Determination Number: AA286/06
File Number: 5034315

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE

BETWEEN	Kevan Salisbury
AND	Moncur Engineering Ltd
REPRESENTATIVES	Clive Bennett for Applicant Roger & Angela Moncur for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	23 August 2006
DATE OF DETERMINATION	12 September 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant submits he was unjustifiably dismissed from his employment with the respondent. To remedy his alleged grievance the applicant claims lost remuneration and compensation pursuant to s.123 (1)(c)(i).

The respondent denies the claim and submits the applicant was justifiably dismissed for poor performance.

The company counterclaims for costs incurred by it in remedying work undertaken by Mr Salisbury.

Background

The respondent is engaged in the engineering business and a large proportion of its business involves assembly and painting of cranes.

The applicant commenced permanent employment with the respondent on 6 June 2005. He was employed as a labourer/trades assistant. His job description describes his role:

Assisting staff where required in heavy engineering, grinding, buffing, painting and welding work, assisting with gas bottles, moving gear, etc.

He was also responsible for cleaning up chores and keeping areas tidy.

As I understand the evidence the applicant was initially engaged in assembling cranes. His performance in the early stages of his employment was satisfactory. However, this changed after Mr Salisbury was directed to paint the assembled cranes and from August 2005 the applicant's

performance deteriorated markedly. The foreman Ray Newton him as *"having a bit of a meltdown"* and a director of the company, Paul Moncur said "*he fell apart about three months prior to his dismissal"*. In particular his painting work – despite training/assistance and supervision - suffered a serious reversal in quality and the company incurred significant cost in remedying some paint jobs undertaken by Mr Salisbury.

On 28 September, Mr Newton undertook an employment review with Mr Salisbury. Mr Salisbury was asked to assess his performance on a number of criteria/tasks. Mr Newton also assessed Mr Salisbury's performance in respect of the same criteria/tasks and the two men discussed the outcome. It is noted Mr Salisbury assessed his own performance as average and below average on a number of criteria.

Mr Newton recorded the following comments at end of the assessment form. His evidence was that he spelt these matters out to Mr Salisbury at the time.

> *"Kevan has mentioned he does not know safety rules. Gave him another safety handbook. Also told him to open his eyes and look at safety hazard board in workshop. He also mentions training. I asked him to identify these areas to me – he said 'crane assembly' – I replied there was nothing left to show him as he had probably built 20+ cranes. Duh! Told him to organise his workload better. Do one job at a time and complete it. Pay attention to work instructions given by myself. Stop stuffing up or there will be no place for him here. Ray".*

The next day Mr Salisbury was painting a crane. Mr Moncur saw the work he was doing and was dissatisfied with the quality of the job. Mr Salisbury was directed to stop painting, to wrap up and find something else to do.

Mr Moncur, Mr Newton and another senior employee (Peter Wilson) then had a conversation about Mr Salisbury's performance and ongoing employment. That meeting lasted about an hour. At the end of the meeting Mr Newton met with Mr Salisbury. The two disagree as to what was said between them. Mr Newton's evidence was that after he left the meeting Mr Salisbury approached him and asked if his *"job was safe"*. Mr Newton said *"honestly…. if you can't come in tomorrow and paint that crane there's no job for you"*. Mr Salisbury denies this conversation.

The following day Mr Salisbury commenced a period of sick leave. His wife faxed a medical certificate to the company, which advised that he was unfit for work and could resume work on 10 October.

The same day Mr Newton was consulting with Luke Moncur (son of Paul and Angela) and Peter Wilson. A conversation took place between Luke and Angela and Angela (who was not present in the workplace at the time) was trying to come to grips with the issues. She prepared two letters – a warning letter and a dismissal letter - with the view that the appropriate letter be given to Mr Salisbury[1]. In the event only the dismissal letter was received by Mr Newton at the business and he signed it and it was sent out to Mr Salisbury. It reads (in part):

> *"The quality and workmanship in your tasks and duties has not improved over the last 3 months where instructions have not been followed, not listening effectively to your peers and not using the skills shown to you, I have given you several verbal cautions with no improvement.*

[1] The plan was that the warning letter would have been given to Mr Salisbury if he had not been formally warned previously in relation to his performance. Otherwise it was considered it would be appropriate to issue the dismissal letter.

This is not a situation that we will accept as it continually causes costly disruption to our planned works.

As you are due for a review and in light of the warnings you have received we hereby provide you one weeks notice to terminate your employment with our company".

Position of the Parties

The applicant submits that the advertisement he responded to did not mention painting. When he was asked to do painting he told them he did not want to paint and had no experience in this field. He submits he was made to do this task in inadequate facilities - poor lighting and no ventilation, no climate control for moisture and very little training. He did however acknowledge that his IEA contained a job description that included painting as a task that was expected of him.
It was also his submission he was provided with insufficient training and support throughout his employment. He was constantly directed to one job by his foreman only to then be redirected by other employees to other tasks. As a result he quickly became overburdened.

Nevertheless it was Mr Salisbury's position that he was frequently told he was doing a great job and after 3 months he was given a $2 per hour wage increase.

Mr Salisbury's evidence was that he completed the self-assessment in the performance review and answered it honestly. He made a point of recording the fact there had been a lack of training (particularly in respect of painting cranes). He felt otherwise that he was performing to the best of his ability and was often told this was appreciated by management.

Mr Salisbury submitted that when he received his termination letter it was the first time that he knew about Moncur being unhappy with his performance. Even after his performance review *"nothing untoward was talked about"* and he was given no indication his job was on the line.

The respondent's witnesses described a chapter of performance problems that dogged Mr Salisbury's employment from August 2005 including the fact that he lost a truckload of J-track on the motorway (when it was his responsibility to check the load) and the fact that he disappeared for hours after having been sent back to the workshop for more J-track[2]. Instead of returning with a second load of track Mr Salisbury, in contravention of the instruction given to him, had gone to have a warrant check[3] carried out on the company truck. He returned to the site hours later – without the J-track to inform the foreman that the truck had failed its warrant. The company witnesses described the botched paint jobs undertaken by Mr Salisbury and the costly remedial work that had to be undertaken to present cranes at the required quality level.

It was the company's position that Mr Salisbury was provided with hours of training, support, assistance and supervision to bring him to the level of performance required. Initially his performance was satisfactory and the company had hopes that he could progress to the position where he could carry out onsite maintenance work on cranes sold by the company. In response to his repeated requests and in an effort to encourage Mr Salisbury and to lift his confidence and performance he was given pay increase. However, Mr Salisbury's performance deteriorated markedly from August 2005. He would frequently refer his botch-ups to Mr Newton and inquire whether his job was safe.

[2] Required to complete a job on site.
[3] A secondary job assigned to Mr Salisbury that day.

After a day on site where Mr Salisbury and Mr Newton worked on a crane maintenance job, Mr Newton formed the view that Mr Salisbury would never progress to undertaking this work alone. It was this that prompted the performance review, which was talked through afterwards. The next day Mr Moncur saw Mr Salisbury making a very poor job of painting a crane and directed that he stop that work and get on with something else. There was a meeting between Mr Newton, Mr Moncur and Mr Wilson with a view to identifying work that Mr Salisbury could do. They concluded they had no other work they could employ Mr Salisbury on and that they could not pay someone $17 per hour to sweep floors. After that meeting Mr Newton met with Mr Salisbury who was concerned about his job. Mr Newton told him that if he could not come in and paint the crane the next day then there would be no work for him.

The next day Mr Salisbury commenced a period of sick leave. Following discussions it was decided to dismiss him. A letter of dismissal was prepared and sent out.

The Moncurs accept that the process adopted in terminating Mr Salisbury's employment was deficient. However, they ask the Authority to compensate them for the cost of time and remedial work undertaken to put right botched work undertaken by Mr Salisbury.

Legal Considerations

The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

> ***103A Test of justification***
> For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The test is the same whatever the reason for the dismissal be it misconduct or poor performance. In deciding the matter I must make an objective assessment of the employer's actions and weigh those actions against those of **a *fair and reasonable employer …in all the circumstances …at the time….***

The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

At paragraph 144 the Court said in respect of the case before it:

> *"The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her".*

The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in the circumstances.

I note too that this is a dismissal which is alleged to have come about as a result of the applicant's poor performance. The most comprehensive statement principles of applicable in situations where poor performance is alleged is that set out in *Trotter v Telecom Corporation of New Z*ealand [1993] 2 ERNZ 659. These principles are summarised in the head note to that case and are attached as Appendix A. In brief where poor performance is an issue such that it could jeopardise an employee's continued employment the law is clear that the respondent must take a careful and structured approach to assisting the worker to raise their performance. The emphasis should always be on raising the performance and avoiding disciplinary outcomes.

Findings

I find that Mr Salisbury was a conscientious employee and a likeable person. He wanted to do well in his position. He was well regarded and the company had hopes for a long and happy relationship.

Mr Salisbury was I find engaged as a labourer/trades assistant. Whilst the job advertisement did not include reference to painting Mr Salisbury was well aware when he commenced his employment that painting was a job included in his job description.

I find that Mr Salisbury was provided with extensive training support and assistance to a level consistent with the performance that would be expected of a labourer/trades assistant.

In the initial period of his employment Mr Salisbury's performance was, I find, satisfactory.

I find, however, that Mr Salisbury's performance did deteriorate dramatically from August 2005. The evidence does not identify a reason for this. I find too that Mr Salisbury was well aware that he was making mistakes in his work and that, from time to time, he sought confirmation from Mr Newton regarding the security of his employment.

I note that Mr Salisbury's employment agreement provided for a probationary period of "about' three months. In *Nelson Air v NZAPA* [1994] 2 ERNZ 665 CA the Court of Appeal said:

> ***"Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings, to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end".***

I find the probationary period had expired by the end of September 2006 and by virtue of the expiry of that period Mr Salisbury was entitled to consider himself to be a permanent employee. I note it only to find that this was a case where the respondent should have been alert to the probationary nature of the employment and should (in reliance on Clause 16 of the IEA) have addressed, in a formal manner, the performance issues that were apparent from August 2005 onwards. In this way the employer could have focussed on the lifting of Mr Salisbury's performance so that his

employment could either be confirmed in early September 2005 or (with him having been put on prior notice that if his poor performance did not improve that his employment would be terminated) terminated for poor performance.

While I accept that Mr Salisbury was provided with training, support and assistance to lift his performance, it was not part of a consistent approach to his poor performance in that it did not formally identify the deficiencies in Mr Salisbury's performance put him on notice of the specific deficiencies, set objective measurable standards of performance and give him an identifiable and reasonable time to show improvement. As noted, this should have been accompanied by a clear statement that if Mr Salisbury's employment would be in jeopardy if he could not demonstrate an improvement in his performance.

Conclusion

I find that the respondent had all the contractual tools necessary to address the shortcomings in Mr Salisbury's performance. Instead of using those tools the respondent took no structured and fair approach to the emerging performance problems and indeed sent some very confusing messages to Mr Salisbury e.g. giving him a pay rise. Further, after Mr Salisbury went on sick leave from 30 September he was summarily dismissed without a vestige of a fair process – notice of concerns, right to representation and an opportunity to be heard prior to the decision to dismiss him.

The respondent's actions were not those of a fair and reasonable employer.

Determination

Mr Salisbury was unjustifiably dismissed from his employment and he has a personal grievance against his former employer Moncur Engineering Ltd.

Remedies

Lost Remuneration

Mr Salisbury was out of work until 10 November when he commenced employment at a lower hourly rate.

In setting lost remuneration in this matter I have had regard to the totality of Mr Salisbury's employment and the performance deficiencies which – despite the training and assistance given to him - became entrenched in as far as his painting was concerned. Mr Salisbury had, I find, an unusual aversion to painting and I find that in all probability his performance would never improve to the extent he could consistently deliver a quality paint job.

This of course was one of the requirements of Mr Salisbury's job description and this business did not, I find, have other work to which it could transfer Mr Salisbury with confidence.

I have also had regard to the findings of the Court of Appeal in *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315. In all the circumstances of this case I find that had the respondent followed a structured and fair process in addressing and lifting Mr Salisbury's performance problems it would remain highly probable that the employment would nevertheless have been justifiably terminated by the end of October 2005.

Given this I am setting lost remuneration at three weeks pay based on Mr Salisbury's average weekly hours of 45 per week.

Therefore, I direct the respondent to pay to the worker the sum of $2,295 gross in lost remuneration.

Compensation pursuant to s.123(1)(c)(i)

The manner of Mr Salisbury's dismissal was profoundly unfair and I accept it had a seriously effect on him. On the other hand the employment was a relatively short one.

In all the circumstances I direct the respondent to pay to the applicant the sum of $4000 net to compensate him under this head.

Costs

The applicant is entitled to costs in the matter. The hearing occupied a little over half a day and I set reasonable costs in the sum of $1000.

The respondent is directed to pay $1000 net to the Mr Salisbury to compensate him for the costs incurred by him in bringing the matter to the Authority.

Counterclaim

The respondent seeks the sum of $3,367 from the applicant to compensate for lost time and remedial work undertaken to put right mistakes made by Mr Salisbury.

There is no evidence to suggest that Mr Salisbury acted deliberately or that he was grossly negligent in his work practice. His was a problem of poor performance. The remedy for this lay in the respondent's own hands via reliance on the probationary provisions in the employment agreement.

No award against the applicant is warranted and the claim is declined.

Janet Scott
Member of Employment Relations Authority