

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 153/08
5113409

BETWEEN Jeremy Kirk
 Applicant

AND Frank Burgess t/a Frank's
 Gardening and Landscaping
 Respondent

Member of Authority: Denis Asher

Representatives: Charles McGuinness for Mr Kirk
 No appearance by or for Mr Burgess

Investigation Meeting Wellington, 2 October 2008

Determination: 12 November 2008

DETERMINATION OF THE AUTHORITY

Draft Determination

- [1] What follows was issued to the parties as a draft determination dated 2 October 2008 following a substantive investigation that day and, on the same day, several telephone discussions with Mr Burgess. In the telephone discussions Mr Burgess made it clear he had received a copy of Mr Kirk's statement of problem and knew of the investigation that day. I explained to him the outcome of the investigation and that the draft would, in 28-days, be confirmed unless

the parties advised the problem had been settled on their own terms or he provided good reason for his non-participation in the employment relationship problem resolution process to date and his non-appearance at the investigation.

- [2] Amongst other comment Mr Burgess advised he had no fixed address, that his place of work was the appropriate address for all communications to be sent to, including the draft determination, and that he would be filing for bankruptcy.
- [3] Neither the Authority nor the applicant has heard further from Mr Burgess. I am satisfied it is appropriate therefore to issue the following determination.

Dismissal Allegation

- [4] Mr Kirk said he was dismissed by Mr Burgess on 5 September 2007 without warning, with no opportunity to be represented and on the basis of spurious performance allegations. Mr Kirk also said that Mr Burgess had never replied to his counsel's letters raising his grievance and proposing that mediation be undertaken.

Notice Served on Mr Burgess

- [5] A process server's affidavit dated 29 August 2008 confirmed that Mr Burgess had been served a copy of Mr Kirk's statement of problem and the Authority's standard letter confirming lodgement of the statement, the value of mediation and the diagram of steps to be taken by the Authority in conducting an employment relationship problem.
- [6] An affidavit dated 1 October 2008 confirmed that process server had been in telephone contact with Mr Burgess on several occasions in an attempt to serve notice of the investigation: he was refusing to meet with them to uplift documents. Mr Burgess advised they were not to visit his workplace. The affidavit also confirmed that the notice of the investigation set down for 2 October was couriered to Mr Burgess' workplace and signed for by "Frank".

- [7] As is clear from par 1 above Mr Burgess was aware of his obligation to file a statement in reply and of the investigation held on 2 October but elected not to respond or attend.

2 October Investigation and Good Faith Report

- [8] Because of the evidence set out above I was satisfied Mr Burgess knew of the investigation, that he was absent without good reason and that I was able, fairly and reasonably, to proceed to hear the application in his absence: s. 173 of the Employment Relations Act 2000 and Clause 12 of Schedule 2 of the same Act applied.

- [9] For the same reasons and under s. 174 of the Act, I am also satisfied that Mr Burgess has obstructed rather than facilitated the Authority's investigation and has failed to act in good faith toward Mr Kirk.

Background

- [10] As is set out in his statement of problem and confirmed at the investigation by affirmation, Mr Kirk was employed by Mr Burgess to work in the latter's gardening and landscape business on 10 April 2007.

- [11] Mr Kirk said he was a conscientious and proactive employee and no issues about his work performance were ever raised until the day of his dismissal.

- [12] Mr Kirk was late to work on Tuesday 4 September because his work-mate failed to pick him up. He said Mr Burgess accepted there had been a mix-up and said see you tomorrow or words to that effect.

- [13] Mr Kirk reported for work on Wednesday 5 September. He was called into Mr Burgess' office who then raised various performance issues. Mr Kirk said the respondent gave no prior indication of his intention to raise concerns and he was not warned his employment was at risk. He was also given no opportunity to be represented or to address allegations he regarded as completely unfounded and unfair, before being summarily dismissed.

- [14] He was told, *"Fuck off – you are not getting a dime from me"*.

Findings

- [15] Mr Kirk was unjustifiably dismissed, both procedurally and substantively. That is because there was no basis for Mr Burgess' allegation and the termination process was entirely lacking in procedural fairness.
- [16] I accepted Mr Kirk's evidence of an earlier conversation with Mr Burgess in which the latter confirmed he had dismissed another employee without justification, partly because of the expiry of a Job Plus subsidy from Work and Income. Mr Kirk was also a subsidised employee.

Remedies

- [17] Mr Kirk said the effects of his dismissal were profound. They included being unable to keep up rent payments on a house he had moved into in Wellington, so as to be closer to his work, and having to move to a 3-bedroomed house in Porirua in which eight people lived. Because of the loss of income (and suitable accommodation) he was unable to visit his two children (9 and 7 years old) or have them stay with him – a contact he describes as very important to him. His inability to maintain access arrangements has caused ongoing argument with the children's mother.
- [18] Mr Kirk described himself as feeling "*knocked over*" (par 24 of his witness statement) by the loss of his job, and its consequences. He claims \$25,000 compensation for humiliation.
- [19] I accept Mr Kirk's evidence that he was humiliated and hurt by his unjustified dismissal: having regard to the above and the duration of his employment, I am satisfied that \$8,000 compensation is payable to the applicant.
- [20] Despite his efforts to find alternate work, through the newspaper, Work & Income and a friend who works for the Ministry of Social Development, Mr Kirk was unable to find work for 19 weeks, including over the Christmas period. Mr Kirk says he is also owed unpaid holiday pay. I accept Mr Kirk's claims in both respects: he is to receive lost income of \$11,400 gross and holiday pay of \$1,948.88 gross (being 8% of his earnings for the period of his employment and lost income).

Contributory Fault

[21] There is no evidence of Mr Kirk's actions contributing in any way to the situation that gave rise to his personal grievance: s. 124 of the Act applied.

Determination

[22] For the reasons set out above, Frank Burgess is to pay to Jeremy Kirk \$8,000 (eight thousand dollars) compensation for humiliation, \$11,400 (eleven thousand and four hundred dollars) gross lost wages and \$1,948.88 (one thousand, nine hundred and forty-eight dollars and eighty-eight cents) gross unpaid holiday pay.

[23] Counsel for Mr Kirk indicates his client's legal costs to be in the vicinity of just over \$2,000: I can indicate to Mr Burgess that, subject to his submissions and a final calculation by the applicant, a claim of this amount is fair and reasonably payable to Mr Kirk.

Denis Asher

Member of the Employment Relations Authority