

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 98
3134255

BETWEEN BENJAMIN NORRISS
Applicant

AND GUN CITY LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Robert Thompson, advocate for the Applicant
Penny Shaw, counsel for the Respondent

Investigation Meeting: 15 February 2022 at Christchurch

Submissions Received: On the day

Date of Determination: 18 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Benjamin Norriss commenced employment with Gun City Limited on 14 September 2020 as a salesperson. He says that he was unjustifiably dismissed from his employment when his employer maintained he had resigned when he had not resigned from his employment. Additional claims of unjustified actions causing disadvantage are absorbed into the unjustified dismissal claim.

[2] Mr Norriss seeks payment of compensation, reimbursement of a sum equal to the loss of his wages and costs.

[3] Gun City Limited (Gun City) is a duly incorporated company having its registered office in Christchurch and carrying on the business of firearm retailing. Gun City does not accept that Mr Norriss was unjustifiably dismissed but says that he resigned from his

employment and was not entitled to withdraw his resignation without the consent of Gun City, which was not forthcoming.

The issues

[4] The Authority needs to determine the following issues in this matter:

- (a) Was there a clear and unambiguous resignation from Mr Norriss?
- (b) If the resignation was not unequivocal did reliance on it amount to a dismissal in all the circumstances?
- (c) If there was a dismissal, then was it unjustified?
- (d) What remedies is Mr Norriss entitled to?

Was there a clear and unambiguous resignation?

[5] Mr Norriss was party to a written individual employment agreement which provided that either party could give notice for the period specified in the second schedule which was two weeks. There was no requirement in the employment agreement for the resignation to be in writing.

26 January 2021 – resignation?

[6] On 26 January 2021 Mr Norriss went to the manager's office area at Gun City. The only person in the office was Matthew Tipple who is the Managing Director of Gun City. Matthew Tipple said that Mr Norriss told him he had come to "hand in his resignation" however Mr Norriss said that he told Matthew Tipple he was "thinking about resigning."

[7] Matthew Tipple was surprised and asked why.

Difficulties with his manager M

[8] Mr Norriss explained to Matthew Tipple that he was experiencing difficulties with his floor manager who I shall call M and he had had enough of matters. He told Matthew Tipple about emails that she had sent to him that he was unhappy with. One he said was an email in which she had called him a liar. Matthew Tipple asked Mr Norriss to send him the emails from M that he was referring to.

Discussion about putting Mr Norriss elsewhere in the business

[9] Mr Norriss and Matthew Tipple recall discussing whether Mr Norriss could be placed elsewhere in the business. Mr Norriss said that he responded that he really enjoyed the sales role. Matthew Tipple could not recall Mr Norriss's response and whether he was agreeable or not to another role. He described the discussion about placement in another area of the business as "a passing comment."

A meeting with M and Mr Norriss?

[10] Mr Norriss understood Matthew Tipple would organise a meeting the following day between him, M and Matthew Tipple. He said that the meeting was to take place the following day at 2pm.

[11] Matthew Tipple's evidence about the meeting aspect differed. He recalled that he agreed to get back to Mr Norriss the following day but that there were two options. He would accept the resignation or organise a meeting if he thought there was a reason to do, so after he had looked at the information provided. He did not accept any time for the meeting, if there was to be one, was given.

Emails sent

[12] Mr Norriss sent copies of two emails from M that he was concerned about, to Matthew Tipple just after 6pm. He said in his email amongst other matters that he would talk to Matthew Tipple the next day and thanked him for taking the time to talk to him that day.

27 January 2021

[13] Matthew Tipple opened the emails from Mr Norriss and thought he spoke the morning of 27 January 2021 to M and senior floor manager, who I shall call C, about Mr Norriss. That would be consistent with the recollection of Mr Norriss that when he was at work on 27 January, he was aware that Matthew Tipple was meeting with C and M upstairs. Mr Norriss recalled that he started to feel uncomfortable. Matthew Tipple said in his discussions with M and C they confirmed that they had some issues with Mr Norriss but not serious matters that required formal performance measures. Matthew Tipple said that he spoke to the Executive Manager who advised that there was nowhere else in the business where Mr Norriss was needed.

David Tipple becomes involved

[14] Matthew Tipple also spoke to his father David Tipple (Mr Tipple) who is a director and majority shareholder in Gun City. Mr Tipple then said that he would talk to Mr Norriss about working out his notice period. Matthew Tipple said that Mr Tipple is the most experienced with staff issues such as resignation.

[15] Mr Tipple wanted to be sure that Mr Norriss had resigned before talking to him. He asked Matthew Tipple what Mr Norriss had said, and Matthew Tipple had advised that Mr Norriss stated, "I'm here to hand in my resignation" and Matthew Tipple told Mr Tipple that he was 100 percent clear that that was what Mr Norriss was doing.

Mr Tipple meets with Mr Norriss

[16] Mr Tipple had not had much contact with Mr Norriss. The day to day running of the business is mostly undertaken by the management team. He did recognise Mr Norriss by sight. Mr Norriss was having lunch and Mr Tipple asked Mr Norriss to come to his office after his lunch.

[17] Mr Norriss went to see Mr Tipple in his office as requested. I conclude from the evidence that a discussion of about five to ten minutes took place between 1.30 and 2pm.

[18] Mr Norriss said Mr Tipple advised him that as he had resigned, he would not be able to continue to serve customers in a face-to-face setting. Mr Tipple said that this is standard practice when a salesperson resigns that they are transferred to another department to work out their notice period. Mr Norriss said that he was "completely blindsided" by that comment. Two options were put to him, to work out the two weeks' notice carrying out different duties or leave immediately without being required to work out the notice period. The latter would not be paid. Mr Norriss was told he should go home and think about the options.

[19] Mr Tipple's written evidence was consistent with that of Mr Norriss' about the options for notice and suggestion that he should go home to think about what he wanted to do. Additionally, the written evidence stated that he told Mr Norriss at the outset that he had heard of his resignation and that unfortunately there was no other role for him.

[20] In his oral evidence Mr Tipple said that the first thing he said to Mr Norriss was “we are accepting your resignation.” He said that Mr Norriss nodded and then the discussion took place about notice.

[21] I could not be satisfied to the required standard that Mr Norriss nodded, although he did not tell Mr Tipple that he had not resigned. When questioned about this Mr Norriss said that he didn’t know what to say, wanted to leave and think about it and that Mr Tipple wanted him to leave.

[22] Mr Tipple said that employees who are not happy can have a negative impact on service and business. He said that once an employee is unsettled, he would rather “close the wound” and it was safer to accept a resignation.

[23] Mr Tipple asked Matthew Tipple to confirm in writing to Mr Norriss that they were processing the resignation.

[24] Matthew Tipple sent Mr Norriss an email at 2.00 pm advising as follows:

Hi Ben,

I regretfully accept your resignation, thanks for your help at Gun City. If you would like to leave before the normal notice requirement please let me know and I will try to make that possible.

[25] Mr Norriss could not recall where he was when he received that email however he responded at 3.06 pm to Matthew Tipple as follows:

Hi Matt,

In this email you have sent you accepted my resignation and I’ve been sent home.

Just to let you know I haven’t actually resigned.

Yesterday in my conversation with you I voiced my concerns about the emails and conversations I was having with M. I understood we would be having a meeting today to resolve the issues I was concerned about.

I intend to come back to work in my sales role tomorrow. Please advise if that isn’t okay.

[26] Matthew Tipple said that he was very surprised to receive the email and forwarded it to Mr Tipple for a response.

[27] Mr Norriss then received an email from Mr Tipple at 3.54pm that stated as follows:

Ben,

Your words to Matt were, "I am here to give you my resignation."

When I spoke with you at lunchtime you were clear that you had resigned and the only thing to consider was whether you wished to work out your two weeks' notice or leave as at the end of today.

Please let me know as soon as possible which one of these two options we discussed, you have chosen?

We are happy to release you from the notice requirement as discussed and you accepted that if you chose to serve out the notice it would be in a non-sales role as "We do not want someone who's resigned forming relationships with customers."

I look forward to hearing from you before work commencement tomorrow at your rostered time.....

28 January 2021

[28] On 28 January 2021 Mr Norriss sent an email to Mr Tipple at 9.56am that provided as follows:

I have received your email and trying to figure out how this happened. I went Matt to complain about my working relationship with M and said that I wanted to leave as it was so difficult. I spoke to Matt and said I wanted to resign as I was very frustrated with the situation and didn't know how to fix the problem.

I never said at lunchtime with you that I was resigning, I thought there would be a meeting to fix the problems.

I have been sent home and told not to come back on the basis that you think I have resigned. Again I have not resigned and we should just have the original meeting to fix my concerns over M and the work environment.

[29] Mr Tipple sent an email by response at 12.05 pm:

I'm sorry Ben you clearly resigned to both me and Matt.

Let me know the answer to working out your notice or not please?

[30] Mr Norriss did not respond as to whether he was working out his notice or not and commenced a new role on 8 February 2021.

[31] A grievance was raised on 4 February 2021 that Mr Norriss had been unjustifiably dismissed and disadvantaged.

[32] Gun City place reliance on two other matters to support Mr Norriss resigned. The first is that he had a job interview on 27 January 2021. Mr Norriss described that as an "insurance

policy.” He said that he would have rather stayed at Gun City and an email from his new employer supports that he did not accept the offer of the new role until 2 February 2021.

[33] The second is text messages to another employee who got on well with Mr Norriss, dated 26 January 2021. Mr Norriss advised the other employee that he had had a chat with Matthew Tipple that went “pretty well.” The other employee asked what he talked to Matthew Tipple about. The text response from Mr Norriss was:

Told him I’m handing in my notice. He offered me a job elsewhere in the business. Said he’s only heard good things and doesn’t want me to leave.

So I told him what my problem was and he wants to have a meeting with me and M tomorrow.

[34] The employee asked “What job.” The Authority was not provided with the response.

[35] Mr Norriss said about the text messages that he sent them without thinking and did not use the correct words.

[36] Mr Norriss’ wife and father when questioned said that Mr Norriss had discussed resigning because of his difficulties at work with M but that he loved his role at Gun City. Both recalled in their evidence that he seemed happy after his discussion with Matthew Tipple and hopeful that his concerns may be resolved.

Conclusion about whether there was a clear and unequivocal resignation

[37] Ms Shaw submits that Mr Norriss unequivocally resigned on 26 January 2021 and as such he could not withdraw his resignation except with the consent of his employer. That is the position where a resignation is clear and unambiguous, although it would be consistent with statutory good faith obligations for an employer to consider a request for a withdrawal of a resignation.

[38] There is a dispute as to what was said on 26 January 2021. Matthew Tipple said he was told by Mr Norriss “I am here to hand in my resignation.” The text message Mr Norriss sent to a friend is not inconsistent with that. Mr Norriss does not deny using the word resignation when he met with Matthew Tipple but says that what was said was in the context of thinking of resigning because of difficulties he was having with M. His email of 28 January 2021 to Mr Tipple stated he told Matthew Tipple he wanted to resign because of the difficulties with his working relationship with M.

[39] The conversation did not end there. Matthew Tipple sensibly agreed to investigate any difficulties and issues in the working relationship with M. Mr Norriss sent him two emails from M. One had been sent by M to Mr Norriss on Friday 22 January 2021. Mr Norriss had worked that day and the Saturday but had Sunday and Monday off work. The second email was one M sent on Monday 25 January 2021. Mr Norriss indicated in his email that found it “hard to hear” a statement in the first of the emails that “he had lied or was not undertaking the basics.”

[40] Matthew Tipple knew from what was said that Mr Norriss in part was reacting to an email from M that he considered accused him of lying. The evidence supported a sense of relief on Mr Norriss’ part when Matthew Tipple said he would investigate the concerns including looking at the emails of concern. Mr Norriss thanked Matthew Tipple for taking the time to talk to him in his email later that day and stated that he would talk to him the next day.

[41] Matthew Tipple said that Mr Norriss did not mention his resignation was only an interim decision or that he may change his mind during the discussion. As Ms Shaw submits, in his written evidence Mr Norriss states that “maybe he shouldn’t have bluffed to resign” but that he felt he had to encourage something to happen about his working relationship. It is likely he did not carefully consider what words he used.

[42] Even if there were words of resignation or an intention to resign at the start of the discussion on 26 January 2021 there was a lack of clarity as to whether Mr Norriss still intended to resign and end the employment relationship at the end of the discussion.

[43] A process had been discussed. Mr Norriss was happy with Matthew Tipple considering the emails of concern and meeting the following day to try to resolve the working relationship difficulties. The expectation that there would be a meeting is recorded in the text messages Mr Norriss sent to his friend on 26 January 2021 and his emails to Matthew Tipple and Mr Tipple on 27 and 28 January 2021. In the email sent after the discussion on 26 January 2021 to Matthew Tipple, attaching the emails from M, there is no mention of resignation.

[44] I am not satisfied that the resignation was unequivocal and could be safely relied on by Gun City in those circumstances without further communication.

[45] There was an obligation on Mr Norriss to correct any incorrect view of Gun City that he had resigned. Mr Norriss did not tell Mr Tipple he had not resigned at the meeting with him

the following day although I am not satisfied that he confirmed that he had resigned. A little over an hour following the meeting with Mr Tipple, Mr Norriss confirmed in writing that he had not resigned and that he expected to have a meeting. He reinforced his view that he had not resigned in a further email on 28 January to Mr Tipple and asked for the meeting. It could not be said that he stood passively by.¹

Did reliance on the resignation amount to a dismissal?

[46] Parties in an employment relationship are obliged to deal with each other in good faith. In particular s4(1A)(b) of the Act is relevant and provides good faith obligations as follows:

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are among other things, responsive and communicative; and...

[47] Ms Shaw submits that a breach of good faith had not been set out as a separate problem in the statement of problem. It is not always necessary to have a separate employment relationship problem that the conduct in which relief is sought involves a failure to act in good faith.² That is because obligations of good faith are overarching and qualify the way employment relationship interactions are undertaken.

[48] Ms Shaw submits that good faith obligations were met by speaking to M to consider whether the concerns were well founded and considering whether there were other options for employment. I am not satisfied that good faith obligations were met in that way. A fair and reasonable employer could and should have communicated further when Mr Norriss said he had not resigned and wanted to meet and try to resolve his employment relationship issues. That was in line with what he understood Matthew Tipple had proposed. Had that occurred then the employment relationship could have been maintained. Instead, Gun City maintained its position that Mr Norriss had resigned in circumstances where it was not safe to rely on the words used and where Mr Norriss had made it clear that he had not resigned. The termination of the relationship was at the initiative of Gun City, prevented any ability for Mr Norriss to continue in his employment and amounted to a dismissal.

¹ *Sadd v Iwi Transition Agency* [1991] ERNZ 438.

² *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 2339.

If there was a dismissal, then was it unjustified?

[49] The test in s 103A is to be applied. Mr Norriss' dismissal objectively assessed was not justifiable and not in accordance with good faith obligations. His resignation was unequivocal. He was treated against his will as having resigned and his request for a meeting along the lines previously discussed was not agreed to. There was no evidence of any conduct that could have justified dismissal. There was no fair process and Mr Norriss was not heard before dismissal.

[50] The dismissal was not what a fair and reasonable employer could have done in all the circumstances.

[51] Mr Norriss was unjustifiably dismissed from his employment. He has made out his grievance of unjustified dismissal and is entitled to consideration of his claim for remedies.

Remedies*Lost wages*

[52] Lost wages are claimed for the period from dismissal until Mr Norriss obtained new employment on 9 February 2021. I remain unclear from the records provided if there was payment for 28 January 2021. I have calculated taking that day into account, there are eight working days including one public holiday that falls on what would otherwise have been a working day from 28 January to 9 February 2021, when Mr Norriss started his new role.

[53] Mr Norriss said that he averaged 40 hours per week and was paid \$22 per hour. That is a weekly amount of \$880 gross which divided by five days is \$176 gross. Lost wages are \$176 multiplied by eight days which is \$1,408 gross. Subject to any issues of contribution that is the amount for reimbursement of lost wages. If there are issues with the calculation and the matter cannot be resolved between the representatives, then either party can return to the Authority within five working days.

Compensation

[54] Whilst Mr Norriss was successful in obtaining a new job, he said that he would rather have stayed with Gun City. I accept that he enjoyed his role there. I note that Mr Norriss did not accept the offer of employment for his new role until 2 February 2021. I find the impact of dismissal on Mr Norriss was quite significant notwithstanding that he obtained a new job

promptly. He felt embarrassed and it knocked his confidence. He referred to anxiety, bad dreams and reliving the situation wondering if he could have done anything differently. He was also concerned and anxious about what had been said to Matthew Tipple by M and C. Mr Norriss said that he finds it hard to trust managers after what occurred. Mr Norriss' wife confirmed that he was happy after his meeting on 26 January that his work concerns would be addressed and following the dismissal he became less confident and more anxious and was not as happy as he had been previously. Mr Norriss' father also confirmed that Mr Norriss does not often seem happy since his dismissal and seems more anxious and down. A medical certificate was provided to support anxiety that required medication. I accept as Ms Shaw submits this was self-reporting and the date on the certificate for the date of dismissal is wrong. There is other evidence however to support the anxiety and I do not need to rely on the medical certificate to any significant extent.

[55] I conclude that subject to any issue of contribution an appropriate award for compensation weighing all matters including the obtaining of other employment within a short period, is \$12,000.

Contribution

[56] I do not find that Mr Norriss contributed in a blameworthy manner to his dismissal and I make no reduction to the awards made above.

Orders made

[57] Gun City Limited is ordered to pay to Benjamin Norriss the following amounts

- a) The sum of \$1,408 gross being reimbursement of lost wages under s 123(1)(b) of the Act.
- b) The sum of \$12,000 without deduction being compensation under s 123(1)(c) of the Act.

Costs

[58] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do so Mr Norriss may lodge and serve a memorandum on costs within 14 days from the date of this determination and Gun City Limited will have 14

days to lodge any memorandum in reply. Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[59] The parties could expect the Authority to apply its usual daily rate adjusted to reflect the time for investigation unless there are other circumstances that require an adjustment of that rate.

Helen Doyle

Member of the Employment Relations Authority