

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 325/07
5077817

BETWEEN ROGER HARRIS
AND BAY TRUCK WASH LTD

Member of Authority: Janet Scott
Representatives: Joanne Watson for Applicant
 David Ballard for Respondent
Investigation Meeting: 10 June 2007 at Hamilton & Telephone Conferences
 with witnesses on 5 September 2007
Submissions received: 5 October 2007 for applicant
 No submissions received from respondent
Determination: 17 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Harris alleges he was unjustifiably dismissed by the respondent. To remedy his alleged grievance he seeks lost remuneration, compensation pursuant to s.123 (1) (c) (i), a penalty for failure to provide an employment agreement and costs in the matter.

[2] The respondent denies the claims

Background

[3] This matter has a chequered history.

[4] In January this year the applicant alleged he had been unjustifiably dismissed. The matter went to mediation where a settlement was reached. That settlement

provided for Mr Harris to return to the work place. However, prior to his return to work the respondent's director Dave Ballard telephoned the applicant to advise him that his safety could not be guaranteed in the workplace. There was a second mediation. However, the matter was not resolved and the applicant's counsel filed a claim in the Authority seeking a declaration that Mr Harris had been unjustifiably dismissed and seeking remedies.

[5] The then Authority Member, Leon Robinson, took the view that the only remedy available for the applicant was an order for compliance with the original settlement. However, after an incident at the Investigation Meeting in the matter where Mr Ballard handed the Member a note stating that he would end his life that night if he was forced to pay the applicant any money, Mr Robinson decided that he would not endorse the settlement because it did not appear to him that there had been consent from Mr Ballard. He advised counsel for Mr Harris that he now took the view that there had been no satisfaction in the matter and therefore the grievance for unjustified dismissal could be investigated.

[6] The file was transferred to the current member who held an Investigation Meeting on 20 June 2007. Mr Ballard would not sit in the same room as Mr Harris and so by agreement I interviewed both men in the company of Mr Harris' counsel and relayed the evidence of each to the other for their response. Information provided by Mr Ballard at that meeting led me to the view I should interview other people who Mr Ballard alleged could support his evidence. However, my attempts to obtain contact details for those persons were later frustrated by difficulties in making contact with Mr Ballard to obtain those details from him.

[7] Eventually, (on 5 September 2007) the Authority spoke to two other people by telephone conference to ascertain any information that might be relevant to the Authority's investigation into the problem.¹ Ms Watson, counsel for Mr Harris, took part in those telephone inquiries. Mr Ballard said he did not wish to take part. He was advised the Authority would submit to him details of the evidence of the witnesses

¹ The Authority did not speak to one potential witness, Melissa Henderson of Noble Lees, Matamata. It transpired she has left the employment of that company.

spoken to together with the Authority's findings to allow him the opportunity to make submissions prior to Authority finalising its Determination.

[8] Mr Ballard has been provided with that opportunity however no comments or submissions have been received from him.

Background to the Personal Grievance Claim

[9] Mr Harris submits he was employed by Bay Truck Wash Limited (BTW) as a truck cleaner/leading hand for a considerable period. He had been employed by the company under previous ownership and his employment was transferred when the company was taken over by Mr Ballard. He had worked for the company under Mr Ballard's ownership for approximately 15 months when the events giving rise to his dismissal occurred.

[10] Mr Harris worked Friday and Saturday nights cleaning trucks at BTW (6pm-6am) and from 9.30am to 2.30pm (or 3.30pm depending on the work) on Mondays and Tuesday. He was paid \$14.50 per hour.

[11] On Saturday 13 January Mr Harris came to work to start his normal shift. He says that Mr Ballard was moving a truck which he was having difficulty manoeuvring. Mr Harris believes Mr Ballard knew he could see him and he was embarrassed about the position he was in.

[12] Mr Harris commenced washing a truck. Mr Ballard came up behind him yelling about some trucks that had not been washed properly. Mr Harris told him to calm down and tell him what the problem was. Mr Ballard stormed off to the office and slammed the door. Mr Harris continued washing the truck he was working on. Another worker Mr Peri arrived about 15 minutes later. Mr Harris advised him that Mr Ballard was in a bad mood and suggested he find out from Mr Ballard what the problem was. Mr Peri went to the office. Mr Harris heard raised voices and when Mr

Peri returned he said Mr Ballard had said that some trucks washed the previous night needed washing again.²

[13] It is Mr Harris' evidence that Mr Ballard then came out of the office and started yelling about the trucks having to be rewashed because the owner was coming in at 7pm and they had to be ready by then. Mr Harris said if he had been advised of that in a calm and rational manner he would have commenced washing those trucks first.

[14] Mr Harris said Mr Ballard was still yelling at him so he hung up the soap wand he was using. He told Mr Peri he was not prepared to put up with this "bullshit" and he went to the office to collect his shoes. Mr Ballard followed him still yelling. When he was putting on his shoes Mr Peri asked him if he was alright – he told Mr Peri he was not prepared to stay and be abused. He then realised he'd left his hat in the office and he returned to the office. Mr Ballard started in on him again. Mr Harris said he told Mr Ballard to calm down and he would talk to him and meet him halfway. He said he then left the building. Mr Ballard followed him still yelling and asked where he was going. He said he was leaving before he did something he might regret.

[15] Mr Harris said he went home. He said he was angry and upset. He decided he should write to Mr Ballard asking for an agreement on how they would work together. Mr Harris penned the following letter to Mr Ballard asking for a reply in 3 days.

"13-01-07

Dear Mr Ballard,

I write this hoping you are in an understanding frame of mind.

I find the situation we are in is not good for moral or conducive to a good working relationship, I would like to discuss these with you at your earliest possible time available so as we can come to an amicable agreement and settle

² The Authority was advised there is a practice that if a worker does not wash a truck properly then it is left for that worker to rewash on their next shift.

all issues between us once and for all.

I require a response to this request within three days in writing and preferably on neutral ground with an independent witness present.

If no response is forthcoming then I will have no choice but to put these concerns and issues in the hands of a mediator. Yours faithfully Roger Harris”

[16] On Monday 15 January Mr Harris rang Mr Ballard’s accountants to advise them he had not quit his employment but wanted a meeting with Mr Ballard to reach an agreement on working together. He did this because he did not want to be accused of abandoning his employment but he did think it would be best to allow time for both of them to cool off. Mr Harris explained this was not the first time Mr Ballard had ranted and raved at him. Mr Harris said he was frustrated because the business was going down hill under Mr Ballard. He did not know much about the business and was not responsive to any of Mr Harris’ suggestions

[17] On Tuesday 16 January Mr Harris heard through contacts that Mr Ballard had sacked him and on Thursday 18 January he received the following dismissal letter on BTW letterhead signed by Mr Ballard.

“15th January 2007

To Roger

Re: Employment with Bay Truck Wash Ltd

Following the incident that occurred on your shift on Saturday 13 January 2007 between yourself and your employer, Mr Dave Ballard, we advise that you are formally dismissed from your employment as of 15 January 2005 on the grounds of serious misconduct by disobeying reasonable and lawful instructions from your employer.

We attach your final wages payment and holiday pay owing as at Monday 15 January 2007. Yours faithfully, Dave Ballard, Owner Bay Truck Wash Ltd”

[18] Mr Harris said he felt the dismissal was unfair. He felt that on 13 January he had walked away to avoid ongoing abuse and he thought his letter had been reasonable asking for a discussion with Mr Ballard about the issues between them. He wanted and needed his job back. Mr Harris went on to discuss events that followed the dismissal and contacts with Mr Ballard including the failed mediations. He also described the serious financial and emotional effects the loss of his job had had on him.

[19] Mr Ballard's evidence was somewhat different as one might imagine.

[20] Mr Ballard described Mr Harris work performance and attitude to customers as extremely poor – so bad in fact that customers did not want him washing their trucks. He also accused Mr Harris of overstating the hours he worked; of physically abusing a young staff member and ignoring non-smoking signs in the company office and clients vehicles. He was also said to have deliberately damaged the paintwork on a customers ute.

[21] As for the events leading to Mr Harris' dismissal it was Mr Ballard's evidence that on the night of 12 January Mr Harris and Mr Peri had washed two Toll Tranzlink trucks. They should have been washed on the Saturday day shift because the paintwork on those trucks is dark and it is difficult to ascertain if they have been properly cleaned when working on them at night. On inspection on Saturday morning the wash job was found to have been unsatisfactory and the trucks were left for Mr Harris and Mr Peri to redo that night.

[22] It was Dave Ballard's evidence that when Mr Harris turned up for work on Saturday night he was told the two Toll Tranzlink trucks had to be rewashed before any other work was done. (This was because the owner was coming to collect them at 7pm). However, Mr Harris had ignored this instruction and brought two EMT Haulage trucks over to the washing bay where he commenced washing one. These trucks take 1 ½ hours each to wash. Mr Ballard said he went to Mr Harris and told him he had to remove the EMT Haulage trucks and bring over the Toll trucks to wash

them first. Mr Harris ignored his instructions and continued washing the EMT Haulage Truck. Richard Peri arrived at work and he agreed with Mr Ballard the Toll Trucks should be rewashed prior to owner's arrival at 7pm to collect them. Mr Ballard instructed Mr Harris once more to move the truck he was working on and to wash the Toll trucks. He admitted he was getting wild by this time. He was also fed up because Mr Harris was wasting pre-spray that would get rained off the EMT Haulage truck.

[23] It is Mr Ballard's evidence that Mr Harris then threw down the pre-spray gun he was using and took a swing at him. After a few heated words were exchanged Mr Harris took his belongings and went home.

[24] It is Mr Ballard's evidence that he received Mr Harris' letter on Wednesday 17 January. He also said he did not dismiss Mr Harris and dismissal letter sent to him had been written by Melissa Henderson of Noble Lees. He did eventually accept it had been written on his instructions and that was after he had received Mr Harris' letter.³

[25] It was also Mr Ballard's evidence that Mr Harris had subsequently gone to the offices of Noble Lees where he had acted in an abusive manner. Mr Harris denied this and said that he had had constructive discussions with one of the company's accountants.

Other witnesses

[26] On 5 September the Authority spoke to two other persons that Mr Ballard submitted would corroborate his evidence.

[27] Mr Daryl James is the Transport Manager for Bell Distributors. Mr Ballard had said BTW lost a contract worth \$3000 per month with Bell Distributors because of Mr Harris' poor performance (in washing their trucks) and his abusive attitude to Mr James.

[28] It was Mr James evidence was that Mr Harris is OK – his bark is worse than his bite. He said he has a lot to say but his work ethic is OK. He said that Roger Harris

³ The dismissal letter is dated 15 January and signed by Mr Ballard.

and his offsider Richard Peri were not washing Bell Distributors Trucks properly. He spoke to Dave Ballard about it several times but he had no control over his staff. He said Dave blamed his staff for the poor performance but he employed them – he should have been out there showing them what to do. He wouldn't deal with the situation so Mr James took his truck washing business away from BTW. He confirmed that Roger Harris had abused him but said "*that was just Roger – we abused each other*". He also stated he had had no problem with Mr Harris' performance when he worked for previous owners. He believed it all came down to leadership.

[29] Ayla Blanchard is a 15-year-old schoolgirl who worked at BTW doing administration duties and truck washing. She said she worked during the day on Saturday 13 January and went home about 5.30-6pm. She was at work when Roger arrived for the night shift but said nothing happened between Roger and Dave before she left. However, after the altercation between them she was telephoned and asked to come back to do truck washing. She also typed out the transcript dictated to her by Mr Ballard in consultation with Richard Peri recording the events of that evening.

[30] She also said that Dave Ballard had appointed her the supervisor and he had had her inspect the Toll trucks that day and tell Roger to rewash the Toll Tranzlink trucks. She didn't think Roger appreciated a 15-year-old girl telling him what to do.

[31] She also said there was not a good atmosphere in the workplace. It was typical she said for Roger to ignore Dave's instructions – all the workers ignored Dave. She said that when Dave said he was going to fire Roger all the workers laughed – they walked all over Dave and she was surprised at how much he put up with.

[32] She also said she thought his dismissal was a big shock for Mr Harris.

Section 103A Test of justification

[33] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

103A Test of justification

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.

[34] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of a *fair and reasonable employer ...in all the circumstances ...at the time....*

Discussion & Findings

Credibility

[35] The evidence of Mr James and Ms Blanchard gave the evidence of Mr Harris and Mr Ballard some much needed perspective. I found their evidence to have been credible. Both had perceptive insights into the management and staff relations' problems at BTW under the ownership of Mr Ballard⁴.

[36] I find as a result that both men underplayed the extent to which their conduct contributed to the altercation between them and I take each man's evidence with a grain of salt.

Findings

[37] I find that Mr Ballard was possessed of poor interpersonal and management skills. He did not lead or manage his staff appropriately. For their part I find that staff

⁴ For one so young Ms Blanchard was particularly perceptive.

had little or no respect for him and did not respond appropriately to his management or instructions – Mr Harris included.

[38] I find that on the night of 12 January Mr Harris and Mr Peri made a poor job of washing the Toll Tranzlink Trucks. On inspection the next day Mr Ballard decided they had to be rewashed by Mr Harris and Mr Peri that evening.

[39] It is unclear to me whether or not it was before or after Mr Harris commenced washing the EMT Haulage truck that he was told the Toll trucks needed to be rewashed. Regardless of the exact sequence of events I find he was then told by Ayla Blanchard and by Dave Ballard that he had to rewash the Toll Tranzlink Trucks because the owner was coming to collect them at 7pm. Mr Harris did not appreciate being told this by Ayla Blanchard and commenced or continued washing an EMT Haulage truck. When Mr Ballard repeated the instruction it was in a manner that Mr Harris objected to. Mr Harris ignored Mr Ballard and continued washing the EMT truck. Mr Ballard became more agitated and heated about the matter and Mr Harris carried on ignoring him. I do not accept that Mr Harris spoke calmly and rationally to Mr Ballard saying that if he calmed down he (Mr Harris) would stop and listen to him. Mr Harris I find had no liking for Mr Ballard and no respect for him or his instructions.

[40] Finally Mr Harris had had enough of Mr Ballard who, I find, went on the warpath over the matter of the Toll trucks and he collected his things and went home.

[41] I do not accept that before he went Mr Harris took a swing at Mr Ballard.

[42] Mr Harris admitted that when he arrived home he was upset and angry.

[43] I find that when he had calmed down he worried that he would have been seen to have walked off the job. He did not want to lose his job and he wrote a conciliatory letter to Mr Ballard with a view to working things out between them. He telephoned Noble Lees to communicate this orally through them to Mr Ballard. Unfortunately Mr Ballard did not have the human resource management skills/knowledge to recognise this was a case where a cooling off period should have been allowed to be followed

by rational and calm discussion with a view to working out a more positive approach to his working relationship with Mr Harris.

[44] I find that Mr Ballard summarily dismissed Mr Harris. The dismissal was unquestionably unjustified, as it was not attended by the processes that would be followed by a fair and reasonable employer in these circumstances. Such a process would have included Mr Ballard inviting Mr Harris to a meeting (with the opportunity for representation); putting his concerns to Mr Harris and hearing him out before coming to a decision as to whether or not dismissal was appropriate in all the circumstances. It is likely too that a fair and reasonable employer in these circumstances would have weighed in the decision his own contribution to the events of 13 January. This could have given rise to some frank discussions between the two about rights and responsibilities in the workplace and the need for both parties to act in good faith in their dealings with each other – perhaps leading to Mr Harris' return to the workplace.

Determination

[45] Mr Harris was unjustifiably dismissed and he has a personal grievance against his former employer.

Remedies

Contribution

[46] In considering the remedies to be provided to the applicant I am required under s.124 of the Act to consider the extent to which the applicant contributed to the situation that gave rise to his personal grievance.

[47] I have found Mr Harris had no respect for his employer and I have also found that he ignored instructions given to him on the night of 12 January to cease washing the EMT Haulage Truck and to rewash the Toll Tranzlink Trucks. Then when Mr Ballard's levels of agitation grew Mr Harris walked off the job.

[48] That was not a conciliatory action. Neither do I accept that Mr Harris did this to de-escalate the rising tension in the workplace. He was angry and upset with Mr Ballard and did not weigh the effect his own refusal to comply with Mr Ballard's instructions was having on the situation.

[49] As a result I am setting Mr Harris' contribution in the matter at 25%.

Lost Remuneration

[50] I am satisfied that Mr Harris lost remuneration as a result of his grievance. I am not, however, persuaded that he has sufficiently mitigated his loss and I decline to exercise the discretion to award him more than three months lost remuneration.

[51] As a result the respondent is directed to pay to Mr Harris three months lost remuneration. That sum being \$7,718.27 gross⁵ is to be reduced by 25%.

[52] The respondent is directed to pay to Mr Harris the sum of \$5,788.71 gross.

Compensation pursuant to s. 123 (1)(c)(i)

[53] I am satisfied on the evidence provided that Mr Harris has suffered hurt and humiliation as a result of his dismissal.

[54] I therefore direct the respondent to pay to the applicant the sum of \$5,000 as compensation pursuant to s.123 (1)(c)(i). That sum is to be reduced by 25% to reflect Mr Harris' contribution in the matter.

[55] The respondent is therefore directed to pay to Mr Harris the sum of \$3,750 net as compensation for hurt and humiliation and injury to feelings he suffered as a result of his dismissal.

⁵ I have calculated Mr Harris average monthly earnings from YTD earnings shown on the final pay slip that was provided to the Authority.

Penalty Action

[56] I note the applicant provided an IEA which cited himself and BTW as parties. It is dated 29 March 2006. I therefore fail to understand the applicant's claim for penalties against the respondent for failing to provide an employment agreement and no remedy is provided under this head.

Costs

[57] I accept the submissions of counsel for the applicant that Mr Ballard's conduct in this matter has significantly added to the legal costs incurred by Mr Harris in having the matter resolved.

[58] I therefore direct the respondent to pay legal costs to the applicant in the sum of \$4000.

Janet Scott

Member of the Employment Authority