

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 111/08
5091011

BETWEEN MICHAEL WESTWOOD
 Applicant

AND BEATTIE AIR
 CONDITIONING LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Robert Thompson, Advocate for Applicant
 Peter Macdonald, Advocate for Respondent

Investigation Meeting: 21 February 2008

Submissions received: 8 March 2008 from Applicant
 14 March 2008 from Respondent

Determination: 1 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant claims to have been both unjustifiably dismissed and disadvantaged in his employment relationship with the respondent. He seeks remedies of reimbursement of wages lost as a result of the alleged dismissal, compensation for hurt and humiliation, a penalty for breach of his employment agreement and costs.

[2] The respondent denies the applicant has any justified claim saying the applicant was dismissed for dishonesty having falsified his timesheet and lied as to his whereabouts during paid business hours. Further, the respondent says the applicant admitted these allegations to Mr Beattie and to Mr Mather, the respondent's Sales and Project managers. Accordingly, it declines to meet the applicant's remedies.

What caused the problem?

[3] The applicant was employed by the respondent company as an air conditioning electrician from August 2006 until the relationship broke down and he was summarily dismissed from his employment in April 2007.

[4] The applicant says that on 19 April 2007 at about 3.15pm he received a telephone call from Mr Beattie requiring him to be at the company's workshop at 4.15pm. He says no reason was given for the direction, but on arrival at the workshop found that he was facing a disciplinary meeting. The applicant arrived to find Mr Beattie and Mr Mather waiting for him.

[5] Mr Westwood says that Mr Beattie presented a list of allegations, that he was never provided with that list nor was he given the opportunity to consider the list, engage support or representation, or advised he may be dismissed if the respondent found him in breach of his obligations.

[6] An issue was that on the day in question, 10 April 2007, Mr Westwood had taken time off to meet a veterinary surgeon between 11am and 3pm. The applicant says that he advised Mr Ussher, the Workshop Manager, of this and says that he worked later that evening to repay some of the time taken up. Further, the applicant says that the respondent does not appear to have the timesheet he submitted for the hours he worked that day.

[7] Mr Westwood says he was telephoned by the office administrator, Erin, while he was working in a confined space. She asked him if he could advise her the hours he had worked on the day he had met the veterinary surgeon. The applicant told her to put his hours down as a normal day, explaining he did not have his diary with him at the time.

[8] It needs to be said that the respondent's perception was that the applicant had attended a doctor's appointment and had some difficulty understanding how such an appointment could take up to some four hours.

[9] At the disciplinary meeting, the applicant says he told Mr Beattie that the absence was related to a vet's appointment, but accepts that he may have told Mr Ussher when he called the Workshop Manager that the absence was due to a doctor's appointment.

[10] The applicant says he was also accused of using a company vehicle in a *reckless manner* which he says resulted from an incident *perhaps two months earlier* than the meeting. He says that at the time of the incident, Mr Ussher issued a general warning that all staff needed to take more care when driving company vehicles. Mr Westwood says that, having been advised of this incident, he went to Mr Beattie and told him that he may have been the driver in question, having gone through an amber traffic light. He says Mr Beattie was understanding of the situation at the time.

[11] Mr Beattie's evidence was that he *requested Mr Westwood to attend a meeting on 19 April 2007 to discuss a complaint we had received from a member of the public. I also wanted to discuss a number of other concerns including issues arising from the installation of an air conditioning unit.* On the matter of the careless driving, Mr Beattie says that Mr Westwood denied that he had driven the vehicle carelessly.

[12] In relation to the installation of an air conditioning unit, Mr Beattie says:

The customer said that she was not happy with the installer. She said that Mr Westwood had told her at 11am that he had a doctor's appointment. He left the site at 11am and returned at 3pm ... Mr Westwood's timesheet was completed by an office administrator after she phoned him and asked him for his hours worked on the day of the installation. Mr Westwood's reply was 8am to 5pm 8½ hours. In fact Mr Westwood was only on site for 5½ hours.

[13] Mr Beattie says:

Mr Westwood admitted that he had given false information regarding the hours he had worked on the day in question ... After further discussion Mr Westwood changed his story and said it was in fact the vet and not the doctor he had visited, to which I said to him you have lied to me again.

[14] Another point at issue was an incident at a work site in Oxford Terrace. Mr Beattie says:

It was put to Mr Westwood that when Mr Mather went to the site at 3.45 on 2 April 2007 Mr Westwood was nowhere to be found and unable to be contacted on his cellphone.

[15] Mr Beattie then says:

By the end of this meeting there was no room for any doubt that Mr Westwood had misled me and had been dishonest ... he [Mr Westwood] admitted that he had lied about the doctor and the fact was that he had gone to the vet.

[16] At the close of his evidence, Mr Beattie says:

I do have an absolute requirement for frankness, openness and honesty from all employees and I will not tolerate being deceived. Mr Westwood was not honest with me. I realise that the process may not have been perfect and could have involved a further meeting. However, the facts of the situation were so clear that there was nothing left for me to investigate and any further discussion could not possibly have made any difference to the final outcome.

Issues

[17] To determine this personal grievance, the Authority needs to decide the following issues:

- Did the employer conduct a full and fair inquiry into the allegations made against the applicant; and
- If it did so, did it fairly consider the explanations put by the applicant; and
- Before dismissing the applicant, did the respondent put its preliminary conclusions and the penalty it was considering to the applicant; and
- Did the applicant contribute to the circumstances which gave rise to the alleged grievance; and
- Is the applicant entitled to remedies and in what measure?

The investigation meeting

[18] At the meeting, the Authority was assisted by evidence from the applicant himself and his wife, Mrs Pamela Westwood. For the respondent, evidence was heard from Mr Beattie and from Mr Mather and Mr Grant Ussher.

[19] While there was clearly some underlying feeling between the parties, the investigation proceeded with efficiency, assisted by advocates for each party.

[20] There were some issues of fact which were in dispute and they were whether the applicant, having been contacted about his hours on 10 April, gave the administrator accurate information about his hours worked on the day in question and whether the applicant admitted that he had misled the respondent as to the reasons for his absence from a work site when advising Mr Ussher that he was going to a doctor.

[21] A number of issues arose. Significant for the respondent was the alleged conversation between Mr Ussher and the applicant when the Workshop Manager was driving Mr Westwood home following the dismissal.

[22] I have had little regard for this in determining this matter as the conversation took place following the dismissal and therefore cannot be relied on at the time the decision to dismiss was taken. Suffice it to say that in reply to the allegation that the applicant told Mr Ussher that he had plenty of private work and was going to return to contracting, is not borne out and is refuted by the evidence of Mrs Westwood. The applicant's securing alternative employment suggests any such discussion reflects a staunch approach by the applicant in the face of his dismissal.

Analysis and discussion

[23] There is a clear deficiency in the process adopted by the respondent. It failed to advise the applicant of the issues it wanted to discuss with him at the meeting to which he was summoned, it failed to advise him that he was entitled to have a representative present at the meeting and at the close of that meeting proceeded to dismiss him without giving the applicant the opportunity to comment or advocate for a penalty short of termination.

[24] That, however, is not the end of the matter. On the evidence before the Authority, on two occasions Mr Westwood absented himself from work sites, on the one hand giving no indication that he was doing so in respect of the Oxford Terrace job, and providing an explanation which was false in the case of the four hour absence from an installation job. For the sake of completeness, I have considered the issue of the so-called *careless use* of a company vehicle and am of the view that this matter had been dealt with prior to the meeting being called.

[25] On the balance of probabilities, I think it very likely that Mr Westwood admitted giving incorrect information to Erin when she rang inquiring about his hours and also that Mr Westwood gave the customer and Mr Ussher false information as to the reasons for his absence. This behaviour falls well short of the good faith required of an employee in respect of his employer and significantly undermines the trust and confidence an employer might have of an employee, particularly where that employee is working away from the company's operational base.

[26] Mr Beattie was quite entitled to demand high standards of all his employees in respect of honesty and able to reach a conclusion that Mr Westwood had deliberately misled both the office administrator in respect of hours and Mr Ussher in respect of the reasons for his absence from a work site.

[27] The difficulty which arises is that the conduct of the investigation process was seriously flawed in that it did not provide the applicant the opportunity to consider the allegations, engage representation, nor did it permit him to attempt to persuade his employer that disciplinary action short of termination was appropriate in all the circumstances. That is not to say the company, had it gone through the process appropriately, would have come to a different conclusion.

The test

[28] The test for justification is set out in s.103A of the Act which requires the Authority to consider, on an objective basis, the respondent's actions and how it acted and what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

The determination

[29] Returning to the issues as set out above in this determination, I find:

- The respondent failed to conduct a full and fair inquiry into the allegations made against the applicant;
- It failed to fairly consider the explanations put forward by the applicant and also failed to put its preliminary conclusions and proposed penalty to the applicant before deciding on its course of action;
- The applicant contributed significantly to the circumstances which gave rise to the alleged grievance and the Authority now turns its mind to the issue of remedies.

Remedies

[30] Mr Westwood claimed \$2,674.45 gross in lost remuneration having begun his new employment on 7 May 2007. He also sought \$15,000 compensation for hurt and humiliation.

[31] The reimbursement figures appear accurate and are accepted. The compensation claim is altogether excessive for an applicant employed for some eight months, given his contribution notwithstanding the embarrassment Mr Westwood endured when driven home following the dismissal. In this case, I think it fair to award the applicant the sum of \$4,000.

[32] As noted above, it is my view that even had the respondent conducted its investigation according to Hoyle, the outcome may well have been no different given the facts of the case. For the respondent, Mr Macdonald urges the Authority, should it find the respondent's procedures fell short of the fair and reasonable benchmark, to apply a deduction of 100% to any awards made to the applicant. I have considered that submission with considerable care however, given the facts of this case, such a deduction would be unduly harsh. The Authority is required to balance the significant shortfall in the disciplinary process against the significant contribution of the applicant. In the particular circumstances of this case, I find a deduction of 60% is just.

[33] The respondent is ordered to pay the applicant the following sums:

- \$1,069.78 gross for lost remuneration under s.123(1)(b) of the Employment Relations Act 2000;
- \$1,600 without deduction as a compensatory payment under s.123(1)(c)(i) of the Employment Relations Act 2000;
- The application for a penalty is dismissed.

Costs

[34] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority