

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 15  
5631932

BETWEEN

DENYM WILLIAMS  
Applicant

A N D

CUSTOM MOTOR BODIES  
(1998) LIMITED  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: May Moncur, Representative for Applicant  
Peter Gilling, Director of Respondent

Investigation Meeting: 19 January 2017 at Auckland

Date of Determination: 19 January 2017

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The respondent, Custom Motor Bodies (1998) Limited (Custom Motor Bodies), has been in the business of building motor bodies in New Zealand for over 40 years.

[2] Mr Denym Williams, the applicant, is an experienced fitter and welder who was employed by Custom Motor Bodies from 19 May 2016 until his dismissal on 9 June 2016.

[3] Custom Motor Bodies says Mr Williams was dismissed justifiably for gross misconduct. The gross misconduct related it says to health and safety concerns relating to sleeping on the job.

[4] Mr Williams says he was told when dismissed that it was for poor time keeping and that health and safety was not mentioned. Mr Williams says the dismissal was unjustified and seeks lost remuneration from the date of dismissal until he

obtained a job some seven weeks later. He is claiming compensation for hurt and humiliation he says he suffered.

### **The investigation meeting**

[5] Mr Williams and his mother, Ms Rachel Williams, both filed witness statements prior to the investigation meeting and both confirmed by way of affirmation that their evidence was true and correct. Mr Peter Gilling, director of Custom Motor Bodies, Mr Dave Andrews, the factory supervisor at Custom Motor Bodies and Mr Nick Jones, also filed witness statements prior to the investigation meeting and confirmed by way of affirmation that their evidence was true and correct.

[6] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence. Rather relevant facts and legal issues are set out, along with the Authority's conclusions.

### **The issues**

[7] The issue for the Authority to determine is whether Mr Williams' summary dismissal was justified. That's the sole issue.

### **The law**

[8] Turning to the law. Section 103A(1) of the Act provides that employers must justify their decisions to dismiss. Whether a dismissal was justifiable must be determined on an objective basis by applying the test set out in subsection (2) which states:

The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[9] The test of justification requires that an employer act in a manner that is substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time<sup>1</sup>.

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<sup>1</sup> *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [22]

**Substantive justification**

[10] s.103A(3) sets out the four particular factors to be considered by the Authority as well as any others it thinks appropriate. The four particular factors relate primarily to the way in which complaints about an employee are dealt with and investigated, whether the employee concerned has been properly notified of the complaints, provided with a proper opportunity to respond to them and whether the employer has genuinely considered the employee's responses.

[11] The test in s.103A is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly (s.103A(5)).

**Mr Williams' employment**

[12] Mr Williams began working full time for Custom Motor Bodies on 19 May 2016 following an interview with the director, Mr Gilling, on 17 May 2016. Mr Williams was told by Mr Gilling that his employment was to be subject to a trial period but he was not provided with a written employment agreement containing a trial period.

[13] On 17 May 2016, Mr Williams saw an advertisement by Custom Motor Bodies on Trade Me, seeking a full time fitter/welder. Mr Williams applied for the position and was interviewed by the director, Mr Gilling, at Custom Motor Bodies' workshop.

[14] The interview was short but covered hours of work which were from 7 am to 3pm, smoko at 9.30am and lunch at 12 noon. Mr Williams was offered the position on a week trial basis and was told that his hourly rate would be \$22 gross and his hours of work would be 40 hours per week and he accordingly commenced work on 19 May 2016

[15] Mr Andrews, to whom Mr Williams reported, says he was told by Mr Gilling that he had employed Mr Williams on a week's trial period primarily to see if he could weld. Mr Williams satisfactorily completed the welding test within 2 days and Mr Gilling was informed of this by Mr Andrews.

[16] During the first week of his employment, Mr Williams was spoken to by both Mr Jones and Mr Williams about his time keeping, namely how long he was taking for smoko and the time he actually started work in the morning after clocking in.

[17] After a week, Mr Andrews told Mr Williams that he was doing well but they were extending the trial period for a week because there were some things he needed to improve upon. Mr Andrews says he told Mr Williams he needed to pick up on his attitude and timekeeping.

[18] Mr Gilling provided the Authority with a summary of his diary note. That record shows a verbal warning about timekeeping being given by him to Mr Williams on 27 May 2016. However, at the investigation meeting Mr Gilling described this as a “friendly warning” and there was no mention of Mr Williams’ employment being at risk.

[19] The next “warning” was issued by Mr Gilling on the 2 June 2016. However, it was not made clear to Mr Williams his employment may be in jeopardy. Mr Williams denies ever getting a warning, verbal or otherwise for his timekeeping. If Mr Gilling did issue “warnings” they were not clear warnings as to the risk to Mr Williams ongoing employment. Rather, in my view Mr Williams was being told his timekeeping was poor and needed improvement. Certainly, Mr Gilling did not meet Mr Williams formally before issuing any warnings nor did he offer Mr Williams the opportunity to have a support person at any meeting at which a warning maybe issued. Mr Gilling told the Authority that Mr Jones had received both a verbal and written warning about timekeeping and that he would have been offered a support person before such a written warning was issued.

[20] I find that Mr Williams was spoken to about his timekeeping but was never made aware his employment may be in jeopardy because of it. No formal verbal or written warnings were issued to him.

[21] Mr Williams believed that his trial period had concluded on 3 June 2016 and he requested a copy of his written employment agreement from Mr Gilling. Mr Gilling informed Mr Williams that he would provide it within the next few days, but this never eventuated.

**9 June 2016**

[22] On 9 June 2016, Mr Williams arrived for work at 6.54am clocking in at 6.56am. Mr Andrews says despite clocking in, Mr Williams did not start work and so he reported the matter to Mr Gilling. Mr Gilling told Mr Andrews he would issue a verbal warning to Mr Williams. Mr Gilling says he told Mr Williams that the rules were clear about start and finish times and verbally warned him. This occurred at approximately 8am.

[23] Mr Gilling told Mr Andrews that he did not think Mr Williams was suitable and that procedures were being put in place to dismiss him.

**Dismissal**

[24] Mr Andrews says that Mr Williams was again the first to go for smoko at 9.30 am and the last to return after 10am. Mr Andrews says one of Mr Williams' colleagues videoed Mr Williams asleep at the smoko lunch room table. Mr Andrews was extremely frustrated. and says Mr Williams' behaviour was affecting the morale of the other staff and he had received complaints about Mr Williams.

[25] I have viewed the video footage of Mr Williams on the morning of 9 June 2016 and it shows Mr Williams sitting back with his eyes closed. It is not clear to me from the video footage that Mr Williams was asleep. Even so, this is a matter which could have been raised with Mr Williams and a matter about which he could have been spoken to and possibly warned about. This did not occur

[26] Mr Andrews says he then observed Mr Williams slouching over a steel cutting saw. Instead of going to Mr Williams to see if this was the case or to see if there was any danger, Mr Andrews decided to go and get Mr Gilling. When asked why if this was such a serious health and safety risk he did not immediately deal with it Mr Andrews' response was he wanted Mr Gilling to observe Mr Williams.

[27] Mr Gilling says that just after 10am he was informed by Mr Andrews that Mr Williams had been sleeping and that he had a video to prove it. Mr Gilling says he was concerned because Mr Williams was using the steel cutting saw which posed a health and safety hazard.

[28] Mr Gilling says that Mr Williams was sleeping on the job and that in itself amounted to serious misconduct which justified his dismissal. Mr Gilling also says that in the space of three hours of starting work, Mr Williams had managed to work less than his other colleagues and this in itself amounted to serious misconduct.

[29] Mr Gilling decided to immediately dismiss Mr Williams which he did. Mr Williams says he was dismissed for because of poor timekeeping and that health and safety was never mentioned. Mr Gilling's diary notes do not refer to any health and safety concerns as the reason for Mr Williams' dismissal. I find that Mr Williams was dismissed for issues arising out of his timekeeping and not because of any health and safety risk.

[30] Mr Williams says in relation to the meeting just after 10 am on 9 June 2016 Mr Gilling approached him and said to him that he was clearly not listening and as he was late for morning tea that he was to pack his things up and go.

[31] Even if the warnings which Mr Gilling says he gave were valid warnings I do not believe Mr Williams was dismissed for health and safety issues, rather he was dismissed for poor timekeeping which in my view does not amount to serious misconduct.

### **Events following dismissal**

[32] Following the dismissal, Mr Williams told his mother, Ms Rachel Williams, what had occurred. Ms Williams attempted to speak to Mr Gilling but was unable to do so. Ms Williams briefly spoke to Mr Andrews. Mr Andrews told her that Mr Williams did a good job but because of his timekeeping he was no longer productive. No health and safety concerns were mentioned.

[33] On 13 June 2016, Ms Williams rang and spoke to Mr Gilling. Following that discussion Ms Williams emailed Mr Gilling recording their conversation that Mr Williams was dismissed for being:

- (a) A clock watcher;
- (b) First to go to break and last to leave;
- (c) His work production began well but then reduced; and

(d) He fell asleep at the table in the smoko room on 9 June 2016.

[34] To form a conclusion that these issues amounted to serious misconduct without a formal discussion, in my view, was not the action of a fair and reasonable employer. Similarly, the other issues which both Mr Gilling and Mr Andrews referred to, including lateness to work, were not the subject of any previous disciplinary action.

[35] The way in which Custom Motor Bodies approached the issues with Mr Williams was not consistent with that of a fair and reasonable employer and was not consistent with the requirements of s.103A of the Act.

[36] Custom Motor Bodies appears to be relying on a trial period. However, the “trial” period was never in writing and was not in accordance with the requirements of the Act. Therefore, the trial period was not valid and cannot be relied upon. See s.67A of the Act.

[37] Accordingly, I find that the dismissal was both substantively and procedurally unjustified.

### **Lost remuneration**

[38] Mr Williams claims lost remuneration as he was unable to find a job for some seven weeks. Under the Act, Mr Williams is entitled to his lost remuneration as his dismissal was unjustified. I order Custom Motor Bodies to pay Mr Williams lost wages amounting to \$6,160 being 40 hours a week at \$22 gross an hour within 14 days of the date of this determination.

### **Remedies**

[39] Mr Williams has claimed \$5,000 in compensation for hurt and humiliation he says he suffered. Mr Williams says he was stressed financially as a result of his dismissal and embarrassed in front of his workmates. Ms Williams also gave evidence that Mr Williams withdrew and was unhappy.

[40] I order Custom Motor Bodies to pay Mr Williams \$5000 under s123 of the Act within 14 days of the date of this determination.

**Costs**

[41] Costs are reserved. Mr Williams has 7 days to file a memorandum as to costs and Custom Motor Bodies has 7 days in which to reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**