

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Robert Whitehouse (Applicant)
AND Moorhouse Construction Limited (Respondent)
REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Hans Van Schreven, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 21 February 2006
DATE OF DETERMINATION 28 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Whitehouse alleges he has suffered unjustifiable disadvantages and has been dismissed unjustifiably by the respondent company by whom he was employed as Construction Manager. He seeks reimbursement of remuneration lost due to his dismissal, the sum of \$50,000 for hurt and humiliation, payment of unpaid bonuses and costs.

[2] The respondent company denies it has caused the applicant to be disadvantaged and further denies that the dismissal of Mr Whitehouse was unjustified. Accordingly, it declines to meet the applicant's claims.

[3] The parties attended mediation but were unable to resolve the employment relationship problem.

The relevant facts

[4] Mr Whitehouse began work with the company as a carpenter on 14 October 2002 and approximately three weeks after being employed was promoted to the position of Construction Manager. Some one year before his dismissal, the applicant's salary was raised to \$52,000 per annum. He also received bonuses, had his home phone rental paid and had full use of a company vehicle.

[5] The respondent says the applicant's performance began to deteriorate around August 2004. It says Mr Whitehouse had received many verbal instructions regarding his need to improve his performance when handing newly built homes to customers, his timely completion of maintenance

items on the homes and in particular over a home built for a couple in Darfield which involved the changing of a construction lock.

[6] The company owns a regional franchise for a national franchisor building residential dwellings and says it must adhere strictly to standards set by the franchisor in regard to the construction, hand over and maintenance on homes which it builds. The franchisor provides the company with a range of manuals and programmes to provide checks during the building process to ensure quality work and contented customers.

[7] As a result of the company's concerns, it issued a written warning to Mr Whitehouse on 31 August 2004. The applicant says he had already attended to changing the construction lock at the Darfield property. When issued with the warning, Mr Whitehouse made it plain to the employer that he would be challenging it. The letter issued states, among other things:

Please take this letter as written warning and an indication of the areas of your role that we feel are below standard. We will be reviewing these points again in one month's time and expect to see a marked improvement to these areas.

If you have any queries regarding any of the above comments please do not hesitate to discuss these with either Rob or myself.

[8] On 24 September 2004, the company left a letter containing a further warning on the applicant's desk. It resulted from dissatisfaction voiced by another customer – the applicant says the customer was dissatisfied with Mr Jeff Roots' handling of matters while the company says the customer was dissatisfied with Mr Whitehouse's handling of matters.

[9] The letter requested Mr Whitehouse to attend a meeting on 29 September 2004 with the company's director, Mr Rob Root, and Mr Jeff Root, the Manager of the respondent.

[10] Mr Whitehouse says he prepared detailed notes of his response to the allegations set out in the warning letter of 31 August 2004.

[11] The 24 September 2004 letter states:

On Wednesday 29 September, immediately after our construction meeting, Rob and I will be carrying out a review of your position within this company and you will be required to attend that review, and at that time you will have an opportunity to respond to these comments and add any further comments of your own.

Please treat this as a serious matter and I again point out that your current position with this company is under review. [Emphasis added]

[12] The letter does not advise the applicant of his entitlement to have a representative accompany him to the meeting. That is significant as the individual employment agreement which, although unsigned was recognised by the respondent as governing the employment relationship, states at para.7.3:

7.3 *Disciplinary procedures.* *The procedures set out in this clause are to be followed in circumstances where the matter(s) causing concern is/are not of sufficient seriousness to warrant summary dismissal.*

7.3.1 *The employee must be advised:*

(a) *Of his/her right of assistance and/or representation at any stage;*

(b) *Of the specific matters causing concern and given an opportunity to state any reasons or explanation;*

(c) *Of the corrective action(s) required to remedy the situation.*

7.3.2 *Under normal circumstances the first instance would entail a first written warning, the second instance a final written warning and the third instance could entail dismissal without notice.*

7.3.3 *The employee must always be given sufficient time to take the necessary corrective action(s).*

[13] Mr Whitehouse duly attended on the Root brothers for the review meeting. Mr Rob Root began by telling Mr Whitehouse that he would not be dismissed and then accused the applicant of not completing the company's construction progress books. Mr Whitehouse denied this, pointing out that the franchisor's national training manager, Sharon Josephson, had audited his duties and checked his files in early 2004. His evidence was that he specifically asked her about the five-star booklets as he had not filled in parts of them. The applicant says Mr Josephson said that he was an experienced construction manager and did not need to fill in the five-star booklets, saying that these were only a guide for new construction managers. The applicant also reports that when doing her checks, Ms Josephson said she was happy with everything he was doing and that he was doing a good job for the company.

[14] The respondent says it asked Mr Whitehouse whether he would fill them out in detail in the future and he replied that he would not, given the directive from the franchisor's national training manager. At that, Mr Rob Root dismissed the applicant, asking for his keys and cellphone. Mr Whitehouse then left the company's premises.

[15] The company then, on 30 September 2004, despatched a letter confirming the applicant's dismissal. It said:

This letter serves to confirm that termination was based on:

(a) *Your continued failure and refusal to carry out direct instructions; and*

(b) *Your actions exposing the company to risks in terms of health and safety by wilful disobedience of protocol and set standards.*

Although the decision to terminate your employment was based upon your responses to issues of concern put to you at that meeting, the company of course took into account in determining its decision to dismiss you, the fact you had had two prior written warnings. This was obviously a factor which weighed in the company's deliberation of its eventual decision to dismiss.

[16] Mr Whitehouse says that at the dismissal meeting he was declined permission to record the meeting and says he was not given the opportunity to put forward his reasons for contesting the 31 August warning letter and the issues contained therein.

The issues

[17] In this particular matter, the Authority is required to determine the following matters:

- Was the applicant disadvantaged by the unjustified actions of the respondent; and
- Was the applicant unjustifiably dismissed; and

- Did the applicant contribute to the circumstances which gave rise to the dismissal; and
- What, if any, remedies are due to the applicant if he succeeds in his claim?

The investigation meeting

[18] The Authority heard from the applicant in support of his claims and from Mr Jeff Root and Mr Murray Smith on behalf of the respondent. Evidence from Sonia Marshall, Michael O'Connor, Coralie Crockett and Mark McFarlane was taken by consent as the evidence of these witnesses was peripheral to the main issues. Mr Rob Root did not attend the Authority's meeting, nor was any affidavit evidence offered in support of the respondent by the company director.

Analysis and discussion

[19] This dismissal was essentially on performance grounds. The company, after a number of complaints by the applicant's alleged failings, advised Mr Whitehouse of a review of his performance in his position. The legal principles appropriate in dealing with performance difficulties are clearly set out in *Trotter v. Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659. At p.681 the Court set out some of the questions it considers in deciding whether a dismissal for poor work performance is justified:

- (1) *Did the employer in fact become dissatisfied with the employee's performance of his or her duties?*
- (2) *If so, did the employer inform the employee of that dissatisfaction and require the employee to attain a higher standard of performance?*
- (3) *Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of the standards requiring to be met?*
- (4) *Was a reasonable time allowed for the attainment of those standards?*
- (5) *Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question of whether the employee had achieved or substantially achieved what was expected, including:*
 - (a) *Using an objective assessment of measurable targets;*
 - (b) *Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;*
 - (c) *Listening to the employee's explanation with an open mind;*
 - (d) *Considering the employee's explanation and all favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and*
 - (e) *Exhausting all possible remedial steps including training, counselling, and the exploration of redeployment.*

[20] There had been discussions between the parties regarding site safety and the obligations of the respondent after securing safe site accreditation. The applicant says he was maintaining, as best he

could in the face of at times uncooperative staff of the building contractors, the required standards of site safety. The respondent says that it took a different view and that it regarded site safety as a primary obligation of the construction manager's role.

[21] There had been a direction given by the respondent to Mr Whitehouse not to *check up on* a particular builder of a specific home. This direction was not documented and not produced to the Authority. However, I understand it followed a complaint from the building contractor in question.

[22] The respondent has not followed its own procedures set out in the individual employment agreement, on which it has relied, despite its not being signed by the applicant, in making notice and holiday payments to Mr Whitehouse. Clearly, it requires the respondent to advise an employee of the right to representation in meetings of a disciplinary nature.

[23] The respondent did not advise that Mr Whitehouse's employment was at risk. It used the terms *review of your position* and *your position is under review*. I am strongly of the view that a review requires an employer to put its concerns on the table and invite and listen to the employee's responses. Then, the employer needs to take some time to consider those responses before deciding a course of action. This simply did not happen in this case. I am also firmly of the view that had the parties had legal representation at the 29 September 2004 meeting, the outcome would likely have been significantly different.

[24] Turning to the applicant's claims for hurt and humiliation in the sum of \$50,000, the Authority heard from no one to attest to Mr Whitehouse's reaction to his dismissal. The sum claimed is significant. The Authority does not doubt the applicant was stunned at the outcome of what the respondent called a *review* meeting, but it requires evidence on which to base an award of this magnitude.

[25] While the Authority accepts the respondent's evidence that the applicant was inquiring of other tradesmen in respect of his ideas of forming a company specialising in foundations for housing, that in itself does not firmly establish that the applicant intended to follow through with doing so had he remained employed. It was only after his dismissal that, as a free man, he registered his company and began trading.

The determination

[26] Returning to the issues to be determined:

- I find the applicant was unjustifiably disadvantaged by the issuing of the warning of 31 August 2004 and by being denied the right to respond to the contents of that warning.
- I find the applicant was unjustifiably dismissed after having been told at the outset of the meeting of 29 September 2004 that the company would not be dismissing Mr Whitehouse. In fact, without any reference to its own documented procedures, the respondent did precisely that.
- I find that in the circumstances of this dismissal, the applicant has not contributed to his demise. The procedure followed by the company is so blatantly flawed and lacking in natural justice that the issue of contribution is negated.
- I have considered the applicant's claim for lost remuneration from the time of the dismissal through to the date of the investigation meeting with some care. I have

balanced this by considering Mr van Schreven's submission that, in the event the respondent fails in its defence, it cannot be expected to pay the applicant who has decided to enter his own business and is unable to draw on the proceeds of that business for a significant period.

- I have also considered whether Mr Whitehouse's dismissal was predetermined by the respondent. I find it was not, but rather came about because Mr Rob Root lost his composure and dismissed the applicant.

Remedies

[27] Having made the above findings, I now make the following orders:

1. The respondent is to pay the applicant lost remuneration in the sum of \$13,000 gross and holiday pay calculated at 6% on this sum.
2. I order the respondent to pay the applicant the sum of \$17,000 pursuant to s.123(c)(1) of the Employment Relations Act 2000. This payment is in respect of the disadvantage findings and of the unjustified dismissal.
3. The respondent is to pay the applicant the outstanding bonuses due to the applicant. The parties are to determine the quantum of these bonuses and if they are unable to agree, leave is granted to return the matter for determination by the Authority.

[28] At the request of counsel, costs are reserved.

Paul Montgomery
Member of Employment Relations Authority