IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 172/09
File Number: 5147389

	BETWEEN	Shanan Rochfort Applicant
	AND	MVT Services Limited First Respondent
	AND	Mike Tobin Second Respondent
Member of Authority:	Denis Asher	
Representatives:	Jessica Greville for Mr Rochfort Mike Tobin represented the Company and himself	
Investigation Meeting	Napier, 28 October 2009	
Submissions Received	By 3 November 2009	
Determination:	5 November 2009	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Rochfort justifiably or unjustifiably dismissed by his employer, the Company? If he was unjustifiably dismissed, is he entitled to any lost wages and compensation for humiliation? And, were there also breaches of his

employment agreement, the Wages Protection Act 1983 and the Employment Relations Act 2000 (the Act)? If so, are penalties appropriate?

Background

[2] As reflected by his employment agreement, Mr Rochfort commenced seasonal employment as a fruit picker with the Company in November 2008: he says he worked from early November 2008 for a 6-week period before his termination on Saturday 13 December 2008. The Company's director, Mr Mike Tobin, says the applicant worked from 27 November.

[3] Mr Rochfort says he was dismissed shortly after turning up for work; Mr Tobin says he dismissed the applicant at the end of the working day for serious misconduct because, in reliance on earlier warnings, he smelt of marijuana and alcohol.

[4] During the Authority's investigation Mr Tobin agreed he did not pay Mr Rochfort's final wages into his bank account in the usual manner, but – so as *"to be a pain in the butt"* (oral admission) – required instead that the applicant approach him and uplift a cheque. Mr Tobin also admitted to deliberately withholding wages and time records relating to Mr Rochfort.

Discussion

[5] Because Mr Tobin agrees he dismissed the applicant, the applicable test is that set out at s. 103A of the Act: the question of whether a dismissal was justified must be determined on an objective basis by considering whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances at the time.

[6] Credibility findings, by way of conclusions based on balance of probabilities findings, are required in this instance because of the competing claims advanced by Mr Rochfort and those of Mr Tobin. The latter claims he warned Mr Rochfort on several occasions about smoking marijuana during working hours, for turning up to work smelling of alcohol and marijuana, and that he

raised concerns about the applicant's work performance because of the apparent effects of these drugs. Mr Rochfort denies the allegations and says his dismissal came as a complete surprise.

Findings

[7] I prefer Mr Rochfort's account of his dismissal for the following reasons.

[8] In respect of serious misconduct, the employment agreement between the applicant and the Company provides verbatim at clause 3.3 as follows:

Instant dismissal shall be for serious misconduct. No tolerance for drug related incidents.

[9] In his oral evidence Mr Tobin said that the grounds for Mr Rochfort's dismissal was, *"use of drugs and alcohol; turning up for work drunk or intoxicated"*. He said that on 29 November, 3 workers – including the applicant – were caught by his son, smoking marijuana. Mr Tobin's evidence was that he approached all 3 and said, *"Don't do it again or you'll be down the road"*.

[10] Mr Tobin said the next incident was on 1 December, when the applicant reported for work, *"smelling like a brewery; he had difficulty doing duties because of his drinking"*.

[11] A further warning was issued on 4 December, according to Mr Tobin, because the applicant smelt of marijuana and he *"again had red eyes"*. He told the applicant, 'don't do it again'.

[12] Mr Tobin said that on 5 December Mr Rochfort again smelt of marijuana and alcohol, and he issued another warning, but it was *"very hard to prove these things"*.

[13] Mr Tobin said that, on 9 December the applicant *"was so drunk it was unbelievable"*, and that the smell of alcohol was *"overpowering"*.

Notwithstanding the applicant's claimed condition, and while giving him another warning, Mr Tobin put him to work.

[14] Mr Tobin says that on 13 December, after talking with Mr Rochfort and asking had he seen a doctor the previous day (because of health issues discussed on 11 December), *"later that day I could smell alcohol. I told him then this is your last day, Shanan, you've had more than enough warnings"*, and that late in the afternoon he dismissed the applicant.

[15] Mr Tobin denies the applicant's allegations that he dismissed under different circumstances at the start of the day, and that he swore at the applicant and told him to f-off.

[16] I do not find credible that an employer who sets out in an employment agreement that there will be no tolerance for drug related incidents would indulge serial serious misconduct, in this case on at least five separate occasions.

[17] I do not find it probable that Mr Tobin would have work for the Company an employee he categorised as 'so drunk it was unbelievable'. That is because, were Mr Rochfort in that condition, he would not have been productive and would have been a serious health and safety risk as well as a very destructive example to other workers.

[18] I do not accept it likely that, given 5 earlier serious misconduct warnings, the same employer would permit a repeat offender to work out the day before dismissing him.

[19] Mr Tobin's claims are not aided by the absence of any directly supporting documentation and witnesses to his claimed warnings of Mr Rochfort.

[20] Mr Tobin's overall credibility is severely undermined by his admitted actions of deliberately not paying Mr Rochfort's final pay into his bank account in breach of clause 3.4 of the parties' employment agreement that provides for

payment of wages *"… by direct credit only"*, so as *"to be a pain in the butt"* (above).

[21] Mr Tobin could give no coherent explanation for his and the Company's failure to respond promptly to the request for Mr Rochfort's time and wages record: his actions leave a compelling impression that he has been less than forthcoming in describing his interaction with Mr Rochfort. He candidly admits he saw fit to deliberately frustrate the applicant's legitimate entitlements.

[22] These were not the actions of a fair and reasonable employer, objectively measured, in all the circumstances at the time and I am therefore satisfied Mr Rochfort was unjustifiably dismissed.

Penalties

[23] Mr Rochfort seeks the maximum penalties against the Company and Mr Tobin in respect of failing to pay his final wages (per the Wages Protection Act 1983) and wage and time records as requested (s. 130 of the Act).

[24] Mr Tobin has admitted the first breach (he withheld final payment so as *"to be a pain in the butt"* (above)). It is a clear breach of the parties' employment agreement and the Wages Protection Act. As for the second, which is also admitted, the Authority's file records Mr Tobin providing the timesheets as late as 17 September 2009). It is a clear breach of s. 130 (2) of the Act.

[25] I accept the applicant's submissions on these breaches: as stated in *Xu* v *McIntosh* [2004] 2 ERNZ 448, and by application of s. 133 of the Act:

> *A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned?*
>
> (par 47)

[26] The next question:

> … *focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.*
>
> (par 48)

[27] In light of the above, and in particular Mr Tobin's motives and his control of the Company, I am satisfied the respondents wilfully breached the Act and penalties of $500 and $1000 should be applied against them respectively, all of which is to be paid to the applicant.

Remedies

[28] Mr Rochfort seeks compensation for humiliation of $9,000. He presented clear evidence of the distress and consequences occasioned him by his unjustified dismissal and, after proper regard to that evidence, I am satisfied compensation of $6,000 is appropriate.

[29] Mr Rochfort seeks lost wages for the period 14 December 2008 until 5 January 2009 when he found fresh, seasonal work, i.e. a total of $1,283.00 gross (calculated by multiplying the applicant's average wage by 3 weeks).

[30] He also claims lost wages from 24 May 2009 until the date of the Authority's investigation.

[31] I reject the latter aspect of Mr Rochfort's claim. That is because the applicant's employment with the Company was clearly seasonal, i.e. his employment was subject to a fixed term and I can see no basis for the implied claim Mr Rochfort's employment would have continued up to the date of the investigation.

[32] While I have no evidence as to the length of the 2008/09 season I have no reason, in all the circumstances, to order compensation of wages lost outside of the 3-month period provided by s.s. 128 (2) of the Act.

Contribution

[33] By his own account Mr Rochfort was dismissed for lying (having given an account to Mr Tobin for the absence of another worker which the latter subsequently found out to be not true).

[34] Having accepted his version of events in preference to Mr Tobin's it follows that, as his – the applicant's – actions were not those of a good employee and by any fair and reasonable test would have resulted in disciplinary action. Mr Rochfort thereby contributed toward the situation that gave rise to his successful personal grievance.

[35] I am satisfied those actions require a substantial reduction of the remedies that would otherwise have been awarded and therefore reduce the compensation payable for humiliation, but not the wages or penalties, by 50%.

Determination

[39] I find in favour of Mr Rochfort's claim that he was unjustifiably dismissed and direct payment of the following sums:

a. The Company is to pay to the applicant compensation for humiliation of $3,000 (three thousand dollars) being a 50% reduction of the award set out above; and

b. The Company is also to pay to the applicant lost wages totalling $1,283 (one thousand, two hundred and eighty three dollars); and

c. Penalties of $1,000 (one thousand dollars) and $500 (five hundred dollars) to be paid respectively by the Company and its director, Mr Tobin, to the applicant.

[40] As requested, costs are reserved. As indicated to the parties, costs typically follow the event: subject to their submissions, an award of $3,000 as a fair and reasonable contribution to the applicant's costs will be the Authority's starting point in this largely conventional grievance.

Denis Asher
Member of the Employment Relations Authority