

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 146/08
5073434

BETWEEN	SHANE TURNER Applicant	
AND	TALLEYS LIMITED Respondent	FISHERIES

Member of Authority: Paul Montgomery

Representatives: Andrew McKenzie, Counsel for Applicant
Graham Malone, Counsel for Respondent

Investigation Meeting: 4 March 2008 at Nelson

Submissions received: 18 March and 1 April 2008 from Applicant
18 March and 2 April 2008 from Respondent

Determination: 30 September 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Turner's role with the company involved the negotiating, confirming and timely delivery of Talley Seafood products into European markets. A key aspect of his tasks was maintaining contact with importers in Europe and to achieve the best price for the species available. He says he was unjustifiably dismissed when told the company could no longer hold his job open after a period of absence due to illness. Accordingly, Mr Turner seeks reimbursement of lost income, compensation and costs.

[2] The company says it never dismissed nor intended to dismiss Mr Turner. It says that in the course of a meeting on 15 February 2006, Mr Turner became agitated and abused his manager, Mr Hazlett, who was attempting to explain proposed changes to manage the European business while Mr Turner recovered from his illness. Mr Hazlett says the applicant left the premises driving the company car aggressively. The company's statement in reply confirms it took the position that Mr Turner had resigned and therefore was not prepared to meet the remedies sought by the applicant.

[3] In spite of attempting to resolve their differences in mediation, the parties were unable to reach agreement.

Issues

[4] To determine this matter the Authority needs to resolve the following issues:

- Did the company dismissed Mr Turner; and
- Did Mr Turner resign; and
- Was the company justified in removing the use of the company car, cellphone and laptop; and
- Were the actions of the employer fair and reasonable in all the circumstances; and
- If Mr Turner has a personal grievance what, if any, remedies are due to him; and
- Did Mr Turner contribute to the circumstances leading to a personal grievance?

Resignation or dismissal

[5] Mr Turner was appointed to the European Desk in October 2004 on an annual salary of \$50,000. He says the role presented a steep learning curve but with assistance he became proficient in the tasks required. Mr Turner says the pressures of the role escalated during 2005, although the company does not accept this view. There were issues between the parties over product pricing but it was the company's directors who set price expectations for various offshore markets rather than management or marketing staff.

[6] The company first became aware Mr Turner was experiencing depression related difficulties when he *broke down* in Mr Hazlett's office in November 2005. Mr Hazlett immediately contact Ms Andrea Wilkinson, the company's Human Resources Adviser who came to the office to support Mr Turner. Mr Hazlett says that at the time the company was unaware Mr Turner had had a depressive episode prior to his employment with Talleys.

[7] After discussion with Mr Turner, Ms Wilkinson arranged a doctor's appointment and anti depressant medication was prescribed. Ms Wilkinson accepted Mr Hazlett's direction to maintain contact and oversight of the applicant to ensure he was not put under any undue stress. Mr Turner was clearly grateful for the support given him by his employer over the ensuing weeks, as his condition deteriorated over the Christmas/New Year period.

[8] Mr Turner was admitted to the Mental Health Unit at Nelson Hospital on 25 January 2006 suffering from severe depression.

[9] Mr Turner says that both Mr Hazlett and Ms Wilkinson visited him, as did Ms Angela Talley, with whom Mr Turner had become friendly. Mr Turner told the Authority *I felt so fortunate to have such a good and caring employer.*

[10] On Thursday 9 February 2006, following a pre-discharge meeting attended by Ms Wilkinson, Mr Turner met with Mr Hazlett. The applicant says his mood was improving but he was anxious to get back to work even on a graduated basis. It was at this meeting that Mr Hazlett raised the possibility of splitting the European market into two segments. Mr Turner would retain southern Europe with a new person to take over northern Europe. Mr Turner says he stressed he had run the whole European market on his own prior to this illness, and Mr Hazlett told him that nothing was to be decided before 13 February.

[11] A meeting with Mr Hazlett was scheduled to 13 February but was postponed until 11.00am on Wednesday 15 February at Mr Turner's request. At the meeting Mr Turner expressed his keenness to return to work but from home, as a transition step to the office environment. Mr Hazlett says the job was not one that could be done properly from home and needed to be done in the office and Ms Wilkinson expressed the view that it was not a good idea for Mr Turner to try working as yet, as the doctors had advised he needed at least three weeks rest and to do otherwise would risk being returned to hospital. Mr Hazlett told Mr Turner that he had decided to employ someone to cover the European Desk while he was recovering and unable to attend work.

[12] Both men agreed that Mr Hazlett told Mr Turner that he ought to concentrate on getting well and that the matter of how he would be deployed following his return could be discussed and resolved at the time that occurred.

[13] Upon his return home Mr Turner says he rang a friend who asked him if he had been permanently or temporarily replaced. He said he was not sure, so he telephoned Ms Wilkinson to clarify this issue. As she was not sure, Ms Wilkinson undertook to inquire and get back to him. When she telephoned the applicant, Ms Wilkinson asked that he come into the office for a meeting with Mr Hazlett at 3.00pm.

[14] Prior to that meeting, Mr Hazlett was approached by another staff member who was servicing the company's European customers in Mr Turner's absence. That employee advised Mr Hazlett that some customers of the company would no longer do business with them and that Mr Turner had acted inappropriately with a number of customers who did now not want to deal with him. Mr Hazlett immediately followed up this information and some customers confirmed his concern.

[15] When Mr Turner came to meet Mr Hazlett, the latter explained that Mr Turner was not to be involved in the European sales and was not to make contact with customers. Mr Hazlett says

Before I could explain further Shane interrupted and verbally abused me. I tried to explain over his outburst that I would not have him sending customers misinformation and abusive emails. This meeting lasted only for a very short time, as Shane refused to listen and stormed out of my office shouting abusive remarks.

[16] Mr Turner says

I met with Tony at 3pm and he told me there was no position there for me and that Talleys couldn't hold my job open any longer. I asked him straight whether I still had a job at Talleys and was told by Tony no. I became very upset at this and left the meeting. Tony rang me soon after and asked me to come back to continue our discussion. I asked if we could make it tomorrow but Tony persisted and I agreed. Soon after I phoned Tony to cancel the meeting. I was distressed and didn't feel in any fit state to discuss matters. Tony wasn't available so I left a message for him to phone me. I was on the phone to my father soon after and there was a knock on the door. It was Tim and Larry from Talleys at Nelson who turned up unannounced to collect my car, laptop and cellular phone. I was dumbfounded and felt like I was being treated like a criminal. ... I cleaned out the car and handed over my keys, the laptop and mobile phone were returned the following morning.

[17] The applicant telephoned Mr Hazlett who passed the phone to Mr Milane Talley, one of the Directors, who told Mr Turner the company needed someone in the role and that *this was business*. Mr Turner says he asked Mr Talley if he was still an employee of the company and says Mr Talley *answered no, no and yes respectively*.

[18] Mr Turner also rang his father and advised him that his job was no longer available. Mr Turner senior was understandably upset as he had spoken to Mr Hazlett on 25 January 2006 after his son's admission to Nelson Hospital and Mr Hazlett had assured him his son's position was secure and the company's main concern was to get Shane well and back to work. Mr Turner senior says he rang Mr Hazlett on 15 February but Mr Hazlett was not prepared to discuss the matter. Mr Hazlett says the reason he was unwilling to discuss the issue was due to Mr Turner's abusive and aggressive manner.

[19] Mr Talley's evidence about the conversation he had with the applicant was more extensive. He says

Shane rang Tony while I was with him and Tony passed the phone to me. Shane was upset that we wanted the car, laptop and phone. I attempted to explain the reasons for removing the laptop, phone and car. Shane was saying that he was still fit to perform his job. I explained that we couldn't have him dealing with the customers in his state of mind, that it was not personal but commonsense from a business point of view. It seemed that he had burnt many bridges with the European customers and would have to look at another area. Shane was not willing to talk about the issues however, maintaining that he could do his job and that he didn't have to, and would not, do any other job and that he had been fired. I did not tell him he was fired or that there was no job for him at Talleys; I tried to explain that we would probably need to look at another region but he simply ignored what I said.

[20] Mr Talley also said

Before there was any decision to dismiss someone at Shane's level the Directors would have had to have discussed the matter and would have had to agree to give Tony authority to do so, if he considered it appropriate. There was no such discussion by the Directors nor did they give Tony any such mandate.

Analysis

[21] Standing back and weighing the evidence, I have concluded that Mr Turner was not formally dismissed by the respondent. What I find occurred was that the company, faced with Mr Turner's insistence that he was able to return to work and carry out his tasks as before, and having confirmed that Mr Turner had dealt inappropriately with valued customers, needed to ensure the applicant did not contact customers while he recuperated. Further, given that Mr Turner had alienated some European buyers, the company needed to consider how to deploy him upon his return.

[22] I have no doubt Mr Turner's belief that he was dismissed was genuine. However, it is clear to me that given his low mood at the time and his feeling *useless for not being able to return to work* he interpreted events and exchanges with company management in the light of his then mental state.

[23] I find that Mr Turner did not resign his position with the company. It was submitted that Mr Hazlett had formed the clear view that, given Mr Turner's comments to him including being told to *fuck off* as Mr Turner left the 15 February meeting, the applicant no longer wished to work for him.

[24] That view based on the applicant's emotional outburst as he left the office cannot amount to a resignation. Mr Hazlett was very aware of Mr Turner's condition at the time and had, without warning or explanation, arranged for two staff members to uplift the company car, the company laptop and cellphone.

[25] In response to my observation in the course of the investigation meeting that while there may have been no dismissal, equally the company appeared to have allowed Mr Turner to drift away and that it could have, but did not, sent him a letter recording its position clearly. Mr Malone submitted that the company's failure to follow up the exchange in Mr Hazlett's office with a written letter cannot turn its actions into a dismissal. The former Chief Judge observed in *Boobyer v. Good Health Wanganui* (WEC17/94) referring to *NZPSA v. Landcorp Ltd* [1991] 1 ERNZ 741:

*That is where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so, or takes advantage of words of resignation known to be unwitting or unintended and the employer promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. In that kind of case, the employer cannot safely insist on its interpretation of what the employee said or wrote. This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once the heat of the moment had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning facilities": **Chicken & Food Distributors (1990) Ltd v. Central Clerical Workers Union** [1991] 1 ERNZ 502, 507. Examples of a sudden flare-up being treated as a resignation are scattered through the books. Some feature rather extreme actions by the employee including emphatic language and expressive conduct extending to actually walking out or using words of resignation, only to return or recant later.*

[26] It is clear that Mr Turner did not return to the workplace due to his state of health, so the opportunity to clarify the situation did not arise. It is also clear from a series of drafted, but unsent, letters prepared by Mr Turner that he held the view the company had dismissed him.

[27] A brief email exchange between the applicant and Mr Michael Talley on 27 and 28 February made it clear that the parties held very different views of Mr Turner's situation. Mr Turner's email was headed *Re: Dismissal*. Mr Talley's opening line read *Shane your subject title is absolutely wrong ... their [sic] was no dismissal you resigned*.

[28] I find the company was not entitled, without formal inquiry, to conclude Mr Turner had resigned his position. What was required of an employer acting fairly and reasonably in all the circumstances was a letter to the applicant clearly setting out the company's views and inviting a response from Mr Turner. This clearly did not occur.

[29] Chief Judge Goddard in *Boobyer* (supra) made the obiter observation

The number and variety of the cases litigated concerning disputed resignations demonstrate the difficulty of these issues and the importance in each case and, particularly in this case, that they should be resolved as soon as possible and as close as possible to the workplace in which they occurred.

[30] The employment relationship came to an end because the respondent failed to clarify the state of the relationship it had with Mr Turner. The omission by the company was serious because it deprived Mr Turner of the opportunity to have his employment continue when he returned to full health. I find the company's determination that Mr Turner has resigned constitutes unjustifiable dismissal.

[31] Balancing this however, are two significant factors which affected the position on 15 February. The first is Mr Turner's outburst in Mr Hazlett's office which was abusive and belligerent, but by far the more serious was the discovery of the emails to several European customers which damaged the company's sales in that market. Mr Hazlett says the emails *caused considerable offence. It later took us between 12-18 months to overcome the damage in our relationships.*

[32] The email issue is very serious and but for Mr Turner's medical difficulties and the company taking the view he had resigned, would most likely have been the subject of disciplinary action. In spite of Mr Hazlett telling the Authority *Shane could have returned to work taking responsibility for a different market*, I am of the considered view that Mr Turner's actions and the ensuing damage would likely have precluded that outcome.

Remaining issues

(1) *The company equipment*

[33] As noted above, the recovery of the company car, cellphone and laptop from Mr Turner was poorly handled. In spite of this, I find that in the circumstances following the discovery of Mr Turner's aberrant communications with customers and his then emotional state, the respondent was entitled to protect its interest and limit any damage to that which had already occurred.

(2) *Contributory conduct*

[34] Assessing contribution in this case is difficult as Mr Turner was unwell and known to be unwell before the altercation in Mr Hazlett's office. I have no doubt that his mental and emotional responses to the events were impaired by his depression and the behaviour Mr Turner displayed in the interaction between the two men was out of character. That said, it is also clear his behaviour led Mr Hazlett to concluding Mr Turner was repudiating the employment agreement.

[35] Weighing the circumstances, I assess Mr Turner's contribution at 25%.

Determination

[36] To summarise my findings on the issues set out above:

- I find Mr Turner was unjustifiably dismissed;
- I find Mr Turner did not resign;
- I find the respondent was entitled to uplift the company's equipment;
- I find Mr Turner contributed significantly to the circumstances which gave rise to his grievance.

Remedies

[37] As I have found Mr Turner to have a personal grievance I turn to the matter of remedies.

(1) *Lost remuneration*

[38] The evidence of the applicant was that he was unable to work until he went to Australia on 17 July 2006 where he found employment about the beginning of September that year. Having considered this issue carefully, I find Mr Turner's illness arose prior to the date on which he claims he was dismissed and it was that illness, which I accept was exacerbated by the loss of his employment, which prevented him from seeking work earlier. The loss of remuneration therefore cannot be due to the dismissal and I decline his application for that reason.

(2) *Hurt and humiliation*

[39] There is no doubt from the evidence that Mr Turner suffered considerably from the dismissal. To his credit he acknowledges the break-up with Ms Talley was part of the injury to his feelings, but it is also clear that the action of the company contributed to his feelings of humiliation and loss of self esteem.

[40] In all the circumstances this case warrants an award of compensation of \$6,000 under s.123(1)(c)(i) of the Act.

[41] Deducting the 25% for contribution, I order the respondent to pay Mr Turner the sum of \$4,500 without further deduction.

Costs

[42] Costs are reserved.

[43] The parties are urged to attempt to resolve the issue of costs between them. If that cannot be achieved Mr McKenzie is to lodge and serve his memorandum 30 days from the date of issue of this determination. Mr Malone has a further 14 days in which to respond.

Paul Montgomery
Member of the Employment Relations Authority

