

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination: WA 62/08
File Number: 5096151

BETWEEN

WHITI KAINUKU
Applicant

AND

GARY FERGUSON TRADING AS
MAN ABOUT THE HOUSE
Respondent

Member of Authority: Vicki Campbell

Representatives: Graeme Ogilvie for Applicant
Gary Ferguson for Respondent

Investigation Meeting: 23 April 2008

Determination: 9 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Whiti Kainuku was employed as a truck driver on 26 April 2007 by Gary Ferguson trading as Man About the House. He was dismissed on 1 June 2007 following a fire in a customer's house which was attributed to Mr Kainuku's workmanship. Mr Kainuku challenges his dismissal and claims it was unjustified.

[2] Mr Ferguson started out in business as an owner operator installing insulation into homes. He eventually entered into licence agreements to install Insulfluff and Styrobeck Plastics. Mr Ferguson also undertakes property maintenance. However the Styrobeck and Insulfluff were the main areas of his business. To meet his growing contractual obligations he needed to employ more staff.

[3] Mr Ferguson worked with his local WINZ office and employed staff through that office, including Mr Kainuku.

[4] Pursuant to section 103A the Authority must scrutinise Mr Ferguson's actions and ascertain whether he carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against

the objective standard of what a fair and reasonable employer would have done in the circumstances.

[5] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[6] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*X v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

Background

[7] Mr Kainuku was employed to drive a company truck and to work the hopper, keeping it full while other staff undertook work installing insulfluff into homes. Mr Kainuku was being trained in installing insulfluff into house walls, however, Mr Ferguson was not happy with the job he was doing and told Mr Kainuku to stick to the truck and hopper work.

[8] On 29 May 2007 Mr Kainuku attended a job and took over the installation of Insulfluff into the customer's ceiling. This was the first and only time Mr Kainuku had undertaken this work. Mr Kainuku was not trained to undertake this work and should not have been doing so.

[9] As a result of the way the Insulfluff was installed, a fire broke out in the ceiling of the house in the early morning hours of Wednesday, 30 May 2007. Mr Ferguson heard about the fire the next morning and attended the customer's house, where he had discussions with the owners, fire assessor and the fire safety officers.

[10] Mr Ferguson then attended a house where Mr Kainuku was found to be, and discussed the fire with him. Mr Ferguson also spoke with the other two workers who had been working with Mr Kainuku on 29 May 2007. From his discussions Mr Ferguson concluded Mr Kainuku had undertaken work he was not trained to do.

[11] Mr Ferguson was concerned about this because he was subject to a licence agreement which prohibited him from having untrained staff installing Insulfluff. In addition to that, his insurance company had advised him that he would not receive insurance cover if he had untrained staff installing Insulfluff.

[12] Mr Ferguson then spoke to Mr Kainuku the next morning, Thursday 31 May 2007 and dismissed him. There is a dispute about when Mr Kainuku received the letter confirming his dismissal. The letter of dismissal is dated 31 May 2007. I have concluded on the balance of probability that Mr Ferguson had the dismissal letter ready for Mr Kainuku when he approached him that morning.

Serious Misconduct

[13] In order to justify a dismissal the Court of Appeal, in *Man O'War Farm Limited v Bree*, [2003] 1 ERNZ 83, at paragraph 30, states:

... an employer must have reasonable grounds for believing and must honestly believe that there has been misconduct by the employee of sufficient gravity to warrant dismissal. An employer must also carry out the dismissal in a manner that is procedurally fair. The minimum requirements of procedural fairness are that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered (with an open mind) that explanation before making the decision to dismiss (Mazengarb's Employment Law (6ed, 2003) para 103.57).

[14] The Authority must have regard to the nature and degree of the alleged misconduct and its significance in relation to the position held by the employee and the business of the employer. What is required, if the response of dismissal is warranted, is that the misbehaviour must go to the heart or root of the contract between them or be such that it constitutes a serious breach of the employment agreement (*North Island Wholesale Groceries Ltd v Hewin* [1992] 2 NZILR 176).

[15] Mr Kainuku was employed to drive the truck and load the hopper. While he received initial training in pumping Insulfluff into walls, he was not suited to the work and was told to only drive the truck and load the hopper.

[16] On 28 May 2007 Mr Ferguson had instructed Mr Kainuku to remain in the truck and load the hopper. After Mr Ferguson left the worksite, Mr Kainuku left his truck and was pumping Insulfluff. Mr Ferguson was advised about the incident and at the end of that day instructed Mr Kainuku it was not to happen again.

[17] There is a reason only trained staff are allowed to install Insulfluff. There are specific protocols for pumping Insulfluff around down-lights which need to be strictly adhered to. In this case, these protocols were not adhered to. In his report the Insurance Assessor concluded that the fire had originated in the ceiling over the kitchen of the house and that the fire was the result of the insulation material covering the halogen down light.

[18] Mr Kainuku's actions in undertaking work which he had been told not to undertake and was untrained for, jeopardised both property and life.

Procedural fairness

[19] It is well known and standard practice that an employer must tell an employee who is summoned to a disciplinary meeting that he is in peril of dismissal, if that is the case (*Morris v Christchurch Airport Limited* [2004] ERNZ 336).

[20] The Court in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35 sets out the minimum requirements of procedural fairness to be applied by an employer in an investigation into serious misconduct:

- notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

[21] In this case I am satisfied there was a complete absence of procedural fairness. Mr Ferguson undertook enquiries of Mr Kainuku and the other two employees working with him on 29 May 2007. He then met with Mr Kainuku at the beginning of his day's work and dismissed him. A letter had already been drafted and this was provided to Mr Kainuku at the same time.

[22] I find that dismissal was an action a fair and reasonable employer would have taken in all the circumstances of this case. However, in considering how Mr Ferguson acted in putting the dismissal into effect, an employer acting fairly and reasonably would have provided clear notice of a meeting including setting out the allegations and potential consequences if serious misconduct was proven, together with allowing an opportunity for Mr Kainuku to seek advice and representation at any meeting at which his explanations would be sought.

[23] Mr Kainuku was unjustifiably dismissed.

Remedies

[24] On 29 May 2007 Mr Kainuku installed insulation without having the required training into a residential home. I have no doubt that his actions put life and property at risk and also jeopardised Mr Ferguson's insurance policy and licence agreement, both of which were breached.

[25] I am satisfied that had Mr Ferguson followed the steps of procedural fairness, there was a high likelihood Mr Kainuku would have been dismissed. In these circumstances I decline to make an award for lost wages to Mr Kainuku. (*Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315; *Waitakere City Council v Ioane* [2004] 2 ERNZ 194)

[26] I am bound by section 124 of the Act to consider the extent to which Mr Kainuku's actions contributed towards the situation that gave rise to his personal grievance of unjustified dismissal, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[27] Mr Kainuku was dismissed as a result of his conduct in installing insulation material which he was not trained or authorised to install. That installation caused damage by way of fire, to the residential property. Mr Kainuku should be thankful that the damage was contained quickly and there was no loss of life given that people were sleeping in the house at the time of the fire.

[28] To compound matters, Mr Kainuku had been instructed the day before, to stay in his truck and load the hopper.

[29] I have already found Mr Kainuku would have been dismissed for serious misconduct had a fair and reasonable process been followed. Therefore Mr Kainuku must be found to have contributed significantly towards the situation that gave rise to the personal grievance.

[30] I am satisfied it is just to reduce the remedies available as a result of Mr Kainuku's conduct. Mr Kainuku is entitled to an award for contribution to his costs but no other remedy. This will acknowledge Mr Kainuku established to my satisfaction a personal grievance based on a claim that he was dismissed unjustifiably, without rewarding him for significant blameworthy conduct.

Costs

[31] Costs are reserved and the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority