

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 18/09
5122200

BETWEEN MATTHEW NEWBLE
 Applicant

AND MODA PIETRA LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Robert Thompson, Advocate for Applicant
 No appearance by respondent

Investigation Meeting: 17 February 2009 at Christchurch

Determination: 23 February 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Newble) filed his statement of problem on 20 October 2008 and despite various telephone contacts with the respondent employer (the Company) and the participation of one of the directors (Mr Peter Carroll) in a directions conference I held, there was no appearance by the Company at the investigation meeting.

[2] This was despite Mr Carroll having participated in the directions conference, agreed to the date for the investigation meeting, and given every indication that he would be involved.

[3] Shortly before the date for the investigation meeting, it became apparent that the Company was experiencing financial difficulties and that an application to liquidate the Company had been filed in the High Court at Christchurch.

[4] That liquidation application was the subject of a hearing in the High Court on 16 February 2009, the day before my investigation meeting was due to take place. That being the position, the question whether the investigation meeting would continue or not was very much up in the air until just before the investigation meeting was due to commence.

[5] Mr Thompson, the advocate for Mr Newble contacted Mr Peter Carroll by telephone immediately prior to the investigation meeting commencing to establish Mr Carroll's whereabouts and the fate of the liquidation proceedings. What Mr Carroll told Mr Thompson in that telephone discussion was helpfully passed to me by Mr Thompson; I am satisfied that what Mr Thompson told me of the conversation can be relied upon.

[6] Mr Thompson was told by Mr Carroll that the liquidation proceedings had not succeeded so the Company was not in liquidation but, despite Mr Thompson making it clear that the investigation meeting could not be rescheduled, Mr Carroll confirmed that he would not be attending on behalf of the Company.

[7] I am satisfied that the Company has had every reasonable opportunity to attend and explain its side of the story and has chosen affirmatively not to engage with the Authority's process. That being the position, I elected to proceed to take Mr Newble's evidence and to make a decision on the material and evidence available to me.

[8] Mr Newble told me that he had commenced his employment with the Company on 29 October 2007 and his job was to assist another employee in the operation of a machine known shortly as the CNC machine, which stands for Computer Numerical Control. Mr Newble told me that in effect this machine enabled a computer literate operator to design and produce benchtops from a variety of substances for the homewares market.

[9] The operator of this machine was Mr Venkatesh Munireddy. Mr Newble was supposed to understudy Mr Munireddy and to assist the latter in the firm's production. But there were communication difficulties between the two co-workers.

[10] Mr Newble told me that everybody in the factory had communication difficulties with Mr Munireddy and while I have no independent verification of that

statement, and nothing turns on its accuracy or otherwise, Mr Newble struck me as an honest and straightforward young man and I incline to accept his evidence.

[11] Mr Newble also told me that he had a background in the materials that were being used in the Company's operation whereas Mr Munireddy did not. While both the two co-workers were computer literate and trained to operate the CNC machine Mr Munireddy's previous work background was in metal fabrication and Mr Newble thought that difference might also have contributed to the tension between the two co-workers.

[12] In the final working week before the Christmas break in 2007, there was an altercation between the two co-workers that Mr Peter Carroll witnessed. The three men were discussing product off the machine and Mr Newble said that a particular item could not be sent to the customer in its present form. Mr Newble recalls Mr Munireddy mumbling something and, in frustration, Mr Newble made some reference to *monkeys*.

[13] Mr Newble told me (and I accept) that his intention in referring to *monkeys* was not a racial slur on Mr Munireddy but was in the context of a comment about Mr Munireddy's competence, not his colour. Mr Newble told me that his observation was in the *pay peanuts get monkeys* context not a racial slur on Mr Munireddy's skin colour.

[14] There was no response from the Company at the time (and as I mentioned Mr Carroll, one of the directors was physically present) nor was there any response for the balance of the working year. Mr Newble commenced work on 7 January and it was not until 11 January 2008 that the matter was raised again.

[15] In the meantime, Mr Newble had had a text message from Mr Carroll (which Mr Newble showed me on his cell phone) whereby Mr Carroll invited Mr Newble to come in to work and have a go on the CNC machine. Presumably the purport of this text was to encourage Mr Newble to learn more about how the machine operated without the ministrations of Mr Munireddy who of course was still on annual leave.

[16] On 11 January 2008 Mr Newble was summoned to a meeting with Mr Carroll and told that he was not communicating well with Mr Munireddy, told that lack of communication was bad for the business and on that basis that his employment would

not be continued, the Company purporting to rely upon a probationary period of employment.

Issues

[17] Three issues require examination:

- (a) The legal status of Mr Newble's employment;
- (b) What happened at the pre-Christmas discussion; and
- (c) Did the Company adopt a fair process?

What were the terms of Mr Newble's employment?

[18] The Company purport to rely upon a probationary period of employment in refusing to confirm Mr Newble's employment. This contention arises because by letter dated 18 October 2007 Mr Newble was offered employment by the Company on terms and conditions which are explicitly referred to as *draft*. The letter lists a number of terms of employment including *trial period three months*.

[19] However, Mr Newble gave me a copy of an employment agreement between himself and the Company which he had signed and dated 30 October 2007, that is twelve days after the offer letter just referred to. The employment agreement does not provide for a probationary period of employment at all. Nor does it have a position for the Company to sign. It proceeds on the basis that the Company is offering employment on these terms and conditions and by signing those terms and conditions in the appropriate place, I hold that Mr Newble has accepted that offer of employment on that basis. I am satisfied that this is indeed Mr Newble's contract of employment and that it is generated by the Company. It appears on what I take to be the Company's letterhead and I am in no doubt that it is the applicable employment agreement.

[20] It follows that any reliance on the probationary period of employment is misconceived.

What happened at the pre-Christmas altercation?

[21] I have only Mr Newble's evidence of this event and I have already recited what he told me in evidence.

[22] I thought Mr Newble a straightforward and honest young man and I have no reason to doubt what he told me.

[23] I think it likely that Mr Newble intended no offence in the remark that he made, but clearly, in the circumstances, the remark was ill advised and I told him so. In the context of a relationship that was already not going well, it can hardly be sound judgment for this young man to make an observation that could so easily be misconstrued.

[24] No doubt Mr Munireddy took offence; Mr Newble told me that Mr Carroll had said to him at the 11 January meeting that Mr Munireddy had met with Mr Carroll on a number of occasions to complain about the discussion.

[25] I am satisfied then that the offending word was spoken, that Mr Newble was ill advised to use that language and that in the circumstances of the case where two co-workers had communication difficulties, it was almost inevitable that Mr Munireddy would take offence, as he appears to have done.

Was the Company's procedure sound?

[26] I have little difficulty in reaching the conclusion that the Company's procedure in addressing the issue was completely unsatisfactory and unfair to Mr Newble.

[27] Mr Newble was summoned to a meeting, without warning, without being told that his employment might be in jeopardy, without being encouraged to obtain independent advice or a support person, and indeed without any of the usual protections that employment law properly requires.

[28] At the meeting itself, Mr Newble was given no opportunity to explain himself and indeed, on Mr Newble's evidence (which I accept) he had very little input at all into the meeting. Mr Newble says that he was told by Mr Carroll that he and Mr Munireddy were not communicating, that that was *too hard* on the business and that *due to outburst last year I am not renewing your contract*.

[29] Mr Newble is adamant that the reference to his *outburst* was the only reference made by Mr Carroll to the alleged racist remark. The remark itself was not referred to and Mr Newble says that he was not asked to explain himself.

[30] Indeed, it is clear from Mr Newble's recollection of events that nothing that he could have said at that meeting would have changed the course of proceedings. There was indeed no opportunity for Mr Newble to explain what he had said, nor was there any opportunity for him to put matters right within an agreed timeframe. The die was cast and Mr Newble was dismissed.

[31] Mr Newble heard no evidence during the subject meeting that Mr Carroll had conducted any inquiries; Mr Newble saw no statement from Mr Munireddy or any evidence at all that the employer had conducted a measured and thoughtful process. All the employer told Mr Newble was that Mr Munireddy had *come to him* several times complaining about the incident.

[32] It is interesting to compare Mr Newble's recollection of that meeting with email material generated by Mr Carroll in which he says that Mr Newble *racially abused a work colleague*. Given Mr Newble's evidence that Mr Carroll did not specifically mention the offending language and the fact that Mr Newble was at no stage given an opportunity to explain himself, it is difficult to escape the conclusion that the process adopted by the Company was fatally flawed. At the preliminary stage, Mr Newble was given no opportunity to obtain advice or be warned of the seriousness of the meeting, or the subject matter to be discussed at the meeting. During the meeting itself, Mr Newble was not given an opportunity to explain himself, offer apology or agree on a process by which matters could be put right. Mr Carroll appears not to have explicitly dealt with the issue that he says was important and rather to have skirted around it by talking about poor communication.

[33] In the end, and in the absence of any evidence from Mr Carroll, despite the clear opportunity for him to be involved, I have no difficulty in finding that the process used by the Company was unsatisfactory and flawed and that the decision to dismiss Mr Newble in those circumstances was not the decision that a fair and reasonable employer would have made in the circumstances that existed at the time the dismissal occurred.

[34] That conclusion is supported by the absence of evidence of any proper investigation to inform the decision making process.

Determination

[35] Because the matter was straightforward and I had a clear view on it after taking Mr Newble's evidence, I gave an indication of my conclusions at the end of the investigation meeting on the footing that a written determination would follow expanding the reasoning for the conclusions reached.

[36] Having concluded that Mr Newble has a personal grievance by reason of having been unjustifiably dismissed, it follows that Mr Newble is entitled to the consideration of remedies.

[37] The question of contribution must now be considered. Section 124 of the Employment Relations Act 2000 requires the Authority to consider whether a successful applicant has in any way contributed to the circumstances giving rise to the personal grievance. I reach the conclusion in the present case that Mr Newble has not contributed in any way to the existence of his personal grievance.

[38] That does not mean of course that the Authority is supportive of racist or uncharitable observations made by one employee to another. It is not. The issue in the present case is that I am satisfied that Mr Newble had no opportunity to explain himself. If Mr Newble had had that opportunity then the outcome might well have been different.

[39] To resolve Mr Newble's personal grievance I direct that Moda Pietra Limited is to pay to Mr Newble the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$5,000;
- (b) Reimbursement of the filing fee of \$70;
- (c) A contribution to lost wages in the sum of \$1,760.00 gross;
- (d) A contribution to legal costs in the sum of \$750.

James Crichton
Member of the Employment Relations Authority