

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 233/07
5044632**

BETWEEN CHRISTOPHER CLEVERLY
 Applicant

AND UNITED CORPORATION LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Craig Phillips for Respondent

Investigation Meeting: 31 July 2007

Determination: 3 August 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Christopher Cleverly (“Mr Cleverly”) says he was unjustifiably dismissed from his employment with United Corporation Limited (“United”). United says in reply that Mr Cleverly was justifiably dismissed because he made threats and allegations towards other employees and directors. Mr Cleverly and United were unable to resolve their differences by mediation.

The facts

[2] United, at all material times, traded as United Video with stores at both Mt Roskill and Henderson. Mr Cleverly commenced his employment with United initially on a casual basis at Mt Roskill from about July 2004. From November 2004 he worked at the Henderson store but the parties disagree as to whether he occasionally worked at Mt Roskill thereafter as well.

[3] Mr Cleverly signed an individual employment agreement on 4 September 2005. The other signatory party is expressed to be “United Video” (not United Corporation Limited) and is executed for and on its behalf by one Emma Johansson on 23 August 2005. Despite this imprecision, there is no objection from either party and critically,

both of them accept it reflected the terms and conditions of the employment relationship between them.

[4] The place of work is recorded as both the Mt Roskill and Henderson stores. Mr Cleverly's evidence is that he had not worked at Mt Roskill for some time but notwithstanding that, he signed the agreement he says accepting that this merely reflected the history of the situation, but not I infer, the legalities.

[5] Clause 4 provides for hours of work but the *Schedule A* summary specifies only that the employment is part-time but fails to specify any particular hours of work. The schedule specifies that the employee is required to work hours "as advised" by the employer. However unsatisfactory that might be to others, Mr Cleverly must be taken to have accepted that arrangement because he signed the agreement.

[6] The genesis of this employment relationship problem seems in my assessment to arise from a dispute as to a Friday shift period that Mr Cleverly considers was his entitlement. I need not make any findings in relation to this situation however because matters evolved from there into something substantively quite different.

[7] On Monday 15 May 2006 at about 6.00 pm, Mr Cleverly was asked by United director Mr Craig Phillips ("Mr Phillips") to meet with him. Present also was the Henderson store manager Mr Jason Lewis ("Mr Lewis"). Mr Phillips said he had some very serious things to talk to Mr Cleverly about involving allegations made by another staff member. He told Mr Cleverly there would be a meeting about the allegations and that Mr Cleverly was welcome to have a support person attend with him.

[8] I accept Mr Cleverly's evidence and find that Mr Phillips said he had been told that Mr Cleverly had been using some sort of recorder to tape other staff and management and that Mr Cleverly was going to use this information to "take down" United Video and other staff members. I also prefer Mr Cleverly's evidence that Mr Phillips also told him that that after a meeting they had had the previous Friday 12 May 2006, Mr Cleverly had threatened a staff member. I also accept Mr Phillips told Mr Cleverly a staff member that he had worked with that same Friday had been in contact with Mr Lewis over the weekend and reported feeling unsafe and threatened

by Mr Cleverly's actions that Friday. Although not identified to him, Mr Cleverly concluded the complainant was the only other person he had worked with on the Friday evening in question.

[9] Mr Cleverly responded by advising he was aware he did not have to say anything without a support person but that he was "pissed off" and annoyed with the accusations made against him and especially, allegations by someone who had always seemed so nice to his face. He then explained that the reason why he been taping certain conversations he had had with staff was because he was "sick" of getting told things which were later denied. He said that if he had recordings he could support what he had been told.

[10] Mr Phillips then told Mr Cleverly he had been in touch with the Labour Department and had received advice on how to handle the matter. He informed Mr Cleverly, that Mr Cleverly was suspended with pay until he was contacted again regarding when a further meeting would take place. Mr Phillips told Mr Cleverly that it would be in Mr Cleverly's best interests not to contact anyone at work for the time being and to stay away from the Henderson and Mt Roskill United Video stores.

[11] On Friday 19 May 2006 Mr Cleverly together with his mother Mrs Erica Cleverly ("Mrs Cleverly") met with Mr Phillips and Mr Lewis. Mr Phillips asked Mr Cleverly if he had anything to add to allegations that were made at the previous meeting. When Mr Cleverly was informed the identity of the complainant, he denied the allegations of threatening behaviour and said that he had been talking and joking with the complainant. He said the complainant had approached him requesting advice on how to fill out a time sheet, and that she had told him she would be leaving the employment soon. He suggested that Mr Phillips view the video surveillance.

[12] Mr Phillips explained the complainant had reported mentioning to Mr Cleverly her brother had just come out of jail and when she had asked Mr Cleverly if he knew someone who was getting out of jail soon, he said he did.

[13] Mr Phillips said he was unhappy about Mr Cleverly secretly recording conversations. He said he needed to ensure a safe working environment and that recording staff was not making them feel safe. He said that staff felt scared and

threatened and understood Mr Cleverly had been recording for about two months. He also said he had been told of allegations of personal threats against himself. Mr Cleverly explained he had only made recordings when he had felt threatened or when he felt his word wasn't going to be good enough.

[14] Mr Phillips asked Mr Lewis about how the staff member was. Mr Lewis said that she had gone to him crying about how she felt threatened.

[15] Mr Cleverly urged Mr Phillips to look at the store video surveillance and said that the complainant had shown him a job description for another job. He said he was surprised that someone had the "guts" to lie and the allegations were untrue. Mr Phillips said the allegations had been made and he was giving Mr Cleverly the right of reply. Mr Cleverly said he did not need to defend himself against false allegations and that if a staff member had a problem he did not know why they had not approached him directly. There was then an adjournment.

[16] When they reconvened, Mr Phillips advised he could not have Mr Cleverly working at Henderson because the staff felt threatened. He said that as far as he was concerned there was supporting evidence and that something did happen. He said he would sort something out at Mt Roskill and find some hours for Mr Cleverly but he would need time to do so. He referred to the employment agreement and the reference to the place of work at both Mt Roskill and Henderson. He said he knew Mr Cleverly was unavailable for work on certain days and that he could not have female staff feeling threatened.

[17] Mr Cleverly asked for the allegations to be put in writing and Mr Phillips said he would check with the Labour Department. Mrs Cleverly said Mr Cleverly had the right to have it in writing.

[18] Mr Phillips said he felt the investigation was done fairly and he followed everything to letter of law of the in terms of process. He referred to clause 8.4 in employment agreement and said he had taken both sides into consideration.

[19] Mr Lewis said he had seen the surveillance camera and could see how everything seemed fine but he also said he had to take the point that the staff members felt threatened. Mr Phillips repeated that he believed something did happen.

[20] Mr Cleverly and Mrs Cleverly left the room briefly to talk. When they returned, Mr Cleverly advised that if he did not accept working hours at Mt Roskill whether that meant that he was dismissed as from then. Mr Phillips said he could not be specific about hours of work without enquiring. Mr Cleverly declared he did not think he could feel comfortable working after everything that had happened. I find that Mr Phillips then advised Mr Cleverly his employment with United was finished from that day and he would have to hand in his uniform.

The merits

[21] Mr Cleverly explains that if he had accepted work at Mt Roskill then he would be admitting the allegations made against him. He was also concerned that there was no guarantee of enough hours of work for him to live on considering the extra travelling distance to work and he was not confident that he would have been treated fairly by United.

[22] Mr Phillips tells the Authority that on 26 May 2006 he and his wife were telephoned at home by the complainant. He says she was distressed, upset and scared. Mr Phillips says the complainant told his wife Mr Cleverly had made threats and allegations against her and Mr and Mrs Phillips "*with an associate who was a gang member and was just out of jail for murder.*"

[23] I prefer Mr Cleverly's account of events. I find that Mr Phillips has his dates wrong and I find that Mr Cleverly's employment terminated on Friday 26 May 2006. Mr Phillips presents to the Authority a statement from the complainant and also signed by Mr Lewis, of the complaint. Mr Phillips says he presented the statement to Mr Cleverly at the final meeting on 26 May 2006. Mr Cleverly denies ever being presented with the statement and says the Authority's investigation is the first time he has seen it. The statement says this:-

To whom it may concern

On Friday 26 May Chris returned from upstairs (office) in a foul mood, ranting and raving he's taking everyone with him. He then showed me a personal tape

recorder and stated that he had information on all staff members threatening to take everybody down if anything was to happen to him. He was swearing and cursing and I could sense a lot of tension which made me feel very uncomfortable, and unsafe. He then talked about that the police were maybe looking for him for something he did the night before and told me about his friend that had just recently got out of prison for murder. I think he said this to me to intimidate, and scare me. This did scare me, so much that I removed all my personal details from the company computer system. I felt threatened and scared, and unsure about my safety at work. After I went home I rang the store owner and told her everything that had happened. I told her I don't want to come back to work and that I was very upset.

[24] The first matter I note is that the date is wrong. I agree with Mr Cleverly that the statement was not put to him at the final meeting because if it had been, it would have been obvious to all that the date of the alleged incident was plainly wrong. The incident was alleged to have occurred on Friday, 12 May 2006. I am confident that Mr Phillips account is incorrect because Mr Cleverly gave notice of personal grievance by letter dated 26 May 2006 which Mr Phillips expressly acknowledged in his response dated 7 June 2006. I consider United's evidence in answer to Mr Cleverly's claim is unreliable.

[25] Most significantly I do not agree that the precise allegations made by the complainant in terms of the written complaint, were properly and fairly put to Mr Cleverly for answer. I find that all Mr Cleverly was asked to respond to was that he had threatened a staff member. He was not informed of the particulars of that alleged threat or threats. That was unfair to him. As well, I do not consider that anything in the written complaint can reasonably or objectively be regarded as a threat by Mr Cleverly regardless of how the complainant reacted to it.

[26] While United maintains to the Authority the complainant telephoned Mr and Mrs Phillips at home, the detail of that discussion was not put to Mr Cleverly. Mr Cleverly was informed the complainant had approached Mr Lewis distressed. Nothing of the Phillips' discussion with the complainant was put to Mr Cleverly and I find that it is relied on by United.

[27] For these reasons, I consider the decision taken by United in concluding that Mr Cleverly had threatened another staff member was unfair and not the decision of a fair and reasonable employer. United failed to act in good faith towards Mr Cleverly. Because of that decision, Mr Cleverly was advised his employment at Henderson was

then terminated. That decision too was consequently also unfair to Mr Cleverly and unjustifiable.

[28] It is true that Mr Cleverly's employment agreement specifies his place of work as both the Mt Roskill and Henderson stores. He clearly disputes this but he should not have signed his employment agreement if he did not accept those terms. He is bound by that description of his place of work. But the decision to remove him from the Henderson store was unfair to him because it was made contrary to United's duty of good faith owed to Mr Cleverly. Mr Cleverly advised he was uncomfortable working for United given everything that had occurred to that point. In doing so, he was affirming his employer's repudiatory breach of the employment agreement. The breach by his employer was so serious that it was foreseeable that Mr Cleverly would adopt that position. He chose to regard the employment at an end because of what his employer had done to him. He was right to regard his employer as having repudiated the employment relationship. I find that Mr Cleverly was unjustifiably constructively dismissed. He is entitled to remedies in settlement of that personal grievance.

The resolution

[29] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Cleverly's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find there was no blameworthy conduct on Mr Cleverly's part and which requires a reduction in the remedies to be awarded to him.

Reimbursement

[30] I am satisfied that Mr Cleverly has lost wages as a result of the personal grievance. I award him 12 weeks lost wages during which he was out of work and not receiving student allowance. **I order United Corporation Limited to pay to Christopher Cleverly the sum of \$4,620.00 (35 hours @ \$11.00 per hour for twelve weeks) as reimbursement.**

Compensation

[31] I accept Mr Cleverly has suffered hurt and humiliation, anxiety and embarrassment as a result of his personal grievance. Having regard to his evidence, his period of service and the circumstances of the dismissal I made a modest award of compensation. **I order United Corporation Limited to pay to Christopher Cleverly the sum of \$3,000.00 as compensation.**

Costs

[32] As neither party was represented by professional advocate, there will be no orders for costs.

Leon Robinson
Member of Employment Relations Authority