

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Brian McGeown (Applicant)
AND Spotless Services (NZ) Limited (Respondent)
REPRESENTATIVES Brian McGeown in person for Applicant
Linda Hart, for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 29 September 2005
DATE OF DETERMINATION 5 October 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr McGeown is an unrepresented party in the Authority.

He requested the Authority to investigate concerns he had relating to his employment status and in particular his claim he was employed by the company as a permanent part-time worker and that the company had unilaterally changed his employment status to that of a casual worker.

He also alleges the company failed to adequately address issues he raised and that at meeting held between himself and company representatives (held on 3 February 2005) company representatives did not enter into an appropriate dialogue with him to discuss and resolve his concerns. He alleges, too, and that one of the company representatives at that meeting dominated the meeting and impugned his character and reputation by making - and repeating earlier made statements - which were critical of his conduct and performance. These statements were inaccurate and insensitive and had no regard to careful explanations prepared by him and delivered to the company in a letter dated 26 January 2005.

It is the company's position that Mr McGeown was treated fairly and reasonably in his employment and there is no case to answer in this matter.

Background

Mr McGeown commenced employment with the respondent in December 2004. He was engaged at Woolworths New Lynn to drive a tractor and trailer unit to collect and deliver supermarket trolleys from the car park and to reposition them in trolley bays for customers to collect and use for their shopping. Mr McGeown was engaged as a casual employee to work two evenings per week

(Thursday and Friday) for four hours per evening. At the time of his engagement it was anticipated that if Mr McGeown mastered the tractor and trailer unit that all being well he would become a permanent part-time worker.

Unfortunately, Mr McGeown's first night of employment could not be described as a success. The worker who had been assigned to train Mr McGeown departed the workplace after spending only half an hour training Mr McGeown. Later in the evening Mr McGeown positioned the tractor and unit in such a way that it was impeding customers' movement and he was unable to rectify the situation. The parties have different perspectives as to whether and how Mr McGeown attempted to resolve the problem. In the event, however, the matter was resolved and from that point Mr McGeown moved trolleys manually.

In January Mr Garland, Contracts Manager (with responsibility for Woolworths New Lynn) was faced with reducing employment hours at the site now that the busy Christmas period was over. To do this he looked at the contracted hours for all staff with a view to making appropriate variations in hours worked. He had a discussion with Mr McGeown who was of the view he was a permanent part-time worker. Mr Garland checked and confirmed his belief that Mr McGeown had been engaged as a casual worker.

In the course of discussion with Mr McGeown the events of 9 December (the first night of Mr McGeown's employment) were canvassed including the fact that Mr McGeown had not been given the training that had been promised. It was agreed that he would be provided with two additional nights training. It was also agreed that if Mr McGeown mastered the tractor and trailer unit over those two nights he would be given those hours to drive the unit. He was also advised that if he did not master the job after being provided with the training the company did not have a requirement for an additional trolley boy over those hours and he would have to be placed on the 'on call' roster.

The second period of training was set for the evenings of 20 and 21 January 2005. The parties disagree as to how successful that training was and how much progress Mr McGeown made in becoming a competent driver of the unit. The company's evidence is that he drove the unit in an unsafe manner. Mr McGeown accepts he drove the unit too close to vehicles and that on one occasion he drove the unit over a curb but generally speaking he felt the training went well and that it was successful.

However, Mr McGeown did not turn up to work on the second night of training (Friday 21 January) and he did not make contact with the company.

Mr Garland attempted to contact Mr McGeown but did not manage to speak to him until Tuesday 25 January. Mr Garland explained he was unhappy that Mr McGeown had 'broken their deal on training' and that he had not contacted the company. He also told Mr McGeown that there had been concerns expressed over the standard of his driving on the Thursday night. He was told he would now be placed on the 'on call' roster. Mr McGeown told Mr Garland that he had not contacted the company because he had no money on his phone. He disagreed with the assessment given of his driving.

Mr McGeown subsequently requested a meeting with company managers to discuss his terms and conditions of employment. On 26 January 2005 he wrote to a company manager detailing a number of concerns he wished to discuss at a meeting with Mr Garland and Paloma Te Rangi (Key Accounts Manager), which was set for 3 February 2005.

The parties have different perspectives as to the purpose for and the outcome of that meeting. Mr McGeown left the meeting dissatisfied with the outcome and he subsequently raised his concerns with the Mediation Service.

The parties attended mediation but matters were not resolved and Mr McGeown has now submitted his concerns to the Authority for determination.

Positions of the Parties

Applicant

Mr McGeown originally claimed that he had been engaged as a permanent part time employee and that he had unilaterally been reduced to the status of a casual employee. As a result he had lost income.

Mr McGeown is also aggrieved that his reputation as a calm, responsible and stable employee has been impugned by statements made by Mr Garland that:

- ‘He turned to custard’ on the first night of his employment when the tractor and trailer unit was ‘ill-positioned’ in the car park
- That he “tipped over the unit” on the night of 20 January.
- That he drove in an unsafe manner on the night of 20 January.

Mr McGeown is also aggrieved that Mr Garland did not read his letter (dated 26 January) prior to the meeting with himself Mr Garland and Ms Te Rangi on 3 February. He also expressed concern that Ms Te Rangi was dismissive of his explanations and that she told him the letter was not important. He submits too, that Mr Garland dominated the meeting of 3 February. As a result of this and the failure of the respondent’s managers to address the issues raised in his letter including the careful explanations contained therein he does not feel his issues were appropriately considered with a view to resolution.

In his initial application Mr McGeown sought substantial compensation to remedy his alleged employment relationship problem(s).

Note: In the course of the investigation meeting Mr McGeown conceded after an examination of the documentary evidence that he had indeed been engaged as a casual employee and that he had not been guaranteed any hours of work per week or work on any particular day of the week. Mr McGeown also stated that he had no issue with the fact that the company did not offer him alternative employment following his placement on the ‘on call’ roster. He accepts that he declined to work any hours other than those stipulated by himself –Thursday and Friday evenings and that he does not hold the company responsible for being unable to offer him alternative work at the time of his choosing.

Mr McGeown also abandoned his claim for substantial compensation in this matter (unless the Authority deems it appropriate). When the investigation meeting was well advanced he proposed a position for settlement. After considering the proposal over lunch the respondent’s representatives declined the proposal.

Respondent

The respondent's position is that Mr McGeown was employed as a casual worker. It was anticipated that if he mastered the tractor and trailer unit he would be engaged as a permanent part time employee to work two evenings per week for eight hours in total.

Mr McGeown's first night of employment did not proceed as expected and hoped. Mr Garland said he told Mr McGeown that (given the totality of the circumstances of that night) '*it had turned to custard*'. The company offered him an additional two night's training and it was agreed that if this training was successful then he would be given the work on two nights each week. Otherwise he would be placed on the 'on call' roster because the company did not have a need for an additional trolley boy to move trolleys manually on those days.

Mr McGeown completed the planned training on 20 January. It was not entirely satisfactory and - based on reports of the person assigned to train him and Mr Garland's own observations - Mr Garland concluded that Mr McGeown had driven the unit in an unsafe manner. However, the company had committed to provide him with a second night of training on 21 January and expected that to proceed.

Mr McGeown did not turn up to the second night of training.

When Mr Garland spoke to Mr McGeown on 25 January he told him he was upset that Mr McGeown had not turned up for the training. He also advised him that there had been reports of him driving the unit in an unsafe manner. He elaborated on this to Mr McGeown i.e. that he had driven too fast, had driven over a curb and had nearly tipped the unit over and that he had driven too close to parked vehicles.

It was the respondent's position that because Mr McGeown had not completed his training he would be placed on the 'on call' roster as had been previously agreed.

When Mr McGeown questioned his terms and conditions company representatives met with him. Prior to that meeting it was agreed between Ms Te Rangi and Mr Garland that Ms Te Rangi would read and distil the relevant points in Mr McGeown's letter. It was Ms Te Rangi's role to lead the discussion in the planned meeting.

The company's position is that at the meeting it focussed on matters that were relevant. Mr McGeown's performance - in driving the tractor and trailer unit - was not relevant and neither were his explanations. The company focussed on:

- Clarifying with him the fact he had been engaged as a casual employee.
- Clarifying the position that, as he had not completed the training agreed, he could not drive the unit on Thursday and Friday nights and as a result he had been placed on the 'on call' roster.
- That his wish for alternative work was taken seriously and that the company would look for alternative positions for him. . There was nothing available at Lynn Mall for the hours Mr McGeown wished to work. The company offered to find other work albeit it might not be the exact hours Mr McGeown wished to work. Mr McGeown declined to work at any other time.

It is the company's position that it treated Mr McGeown fairly and reasonably throughout. It considered he had been let down on the first night of his training so it arranged for two more nights training. Mr McGeown did not keep to his side of that bargain and he was placed on the 'on call' roster. When he raised a concern about his employment status the company met with him to clarify the situation and was genuine in its willingness to find alternative work for him. Mr McGeown made that impossible when he would not consider alternative hours/days.

The company submits there is no case to answer in this matter.

Discussion and Findings

Having examined the relevant documentation at the Investigation Meeting Mr McGeown conceded he had been employed by Spotless as a casual employee. He was not guaranteed a minimum number of hours work per week or work on any set day per week. As a result of that concession I am treating Mr McGeown's claim that he was engaged as a permanent part-time worker and reduced to casual status as resolved.

In respect of the other matters raised by Mr McGeown I am treating them as allegations of unjustified action by the respondent that disadvantaged him in his employment.

Credibility

Mr McGeown's holds very strong views as to the precise words used by Mr Garland in conversations with him. His beliefs in this respect are genuinely held.

However, the weight of the evidence – including some of Mr McGeown's evidence - supports the position taken by the company in respect to the events in question. I must also find that Mr McGeown damaged his own credibility with his admissions that he lied on his application form¹. He also admitted that it was not the case he had forgotten to come to work on 21 January (the second training night). Rather it was the case he had a pressing personal matter he preferred to attend to. He admitted he did not contact the company to advise of his intended absence.

The evidence of the company's witnesses was in contrast to that of Mr McGeown coherent, consistent and more probable and it is the evidence of those witnesses that I prefer where the evidence is in dispute.

Findings

1. Mr McGeown was employed by the respondent as a casual worker and did not have any guaranteed hours of work. However he was assigned to drive the tractor unit under training on the night of 9 December and to move trolleys. If his training went well it was contemplated he would become a permanent part – time worker (engaged for eight hours per week on a Thursday and Friday night).
2. On the first night of his employment Mr McGeown was not provided with the training at the level promised. Unfortunately he positioned the unit where it was impeding the movement of traffic. Mr McGeown could not rectify the situation and he abandoned the unit. I find further that, apart from telephoning his manager, Mr McGeown played no part in resolving

¹ Mr McGeown stated on his application form he had not previously worked for Spotless or any of its associated companies. He admitted he lied because he believed that if he had told the truth the company would have investigated and would probably not have employed him.

the situation and it was other employees who moved the tractor and trailer unit and restored order to the car park. Thereafter Mr McGeown moved the trolleys manually.

3. In January 2005 it was agreed between Mr Garland and Mr McGeown that he would be provided with two additional nights training and that if he mastered the tractor and trailer unit after this training he would be given the two nights work. Otherwise he would be placed on the 'on call' roster because the company did not need an extra trolley boy to manually move trolleys on the nights in question.
4. Mr McGeown completed the first of the two training nights. He did not attend work for the second night of training. I find that Mr McGeown did not turn up for work that night because he chose to pursue a personal matter in preference to meeting his agreed obligation to his employer. He did not advise his Manager, Mr Garland.
5. Mr Garland advised Mr McGeown on 25 January that he was unhappy that Mr McGeown had not attended work on the 21st of January and that he had not completed the agreed training. He also advised he was unhappy that Mr McGeown had failed to advise that he would not be attending work that night. Mr Garland told Mr McGeown that as had been agreed he would now be put on the 'on call' roster. Mr Garland also reported to Mr McGeown concerns relating to his standard of driving on the night of 20 January. I find he elaborated on those concerns.
6. I find that at that time Mr McGeown mistakenly believed he was a permanent part-time employee. He sought a meeting with Spotless management personnel to clarify his terms and conditions. He wrote a long letter to the company setting out concerns he wished to address and detailing explanations in respect to the stated concerns with his driving.
7. I find the company was entitled to focus the meeting on the matters of Mr McGeown's employment status and the opportunities for alternative employment with the company. The meeting with Mr McGeown on 3 February was not a disciplinary meeting and neither was his performance &/or explanations for issues associated with his driving the appropriate focus of that meeting. Mr McGeown had agreed that he would complete two nights training and that if he was successful in that training he would become a permanent part-time worker. Through his own actions (in not completing the driver training arranged for him) Mr McGeown had destroyed any prospects of permanent part-time work and he was allocated to the 'on call' roster. Given his casual employment status the company was entitled to do that.
8. I find that the company personnel behaved in a fair and reasonable manner towards Mr McGeown at the meeting on 3 February. The managers in question were entitled to focus on the relevant matters of clarifying Mr McGeown's employment status and examining alternative employment opportunities for him. His performance or lack of it and his explanations in that regard were not relevant to the go forward position.
9. I find (to give certainty in the matter) that Mr Garland did not tell Mr McGeown that "*he turned to custard on the first night of his employment*". I find that with reference to all the events of that night Mr Garland told Mr McGeown "*It turned to custard*". I also find that Mr Garland never told Mr McGeown "*he tipped the unit over*". With reference to the fact that Mr McGeown had driven the unit over a curb on 20 January he told Mr McGeown that Mufa (who was training Mr McGeown that night) had reported that he (Mr McGeown) had "*nearly tipped it over*".

Conclusion

An examination of the evidence reveals no breach of duty by the respondent towards Mr McGeown that could rise to a finding that he was unjustifiably disadvantaged in his employment. Mr McGeown chose not to complete the tractor training arranged for him and destroyed his own chances of obtaining permanent part-time employment with the respondent. The company behaved in a fair and reasonable manner towards Mr McGeown following this. It met with him at his request to clarify his employment status and to examine alternative employment options. It was Mr McGeown's choice not to pursue alternative employment options with the company.

Determination

Mr McGeown's application is declined and he is not entitled to remedies.

In a final note I must say that if I had found any instance of an unjustified action on this employer's part towards Mr McGeown I would, in considering remedies, have had to contemplate his own actions in this matter. Mr McGeown did not come to the Authority with clean hands. He admitted lying on his application for employment with the company and the evidence shows he put his personal interests over that of the company when he did not show up for work and training on 21 January. While Mr McGeown has apologised profusely for his failure to turn up for training that night it does not change the fact that, when faced with a choice between his own interests and his obligations towards his employer, Mr McGeown put his own interests first.

Costs

Costs are reserved. The parties are to file and serve submissions on costs to enable the matter to be determined.

Janet Scott
Member of Employment Relations Authority