

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 271
3103556

BETWEEN	JOSHUA HARGREAVES Applicant
AND	CAFIXR AUTO SERVICES LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Paul Matthews, advocate for Applicant
Jemani Sherson, counsel for Respondent

Investigation Meeting: 31 March and 20 April 2021

Submissions Received: 26 April 2021 from Applicant
4 May 2021 from Respondent

Determination: 24 June 2021

DETERMINATION OF THE AUTHORITY

- A. Mr Hargreaves has not established that one or more conditions of his employment were affected to his disadvantage.**
- B. Mr Hargreaves was unjustifiably dismissed. In resolution of his personal grievance Carfixr Auto Services Limited is ordered to pay to Mr Hargreaves the following sums within 28 days of the date of this determination:**
- (a) \$6,323.20 gross for reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000; and**

(b) \$8,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

C. Costs are reserved.

Employment relationship problem

[1] Cafixr Auto Services Limited (Cafixr) operates a business servicing and repairing motor vehicles and undertaking warrant of fitness (WOF) inspections. Mr Lionel Clark is the sole director and shareholder of Cafixr.

[2] Mr Joshua Hargreaves was referred to Mr Clark from Work and Income New Zealand as a possible candidate as a mechanic. Mr Hargreaves was not a qualified mechanic but had experience as a mechanic and undertaking WOF checks on cars. It was common ground that no employment agreement had been signed between the parties.

[3] Mr Hargreaves claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Carfixr and that he was unjustifiably dismissed on 2 December 2019. Mr Clark denies the claims. He acknowledges there was a discussion on 2 December 2019 which resulted in Mr Hargreaves removing all of his tools from the workshop and not returning but that did not constitute a dismissal.

Issues

[4] In order to resolve Mr Hargreaves' application I must determine:

- (a) Whether one or more conditions of his employment were affected to his disadvantage by unjustified actions of Carfixr;
- (b) Whether he was unjustifiably dismissed; and
- (c) What if any remedies should be awarded.

[5] As permitted by s 174E of the Employment Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence received I have carefully considered all relevant material lodged with the Authority.

Unjustified disadvantage

[6] In the statement of problem Mr Hargreaves claims one or more conditions of his employment were affected to his disadvantage when he was required to undertake warrant of fitness checks when he was not qualified to do so and when Mr Clark acted unreasonably after a car accident.

[7] Under s 103(1)(b) of the Act an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[8] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

Warrant of fitness checks

[9] Mr Hargreave says he was required to undertake WOF inspections on vehicles in circumstances where he was not qualified to do so.

[10] A qualified WOF inspector must either be qualified as an automotive technician with New Zealand Trade or Automotive Technician certification or be a person who has worked in full-time employment carrying out motor vehicle repairs and maintenance for at least five cumulative full time years. In the absence of meeting these requirements Mr Hargreaves was required to be supervised in his work.

[11] It was common ground that Mr Hargreaves expressed an interest in becoming a qualified WOF inspector. Mr Clark told me he agreed he would begin training Mr Hargreaves to meet the necessary requirements. In line with this he supervised Mr Hargreaves inspecting vehicles. Mr Hargreaves inspected a vehicle and reported back to Mr Clark on any faults he may have identified but Mr Clark retained responsibility for the final inspection and issuing of any WOF's.

[12] At the investigation meeting Mr Hargreaves confirmed he had experience in undertaking WOF checks. However, Mr Clark was aware Mr Hargreaves did not hold

the required certification or meet the experience required to enable him to undertake WOF inspections without supervision.

[13] Having heard from the witnesses I am satisfied it is more likely than not that Mr Hargreaves undertook a number of WOF vehicle inspections without any direct supervision from Mr Clark. Mr Hargreaves recorded all of the vehicle inspections he undertook in two notebooks which were available to Mr Clark. Mr Clark took the information from the notebooks and recorded this in the official WOF forms before signing them off.

[14] Mr Hargreaves told me that he would often take vehicles to a repair shop around the corner from Cafixr to have any issues identified through the WOF inspection rectified. Mr Clark told me while he may not have checked the vehicles before Mr Hargreaves took them to the mechanics workshop, he would attend the mechanics workshop and check the vehicles to satisfy himself that Mr Hargreaves had properly undertaken his assessment. I was not persuaded by Mr Clark's evidence.

[15] I am satisfied it is more likely than not that Mr Hargreaves undertook WOF inspections without the required supervision. He has not, however, established how one or more conditions of his employment were affected to his disadvantage as a result of not having had the required supervision.

[16] Even if the required supervision was provided to Mr Hargreaves he was still some years away from being able to claim to meet the experience level required to undertake WOF inspections on his own.

Car accident

[17] On 19 March 2019 Mr Hargreaves was instructed to collect car parts from an outlet about 100 metres from the workshop. He was given permission to take Mr Clark's personal vehicle. As Mr Hargreaves was exiting the outlet after receiving the car parts a vehicle driving along the street collided with his vehicle as he attempted to enter the street.

[18] Mr Hargreaves phoned the police and Mr Clark and gave his details and the company details to the second party involved in the accident. After talking with Mr Hargreaves, Mr Clark arrived at the site of the accident and told Mr Hargreaves to jump in the car so they could return to the workshop. This was before the police had arrived

to attend the scene. Mr Clark drove the damaged vehicle back to the workshop with Mr Hargreaves.

[19] Mr Hargreaves returned to work and completed the job he had been working on but felt unwell. Mr Clark, seeing how unwell Mr Hargreaves looked invited him to leave work and go home. After Mr Hargreaves had left work the police arrived to get a statement from him about the accident. As events have transpired Mr Hargreaves has never provided a statement to the police.

[20] The damage caused to the second vehicle involved in the accident amounted to \$7,855.60.

[21] In July 2019 Mr Hargreaves received a letter from the second vehicle owner's insurance company advising him the company had attempted to contact him a number of times by both phone and mail to discuss payment for the repairs to the second vehicle. Mr Hargreaves was asked to contact its 0800 number and was told that if he did not call within seven days the insurance company would commence debt recovery action against him.

[22] Mr Hargreaves did not make contact. He did take the letter and pass it onto Mr Clark. However, nothing further happened and on 13 November 2019 Mr Hargreaves received a further letter from the insurance company asking him to contact it immediately or face recovery action.

[23] Again, Mr Hargreaves did not make contact and on 4 December 2019 he received a debt collection letter seeking full payment of the cost of repairs to the second vehicle.

[24] On 2 December 2019, before Mr Hargreaves had received the letter dated 4 December 2019 from the debt collection agency but after he had received the 13 November letter from the insurance company, he approached Mr Clark asking if they could talk about the letter.

[25] Mr Hargreaves told me Mr Clark told him he was too busy. Mr Hargreaves approached Mr Clark about 10-15 minutes later and asked him again if they could talk about the letter. Mr Hargreaves told me Mr Clark told him he had too many things to

do and didn't want anything to do with it and if he didn't like it to get his tools and get out.

[26] Mr Hargreaves told me he then clarified with Mr Clark that he wouldn't do anything about the letter or pay for it to which Mr Clark replied "Nope so get your shit and get out if you don't like it I'm @\$%g busy".

[27] Mr Clark told me Mr Hargreaves arrived at work agitated and demanded to speak with him immediately about the money he owed for the second vehicle. Mr Clark accepts he told Mr Hargreaves he was too busy but said he would speak to him later that day. Mr Clark told me Mr Hargreaves became very heated, verbally abusive and aggressive toward him and so he told him to go home and cool down.

[28] It is common ground that at that point Mr Hargreaves packed up his tool box and left the workshop. He did not return.

[29] It is common ground that since 2 December 2019 Carfixr has paid the insurance account in full.

[30] I have preferred to treat this incident as part of Mr Hargreaves claim for unjustified dismissal rather than a disadvantage grievance. He has not established how his employment was affected to his disadvantage as a result of the accident or how Mr Clark handled matters, and it is apparent to me that the events following receipt of the letters from the insurance company form part and parcel of his unjustified dismissal claim.

Was Mr Hargreaves dismissed?

[31] Mr Hargreaves says he took Mr Clark's advice that if he didn't like the situation he could leave, as constituting his dismissal. He heard nothing further from Mr Clark and wrote to him raising a personal grievance on 20 December 2019.

[32] The onus of proving a dismissal in this case rests with Mr Hargreaves. Dismissal is the termination of employment at the initiative of the employer. It is an unequivocal act, which amounts to a sending away.¹ The assessment of whether the employer's statement is an unequivocal sending away is a question based on an analysis of not just the statement but also the circumstances giving rise to it. The question is

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

whether it was reasonable for somebody in Mr Hargreave's position to have considered his employment had been terminated.²

[33] The question for determination is whether by his words and actions Mr Clark sent Mr Hargreaves away. Clearly the two men were upset. Mr Clark at being interrupted and Mr Hargreaves by the threat of having to pay a bill of over \$7,000 which he could ill afford. I have regarded the situation as occurring in the heat of the moment.

[34] In such situations a cooling off period should be allowed before acting on words or actions arising out of heated exchanges.³ This approach is consistent with the mutual obligation of good faith which requires the parties to be responsive and communicative in establishing and maintaining an employment relationship. Both Mr Hargreaves and Mr Clark needed to act in a measured way to cool down and check what was being communicated.

[35] It was common ground that Mr Hargreaves packed up his tool box which is large and heavy, loaded it into his vehicle and left the workplace. This should have sounded alarm bells for Mr Clark who acknowledged at the investigation meeting that it was unusual for Mr Hargreaves to take his entire tool box home with him.

[36] If Mr Clark had not intended for the relationship to end, it was incumbent on him to let time pass and then make enquiries of Mr Hargreaves to check if he intended to return to work and to make it clear to him he did not intend to send Mr Hargreaves away permanently, that is, to terminate the employment relationship.

[37] I have accepted Mr Clark's evidence that he attempted to contact Mr Hargreaves through social media but he had been blocked and so was unable to make contact.

[38] Mr Clark has suggested that an alternative defence to Mr Hargreaves claim is that Mr Hargreaves abandoned his employment. That position does not assist Mr Clark. For an employer to assert abandonment it must first attempt to confirm where the employee is and whether the employee is intending to return to work. Again, no steps were taken by Mr Clark to that effect.

² *Cornish Truck & Van Limited v Guldenhuys* [2019] NZEmpC 6 at [45].

³ *Walker v Firth Industries* [2014] NZEmpC 60 at [23] and [74].

[39] I have concluded that when Mr Clark told Mr Hargreaves on 2 December 2019 that if he did not like his position on not paying the insurance account he could leave, Mr Clark dismissed Mr Hargreaves. The issue was of serious concern to Mr Hargreaves who was seeking some assurance from Mr Clark that Carfixr would take care of the matter for him.

Was the dismissal justified?

[40] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Carfixr's actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[41] Standing back and considering the evidence and submissions received I am satisfied Carfixr's actions on 2 December 2019 and its failure to follow up with Mr Hargreaves after he had left the worksite on 2 December 2019 were not actions an employer acting fairly and reasonable could take. Its failures were not minor and resulted in Mr Hargreaves being treated unfairly.

[42] Mr Hargreaves was unjustifiably dismissed and is entitled to a consideration of remedies.

Remedies

[43] Having established a personal grievance for unjustified dismissal I may award any of the remedies provided for under s 123 of the Act. In this regard Mr Hargreaves seeks reimbursement of lost wages and compensation in the sum of \$23,000 for humiliation, loss of dignity and injury to feeling.

Lost wages

[44] Section 123(1)(b) of the Act provides for reimbursement by Carfixr of the whole or any part of wages lost by Mr Hargreaves as a result of his personal grievance. Section 128(2) of the Act provides for an order of the lesser of a sum equal to his lost remuneration, or to three month's ordinary time remuneration. I have a discretion under s 128(3) of the Act to order a greater sum reflecting the lack of earnings for a period longer than three months.

[45] Mr Hargreaves seeks a payment equivalent to six months' pay. I am not minded to exercise my discretion to award a greater sum than the three months. This

is because Mr Hargreaves has not satisfied me he made any genuine attempts to mitigate his loss. Mr Hargreaves has provided screen shots of jobs he says he has applied for, but there are no dates on these documents and a number of the jobs he says he applied for were outside his skill range.

[46] Further, soon after raising his personal grievance Mr Clark offered Mr Hargreaves his job back. Mr Clark told me Mr Hargreaves was a good worker and would have taken him back if he had accepted the offer of re-employment.

[47] Subject to my findings on contribution an appropriate award for lost wages is \$7,904. This sum has been calculated based on Mr Hargreaves usual hours of 32 hours per week multiplied by \$19 per hour over 13 weeks.

Compensation

[48] Mr Hargreaves claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act in the sum of \$23,000.

[49] In support of his claim Mr Hargreaves told me that following his dismissal were some of his hardest and darkest days. He provided me with a copy of a medical certificate dated July 2020 that confirmed he had a history of suffering from depression and anxiety. I have to say I found aspects of Mr Hargreaves' evidence to have the appearance of exaggeration. After admitting he is a regular drug user Mr Hargreaves told me his medical practitioner encouraged him to smoke copious amounts of marijuana to alleviate his condition. That evidence is simply not credible.

[50] I am satisfied Mr Hargreaves suffered humiliation, loss of dignity and injury to feelings. I consider the evidence warrants an award of compensation in the sum of \$10,000. When setting this sum I have been mindful of the need not to keep compensatory payments artificially low and have taken into account decisions from the Employment Court on compensation levels.⁴

Contribution

[51] Having found Mr Hargreaves is entitled remedies for his personal grievance for unjustified dismissal, I am required by s 124 of the Act to consider whether he contributed to the situation giving rise to his grievance.

⁴ *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791; *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

[52] I find it is more likely than not, that on 2 December 2019 Mr Hargreaves was highly agitated about the letter he had received from the insurance company and this came across in his approaches to Mr Clark who responded in kind.

[53] Good faith is a mutual obligation. After a cooling off period, it was incumbent on Mr Hargreaves to check his understanding that he had been dismissed. He took steps to ensure Mr Clark could not contact him via social media by blocking him. This meant Mr Clark could not contact him through the usual channels.

[54] I find there was a level of contribution by Mr Hargreaves which I have assessed at 20 per cent. Mr Hargreaves remedies will be reduced accordingly.

[55] Cafixr Auto Services Limited is ordered to pay to Mr Hargreaves the following sums within 28 days of the date of this determination:

(c) \$6,323.20 gross for reimbursement of lost wages under s 123(1)(b) of the Act; and

(d) \$8,000 compensation under s 123(1)(c)(i) of the Act.

Costs

[56] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Hargreaves shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. Cafixr shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[57] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority