

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 26
5362839

BETWEEN JAMES HUNT
 Applicant

AND GEMCO ELECTRICAL
 SERVICES LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: John McDowell, Counsel for the Applicant
 Dave Robb, Advocate for the Respondent

Investigation Meeting: 23 January 2013 at Napier

Submissions Received: 23 January 2013 (at investigation meeting)

Determination: 18 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] James Hunt was on a final written warning issued on 18 August 2011 for performance, absenteeism and attitude in his employment with Gemco Electrical Services Limited (“Gemco”). On 23 September 2011 Mr Dominic Salmon, a Hasting’s district council employee, made a complaint by email about Mr Hunt speeding while driving a vehicle in a cul de sac leading to the company’s yard. The cul de sac is called Martin Place and there are some recycling bins located there that Mr Salmon and another district council employee were monitoring. Mr Solmon says there were some members of the public present at the time using the bins. He also complained to Gemco about Mr Hunt’s manner when Mr Hunt stopped and parked his car. He says Mr Hunt leered at them and went inside the building and looked out the window at Mr Salmon and the other person he was working with and the members of the public. Mr Solmon says this was aggressive and threatening. He says he did not

write down Mr Hunt's number plate details and did not keep any details of the names and addresses of the members of the public.

[2] It is common ground that the complaint from Mr Salmon related to Mr Hunt's driving and manner. Mr Hunt denied the claims at the time, but accepted at the time that he was driving his car to go and get food during a tea break, before returning to work.

[3] Mr Karl Johnson, General Manager, conducted an investigation and was the decision maker who terminated Mr Hunt's employment summarily for a breach of trust and confidence.

[4] Gemco denies all Mr Hunt's claims and his claims for lost wages, compensation for hurt and humiliation and costs. Gemco claims costs. Gemco accepted that the incident on its own would not justify dismissal, but because Mr Hunt was on a final warning there was no other option but to dismiss Mr Hunt.

The law

[5] The law that applies in this instance is s.103A of the Employment Relations Act 2000; the test for justification:

(1) ...

(2) *The test 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 of the dismissal or action occurred.*

(3) *In applying the test in subsection (2), the Authority or court 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.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
- (b) *did not result in the employee being treated unfairly.*

Section 103A: substituted, on 1 April 2011 by section 15 of the Employment Relations Amendment Act 2010 (2010 No.125).

[6] The issues in this matter are:

- (a) Whether the employer came to an honestly held belief that Mr Salmon's complaint was accurate.
- (b) Whether the incidents relied upon by the employer amount to a justifiable reason for dismissal.
- (c) Whether the process followed by the employer was fair.

The facts

[7] Mr Salmon (Waste Minimisation Officer of the Hastings District Council) sent an email complaint on 23 September 2011 to Darren Diack, the Managing Director of Gemco Group Holdings Limited (Gemco). Mr Salmon's email stated:

While on site this morning a light blue car (older model with a loud exhaust) was driven into your yard at significant speed. Having accelerated the entire length of Martin Place, with complete disregard for members of the public unloading their vehicles or contractor vehicles. The driver upon exiting his vehicle proceeded to display major attitude, continuing to leer from the window in the workshop (I assume he is an employee/contractor due to access to the building). I am concerned that the irresponsible driving style is an accident waiting to happen especially with the amount of elderly and children using the recycling site. Is there any chance a quiet word (sic) could be had to reduce the risk?

[8] Mr Diack forwarded the email to Karl Johnson and requested Mr Johnson to initially investigate the complaint further. This would have been to identify anyone from Gemco driving the vehicle.

[9] Mr Johnson contacted Mr Salmon, and from the details given by Mr Salmon, concluded that Mr Hunt was driving the vehicle at the time. Mr Johnson was asked to investigate the matter fully by Mr Diack. Mr Johnson wrote an investigation letter dated 23 September 2011 to Mr Hunt. It read as follows:

We wish to have a meeting with you to investigate concerns with regards to your driving and attitude (towards the public near the recycling bins) from our workshops on the morning of Friday the 23rd September 2011.

This could lead to further disciplinary action.

You are encouraged to bring a support person with you to the meeting if you require.

[10] Mr Johnson handed the letter to Mr Hunt personally, and also informed Mr Hunt of the detail of Mr Salmon's complaint.

[11] Mr Johnson met with Mr Hunt on 26 September 2011. At the meeting they discussed the detail of the complaint. It is common ground that Mr Johnson read the email fully to Mr Hunt, as well as reading excerpts out during the meeting. Mr Hunt informed Mr Johnson that he had been to get morning tea and returned to the workshop driving his car. He says he was in third gear doing 40kph. His version was that the group of people at the recycling bins were staring at him. Nothing was said. They watched him go into the smoko room and when he looked out the window of the joinery shed he says he saw them taking his number plate. I hold that it is more likely than not that Mr Salmon and nobody else present wrote anything down. I am supported by the content of Mr Salmon's email in reaching this conclusion. Also, Mr Hunt has not been able to offer any evidence of his number plate being written down. Mr Hunt accepts that he acknowledged at the time that "*he might be in trouble – not happy about it!*"

[12] Mr Johnson then contacted Mr Salmon again (after the meeting) and was given further information that included the details as follows:

(a) *Everybody at bins had to step back towards bins and curb for their own safety.*

- (b) *Easily doing over 60 kph then brake right at the end of the street.*
- (c) *Dominic thought there was a real safety issue for the public, it also looked terrible for Gemco that their staff were seen behaving like this.*
- (d) *They knew he worked for Gemco because he drove in the yard and went into office/smoko room.*
- (e) *The worst thing was the aggressive attitude shown to himself the public when getting out of his car then again from out the window of the Gemco smoko room threatening.*
- (f) *Attitude was the worst and reasons for the complaint.*
- (g) *If it was the driving only he could have accepted an error in judgement but the attitude was so bad he had to address this with us couldn't be ignored.*
- (h) *Said that James "stared them down then sauntered over to workshop and then did the same again out the window of Gemco Joinery building.*
- (i) *Finally, spoke with owner of Gernham Auctions who was at bins also who confirmed that this driving speed was a regular occurrence.*

[13] Point (i) above was never relied upon by Gemco at any time, including not being a part of the investigation, and there has been no evidence produced in regard to the information.

[14] Upon receiving the information above, Mr Johnson consulted Mr Diack in regard to making a decision. Mr Johnson made the decision to dismiss Mr Hunt on 27 September, and he made an arrangement to meet Mr Hunt on 28 September 2011.

[15] Mr Johnson prepared another letter on 27 September 2011 for Mr Hunt which read as follows:

I have reached a decision regarding the above issue and wish to have a meeting with you on Wednesday the 28th of September at 7.30 in my office.

You are advised to bring a support person with you to the meeting.

[16] At the meeting Mr Johnson handed Mr Hunt the dismissal letter dated 28 September 2011. The letter read as follows:

Re: summary dismissal

This is to advise you that effectively and immediately your employment with Gemco Trades Limited is terminated.

The reason for your dismissal is in relation to the driving issue and contempt shown to Hasting District Council staff and the general public on Friday 23 September 2011 at 13 Martin Place. This final incident has led to my complete loss of trust and confidence in you as an employee of Gemco Trades Limited.

In making my decision I have taken into account your explanation given at our investigation meeting on the 26th September 2011, and having found your explanations unacceptable. You have breached your employment agreement by not complying with the companies (sic) work rules and code of conduct policies by displaying “actions that are likely to bring the employer into disrepute”. This constitutes misconduct which on its own is not grounds for dismissal, however you were already on a final written warning (dated 18-8-2011).

When this incident is considered in conjunction with your final written warning and previously documented non-performance issues there is a continual pattern of unacceptable behaviour which has damaged the employment relationship beyond repair.

I also note for the record that at all these meetings you were invited to have support and representation but elected on each occasion not to do so.

Your final pay up to the date of termination including all holiday pay owing will be paid into your bank account next week.

[17] The written warnings referred to in the letter culminated in a final written warning for misconduct dated 18 August 2011 (the fourth warning). The final written warning was for absenteeism involving Mr Hunt failing to turn up to work without contacting his direct supervisor. The warning also put Mr Hunt on notice that “*these issues must be addressed immediately*”. He was also advised that “*if there are further incidents or shortcomings of any nature then further disciplinary action including dismissal could be taken*”. The final written warning was still alive when the latest incident occurred.

[18] In his evidence (statement of evidence “SOE”) in the Authority Mr Johnson said that his reason for preferring the complainant’s version of the incident was because:

“It was very clear that Dominic’s interpretation of the events was different to that of James and when considering the evidence of Dominic versus James I took into consideration that Dominic had no reason to want to complain about James (he did not know James at

all). James on the other hand had a number of previous work and performance issues hence receiving four previous written warnings. When discussing this incident with Dominic at no point did I mention the history of James (sic) performance to cloud his opinion”.

[19] Mr Johnson’s conclusion after speaking with Mr Diack was that Mr Hunt was at fault. He concluded:

Because the incident was one of public safety, and James was on a final written warning, I considered that the company had a loss of trust and confidence in James to favourably represent Gemco as an employee (the Hastings District Council is also a major customer for Gemco). I believed as James’ employer we were really left with very few options but to take formal disciplinary action. Darren advised me that my decision should be left overnight and discussed with him again in the morning.

[20] A further written warning was considered, but the conclusion was reached that it would not be realistic as Mr Hunt was already on a final written warning. Mr Hunt was dismissed on 28 September 2011 without any notice.

Determination

[21] It is common ground that Mr Hunt was driving his vehicle in work time during a tea break.

[22] The absence of the detail of the complaint being put in writing by Mr Johnson when he requested Mr Hunt to attend an investigation is not fatal, I hold. This is because the entire email was read to Mr Hunt and excerpts were read again during the meeting. I am satisfied that Mr Johnson provided Mr Hunt with sufficient detail of Mr Salmon’s complaint.

[23] I am satisfied that a fair and reasonable employer could have relied upon Mr Salmon’s complaint and come to an honestly held belief that Mr Hunt was involved in the speeding on Mr Salmon’s version of events. Mr Salmon had no reason to want to complain about Mr Hunt. I accept that this was Mr Johnson’s reasoning at the time. However, a fair and reasonable employer could not determine what it actually was about Mr Hunt’s attitude to establish aggressive and threatening behaviour because Mr Hunt went inside, was seen by Mr Salmon standing at the window, the absence of any reliance on any other witnesses and there being no details. Moreover, Mr Salmon was not able to explain what it was that Mr Hunt was doing that was aggressive and

threatening. There were no other witnesses relied upon. Mr Hunt made no contact with anyone who was in Martin Place at the time. Mr Salmon has only referred to Mr Hunt leering at them at the time. This, contrasts with his wish that Gemco have “... *a quiet word (sic) ... to reduce the risk*”. I accept the submission that the warnings Mr Johnson referred to in his statement of evidence that he says caused him to prefer Mr Salmon’s version, could not be a basis for concluding that Mr Hunt was not telling the truth. This is because the three prior warnings had expired and that they related to performance matters, and the last final written warning related to absence without Mr Hunt informing his direct supervisor. Although they related to misconduct the nature of them related to different offences.

[24] Next, Mr Johnson failed to put to Mr Hunt that he had come to the conclusion that there had been a loss of trust and confidence in Mr Hunt to work for Gemco (statement of evidence). Mr Hunt’s behaviour related to bringing his employer into disrepute under the offences for misconduct. The reliance on a loss of trust and confidence, which is serious misconduct, conflicts with the reliance on misconduct. On its own the findings do not amount to putting Gemco’s reputation at risk. This is because Mr Salmon did not know at first who was involved, it could have been anyone. Second he only asked for Gemco to have a quite chat with Mr Hunt to reduce the risk of an accident. Third there is not enough information to ascertain exactly what the threatening behaviour, other than leering, was about.

[25] Also, Mr Johnson failed to tell Mr Hunt that he was considering dismissing him. In fact he made the decision without giving Mr Hunt any opportunity to have input and comment on any other options in a disciplinary setting considering that the only meeting they had was an investigatory one. A fair and reasonable employer is required to give an employee an opportunity to discuss the likely outcome and to give the employee the opportunity to have input on any options other than dismissal. The failure to do that was unfair, I hold.

[26] I hold that Mr Hunt has a personal grievance.

Remedies to resolve the personal grievance

[27] Mr Hunt has established that he has lost some wages. He quickly mitigated his loss at the time and has been very fortunate to get work to continue his

apprenticeship. His claim for wages has been very clumsily put in his statement of evidence and statement of problem, and more money asked for in the final submissions. Also, I have found his evidence confusing given he says that he was unemployed for a month (SOE paragraph 28) and claims his loss of wages from 1 October 2011 (SOE paragraph 31). He should have been paid 2 weeks in lieu of notice. The sum for this is \$1,144 gross based on (\$572 per week at \$13 per hour for 44 hours per week). The law requires notice to be paid other than where serious misconduct is involved, and the employer can not contract out of the requirement. Indeed the employer accepted that the reason relied upon in regard to the incident would not justify dismissal on its own. Mr Hunt says his lost wages amount to a difference of a loss of \$50 per week from 1 October 2011 between what he earned at Gemco and in his new employment. The sum was not challenged although details were not actually provided of the calculation. He put it that his loss was \$2,037 (SOE paragraph 31) per month based on the difference in earnings. First since Mr Hunt's new job started on 1 October 2011 the three months' difference amounts to \$6,111. However I hold that once he obtained the new job there is no evidence of any attempt to mitigate his loss further. Mr Hunt has failed to mitigate the loss over the extended period of the claim. I will not award that part of the claim. I assess Mr Hunt's loss as two weeks notice \$1,144 plus the one month's wages \$2,037 (total \$3,181) subject to the deduction below.

[28] I must assess Mr Hunt's contribution pursuant to s 124 of the Employment Relations Act. This relates to any blameworthy conduct. I hold that it is more likely than not that Mr Hunt was speeding despite Mr Hunt's denials. I hold this because Mr Salmon was a credible and reliable witness. He was consistent in his evidence where Mr Hunt was not. Mr Hunt says that he was going at different speeds and did not know whether he was travelling at 30 kph or 40 kph. Mr Salmon always has maintained Mr Hunt's speed was over 60 kph. I also have weighed up that Mr Salmon thought that the incident only warranted a quiet chat to the person concerned, although he was never aware of Mr Hunt's employment history. I am not able to assess Mr Hunt's attitude that day because Mr Salmon could not explain what he considered was aggressive about Mr Hunt's behaviour, other than leering. Also there were other witnesses but none, bar one, of them have been identified to give any evidence. My assessment of Mr Hunt's action is 50% contribution due to blameworthy conduct. The wage loss will be deducted accordingly. It is common

ground other staff in the tea room would have heard Mr Hunt's car but not necessarily seen what happened. Other than Mr Salmon, no one else was called to provide any evidence of Mr Hunt's demeanour. Because I found Mr Salmon's evidence inconclusive I hold that Mr Hunt's attitude therefore can not be assessed as blameworthy.

[29] Mr Hunt has not proved his claim for compensation of \$15,000 for hurt and humiliation. I hold that he was shocked given that the decision was predetermined without his input on options and forewarning that dismissal would be a likely outcome. He says he suffered some embarrassment job hunting for new work and returning to a previous employer. He is entitled to \$2,000, but to be reduced by 50%.

The Authority's remedies under the Act

[30] Gemco is required to pay Mr Hunt \$1,590.50 lost wages and \$1,000 compensation for hurt and humiliation to Mr Hunt's feelings.

Costs

[31] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority