

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Richard Begg (Applicant)
AND South Auckland Hydraulics Limited (Respondent)
REPRESENTATIVES Francis Sabbineni, Advocate for Applicant
Gary Blair, Advocate for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 19 August 2005
DATE OF DETERMINATION 25 August 2005

DETERMINATION OF THE AUTHORITY

- [1] Nigel Clayton, director and sole shareholder in the respondent company, owned two “Hydraulink” franchises for the repair and maintenance of hydraulic equipment. These franchises gave him exclusive rights to certain geographic areas, support from “Hydraulink” Head Office, and a van with the equipment necessary to do the repair work. Each was small enough to be operated by one driver/technician working alone. Mr Clayton looked after one himself (in fact he still does) and set up South Auckland Hydraulics Ltd to run the other.
- [2] From 8 August 2004 that company employed Mr Begg to drive the van and do the repairs. One evening in late January 2005 Mr Clayton arrived at Mr Begg’s home unannounced and told him that he had come to take back the van because Mr Begg was dismissed. Mr Begg says this was unjustified, came without warning, and caused him great distress. Mr Clayton acknowledges that he knew very little about employment matters and may not have done things “by the book.” However he says that Mr Begg’s performance was so bad that the business was going under and Mr Begg knew this. He said he had given Mr Begg as much of a chance as he could but the business was not covering costs and he could not afford to keep paying Mr Begg’s wages.
- [3] The issues for determination are:
- whether the business was genuinely having the difficulties Mr Clayton described and whether that was Mr Begg’s fault;
 - whether Mr Begg received any warnings about his performance;
 - whether the dismissal was conducted in a fair manner, and
 - if Mr Begg does have a personal grievance, what remedies are appropriate and whether he contributed to the situation that gave rise to the grievance.

How were the company and Mr Begg performing?

- [4] Mr Clayton did not provide the Authority with month by month sales figures. However he did give me the annual accounts for the year ending 31 March 2005 and these showed that the business had lost heavily. After Mr Begg was dismissed in January the business did not trade again and shortly before the investigation meeting Mr Clayton decided to cut his losses and sell the franchise.
- [5] Mr Clayton told me that the business had been in operation for some time before he employed Mr Begg and had been doing reasonably well. It had a base of large established customers who dealt with Hydraulink nationally. However he said from the time Mr Begg began it went into decline. In order for it to break even it needed to make \$12,000.00 per month turnover but he said in six months Mr Begg achieved this only once. Mr Clayton said previous customers were leaving (including some of the well established ones) and were not being replaced by new ones. A sales representative from Head Office went out with Mr Begg three times to show him how to approach new customers but this did not help.
- [6] The main concern reported by dissatisfied customers was that they did not have confidence in Mr Begg or his work. Mr Begg's background was in plumbing and this was why Mr Clayton had hired him. However he was surprised at how long it took Mr Begg to learn the job. Mr Clayton spent three weeks training Mr Begg when it usually took someone with the right background more like a week to become competent.
- [7] Mr Clayton also had concerns about Mr Begg's driving. He had received complaints about dangerous driving via Head Office which was contacted by motorists who had seen "Hydraulink" signage on the van. Mr Clayton provided the Authority with written confirmation from customers and from Head Office of the feedback he had received about Mr Begg's work and driving habits. He told me that he came under increasing pressure from Head Office to do something about Mr Begg's performance.
- [8] Mr Begg agrees that Mr Clayton spoke to him about his driving but denies that this was a serious or on-going problem. Mr Begg does not dispute that Mr Clayton told him of the target and spoke to him generally each month about sales although he says he did not see the actual figures. Mr Begg believes he achieved target, or close to it, in two or three of the months during which he was employed. He says that this was reasonable performance since he needed time to learn the role and could not be expected to meet target immediately. He also notes that public holidays affected the figures for October and for December/January. For his part, Mr Clayton felt that one or two months should have been enough for Mr Begg settle in and he expected him to meet the break even point after that.

Determination

- [9] The annual accounts for the business show that it did very badly in the year to March 31 2005. The six months Mr Begg was employed was a big portion of the year and it is reasonable to conclude that it made a significant impact on the overall performance of the company, especially since the best case scenario (by Mr Begg's own evidence) was that sales reached the break even point in two or three of the six months. **I am satisfied that, during the time Mr Begg was employed, the business was failing.**
- [10] There is nothing in front of me to suggest that the business had not been viable in the past. Mr Begg was of course its only employee and responsible for all its day to day operations. The performance of the franchise depended solely on him. He must bear responsibility for its poor

showing. **I am satisfied therefore that Mr Begg did not perform to the minimum standard required.**

Was Mr Begg warned about his performance?

- [11] Mr Clayton told me that by November (by which time he had seen the figures for August, September and October) he was having serious concerns about Mr Begg's work. However, he knew that Mr Begg's marriage had just ended and he was mindful of the stress that Mr Begg was under as a result. He said that he did not wish to place too much pressure on him at this difficult time, and hoped that once his personal life settled down his work would improve. He told me he decided to give Mr Begg a bit more time to come up to scratch.
- [12] Around early December he spoke with Mr Begg about his driving, and about the sales figures. He says he was sure by this stage Mr Begg was aware that his performance was below par and that the situation could not go on as it was. I accept that Mr Clayton told Mr Begg that the sales figures were not satisfactory. Mr Begg did therefore know that things were not going well with the business and must have known that this reflected on him since he was the only employee.
- [13] However I am not satisfied that he was given a timeframe for improvement or even told specifically that his job was in jeopardy. **What Mr Clayton said to Mr Begg did not meet the minimum requirements for an employment warning.**

Was the dismissal conducted in a fair manner?

- [14] I accept Mr Clayton's evidence that he was concerned about Mr Begg after his marriage broke up and that this was the reason he did not tackle the employment issues sooner, and more directly. Unfortunately, the end result of putting off this difficult task was a dismissal that was far more distressing for Mr Begg than a properly handled process would have been.
- [15] After Christmas nothing had improved. Mr Clayton did not have the final sales figures until the end of the month but he says he realised early on that that January was not going to be a good month. (It turned out that January sales were \$2,800.00 in total.) Then on January 27 came what was for him the final straw. That afternoon Mr Begg was working on a repair job for a major customer. He was not able to complete this job as the customer felt he should and Mr Clayton came out to assist. This of course took him away from the other run for which he had sole charge responsibility. More importantly, though, the customer was very angry at what he felt was poor service and told Mr Clayton so in no uncertain terms. Mr Clayton told Mr Begg that "this can't go on."
- [16] That evening Mr Clayton turned up unexpectedly at Mr Begg's home. Without further ado, he told him he was sacked and that he was taking the van back. Mr Begg told me, and I accept, that he was shocked rigid. His humiliation was compounded by the fact that Mr Clayton was accompanied by another franchise holder (in whose franchise Mr Clayton had a stake) who was there to drive the van away. Mr Begg told me that this person stood watching and drinking a can of beer while Mr Begg unloaded his personal belongings from the van in preparation for it to be taken away.
- [17] Coming when it did the dismissal compounded what was already a black patch in Mr Begg's life. Although Mr Clayton did in the event continue to pay Mr Begg for two more weeks, he did not initially tell Mr Begg that he would do so, which added to his anxiety. Mr Begg has been suffering from stress and depression ever since and went on a sickness benefit on 21 March 2005. He has not even been able to look for work.

[18] Mr Clayton told me that he acknowledges that the way this dismissal was conducted was not the best. He says he was just did not know what to do or how to deal with the situation; the business was losing money hand over fist and he was under pressure from Hydraulink and from customers to act decisively. After the events of 27 January he felt he could not put this off any longer.

Determination

[19] This dismissal is of course totally lacking the minimum of procedural fairness. Mr Begg was not properly warned, he was not given a chance to obtain representation and he was not given an opportunity to respond to Mr Clayton's concerns before he was dismissed. It was also insensitive in the extreme for Mr Clayton to have a virtual stranger looking on while he dismissed Mr Begg, and at his home rather than in the workplace. **Notwithstanding the fact that Mr Clayton's concerns had substance, the dismissal is unjustified for want of procedural fairness.**

Remedies and Contributory Conduct.

[20] As I have already indicated, I heard evidence that the respondent company has ceased trading and has no assets, having sold up at a net loss. This makes any award of remedies something of an academic exercise. However, Mr Begg explained that it is important to his sense of closure that he know what remedies are due to him

[21] As we have seen, Mr Begg was paid for a period of two weeks after he was given notice of dismissal. This took him though until 10 February 2005. He went on to a benefit on 21 March 2005, some six weeks later. I accept that he could not mitigate his loss in the interval and is entitled to lost earnings for that period. I do not go beyond that point as I cannot be confident that the dismissal is the principal cause of his on-going inability to work. In total he lost six weeks full time wages at an hourly rate of \$21.00. This comes to the sum of \$5,040.00 gross, less any deduction to be made for contributory conduct.

[22] As for hurt and humiliation, I accept that the manner of the dismissal was deeply distressing and caught Mr Beg at a particularly vulnerable point in his life. His distress should however have been tempered by the realisation that the business situation was unsustainable. (I am satisfied that if Mr Clayton had not acted as he did, a termination for redundancy would undoubtedly have followed very soon after.) Mr Begg does not acknowledge this. Given the fact that he had other personal issues at the time I also doubt that all his distress and health problems can be blamed on the dismissal. Finally it is also relevant that Mr Begg had been in the job for a relatively short time. In these circumstances I consider an award of \$5,000.00 to be appropriate subject to deduction for contributory conduct.

[23] Coming finally to the question of contributory conduct I note that it is usually difficult to demonstrate this in a performance related dismissal without warnings. Such circumstances usually lead to a concern that with proper performance management the situation might have been turned around and the dismissal averted. However the circumstances here are a little unusual because of the particularly poor performance of the business (of which Mr Begg should have been aware) and because the company had limited means to manage his performance (as a sole employee.) For these reasons, I consider it appropriate to take contributory conduct into consideration here. I conclude that 35% should be deducted on this basis from the figures I have arrived at above.

[24] In short South Auckland Hydraulics Limited is ordered to pay to Mr Begg the following sums:

- **\$3,276.00 gross for lost earnings;**
- **\$3,250.00 as compensation for hurt and humiliation.**

Costs

[25] This issue is reserved. If the parties cannot agree a figure they have a period of 28 days in which to request a determination of the issue.

Y S Oldfield
Member of Employment Relations Authority