



New Zealand Employment Relations Authority Decisions

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Hosegood v Head Auto Wreckers Limited WA140/10 (Wellington) [2010] NZERA 758 (6 September 2010)

Last Updated: 16 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 140/10 5282938

BETWEEN ANDREW HOSEGOOD

Applicant

AND HEAD AUTO WRECKERS

LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received: Determination:

G J Wood

Charlie Clayton for the Applicant Joe Richardson for the Respondent

1 July 2010 at Wellington

By 12 July 2010

6 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent, Head Auto Wreckers Limited (Heads) claims that the applicant, Andrew Hosegood, was justifiably dismissed for theft as a servant on 14 September 2009. Alternatively, Heads claim that Mr Hosegood's contribution to the situation that gave rise to any personal grievance is so great as to disentitle him to any remedies. By contrast, Mr Hosegood claims that his dismissal was unjustified because he believed he had been given authority to take home the first aid kit in question.

[2] The first issue for determination is whether or not Heads' decision to dismiss Mr Hosegood, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time. The second issue is that, if not, what remedies should be awarded to Mr Hosegood.

Credibility

[3] There are stark differences in the evidence between the witnesses in this case, namely Messrs Michael and Stephen Head, brothers and co-directors of Head Auto Wreckers Limited on the one hand, and Mr Andrew Hosegood and his father, David, on the other.

[4] The Authority can have no certainty about events that occurred approximately a year ago, but is required to determine the facts on the balance of probabilities, i.e. what is more likely or not to have occurred. In assessing matters, the more serious an accusation (and an accusation of theft as a servant is a particularly serious accusation), the more convincing the evidence in support of it must be if the Authority is to come to such a conclusion as a result of its investigation.

[5] Troublingly in this case, I have no particular reasons to doubt the words of any of the witnesses. Each is entitled to his perceptions as to what occurred on the days in question and I consider that, at the time they gave evidence, they were their actual perceptions of events.

[6] Mr Andrew Hosegood's evidence was unfortunately very much all over the place. In the normal course of events I would have to count this factor against him. This would be significant given that one major issue in this case requires an assessment of Mr Hosegood's intent at the time he took a first aid kit from a car, the property of Heads, home. However, Mr Hosegood has a number of learning difficulties and while he can function as an employee and certainly knows the difference between right and wrong, I conclude that his evidence was genuine even though he was easily confused. His explanation at the Authority's investigation meeting was particularly garbled.

[7] It was clear in the end, however, that he believed he had been given permission on the Thursday to take the kit home, in order to bring it back to work, replenished with more first aid materials for his own use. He had, however, forgotten to do so that day. Accordingly, he took it home the next day after work.

[8] This version was supported by Mr Hosegood senior, who observed his son's comments and reactions at the time. I do not consider that his father would have lied simply to support his son, particularly as relations between the two of them are not always harmonious.

[9] Thus while I accept the evidence of Heads that Mr Hosegood's behaviour on the day appeared suspicious to them, I am not prepared to conclude, given the seriousness of this allegation, that he had deliberately taken home the first aid kit without permission. I note for the record that this conclusion is consistent with the conclusions of the Police who, after investigating the matter, reached the decision that Mr Hosegood had no criminal intent when he attempted to leave the company's premises with the first aid kit.

[10] While there are other matters of credibility between the parties, they are not particularly relevant to my determination and therefore are not referred to.

The Facts

[11] As the name implies, Head Auto Wreckers is a car dismantling and used parts sales yard. Its premises are at Seaview, Lower Hutt. It is run by Mr Stephen Head and his brother, Michael. Stephen Head is responsible for the administrative and financial parts of the company, while also working in the business, and Michael Head works purely hands on in the yard.

[12] On 2 February 2009, Heads took on Mr Hosegood as its sole employee. Mr Hosegood worked a minimum of 40 hours a week at \$13 an hour, assisting Mr Michael Head in particular. The business has been in operation since 1984 and has never employed anyone on a written employment agreement. Unlike Heads, Mr Hosegood, through his father, came to be aware that employees were required by law to have written employment agreements. Employees with more than six months' service such as Mr Hosegood were also entitled to sick pay. When Mr Hosegood raised these issues with both Messrs Head, he was informed that there would be no written contracts and that he was not entitled to sick leave. Mr Hosegood, with the assistance of his father, made a complaint to a Labour Inspector about sick leave on 31 August.

[13] These matters were later resolved to a large extent, and I have no clear evidence to doubt Mr Stephen Head's claims that they had nothing to do with Mr Hosegood's subsequent dismissal.

[14] The issues did, however, leave an underlying tension between Messrs Head and Messrs Hosegood, particularly after Mr Hosegood Snr had been to see

Mr Stephen Head about matters, and had come away feeling pressured by Mr Stephen Head.

[15] Although Mr Hosegood's claims for sick leave and holiday pay were resolved after his employment ended, the sum of \$16.64 gross does remain outstanding, which Heads has no objection to paying.

[16] Given my acceptance of Messrs Hosegood's evidence, I find that on Thursday, 10 September Mr Hosegood had gained the permission of Mr Michael Head to take home a small first aid kit that had been found in one of the cars. Mr Hosegood forgot to take the kit home that night but remembered to take it home the next night. I accept that he intended to stock the kit with fresh bandages and plasters from his parents' supply.

[17] Mr Hosegood remembered to take the kit home the next night. He was seen carrying it out by Mr Michael Head. Mostly likely Michael Head had forgotten that he had given permission to Mr Hosegood the day before and thus asked his brother whether he had approved the removal of the kit, who replied in the negative. Mr Stephen Head then approached Mr Hosegood, asked him what he was doing with the first aid kit, that it was theft, and to put it back. Mr Hosegood did so without offering any explanation. Mr Hosegood then met his parents, who had come to collect him, and told them that he had been accused of stealing, that he was innocent and that he had got approval to take the kit the day before.

[18] Mr Stephen Head decided that evening that Mr Hosegood's actions constituted theft as a servant and therefore justified dismissal. He therefore prepared, with the agreement of his brother, a letter of dismissal which was dated Friday, 11 September. It was delivered to Mr Hosegood on his arrival at work the following Monday morning, as Messrs Head felt that there was no way they could tolerate having a thief working for them. Mr Hosegood was informed by Stephen Head that he no longer had a job at the same time as being given the letter.

[19] The letter of dismissal dated 11 September states:

Andrew Hosegood's dismissal to take effect immediately due to theft of property from his employer's workplace.

[20] The letter set out Heads' reasons for doing so, informed him that he would be paid all wages and holiday pay owing on 17 September, and indicated that it expected his wages and any of his personal possessions to be picked up at that time.

[21] Mr Hosegood felt intimidated by Mr Stephen Head and did not proffer any explanation at the time the letter was given to him. Mr Stephen Head told him he should collect his tools immediately, contrary to the contents of the letter.

[22] Mr Hosegood could not locate all of his personal possessions. I accept that Mr Hosegood has not received, as he should have, his ring spanner, tube socket, scissors, box knife, and blades to the value of approximately \$140. Subsequently, Mr Stephen Head tried to return some tools to Mr Hosegood, but he would not accept them because they were not the ones that had not been returned, but rather cheap replacements. It was Heads' responsibility to keep Mr Hosegood's personal property safe at work and it is therefore appropriate that he be reimbursed the above sum, it not being possible to order return of property Heads can no longer locate.

Determination

[23] There is no doubt that an employer can justifiably dismiss an employee who steals money or goods from it, even if the value of those goods is not significant. No employer can be expected to keep on an employee who it cannot trust because he or she has stolen from his or her employer.

[24] The issue in this case, however, is whether what Heads did and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[25] In a serious matter such as theft as a servant, a full and proper investigation is required, however strongly an employer may believe the employee is guilty. The minimum requirements under law are notice to the worker of the specific allegation of misconduct and the likely consequences if it is established, a real opportunity to attempt to refute the allegation or to explain or mitigate his conduct, and an unbiased consideration of the worker's consideration. In this case, there was no proper opportunity for Mr Hosegood to respond to the allegation of theft as a servant. He certainly made no explanation at the time, but I accept that this was because of his learning difficulties and the fact that he was in shock. After that time, he had no influence on the decision, as Heads simply decided that he was to be summarily dismissed, and that dismissal was effected by Mr Stephen Head at the very beginning of the next working day.

[26] No fair and reasonable employer would act in that way, I hold, as it breaches all the minimum requirements under the law. Furthermore, for the reasons given above, I do not accept that Mr Hosegood intended to steal the first aid kit in question. Rather, there was a misunderstanding between him and Mr Michael Head over whether or not he could take the first aid kit. There was therefore no serious misconduct and therefore no cause for dismissal.

[27] It follows that, in all the circumstances, the decision to dismiss Mr Hosegood by Heads, and how it acted, were not how a fair and reasonable employer would have acted at the time of the dismissal. Mr Hosegood's claim for a personal grievance for unjustified dismissal is therefore made out.

Remedies

[28] Being branded a thief, together with the financial impact of not having steady employment for several months has had a significant impact on Mr Hosegood, an already vulnerable individual. I accept his evidence, and that of his father, of the impact the dismissal had on him. I therefore consider the claim of \$5,000 compensation is appropriate in all the circumstances.

[29] Mr Hosegood also claims three months' lost remuneration. I accept that he has lost more than three months' remuneration in the period since his dismissal. I also accept that Mr Hosegood has attempted to mitigate his loss. He was out of work during the period of a recession. He still managed to get some work, including his present job, at which he is paid at a higher hourly rate, but which is only part time.

[30] Three months' lost remuneration constitutes \$6,670 gross. Mr Hosegood is also entitled to \$16.64 gross in underpaid holiday pay and \$140 net for the failure of Heads to return his tools.

Contribution

[31] I do not accept that there has been any blameworthy behaviour by Mr Hosegood requiring a reduction in remedies. He is not responsible for the complete absence of any process to fairly deal with Heads' concerns over the first aid kit and there is insufficient evidence to conclude that he intended to take said kit without authority, as I have already found.

[32] I therefore order the respondent, Head Auto Wreckers Limited, to pay to the applicant, Mr Andrew Hosegood, the following sums:

- \$5,000 net compensation under [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#);
- \$6,760 gross in lost remuneration;
- \$16.64 gross in unpaid holiday pay;
- \$140 net for tools not returned.

Costs

[33] Costs are reserved.

G J Wood
Member of the Employment Relations Authority

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