

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 579
5408684

BETWEEN FRANCIS HUDSON
 Applicant

AND JAPANESE SPARES LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: Emma Foster, Advocate for the Applicant
 Angela Lee, Advocate for the Respondent

Investigation Meeting: 25 September 2013 at Auckland

Determination: 18 December 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Francis Hudson, claims that he was unjustifiably dismissed on 21 January 2013. Mr Hudson asks the Authority to find that he has a personal grievance and award him reimbursement of lost wages and distress compensation.

[2] The respondent, Japanese Spares Limited (JSL) rebuts Mr Hudson's claims and says that his dismissal was justified on the grounds of serious misconduct.

Background

[3] From June 2011 to 21 January 2013 Mr Hudson was employed by JSL in the role of delivery person/storeman.

[4] On 21 January 2013 Mr Hudson had returned from a delivery run and was having his lunch. His evidence is that he was approached by Mr Shameem Khan, the Store Manager for JSL, who indicated he wanted to have "a chat". Mr Hudson says

that he was then told by Mr Khan that: "...*there was no more job for me*". And that: "*Don't bother coming in any more*". Mr Hudson attests that he then collected his tools and left.

[5] Unfortunately, Mr Khan no longer works for JSL and he did not attend the investigation meeting. And attempts by the Authority to contact him to arrange an interview have not been successful. The best evidence available to the Authority regarding Mr Khan's involvement with the dismissal of Mr Hudson, is a signed statement (26 June 2013) attached to the *Statement in Reply*. Mr Khan's statement acknowledges summarily dismissing Mr Hudson on 21 January 2013 and this was because Mr Khan and another employee:

...had found him sleeping during working hours in a space that he had carved through the ceiling of the third floor. The continued use of the space to avoid his working obligations have presented safety hazards to the working environment as the ceiling has collapsed inwards and the structural integrity of the cross-beams sustained extensive damage. When I confronted him about the situation he just laughed and I responded by requesting him to leave. Francis stormed off and as my car was parked in front of his, he threatened me 'to come out or I will smash you and smash your ute'. He had threatened myself and endangered those around him with his actions which has caused me no choice but to dismiss him despite opportunities for him to improve.

[6] JSL has produced photographs of what appears to be the ceiling of the work premises whereby it is clear that a hole has been cut into the fibrous ceiling to enable access to the ceiling. JSL have also provided a quotation from a construction company regarding the proposed costs of repairing the ceiling where it is alleged that Mr Hudson was entering and sleeping. The total quoted cost is \$37,145 but there is insufficient evidence to support whether or not Mr Hudson was responsible for the state of the ceiling area.

[7] JSL has also provided written statements from three other employees who make reference to Mr Hudson being either in the ceiling or a "hiding" place. Mr Hudson gave some explanation to the Authority about his presence in the ceiling of the JSL building but I did not find his evidence to be convincing.

[8] The Authority also notes that Mr Khan provided a response to the raising of the grievance by Mr Hudson's advocate. Mr Khan refers to Mr Hudson:

- Not following a time for breaks.

- Hiding in the building during working hours.
- Driving the forklift without a licence and damaging parts.
- Not following instructions from management and sales staff.
- Listening to the radio on his mobile phone while working.
- Being caught sleeping at work in the roof.
- Sleeping in car parks when he was supposed to deliver parts and come back to work.
- Doing personal things during working hours without informing the Manager.
- Going home early without any arrangements with the Manager.

[9] Mr Khan makes reference to Mr Hudson repeating his particular behaviour during the two years that he was employed and there is also reference to a verbal warning.

[10] At the investigation meeting, Mr Hudson gave a brief explanation about some of the above matters, from his perspective, but it is difficult to come to any real conclusions about some of these matters.

Analysis and conclusions

[11] When a dismissal is challenged as being unjustifiable, the Authority must apply the test provided by s 103A(2) of the Employment Relations Act 2000. That is: Whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time that the dismissal occurred.

[12] And then in applying the above test, the Authority must consider:

- (a) Whether having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the

employee before dismissing or taking action against the employee.¹

Was the dismissal of Mr Hudson what a fair and reasonable employer could have done in all the circumstances?

[13] The Authority is left with no option but to answer this question in the negative. The dismissal of Mr Hudson was most certainly procedurally, and possibly substantively, unjustified. This is because, first, the employer completely failed to observe the fundamental requirements of s 103A(3) of the Employment Relations Act. And even taking into account the lack of appropriate resources and the lack of experience within the business pertaining to such matters, had JSL obtained even basic advice, more probably than not, the company could have avoided it getting it so badly wrong. This is not a case whereby the employer has merely slipped up on minor or technical matters. The procedural failures are at the most negative end of the scale in regard to such matters. While there is some evidence of Mr Khan perhaps raising his concerns previously with Mr Hudson, the overall evidence is that Mr Hudson was never properly informed of concerns of the company, neither was he given any meaningful indication that his employment was in jeopardy.

Remedies

[14] Having found that the dismissal of Mr Hudson was unjustified, it follows that he has a personal grievance for which remedies are available under s 123(1) of the Act.

Reimbursement of lost wages

[15] Pursuant to s 128(2) of the Act, where the Authority determines that an employee has a personal grievance and as a result there is lost remuneration, then the Authority must order the employer to pay to the employee the lesser of a sum equal to the lost remuneration or to three months ordinary time remuneration.

[16] The evidence of Mr Hudson is that following his dismissal on 21 January 2013, he could not find work in Auckland and he moved to Christchurch in early February 2013; although he was rather vague about exactly when he went to Christchurch. Mr Hudson says that he obtained some temporary work in Christchurch but was only “averaging \$200 a week” up until the end of March 2013. But Mr

¹ Section 103A(3) of the Employment Relations Act 2000

Hudson has not provided any details at all in regard to how he “averaged” \$200 per week. Neither has he provided any tangible evidence of attempting to mitigate his losses by applying for other employment. Given the vagueness of Mr Hudson’s overall evidence about his purported loss of remuneration, it is not possible for the Authority to conclude the degree of his actual loss with any real certainty.

[17] On the limited evidence available, I conclude that most probably, Mr Hudson lost the equivalent of one month’s wages. The bank statements provided by him show that he received a net weekly wage of \$397.67 and for a period of four weeks the lost remuneration equates to \$1,590.68.

Compensation

[18] Mr Hudson asks that the Authority award him \$8,000 under s 123(1)(c)(i) of the Act. But there is little evidence from him to justify an award at this level. At best, Mr Hudson says that he was “very distressed” about what happened and he found it hard to pay his bills in the weeks following his dismissal. I conclude that any award of distress compensation should be at the lower level and a sum of \$2,000 is appropriate.

Contribution

[19] Pursuant to s 124 of the Act, the Authority must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, reduce the remedies that would otherwise have been awarded. Even on the rather limited and incomplete evidence available to the Authority, I conclude that the actions of Mr Hudson did contribute to the situation that gave rise to the personal grievance and he is blameworthy to such a degree that the remedies should be reduced by 50%. This is because, despite his rather unconvincing denials, Mr Hudson has been shown to be a person that was difficult to keep on the job and he was in the habit of hiding away, quite regularly it seems, to avoid having to carry out some of the duties he was employed for. Perhaps it is fortunate for Mr Hudson that Mr Khan was not available to give first hand evidence to the Authority as had he done so, I suspect that the remedies available to Mr Hudson may have been reduced further.

Determination

[20] For the reasons set out above, the Authority finds that the dismissal of Mr Hudson was unjustified.

[21] Pursuant to ss 123 and 128 of the Act, Japanese Spares Limited is directed to pay to Mr Hudson the net sum of \$795.34 (\$1,590.68 less 50%). Pursuant to s 123(1)(c)(i) of the Act, Japanese Spares Limited is directed to pay to Mr Hudson the sum of \$1,000 (\$2,000 less 50%).

Costs

[22] Costs are reserved. The parties are invited to resolve this matter. In the event that a resolution is not possible, the applicant has 28 days from the date of this determination to file submissions. The respondent has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority