

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 167/07
File Number: 5089666

BETWEEN Michael Davies
Applicant

AND Smart Steel Limited
Respondent

Member of Authority: Denis Asher

Representatives: Megan Williams for Mr Davies
No appearance by or for the Company

Investigation Meeting Napier, 12 December 2007

Submissions Received From the applicant only on 12 December 2007

Determination: 12 December 2007

DETERMINATION OF THE AUTHORITY: Oral Determination

Employment Relationship Problem

- [1] In his application filed on 7 June 2007 Mr Davies said he had been unjustifiably dismissed by the Company and in a procedurally unfair manner. He sought unspecified lost wages and costs, and compensation for humiliation, etc of \$10,000.

- [2] In its statement in reply received on 28 June the Company said, amongst other things, that Mr Davies was dismissed as a consequence of repeated and persistent refusals to carry out the reasonable instructions of the respondent.
- [3] The parties subsequently agreed to undertake mediation on 2 August but the respondent's director, Mr Eric Lewthwaite did not appear. The Authority was advised that he sent a fax to the Department of Labour's mediation service attributing childcare commitments to his non-appearance. There is no evidence of the respondent proposing or initiating another mediation date.

Direction by Authority

- [4] I therefore arranged a telephone conference of the parties on 10 August. Prior to that date the Company had been represented by Untapped Limited, a company that advertises itself as human resource specialists. Its representative was Ms Judy Daniell. During the 10 August telephone conference Ms Daniell advised she was not sure she had the authority to represent the Company and that it had advised her it was no longer trading. As a result of Ms Daniell's helpful advice I directed the parties to undertake a one-day investigation in Napier commencing at 10.00 a.m. on Wednesday 12 December 2007: s. 160 of the Act applied.
- [5] It is clear from Authority support staff records that the respondent, via its Company director, Mr Lewthwaite, was advised of the direction to an investigation and other relevant matters. In particular Mr Lewthwaite was spoken to on the telephone by Authority support staff on 7 & 18 September. Support staff also sent the Company a number of emails as well as a letter dated 20 September: amongst other matters these communications made clear that an investigation was scheduled for 12 December at 10.00 a.m.
- [6] The applicant usefully provided witness statements in advance of today's investigation.

Decision to Proceed

- [7] Prior to the commencement of today's investigation I telephoned and spoke to Mr Lewthwaite: he initially denied all knowledge of today's investigation. When I reminded him, by reference to the support staff's records, of the Authority's communications he advised he was in Taupo and would not be attending. He repeated earlier advice that the Company was not trading: I pointed out to Mr Lewthwaite that the Companies Office information in respect of the respondent carried no advice to that effect. He said the

respondent's accountant had forwarded information as to its trading and financial status: I advised Mr Lewthwaite there was no communications on the Authority's file from the Company's accountant; I suggested he urgently forward the same to the applicant and to the Authority.

- [8] I advised Mr Lewthwaite that, as I was satisfied he knew of the day's investigation and had given no good cause for the Company's non-attendance, I was proceeding with the investigation: clause 12 of Schedule 2 of the Employment Relations Act 2000 applied.

Background

- [9] I am satisfied from Mr Davies', and that of his partner, Ms Gail Shaw's, affirmed evidence that the following is an accurate summary of relevant events.
- [10] By way of a written employment agreement, Mr Davies worked for the Company from 8 January 2007. The agreement described the applicant as (verbatim) *"being employed as the Hawks Bay area representative for Kiwispan, in the running of the Steel Framed Shed Business including, administration, site deliveries, sales, dept collection and overseeing works as required"* (clause 2.1, attachment to statement of problem).
- [11] By fax dated 19 April Mr Lewthwaite required the applicant to attend a meeting in Taupo on Friday 20 April *"... so we can go through a few items that need addressing"* (attachment to statement of problem). That communication makes no reference to the meeting being for disciplinary purposes or that Mr Davies' ongoing employment was in jeopardy.
- [12] Mr Davies says no performance or disciplinary issues were raised by Mr Lewthwaite at the 20 April meeting, nor was there any suggestion his employment was at jeopardy.
- [13] On Monday 30 April, at about 6.45 a.m., and before he started work, a fellow employee arrived at Mr Davies' home and – on behalf of the respondent – gave him a letter dated 27 April 2007 summarily dismissing the applicant for serious misconduct (attachment to statement of problem).
- [14] No effort was made then or later by the Company to pay Mr Davies' outstanding wages and holiday pay.

Discussion and Findings

- [15] The only evidence or argument provided on behalf of the Company is set out in its statement in reply. It says Mr Davies “*was dismissed from his employment as a consequence of repeated and persistent refusals to carry out the reasonable instructions of the Employer*”.
- [16] No evidence has been provided by the respondent in support of that claim or other allegations set out in the statement in reply and in Mr Lewthwaite’s letter of 14 May to the applicant’s advocate, Ms Megan Williams. There are no copies of any minutes of disciplinary meetings or of communications from the Company to Mr Davies setting out allegations, warnings or findings, etc. Mr Davies disputes ever being warned. I have no reason to doubt Mr Davies’ evidence.
- [17] The only communication from the Company to Mr Davies (its letter of 19 April) makes no reference to disciplinary matters, etc. Evidence promised in the statement in reply (see par 4) has not been provided.
- [18] In respect of the claim Mr Davies used his employer’s portable phone to run a private business, the applicant says he advertised the contact number only to dispose of his private vehicles as he now had use of the Company’s vehicle (per clause 9.2 of his employment agreement): he otherwise denied operating a private business on the respondent’s portable phone. I have no reason to doubt that claim or question its fairness and reasonableness. It does not amount to grounds for dismissing the applicant without fair process. The cost of any personal usage of the Company’s portable phone was any way recoverable via the relevant provision in the employment agreement.
- [19] The various allegations advanced by the Company have not been substantiated. They are not allegations so serious and/or urgent that would justify the absence of fair process by the respondent.
- [20] There was clearly no opportunity for Mr Davies to address the matters set out in the Company’s letter of summary dismissal, which he disputes. Again, the allegations are not such as to justify the failure by the Company to apply fair process.
- [21] The respondent’s decision to terminate Mr Davies was clearly pre-determined.
- [22] Because the decision to dismiss was pre-determined and because the applicant was denied any opportunity to address the serious allegations set out against him in the

Company's letter of dismissal and in a later communication, and because I am satisfied those allegations were any way without any substantive justification, it follows that Mr Davies was procedurally and substantively unjustifiably dismissed.

Remedies

- [23] Mr Davies seeks \$10,000 compensation for humiliation, etc. The evidence from the applicant and his partner as to the effects of the termination was unchallenged and stark: the applicant's dismissal came suddenly, without any prior notice or indication. It was a serious shock to Mr Davies, not least because of the serious allegations against him which are set out in the dismissal letter of 27 April as well as a subsequent reply dated 23 May to notice from his advocate, which sets out additional (and arguably defamatory) allegations against the applicant. Mr Davies disputes all of the allegations. His unjustified dismissal caused the applicant distress and depression (oral evidence).
- [24] The basis of Mr Davies' termination (and its details) was clearly known by the fellow employee who delivered the letter of termination: the co-worker urged the applicant to read the letter then and not, as Mr Davies proposed, on his return from work that day.
- [25] I am satisfied from his unchallenged and corroborated evidence that the impact of his unjustified dismissal, compounded as it was by a subsequent serious and unsubstantiated allegation, fully justifies the compensation he seeks of \$10,000 for humiliation, etc: ss 123 (c) (i) of the Act applied.
- [26] Mr Davies also claims 12 days unpaid wages, from 16 April to his termination effective 1 May, or \$880.00 gross. On the basis of the applicant's evidence I am satisfied this claim is made out: ss 123(b) of the Act applied.
- [27] Mr Davies also seeks commission earnings totalling \$2,390.91 gross. Consistent with clause 7.2 of his employment agreement and his unchallenged evidence I am satisfied that claim is made out: ss 123(b) of the Act applied.
- [28] Mr Davies says he sought and found various jobs between his termination and 24 September, when he found his current employment. Taking account of monies earned during this period of nearly 5-months (at lesser hourly rates) he claims wages lost as a result of his unjustified dismissal of \$2,764.80 gross. Again I accept Mr Davies' claim: ss 128 (2) of the Act applied.

[29] Finally, Mr Davies seeks unpaid holiday pay of \$1,132.98 gross. I am similarly satisfied the applicant is entitled to recover that sum: ss 123(b) of the Act applied.

Contributory Fault

[30] It follows from the findings set out above that I am satisfied Mr Davies did not contribute in any way to the situation that gave rise to his personal grievance.

Report in Relation to Good Faith

[31] In the event of this matter being challenged the Employment Court may wish to exercise s. 181 of the Act and call for a report in relation to the extent to which the parties have acted in good faith towards each other during the investigation.

Determination

[32] The Company unjustifiably dismissed Mr Davies and is therefore directed to pay to him the following remedies:

- a. Compensation for humiliation, etc of \$10,000 (ten thousand dollars); and
- b. 12 days unpaid wages, from 16 April to his termination effective 1 May, i.e. \$880.00 (eight hundred and eighty dollars) gross; and
- c. Commission earnings totalling \$2,390.91 (two thousand, three hundred and ninety dollars and ninety-one cents) gross; and
- d. Wages lost as a result of his unjustified dismissal of \$2,764.80 (two thousand, seven hundred and sixty-four dollars and eighty cents) gross; and
- e. Unpaid holiday pay of \$1,132.98 (one thousand, one hundred and thirty-two dollars and ninety-eight cents) gross.

[33] Costs of \$2,250 and a \$70 filing fee are claimed. Because of the Company's (i.e. Mr Lewthwaite's) failure to engage in the employment relationship problem resolution process and the resulting costs to the applicant, and because the costs sought are entirely reasonable for the investigation required by an employment relationship problem of this type, I am satisfied the claim is fully made out and award costs of \$2,250 (two thousand,

two hundred and fifty dollars) and the filing fee of \$70 (seventy dollars) against the respondent.

Denis Asher

Member of the Employment Relations Authority