

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 10  
5577894

BETWEEN            PAUL BLACK  
                                 Applicant  
  
A N D                YANKEE BOURBON  
                                 COMPANY LIMITED  
                                 Respondent

Member of Authority:     Peter van Keulen  
  
Representatives:         Michael McDonald, Advocate for Applicant  
                                 Paul King, Representative for Respondent  
  
Investigation Meeting:    20 September 2016 at Christchurch  
  
Oral Submissions:        20 September 2016, from both parties  
Written Submissions:     20 September and 12 October 2016, from the Applicant  
                                 4 October 2016 from the Respondent  
  
Date of Determination:    17 January 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.    The respondent acted in an unjustified manner causing disadvantage to the applicant in his employment, by failing to make employer contributions to the applicant's KiwiSaver. The respondent is to pay the applicant the sum of \$240.79 for KiwiSaver contributions.**
- B.    The respondent acted in a justified manner when deducting \$73.49 from the applicant's final pay and the respondent had a signed employment agreement. I decline the applicant's personal grievances for unjustified action causing disadvantage relating to an alleged unauthorised deduction from wages and failing to have a signed employment agreement.**

**C. The respondent unjustifiably dismissed the applicant. However, due to the applicant's misconduct he is not entitled to receive any remedies for the unjustified dismissal.**

**D. Costs are reserved with a timetable set for submissions if required.**

### **Employment relationship problem**

[1] The applicant, Mr Black, claims that the respondent, Yankee Bourbon Company Limited (YBC) unjustifiably dismissed him by text message sent on 29 July 2015.

[2] Mr Black also claims that YBC acted in an unjustifiable manner that caused disadvantage to him in his employment. Mr Black complains of three actions, a failure to pay employer KiwiSaver contributions on his behalf, making an unauthorised deduction of \$73.49 from his final pay and not having an individual employment agreement.

[3] In response, YBC says that Mr Black resigned prior to the text message that it sent to him. It says the text message was simply in response to an earlier text from Mr Black that it took as a request to have his job back. In the alternative, it says that if it did dismiss Mr Black then there was a valid trial period provision upon which it relied. Finally, in relation to any potential dismissal, YBC says that Mr Black performed poorly and acted in such a way during his employment that his dismissal was justified. Put simply, it says that the employment relationship with Mr Black was not working out as he did not work hard enough. He also did unacceptable things at work, such as taking extended breaks, arriving at work late, misusing company property (for example it is alleged he caused damage to a work vehicle), and using a work mobile telephone to access pornography including during work time.

[4] In connection with the alleged unjustified actions, YBC says that it was not required to make employer contributions to Mr Black's KiwiSaver as Mr Black had informed it that he was on a KiwiSaver holiday. In connection with the deduction from his final pay and the failure to have a signed employment agreement, it says it had a signed employment agreement that included an authorisation to deduct money from Mr Black's final pay.

**The issues**

[5] In order to resolve the employment relationship problem I must first determine what the terms of employment were between Mr Black and YBC including whether there was a written individual employment agreement that both parties had signed.

[6] Next in terms of the unjustified action causing disadvantage grievance, I must determine whether the actions alleged occurred and if so, did they cause disadvantage to Mr Black's employment or a condition of his employment and then, if that is the case, whether the actions were justified.

[7] Finally dealing with the unjustified dismissal grievance, I must determine first if there was a dismissal. If there was a dismissal, I must then consider whether it was justified considering YBC's allegation that there was a valid trial period provision on which it relied and failing that then whether procedurally and substantively the dismissal was justified. If I am satisfied that there is an unjustified dismissal, I must then consider what remedies are available, including the effect of any contributory conduct.

**Terms of employment**

[8] YBC is a company that manufactures spirits and imports beer and wine. Primarily it sells its product wholesale but it also has a small retail operation.

[9] YBC is a family owned and operated company. Ron King is the director and shareholder and has authority for many of the business decisions made by YBC including dealing with employees.

[10] Two of Mr King's sons, Andrew King and Paul King, worked in the business.

[11] In or around May 2015, Andrew King was to have an operation on his shoulder and as a result was likely to be unable to do some of his factory-based work. It is against this background that Paul King met Mr Black and after some discussions determined that Mr Black, who was looking for new employment, might be able to take over some of Andrew King's work in the factory pending his rehabilitation from the operation.

[12] Paul King recounted meeting with Mr Black and his wife one evening in late April 2015 and discussing a potential offer of work to him. He was very clear on the

basis of any offer of work being put to Mr Black. Paul King then discussed this with Ron King. The decision was made to offer employment to Mr Black.

[13] YBC sent Mr Black an offer letter dated 20 May 2015 offering him a role as a casual factory worker. The letter had a draft employment agreement enclosed (the IEA). The IEA stated that Mr Black was to work 24 hours per week. The IEA that was produced at the investigation meeting was not signed.

[14] Mr Black says he never received the offer letter or the IEA. He therefore claims he never signed the IEA. He says that during the first couple of weeks of employment, he asked for a copy of an IEA but he never received one.

[15] The evidence from YBC is that it gave the offer letter and IEA to Mr Black. It also claims that Mr Black signed the IEA and returned it. YBC says it kept the signed IEA in a filing cabinet at work but when Mr Black's employment finished it could not find it.

[16] Mr Black also says that he was not simply employed as a casual factory worker but his role was to be as a sales representative, he was to be paid the minimum wage that would be topped up with commissions on successful sales. He accepts that he worked in the factory at the commencement of his employment but this was in order to learn about the business and the way it operated.

[17] The witnesses for YBC deny that Mr Black was employed as a sales representative. They point to the fact that YBC has a liquor licence governing its sale and distribution of alcohol. It would not simply appoint anyone to sell alcohol unless they were satisfied that person could comply with the requirements for selling alcohol. In addition, it says there was no need for a sales representative at that time as Andrew King was able to continue this part of his role. What they required was someone to assist them in the factory.

[18] It is notable that Mr Black, when asked about the commission structure, could not provide any information about any discussions about commissions he would be paid let alone any evidence to show that something was agreed. Mr Black says he organised one sale during his employment but he did not receive any payment for it. The fact that Mr Black could not describe an agreed or even proposed commission structure and the fact that he never received any commission during his employment supports the contention that he was not a sales representative.

[19] I accept that YBC employed Mr Black as a factory worker and not as a sales representative.

[20] I am satisfied that YBC did give Mr Black the letter outlining the offer of employment and attaching the IEA.

[21] YBC produced the copy of the offer letter, albeit unsigned, and the draft IEA. If YBC did not draft these at the time it discussed the offer of employment with Mr Black then it would appear that YBC must have done so subsequently and in order to mislead me. There is no evidence to support this nor was it put to the witnesses for YBC in cross-examination.

[22] Both Andrew King and Paul King confirmed in evidence that Paul King drafted the IEA and the offer letter and gave them to Mr Black. On the other hand, Mr Black denied ever seeing the offer letter or the draft IEA, clearly, a direct conflict. I must determine which evidence I prefer and have considered:

- a. Paul King's evidence on this point was credible and consistent; that YBC required an employment agreement for its employees and that Paul King was responsible for drafting employment agreements for YBC and for Ron King's other businesses.
- b. Mr Black's evidence was clear and concise; he simply denied ever seeing either document. Yet his story lacked some consistency. He went on to say he asked for an IEA including the supposed commission structure but there is no evidence to support this, such as a text message (noting that Mr Black and Paul King had regular text exchanges about work). He said he spoke to Andrew King about an IEA and the commission structure and Paul King about an IEA. Yet he was unable to say when he asked and how often he asked for these documents. It also seems inconsistent that he would speak to Andrew King about an IEA and the commission structure when all discussions about his employment had been with Paul King.
- c. Overall, Mr Black's evidence lacked credibility, for example, I have already stated that I do not accept his evidence that he was employed as a sales consultant. His oral evidence was littered with phrases such as "I can't recall ...", "I don't think" an event happened, etc. This of

itself is not problematic and I accept witnesses memories fade over time but Mr Black's failure to recall events did sometimes coincide with events where an admission would be damaging to his case yet in the circumstances I would expect he would recall if an event took place. For example, when asked about the discussion about possible employment at his home over dinner with his wife and Paul King he could remember details of what was discussed such as the sales role but could not recall when it was discussed, whether that was over dinner and whether his wife was present.

- d. In the text message, which Mr Black says was notice of termination, Paul King referred to Mr Black still being under a trial period, that being consistent with terms in the IEA. Mr Black in response to that text message agreed with Paul King, which suggests he accepted he was under a trial period which in turns supports the suggestion that he had received the IEA (as it contained a trial period provision).
- e. In the letter from Mr Black's advocate raising a personal grievance, the advocate requested a copy of Mr Black's employment agreement, suggesting that Mr Black believed there to be one. There was no statement in that letter that Mr Black had never seen an employment agreement or that he had not signed an employment agreement.

[23] It follows from this analysis that I also accept YBC's position that Mr Black signed and returned the IEA. That YBC could not subsequently locate it is problematic but does not mean it was not signed – it may have been misplaced or someone may have removed it.

[24] Based on the IEA, Mr Black's terms of employment included that he would work 24 hours per week, although there was some variation on this depending on work requirements, working Monday to Thursday starting at 9:00 am. Mr Black was paid \$14.75 per hour.

[25] In addition, Mr Black was entitled to the use of a company car or van for work purposes, primarily deliveries that he undertook from the factory. Mr Black also had a mobile telephone that YBC purchased and paid the line rental. Mr Black had this

phone so that YBC could keep in contact with him when he was out effecting deliveries.

### **Unjustified disadvantage**

[26] Of the three actions complained of I find:

- a. YBC did not make the employer-related contributions to Mr Black's KiwiSaver. There was a suggestion from YBC in its submissions that Mr Black was on a KiwiSaver contribution holiday but there was no evidence produced to support this<sup>1</sup>. Without this YBC was obliged to make employer-related KiwiSaver contributions, as it should have treated Mr Black as being automatically enrolled in KiwiSaver.
- b. YBC deducted the sum of \$73.49 from Mr Black's final pay for an overpayment of wages.
- c. YBC did have a signed employment agreement albeit that it was unable to locate it at the end of Mr Black's employment.

[27] The failure to make the employer contributions to Mr Black's KiwiSaver and the deduction from Mr Black's final wage payment caused disadvantage to Mr Black in his employment.

[28] YBC's failure to make employer contributions to Mr Black's KiwiSaver was not justified. YBC's deduction from Mr Black's final wage payment was justified as there was an appropriate consent clause in the IEA.

[29] Based on these findings, I determine that Mr Black only has a valid personal grievance for unjustified action causing disadvantage in connection with the failure to make employer contributions to his KiwiSaver account.

[30] Mr Black calculates the unpaid employer contributions to his KiwiSaver to be \$240.79. I accept his calculation and YBC is to pay him this amount.

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<sup>1</sup> YBC gave evidence that it believed Mr Black had given it a form indicating that he was on a contribution holiday, however it could not produce this form. The only additional evidence it provided was a blank KS 1 form on 19 October 2016 but this did not provide the necessary evidence of the claimed contribution holiday.

## **Unjustified dismissal**

### *Issues during employment*

[31] YBC complains that it had a number of issues with Mr Black's work. These issues included:

- (a) He had a poor work ethic and an attitude of trying to avoid working where possible. For example, he would often arrive at work late and then take a coffee break before he even commenced work. YBC also complained that he spent a lot of time taking toilet breaks.
- (b) He used the work vehicles for personal use contrary to YBC's unwritten policy. For example, on one weekend he took a company car home and used \$100.00 worth of petrol for personal travel.
- (c) YBC believes he damaged two work vehicles, a car and a van. I am not satisfied that there is evidence to prove this although it does appear the vehicles could have been damaged during the time Mr Black was driving them.
- (d) He had injuries with his knees and back, which meant he was unable to do any heavy lifting; this made him unsuitable for the factory role.

[32] In short, YBC says that Mr Black did not appear to want to work in the factory or undertake the deliveries he was given. He seemed to want to have a role where he would drive around completing some deliveries but essentially having coffee with various contacts and trying to drum up some business for YBC.

[33] YBC says that it discussed the issues that arose with Mr Black on a day-to-day basis. That is it discussed the things as they occurred but it did not take any formal disciplinary steps over its concerns.

[34] YBC also says that after Mr Black's employment ended, Mr Black was reluctant to return the mobile phone. When YBC did get it back, Mr Black had erased the content. YBC was able to back up the phone from its network and discovered a high incidence of personal use including viewing pornography some of which occurred on work time. YBC was not aware of this during Mr Black's employment

and it says it would not have tolerated this behaviour had it been aware of it at the time.

*Incident on 29 July 2015*

[35] On 29 July 2015, Mr Black was asked to deliver company property to a residential address. Mr Black was unable to locate the address and was confused about what was required. He called YBC and spoke to Andrew King. Mr Black says he was directed to return to the warehouse. Andrew King says Mr Black simply told him he was returning.

[36] Either way, Mr Black returned to the YBC warehouse without delivering the company property. Paul King, who had instructed Mr Black to deliver the property, was angry and there was a confrontation between the two.

[37] Paul King told Mr Black he was “fucking useless” and “a waste of space”. Mr Black told Paul King to “go fuck himself”.

[38] Mr Black says the confrontation concluded with Mr King saying “make your last day Friday then”.

[39] Paul King says that the confrontation concluded with Mr Black leaving after swearing at him. Paul King was of the view that Mr Black was walking out, i.e. quitting his job.

[40] YBC submitted that it was illogical for Paul King to say “make Friday your last day” when YBC did not open on Fridays and no employees worked on Friday. I accept this and therefore accept Paul King’s version of what occurred at the conclusion of the confrontation. However, I am not satisfied that Mr Black leaving at the end of the altercation amount to him walking out or resigning.

[41] That evening, Mr Black sent a text message to Paul King stating “do u want me to come in tomorrow Paul?”. Paul King says that on receiving that text message he was surprised and thought that Mr Black was asking to have his job back so he sent a text message to Mr Black that stated:

We think that you and the job are not compatible. You are only 63 days into your 90 day trial. It is better for you and us to finish before any bigger issues arise. You can make more money and feel better in yourself if you do an extra gig every week. You can call in tomorrow

and get this week's pay and any holiday pay etc that might be due.  
Our friendship will be okay this way.

[42] Mr Black texted back simply stating "okay will do and I totally agree".

[43] The next day, Mr Black attended at YBC. He returned his business cards and collected his final pay.

[44] I conclude that text sent by Paul King amounted to a dismissal effected by YBC. Paul King may have believed that Mr Black had resigned because of the events that occurred on the day of 29 July 2015 but the text message that evening inquiring as to whether Mr Black should come into work would have put Paul King on notice that Mr Black did not consider that he had resigned. Applying the principles in *New Zealand Cards Ltd v Ramsay*<sup>2</sup>, the duty of good faith imposed upon YBC an obligation to inquire into what Mr Black thought had occurred and what he believed to be the state of his employment.

[45] The result is that the text message sent by Paul Black on the evening of 29 July 2015 amounted to a dismissal. It makes no difference that Mr Black sent a text back accepting what Paul King said.

### **Was the dismissal justified?**

#### *Trial period provision*

[46] YBC says that if there was a dismissal then that it dismissed Mr Black pursuant to the trial period provision in the IEA and, as a result, Mr Black cannot bring a personal grievance for unjustified dismissal.

[47] The IEA has a clause in the section entitled "Resolving Employment Relationship Problems" (the Clause) that states:

#### **Personal Grievances**

If the problem is a personal grievance, then the Employee must raise it within 90 days of when the facts that give rise to the grievance occur or come to their attention. A personal grievance can only be raised outside this frame with the agreement of the Employer or in exceptional circumstances.

The employee's employment agreement contains a trial period clause, they may not raise a personal grievance on the grounds of unjustified dismissal. The employee may raise a personal grievance on the

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<sup>2</sup> [2012] NZEmpC 51 at [44] and [45]

grounds specified in sections 103(1)b-g of the Employment Relations Act, and in the trial period clause in this agreement.

[48] There are a number of concerns that I have about YBC relying on the Clause to create a trial period for Mr Black that it can use to prevent Mr Black from raising his personal grievance for unjustified dismissal:

- a. There is no signed copy of the IEA evidencing acceptance by Mr Black of a trial period.
- b. There is no other clause in the IEA dealing with a trial period and without this it is ambiguous as to whether there is in fact a trial period.
- c. There is no commencement date for the trial period in the Clause.
- d. There is no specified timeframe for the trial period in the Clause.

[49] I accept that not having a signed copy of an employment agreement with a trial period provision in it is not fatal. In *Modern Transport Engineers (2002) Limited v Phillips*<sup>3</sup> the Employment Court held that the failure to comply with the statutory obligation to retain a signed copy of an employment agreement does not lead to a finding that the trial period provision is invalid. The issue was whether the employment agreement contained a relevant and enforceable provision, not whether the employer retained a copy of the employment agreement.

[50] The issue in this case with the IEA is that the Clause is not labelled as a trial period provision and it specifically references another provision. This is misleading and because of the placement of the Clause it is somewhat “buried” in the agreement<sup>4</sup>. All of this means I cannot be satisfied that the Clause constitutes a valid trial period provision.

[51] That said, Mr Black’s text in the evening of 29 July 2015 where he agreed with Paul King indicates that he accepted that he was employed under a trial period. This however does not mean he understood the effect of the trial period and accepted it nor does it make a non-complying clause into a valid one.

[52] If I am wrong on this point there is a further problem for YBC seeking to rely on the Clause. The advocate for Mr Black submitted that the Clause was not a valid

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<sup>3</sup> [2016] NZEmpC 68

<sup>4</sup> See *Modern Transport* at [15]

trial period clause because it does not reference a date for which the trial period commences, relying on the Authority determinations in *Honey v Lighthouse ECE Ltd*<sup>5</sup>, *Clark v Lighthouse ECE Ltd*<sup>6</sup>, *Du Plooy v Lighthouse ECE Ltd*<sup>7</sup>, and *Baxter v Lighthouse ECE Ltd*<sup>8</sup>.

[53] Section 67A(2) of the Employment Relations Act 2000 (the Act) provides:

**Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –

(a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and

(b) during that period the employer may dismiss the employee; and

(c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[54] I do not accept, notwithstanding the *ECE Lighthouse* determinations that a trial period provision must specifically state the date on which the trial period commences. The effect of s 67A(2) and the well established principles on trial period provision is that trial periods can only start when an employee begins work<sup>9</sup>.

[55] In some cases, perhaps many, it will be obvious that a trial period commences when the employment commences and equally it will be obvious when the employment commences even if there is not a commencement date in the employment agreement.

[56] In my view, it is not a case of looking at whether specifically the commencement date is stated in the trial period provision. Rather it is case of saying is it clear to the employee what the specified period is for which he/she will be subject to the trial; is it clear when the period starts and when it finishes.

[57] On this basis, the real problem with the Clause is not the failure to specify a commencement date per se, but rather a review of the Clause and the IEA as a whole

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<sup>5</sup> [2016] NZERA Auckland 284

<sup>6</sup> [2016] NZERA Auckland 281

<sup>7</sup> [2016] NZERA Auckland 282

<sup>8</sup> [2016] NZERA Auckland 283

<sup>9</sup> *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152

shows it is not clear for what period Mr Black will be subject to a trial<sup>10</sup>. This failure renders the Clause invalid as a trial period provision and this means Mr Black can bring a personal grievance for unjustified dismissal.

### *Justification*

[58] I can deal with the issue of whether the dismissal was justified in very simple terms. YBC may have had concerns about Mr Black's performance in his role and may have believed he was not suited to the job. This view coupled with the incident on 29 July 2015 might have provided justification for dismissing Mr Black. However, in acting on these beliefs, YBC did not take any of the steps set out in the test for justification in s 103A of the Act and for this reason the dismissal of Mr Black was unjustified.

### **Remedies**

[59] As YBC unjustifiably dismissed Mr Black, I must turn to consider remedies.

[60] Mr Black seeks reimbursement for lost remuneration for 13 weeks pursuant to s 123 and s 128 of the Act. This is \$4,808.96. Mr Black also seeks compensation pursuant to s 123(1)(c)(i) of the Act. He says I should award \$15,000.00 as compensation.

[61] YBC says that if it acted unjustifiably in any way toward Mr Black then any remedies should be "weighed up with the contribution from [Mr] Black and also the misconduct and lack of good faith on [Mr] Blacks part...."

[62] YBC is correct. I must consider relevant conduct by Mr Black in connection with remedies not just for assessing any reduction due to contribution<sup>11</sup> but also when I consider whether remedies should be granted at all.

[63] In a recent case, *Xtreme Dining Ltd t/a Think Steel v Dewar*<sup>12</sup> a full bench of the Employment Court considered circumstances whereby the Authority or the Court might conclude that it should not award any remedies to an applicant notwithstanding a successful finding of a personal grievance. The Court said:

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<sup>10</sup> *Lumb-Vaipapa v B & Y Trust Co 2015 Ltd* [2015] NZERA Christchurch 187

<sup>11</sup> Section 124 of the Employment Relations Act 2000

<sup>12</sup> [2016] NZEmpC 136

[216] We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with “equity and good conscience”. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[64] If there is misconduct by an applicant employee that is outrageous, particularly egregious or disgraceful I should consider whether it is appropriate to award any remedies.

[65] It is clear from *Dewar* that this assessment is not limited to misconduct discovered after termination of employment as was the case in *Salt v Fell*<sup>13</sup>.

[66] In a subsequent decision, *Lawson v New Zealand Transport Agency*<sup>14</sup> Judge Corkill applied this assessment and concluded:

[320] That misconduct, together with the misconduct of which the Agency had knowledge prior to dismissal leads to a conclusion that the totality of inappropriate behaviours was sufficiently egregious as to warrant a finding there should be no remedies under s 123 of the Act.

[67] Therefore, my assessment of the misconduct complained of requires me to assess whether the totality of inappropriate behaviour, both that known before the dismissal and that discovered after the dismissal, is sufficiently egregious so that no remedies should be granted. Sufficiently egregious is behaviour that is outrageous, disgraceful or particularly egregious.

[68] The contribution, misconduct and lack of good faith by Mr Black that YBC complains of includes:

- a. Various issues that stemmed from an unwillingness to perform the role he was employed to do or pay proper attention to what he was doing.

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<sup>13</sup> [2008] NZCA 128

<sup>14</sup> [2016] NZEmpC 165

- b. Misuse of YBC vehicles contrary to what YBC told Mr Black, that is using YBC vehicles for personal use and damaging YBC vehicles.
- c. The altercation with Paul King on 29 July 2015.
- d. The deletion of all telephone records on the mobile telephone that YBC provided to Mr Black. This is part of a wider allegation that Mr Black deleted or removed, fabricated and altered various documents to suit his purposes particularly for his personal grievance.
- e. The misuse of the mobile telephone provided to him including an excessive amount of personal use and viewing pornography on the telephone both during work time and outside of work.

[69] The various issues YBC had with Mr Black's performance was evidenced by behaviour such as being consistently late for work, taking long breaks including toilet breaks, not following instructions, dropping bottles and leaving equipment lying around. YBC says this kind of poor performance occurred daily and it was constantly addressing such issues with Mr Black although it did not take any formal steps.

[70] I am satisfied that Mr Black performed poorly at work. He admitted arriving at work around 10:00 am on a regular basis but suggested his start time was actually 10:00 am and not 9:00 am. I do not accept this explanation and the fact he tried to justify consistently being late by this suggestion was disingenuous and reflected badly on Mr Black. I am also satisfied that much of this poor performance stemmed from Mr Black not wanting to undertake the tasks given to him but rather a desire on his part to do sales or business development type work despite this not being part of his role. Some of his poor performance was not simply down to inability or not trying hard enough but deliberate actions to avoid specific instructions and more generally, work given to him.

[71] YBC gave examples of the personal use of YBC vehicles by Mr Black including on one weekend in particular when Mr Black used a full tank of petrol at a cost of \$100.00. YBC said it discussed this use with Mr Black on several occasions not just because of the cost of running the vehicles but because personal use would likely incur fringe benefit tax, for which YBC would have to account to Inland Revenue.

[72] Again, I accept YBC's evidence on this matter and find that despite being told not to use company vehicles for personal matters, Mr Black did so at a cost to YBC.

[73] YBC also gave evidence of discovering damage to work vehicles after Mr Black had used them. I accept this but cannot say on the evidence I heard if Mr Black was responsible for the damage.

[74] There is no dispute that the altercation between Paul King and Mr Black took place. Neither individual acted appropriately in the circumstances, each swearing at the other. Whilst this behaviour is unacceptable, Mr Black's conduct is mitigated by the circumstances.

[75] It is clear that Mr Black deleted all data and records of the mobile telephone that he used whilst employed by YBC. However, I do not accept that was to tamper or destroy evidence that might be used in the dispute but rather I conclude it was to remove the history of use by Mr Black because it was personal. There was also an element of seeking to hide wrong doing, that is hiding the fact that Mr Black accessed pornography on the mobile telephone.

[76] The deletion of records and data off the mobile telephone meant YBC was unable to identify precisely what internet sites Mr Black accessed and for how long but it was able to access data that evidenced the internet searches Mr Black undertook on the telephone.

[77] The records of these searches evidenced a high amount of personal internet use by Mr Black including searching for, and it logically follows accessing, pornography. Mr Black acknowledged that he occasionally accessed pornography on the mobile telephone. He could not recall if he viewed pornography during work time but conceded it was possible. He said YBC had not told him that he should not access such material.

[78] It is clear to me that Mr Black did access pornography during work time. An example of this appears in the records for the internet searches conducted on the mobile telephone on Thursday 30 July 2015. The first search is recorded at 10:55 am and appears to be for pornographic material. A second search occurs at 11:21 am and it for a pornographic website. There is then a third search at 11:25 am for another pornographic website. So there is a 30 minute span of three searches for pornographic material and websites which appears to suggest that some of the results of those

searches were accessed during that time frame and probably after. That indicates, as do other days of search history, that Mr Black accessed pornography during work time for over 30 minutes.

[79] There is no evidence that identified the nature of pornography accessed by Mr Black, so no suggestion any of it was illegal. However, accessing pornography on a work device was contrary to the expected standards of conduct and contrary to the IEA, which required Mr Black to ensure that his internet use met the “ethical and social standards of the workplace”. The IEA also provides that a reasonable level of personal use is acceptable but it states that such use “must not interfere with the Employee’s employment duties or obligations”.

[80] In my view, there are two aspects to this complaint. Viewing pornography may be morally repugnant to some and completely acceptable to others. Employment law to the most extent is not about setting moral or ethical standards for employees outside of work time. Mr Black should not be judged on his choice to access and view pornography in his own private time. However, he cannot and should not use work devices and work mobile data (which has a cost to YBC) to view pornography. And he cannot and should not use work time for this as it extends beyond reasonable personal use of the internet in work time – for the most part what employers have in mind for this type of use is checking emails, looking at news and weather and perhaps the odd search for products or addresses or the like.

[81] In summary, the behaviour I have to assess when considering if Mr Black is entitled to any remedies for his personal grievance is:

- a. A failure to carry out his role properly and work consistently, creating performance issues; and deliberately ignoring instructions or choosing not to undertake required tasks.
- b. Using work vehicles for private use at a cost to YBC in breach of instruction and direction regarding use of work vehicles.
- c. Excessive use of the internet in work time including accessing and viewing pornography in breach of YBC expectations and the IEA.

[82] In summary, Mr Black appears as someone who wanted YBC to pay him for attending at work but he did not want to work. He also wanted the resources provided for that work to be for his own personal use despite instructions to the contrary.

[83] The requirement that an employee present at work, ready willing and able to work and then undertakes work to the best of his or her ability is fundamental. Work places are not social clubs, they are businesses or enterprises organised and operated to achieve objectives. They are run at a cost and in order to be successful employers rely on employees engaging appropriately. Attending at work to primarily socialise, surf the internet, drink coffee, read a newspaper or pursue some other personal goal is unacceptable.

[84] Further, Mr Black's behaviour, particularly in connection with the use of work vehicles and accessing pornography in work time, amounts to serious misconduct<sup>15</sup>. I believe a fair and reasonable employer could have dismissed Mr Black for this.

[85] I believe this is the type of outrageous and disgraceful behaviour that the Employment Court had in mind as being sufficiently egregious to mean an employee should not receive any remedies for a personal grievance.

[86] My conclusion on this is supported by reviewing some of the earlier decisions in which contribution has been set at 100% or where no monetary remedies have been awarded<sup>16</sup>.

[87] In all the circumstances making an assessment in a manner that conforms with "equity and good conscience" I determine that Mr Black is not entitled to any remedies for his personal grievance for unjustified dismissal.

### **Penalty**

[88] Mr Black also seeks a penalty against YBC for failing to have a signed employment agreement. I decline this request. My reasons include that the request was not pleaded in the statement of problem and only raised at the investigation

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<sup>15</sup> See for example *Hiha v Crane Distribution NZ limited* [2012] NZERA Auckland 351 where accessing pornography was held to be serious misconduct.

<sup>16</sup> A good example is *X v Auckland District Health Board* [2007] ARC 52/05

meeting, and that I have determined that the IEA was signed but YBC did not retain a copy. In these circumstances, a penalty is not appropriate<sup>17</sup>.

### **Determination**

[89] YBC acted in an unjustified manner causing disadvantage to Mr Black by failing to make employer contributions to Mr Black's KiwiSaver. YBC is to pay Mr Black the sum of \$240.79 for KiwiSaver contributions.

[90] YBC acted in a justified manner when deducting \$73.49 from Mr Black's final pay and YBC had a signed employment agreement. I decline Mr Black's personal grievances for unjustified action causing disadvantage relating to an alleged unauthorised deduction from wages and failing to have a signed employment agreement.

[91] YBC unjustifiably dismissed Mr Black. However, due to Mr Black's misconduct he is not entitled to receive any remedies for the unjustified dismissal.

### **Costs**

[92] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[93] If they are not able to do so and a determination of costs is needed, any party that considers it is entitled to costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum. I will not consider any application for costs outside this timetable unless leave is sought and granted.

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>17</sup> *Modern Transport Engineers (2002) Limited v Phillips* [2016] NZEmpC 68