

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Robert Miles
AND Masterweld Limited
REPRESENTATIVES Barry Leveson, advocate for Robert Miles
Martin Walsh, advocate for Masterweld Limited
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 24 November 2006
SUBMISSIONS RECEIVED 30 November and 11 December 2006
DATE OF DETERMINATION 19 December 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robert Miles says he was unjustifiably dismissed by his former employer, Masterweld Limited ("Masterweld").

[2] Masterweld employed Mr Miles as a steel fabricator. It dismissed him after an incident in which Mr Miles displayed abusive and intimidating conduct in the course of an altercation with another person outside the company's premises. It says the dismissal was justified.

[3] Mr Miles also seeks a penalty for the failure to provide him with a written employment agreement. Masterweld denies any such failure.

The altercation and the dismissal

[4] Masterweld shared a driveway with other businesses, including its next door neighbour, Heritage Tiles Limited ("Heritage Tiles"). On 6 October 2005 Samuel Albert, an employee of a transport company, was making a delivery to Heritage Tiles. He drove up the driveway and parked his truck outside Heritage Tiles' premises in such a way as to partly obstruct egress from Masterweld's premises. He then used a forkhoist to unload the truck, with the movements of the forkhoist again partly obstructing egress from Masterweld.

[5] At about 3.45 pm Mr Miles had finished work and was ready to leave. He was driving a van, and sought to access the driveway so he could depart. He was watching the movements of Mr Albert's forkhoist, seeking to identify a point where he could avoid the moving forkhoist and reverse out into the driveway through the gap between the parked truck and a bollard near the corner of the next building. When he thought he saw an opportunity, he executed his planned manoeuvre.

[6] Although Mr Miles considered the manoeuvre was safe, Mr Albert did not. Nor did Mr Albert's wife, who was sitting in the truck and observed what had happened. Neither Mr nor Mrs Albert had been aware of Mr Miles' presence, and both described him as 'shooting out' into the driveway. Both were seriously and genuinely fearful there would be an accident.

[7] Mr Albert reacted by calling 'fuck you', or something of that kind, to Mr Miles. Mr Miles took exception to that, jumped out of his van and approached Mr Albert. Mr Albert got off the forklift and met Mr Miles. There followed a loud argument in which Mr Albert expressed a concern that he could have been killed, and Mr Miles vented his frustration at having access to the driveway blocked. The two men were standing face to face and it was common ground that Mr Miles placed two hands on Mr Albert's chest – although Mr Albert called the movement pushing him away and Mr Miles called it a protective movement before he stepped back. This was the 'assault' of which Mr Miles was subsequently accused.

[8] Shortly afterwards, and with the encouragement of several witnesses, both men calmed down, shook hands, and resumed their previous activities.

[9] Martin Walsh, Masterweld's director and shareholder, also saw the incident. After Mr Miles had left, Mr Walsh went to speak to Mr Albert. Mr Albert gave his account of the incident, and told Mr Walsh he had smelled alcohol on Mr Miles' breath. Mr Miles said in evidence that, before he left, he drank a beer from a supply he kept in the fridge on the premises. Mr Walsh apologised to Mr Albert for Mr Miles' conduct.

[10] Mr Walsh telephoned someone he knew in order to seek advice on how to handle the matter. He says he was told Mr Miles' conduct was grounds for dismissal. The advice seems to have ended there. Mr Walsh should have sought further advice on how to handle a dismissal.

[11] About an hour after the incident Mr Walsh telephoned Mr Miles. He told Mr Miles he had 'gone too far' and would be dismissed. When questioned at the investigation meeting about exactly what he said, Mr Walsh was unsure of whether he used the word 'dismissed' but was sure he said something like 'I don't want to employ you any more'. He told Mr Miles not to come back to the office. Mr Miles said he would come back, and did so promptly.

[12] When he gave evidence Mr Miles denied any mention of dismissal, and said he was accused of assaulting Mr Albert. Otherwise he accepted he was told not to come back to the office, but said he thought it better to return.

[13] Mr Miles also said that, when he returned, he asked Mr Walsh to explain what he (Mr Miles) had done. Mr Walsh said Mr Miles had assaulted a truck driver. Mr Miles took issue with that accusation. Moreover, he said in evidence he was 'disgusted' with Mr Walsh's behaviour in not defending him in conversation with Mr Albert. When Mr Walsh said Mr Albert had done nothing wrong, Mr Miles said 'neither had I'. It was common ground that, after discussing the incident, the conversation moved to Mr Miles expressing at some length his adverse view of the way the company was being run. Mr Miles said it was not until after he had done so that he was told he was fired, and alleges his criticism of the management of the company was the reason for his dismissal.

[14] Mr Walsh said Mr Miles came back in a rage, and swore, cursed and stood over him. He also believed Mr Miles was drunk, because Mr Miles was slurring his words. Mr Miles denied being drunk, saying he slurs his words when he is upset. However he had already admitted having something to alcoholic to drink before he left work, although Masterweld disputed both that Mr Miles consumed only one can and that the drink was beer.

[15] I consider it likely that, at the very least, Mr Miles was angry and aggressive. He came back because he wanted to tell Mr Walsh immediately what he thought of Mr Walsh's handling of the incident with Mr Albert, and of Mr Walsh. He did so at length. As for what Mr Walsh described as 'horrible behaviour' during the discussion, extending to Mr Miles' assertions that

the business could not be run without him, I did not understand Mr Miles to have denied the behaviour itself. Instead he called it 'honest and hitting home'.

[16] Mr Walsh said he was scared, and tried to keep calm so that the behaviour would stop.

[17] Eventually Mr Miles calmed down, and Mr Walsh gave him two weeks' pay in lieu of notice. The employment relationship ended that day.

Other allegations

[18] Mr Walsh sought to make a number of allegations about Mr Miles' conduct during the course of his employment, although he told me during the investigation meeting that Mr Miles would not have been dismissed but for the incident of 6 October. Despite this he said in submissions that Mr Miles was dismissed for: being abusive, violent and threatening to staff; drinking during working hours; and not taking instruction or correction.

[19] For the most part there was no evidence in support of these allegations beyond assertion and supposition, and most incidents had occurred at vaguely identified times many months before the dismissal. One example concerned an allegation that Mr Miles was drinking on the job on an unspecified date at least a year before the dismissal. The only 'evidence' in support of the allegation was an observation that Mr Miles had a bourbon can with him while he was working on a site. Mr Miles said at the investigation meeting that there was water in the can. At the time no-one questioned Mr Miles or checked what was actually in the can, and there was no allegation that Mr Miles was seen drinking from the can. Appallingly, if there really was a belief that Mr Miles was drinking on the job, no-one did anything about the matter at the time.

[20] More importantly for present purposes, it was apparent from the evidence about the events of 6 October that the additional incidents were at best background to the dismissal, and were not in themselves direct causes of the dismissal. Mr Walsh has ignored my attempts to explain that distinction, and has insisted after the event on raising as many incidents as he can think of in support of the decision to dismiss and the justification for it. His obvious misunderstanding of the law has not affected my conclusions of fact regarding the direct cause of the decision to dismiss.

[21] Having said that, there was better evidence in support of one of the incidents that had caused concern. I take it into account because of the light it sheds on the nature of the parties' interactions and their general credibility. I do not take it into account as a ground for dismissal.

[22] Paul Clareburt was employed as the workshop supervisor in late 2004, when the incident occurred. Mr Clareburt and Mr Miles had a dysfunctional relationship, and Mr Clareburt expressed similar feelings of intimidation to those of Mr Walsh. The incident in question arose after Mr Clareburt had issued written delivery instructions to another employee who happened to be a relative of Mr Miles'. Mr Clareburt acknowledged his handwriting was poor, and Mr Miles thought so too.

[23] Mr Miles decided to confront Mr Clareburt about the effect of his relative's inability to follow Mr Clareburt's instructions. Mr Clareburt described Mr Miles as loud and abrasive, and said he was swearing. Mr Clareburt was afraid Mr Miles would hit him. He said Mr Miles told him 'I should hit you'. Mr Miles is larger and stronger than Mr Clareburt, and Mr Clareburt found him physically imposing.

[24] Mr Miles' view was that he was trying to help his relative out. He denied being abusive and said he was just talking. Again he sought to criticise the way in which the company was run. Since Mr Clareburt's account is consistent with all of the evidence concerning Mr Miles' conduct, I accept it.

[25] From this, from the evidence about the events of 6 October 2005, and from the parties' exchanges during the investigation meeting, I discerned a tendency on Mr Miles' part to be absolutely insistent in expressing his views, particularly when they were critical of Masterweld or its staff, and uncompromising about the correctness of them. His behaviour was bullying. He either had no insight into, or no concern about, the effect on other people of the strength and insistence with which he expressed his views, and appeared to have no idea that such behaviour exceeded the boundaries of acceptable conduct in any situation. He certainly did not recognise the flaws in his conduct on 6 October.

[26] Both Mr Clareburt and Mr Walsh said they were unable to manage Mr Miles. For Mr Walsh, the incident with Mr Albert meant he concluded he could not continue to employ Mr Miles.

Justification for the dismissal

[27] Against that background, on his own evidence Mr Walsh did not observe even the most basic requirements of procedural fairness when he effected the dismissal. If Mr Miles really thinks he was dismissed on 6 October after he criticised the way Masterweld was being run, and because of that criticism, he has completely missed the point. Mr Miles was dismissed on the telephone before there had been any discussion about the fact that his employment was in jeopardy, or any discussion about the allegations against him, because the incident with Mr Albert meant Mr Walsh had decided he could take no more.

[28] The decision to dismiss was too devoid of any proper consideration to be considered justified. The decision was flawed enough if the immediate reason for it was the 6 October incident. For example – although Mr Walsh had observed the incident from his office - there was no investigation into the concerns about what or how much Mr Miles had to drink, and no discussion of the circumstances of the alleged 'assault'.

[29] The history failure to address the additional concerns Mr Walsh raised makes the decision even more flawed, if Masterweld is relying on the wider grounds advanced in submissions. Leaving aside the lack of evidence, what amounts to poor personnel management cannot be invoked to justify the failure to address those matters, regardless of Mr Miles' conduct.

[30] For these reasons the dismissal was not justified. Mr Miles has a personal grievance.

Remedies

[31] Mr Miles seeks reimbursement of remuneration lost as a result of his personal grievance, as well as compensation for injury to his feelings.

[32] Section 124 of the Employment Relations Act 2000 requires the Authority to consider the extent to which the actions of the employee contributed to the situation that gave rise to the grievance, and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[33] Mr Miles' actions contributed very significantly to the circumstances giving rise to his personal grievance. The way in which he sought to pass Mr Albert and access the driveway on 6 October was inherently dangerous, and at the very least he should have warned Mr Albert of his presence and reached some arrangement with Mr Albert before he attempted to access the driveway. He denied at the time, and in evidence, that he had been driving in an unsafe manner and I do not accept the advocate's submission that he acknowledged his driving was dangerous. If Mr Walsh had addressed that issue properly any resulting dismissal would probably have been justified. The conduct, however, remains relevant to the remedies available to Mr Miles.

[34] Secondly, Mr Miles' conduct in seeking to confront Mr Albert when Mr Albert protested his unsafe driving was unacceptable. Mr Miles should have apologised to Mr Albert, even if Mr Albert had sworn at him. Instead he escalated the incident quite unnecessarily, and Mr Albert simply stood up to him. Again, if Mr Walsh had addressed that issue properly any resulting dismissal would probably have been justified. Again, the conduct remains relevant to the remedies available to Mr Miles.

[35] Finally Mr Miles sought to bully Mr Walsh into acknowledging he had done nothing wrong, and to criticise Mr Walsh to the extent that he remonstrated with Mr Walsh for not supporting him against Mr Albert.

[36] Overall there was no reasonable explanation for that conduct. Even if I disregard the allegations that Mr Miles was drunk, and characterise his placing of two hands on Mr Albert's chest as less than an assault, Mr Miles' conduct was unacceptable. I do not see any mitigating factors in respect of the incident and its aftermath, or in the parties' employment history.

[37] I find the conduct contributed so significantly to the circumstances of the grievance as to disentitle Mr Miles to any remedy. Accordingly there will be no order for remedies.

Failure to provide a written agreement

[38] Masterweld produced a full and detailed written employment agreement, and said a similar document was provided to Mr Miles for signature and return. It said all employees were given a copy of the agreement, together with a job description. Mr Miles did not sign and return the full document, but did sign and return the job description.

[39] Mr Miles denied being provided with the full written employment agreement, but accepted he had been given two pieces of paper, including a job description. The 'job description' set out his job title, gave an indication of his duties, commented on the conduct expected of him, set out his rate of pay and an overtime rate, and referred to the use of a company vehicle.

[40] Masterweld was in general aware of its obligations regarding a written individual employment agreement and sought to observe them. However it has not proved that it did so in respect of Mr Miles. If it provided the full written agreement it said it did to Mr Miles, it should have sought his acknowledgement of that or at least made a note of its actions, and should have followed up with Mr Miles regarding his agreement to the document.

[41] The job description did contain some of the key terms and conditions of employment. Even so as a stand-alone document it did not comply with s 65 of the Employment Relations Act. However that is of limited relevance since s 65 is not referred to in s 63A of the Act, where the closest potentially relevant penalty provision is now found. Section 65 does not contain a penalty provision of its own. Penalties for breach of any provision in the Act are available only where penalties are provided for in that provision.

[42] Accordingly I decline to order payment of a penalty.

Costs

[43] Costs are reserved. If either party seeks a determination from the Authority on the matter they shall have until the close of business on 31 January 2007 in which to file and exchange statements of their position.

R A Monaghan
Member of Employment Relations Authority