

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 138/08
5117564

BETWEEN NATHAN SCOTT
 Applicant

AND GORRIE FUELS (SI)
 LIMITED
 Respondent

Member of Authority: P Cheyne

Representatives: Nathan Scott in person
 Don Gorrie, representative for Respondent

Investigation Meeting: 9 September 2008 at Christchurch

Determination: 18 September 2008

DETERMINATION OF THE AUTHORITY

[1] Nathan Scott worked for Gorrie Fuels (SI) Limited for a short period then gave notice of resignation. Part way through the notice period he was suspended without pay then dismissed for serious misconduct. Mr Scott was not paid for the last few days he worked, nor was he paid holiday pay. Mr Scott referred the issues about arrears and a grievance to the Authority by lodging a statement of problem. In response Gorrie Fuels denied any grievance but said nothing about the wages or holiday pay.

[2] Mediation did not resolve the problem.

[3] There are few relevant factual disputes. To determine the grievance I must explain the sequence of events and apply the law relating to justification for a dismissal. It is convenient to deal first with the arrears and holiday pay point because Gorrie Fuels acknowledged during the investigation meeting that an amount remains owing.

Arrears

[4] Mr Gorrie told me that Mr Scott worked 42¼ hours but was not paid. That is also Mr Scott's evidence. The rate of pay was \$11.50 per hour so the amount owed is \$485.88 (gross). Including the arrears, Mr Scott's total gross earnings were \$1,152.88 so he should have been paid \$92.23 in holiday pay.

[5] Mr Gorrie told me that he retained this pay because he thought at the time that he was permitted to do so since Mr Scott did not work out his notice of resignation. That makes no sense. Mr Scott did not work out his notice because he was summarily dismissed before its end. Mr Gorrie could give no other explanation for withholding Mr Scott's final pay. Perhaps fortunately for Gorrie Fuels Mr Scott did not claim a penalty against his former employer so the reasons for the non-payment do not need to be explored further. There will be an order for Gorrie Fuels to pay to Mr Scott \$585.11 in arrears of wages and holiday pay.

Customer Complaint

[6] Mr Scott had a dispute with a customer during the evening on 31 January 2008. The customer entered the service station shop area while Mr Scott, the sole attendant, was elsewhere attending to another customer. Mr Scott noticed a further customer enter the shop so he followed that person into the shop to find the complainant who expressed displeasure at being left unattended for a time. The complainant tendered some vouchers but not sufficient to cover his purchase. He scrambled through his bag to find more. Mr Scott attended others in the meantime then addressed the complainant who found a further voucher. The vouchers totalled more than the purchase price. Mr Scott said that he could not give change to cover the difference. The complainant disputed that and referred to the conditions printed on the voucher. On Mr Scott's account the complainant started yelling, stomping his feet, banging on the counter and asking for the manager to be called. Mr Scott attended to other customers during this time. When the complainant did not relent Mr Scott gave him change in coins. As the complainant left the shop Mr Scott made a comment to him which he accepts was abusive.

[7] There is a printed report recording details of the customer's complaint to the BP help desk made at about 9.30 pm on 31 January 2008. Mr Gorrie says that the

email was probably sent to his business on or about Friday 1 February 2008 but he saw it (and learnt of it) for the first time on Sunday 3 February 2008. Mr Gorrie was then away from the business until Tuesday 5 February 2008. There is no reason to doubt this evidence.

Mr Scott's suspension

[8] Mr Scott worked on 1 & 2 February 2008, was off on 3 & 4 February 2008 and was scheduled to return to work on Tuesday 5 February 2008. When he arrived at work on the Tuesday the other employee told Mr Scott that Mr Gorrie wanted to see him in the staff room so Mr Scott went there. Mr Gorrie arrived soon after.

[9] There are some minor differences in recollection between Mr Gorrie and Mr Scott about precisely what was said and the sequence. No-one else was present and there is no contemporaneous record.

[10] In evidence Mr Gorrie acknowledged asking Mr Scott some questions about where and when the dispute occurred. Mr Gorrie told me that this was so he could more readily review the security video footage which he had not looked at to that point. Mr Scott's evidence is that he inferred from the questioning that Mr Gorrie was concerned there might have been some physical intimidation of the complainant. The written complaint does not suggest that. There is no reason to disbelieve Mr Gorrie's evidence about the purpose of his initial questions.

[11] From Mr Scott's responses, Mr Gorrie thought that the allegations against Mr Scott amounted to potential serious misconduct. The written employment agreement permits suspension without pay to allow for an investigation in such circumstances so Mr Gorrie told Mr Scott that he was suspended without pay pending further investigation. Both Mr Gorrie and Mr Scott say in evidence that no earlier mention than this was made of the possibility of a suspension.

[12] Mr Scott asked for a copy of his employment agreement, a copy of the written complaint and the video footage. It may be that Mr Scott knew there was a written complaint from having contacted the BP help desk after the incident. Mr Gorrie refused to provide these items then relented in respect of the employment agreement. He got a copy of an unsigned agreement rather than the signed agreement now in evidence. The relevant provisions are identical. In evidence Mr Gorrie referred to the technical and practical difficulties of showing the video footage and said that he did

not give Mr Scott a copy of the written complaint because *I felt that Nathan's recollection would be tarnished if he'd seen what the customer had written.*

[13] Mr Scott also said that he would just leave because he could not be bothered with the stress and hassle. Mr Gorrie told Mr Scott that he would keep the last week's wages if Mr Scott did that. Mr Scott then left the premises, an arrangement having been made for a further meeting next day.

The dismissal

[14] The next meeting was deferred until Thursday 7 February 2008 at about 3pm. Again only Mr Scott and Mr Gorrie were present and there is no contemporaneous record. Before the meeting Mr Scott called the BP help line to learn that a written complaint had been passed on to Gorrie Fuels but he was not given any of the details. As noted above it may be that Mr Scott knew of the existence of the written complaint before the 5 February 2008 exchange.

[15] Before the dismissal meeting Mr Gorrie reviewed the security video footage and made a note of relevant events and timings. In evidence Mr Gorrie agreed that there was initially some confusion about the sequence of events in the way he put the allegations to Mr Scott. Mr Gorrie questioned Mr Scott about what he was going to do with the change initially refused the complainant. That caused Mr Scott to think that he was being accused of theft. Mr Scott said that change had never been given on vouchers. That was a reference to the practice of some businesses never giving any change for voucher purchases. Mr Gorrie said that Gorrie Fuels always gave change. Mr Scott asked when had the complaint been received and Mr Gorrie said 1 February 2008. In response to Mr Gorrie's questions about the incident Mr Scott said that the delay was unfair and he could not recall exactly what had happened. Mr Gorrie explained the delay by reference to his absence. Mr Scott asked to see the video footage but Mr Gorrie said that was too much trouble and he also refused to show Mr Scott the written complaint. Mr Gorrie told Mr Scott that it was serious misconduct and that he was dismissed. Mr Scott asked for his final pay and Mr Gorrie refused. Mr Scott then walked out saying he would see Mr Gorrie in Court.

Justification

[16] Justification is determined on an objective basis by considering whether an employer's actions and how the employer acted at the time, were what a fair and reasonable employer would have done in all the circumstances.

[17] The situation did not require urgent action. In such circumstances, no reasonable employer would suspend an employee without pay without first giving them an opportunity to comment on whether there should be a suspension. That did not happen here so the suspension was an unjustified action which disadvantaged Mr Scott by depriving him of work and pay.

[18] Mr Gorrie had the complainant's written account of the incident as well as his notes from viewing the security video footage. Mr Scott asked for this material but his request was denied. There was no good reason for Mr Gorrie refusing Mr Scott a copy of the written complaint at the outset. While there may be merit in Mr Gorrie's reason for not showing Mr Scott the security footage initially, it was possible for Mr Gorrie to view the footage before the 7 February meeting so it must have been possible for Mr Scott to see it. Accordingly both pieces of information could have been made available to Mr Scott; I find further that they should have been made available to him. The material would have established an element of exaggeration in the complainant's account and provided some support for Mr Scott's explanation of over-reaction and provocation by the complainant. Access to the material would have permitted Mr Scott to mitigate his conduct so was relevant to whether serious misconduct warranting dismissal had occurred.

[19] No reasonable employer would have proceeded to dismiss an employee without first providing them with a copy of the written complaint and the opportunity to match that against the security footage. It follows that Mr Scott was unjustifiably dismissed.

Remedies

[20] Mr Scott contributed to the circumstances giving rise to his grievances. He initially refused to give change because the complaint criticised him for the delay even though Mr Scott was busy on other work unaware that the complainant was waiting. Mr Scott escalated the conflict by preferring other customers and then abused the complainant as he left the shop. This contribution warrants a reduction in remedies which I assess at 50%.

[21] There is a claim for \$4,000.00 compensation. There was distress caused to Mr Scott by the dismissal and the suspension. The claim is modest and I award it in full for both grievances, subject to an adjustment for Mr Scott's contribution.

[22] Mr Scott missed out on 53.5 hours pay because of the suspension and dismissal bearing in mind that he was due to finish work in accordance with his own resignation. That amounts to lost remuneration of \$615.25 which I award in full, subject to an adjustment for Mr Scott's contribution.

Summary

[23] Gorrie Fuels (SI) Limited is ordered to pay Mr Scott \$585.11 (gross) in arrears of wages and holiday pay pursuant to section 131 of the Employment Relations Act 2000. Gorrie Fuels (SI) Limited is further ordered to pay interest on the arrears at the rate of 9% per annum commencing on 7 February 2008 until the arrears are paid in full.

[24] Gorrie Fuels (SI) Limited is ordered to pay Mr Scott \$2,000.00 compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

[25] Gorrie Fuels (SI) Limited is ordered to pay Mr Scott \$307.63 (gross) reimbursement for lost remuneration pursuant to section 123(1)(b) and section 128(2) of the Employment Relations Act 2000. Mr Scott also seeks interest on this award. The Employment Court in *Salt v Fell* [2006] ERNZ 449 confirmed that interest may be awarded on sums of reimbursement for lost remuneration but not distress compensation. Accordingly Gorrie Fuels (SI) Limited is ordered to pay interest on \$307.63 at the rate of 9% per annum commencing on 7 February 2008 until the reimbursement is paid in full.

[26] Costs are reserved. Any costs application must be in writing lodged and served within 14 days of the date of this decision. The other party may then lodge a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority