



# New Zealand Employment Relations Authority Decisions

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## Turdeich v Dale Fibreglass Limited (Auckland) [2007] NZERA 175 (30 July 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

5041653 AA 222/07

BETWEEN Ivan Turdeich

Applicant

AND Dale Fibreglass Limited

Respondent

Member of Authority: Vicki Campbell

Representatives: Ivan Turdeich in person

Mark Ryan for Respondent

Investigation Meeting: 20 June 2007 at Auckland

Determination: 30 July 2007

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] Mr Ivan Turdeich was employed by Dale Fibreglass Ltd ("DFL") as a Fibreglasser from 1 February 2006 until he was dismissed on 28 February 2006. Mr Turdeich has two applications before the Authority, one seeking leave to raise a personal grievance outside the 90 day period and the second for unjustified dismissal.

[2] DFL objects to the personal grievance being raised outside the 90 day period and denies Mr Turdeich was unjustifiably dismissed. DFL says it did not know that Mr Turdeich alleged he had a personal grievance until it received a letter from the Mediation Service in Hamilton on 8 June 2006.

[3] As agreed with the parties, this determination will firstly determine the issue of whether leave should be granted, and if it is, then I will then proceed to determine the substantive issues relating to the claim for alleged unjustified dismissal.

#### Application for leave

[4] Section 114(4) of the Employment Relations Act provides the discretion for the Authority to grant leave where the Authority:

- is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
- considers it just to do so.

[5] Section 115 sets out four occasions on which exceptional circumstances will exist. This case is concerned with s.115(b) and (c):

- Where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
- Where the employees employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section

65, as the case may be.

*Were reasonable arrangements made to have the grievance raised* [6] There is no dispute that Mr Turdeich failed to raise his personal grievance within the requisite 90 day period. I have considered whether this failure was occasioned by either of the exceptional circumstances set out in s1 15 (b) or (c).

[7] Mr Turdiech says he contacted Mr Samual Cuddon of Employment Dispute Services ("EDS") in Auckland on 14 April 2005 and outlined the events which took place leading up to his dismissal on 28 February 2005. He says Mr Cuddon agreed to take the case. Mr Turdeich says he contacted Mr Cuddon again on 3 May 2005 for an update and was told Mr Cuddon had left the firm. He then tried to contact Mr Cuddon on his cellphone but to no avail.

[8] Ten months later, in March 2006, Mr Turdeich again contacted EDS and spoke with Mr David Feist. Mr Turdeich says Mr Feist told him that he would take over his case for him and requested copies of his contact and dismissal notice together with a cheque for \$70.00 to lodge his grievance. Mr Turdeich produced a letter dated 11 April 2006 addressed to Mr Feist setting out his employment relationship problem.

[9] Mr Turdeich says that he then attempted to contact Mr Feist on 3 May, 31 May and 5 June 2006. On 5 June he was advised Mr Feist would not be taking his case as he was too busy. After requesting all his files to be returned to him, Mr Turdeich says he was advised no files existed.

[10] Mr Turdeich was required to make reasonable arrangements to have his grievance raised on his behalf by an agent. I am not satisfied that he did so.

While he discussed his dismissal with Mr Cuddon on 14 April 2005, there is no supporting evidence that he instructed Mr Cuddon to raise a grievance with DFL. Also, on 3 May 2005, when Mr Turdeich was advised Mr Cuddon was no longer working for EDS, he was still within the 90 day period to raise his grievance. It would have been reasonable for Mr Turdeich to have requested to speak with someone else within EDS, about his grievance. It was not until ten months later, in March 2006, that Mr Turdeich next made contact with EDS at which stage he discussed the matter with Mr Feist. I am satisfied Mr Turdeich did not make reasonable arrangements to have the grievance raised on his behalf.

*Was there an explanation concerning the resolution of employment relationship problems contained within the employment agreement?*

[11] Mr Turdeich says that he knew nothing about the requirement to raise his grievance within the 90 day period. DFL had an obligation to provide an employment agreement which contained a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the 90 days in s.114 within which a personal grievance must be raised.

[12] There is no dispute that the employment agreement did not contain the explanation concerning the resolution of employment relationship problems as required by section 65. The employment agreement was therefore in breach of the Act in that regard.

[13] The principle issue here is whether Mr Turdeich's delay in raising the personal grievance was occasioned by the lack of the explanation. As already stated, Mr Turdeich says, and I accept, that he knew nothing about the requirement to raise his grievance within 90 days.

[14] I am satisfied that while Mr Turdeich did not raise a personal grievance with his employer within the requisite 90 day period, he obviously had issues he wanted to raise with his former employer. Because of the absence of the required explanation of his rights in his employment agreement, he cannot be presumed to have knowledge of those rights to raise his employment issues in the correct manner and within the correct timeframe. I am therefore satisfied that the lack of the explanation of rights occasioned his delay in bringing the personal grievance (*Bryson v Three Foot Six Limited*, unreported, WC17/06, 1 September 2006, Shaw, J, followed).

*Is it just to grant the leave*

[15] The final question is whether it is just to allow the case to be brought outside the 90 day period. There have been some inordinate delays with this matter being pursued, however, I am satisfied that Mr Turdeich has, at all times, been intent on pursuing his grievance against DFL.

[16] I find that the exceptional circumstance in this case was the absence of a s.65 explanation in Mr Turdeich's employment agreement, that this occasioned the delay and that it is just to grant leave for the grievance to be brought out of time.

**Unjustified dismissal**

[17] As already set out earlier in this determination Mr Turdiech was employed on 1 February 2005 and was dismissed on 28 February 2005 because his performance did not meet the employers expectations. DFL says Mr Turdeich was subject to a fixed term agreement which was due to expire on 11 March 2005 and that what they did was dismiss him two weeks prior to that expiry date.

### **Employment agreement**

[18] [Section 66](#) of the [Employment Relations Act 2000](#) allows the use of fixed term agreements provided the employer has genuine reasons based on reasonable grounds for the employment ending in the way stated and must advise the employee when, how and why the employment will end. [Section 66](#) prohibits the use of fixed term agreements for the purpose of establishing the suitability of an employee for permanent employment.

[19] Mr Turdeich signed an employment agreement on 23 February 2005. This agreement purports to be for a fixed term period, the purpose of which is:

To enable the parties to have a probationary period within which to decide whether they wish to enter into a permanent employment relationship.

[20] At the investigation meeting Mr Peter Montgomery, Managing Director, accepted the employment agreement was in breach of [section 66](#) of the Act, in that the agreement was a temporary agreement for the sole purpose of establishing Mr Turdeich's suitability for permanent employment. I find therefore, that the respondent is unable to rely on the fixed term nature of the agreement.

[21] [Section 67](#) of the Act allows parties to an employment agreement to agree that an employee will serve a period of probation or trial after the

commencement of employment. The section stipulates that such agreements must be reduced to writing. The employment agreement between Mr Turdeich and DFL clearly sets out the agreement that Mr Turdeich's employment be subject to probation and therefore the requirements of [section 67](#) have been met.

### **Performance issues**

[22] In asking whether Mr Turdeich's dismissal was justified, the Authority considers on an objective basis whether what DFL did in dismissing Mr Turdeich for poor performance, and how DFL carried out the dismissal was what a fair and reasonable employer would have done in the circumstances.

[23] The law relating to unjustified dismissals is not altered by arrangements for probationary periods. The standard for dealing with alleged poor performance is well-established in case law. A fair and reasonable employer will put the perceived performance problem or problems squarely to the employee. Measures to address the problems will be discussed, along with any assistance needed by the employee, in order to meet necessary targets or outcomes. An employee will be given an opportunity to improve and progress towards improvement will be reviewed with the employee. If the employee fails to improve and is given an opportunity to explain why expected outcomes were not achieved but cannot adequately do so, the employee may be dismissed. At each stage of this process, the employee will be provided with specific information about the perceived shortcomings and have the opportunity to be accompanied in meetings with the employer by a representative or support person. (see *Trotter v Telecom corporation of New Zealand Ltd* [\[1993\] NZEmpC 152](#); [\[1993\] 2 ERNZ 659](#)).

[24] Employees who agree to a probationary period must be taken to realise that they will be under close and critical assessment. However, during a probationary period an employer can not simply be a critical observer but must be ready to advise on any necessary improvements and to warn of the likely consequences if its expectations are not met. The objective is always that the probationary period will be successful (see *Nelson Air Ltd v New Zealand Airline Pilots Association* [\[1994\] 2 ERNZ 665](#)).

[25] The issues to be resolved are:

- Was Mr Turdeich fairly warned of alleged poor performance, with specific information on the problems and clear steps on what was needed to improve?

- Was his subsequent dismissal carried out in a fair way?
- If the dismissal was not carried out in a fair way, what remedies is he entitled to?

[26] It was common ground that when Mr Turdeich applied for the position with DFL he explained to Mr Montgomery that he had not operated a chopper gun for a number of years. Notwithstanding this, Mr Montgomery offered him employment,

albeit subject to a probationary period. Mr Turdeich's role was to fibreglass canopy's and play troughs.

[27] Mr Montgomery says that throughout the short tenure of Mr Turdeich's employment, he spoke to him on a daily basis about his performance and work quality. Mr Turdeich disputes this and says that Mr Montgomery was not on the factory floor every day and recalls only one occasion when Mr Montgomery raised a quality issue with him. I am satisfied that it is more likely than not that Mr Montgomery made a habit of regularly walking around the factory and that during such excursions did identify issues about Mr Turdeich's work quality.

[28] Mr Henry Slade, Mr Turdeich's supervisor, told me Mr Turdeich's work was below standard. He told me, and I accept, that he provided Mr Turdeich with feedback on problems in his work and helped him to rectify the problems.

[29] I am satisfied Mr Turdeich was aware his performance was short of the expected standard. However, what Mr Montgomery and Mr Slade did, did not meet the required standard for dealing with poor performance. There were no measures to address Mr Turdeich's quality of work, no reviews to assess any improvements, and no opportunity to provide feedback as to why expected outcomes were not achieved. Indeed the evidence at the investigation meeting was that short cuts in the fibreglassing process were not uncommon and were actually endorsed by Mr Slade, as Mr Turdeich's supervisor.

[30] On 28 February 2005 Mr Montgomery met with Mr Turdeich on two occasions. During the first occasion Mr Montgomery advised Mr Turdeich his performance was of concern and that despite efforts by Mr Slade to help him improve his performance he did not seem to have the experience or knowledge necessary for the job.

[31] Following that meeting Mr Montgomery weighed three canopies Mr Turdeich had been involved in fibreglassing. I accept Mr Turdeich's evidence that

he never completed the fibreglassing of a canopy on his own, he was always assisted by Mr Slade. This evidence was supported by Mr Slade who told me that a canopy was too big for one person to do.

[32] At the second meeting Mr Montgomery accused Mr Turdeich of lying about his chopper gun experience, which Mr Turdeich denied. Mr Turdeich was dismissed and handed a letter confirming his dismissal and a cheque for his final pay.

[33] Mr Turdeich was entitled to a fair warning before the end of his probationary period, that his employment may be coming to an end. There is no evidence that either Mr Slade or Mr Montgomery gave Mr Turdeich any indication that his performance may end with no offer of permanent employment following the completion of the probationary period. Mr Turdeich was not given the opportunity to complete his probationary period either, as he was dismissed two weeks before the probationary period was to come to an end.

[34] I find Mr Turdeich's dismissal to be unjustified. In particular, how DFL acted was not how a fair and reasonable employer would have acted in the circumstances ([s.103A](#) applied).

## **Remedies**

### *Lost wages*

[35] Mr Turdeich was paid one days pay in lieu of notice in accordance with the employment agreement signed between the parties. As already set out in this determination Mr Turdeich was subject to a probationary period which was due to end on 11 March 2007. Given Mr Turdeich's performance issues it is doubtful his employment would have carried into a permanent position.

[36] In all the circumstances I think it appropriate that Mr Turdeich be compensated for his loss of earnings for two weeks.

**Dale Fibreglass Limited is ordered to pay to Mr Turdeich lost wages of \$1,224 gross pursuant to [section 123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#) within 28 days of the date of this determination.**

### *Compensation*

[37] There was very little evidence from Mr Turdeich relating to his claim for compensation. Prior to his employment Mr Turdeich had operated a Taxi in

Dargaville and had closed this down and moved to Auckland to take up his new job. Mr Turdeich told me he was shocked at his dismissal.

[38] In all the circumstances I think it appropriate that Mr Turdeich be compensated for his unjustified dismissal at the lower end of the scale and award him \$2,000.

**Dale Fibreglass Limited is ordered to pay to Mr Turdeich compensation of \$2,000 pursuant to [section 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) within 28 days of the date of this determination.**

## *Contribution*

[39] I am bound by [section 124](#) of the Act to consider the extent to which Mr Turdeich'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.

[40] Mr Turdeich's performance was, from all accounts, not entirely satisfactory. However, the statutory duty of good faith makes it imperative that an employer take an active approach to ensuring a trial period will be successful. While Mr Turdeich was told of some of the issues relating to the quality of his work he was also entitled to be provided with enough information to assist him to improve to the expected standards and to be given clear advice that if he failed to meet those standards his employment was in jeopardy.

[41] Mr Turdeich can not be held responsible for the breaches of fair and reasonable treatment by DFL. In these circumstances it is not appropriate to reduce the remedies.

## **Costs**

[42] As Mr Turdeich is not represented by a professional advocate, he is entitled to reimbursement of his filing fee of \$70.00 but there shall be no further order for costs.

Vicki Campbell

Member of Employment Relations Authority

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