

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 340
5451096**

BETWEEN NATHAN McDERMOTT
Applicant

AND McDERMOTT TRANSPORT
AND EXCAVATION LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Glenda Norris-Palmer, Advocate for Applicant
George Swanepoel, Counsel for Respondent

Investigation Meeting: 12 August 2014 at Whangarei

Submissions received: 12 August 2014 from Applicant and from Respondent

Determination: 18 August 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Nathan McDermott, is claiming unjustifiable dismissal from, and unjustifiable disadvantage in, his employment with the Respondent, McDermott Transport and Excavation Limited (MDT).

[2] MDT denies that Mr McDermott was unjustifiably dismissed or unjustifiably disadvantaged in his employment, and claims that he voluntarily resigned from his employment as a result of a personal family matter.

Issues

[3] The issues for determination are whether or not Mr McDermott was unjustifiably:

- dismissed or he resigned voluntarily
- disadvantaged in his employment as a result of the meeting held on 17 March 2013.

Background Facts

[4] MDT is a small earth-moving and transport company based in Kaikohe. Mr Charles McDermott (Mr McDermott Snr), Shareholder and Managing Director, is the father of the Applicant, Mr Nathan McDermott.

[5] Mr McDermott was employed by MDT on or about February 2011 as a Labourer and driver of an industrial digger in addition to other such vehicles including a tractor, bulldozer and roller.

[6] He was paid \$16.50 per hour, and his hours varied from an average of 65 hours per week in the peak season to fewer hours in the off season, working Monday to Saturday each week, with Saturday being a half day and Sunday a full day off. However he would sometimes have to work on both Saturday and Sunday.

[7] Mr McDermott was not supplied with a written employment agreement (the Employment Agreement) until October 2011. The Employment Agreement described his employment as casual, and referred to a notice period of two weeks by either party.

Events prior to 17 March 2013

[8] Mr McDermott said that prior to 17 March 2013 he had enjoyed a good working relationship with Mr McDermott Snr, and that he had received no complaints or disciplinary warnings about the standard or quality of his work.

[9] Mr McDermott Snr confirmed this was the case, although he said he had spoken to Mr McDermott informally about gossiping.

[10] Mr McDermott said that during his employment he had been given a mobile telephone by Mr McDermott Snr which, although there had been a contract associated with it and paid by MDT, he had understood to be a gift which he could retain upon his employment ending.

[11] Mr McDermott Snr denied that the mobile telephone had been a gift and said he had provided it to Mr McDermott in order that they could communicate and for work usage, although he had agreed that Mr McDermott could use it for personal calls.

[12] Mr McDermott said that during the course of his employment at MDT he had been assisted by MDT in the purchase and installation of a car alarm for his own vehicle. The arrangement had been that he would purchase it through MDT and repay the cost on a weekly

basis with the costs being variable. Mr McDermott claimed that the final payment was paid on 2 April 2013.

[13] Mr McDermott Snr confirmed that MDT had agreed to the arrangement regarding the purchase of the car alarm and installation, but said that Mr McDermott had failed to make any repayments of the cost of it.

[14] Mr McDermott said he had been working with Mr Neil Hudson, a contractor with MDT, on or about early March 2013 when Mr Hudson began talking about the owners of another transport and excavation business in Kaikohe, Mr and Mrs Galen Pinkney. As Mr McDermott knew and liked Mr and Mrs Pinkney, he had asked Mr Hudson to desist from the topic of conversation.

17 March 2013

[15] Mr McDermott said he had been at home on Sunday 17 March 2013 when he had received a telephone call from Mr McDermott Snr who asked in an abrupt manner that he come to his (Mr McDermott Snr's) house immediately to meet with him.

[16] He said that Mr McDermott Snr had not explained the reason for the meeting needing to take place on his day off or what it was concerning, nor had he been advised that he could have a support person with him.

[17] When he had arrived at Mr McDermott Snr's house, he had found that there were five people present, Mr McDermott Snr, his then partner, Anakorn Narakorn, Mr Hudson and his wife, and Ms Wendy Matthews.

[18] Mr McDermott said that when he arrived Mr McDermott Snr had accused him of "*telling everyone our business*". He had understood this to refer to the earlier conversation he had had with Mr Hudson when he asked him to stop talking about Mr and Mrs Pinkney.

[19] The meeting had become heated and ended when Mr McDermott Snr had told him he was 'sacked'.

[20] Mr McDermott Snr said that the meeting with Mr Dermott had been a purely personal matter which concerned an allegation by Mr Hudson that Mr Dermott had been gossiping about Mr McDermott Snr's relationship with Ms Narakorn to clients of MDT.

[21] He agreed that Mr McDermott appeared to be confused as to the reason for the meeting, referring to Mr and Mrs Pinkney, and that he had clarified it was about his (Mr McDermott Snr) personal business.

[22] Mr McDermott Snr said that the meeting had become heated, and it had been concluded by Mr McDermott saying: "*F ... this s... I am out of here*". He had responded by telling Mr McDermott he should remove his personal items and return the MDT Ute which he had been using and also the mobile telephone.

[23] Mr McDermott had left the meeting and telephoned his brother to ask him to provide him with a lift as he had left behind the MDT Ute as instructed, however he had retained the mobile telephone as his understanding had been that that had been a gift.

[24] Ms Cally Flood, partner of Mr McDermott's brother, said that immediately following the meeting on 17 March 2013 Mr McDermott had told them both that he had been dismissed.

[25] Mrs Pinkney said that following the meeting, Mr McDermott had telephoned her, he had been upset and had told her that the reason he had been dismissed had been related to the discussion he had with Mr Hudson about him (Mr Hudson) talking about her and Mr Pinkney.

[26] Ms Matthews and Mr Hudson said that Mr McDermott had appeared confused during the meeting concerning the reason for it, and that he had left after both he and Mr McDermott Snr had become angry. Ms Matthews said that Mr McDermott Snr had not told Mr McDermott he was dismissed.

[27] At the Investigation Meeting Mr McDermott said that following the termination of his employment he had not heard written to Mr McDermott Snr confirming his resignation as he had not resigned but had been dismissed.

[28] Mr McDermott Snr said he had tried to contact Mr McDermott by telephone after the meeting on 17 March 2013; however he had been unable to make contact and was unable to provide any evidence at the Investigation Meeting that he had made the telephone calls. He had not written to Mr McDermott to confirm that it had been his intention to resign.

[29] Following Mr McDermott's termination of employment, Mr McDermott sent a text message to Mr McDermott Snr which read:

(NMCD) Its Nathan 33 ours for thurs, fri and Saturday and since u fired me + holiday pay and 4 stat days in the back of my diary.

(CMCD) There is no service here you will need to tx

(CMCD) U need to find service and contact me to sort out yr pay as u have wages book and return my phone ASAP

(NMCD) *Im not in Kaikohe I tx u my hours. On pay day. And if u cant find them its 33 hours + holiday pay and 4 days stat in the back of mt book and I don't have reception*

[30] On 7 March 2014 Mr McDermott filed a Statement of Problem with the Authority after mediation failed to resolve the issues between the parties.

Determination

Was Mr McDermott unjustifiably dismissed by MDT or did he resign voluntarily?

[31] Mr McDermott Snr was not only Mr McDermott's father; he was also, as Shareholder and Managing Director of MDT, his employer. Whilst Mr McDermott Snr claimed that the meeting on Sunday 17 March 2013 was concerned with a purely personal matter, it had consequences for Mr McDermott's employment, and there is no dispute between the parties that a direct result of the meeting had been the termination of Mr McDermott's employment with MDT.

[32] I find that the employment nature of the relationship within the context of the 17 March 2013 meeting was acknowledged by Mr McDermott Snr when he gave instruction at the conclusion of the meeting to Mr McDermott that he was to return the MDT Ute and the mobile telephone.

[33] Moreover the meeting on 17 March 2013 had been called by Mr McDermott Snr to discuss an allegation by Mr Hudson that Mr McDermott had been discussing Mr McDermott Snr's personal relationships. These discussions had allegedly been held not only with Mr Hudson, a contractor with MDT, but also with MDT clients. These allegations therefore sit within the employment relationship.

[34] Whilst Mr McDermott Snr states that Mr McDermott resigned, Mr McDermott claims that he was dismissed. It is clear from the evidence that the meeting held on 17 March 2013 had become heated, and that both men had become angry. Whilst Mr McDermott Snr said that he had understood Mr McDermott's comment that: "*he was out of here*" accompanied by expletives to have been a resignation, I note that his response regarding the return of the MDT Ute and the mobile telephone effectively eliminated any prospect of the employment relationship being sustained beyond the meeting.

[35] Mr McDermott I find to have made clear his understanding of the situation in the text message following the termination of his employment in which he states: "*... since u fired*

me ...”. Neither in that text message exchange or subsequently is there any documentary or oral evidence from Mr McDermott Snr refuting that statement.

[36] Moreover it is clear that if Mr McDermott had resigned, which he denies, he did so after an emotional scene. In *Boobyer v Good Health Wanganui Ltd* the Employment Court said of that in this type of case that the employer cannot safely insist on what the employee may have said:

This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this issue or it would have become obvious upon inquiry made soberly once “the heat of the moment” had passed and taken with it any “influence of anger or other passion commonly having the effect of impairing reasoning faculties”.

[37] In that situation, the employer acts reasonably in allowing the employee a ‘cooling down’ period. However there is no evidence that Mr McDermott Snr attempted to contact Mr McDermott following the meeting on 17 March 2013 to ascertain his intentions regarding his employment.

[38] Having considered all the evidence as presented, I find that Mr McDermott was dismissed at the meeting held on 17 March 2013.

[39] In this situation the Test of Justification as set out in s 103a of the Employment Relations Act 2000 (the Act) applies.

[40] The Test of Justification in s103A of the Act states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. 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 the dismissal or action occurred.*

[41] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. MDT must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[42] In accordance with s 103A (3) of the Act the Authority must also consider whether:

(a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee ...

(b) ... the employer raised the concerns that the employer had with the employee ...

(c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...

(d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[43] Whilst I accept that MDT was a small employer and as such lacked the resources normally available to a larger employer when dealing with disciplinary matters, I consider that there were major rather than minor flaws in the procedure adopted by MDT in terminating Mr McDermott's employment which cannot be explained merely by the fact that MDT was a smaller employer. In this case:

- there is no evidence that McDermott Snr investigated the allegations that Mr McDermott had been discussing his personal business with Mr Hudson and/or MDT clients prior to, or following, the meeting on 17 March 2013;
- Mr McDermott had been provided with no timely explanation of the reason for the meeting in order that he could prepare a response to it;
- He had not been advised of his right to have a support person present; and
- There is no evidence that Mr McDermott Snr genuinely considered Mr McDermott's explanation as there is fundamentally some doubt that Mr McDermott had understood the allegations made at the meeting in order to provide an explanation. In that situation there could be no consideration, genuine or otherwise, of the explanation by Mr McDermott since none pertinent to the subject matter of the meeting had been able to be provided in the circumstances.

[44] I accept that this is a situation in which a familial and employment relationship were closely combined, however there remains the onus on MDT to behave as a fair and reasonable employer towards Mr McDermott as its employee, and this it failed to do.

[45] I determine that Mr McDermott was unjustifiably dismissed by MDT.

Was Mr McDermott unjustifiably disadvantaged as a result of the meeting held on 17 March 2013?

[46] Having found that Mr McDermott was unjustifiably dismissed by MDT at the meeting held on 17 March 2013, I consider that there is no separate disadvantage grievance arising from the same meeting.

Remedies

[47] Mr McDermott has been unjustifiably dismissed and he is entitled to remedies.

Outstanding Wages and Holiday Pay

[48] Mr McDermott was summarily dismissed. He was entitled to two weeks' notice in respect of the termination of his employment pursuant to the Employment Agreement.

[49] I order that MDT pay Mr McDermott the sum of \$1,320.00 (calculated as 80 hours per week at \$16.50 per hour) gross in respect of 2 weeks contractual notice entitlement which he did not receive.

[50] I order that MDT pay Mr McDermott the sum of \$544.50 gross in respect of 33 hour's worked and not paid.

[51] In respect of Mr McDermott's entitlement to any outstanding annual and statutory holiday payment, I have used the wages record submitted by MDT as the basis of calculation. I order MDT pay Mr McDermott the sum of \$1,487.62 gross in respect of outstanding annual and statutory holiday payment.

Lost wages

[52] Mr McDermott when questioned by the Authority at the Investigation Meeting, confirmed that he had attempted to find alternative employment in Kaikohe following the termination of his employment, however he had been unable to obtain any due to it being the 'off-season' and he had had to return to Fielding where his mother lived for accommodation and financial support during a period of unemployment.

[53] Mr McDermott obtained alternative employment on 20 June 2013.

[54] I order that MDT pay Mr McDermott the sum of \$7,260.00 gross in respect of lost wages (calculated as 13 weeks at an average weekly payment of \$660.00 less two weeks' notice payment).

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[55] Mr McDermott was dismissed at the meeting on 17 March 2013 which took place in the presence of 4 people in addition to Mr McDermott Snr, Mr Hudson worked who with him, and the others he knew socially.

[56] I accept that in this situation Mr McDermott experienced hurt and humiliation. He also was dismissed from employment which he had enjoyed and in which he had performed satisfactorily. Further he was unable to obtain suitable alternative employment in Kaikohe and had to return to Fielding in order to manage financially until he found permanent employment.

[57] I order MDT to pay Mr McDermott the sum of \$6,000.00, pursuant to s 123(1) of the Act.

Contribution under s 124 of the Act

[58] I have considered the matter of contribution as I am required to do under s124 of the Act. I find no evidence that Mr McDermott contributed to the situation which gave rise to the dismissal. There is to be no reduction in remedies.

Mobile Telephone

[59] MDT has requested that Mr McDermott return the mobile telephone supplied to him. McDermott claims that the mobile telephone supplied was a gift from Mr McDermott Snr which Mr McDermott Snr denies.

[60] Mr Malcolm Williams said he had been present when the issue of the provision of a mobile telephone had been discussed between Mr McDermott Snr and Mr McDermott. He said that Mr McDermott Snr had said that the mobile telephone was to be used for work, but also confirmed that it had been discussed that Mr McDermott could use it personally. He had also become aware subsequently that Mr McDermott had downloaded music to the mobile telephone.

[61] Whilst the Employment Agreement is silent on the matter, it does contain a statement that the parties may vary it by written agreement, and Mr McDermott Snr confirmed that there had been no agreement in writing with Mr McDermott regarding ownership of the mobile

telephone, the circumstances regarding its usage, or when the mobile telephone was to be returned.

[62] There is no doubt that initially MDT purchased the mobile telephone for the exclusive use of Mr McDermott, and that it was to be used not just for personal use but also during the course of his employment. However that did not bring it within the ambit of the Employment Agreement.

[63] In these circumstances I find there to be insufficient evidence as to the ownership of the mobile telephone to refute Mr McDermott's assertion that it was a gift.

Car Alarm Purchase and Installation

[64] It is agreed between the parties that the purchase and installation of the car alarm had been made by MDT on the understanding that the cost was to be reimbursed in full by Mr McDermott by way of payment instalments. The car alarm purchase and installation did not fall within the provision of equipment for use in his employment and I find therefore it to be a personal loan from MDT to the value of \$1,183.71 which is to be repaid in full.

[65] MDT claims that no repayments have been such that the full cost of \$1,183.71 remains outstanding.

[66] Mr McDermott claims that he had made the repayment in full, with the final payment being made on 2 April 2013. Although Mr McDermott provided copies of some personal bank statements to the Authority, there is no indication of how or where such repayments were made and no reference to the alleged final payment made on 2 April 2013.

[67] I order that Mr McDermott provides definite proof of the amounts he repaid to MDT and I anticipate in that situation that the parties can resolve the amount outstanding, if any, between them. If not, leave is reserved for the parties to revert to the Authority.

Costs

[68] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority

