

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 139  
5395211

BETWEEN                      LUKE CURTIS  
   Applicant  
  
A N D                              RS CONSTRUCTION  
   LIMITED  
   Respondent

Member of Authority:      Rachel Larmer  
  
Representatives:              Stan Austin, Advocate for Applicant  
   Wendy MacPhail, Advocate for Respondent  
  
Investigation Meeting:      15 April 2013 at Tauranga  
  
Date of Determination:      23 April 2013

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**DETERMINATION OF THE AUTHORITY**

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**A. RS Construction Limited's summary dismissal of Mr Curtis was unjustified. It is ordered to pay him:**

- (a)      \$1,420 lost remuneration**
- (b)      \$3,200 distress compensation.**

**Employment relationship problem**

[1]      RS Construction is a small company which primarily undertakes directional drilling on construction sites. It employed Mr Luke Curtis as a Driller on 20 February 2012. The owner of the business Mr Rob Sherris summarily dismissed Mr Curtis on 31 July 2013 for insubordination as a result of the way in which Mr Curtis spoke to him when instructed to do a task.

[2] Mr Curtis claims his dismissal is substantively and procedurally unjustified.

### **Issues**

[3] The following issues must be determined:

- a. Was Mr Curtis' dismissal justified?
- b. If not, what if any remedies should be awarded?

### **Was Mr Curtis' dismissal justified?**

#### *Justification test*

[4] Justification is to be determined in accordance with the section 103A justification test in the Employment Relations Act 2000 ("the Act"). This requires the Authority to assess RS Construction's "*actions, and how it acted*" to determine whether the substantive decision to dismiss Mr Curtis and the process it followed was "*what a fair and reasonable employer could have done in all of the circumstances*".<sup>1</sup>

#### *Incident which gave rise to alleged misconduct*

[5] On 31 July 2012 Mr Sherris and Mr Curtis were on site together as the company had been contracted to move cobblestones situated near the front door of a bar. Mr Sherris instructed Mr Curtis to move the cobblestones to a particular location so they would be ready for another contractor to use. Mr Curtis told Mr Sherris it would be better relocate the cobblestones to another area to avoid extra work for RS Construction.

[6] Mr Sherris rejected Mr Curtis' suggestion and when the cobblestones had to ultimately be moved back to where Mr Curtis had said they should go, he told Mr Sherris "*I told you we should have left them there*". Mr Curtis claims he made this comment "*in a laughing manner*" whilst Mr Sherris believes Mr Curtis was laughing at him.

[7] Mr Sherris then instructed Mr Curtis to get the drill keys and move the drill to the next worksite. Mr Curtis replied "*I already got them*" to which he claims Mr Sherris responded in a raised voice "*Just do it*". Mr Curtis then told Mr Sherris

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<sup>1</sup> Section 103A of the Act.

*“lose the attitude and calm down”*. Mr Curtis claims he made that comment in a *“laughing tone”*. Mr Sherris says he was very angry about being told to lose the attitude and calm down. Mr Sherris says he considers Mr Curtis’s comment was insubordination.

[8] Mr Sherris went off to get a coffee in order to calm down and when he returned to the work site he pulled Mr Curtis aside to remonstrate about what Mr Sherris viewed as Mr Curtis’ insubordination. Exactly what each party said and how they said is in dispute.

[9] Mr Sherris says he was annoyed and frustrated that Mr Curtis did not appear to be focused on what Mr Sherris wanted to raise with him, namely his unacceptable insubordination. Mr Sherris says Mr Curtis completely missed the point by focusing on where the keys for the drill had been or were supposed to be immediately before he had been told to move it.

[10] I consider this misunderstanding was understandable because from Mr Curtis’ perspective the last communication he had had with Mr Sherris had involved Mr Sherris telling him to the keys and move the drill, which he had done.

[11] Mr Sherris’ view is that he put Mr Curtis on notice that if he did not change his attitude problems and insubordinate behaviour, he was putting his employment at risk. Mr Sherris claims Mr Curtis puffed his chest up and looked angry which Mr Sherris says made him feel threatened. Mr Sherris acknowledges he did not tell Mr Curtis he felt threatened before dismissing him.

[12] Mr Curtis says Mr Sherris told him he could be sacked. Mr Curtis says he told Mr Sherris he couldn’t be sacked because he did not have any prior warnings. Mr Sherris told Mr Curtis he did have previous warnings and Mr Curtis disputed that. I consider it was reasonable and understandable for Mr Curtis to take issue with Mr Sherris’ threat to dismiss him when he had not been put on notice that his on-going employment was in jeopardy.

#### *Alleged previous warnings*

[13] I find Mr Curtis had not received any previous warnings. Mr Sherris relies on a verbal warning he says was given to Mr Curtis on 9 March 2012. An issue had arisen on site that day because Mr Curtis suggested to Mr Sherris a way of working

which Mr Sherris believed was not in accordance with industry standards. Mr Sherris made it clear to Mr Curtis that he had to do the job in a way which strictly accorded with industry standards.

[14] I find this discussion was merely an instruction from Mr Sherris to Mr Curtis about the manner which a particular work activity had to be undertaken – it was not a verbal warning. There was no disciplinary process around this warning, no disciplinary documentation, and no record of the purported warning.

[15] Even if Mr Sherris had issued a verbal warning (and I find he did not) it would have been unjustified because none of the basic procedural fairness and natural justice requirements an employer is required to comply with before issuing a warning had been met.

[16] I also reject Mr Sherris' claim that Mr Curtis was given a written warning on 6 June 2012. Mr Sherris relies on a note he made in his diary which states "*need to work on attitude*" as constituting the written warning. I find this was not a valid written warning.

[17] Once again, there was no documentation associated with this purported warning. There was no disciplinary process and no specific disciplinary allegations were put to Mr Curtis to respond to. The discussion which occurred between Mr Sherris and Mr Curtis on 6 June 2012 which gave rise to the diary note was in fact an informal performance review which had been initiated by Mr Curtis so he could find out how he was going in his new job.

[18] The full note Mr Sherris made in his diary, which was signed by both parties, makes it clear it was an informal performance review, not a formal disciplinary process. It states:

"3 month review

*Very happy with work ethic and attendance.  
Need to work on attitude."*

[19] The mere fact Mr Sherris gave Mr Curtis feedback that he needed to work on his attitude did not amount to a formal written warning. Even if that had been a warning (and I have found it was not) it still would have been unjustified. There was

no good reason for Mr Sherris to issue Mr Curtis with a warning during his informal performance review and he did not follow a fair or proper process before doing so.

*Substantive justification*

[20] I consider Mr Curtis' comments to Mr Sherris to "*lose the attitude and calm down*" were rude, disrespectful and should not have been said. However, I find that a fair and reasonable employer could not have concluded that saying these words amounts to serious misconduct.

[21] Mr Curtis' comment, although inappropriate and unacceptable, was not so serious that it fundamentally undermined the trust and confidence inherent in the employment relationship. I therefore find that a fair and reasonable employer could not have justified summary dismissal in all the circumstances. Mr Curtis' comments should have been treated as a first instance of misconduct and a fair and proper disciplinary process should have been initiated.

*Procedural fairness*

[22] RS Construction is unable to meet any of the four test in s.103(A)(3) of the Act which all relate to basic procedural fairness and natural justice requirements.

[23] The way in which Mr Sherris changed an informal on site discussion with Mr Curtis into a serious misconduct disciplinary meeting which resulted in summary dismissal was unfair and unjustified.

[24] Mr Sherris failed to put any specific disciplinary allegations to Mr Curtis to respond to. He did not inform Mr Curtis that a possible outcome of their onsite discussion was summary dismissal. He did not give Mr Curtis any time to prepare a response, he did not offer Mr Curtis the opportunity to be accompanied by a representative or support person, and he failed to inform Mr Curtis of the change in the status of their discussion when it morphed from an informal discussion into what Mr Sherris views as a disciplinary meeting.

[25] I reject Mr Sherris' evidence that the nature of the business meant it was impractical to hold a disciplinary meeting. He interviewed prospective employees at his home and he should have conducted a disciplinary process there instead of immediately dismissing Mr Curtis during a very brief on site exchange.

### *Good faith*

[26] A fair and reasonable employer is expected to comply with its statutory good faith obligations. These include the obligation contained in section 4(1A) of the Act to provide an employee with access to information relevant to a decision about their ongoing employment and an opportunity to comment on that before they make a final decision that may adversely impact on the employee's ongoing employment.

[27] That did not occur in this case. From Mr Sherris' own evidence it was clear Mr Curtis did not understand the nature of the concerns that were being raised with him or the possible adverse consequences to his on-going employment should Mr Sherris be unhappy with his response.

[28] Mr Sherris told me he became annoyed, frustrated and believed dismissal was required because Mr Curtis was focusing on the drill key and not addressing concerns about his attitude. This indicates that the parties were talking at cross purposes. I consider RS Construction must take the blame for that because that probably would not have happened if it had complied with its statutory good faith obligations.

### **Outcome**

[29] I find that how RS Construction acted (in terms of its decision to summarily dismiss Mr Curtis), and its actions (in terms of non-compliance with its statutory obligations), were not what a fair and reasonable employer could have done in all the circumstances at the time that Mr Curtis was dismissed.<sup>2</sup>

[30] I find that Mr Curtis' dismissal was substantively and procedurally unjustified.

### **Remedies**

#### *Mitigation of loss*

[31] I consider Mr Curtis took appropriate steps to mitigate his loss because he obtained new employment two weeks after he was dismissed.

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<sup>2</sup> Ibid 1.

### *Lost remuneration*

[32] Mr Sherris paid Mr Curtis one week's wages upon termination as an ex gratia payment. Mr Curtis was out of work for 1 week and 3 days which meant his actual loss consists of three days' lost remuneration only.

[33] The parties agreed that for the purposes of calculating lost remuneration Mr Curtis works nine hours per day at \$20 per hour, giving him a loss of \$540 (being \$180 x 3 days).

[34] Mr Curtis also has a continuing loss because his new employment initially paid less per hour than he received from RS Construction. In the three months immediately following his unjustified dismissal, Mr Curtis' continuing loss amounts to \$880.

[35] I order R S Construction to pay Mr Curtis \$1,420 lost remuneration under section 128(2) of the Act.

### *Distress compensation*

[36] I accept that Mr Curtis suffered distress and humiliation as a result of his unjustified dismissal. He described being staggered to be sacked in the way he was and felt considerable stress because he was awaiting the birth of his second child when he was dismissed. Mr Curtis said he was anxious about obtaining a new job and worried his family would find it difficult to cope financially. He also told me his sleep was disrupted for a long time despite him finding new employment very quickly.

[37] I order RS Construction to pay Mr Curtis \$4,000 under section 123(1)(i)(c) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his unjustified dismissal.

### *Contribution*

[38] Having established Mr Curtis has a personal grievance, s124 of the Act requires me to consider whether he contributed to the situation which gave rise to his grievance, and if so reduce remedies accordingly.

[39] I find Mr Curtis was rude and disrespectful when he told Mr Sherris to "*lose the attitude and calm down*". This was the catalyst for his unjustified dismissal so I

consider it appropriate to reduce the distress compensation he has been awarded by 20% to reflect that contribution. RS Construction therefore only has to pay Mr Curtis \$3,200 distress compensation (\$4,000 less 20% reduction to reflect contribution).

### **Costs**

[40] Mr Curtis as the successful party is entitled to a contribution towards his actual costs. The parties are encouraged to agree costs. If that is not possible costs will be dealt with by an exchange of memoranda. Proof of actual costs will also be required.

[41] Mr Curtis has 14 days from the date of this determination within which to file his costs memorandum and R S Construction has 14 days to file its response memorandum. This timetable will be strictly enforced so any departure from it requires prior leave to do so.

**Rachel Larmer**  
**Member of the Employment Relations Authority**