

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 375
5560187

BETWEEN NATHANIEL JOHN ALVEY
Applicant
AND MANUKAU AUTO CENTRE
LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: K Fayen, Advocate for the Applicant
P Hodge, Advocate for the Respondent
Investigation Meeting: 10 November 2016 at Auckland
Submissions received: 10 November from both parties
Date of Oral Determination: 10 November 2016
Date of Determination: 16 November 2016

ORAL DETERMINATION OF THE AUTHORITY

- A. Nathaniel Alvey was constructively and unjustifiably dismissed by Manukau Auto Centre Limited.**
- B. There is an order that Manukau Auto Centre pay Nathaniel Alvey lost remuneration of \$1,312.50 inclusive of a reduction of 25% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**
- C. There is an order that Manukau Auto Centre pay Nathaniel Alvey compensation of \$750 inclusive of a reduction of 25% for contributory behaviour pursuant to ss.123(1)(c)(i) and 124 of the Employment Relations Act 2000.**

D. There is an order for Manukau Auto Centre Limited to pay Nathaniel Alvey \$875 towards his costs.

Employment relationship problem

[1] Nathaniel Alvey alleges he resigned because he was constructively and unjustifiably dismissed and disadvantaged in his employment by the conduct of his employer between January and February 2015. He also alleges he was not given his full 40 hours work.

Relevant Facts

[2] By consent, the applicant's employer is the Manukau Auto Centre Limited (MAC).

[3] MAC provided automotive painting services. Daniel Alexander was the director and manager.

[4] Mr Alvey was employed as a machine painter. His employment lasted for approximately three months between November 2014 and 2 March 2015.

[5] Prior to January 2015, Mr Alvey and his employer had a relatively collegial relationship. A series of text messages were exchanged between Mr Alvey and Mr Alexander in January and February 2015 that give rise to this dispute.

[6] In January 2015, Mr Alexander texted Mr Alvey telling him not to come into work on a Saturday and Sunday (10 and 11 January) and a Saturday (24 January) due to a lack of work.

[7] On 12 January 2015, Mr Alexander texted Mr Alvey telling him they needed business, were seeing two clients and cold calling various businesses on 13 January 2015 and asked Mr Alvey to "*wear something decent*".

[8] On 27 January 2015, Mr Alexander asked Mr Alvey if he had called one of the clients.

[9] On 20 February 2015, Mr Alexander texted Mr Alvey. He informed Mr Alvey his brother Andrew had told him that Mr Alvey was hitting him up for work. Mr Alexander then goes on to state:

I'm not having you here and there. If you want to work there I'll accept your notice.

[10] On 27 February 2015 Mr Alvey texted Mr Alexander requesting a day off to attend job interviews. Mr Alexander responded:

Not good enough. I think it's best you just send your resignation letter in. You're out looking for jobs.

[11] On 2 March 2015, Mr Alvey resigned. He did not at that stage have any further work.

Issues

[12] Following discussions with Counsel at the start of hearing, the issues were reduced by consent to the following:

- Whether Mr Alvey was constructively and unjustifiably dismissed and/or disadvantaged in his employment by the respondent's conduct?
- Whether Mr Alvey was disadvantaged in his employment by the respondent's requirement he source his own clients for the business and/or stay away from work?

Whether Mr Alvey was constructively and unjustifiably dismissed and/or disadvantaged in his employment by the respondent's conduct?

[13] The commonly applied test for constructive dismissal is whether the initiative for the dismissal has come from the employer.¹

[14] There was evidence Mr Alvey's dismissal was initiated by the employer. There was insufficient ongoing work for Mr Alvey. This is evidenced by the number of times it was accepted he was told not to attend work. There were also references throughout to Mr Alexander having to go out and find and retain more ongoing work for Mr Alvey.

[15] However it is the text messaging on 20 and 27 February 2015 that unequivocally shows Mr Alexander took the initiative for the dismissal by asking for Mr Alvey's notice. I do not accept that the language used was optional. I do not accept it was intended to give him the option of staying or resigning.

¹ *NID Distribution Workers etc IUOW v Foodtown Supermarkets Ltd* [1988] NZILR 588 (LC).

[16] The evidence supports a finding this was conduct whose purpose was to force Mr Alvey to resign or be dismissed for his behaviour. This falls within one of the accepted categories of constructive dismissal.²

[17] Given the initiative for resigning came from the employer, there is sufficient to show that MAC should have foreseen Mr Alvey's resignation.

[18] I need to consider whether this dismissal was justified. Section 103A of the Employment Relations Act 2000 (the Act) requires a process be followed to justify any dismissal. This is having regard to the resources available, an employer sufficiently investigates allegations, raises concerns with the employee, gives the employee a reasonable opportunity to respond and genuinely considers the employee's explanation prior to dismissal occurring. None of this occurred here. Therefore Mr Alvey was constructively and unjustifiably dismissed by MAC.

Whether Mr Alvey was disadvantaged in his employment by the respondent's requirement he source his own clients for the business and/or stay away from work?

[19] I do not accept that there was evidence that he was required to source clients. Even if there was, it appeared to have occurred only on one occasion and there was evidence that this type of work fell within his job description and existing skills in any event. The onus is upon Mr Alvey to prove disadvantage. This has not been proven and that application is dismissed.

[20] It was accepted that Mr Alvey was told to stay away from work on three days. All of the days fell over two weekends. There is no evidence of disadvantage because the evidence showed he worked more than 40 hours per week on average and his hours of work set out in his agreement did not specify weekend work. That application is dismissed.

Remedies

[21] Mr Alvey has a proven personal grievance. He is entitled to seek lost remuneration and compensation.

² *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

Lost wages

[22] He has proven he did things to mitigate his losses. He gave evidence of seeking employment with 10 applications over 2 ½ weeks. When unsuccessful he started a new business. His losses are confined to 2½ weeks. His average earnings during that period of time were \$1,400 per fortnight or \$700 per week totalling \$1,750. This figure may still be reduced for any contributory behaviour.

Compensation

[23] There is little evidence of hurt and humiliation for Mr Alvey. I accept there was some stress involved in the weeks leading up to the dismissal but it seems as though he has adequately resolved that enough to start his own business. An award of \$1,000 is appropriate to mark his distress subject to any reduction for contributory behaviour.

Contributory behaviour

[24] I must also consider the extent to which an employee's actions contributed towards the situation that gave rise to the personal grievance and if required reduce the remedies that would otherwise be awarded.

[25] Contributing behaviour is behaviour which is causative of the outcome and blameworthy. There are two actions by Mr Alvey which prompted this dismissal. First, the alleged cash jobs undertaken for Mr Alexander's brother. This potentially put him in a conflict of interest situation with MAC. He also sought time off at the last minute to go job hunting. This created problems for MAC in that it had to find alternative workers and also left it in some uncertainty about whether he was returning to work and for how long. In my view that behaviour was both causative and blameworthy. It justifies a reduction in remedies of 25%.

Determination

[26] Accordingly the following orders are now made:

- (a) Nathaniel Alvey was constructively and unjustifiably dismissed by Manukau Auto Centre Limited.

- (b) There is an order that Manukau Auto Centre pay Nathaniel Alvey lost remuneration of \$1,312.50 inclusive of a reduction of 25% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.
- (c) There is an order that Manukau Auto Centre pay Nathaniel Alvey compensation of \$750 inclusive of a reduction of 25% for contributory behaviour pursuant to ss.123(1)(c)(i) and 124 of the Employment Relations Act 2000.

Costs

[27] I have heard both parties in respect of costs. The starting point for costs in the Authority is its daily notional tariff which is \$3,500. This matter took half a day's hearing time. The starting point will be reduced to \$1,750. This may be increased or reduced dependent upon any relevant factors.

[28] I was made aware of a *Calderbank* offer for \$5,000, \$3,000 towards compensation and \$2,000 for costs. This was significantly more than has been achieved here. I set that aside in determining costs.

[29] Mr Alvey was also only partially successful. This justifies reducing costs by 50%.

[30] There is an order for Manukau Auto Centre Limited to pay Nathaniel Alvey \$875 towards his costs.

T G Tetitaha
Member of the Employment Relations Authority