

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Geoffrey Watt (Applicant)  
**AND** R. D. Managh Limited, T/a Odin's Marine (Respondent)  
**REPRESENTATIVES** David Bruce, Advocate for Applicant  
Ron Managh, Advocate for Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 16 January 2006  
**SUBMISSIONS RECEIVED** 24 January 2006  
**DATE OF DETERMINATION** 11 April 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

- [1] Mr Watt claims that he was unjustifiably dismissed on 28 February 2005, on one week's paid notice. Mr Watt asks that the Authority find that he has a personal grievance and award him the remedies of loss of wages and compensation of \$10,000. Mr Watt also asks that a penalty be awarded for the failure to provide an employment agreement.

Mr Ron Managh, the Managing Director of R. D. Managh Limited ("the Company") denies that the dismissal of Mr Watt was unjustified and says that Mr Watt was dismissed on the grounds of misconduct related to his continuing failure to carry out his duties in a competent manner. Mr Managh says that Mr Watt's incompetence cost the Company more than \$5,000 due to repairs that had to be re-done.

**Background Facts and Evidence**

- [2] Odin's Marine is largely involved with the supply and servicing of marine motors, particularly outboard motors for recreational boating. Mr Watt was employed as a Technician, initially on a casual basis from January 2002, then on a permanent basis from March 2002. The evidence of Mr Watt is that because he is not a qualified mechanic, he worked on servicing outboard motors, installing outboard motors, and general installation and servicing of boat accessories, along with washing and cleaning boats.
- [3] The evidence of Mr Managh is that Mr Watt claimed that he had previous outboard motor technician experience and he also claimed to be an experienced diesel engine mechanic. Mr Managh also says that the Workshop Manager employed by the Company "vouched" for Mr Watt as a mechanic.

- [4] While it appears that there were various problems relating to the general performance of Mr Watt, there is nothing documented. Mr Watt says that he only received one verbal warning from Mr Managh, for refusing to wash boats, and that issue was resolved. However, it seems that the general dissatisfaction and frustration that Mr Managh had with Mr Watt's overall performance, particularly in the area of the pre-delivery inspection procedures for outboard motors, reached a peak in mid 2004.
- [5] Mr Managh's evidence is that at that time, he spent some time with Mr Watt going over the outboard motor manuals and discussing the reasons why it is important that the pre-delivery procedures must be followed. Mr Managh says that the manuals are specific and that for the first 10 minutes of operation, the motors must be run at an idle speed, but Mr Watt used to run the motor at high revs. Mr Managh says that upon receiving instructions as to what was required, Mr Watt indicated that he understood the point of the training and would follow the procedures.
- [6] However, it is the further evidence of Mr Managh that while Mr Watt followed the proper procedures pertaining to the outboard motors for a few months, he then went back to the habit of over-revving the motors. Mr Managh says that on 4 December 2004, he and the Workshop Manager discussed Mr Watt's habits and decided that he should undergo further training on an "informal and casual basis." The task of providing further training for Mr Watt was attempted by the Workshop Manager. Mr Managh says that the response from Mr Watt was "a barrage of foul language" and a total refusal to carry out any further work on new motors. Mr Managh says that this was followed by "a three day sulk" and Mr Watt became "sullen and unapproachable" and carried out his tasks in an incompetent and un-workmanlike manner.
- [7] The evidence of Mr Watt is that one morning in mid 2004, Mr Managh came to him in "a fiery mood" and said something to the effect that Mr Watt should: ["pack your fucking tools and get the fuck out of my workshop." Mr Watt says that upon the Workshop Manager overhearing this, he told Mr Managh that this action was against the law, whereupon Mr Managh apologised and asked Mr Watt if he wanted to stay and that it was Mr Watt's choice.
- [8] In early January 2005, there was an issue regarding a Tohatsu outboard motor. The evidence of Mr Managh is that in contravention of the training and discussion that had taken place with him, upon starting the motor, Mr Watt revved it for at least 10 minutes. Another fault was identified, not connected with the servicing of the motor that Mr Watt had carried out, but requiring the motor to be stripped down. This revealed damage to the bore of the motor consistent with the earlier revving of the motor by Mr Watt. Mr Managh says that the cost of the repairs to the motor for the damage that Mr Watt caused was approximately \$1,000.
- [9] Mr Managh referred the Authority to another incident that also occurred in early January 2005. Mr Watt had carried out a routine servicing on an outboard motor for a client but the motor stopped while the client was out at sea. The boat was brought back to the local marina and Mr Watt was requested to go there and make the necessary repairs. Mr Managh says that Mr Watt made it clear; "using the foulest of language" that he was not prepared to go to the marina and service the boat motor. He was finally persuaded by the Workshop Manager to go.
- [10] The further evidence of Mr Managh is that about the same time, Mr Watt was required to clean a boat that was available for resale but he did not carry out the cleaning and placed the boat in the showroom in a dirty condition. When questioned about this, Mr Watt claimed to have cleaned the boat but Mr Managh says this was "an obvious lie" - that Mr Watt admitted to later.

[11] Mr Watt does not appear to take issue with most of what Mr Managh has to say about his performance and attitude, apart from the matter of the Tohatsu motor – Mr Watt says that the motor had a manufacturing fault and the damage that occurred was because of that.

### **Dismissal - 28 February 2005**

[12] Mr Watt says that on the morning of 28 February 2006, Mr Managh asked to see him in his office. Upon being seated in the office, Mr Watt says that Mr Managh told him that he was unhappy with the inadequate cleaning of a boat that Mr Watt had carried out on Friday 25 February, as when showing a customer the boat, it was seen to have “bird shit” on the dashboard. Mr Watt says that he told Mr Managh that he had cleaned the boat but Mr Managh loudly told him he had not.

[13] Mr Watt also says that Mr Managh told him he was unhappy with the language that Mr Watt used. The evidence of Mr Watt is that Mr Managh told him that he had been thinking over the weekend about the problems with Mr Watt and how to fix them and: [“that because of the downturn in business, he could not pay me any more and that he was letting me go.”

[14] The evidence of Mr Managh is that he met with Mr Watt and was mindful that:

- Mr Watt refused to do work away from the workshop;
- He could not rely on Mr Watt to clean boats;
- Despite training Mr Watt on the correct procedures for servicing new outboards, he was unable to have him do that.

Mr Managh says that effectively, Mr Watt had: [“created a situation for himself where his employment could not be continued.”

[15] Mr Managh says that he explained this and that Mr Watt reluctantly agreed with the situation. Mr Watt had his employment terminated on the grounds of “gross misconduct” because of:

1. The failure to undertake pre-delivery duties correctly on the outboard motors, even after training, one outcome being a costly repair job;
2. There was a continuous failure to undertake cleaning duties as requested; and
3. There was an attitude problem when asked to carry out duties away from the workshop.

Mr Managh says that with the ongoing problems with Mr Watt carrying out his work, coupled with a downturn in business, he was no longer prepared to retain Mr Watt.

### **Analysis and Conclusions**

[16] Mr Watt claims that his dismissal was substantively and procedurally unjustified. Turning first to the procedural aspects of Mr Watt’s dismissal, The minimal procedural requirements that an employer must observe before deciding to dismiss an employee are well established and are set out in *NZ (with exceptions) Food Processing etc IUOW v Unilever* [1990] 1 NZILR 37. The requirements are:

1. Notice to the employee of the specific allegation of misconduct to which the employee must answer and of the likely consequences if the allegation is established;
2. An opportunity, which must be real as opposed to a nominal one, for the employee to attempt to refute or to explain or mitigate his or her conduct; and

3. An unbiased consideration of the worker's explanation in the sense that the consideration must be free from determination and uninfluenced by irrelevant considerations.

- [17] In regard to the substantive reasons given for the dismissal, I accept the evidence of Mr Managh that there were ongoing performance problems with Mr Watt and that these problems were detrimental to the effective operation and reputation of his business. I also accept that in regard to the proper process to be followed as to the running of new outboard motors, Mr Watt was well aware of what was required but still chose to ignore what he had been told several times.
- [18] Nonetheless, there is no evidence that Mr Watt was ever warned about the possible consequences of such behaviour continuing or being repeated, or that his employment was in jeopardy.
- [19] I appreciate that Mr Managh operates a reasonably small business operation and does not have at hand the resources that a larger enterprise has in regard to being aware of correct personnel procedures. However, the law pertaining to the necessary criteria to be followed in regard to a potential dismissal for poor performance is well established, and certainly Mr Managh could have and should have, obtained appropriate advice before dismissing Mr Watt.
- [20] If Mr Managh had followed appropriate procedures, given time, I suspect that the dismissal of Mr Watt may well have been justified. Unfortunately, Mr Managh failed to observe any of the necessary criteria and hence the dismissal of Mr Watt was substantively unjustified on procedural grounds alone and he has a personal grievance.

## Remedies

- [21] Having found that Mr Watt has a personal grievance, I turn to the remedies that he may be entitled to.

(a) Reimbursement of Wages

Section 123(1)(b) of the Employment Relations Act 2000, provides that where the Authority determines that an employee has a personal grievance, it may provide for:

“the reimbursement to the employee of a sum equal to the whole or any part of the wages or any money lost by the employee as a result of the grievance.”

Further to that provision, section 128(2) of the Act provides that:

“If this section applies then, subject to subsection (3) and subsection 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months’ ordinary time remuneration.”

- [22] Mr Watt claims for reimbursement of actual loss of wages from 7 March 2005 until 1 June 2005, when he obtained alternative employment, a total of 12 weeks at the rate of \$540 gross per week, being \$6,480.00. There is no evidence of Mr Watt making any attempt to mitigate his losses. Mr Managh alluded to Mr Watt getting paid to cut firewood and injuring himself while doing so and possibly being on accident compensation, but the evidence is inconclusive about this.

[23] But in any event, given that apart from the provisions of section 124 of the Act, having found that Mr Watt has a personal grievance, s.128(2) of the Act provides that the Authority is bound to order the employer to pay the sum equivalent to the actual lost remuneration, being \$6,480.00. However, as it is my conclusion that Mr Watt contributed to the circumstances that gave rise to the personal grievance, that sum will be reduced accordingly.

[24] (b) Compensation

Section 123(1)(c)(i) of the Employment Relations Act 2000, provides that where the Authority determines that an employee has a personal grievance, it may provide for:

“the payment to the employee of compensation by the employee’s employer, including compensation for-

(i) humiliation, loss of dignity, and injury to the feelings of the employee; .....

Mr Watt seeks compensation of the sum of \$10,000 but there is no evidence before the Authority that would support an award of this sum. Indeed, I observed Mr Watt to be of a robust nature and I saw no obvious evidence of the damage that he says was visited upon him. Nonetheless, there is evidence of the effect of the dismissal, particularly its suddenness, that warrants compensation of the sum of \$3,000, to be reduced as below.

[25] (c) Contribution

Pursuant to the provisions of section 124 of the Act, the Authority is bound to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. Given the overall behaviour of Mr Watt towards his employer and his failure to follow instructions regarding his duties, particularly in the pre-delivery servicing of outboard motors, I find that the actions of Mr Watt contributed significantly towards the situation that gave rise to the personal grievance. Hence, the remedies that would otherwise be awarded should be reduced accordingly by 50%.

[26] Mr Watt has also sought that a penalty be awarded for the failure on the part of Mr Managh to provide an employment agreement. However, there is no evidence of Mr Watt requesting an agreement or making any issue about such during his employment. Given the overall circumstances, I do not consider that the awarding of a penalty is appropriate and decline to do so.

## **Determination**

1. I find that the dismissal of Mr Watt was unjustified. He has a personal grievance and is entitled to appropriate remedies.
2. Pursuant to sections 123(b) and 128(2) of the Act, R. D. Managh Limited is ordered to pay to Mr Watt the gross sum of **\$3,240.00** (\$6,480 reduced by 50%).
3. Pursuant to section 123(1)(c)(i) of the Act, R. D. Managh Limited is ordered to pay to Mr Watt the gross sum of **\$1,500.00** (\$3,000 reduced by 50%).

**Costs**

Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**