

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 394
5338378**

BETWEEN TODD GATE
 Applicant

AND DEEJAY HOLDINGS LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Diana Crouch, Director of the Respondent

Investigation Meeting: 19 August 2011 at Tauranga

Submissions received: 23 August 2011 from Applicant
 26 August 2011 from Respondent

Determination: 12 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Todd Gate, claims that he was unjustifiably dismissed by the Respondent, DeeJay Holdings Limited (“DHL”).

[2] DHL denies that it terminated Mr Gate’s employment, and claims that Mr Gate left his employment voluntarily.

Issues

[3] The issue for determination is whether Mr Gate was unjustifiably dismissed by DHL, or whether he voluntarily terminated his employment.

Background Facts

[4] DHL is a bread distribution company contracted by Goodman Fielder Limited to pack, deliver and merchandise bread, small goods and chilled items to the Northern Territory of Tauranga. DHL operates 7 nights a week, employing 2 full-time and 2 part-time staff

members. It is part of the contractual agreement with Goodman Fielder Limited that the delivery run will be completed every night, unless there are exceptional circumstances. Not completing the nightly delivery run without an exceptional circumstance occurring puts DHL in breach of contract, and at the risk of the contract being terminated.

[5] Mr Gate commenced employment with DHL on 30 October 2010 as a Packer/Driver. Mr Gate, who had other employment at the time, was initially employed on a part-time basis to cover the weekend shifts. Mr Gate was interviewed by Ms Diana Crouch, Director of DHL. Present at the interview was Mr Rene Crouch who was responsible for the operation of the Tauranga business. Ms Crouch, who is based in Auckland, was responsible for making the recruitment decisions, stock ordering and the payroll.

[6] Approximately two weeks after Mr Gate commenced employment, he failed to attend for his shift and failed to contact either Mr or Ms Crouch to inform them that he would not be coming in that night. Mr Gate explained that his failure to turn up was as a result of a miscommunication and misunderstanding between himself and Mr Crouch.

[7] Ms Crouch said that as they had been unable to contact Mr Gate, Mr Crouch had been contacted at 11 p.m. and had covered Mr Gate's shift in order that the scheduled delivery run could be completed. Ms Crouch said that upon subsequently making contact with Mr Gate, he had explained that he had decided that the job did not pay enough money to make it worth his attending work.

[8] Upon further enquiry by Ms Crouch, it was ascertained that there had been a discrepancy between the hours which Mr Gate had worked and those for which he had been paid. Ms Crouch had apologised for the error and had rectified it. Ms and Mr Crouch said that following this incident, Mr Gate had been reminded of the importance of making contact if he was not able to work his rostered shift.

[9] Mr Gate said that he had visited his doctor on 29 December 2010 as his foot had become swollen and painful. The doctor had diagnosed gout and instructed Mr Gate to have a blood test, the results of which had been expected to be received by Monday 3 January 2011.

[10] Mr Gate telephoned and spoke to Mr Crouch that same day, advised him that he had gout, and that he had been signed off by his GP as unfit to work until 3 January 2011. Mr Gate said he had agreed to telephone Mr Crouch on 3 January 2011, as requested by Mr Crouch, to confirm if he would be available to work his next rostered shift on Thursday 6 January 2011.

[11] Mr Gate stated that during the telephone call on 29 December 2010, Mr Crouch did not sound too pleased at the news that he would have to cover Mr Gate's shifts on 30 December 2010 and Saturday 1 January 2011.

[12] Mr Gate did not contact Mr Crouch on Monday 3 January 2011. Mr Crouch said he had tried contacting Mr Gate on both of the two telephone numbers Mr Gate had provided, these being Mr Gate's parents' telephone number and Mr Gate's mobile telephone number, but there had been no reply on either of these numbers. Consequently Mr Crouch said he called Mr Gate's mother-in-law's telephone number as he was aware that Mr Gate stayed at that address on occasion.

[13] Mr Gate said that on 3 January 2011, upon his returning to his mother-in-law's house, he had been advised that Mr Crouch had been trying to contact him by telephone on several occasions. Mr Gate said that he had decided not to return Mr Crouch's calls as he felt that if he did so, he would be pressurised into working, even though it was his week-end off. This was despite the fact that Mr Gate had previously agreed to telephone Mr Crouch on 3 January 2011.

[14] Mr Gate said that he had retired early that night. The following morning, Tuesday 4 January 2011, his mother-in-law had told him that Mr Crouch had telephoned at 9.30 p.m. the previous evening, and upon her having told Mr Crouch that she was not sure Mr Gate was at home, Mr Crouch replied that he knew Mr Gate was at home since he had driven past and seen Mr Gate's car in the driveway.

[15] Mr Gate did not return Mr Crouch's call during the morning of the 4 January 2011, nor did he call Mr Crouch when he arrived back at his mother-in-law's house that afternoon after paying a visit to his parents, and hearing that Mr Crouch had telephoned again to speak to him.

[16] On Wednesday 5 January 2011 Mr Crouch again telephoned and spoke to Mr Gate's mother-in-law, requesting that Mr Gate be asked to call him. Mr Crouch said that Mr Gate's mother-in-law advised him to call around and speak to Mr Gate in person. Mr Crouch said that he had driven to the house and spoken to Mr Gate's sister-in-law who had been unloading her car in the driveway, and asked her to pass on a message to Mr Gate that he wished to speak with him.

[17] Mr Gate said that he was annoyed by the constant attempts by Mr Crouch to contact him by telephone and by leaving messages, and had informed his mother- and sister-in-law that he did not intend to make contact with Mr Crouch until the evening of 6 January 2011, this being his rostered day for attending work.

[18] On the evening of 5 January 2011 at 18.28 p.m. Mr Gate said he had received a text message from Mr Crouch which stated:

“Hay bro Rene hea, I’ve been trying to get hold of u since Monday and u haven’t replied u have 2 hrs 2 get in touch or u don’t have a job with us anymore.”

[19] Mr Gate said that he had been offended by the text and had decided to ignore it.

[20] The next morning, Thursday 6 January 2011, Mr Crouch said he had arrived at the house of Mr Gate’s mother-in-law, and that he had found the front door open and could see Mr Gate standing inside. Mr Gate stated that Mr Crouch had told him he was there to collect the keys to the DHL depot and truck. Mr Gate said that when asked, Mr Crouch had informed him that he was being fired because he had not communicated with Mr Crouch. Mr Gate said that he had handed his medical certificate to Mr Crouch as he was leaving the property and advised him that he would see him in the Employment Court.

[21] Mr Gate said that after a few hours, he had telephoned Ms Crouch and asked her why Mr Crouch had dismissed him. Ms Crouch agreed that Mr Gate had telephoned her and asked for his wages and holiday pay as Mr Crouch had dismissed him. Ms Crouch stated that she had explained to Mr Gate that Mr Crouch had no authority to dismiss him, only to contact him and ascertain if he would be returning to work on Thursday 6 January 2011, on the basis that Mr Gate had failed to make contact as agreed on Monday 3 January 2011.

[22] Ms Crouch said that she had told Mr Gate that his position was available should he wish to continue being employed by DHL. Mr Gate had responded that he could not work, since he no longer had the keys for the DHL depot or truck. Mr Gate said that Ms Crouch had defended Mr Crouch’s actions and had again asked Mr Gate if he wanted to work that night. Mr Gate said that his response had been that he had no keys, whereupon Ms Crouch had accepted the situation.

[23] Ms Crouch explained that Mr Gate would have been able to attend work that night irrespective of whether or not he had any keys, as he was rostered to be on a packing shift, and there were always other packers at the depot who could give him access.

[24] Mr Gate stated that following his conversation with Ms Crouch he had telephoned the Department of Labour for advice, and had then called Ms Crouch to ask if she would attend mediation. Mediation took place on 31 May 2011, but did not resolve the matter.

Determination

[25] In deciding whether DHL dismissed Mr Gate, I take into consideration the fact that any decision to dismiss an employee must be a justifiable decision. The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Act which states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred"

The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice. A process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable.

[26] Mr Gate believed that Mr Crouch had the authority to dismiss him when the conversation took place on 6 January 2011, in which Mr Crouch informed Mr Gate that he was dismissed. Mr Crouch had been present at his recruitment interview, acted throughout Mr Gate' period of employment as his supervisor, and was in charge of the Tauranga operation of DHL. Although Ms Crouch in a later telephone conversation explained to Mr Gate that Mr Crouch had no authority to dismiss him, I believe that it was reasonable of Mr Gate to believe that Mr Crouch did have the requisite authority.

[27] I find that Mr Gate did not voluntarily resign from his employment, but that he was dismissed by DHL.

[28] Mr Gate was dismissed without any proper procedure being followed: Mr Gate was not informed of the allegations against him, he was not provided with an opportunity to respond, and there was no consideration of any response since he had not been provided with the opportunity to provide one.

[29] Mr Gate had been signed off work in accordance with a medical certificate until 3 January 2011. Mr Gate was not rostered to work until 6 January 2011. Mr Gate had agreed to call Mr Crouch on 3 January 2011 to confirm is he would be available to work his next rostered shift on Thursday 6 January 2011 but had failed to do so; however he was not at fault

in not attending work on 3, 4 and 5 January 2011 since he was not rostered to work until 6 January 2011.

[30] I find that DHL did not follow a fair procedure, indeed it did not follow any procedure, in dismissing Mr Gate such as to render the dismissal of Mr Gate an unjustifiable dismissal.

[31] I find that on an objective basis, the decision by DHL to dismiss Mr Gate was not a decision an employer acting fairly and reasonably would have made in all the circumstances.

Remedies

[32] Mr Gate has been unjustifiably dismissed and is entitled to remedies.

Lost wages

[33] Mr Gate is to be reimbursed for lost earnings from 6 January 2011 until 8 March 2011 when Mr Gate commenced employment in a full-time position. From this amount is to be deducted monies earned by Mr Gate in the way of paid part-time employment during the period 7 January 2011 to 7 March 2011. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

Compensation

[34] Mr Gate is also entitled to compensation for humiliation and distress. Mr Gate said that he had been embarrassed and humiliated in front of his family by Mr Crouch coming to his mother-in-law's home and informing him he had been dismissed, and by Mr Crouch at that time collecting the DHL depot and truck keys. I find that Mr Gate suffered humiliation, loss of dignity and injury to feelings.

[35] In respect of the disadvantage and dismissal grievances, DHL is to pay Mr Gate the sum of \$3,000, pursuant to s 123(1) (c) (i).

Contribution

[36] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[37] Mr Gate had informed Mr Crouch on 29 December 2010 that he would contact Mr Crouch on 3 January 2011 to update Mr Crouch on his blood test results, and to advise him of whether he would be at work for his rostered shift on 6 January 2011.

[38] Mr Gate did not telephone Mr Crouch on 3 January 2011 as had been agreed, nor did he respond to any of the subsequent attempts made by Mr Crouch to contact him on 3, 4 and 5 January 2011. Even on 5 January 2011 when advised by text message that his employment was in jeopardy unless he made contact, Mr Gate refused to do so.

[39] I find Mr Gate's persistent refusal to make contact unreasonable. The statutory duty of good faith is relevant to the consideration of this issue. Employers and employees have a duty to deal with each other in good faith under s 4(1A) of the Act which states:

The duty of good faith in subsection (1) –

- a. is wider in scope than the implied mutual obligations of trust and confidence; and*
- b. requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...”*

[40] The good faith requirements of the Act apply equally to the employer and the employee. Mr Gate was under a duty to be “*responsive and communicative*”¹ and I find that by not responding to Mr Crouch's numerous telephone calls, visits in person to his mother-in-law's house and the text message on 5 January 2011, Mr Gate failed to act in good faith.

[41] I do not accept as valid Mr Gate's explanation that he believed he would have been pressurised by Mr Crouch to work additional shifts during this period. I accept that Mr Crouch, who had been working a number of night shifts continuously by 3 January 2011, may have made such a request had Mr Gate returned any of the calls, but not that Mr Gate would have been pressurised into working them against his wishes.

[42] In this respect I find it significant that it was accepted by the parties that Mr Gate, who had previously advised that he wanted to be considered for additional hours should these be available, had been called at 6 p.m. one evening prior to this date, and asked to work at 8 p.m. that evening. Mr Gate had refused to work as requested on the basis that he was not being provided with sufficient notice, but his refusal to work had been accepted without question, and there had been no repercussions. Further the request to work that night had

¹ Section 4 (1A)(b) of the Act

been made in response to Mr Gate's request for additional hours, rather than being an unsolicited request made by DHL

[43] Following the encounter with Mr Crouch, Mr Gate had had the dismissal notification by Mr Crouch rescinded by Ms Crouch, and had been presented with the opportunity to resume his employment with DHL. Mr Gate chose not to do so, despite Ms Crouch having repeated her offer and the fact that even without keys, he was able to gain access to the depot and complete a packing shift.

[44] I find significant contributory fault on the part of Mr Gate and reduce the figures awarded in respect of the remedies by 90 %.

Costs

[45] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave of the Authority.

Eleanor Robinson
Member of the Employment Relations Authority