

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 277/07
5050926

BETWEEN GRAYSON FORD
Applicant

AND GENERAL STORAGE
LIMITED
Respondent

Member of Authority: Robin Arthur
Representatives: Mark Ryan for Applicant
Peter Elder for Respondent
Investigation Meeting: 1 August 2007 at Auckland
Additional information 13 August 2007
Determination: 10 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant alleges he was unjustifiably dismissed by the Respondent after providing a medical certificate indicating he would be unable to work for a month due to depression and stress. He also alleges he was unjustifiably disadvantaged through his employment by not being provided with requested training and being verbally abused for work his employer saw as inadequate. The Applicant seeks remedies of lost earnings, compensation for hurt and humiliation and his costs.

[2] The Respondent says the Applicant left the job of his own accord, resigning rather than being dismissed. It denies there was a lack of training or any verbal abuse of the Applicant.

Issues

[3] The following issues must be determined to resolve this problem:

- (i) Were any performance issues handled fairly; and
- (ii) Did the Applicant resign or was he dismissed; and
- (iii) Were the actions of the Respondent justified in either accepting a resignation or making a dismissal; and
- (iv) If the circumstances of the termination of his employment amounted to an unjustified disadvantage or unjustified dismissal, what remedies is the Applicant entitled to after allowing for the obligation to mitigate his losses and, if necessary, any reduction for contribution?

The investigation

[4] For the one-day investigation meeting, I had written witness statements from the Applicant, the Respondent's director Brett Walker and his wife Angela Walker. These three witness and the Applicant's mother, Judith Ford, attended the investigation meeting where each gave evidence under oath. The parties' representatives asked additional questions and provided oral closing submissions. Provision was made for the Applicant to provide copies of some additional bank statements about his earnings following the ending of his employment with the Respondent, with the Respondent having an opportunity to comment on those additional documents if necessary. This information was provided and copied to the Respondent's advocate but no comments were subsequently received.

[5] By consent the Respondent originally cited in this matter was amended to the company now identified in the intituling of this determination. Mr Walker is the company's sole director and shareholder.

Credibility

[6] The Authority is required to establish the facts and make a determination based on the balance of probabilities, that is, what is more likely to have happened than not. The closing submissions of both representatives suggested findings of the credibility as to the evidence of witnesses for their respective parties were necessary to determine this matter. However, having reviewed the evidence, both written and oral, I have come to a firm view of the facts as to what most likely happened without needing to make negative credibility findings in respect of any witness. Rather, for

reasons set out below, I consider that the Applicant has made out his case of unjustified treatment by the Respondent largely on the evidence of the Respondent's two witnesses themselves without having to rely, for essential points, on any particular contrary evidence given by the Applicant and his mother.

The facts

[7] The Respondent is in the business of installing wardrobes, assembled from materials measured and cut in its workshop then transported 'flat' for assembly at the houses or premises of clients.

[8] The Applicant started work for the Respondent in late April 2006. He had completed trade training as a boat builder but was working on a construction site for around \$14 an hour before starting the job with the Respondent as a "company carpenter" on \$27 an hour.

[9] Mr Walker conducted no reference checks before offering the Applicant a job.

[10] The Applicant and Mr Walker discussed a three month probation period – a "trial period" – so that they could, as Mr Walker put it, "determine what the needs of both parties would be". It was, he accepted, something that was intended to go both ways, addressing any concerns of the employee as well as of the employer.

[11] The Applicant signed a written employment agreement. Although there was conflict in the evidence as to the circumstances of him signing that agreement, it is not relevant to determining his claim of unjustified dismissal or disadvantage. The agreement included this term about the probationary period:

*A three-month probationary period is a condition of first appointment to the Company. A review of performance in the position will be made by the Company during this period. **Where the employee fails to meet the Company's required standards, the employee shall be subject to the Company's disciplinary procedures, which could lead to dismissal either during or at the end of the probationary period.** During this period one-day's notice of the termination of employment shall be given by either party, or, in lieu thereof, an amount equivalent to one day's wages shall be paid or forfeited by the party not giving required notice. The Company reserves the right to extend the probationary period of necessary.* [my emphasis]

[12] The Applicant and Mr Walker agree that they discussed the Applicant's need for specific training in installing wardrobes. The Applicant began by working alongside an experienced installer and each day would talk to Mr Walker or another

manager at the Respondent's base workshop about the requirements for particular jobs. The Applicant admits that he struggled with a number of aspects of the job, due to his relative lack of experience in the particular tasks required for installation, but says he repeatedly asked for additional training. He also says that he was aware, through direct comments to him and some feedback relayed to him by the office administrator, that some customers had made positive comments about the quality of his work. He was however frustrated by a number of jobs where the materials provided were inadequate and he had to take extra time to fix problems or return to the workshop to get replacement materials. Mr Walker acknowledges that there were "*a few occasions*" when the Applicant was given materials from the workshop which were "*not fully up to standard*" but says that, as a tradesman, the Applicant's role was to rectify problems on the job if possible or report the matter back to the workshop.

[13] It appears that within a few weeks Mr Walker developed reservations about the Applicant's ability to "*get to grips with the role of being an installer*".

[14] Two examples were focused on in the evidence. One involved installation of a shelf at the Respondent's showrooms put up by the Applicant at the direction of Mrs Walker who was managing the business while Mr Walker was in hospital for some time in June 2006. Mrs Walker says the Applicant seemed to lack confidence in undertaking the task and asked a number of questions about what needed to be done but she had left him to do the task because she saw it as his responsibility as a carpenter and because it would be a "*bit of a test*".

[15] On returning to work after getting out of hospital, Mr Walker says he walked into the showroom and, seeing the shelf installed by the Applicant, said: "*Oh my God, who did that?*" He later rebuked the Applicant for what he considered was inadequate work saying: "*You're a cabinet maker and cannot follow a plan. If you think this is correct you ought to be shot*". The Applicant says that Mr Walker also called him a "*f...ing idiot*" but Mr Walker denies saying that.

[16] Another incident occurred when the Applicant was sent to an urgent job, with a client waiting, but ended up getting his van stuck down a driveway at the wrong address. Mr Walker says that he said to the Applicant: "*For God's sake, can't you follow instructions?*" The Applicant's evidence was that he was also called a "*f...ing idiot*" on that occasion.

[17] Matters came to a head a few days later on 30 June 2006 when the Applicant and Mr Walker were discussing arrangements for the second day of an installation job. Mr Walker says he was giving detailed instructions to the Applicant about what needed to be done, step-by-step, at the job on that day. The Applicant says that he had wanted assistance with installation of wardrobe doors and Mr Walker had promised to come to the job with him that day but instead decided to give him detailed written instructions. Mr Walker says that when he asked the Applicant whether he understood the instructions, the Applicant “*reacted very negatively*” by saying: “*You don’t trust me*”.

[18] A heated discussion followed. The Applicant talked about leaving the job. There is a dispute in the evidence about whether this meant leaving the job for the day or leaving the job entirely. The Applicant accepts that Mr Walker did remonstrate with him about leaving that day and said that it was like a player walking out on their team at half time. Mr Walker says that the Applicant said: “*I’m leaving right now. I’m not going to work here any longer*” and then said “*I’m going to the doctor, because I feel depressed*”.

[19] The Applicant says his words were: “*I can’t work under these conditions any longer. I’m depressed, sick, not coping and you’re treating me like an animal. I need to go and see a doctor because I’m not coping at all. I’m going to think about handing in my notice on Monday*”. He says that he was crying during the conversation.

[20] Mr Walker denies that the Applicant was crying but accepts that the Applicant was shaking, was “*very emotional, very worked up*” and “*in an emotional state by the time he left*”.

[21] The Applicant left the premises and drove to the workplace of his mother which was nearby. Around two hours later, he attended a local medical practice where he was seen by a doctor who had seen him one or two times before – not his usual GP. The doctor filled out a WINZ sickness benefit medical certificate which described his condition as “*tearful, anxious, worry about performance, low mood*” and described his incapacity as stress and depression. She recommended he not work for the following month.

[22] The Applicant's mother, Mrs Ford, took the medical certificate to the Respondent's workshop and gave it to Mr Walker. Their accounts of their conversation differ. Mr Walker says that he asked why the medical certificate concerned him because the Applicant had already left the job. Mrs Ford says that Mr Walker said that the medical certificate did not matter because the Applicant had been fired anyway.

[23] What is clear is that Mr Walker had the medical certificate before he wrote a letter to the Applicant dated 30 June 2006. The letter was collected by the Applicant on 2 or 3 July when he came in to pick up a form he needed to have signed in order to apply for a sickness benefit. The letter, signed by Mr Walker, begins with the subject line "*Three Months Trial Period*" and continues:

Upon reviewing a number of your jobs and considering what would be required from you in the future, I am confirming with this letter that under the terms of your contract with this company there will be no offer of a permanent contract and that your employment with this company did in fact cease this morning at the time of your verbal resignation.

It is normal that when an employee resigns without notice and thereby breaks their contract with their employer, they also forfeit their rights to any payments other than any holiday pay that may be owing, however I have decided to pay you one week's pay in addition to your holiday pay entitlement.

I wish you well for the future and thank you for your efforts made on my company's behalf.

[24] On 5 July 2006 the Applicant, through his lawyer, raised a personal grievance. The matter was not resolved in mediation prior to the Authority's investigation.

Performance issues

[25] Mr Walker's evidence was that he employed the Applicant on the understanding that he would need to be trained in the particular requirements of wardrobe installation. He considered that the Applicant struggled to get to grips with his role and that generally his work was not of the required standard. However, he was emphatic in answer to questions during the investigation, that any performance issues were "*nothing of the nature that led to any disciplinary procedures*". Rather he said, talking to the Applicant about his work was "*just trying to get him up to speed. It was ordinary on-the-job training*".

[26] The Applicant accepted that he had a lot to learn about installation work and was clearly open to seeking comments and correction. If anything, his readiness to ask questions and seek more information were a source of frustration for Mr Walker who was concerned that the Applicant did not understand the need to finish each day's job on time in order to be ready to start the next day's work and meet budget targets.

[27] On the basis of Mr Walker's evidence the termination of the Applicant's employment – whether by resignation or dismissal – could not have come within the terms for dismissal set out in the probationary period clause in the Applicant's employment agreement.

Resignation or dismissal?

[28] The Applicant denies using words of unequivocal resignation when he left the Respondent's premises on 30 June 2006. If he said that he was leaving, that was a reference to leaving to go and see a doctor, not leaving the job.

[29] However, the Applicant's evidence was that he was so upset by the argument with Mr Walker that he was crying because of his sense of frustration and humiliation.

[30] Mr Walker's evidence confirms the Applicant was, at least, in a state of emotional distress. In such circumstances I consider it more likely than not that the Applicant did say he was not going to work for the Respondent any longer and was leaving, but because of his heightened emotional state he does not remember the words as clearly as Mr Walker.

[31] However, accepting that the Applicant did use words of resignation that day does not necessarily resolve the matter in the Respondent's favour.

[32] Throughout, the obligations of the Respondent – through the actions of Mr Walker – are to be assessed against the standard of conduct required by s103A of the Employment Relations Act 2000 (“the Act”). The question to be answered is whether Mr Walker's actions, and how he acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

[33] An unequivocal resignation cannot be withdrawn without the consent of the employer: *Harris & Russell Ltd v Slingsby* [1973] 3 All ER 31, 32; applied in *NZ*

Labourers Union v Hodder & Tolley Ltd [1989] 1 NZILR 430,439. However, in circumstances where a resignation is given during a heated discussion, an employer should act with caution and allow a “cooling off” period before taking reasonable steps to ensure a resignation is genuine: see cases cited in *Little Earth Ltd (t/a Kiwi Hilton Backpackers) v Luxmore* (unreported, EC Auckland, AC149/98, 8 December 1999, Travers J). In *Boobyer v Good Health Wanganui* (unreported, EC Wellington, W17/94, 24 February 1994, Goddard CJ) the Court states that an employer cannot safely insist on its interpretation of words of resignation that are “*an emotional reaction or amount to an outburst of frustration*” if it is obvious that on sober inquiry the words were not meant to be taken literally and that this would have been obvious if the employer made inquiry after the heat of the moment had passed taking with it any influence of anger or other passion that may impair the employee’s reasoning.

[34] This approach is consistent with the following commentary by the learned authors of *Brookers Employment Law* at ER 103.27(7), which I consider may be applied to the circumstances of this case:

In Ray v Mahoe Developments NZ Ltd 28/3/06, J Scott (member), AA91/06 it was held that, where an employee “resigns” and he/she is not mentally in a fit condition to formulate a considered intention, and later attempts to withdraw his/her “resignation”, the employer shall make a fair inquiry as to whether in fact the employee intended to resign. It may be observed that such an obligation is consistent with an employer’s obligation under s 4(1A) ERA “to be active and constructive in establishing and maintaining a productive employment relationship”. After a fair inquiry, however, it would not be unreasonable for an employer to conclude that the requisite intention existed and to refuse to allow an employee to withdraw his/her resignation.

[35] It is clear in the present case that Mr Walker did not act with any such caution. Within a few hours of the Applicant having walked out in what Mr Walker accepts was a “*very worked up*” state, the Applicant’s mother presented Mr Walker with a medical certificate saying the Applicant was incapacitated by stress and depression. It appears to have given Mr Walker little pause for thought. There was no evidence that Mr Walker made any subsequent inquiry of the Applicant as to whether he really meant what he said or made any arrangements for a calm discussion about what had happened and what was worrying the Applicant. That is not, I find, what a fair and reasonable employer would have done in all of the circumstances.

[36] Rather than arranging to talk to the Applicant again after a cooling off period – which was naturally provided by the weekend occurring immediately after the Applicant’s walking out on a Friday – Mr Walker seized the opportunity to write the letter dated 30 June and collected by the Applicant on 2 July, which itself is somewhat equivocal about whether there had been a resignation or whether the company was terminating the employment.

[37] If the Applicant had unequivocally resigned, as Mr Walker asserts, such a letter would need only have referred to accepting resignation.

[38] The letter was not, however, limited to that subject as is clear by the subject line stating: “*Three month trial period*”. The opening paragraph of the letter talks of Mr Walker having reviewed a number of the Applicant’s jobs and the company’s future requirements and deciding that he would not be offered “*a permanent contract*”.

[39] In all the circumstances, particularly not having allowed a cooling off period, this letter was an action by the Respondent to ‘send away’ the Applicant in a matter that amounted to a dismissal.

[40] I note the termination of the employment occurred about ten weeks into what had been agreed to be a twelve week probation period. There was at least another fortnight in which the Applicant and the Respondent could have, in the spirit of the original agreement about a three month probation period, explored the prospect of whether they could have a fruitful employment relationship or it was better to call it ‘*quits*’.

Determination

[41] In all the circumstances, I find that:

- (i) the Respondent’s failure to allow a “cooling off period” or make a later, sober inquiry as to the Applicant’s intentions amounted to an unjustified disadvantage; and
- (ii) the advice to the Applicant by the letter of 30 June 2006 that he would not be offered a permanent job amounted to an unjustified dismissal.

[42] Accordingly, the Applicant has a personal grievance which requires remedies.

Remedies

[43] The Applicant's evidence, which I accept, was that the circumstances of his treatment and dismissal by the Respondent had affected his confidence in seeking and holding down a job.

[44] Around eight weeks after his dismissal he worked in a liquor store for five weeks, then worked three weeks for a cabinet making business and three weeks for a kitchen installation company. From late December 2006 to mid April 2007 he was not working until he started work for an office furniture company where he stayed 15 weeks before starting his present job with a shopfitting firm.

[45] Asked why he had changed jobs a number of times, the Applicant said he suffered anxiety attacks and was "*freaking out*" at work.

[46] Asked why he thought he should get compensation for hurt and humiliation he said: "*All my confidence has gone. I feel like I'm an idiot – you start to believe it if you're told it often enough. I feel pretty much like shit. I don't know how to say it.*"

[47] That evidence was consistent with his doctor's referral letter to a counsellor in July 2006 identifying the Applicant as suffering anxiety related to work stress and mild depression. A medical certificate in February 2007 stated the Applicant continued to struggle with medical and mental health issues which would require ongoing medical treatment.

[48] Making any compensation award involves answering a hypothetical question as to how the Applicant would have been placed in the absence of the legal wrong in issue, and the answer must allow for all the contingencies or vicissitudes of life which might, but for the unjustifiable disadvantage and dismissal, have resulted in termination of the Applicant's employment: *Telecom NZ Limited v Nutter* [2004] 1 ERNZ 315 (CA) at [73] and [81].

Loss of earnings

[49] If the Respondent had properly allowed a cooling off period and made a proper inquiry of the concerns which had resulted in the emotional argument of 30 June, there is a reasonable prospect that the Applicant would have returned to work

for the Respondent, after taking the four weeks sick leave and counselling recommended in his doctor's medical certificate that day.

[50] The prospect of a return to work must be given a high degree of likelihood if it is correct, as Mr Walker said in his evidence, that he did not consider there were any performance issues requiring action at the disciplinary level, that he was continuing to provide ordinary on-the-job training, and that, as he described himself, he was an employer who was empathetic to his staff and hired for the long term.

[51] A sensible discussion held at a later date with cool heads, may also have seen the probation period extended or the Applicant resolve that he would rather move on to another employer and have made arrangements to work out a notice period. However, as Mr Elder established in his questions, the Applicant's hourly rate of \$27 was superior to previous and subsequent jobs and would have proved an incentive to stay with the Respondent.

[52] Weighing all those contingencies I consider it reasonably likely that the Applicant would have remained dissatisfied with the level of support and other frustrations in his job with the Respondent and have looked for work elsewhere. For that reason I do not consider it reasonable to provide for lost earnings for a period greater than six months. That is also the period in which he might, after the benefit of the medically-recommended month's leave, have returned to work to try again while also reasonably expecting to deal with work-related anxieties with the assistance of counselling and other treatment. Accordingly I set six months as the appropriate period for assessment of lost wages.

[53] During the second half of 2006 I accept the Applicant made reasonable endeavours to mitigate his loss of earnings. Despite his diagnosis he managed to find work with three employers and work for at least 13 weeks over the period. To the total of income from work in that period must be added one week's notice paid by the Respondent.

[54] Also to be accounted for is the four weeks sick leave recommended by his doctor after assessing him as being incapacitated by depression and stress. He would not otherwise have received sick pay for the period – not having been in the job to accumulate any entitlement. However that must be allowed for in lost earnings as arising from the Respondent's actions.

[55] According to his bank statements, and not questioned by the Respondent, the Applicant was receiving \$958.21 a week after tax in wages from the Respondent. I have assumed this weekly payment included the tax free weekly allowance of \$150 provided by the employment agreement for use of his own van for company purposes.

[56] For a period of 26 weeks (July-December 2006) he could have expected to receive remuneration totalling \$24,913.46 nett. From this must be deducted earnings of \$9960.46. Under s123(1)(b) and 128 of the Act the Applicant is awarded the sum of \$14,953.00 nett in reimbursement of wages and other money lost as a result of the grievance.

Compensation for hurt and humiliation

[57] Compensation for non-economic loss is assessed as a matter of impression and discretion within recognised parameters: *NCR (NZ) Corporation Limited v Blowes* (unreported, CA, 23 September 2005, CA 186/04).

[58] The Applicant was dealt with insensitively by the Respondent after he left work in an emotional state and on the same day was assessed by his doctor as suffering depression and stress. Rather than providing a period of respite before addressing the future of his employment, the employer purported to terminate a probation period and the prospect of any ongoing employment, which was abrupt, and in the circumstances, brutal.

[59] I accept this resulted in humiliation, loss of dignity and injury to the feelings of the employee. Having regard to the particular circumstances and the general level of awards of compensation in cases of this type, the Applicant is awarded \$5000 (without deduction) under s123(1)(c) of the Act.

Contribution

[60] As required under s124 of the Act I have considered whether any remedies should be reduced because of actions of the employee contributing towards the situation giving rise to the personal grievance.

[61] While there may have been performance issues that the Respondent could have addressed, Mr Walker stated these were not at a level requiring any disciplinary

measures from which I infer there was no blameworthy conduct of a level requiring reduction for contribution.

Costs

[62] The Applicant is entitled to costs. The parties are encouraged to resolve that matter between themselves. The principles and description of the Authority's practice set out in *PBO Ltd v Da Cruz* (unreported, EC, 9 December 2005, AC28/05) will be of assistance. If the parties are not able to resolve costs, the Applicant may lodge within 28 days of the date of this determination, an application for the Authority to determine costs. The Respondent will have 14 days from the date any such application is lodged to reply. No application for costs will be considered outside this timetable.

Robin Arthur
Member of the Employment Relations Authority