

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 157/08
5127939

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| BETWEEN | JASON HEPI Applicant | |
| AND | EVERGREEN LIMITED Respondent | HYDRO |

Member of Authority: James Crichton

Representatives: Applicant in person
No appearance for respondent

Investigation Meeting: 21 October 2008 at Christchurch

Determination: 23 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, (Mr Hepi) was employed by the respondent Evergreen Hydro Limited (Evergreen) as a storeman sales person at their Sockburn premises and Mr Hepi commenced his employment in September 2007.

[2] The employment relationship appears to have been stable enough in its early stages but on 13 May 2008, Mr Hepi was handed a dismissal letter by Mr Alan Canavan a director of the employer.

[3] The dismissal letter is actually dated 9 May 2008 and it lists a series of bullet points (10 in number) which allegedly form the basis of the dismissal.

[4] Mr Hepi was told to remove his personal things and quit the workplace. Before doing so, Mr Hepi spoke with a workmate and wondered whether Mr Canavan would allow him to resign his employment and give him a reference, instead of

dismissing him. The workmate said that Mr Hepi would need to speak to Mr Canavan.

[5] In the meantime, Mr Hepi has rung his mother to advise he had been dismissed and his mother's advice was to leave the workplace immediately. In the result, Mr Hepi was shortly thereafter collected by his mother and the issue of whether Mr Hepi might resign his employment and obtain a reference from Mr Canavan was never explored.

[6] The letter of dismissal from Evergreen referred to earlier warnings (both verbal and written) and after the dismissal, Mr Hepi (with the assistance of his mother) attempted to obtain further and better particulars about those earlier warnings and the allegations which apparently led to the dismissal. Mr Hepi's evidence is that the only earlier warning that he had become aware of was one dated 29 April 2008 which he only saw after the dismissal because Mr Canavan told him about that warning at the time of the dismissal discussion and indicated that the warning letter had been left in Mr Hepi's top drawer of his workstation.

[7] In partial response to Mr Hepi's attempt to obtain further information from Evergreen, Mr Canavan faxed Mr Hepi's mother on 20 May 2008 alleging that Mr Hepi had resigned his employment and seeking to discuss matters further to see if Mr Hepi wished to continue in employment.

[8] There was a meeting held between Mr Hepi and a support person Ms Shelley Campion with Evergreen on 23 May 2008 at which there was a proposal that Mr Hepi would recommence his employment with Evergreen on Wednesday 28 May 2008.

[9] Arrangements were not completed for Mr Hepi to return to work on that day and a facsimile was received from Evergreen at 8pm on that date confirming that the arrangements for Mr Hepi to return were still being worked on.

[10] Mr Hepi then delivered to Evergreen his own letter which he had drafted on 26 May 2008 but which he delivered at 9am on 29 May 2008 indicating that he would not be recommencing employment, that he would be proceeding with a personal grievance claim, and again requesting documents concerning the detail of his employment at Evergreen. I am satisfied that this letter constitutes a proper raising of Mr Hepi's personal grievance claim with Evergreen. That letter was acknowledged by facsimile by Mr Canavan on behalf of Evergreen.

[11] Mr Hepi then promptly filed his statement of problem in the Authority on 23 June 2008 in which he alleged *unfair* dismissal and failure by Evergreen to supply wage and time records as required by the Employment Relations Act 2000.

[12] In its statement in reply filed in the Authority on 11 July 2008, Mr Canavan simply alleges that Evergreen Hydro Limited (the employer) has ceased to trade and has no income to pay any potential claim against them and that the employer had had a meeting with Mr Hepi (presumably the meeting on 23 May 2008) but that the *outcome (was) refused by claimant*. The latter reference is presumably a contention that Mr Canavan offered re-employment and Mr Hepi refused.

[13] The parties were referred to mediation but Mr Canavan refused to attend. Mr Canavan has not been a willing participant in the Authority's process and did not attend either the telephone conference or the investigation meeting.

[14] I am satisfied that Evergreen knew that the proceedings were on foot, that they had every opportunity to participate in the Authority's process but that they chose not to. Having reached that view after a consideration of the Authority's file, I determined to proceed to take the evidence of the applicant Mr Hepi and to issue this determination in respect to his employment relationship problem.

Issues

[15] The Authority must consider the following issues:

- (a) Was Mr Hepi warned?
- (b) Was the dismissal process fair?
- (c) What happened after the dismissal?
- (d) Did Evergreen provide wage and time records?

Was Mr Hepi warned?

[16] The letter of dismissal dated 9 May 2008 from Evergreen refers to *verbal warnings* and *written warnings of 29 April and 9 May 2008*.

[17] There is no evidence before the Authority to suggest there were any verbal warnings. Mr Hepi denies having ever received a verbal warning and his several

requests to the employer post-dismissal seeking evidence of those verbal warnings were never responded to. That fact, of itself, tends to support my conclusion that there were no verbal warnings.

[18] There is a written warning dated 29 April 2008. The existence of that warning is not challenged by Mr Hepi. However, in his oral evidence before the Authority, he was quite unequivocal that he did not see this warning until after the dismissal. I consider this such an extraordinary claim to *make up* as to suggest that Mr Hepi's recollection of the matter is absolutely truthful. He says that he was unaware of the existence of this written warning until the dismissal letter was handed to him by Mr Canavan at which point Mr Canavan, when asked about earlier warnings, said that this written warning was in Mr Hepi's top drawer of his workstation. I am satisfied then that Mr Hepi's evidence is truthful and that he did not see this warning until after the dismissal.

Was the dismissal process fair?

[19] Mr Hepi was handed the 9 May 2008 dismissal letter by Mr Canavan on 13 May 2008. The text of that letter reads as follows:

Dear Jason

Unfortunately the company can no longer provide employment to you.

The reasons for the dismissal are:

- *Lack of punctuality;*
- *Very long periods of time on your mobile phone on personnel (sic) business (very long toilet breaks in excess of those as stipulated in the warning of 29 April 2008);*
- *General appearance;*
- *Friends in attendance while working;*
- *Not getting time sheets signed off;*
- *Taking time off without approval;*
- *Not phoning in when not coming to work;*
- *Long periods of time spent on personnal (sic) calls during work hours;*
- *Excess time spent on toilet breaks.*

These have been discussed in the verbal warnings and later in the written warnings of 29 April and 9 May 2008.

I regret it has come to this and wish you all the best in the future.

Yours faithfully

Alan Canavan

[20] The letter plainly constitutes a dismissal. It identifies ten grounds on which the dismissal is allegedly based none of which Mr Hepi was given any opportunity of responding to before the effect of the dismissal was felt. Having read the letter, I am satisfied that Mr Hepi was told to exit the building having removed his personal items.

[21] This is a dismissal with a complete lack of a proper process. None of the alleged warnings have any force or effect for reasons I have already made clear and this dismissal letter (which it seems is a written warning as well as a dismissal letter) is also completely bereft of process. It is clear from the text that Mr Hepi is being *sent away* for a list of offences which he has had no opportunity whatever to comment on, no opportunity to put right (if indeed that is possible) no opportunity to take proper advice about and indeed no opportunity to engage in a measured and reflective process which ensures that a fair and reasonable outcome can be achieved.

[22] There has been no sequence of warnings on which a legitimate decision to dismiss might be based and no early advice to Mr Hepi that dismissal was in prospect.

[23] Indeed, in every respect, the dismissal fails all of the procedural requirements built into our employment law for the protection of both parties. I have no hesitation in reaching the conclusion that the dismissal was procedurally unfair.

What happened after the dismissal?

[24] Immediately after the dismissal, Mr Hepi, assisted by his mother Ms Dianne Cavill, attempted to obtain from Evergreen wage and time records in respect to Mr Hepi's employment. During the course of those fruitless exchanges with Evergreen, a proposal emanated from Evergreen that there be a meeting between the parties to the employment relationship. This proposal was conveyed in a facsimile from Evergreen to Ms Cavill dated 20 May 2008 and includes the allegation that Mr Hepi had resigned his employment on 13 May 2008 to both Mr Canavan and another staff member. This appears to be a reference to the conversation Mr Hepi had with the other staff member after he was dismissed at which he wondered out loud whether Mr Canavan would allow him to resign and give him a reference. Mr Hepi is adamant that he never had that conversation with Mr Canavan and the suggestion that he resigned to Mr Canavan and his co-worker is accordingly fanciful. I am absolutely

satisfied with Mr Hepi's evidence on this point and I reject Mr Canavan's claim in his facsimile accordingly.

[25] In any event, having made this claim, Mr Canavan then goes on to suggest that because *the story has changed* he wished to meet with Mr Hepi *to clarify if Jason [Mr Hepi] indeed wishes to resign or continue his employment*. Given that it is plain from Mr Canavan's own documentation that he has dismissed Mr Hepi this seems an extraordinary proposal.

[26] In any event, Mr Hepi met with Mr Canavan and another employee of Evergreen on 23 May 2008 at which Mr Canavan made a verbal offer that Mr Hepi could recommence his employment starting on and from 28 May 2008.

[27] I am satisfied that that date was chosen for Mr Hepi to recommence his employment to enable Mr Canavan to re-document the employment. In the result, by facsimile dated 27 May 2008 but not received until 8pm on the following day, Ms Lyn Canavan (Mr Canavan's wife) advised Ms Cavill that Mr Canavan had been *unable to complete the contract required for Jason (Mr Hepi) He is also waiting for approval from the Head Office and he will be in touch as soon as possible with the requirements for Jason's return to work*.

[28] Given that that facsimile was not received by Ms Cavill until the evening of the day that it was arranged Mr Hepi was to re-start his employment, Mr Hepi told me in his oral evidence that he had little confidence in the employer fulfilling its obligations and accordingly he delivered to the employer at 9am on 29 May 2008 a letter confirming his refusal to accept the offer of re-employment and also confirming the personal grievance and the request for wage and time records.

Did Evergreen provide records?

[29] The evidence is unequivocal that the only records provided by Evergreen despite a number of clear express written requests from Mr Hepi and Ms Cavill on Mr Hepi's behalf, the only document ever supplied by Evergreen was a copy of Mr Hepi's final pay slip. The rest of Mr Hepi's requests were ignored by Evergreen.

[30] Mr Hepi relies upon s.130 of the Employment Relations Act 2000 which requires every employer to keep a proper wage and time record. In particular,

Mr Hepi relies upon sub.section 2 of that section which requires the employer to provide a copy of the wage and time records relating to that employee.

[31] Indeed, not only did Mr Hepi rely on that provision in his claim before the Authority but he also took the trouble to forward a copy of the relevant section to Mr Canavan to draw Mr Canavan's attention to the employer's legal obligations in the matter.

Determination

[32] I am satisfied on the balance of probabilities that Mr Hepi has made out his claim that he has been unjustifiably dismissed from his employment. Accordingly he has a personal grievance and is entitled to the consideration of remedies. I reach this conclusion because a dismissal of the sort described in this determination does not comply with the test required in s.103A of the Employment Relations Act 2000, it being a dismissal which a fair and reasonable employer would not have been justified in making.

[33] I do not consider Mr Hepi was ever warned by his employer Evergreen and I am satisfied that the actual dismissal process was completely unjust. The circumstances which followed the dismissal, where Evergreen sought to claim that Mr Hepi had resigned his employment seem extraordinary when Evergreen's own correspondence make clear that Mr Hepi was in fact dismissed.

[34] I must consider whether Mr Hepi has contributed by his behaviour to the circumstances giving rise to his dismissal and I am satisfied there is no evidence to support such a conclusion.

[35] The Authority must make clear that it is concerned at the refusal of Evergreen to provide Mr Hepi with wage and time records and other documentation to which he is absolutely entitled. In respect to the failure to provide wage and time records in particular, the Authority has powers under s.130(4) of the Employment Relations Act 2000 to impose a penalty for that failure and I intend to do so in this case.

[36] To remedy Mr Hepi's personal grievance I direct that Evergreen is to pay to Mr Hepi the following sums:

- (a) Compensation under s.123(1)(c)(i) if the Employment Relations Act 2000 for unjustified dismissal in the sum of \$3,500;
- (b) A reimbursement of the Employment Relations Authority filing fee of \$70;
- (c) A contribution to Mr Hepi's lost wages in the sum of \$7,000;
- (d) The payment of a penalty in respect to the failure to provide wage and time records (s.130(4) Employment Relations Act 2000) in the sum of \$1,000, such sum to be payable to Mr Hepi.

Costs

[37] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority