

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 61/08
File Number: 5096143

BETWEEN	TE RA STRICKLAND Applicant
AND	GARY FERGUSON TRADING AS MAN ABOUT THE HOUSE Respondent

Member of Authority:	Vicki Campbell
Representatives:	Graeme Ogilvie for Applicant Gary Ferguson for Respondent
Investigation Meeting:	23 April 2008
Determination:	9 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Te Ra Strickland was employed initially on 26 April 2007 as a general labourer and then on 4 June 2007 as an under-floor installer by Gary Ferguson trading as Man About the House "MAH". Mr Strickland claims he was unjustifiably dismissed from his employment on 1 July 2007. Mr Strickland also claims Mr Ferguson made an unlawful deduction from his final pay for tools and uniform items.

[2] Mr Ferguson started out in business as an owner operator installing insulation into homes. He eventually entered into licence agreements to install Insulfluff and Styrobeck. Mr Ferguson also undertakes property maintenance, however the installation of Styrobeck and Insulfluff were the main areas of his business. To meet his growing contractual obligations he began employing staff.

[3] Mr Ferguson worked with his local WINZ office and employed staff through that office. Mr Strickland was employed by Mr Ferguson after being referred to Mr Ferguson by Ms Maxine Matenga, a work broker working for WINZ.

[4] After becoming dissatisfied with Mr Strickland's performance Mr Ferguson dismissed him with one week's notice. Mr Strickland claims that dismissal to be unjustified and seeks remedies.

[5] Pursuant to section 103A the Authority must scrutinise the Trusts' actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[6] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[7] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*X v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

Background

[8] Mr Strickland came to be employed through WINZ on a job plus scheme. It was common ground that Mr Ferguson was advised by Ms Matenga before he employed Mr Strickland, that Mr Strickland had some problems and was a bit slow.

[9] Mr Strickland was originally employed to assist with loading the hopper, running hoses out, cleaning up and general labouring. However, that changed on 4 June 2007 when Mr Strickland began undertaking alternative duties and assisted with the installation of under floor insulation.

[10] Mr Ferguson says, and I accept, that Mr Strickland did not work out as a general labourer. Mr Ferguson says Mr Strickland was dismissed and then re-employed in the under floor installation after Mr Strickland's cousin, Jerico, approached Mr Ferguson and requested

[11] that Mr Strickland be retained. Mr Ferguson agreed, but on the basis that Jerico closely supervise Mr Strickland.

[12] Mr Ferguson says Mr Strickland's work was untidy and he was often not working and sometimes sleeping. Mr Ferguson says he gave Mr Strickland a written warning. This was disputed by Mr Strickland and a copy has not been provided to the Authority.

[13] Mr Strickland accepted that he sometimes slept when he was out on a job, but only when he was in the truck or on his lunch breaks. He recalls Jerico telling him on some occasions to stop sleeping.

[14] On 1 July 2007 Mr Ferguson attended Mr Strickland's home and advised him that as his work was not up to scratch, he had no option but to dismiss him with one week's notice. Mr Ferguson gave Mr Strickland the opportunity to work out the week's notice, which he did.

Relevant terms and conditions of employment

[15] Mr Ferguson says he gave Mr Strickland a copy of a written employment agreement with a letter of offer at the first meeting in the WINZ office. Mr Strickland can not recall whether he received a copy of the agreement or not. Ms Matenga says she does not recall Mr Ferguson giving Mr Strickland a written agreement at their first meeting.

[16] Mr Ferguson says he followed up with Mr Strickland about the agreement, gave him a second copy and asked him to sign it. Mr Strickland, through his father Mr Whiti Konuku (who also has a personal grievance against this respondent) told Mr Ferguson that he would not be signing the agreement.

[17] I have concluded on the balance of probability that Mr Strickland was presented with a copy of a written employment agreement, although not at the first meeting, and that he refused to sign it. Ms Matenga gave oral evidence at the investigation meeting that Mr Konuku had told her they had received their employment agreements and had taken them home.

[18] The employment agreement provides for a probationary period in the following terms:

The parties agree that the Employee will serve a probation period of five weeks at the beginning of their employment. The Employer will provide guidance and feedback to the Employee during this probation period. If the Employer justifiably considers the Employee has failed to appropriately carry out their duties during the probation period, and the Employee has been appropriately warned and supported during the probation period, the Employer may terminate the employment agreement upon the expiry of the probation period by providing written notice of termination as specified in the

termination clause. Nothing in this clause limits the legal rights and obligations of the Employee or the Employer during or after the probation period.

[19] Mr Ferguson says that at the time he dismissed Mr Strickland he was still under the probationary clause. Mr Ferguson relies on his evidence that he dismissed Mr Strickland at the end of May then re-employed him which was a new employment relationship. Mr Strickland denies he was dismissed in May, he says that he took a week off at that time to attend a Tangi and when he came back he was assigned to different duties.

[20] I am not satisfied Mr Ferguson did dismiss Mr Strickland in May 2007. Mr Strickland was not paid holiday pay as one would expect if his employment had been terminated, neither was he presented with a new employment agreement on 4 June 2007. That is not to say that he wasn't thinking about it. I am satisfied he contacted Ms Matenga to discuss issues he was having with Mr Strickland's performance and that he [Mr Ferguson] received advice as to how to proceed through a warning process to affect a dismissal.

[21] On that basis Mr Ferguson can not rely on the probationary clause in the employment agreement. Even if I am wrong on that point, I am satisfied Mr Ferguson never made it clear to Mr Strickland that his job was in jeopardy if he did not make improvements. Neither did Mr Ferguson point out the weaknesses in Mr Strickland's performance and set measurable targets, or provide specific training to assist Mr Strickland to improve.

[22] Mr Ferguson can not rely on the fact that Jerico had undertaken to supervise Mr Strickland either. There was no evidence at the investigation meeting that Mr Ferguson discussed Mr Strickland's performance with Jerico. In the letter of dismissal Mr Ferguson advises Mr Strickland that his employment was subject to his being trained to an acceptable level. Again, Mr Ferguson has failed to provide any evidence that such training took place.

[23] A letter dated 12 June 2007 and addressed to Mr Strickland sets out a complaint received by MAH from Styrobeck Plastics and advises that some problems need rectification and goes on to set out procedures for working. This letter falls short of putting Mr Strickland's job in jeopardy but does advise him that:

As these complaints to Styrobeck have resulted in Man About The House being warned that these problems can not occur, and Styrobeck is one of our main suppliers, any further complaints could result in the loss of the installation contract. So as to safeguard the business, any further complaints could result in management looking for installers who will do the job to the required standard.

[24] At the investigation meeting Mr Ferguson pointed to this letter as being a warning that if Mr Strickland did not improve his performance he would be replaced. The letter did not go far enough. If it was Mr Ferguson's intention to dismiss Mr Strickland if his performance did not improve, he was required to spell that out clearly.

[25] Mr Ferguson also told me at the investigation meeting that he told Mr Strickland "to get on with it" a week before Mr Strickland was dismissed. That also, does not constitute a clear and unequivocal warning that Mr Strickland's job is in jeopardy.

[26] I am satisfied Mr Strickland's dismissal was unjustified. Mr Strickland was dismissed in the absence of any notion of procedural fairness. Mr Ferguson arrived at Mr Strickland's address and handed him a letter of dismissal. There was no prior communication that such a step may be taken and the decision was clearly made without any reference back to Mr Strickland for his input or any explanation.

[27] I have concluded that what Mr Ferguson did and how he acted towards Mr Strickland was not what a fair and reasonable employer in all the circumstances of this case would do.

[28] Mr Strickland is entitled to remedies.

Arrears of wages claim

[29] Mr Strickland claims the reimbursement of \$124.80 which was deducted from his final pay. Mr Ferguson deduction this sum as he believed Mr Strickland had not returned tools and clothing belonging to the respondent. Mr Ferguson made this deduction in the absence of any express agreement from Mr Strickland that such deductions could lawfully be made.

[30] At the investigation meeting Mr Ferguson pointed to an undated letter in which he advises all staff that tools and clothing not returned to management at the time of cessation of employ will be charged to the employee and deducted from the final pay to support his contention that the deduction was lawful.

[31] The letter does not meet the requirements of section 4 of the Wages Protection Act 1983, which requires all wages payable to be paid without deduction except where a worker has provided his written consent. The deduction made by Mr Ferguson from Mr Strickland's final pay was therefore unlawful.

Gary Ferguson trading as Man About the House is ordered to reimburse Mr Strickland \$124.80 within 28 days of the date of this determination.

Remedies

Lost wages

[32] On 25 June 2007 Mr Ferguson gave notice to his employees that he was facing the possibility of restructuring the company and all staff may be made redundant. By the end of July 2007 no staff remained employed by Mr Ferguson.

[33] Mr Strickland worked out a week's notice and left his employment on 6 July 2008. Mr Strickland says he was out of work for 10 weeks. It is more likely than not, however, given the situation the respondent was facing, that Mr Strickland's employment would not have endured beyond 27 July 2007 in any event.

[34] Mr Strickland is entitled to recover lost wages for the period 9 – 27 July 2007 inclusive. I have calculated the lost wages on the basis of a 40 hour week at the rate of \$12.00 per hour which amounts to \$1,440 gross.

Compensation

[35] Mr Strickland told me he thought the job was going well and that he was doing it properly. He told me he was sad to lose his job and didn't know why he did. Mr Strickland was never given an opportunity to discuss the issues with his performance.

[36] Subject to my finding on contribution, a fair and equitable assessment of compensation arising out of the termination of Mr Strickland's employment, based upon the evidence as I see it, is a sum of \$2,500.

Reductions to remedies

[37] I am bound by section 124 of the Act to consider the extent to which Mr Strickland's actions contributed towards the situation that gave rise to his personal grievance and if those actions so require to reduce the remedies that would otherwise have been awarded accordingly.

[38] Mr Ferguson wrote to Mr Strickland on 12 June 2007 and advised him of the need to improve in his work and set out specific instructions to assist him in

that endeavour. Mr Strickland told me he did sleep while at work, although he says this was only on his breaks. Mr Strickland also told me he would sleep when he was on the truck or having lunch and that at times Jerico would tell him to stop sleeping.

[39] The evidence supports a finding that Mr Strickland contributed to the situation that gave rise to the personal grievance, which I have assessed at 10%.

Summary of orders

- **Gary Ferguson trading as Man About the House is ordered to reimburse Mr Strickland lost wages of \$1,296.00 gross pursuant to section 123(1)(b) of the Employment Relations Act 2000.**
- **Gary Ferguson trading as Man About the House is ordered to pay Mr Strickland compensation of \$2,250 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

Costs

[40] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority