

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 140
5397287

BETWEEN DANIEL HARTIGAN
Applicant

AND MAINLAND DRIVING
SCHOOL LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Anna Oberndorfer, Advocate for Applicant
Robert Thompson, Advocate for Respondent

Investigation Meeting: 1 May 2013 at Christchurch

Written submissions by 29 May 2013

Date of Determination: 9 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mainland Driving School Limited (Mainland) accepts that Mr Hartigan was dismissed from his employment on 12 December 2011. Mainland accepts that the procedure under the employment law has not been followed properly, but says that if there was an investigation and an opportunity given to Mr Hartigan to comment and discuss the reasons for the decision to dismiss him, the outcome would have still been the same because of the seriousness of his offending behaviour.

[2] Mainland claims that Mr Hartigan has not properly mitigated his claim for lost wages, and that in any event when he obtained new employment the link between his claim for lost wages and his dismissal was severed. Mainland also claims that Mr Hartigan contributed to the situation giving rise to his personal grievance and that he should not be awarded any monetary remedies, including compensation.

[3] Mr Hartigan has requested the Authority to award him:

- A penalty for a breach of good faith.
- 12 weeks lost wages based on his base salary of \$80,000 per annum (less 2 weeks for a Christmas shutdown) - \$15,384.60;
- 4 weeks lost wages based on the difference between his earnings in a new job and his employment with Mainland - \$3,318.64;
- 14 weeks of petrol allowance - \$1,346.10;
- \$1,500 for the loss of belongings;
- Compensation under s 123 (1) (c) (i) of the Act;
- Withdrawal of opposition to his NZTA approved assessor/driving instructor licence.

The total amount of lost wages Mr Hartigan is claiming amounts to \$18,703.24 gross. Mr Hartigan did not give a sum for compensation for hurt and humiliation and has left it to the Authority to determine an appropriate sum.

[4] During the investigation meeting I indicated that I would not accept a claim for the loss of belongings at an estimated replacement value of \$1,500. Mr Hartigan failed to produce an itemised inventory of his claim and he failed to provide any independent verification and/or valuation of the replacement value of the items that he claimed.

[5] Also, I expressed that I have no jurisdiction in regard to the matter on the opposition from Mainland to Mr Hartigan's licence.

Issues

[6] The issues in this matter are as follows:

- a. Has Mr Hartigan adequately mitigated his loss by looking for alternative employment? What are his lost wages and how much is he entitled to considering that he did obtain new employment?

- b. What is Mr Hartigan's claim for compensation under s. 123(1)(c)(i) of the Employment Relations Act for?
- c. What is the level of Mr Hartigan's contribution to the situation giving rise to the personal grievance (s. 124 of the Employment Relations Act)?
- d. Is Mr Hartigan entitled to a petrol allowance after his employment ended?
- e. Has there been a breach of good faith? Is Mr Hartigan entitled to get a penalty payment for the claim of a breach of good faith?
- f. What else is Mr Hartigan entitled to, to resolve the personal grievance claim? (see statement of problem)
- g. Who gets costs and how much?

[7] The cause of action occurred after 1 April 2011. The test is s 103 A (1) and (2) of the Employment Relations Act, and s 103A (3) (a)-(d) and (4) and (5) of the Act apply.

Facts

[8] Daniel Hartigan was employed by Mainland. He was employed in the role of branch manager under the terms of a signed off individual employment agreement dated 1 August 2011. Under the employment agreement he was paid a salary of \$80,000 per annum. A company vehicle was provided and an annual allowance for petrol was provided by allowing him to use a company fuel card which was capped at \$5,000 per annum. His hours of work were as required, 7.30am – 5pm, Monday – Friday but additional hours as required.

[9] Mainland is a business owned by Shane McQuinlan. Mr Hartigan was required in his role as the manager to undertake the day to day management of the company and Mr McQuinlan was left to form relationships with others outside the business and to grow the business. Mr Hartigan's wife was employed in the business also, to undertake administrative duties.

[10] Mainland is described as a small employer with about six employees. It provides instruction to students learning to drive. In addition to managing employment matters internally, Mr McQuinlan relied upon advice from advisors.

[11] In 2011 a problem involving another employee, a course coordinator teaching theory to clients, came to a head between Mr Hartigan and Mr McQuinlan. There were a number of performance management issues that Mr Hartigan had raised with Mr McQuinlan about the employee, and Mr McQuinlan met with the employee to establish for himself whether there was any foundation to the problems that Mr Hartigan had raised with him. The details of Mr McQuinlan's and Mr Hartigan's discussions had never been put in writing, except for references made in the occasional minutes of meetings. Mr McQuinlan believed that the responses from the employee concerned appeared to be plausible and reasonable explanations. These explanations resulted in Mr McQuinlan deciding to review what the next step and course of action should be, including putting the matter back to Mr Hartigan for his responses.

[12] During Mr McQuinlan's discussion with the employee she became upset and claimed that she was being picked on and potentially bullied in her employment by Mr Hartigan over working her. Mr McQuinlan informed the employee to go home, on full pay, to allow her to compose herself, and return to work on 12 December 2011. He agreed to meet the employee on 12 December 2011 prior to her returning to work. He did meet with the employee on 12 December 2011 to explain that he would be meeting with Mr Hartigan the same day and to ensure the allegations against her were withdrawn and that he would arrange some form of method or arrangement to enable them to work together. He wanted to be facilitative and clear the air and to set some criteria in regard to expectations.

[13] Mr McQuinlan met with Mr Hartigan and raised four issues with him that were:

- a. Stop overworking the employee;
- b. Cease any disciplinary action with the employee;
- c. Treat Mrs Hartigan the same as other staff and to stop letting her run the place as she wished;

d. Stop undermining Mr McQuinlan with the staff.

[14] The reaction from Mr Hartigan to these allegations caused a heated argument to arise. During questioning, at the Authority's investigation meeting, Mr McQuinlan accepted that it was entirely possible that Mr Hartigan was shocked by the development. I hold that it is more likely than not that Mr Hartigan believed that Mr McQuinlan was doing one thing while Mr McQuinlan had conveyed to the employee an entirely different situation, thus it is more likely than not that Mr Hartigan was shocked and both Mr Hartigan and Mr McQuinlan got into a discussion that became loud and heated and was overheard by other people in the workplace, albeit they did not hear the content. There are different accounts from everyone that heard and say that they saw different things, and between Mr McQuinlan and Mr Hartigan.

[15] What resulted was that Mr McQuinlan demanded Mr Hartigan leave the premises because Mr Hartigan would allegedly not calm down and not stop yelling. Mr McQuinlan says that he believed Mr Hartigan's behaviour was becoming increasingly aggressive, and Mr McQuinlan says that he felt threatened and that he possibly could have been assaulted by Mr Hartigan. Mr Hartigan denies this claim, but in any event the situation had developed to such a stage that Mr McQuinlan decided Mr Hartigan had to leave and his employment was at an end. This had never happened before. Mr McQuinlan accepts that by his action Mr Hartigan's employment ended.

[16] Mr McQuinlan says that he needed to call the Police because Mr Hartigan refused to leave. Mr Hartigan does not know whether or not the Police were actually called. I accept that the Police were called on the basis that Mr McQuinlan says that this happened and was supported by another employee who says she saw the Police arrive. There is also a letter referring to the involvement of the Police. It is more likely than not that the Police were called and this was supported by Mr McQuinlan writing a letter to Mrs Hartigan that referred to the Police being called. At the end of Mr Hartigan's employment, arrangements were not put in place between the parties to take possession of their personal property. Unfortunately this remained an outstanding issue even at the time of the Authority's investigation meeting and despite the parties having been to mediation.

[17] Mr Hartigan was paid by Mainland for his final pay entitlements and holiday pay. A pay slip was produced that Mr Hartigan's final pay was for the period ending 9 December 2011. Mr Hartigan was cross-examined on the date of his availability to take up new employment and while Mr Hartigan says that he would have made himself available for work earlier, the documentation indicates that he would not be available to commence work before the later part of January 2012 (letter dated 6 January for job application; document H of the bundle). Mr Hartigan had planned to have a holiday and attend a private engagement previously arranged. He was entitled to do that I hold, and because he was entitled to holidays in his employment, not working during that short time, should not be held against him. Mr Hartigan says he started to look for a new position and did obtain work at Advanced Excavating and worked two full days on 22 and 23 February 2012 before deciding to leave the job because he considered it had been misrepresented and that he did not have the physical ability to work in a trench labouring, instead of driving a truck. He then applied for two jobs at the same time, Ready Mix Concrete and Invercargill Passenger Transport. He was able to obtain another new job at Christchurch Ready Mix, driving trucks, and started on 5 March 2012. He resigned that job 3 weeks later to take on a new job at Invercargill Passenger Transport as the operations manager/training manager on a lesser salary of \$57,000.

The Authority's determination

[18] Mr Hartigan was dismissed from his employment with Mainland. The dismissal was unjustified because there was no investigation and Mr Hartigan had no opportunity to discuss the reasons for his dismissal. Indeed given that this was the only instance of such an argument occurring a fair and reasonable employer could be expected to have a cooling off period first and then to have met to sort the issues out, instead of implementing a summary dismissal and notwithstanding the employer's resources. Indeed at such a level of action I hold that the employer's resources do not off-set its responsibility, in this instance to act properly. Furthermore given that the employer obtained assistance and advice on the employment relationship problem it would have reasonable to have obtained advice much earlier.

[19] Mr McQuinlan genuinely wanted to be facilitative between the employee and Mr Hartigan about what to do in regard to a number of performance and personal issues with that employee. Mr Hartigan had different views about what Mr

McQuinlan was doing, and a fair and reasonable employer could not have dismissed in regard to those matters. However, the argument that occurred between Mr McQuinlan and Mr Hartigan could lead to serious misconduct if Mr Hartigan was threatening Mr McQuinlan with assault. Mr Hartigan was certainly shocked about the four matters Mr McQuinlan had raised with him. There are witnesses who say that they heard loud voices and Mr Hartigan getting very upset. One witness recalled Mr Hartigan reacting physically. Certainly there was a heated argument, I hold. Indeed the whole situation got so out of hand that Mr Hartigan's wife and the employee whose performance was questioned said things they both now probably regret. A fair and reasonable employer even in this situation could be expected to have a cooling down period instead of summary dismissal. Also, I find that although witnesses told me what they say they heard, and two of them referred to what they say they saw happening, the confusion and the sides the witnesses have taken in the matter, does not instil me with sufficient confidence that their evidence reliably recalled what happened, I hold.

[20] Mr Hartigan has claimed that Mainland breached its obligation to act in good faith. Mainland did fail to act in good faith by not following a correct procedure, but it would be inequitable to apply a penalty considering that the employment relationship problem can be resolved by personal grievance remedies. A penalty would be a disproportionate response to resolve the problem, I hold.

[21] As Mr Hartigan has a personal grievance for unjustified dismissal he is entitled to lost wages. He has mitigated his lost wages. He found new work, albeit at first it was unsatisfactory, and second, both jobs were for short term periods. One of the jobs did not work out; he left another one for something better and is now employed on less salary. He was entitled to spend time on holiday since he had holiday pay paid. He obtained other work and I am satisfied that he had 10 weeks of losses as claimed. He is also entitled to the difference in wages as claimed because the claim is limited to 4 weeks and at that point the period of the loss and dismissal would have become severed. He is entitled to a total \$18,703.24 gross lost wages.

[22] Mr Hartigan's entitlement amounts to

- i. 12 weeks lost wages based on his base salary of \$80,000 per annum (less 2 weeks for a Christmas shutdown) - \$15,384.60

- ii. 4 weeks lost wages based on the difference between his earnings in a new job and his employment with Mainland - \$3,318.64

[23] In addition, I am satisfied Mr Hartigan is entitled to the petrol allowance because of a concession Mr McQuinlan made during his evidence in regard to Mr Hartigan being entitled to the allowance. Mr Hartigan is to be paid 14 weeks of petrol allowance - \$1,346.10.

[24] Mr Hartigan is entitled to compensation for hurt and humiliation in the sum of \$5,000 under s 123 (1) (c) (i) of the Act for the shock of dismissal and to have to look for a new job and the financial impact on him.

[25] The amounts of lost wages and compensation are to be deducted by 50% for contribution (applying s 124 of the Act), given that Mr McQuinlan and Mr Hartigan were equally to blame for the situation that developed and as a senior manager, albeit in a small firm, Mr Hartigan should have reacted differently. He accepted in hindsight that there were other options as to what he could have done properly at the time.

Orders of the Authority

[26] Mainland Driving School Limited is required to pay Mr Daniel Hartigan:

- i. \$9,351.62 lost wages under s 123 and 128 of the Act.
- ii. \$1,346.10 petrol allowance under s 123 (1) (c) (ii) of the Act.
- iii. \$2,500 Compensation under s 123 (1) (c) (i) of the Act

[27] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority