

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 164
3002351

BETWEEN SHANE CLEMENT
Applicant

A N D DIVERSE HYDRAULICS &
PNEUMATICS LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Robert Morgan, Advocate for Applicant
Shane Solly and Jeff Chandler, Advocates for Respondent

Investigation Meeting: 27 June 2017 at Nelson

Submissions Received: Submissions received at the investigation meeting

Date of Determination: 28 September 2017

DETERMINATION OF THE AUTHORITY

- A. Diverse Hydraulics & Pneumatics Limited unjustifiably dismissed Shane Clement**
- B. Diverse Hydraulics & Pneumatics Limited must pay Shane Clement:**
 - (a) Lost wages of \$11,375.00 gross and holiday pay of \$910.00 gross;
and**

- (b) Compensation for humiliation, loss of dignity and injury to his feelings in the amount of \$15,000; and**
- (c) Legal costs and the cost of the filing fee amounting to \$1,946.56.**

Employment relationship problem

[1] Shane Clement worked as a hose doctor for the ENZED Division of Diverse Hydraulics & Pneumatics Limited (Diverse) from September 2012 until 23 December 2015, when he was dismissed. Mr Clement considers that he was unjustifiably dismissed.

[2] Diverse considers that the dismissal was justified because Mr Clement had been given:

multiple opportunities to adhere to basic employment expectations, he was unable to do this, nor could he accept any form of censure whatsoever when performance was an issue.

[3] Diverse dismissed Mr Clement in part because of written warnings it had issued him before 23 December 2015.

[4] By way of remedy, Mr Clement claims lost wages for 19 weeks at a gross amount of \$875 per week, holiday pay on those lost wages, and compensation of \$25,000 for humiliation, loss of dignity and injury to his feelings arising out of the dismissal.

What is unjustified dismissal?

[5] An employer who has dismissed an employee needs to prove that the decision it made, and the way it made its decision, was something a fair and reasonable employer could have done in all the circumstances.

[6] In addition, there are basic procedural rules that must be satisfied for a dismissal to be justified. These rules are found in s 103A(3) of the Employment Relations Act 2000 (the Act). They require that Diverse:

- (a) Investigated each of its concerns;

- (b) Raised those concerns with Mr Clement;
- (c) Gave Mr Clement a reasonable opportunity to respond to those concerns; and
- (d) Considered his explanations when considering whether to dismiss him, or give him a warning.

[7] If none of the four of those basic procedural requirements were complied with, then the dismissal would be an unjustified one.

[8] The letter of dismissal, handed to Mr Clement on 23 December 2015, reads:

Dismissal notice for Shane Clement.

Under clause 13.3 sub section 2 and 4 of your contract you are now instantly dismissed from your employment ...

You will hand over your keys, van, and phone instantly and remove your personal property from the van forthwith.

Any remaining monies owing will be put in your bank account as soon as we can.

[9] Clause 13.3 of Mr Clement's employment agreement reads:

Notwithstanding any other provision in this agreement, the Employer may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes, but is not limited to:

- (i) ...
- (ii) Dishonesty
- (iii) ...
- (iv) Serious or repeated failure to follow a reasonable instruction;
- ...

[10] Therefore, Diverse decided to dismiss Mr Clement for dishonesty, and a serious or repeated failure to follow a reasonable instruction. At the investigation meeting Diverse's

manager, Jeff Chandler, and Shane Solly, Diverse's director, told the Authority that the dishonesty was to do with Mr Clement's "misuse of time" and the repeated failure to follow a reasonable instruction was because he frequently went to his own workshop when he was supposed to be working for Diverse.

Events leading up to Mr Clement's dismissal

The first warning

[11] The first event that Diverse appears to have relied on in reaching its decision to dismiss Mr Clement occurred on 20 October 2015. Mr Chandler says that Mr Clement had been at work for about 1.5 hours that day when he had a heated disagreement with another employee. Mr Chandler says that Mr Clement "flipped his lid, rushed upstairs and yelled down the hallway 'I'm over this f...ing shit and I'm out of here'". Mr Chandler says he knows Mr Clement did not go home, which he expected him to do. Mr Chandler says he knew that because he saw Mr Clement's work van at his own workshop near Diverse's premises at about 1.30 pm. Mr Chandler did not stop and ask Mr Clement what he was doing there.

[12] On the following day, 21 October 2015, Mr Clement came to work at 8am and said that his throat was sore. Mr Chandler gave him permission to go home sick. However, on that same day at 8.20 am, Mr Chandler was driving down the street and saw Mr Clement driving his work van into his workshop, where he had been the previous day. Mr Chandler saw the van still there some two hours later. Mr Chandler expected that Mr Clement would have gone to his home rather than to his workshop.

[13] The next day, 22 October 2015, Mr Chandler telephoned Mr Clement and asked him to come into work at 2 pm to talk about his absence from work on 20 October, when Mr Clement left work after 1.5 hours. Mr Chandler advised Mr Clement he could bring a support person if he wished.

[14] Mr Clement attended the meeting at 2 pm, without a support person or a representative. Mr Chandler says that Mr Clement walked out of the meeting. Later, Mr Chandler rang Mr Clement and asked him to attend a further meeting at 4.15pm. He told him that it would be a disciplinary meeting and that he was encouraged to bring a support person. Mr Clement attended alone.

[15] Mr Chandler had prepared a written warning to give Mr Clement at the meeting. It read:

On Tuesday the 20th of October between 9am & 9.30am you left work and remained absent for the remainder of the day without my or anyone else's acknowledgment nor giving reason for your exit from your expected duties.

Upon your return today, you have filled in your time sheet you have put down 8 hours sick for that day. This is in breach of your contract, in this instance of failing to notify your supervisor of your intentions, plus giving false information on your timesheet.

In future please give reasonable notice so a stand in can be arranged to carry out your duties. Any further instances of this nature or warnings may jeopardise your employment with this company.

[16] On viewing the timesheet Mr Clement submitted, supplied by Diverse, it is clear that for 20 October 2015 he only claimed for 1.5 hours of work time; that is the time he had been at work before leaving. He claimed for 8 hours sick leave for 21 October 2015, not for 20 October.

[17] The process leading up to the warning and its result were unfair. Diverse did not properly investigate its concerns and I cannot be clear that it properly articulated those concerns to Mr Clement in advance of the meeting. If it had, it is highly likely he would have pointed out that he had not tried to claim for 8 hours of work for 20 October 2015.

[18] That issue could have been resolved had Diverse given Mr Clement a written letter setting out its concerns and asking him to come to a meeting to explain himself. It would have required giving Mr Clement a copy of the timesheet and referring to it at the meeting

when they both could have seen exactly what it was that Mr Clement had claimed for those two days.

[19] In addition, it appears from the warning letter that Diverse has merged its concerns about the two days, 20 and 21 October. Mr Chandler reached the decision that Mr Clement could not have been sick on 21 October 2015 because he saw Mr Clement's van at his workshop. However, he did not go in and ask Mr Clement what he was doing there. It is unclear whether Mr Chandler raised that concern with Mr Clement.

The second warning

[20] The next events that Diverse relied on to dismiss Mr Clement occurred on 9 and 10 December 2015. On 9 December 2015, Mr Chandler held a sales meeting with Mr Clement and another employee. Mr Chandler directed Mr Clement to drop off calendars and diaries to customers. Mr Clement left the Diverse premises. At about 10 am, Mr Chandler saw Mr Clement's van parked at his workshop. Mr Chandler saw the van still there at 11.16 am. Mr Chandler says that Mr Clement had no permission to be at the workshop because he was meant to be seeing customers.

[21] Mr Chandler rang Mr Clement and asked him why he had been at his workshop. He says that Mr Clement replied that he had not been, and he had been out seeing clients.

[22] Mr Chandler did not investigate Mr Clement's answer any further. For example, he did not tell him he doubted that because Mr Clement's van had been at his shed. He did not ask Mr Clement to name the clients he had visited on foot, and because he did not know who they were, he was unable to check Mr Clement's explanation with the clients.

[23] On 10 December 2015, Mr Chandler again saw Mr Clement's van at his shed at about 10.40 am, at 12.15 pm, and again 12.50 pm. A little after 1 pm, Mr Chandler telephoned Mr Clement and asked him where he was. Mr Clement advised that he was "at Trafalgar Painting doing a call".

[24] Mr Chandler asked Mr Clement to come in and complete his time cards and some other paperwork. When he arrived, Mr Chandler asked Mr Clement why, if he was doing calls to clients, his van was at his workshop. Mr Clement said that he had left his van there and was walking around doing some calls.

[25] Later that afternoon, Mr Chandler rang Mr Clement and asked him to attend a meeting at 4.15 pm in his office. Mr Chandler says he informed Mr Clement that it was to be a disciplinary meeting and he could bring a support person with him if he chose. Mr Clement decided that he did not need a support person, and did not bring a representative.

[26] At the meeting, Mr Chandler told him he had a concern that Mr Clement had been lying to him by saying that he had been at Trafalgar Painting and doing customer calls when he was actually at his shed. Mr Chandler had pre-prepared a written warning, which he attempted to give to Mr Clement about his concerns about 9 December 2015. The warning letter is dated 9 December, meaning Mr Chandler prepared it the day before he invited Mr Clement to the meeting and before he met with Mr Clement. The letter reads:

... your ENZED van was spotted at your workshop, without permission.

Your van was still at your workshop at 11.16 am on the 9th December still without permission.

This is in breach of you contract, in this instance, for failing to carry out your duties as instructed by the manager.

As this is the second warning within a close period, any further warnings, will jeopardise your employment ... and may result in instant dismissal.

[27] Mr Clement did not accept the letter and walked out. Mr Chandler put the warning in a sealed envelope in Mr Clement's file drawer.

[28] Mr Chandler had already reached a conclusion that Mr Clement needed to be issued a formal written warning before he investigated Diverse's concerns about 9 or 10 December, and before he gave Mr Clement a reasonable opportunity to respond to those concerns.

The dismissal

[29] The final event relied on by Diverse to dismiss Mr Clement occurred on 23 December 2015. That was the last day of the work year, and the day before Mr Clement was to go on two weeks' annual leave.

[30] At the morning meeting with Mr Chandler, Mr Clement asked if he could take some time to take his own tools and toolbox out of the van that day. Mr Clement's toolbox was affixed to the van. Mr Chandler said he could do so, but not until the end of the day.

[31] Mr Chandler expected that Mr Clement would continue making calls to customers to drop off calendars and diaries. He also expected that if Mr Clement ran out of work to do, he would come back to the Diverse workshop and ask Mr Chandler if there was any other work to do. However, at approximately 10.30 am, Mr Chandler again noticed Mr Clement's work van at his workshop.

[32] Mr Chandler rang Mr Clement and asked him to come into the office at 1.30 pm to explain himself. He told him that he could bring a support person with him. Mr Chandler told Mr Clement that the meeting would be about dishonesty, and it would be about his failure to follow the instruction to make calls to clients.

[33] It is not clear whether Mr Chandler told Mr Clement the result of the meeting might be dismissal.

[34] When Mr Clement came into the meeting, Mr Chandler told him that he had seen him at the shed that morning and that he had not sought permission to go and do any work at the shed. Mr Chandler told Mr Clement he had had a previous warning for that. It is not clear whether Mr Chandler gave Mr Clement a reasonable opportunity to respond to that concern. Mr Clement did not have a support person or a representative with him.

[35] Mr Chandler suggested that they have a cooling off period and that Mr Clement should come back in two hours' time. Mr Clement did not arrive two hours later and

Mr Chandler rang him to ask him to come in again. Mr Chandler advised Mr Clement that it was a disciplinary matter and he could bring a support person with him if he wished. Again, Mr Clement responded he would not need a support person.

[36] Mr Chandler had already prepared the letter of dismissal for Mr Clement and he handed it to him when he came in for the second meeting. In fact, that was not a meeting to hear Mr Clement's explanation but was the opportunity for Mr Chandler to communicate that Mr Clement had been dismissed.

Determination

[37] Diverse unfairly dismissed Mr Clement. A fair and reasonable employer would abide by the natural justice processes set out in s 103A(3) of the Act. Mr Chandler never told Mr Clement he might wish to be represented at any of the meetings, as opposed to having a support person. Each of the meetings leading to a warning and ultimately Mr Clement's dismissal were disciplinary meetings and needed to be conducted fairly.

[38] Diverse did not mention the reason for the October warning in the dismissal letter. However, during the Authority's process, Diverse supplied written evidence and Mr Chandler and Mr Solly gave oral evidence about a number of concerns Diverse had about Mr Clement's work. I find that Mr Chandler took all of Mr Clement's work history into account when deciding to dismiss him. A number of those issues had not been put to Mr Clement as part of any disciplinary or performance management process.

[39] In making the decision to dismiss, a fair and reasonable employer could not rely on:

- The first warning because it was clearly based on incorrect conclusions, and an unfair process.
- The second warning or the unfair process used to reach it to dismiss Mr Clement.

[40] I am also concerned that in relation to the dismissal there was insufficient investigation, there was not a reasonable opportunity for Mr Clement to give explanations

because he did not clearly know exactly what the concerns were before he attended each meeting.

[41] I am also concerned that there was pre-determination. When the second warning of 9 December 2015 was issued, it had already been typed up before Mr Clement came in to have a meeting.

[42] When the dismissal letter was given, Mr Clement had been asked to come into a disciplinary meeting and that would normally mean that the employer was there to listen to his explanations before making a decision. However, that was not the case because the letter was prepared before the meeting.

[43] The substantive grounds that Diverse relies on to dismiss are also troubling. It is not clear that taking his work van to his workshop without permission could be said to be dishonest. In an employment context, dishonesty usually means being deceitful or fraudulent, including falsifying timesheets, or taking goods or money from your employer for your own benefit. Whether Mr Clement was 'dishonest' about his use of work time would depend on what his van was doing at his workshop.

[44] At the investigation meeting, Mr Clement said that at various times at his own workshop he used his own tools and worked on improving the sliding tray in his van that had never worked properly. Because there was insufficient investigation, it is unclear whether he had the opportunity to give that explanation and it is also unclear, if Mr Chandler had gone to the workshop when Mr Clement was there, what he may have seen. It may be that Mr Clement was indeed working on the van itself and that would have been of some benefit to Diverse.

[45] Mr Chandler said that, before the second warning, he did not think he ever told Mr Clement not to go to his workshop in work time. Generally, that would not be a necessary instruction. However, occasionally Mr Chandler had specifically agreed to Mr Clement going there to get something in work hours. That factor, combined with the lack of

investigation, made it unfair and incorrect to conclude that Mr Clement had repeatedly ignored an instruction to not go to his workshop during work time, and that when he was there he was not doing work.

[46] It is also unclear whether Diverse relied on the failure to follow reasonable instructions being “repeated” or “serious”, or both. That would also depend on what his van being at his shed meant. For example, Mr Clement’s evidence at the investigation meeting was that his van may have been at his workshop but that he was walking around parts of the port delivering calendars etc., such as to Trafalgar Painting. Mr Chandler did not investigate that possibility.

[47] Had a proper process been followed it may be that a fair and reasonable employer could have concluded that on 23 December 2015, Mr Clement failed to follow Mr Chandler’s instruction not to take his toolbox out until the end of the day. That is because because Mr Clement accepts that Mr Chandler told him he could not take his toolbox out of the van until the end of the day and agrees he started doing that at around 10 or 10.30 am.

[48] However, a fair and reasonable employer could not have summarily dismissed Mr Clement for that reason alone. It also does not explain why Mr Chandler did not simply go into Mr Clement’s workshop or telephone and instruct him to stop what he was doing and direct him to do some Diverse work. At the investigation meeting, Mr Chandler indicated he would have had further work for Mr Clement to do.

[49] At the investigation meeting, Mr Solly and Mr Chandler acknowledged that the process used was not ‘perfect’. I was not looking to ensure Diverse had acted perfectly. However, I did need to assess whether it acted as a fair and reasonable employer could have in all the circumstances. I conclude that Diverse did not do so.

Remedies*Lost remuneration*

[50] Mr Clement got new employment in May 2016, and seeks 19 weeks of lost remuneration after his dismissal. His evidence was that he received no income from his last pay from Diverse until his new job began.

[51] He also seeks holiday pay of 8% on his lost remuneration.

[52] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Diverse of the whole or any part of wages Mr Clement lost as a result of his grievance. Section 128(2) of the Act provides that I must order Diverse to pay Mr Clement the lesser of a sum equal to his lost remuneration, or to three months' ordinary time remuneration. The amount Mr Clement lost is more than three months ordinary time remuneration, so I must award three months ordinary time remuneration.

[53] Mr Clement's ordinary time remuneration was \$875.00 per week, according to the statement of problem.

[54] There are 13 weeks in three months. Diverse must pay Mr Clement $13 \times \$875 = \$11,375.00$ gross in lost remuneration.

[55] In addition, s 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s 128(2); that is, for more than three months.

[56] However, in exercising the discretion I need to consider what may have happened if Mr Clement had not been unjustifiably dismissed. In all the circumstances, including Diverse's unhappiness with Mr Clement's performance, it may have gone on to conduct a fair disciplinary process, or a performance management process. Either of those processes may have eventually resulted in a justified dismissal. Mr Clement also had some dissatisfaction with his work. Ultimately, I consider it unlikely Mr Clement would have worked for Diverse

for more than three months after his unjustified dismissal. I decline to exercise my discretion to award him more than three months lost remuneration.

[57] However, Mr Clement is entitled to holiday pay of 8% on his lost remuneration, an amount of \$910.00 gross.

Compensation

[58] Mr Clement has claimed \$25,000 in compensation for humiliation, loss of dignity and injury to his feelings caused by the unjustified dismissal.

[59] Mr Clement's evidence is that because he lost his job he also lost his home, and his relationship of 14 years. That occurred because he was unable to pay rent or support his partner and her children. After losing his home, Mr Clement moved into his workshop and lived there with his landlord's knowledge despite there being no kitchen, no windows and no toilet facilities in the workshop. His landlord allowed him to use the bathroom facilities in the adjoining commercial premises.

[60] Mr Clement's evidence was that he had an emotional and physical breakdown when he lost his job, and consequently his home and his relationship.

[61] The negative effect of the unjustified dismissal on Mr Clement was significant. In my view, compensation of \$15,000 is reasonable in this case.

Contribution

[62] Section 124 of the Act requires me to consider what contribution Mr Clement made to the circumstances leading to his personal grievance in this case of unjustified dismissal. If I consider that his behaviour was blameworthy enough, I should reduce the amount of remedies for which he is eligible.

[63] However, considering that I do not think that his behaviour was sufficient to lead to dismissal in the circumstances and the investigation by Diverse was so inadequate, there is

insufficient evidence for me to conclude that Mr Clement's behaviour was so blameworthy that I should reduce the remedies due to him. That is so, even though Mr Clement accepted that he should not have started removing his toolbox from his van so early on 23 December 2015. I conclude that while Mr Clement was wrong to have done so, that alone could not have led to his dismissal. Therefore, his behaviour on 23 December 2015 could not have contributed to his unjustified dismissal.

Costs

[64] Mr Clement was successful in his claim. The successful party can usually expect a reasonable contribution towards its costs from the unsuccessful party. The Authority operates based on a daily tariff of \$4,500 for a full day of an investigation meeting. The investigation meeting took from 9.30 am until 12 noon. That is 2.5 hours of a full day of six hours. Diverse must pay Mr Clement \$1,875 as a contribution towards his legal costs, and \$71.56 being the cost of the filing fee.

Christine Hickey
Member of the Employment Relations Authority