was told to take it up with Mr Smith. Mr Wilson said that it was *Bullshit*. He says that Mr Dale *got all irate and got all shitty with me*. Mr Dale told him to shut-up and he responded by telling Mr Dale to shut-up. Mr Wilson says that he then went back upstairs to work.

[7] Mr Dale's account of this exchange is somewhat different. He says that he felt intimidated by Mr Wilson who was yelling and swearing at him although he never thought he would be hit. He says that *every second word was the f... word*. Mr Dale says that when he told Mr Wilson to go back to work, he did so. That was the end of the exchange.

Mr Smith's investigation

[8] Mr Smith heard about what had happened first from Mr Kennedy, the managing director of Anchor Construction Limited. Mr Kennedy told me that he has strong views about abusive behaviour on his sites and does not tolerate it. He heard from his foreman (Malcolm) who had been present during the afternoon exchange about what had happened. Mr Kennedy then rang Mr Smith at about 5.30pm on the Monday and told him about that report. He made it clear to Mr Smith that the person must be removed from the site and would be permanently banned from all other Anchor Construction sites. Mr Kennedy said he would follow up in writing, which he did by a letter dated 9 November.

[9] Next, Mr Smith received a phone call from Mr Dale at about 6pm. Mr Smith told me that he could tell from Mr Dale's tone that he was upset. Mr Smith then rang his other employee who was present during the afternoon exchange (Vanessa). He asked Vanessa if Mr Wilson had been abusive, loud and swearing and whether others from outside the company could have heard the exchange. Mr Smith told me that Vanessa confirmed these things.

[10] Mr Smith says that he then considered what was in the employment agreement. He decided that various clauses were relevant. Clause 1.1 requires an employee to comply with reasonable directions and policies; clause 1.3 requires an employee to carry out assigned work; clause 1.5.1 prohibits an employee from prejudicially affecting the employer's goodwill and reputation; clause 13.1.1 provides for dismissal in the event of serious misconduct; clause 13.3.8 defines as serious misconduct a refusal to perform assigned work or a serious breach of the employer's code of conduct; clause 13.6.1 declares that the employer will not tolerate verbal, racial, physical or sexual harassment and may summarily dismiss any employee who does those things; clause 13.6.2 is a reminder that behaviour and language acceptable to some may not be acceptable to others. Mr Smith says that he decided that he would stand down Mr Wilson. That is a reference to clause 13.2 of the agreement that says that the employer may stand down the employee without pay for up to two weeks to enable the employer to investigate an allegation of misconduct.

[11] On Tuesday 9 November, shortly before Mr Wilson arrived at work, Mr Smith spoke again to Mr Dale. Mr Dale gave evidence that *I think Robin [Smith] said that he was going to let him go – behaviour not acceptable.*

The dismissal

[12] Mr Wilson drove up to work. He saw Mr Smith approach him and got out of the car. Mr Wilson's evidence is that Mr Smith told him he was on a three month trial, that he was not happy with his work and would have to let him go. Mr Wilson asked if Mr Smith was going to hear his side but Mr Smith just turned and walked away. Mr Wilson said that it was unfair. He then drove over to see a supervisor at the Richmond Mall site (Dave) where he had worked before the current job. Dave rang Mr Smith to say that Mr Wilson's work was fine but Mr Smith told him that it was none of his business.

[13] Mr Smith's evidence is somewhat different. He said that from his investigation he was convinced something serious had happened. He went over to Mr Wilson when he saw the car pull up and was not sure if Mr Wilson even got out of the car. It was not a long discussion. Mr Smith said *We've got an issue* but Mr Wilson was reluctant to discuss it. Mr Smith then said *Under the circumstances, I can no longer continue to employ you.* Mr Smith told Mr Wilson that he would pay out the balance of the week in lieu of notice. Mr Smith also gave evidence that Mr Wilson asked him if there was any problem with his performance and he said that there were a few things. However, Mr Smith's evidence is that performance was not the reason for the dismissal. The dismissal was for abuse, particularly the afternoon episode. Mr Smith acknowledged that he received a call from Dave and told him that it was none of his business.

[14] I prefer the evidence given by Mr Smith about the dismissal incident.

Justification

[15] The test for justification when dismissing for serious misconduct is set out in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448. The Court of Appeal held that an employer must show that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.

[16] A full and fair investigation would comply with any process set out in the relevant employment agreement. In the present case, clause 13.1.1 says *...the employer will advise the employee of the allegation and all information it has relating to that allegation and shall advise the employee that if the employer finds that such misconduct occurred then the employee will or may be*

dismissed. ...The employer shall fairly hear and consider the employee's reply before making a determination of the matter.

[17] Mr Smith did not comply with these terms of the employment agreement. He did not tell Mr Wilson about Vanessa backing up Mr Dale's account of the afternoon incident. Mr Dale had made some notes of the incidents but these were not provided to Mr Wilson. Mr Wilson was not told that he might be dismissed depending on his response. None of the clauses in the employment agreement thought by Mr Smith to be relevant were mentioned to Mr Wilson.

[18] Further, I find a significant element of predetermination on the part of Mr Smith. I accept Mr Dale's evidence that he was told shortly before the dismissal that Mr Smith was going to let go Mr Wilson. That is unsurprising because by then Mr Smith himself had clearly decided that something serious had happened and he knew that Mr Wilson could no longer work on that site, regardless of anything said by him in his defence.

[19] For these reasons, I find that the dismissal is unjustifiable. Mr Wilson has a personal grievance as a result.

Remedies

[20] It is necessary to consider the extent to which Mr Wilson's actions contributed to the situation giving rise to the personal grievance. That requires some findings about exactly what happened between Mr Wilson and Mr Dale during the *toolbox meeting* and during the afternoon smoko. Mr Dale made some notes of the day's events in his notebook. The notes only came to light on the day of the investigation meeting but there is no reason to doubt them as a contemporaneous account of events. The notes record Mr Wilson as *extremely argumentative*, that he *mouthed off* about Vanessa and was *extremely abusive saying [the toolbox meeting] was a waste of time*. They record Mr Wilson as *very abusive, aggressive & threatening*. I accept that such was Mr Dale's perception at the time although Mr Dale accepted in evidence that no threats were actually made and he did not think that there would be any physical violence. It is also probable that Mr Wilson used the word *fucking* or similar language. Mr Wilson's conduct towards Mr Dale was uncalled for and leads me to conclude that that he contributed to the circumstance giving rise to the grievance in the order of 50%.

[21] Mr Wilson seeks \$5,000.00 compensation for distress. He says that he *felt like shit* having to explain to his family about being dismissed. The loss of employment caused him significant financial problems shortly before Christmas and after until he found other work which took some time. In the circumstances, the claim is reasonable and I award it in full subject to the finding about contribution. The respondent is to pay compensation of \$2,500.00 to Mr Wilson pursuant to section 123 (c) (i) of the Employment Relations Act 2000.

[22] Mr Wilson lost remuneration as a result of the grievance. While he was only about 2 months into a trial period, it is probable that his employment would have continued beyond the trial period. Mr Smith was very clear that the dismissal was not to do with work performance. Mr Dale told me that Mr Wilson's work was *average*, meaning not great, but in the prevailing job market, the company had to take what employees it could get. Mr Smith also told me that there was other work away from the Anchor site that Mr Wilson could have been moved to.

[23] Mr Wilson commenced alternative employment in March 2005 and I accept that he made reasonable efforts to find work before then. He could not tell me exactly when in March he started. Subject to the finding about contribution, I award Mr Wilson compensation for his lost remuneration for 3 months from the date of the employment ended. I limit it to 3 months to ensure

there is no overlap with his new job. Mr Wilson's average weekly wage for the eight weeks worked before the week of the dismissal was \$660.00. I find his loss during the 13 weeks after the dismissal was therefore \$8,580.00 so I order the respondent to pay him \$4,290.00 compensation for lost remuneration pursuant to section 128 (3) of the Employment Relations Act 2000.

Summary

[24] The respondent is to pay Mr Wilson compensation of \$2,500.00

[25] The respondent is to reimburse Mr Wilson's lost wages in the sum of \$4,290.00.

[26] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority