

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 136/07
5089242

BETWEEN CALEB AYERS
 Applicant

AND QUAD 2000 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Anne-Marie McRae, Counsel for Applicant
 Tim Maguire, Advocate for Respondent

Investigation Meeting: 16 October 2007 at Christchurch

Determination: 12 November 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Caleb Ayers, claims he was unjustifiably summarily dismissed from his employment as a solid plasterer with the respondent on 14 July 2006. He seeks reimbursement of lost remuneration, the balance of his holiday pay, compensation for hurt and humiliation in the sum of \$10,000 and costs.

[2] The respondent denies the dismissal was unjustified and apart from agreeing to pay the balance of the holiday pay, declines to meet the applicant's remedies.

What caused the problem?

[3] The applicant commenced work with the respondent company, of which Mr Maguire was the sole director, in March 2006. The employment was for 40 hours per week. However, if weather prevented work, the applicant and other employees were not paid for lost hours. Caleb said he worked between 20 and 30 hours each week during his employment due to interruptions by inclement weather.

[4] There is no written employment agreement governing the relationship between the parties, but the applicant said that he understood he was to be paid for 40 hours when he was offered the job.

[5] On 14 July 2007, Caleb went to work at a building site in Wigram. The team, including Mr Maguire, worked from 8am through until 3pm with only a 10 minute tea break. When they stopped for an afternoon break, Caleb and two fellow employees went to nearby shops to get food and some drinks. Mr Maguire asked the team to get some things for him as he remained at the site.

[6] On returning to the site some 10 minutes later, Caleb, who says he was smoking a tailor-made cigarette at the time, took Mr Maguire's food across to him. Caleb says that Mr Maguire told him that he (Mr Maguire) wanted to see all the team after smoko, but then went over to the car in which the other two were sitting and accused all three of smoking cannabis. Each denied the allegations saying they had been smoking roll-your-own cigarettes. Mr Maguire searched the car and the ashtray but found no evidence to support his allegation.

[7] Mr Maguire accepts he became *a bit heated* at the incident. He says that, faced with their denials which he regarded as *a blatant lie*, he dismissed all three on the spot.

[8] Mr Maguire says that he had warned Caleb and the others about the use of drugs on an earlier occasion explaining that it was unsafe on a building site. He had no record of issuing these warnings. Caleb says that he recalls a discussion between Mr Maguire and himself earlier, but said it was more in the nature of a general caution.

[9] The respondent says that it has paid all three what was owed to them, including their holiday pay, that evening via their individual bank accounts.

The investigation meeting

[10] At the investigation meeting, the Authority was assisted by evidence in person from the applicant and from his father, Mr Philip Ayers. For the respondent, the Authority heard from Mr Maguire in person. All participants were open and frank in expressing their views and I gained the distinct impression that all three were

essentially decent, honest people. I would also like to record the Authority's thanks to Ms McRae for her well organised and on point submissions.

Analysis and discussion

[11] The respondent faces a major difficulty in justifying its actions in a dismissal setting. To put it squarely, the investigation process, when summary dismissal for serious misconduct is a possibility, must be thorough and give real opportunity for the employee to state his case. As the Court of Appeal stated in *Auckland City Council v. Hennessy* (1982) ERNZ Sel CAS 4; [1982] ACJ 699 (CA):

A course of action is unjustified when that which is done cannot be shown to be in accord with justice or fairness. It follows that a dismissal may be held unjustifiable where the circumstances are such that justice or fairness requires that the employee shall have an opportunity, which he has not been afforded, of stating his case.

[12] The applicant had been in a fellow employee's car during the trip to the shops. His evidence was that he was smoking a tailor-made cigarette when he took Mr Maguire's purchases to him. Further, he denied, and continues to deny, that he was smoking cannabis. A full inquiry may well have established that one of the other employees, said by Mr Maguire to be a *heavy user*, may have been responsible for the smell on the applicant's clothing. While a search of the interior of the vehicle and its ashtray was a practical step to take, it falls well short of what a fair and reasonable employer would have done in all the circumstances.

[13] Mr Maguire had every right to ensure that safety standards are maintained at all times on any building site on which they are working. A ban on drug use certainly falls under these requirements. However, his action in dismissing the applicant was instinctive rather than considered, and the respondent company must live with his decision.

[14] Mr Maguire's submission at the investigation meeting was that Caleb could have found work more promptly than he did as the building sector was short of skilled tradespeople at the time. Caleb says he was very upset following the dismissal but found some work through a temping agency in later 2006 and found a permanent factory role in mid-January 2007.

[15] Counsel for the applicant submitted that, to the best of his ability, Caleb had sought to mitigate his loss. Mr Ayers gave evidence that after getting two weeks'

labouring work through the agency, Caleb kept looking for full time work. Caleb's father told the Authority that the applicant was dependent on him and his wife for financial support, and became *morose and withdrawn and stopped going out with his friends ... because he did not have any money.*

Issues

[16] To determine this matter, the Authority is required to decide on the following matters:

- Did the respondent conduct a full and fair investigation into the allegations made; and
- Was the respondent justified in dismissing the applicant in all the circumstances surrounding the matter; and
- If not, what, if any, remedies are due to the applicant; and
- Did the applicant contribute to the circumstances giving rise to his dismissal?

The test

[17] The test of justification in relation to a dismissal or action being justifiable is set out in s.103A of the Employment Relations Act 2000. This requires the Authority to step back and consider objectively 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.

Determination

[18] I find the applicant was unjustifiably dismissed. I find he did not contribute to the circumstances giving rise to his dismissal. I find the applicant has a personal grievance and now turn to the remedies.

Remedies

[19] The applicant sought 20 weeks' actual loss of earnings, counsel urging that this was a case in which the Authority should exercise its discretion. I have considered that submission. However, I am mindful the respondent company is a

modest enterprise and an award as sought may bring a heavier burden on it than is warranted.

[20] The respondent is to pay the applicant the sum of 13 weeks' wages at 40 hours per week at the rate of \$14 gross per hour. That is, the sum of \$7,280 gross.

Holiday pay

[21] The applicant sought the balance of his holiday pay still owed at the time of his final pay. He sought *approximately* \$71.46. Having calculated what is due on the basis of the company's records and the applicant's bank statements, the respondent is to pay the applicant the sum of \$92.47 gross.

Compensation

[22] The applicant suffered significant hurt and humiliation as a result of his dismissal. After considering the evidence of his father and the submissions of his counsel, I award the applicant the sum of \$4,500 under s.123(1)(c)(i) of the Act.

Costs

[23] Ms McRae sought costs in the sum of \$4,000 pointing out that additional time was necessarily deployed due to the respondent's lack of cooperation. I have borne this in mind, as I have the principles set out by the Full Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* AC2A/05.

[24] The investigation meeting was completed in half a day, the two statements of evidence prepared for the applicant were relatively short and the submissions of counsel precise and well set out.

[25] In the circumstances I think it just to award the applicant the sum of \$2,200 as a contribution to his reasonably incurred costs.

Paul Montgomery

Member of the Employment Relations Authority