

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 97/10  
5159978

BETWEEN SEAN YOUNG  
Applicant

AND ROONEY EARTHMOVING  
LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Kevin Murray, Advocate for Applicant  
Roger Brown, Counsel for Respondent

Investigation Meeting: 8 April 2010

Determination: 28 April 2010

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**DETERMINATION OF THE AUTHORITY**

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[1] Sean Young worked for Rooney Earthmoving Limited from December 2007 until March 2009. In his statement of problem Mr Young says that he was unjustifiably dismissed, unjustifiably disadvantaged, discriminated against, subjected to a breach of his rights to natural justice, subjected to a breach of good faith and not paid wages owing to him. All that arose between the end of February and mid March 2009. The remedies identified in the statement of problem are reimbursement of wages owed (\$13,300.00) pursuant to s.123(1)(b); reimbursement for loss of remuneration (\$13,300.00) under s.128; compensation for distress caused by discrimination (\$25,000.00); compensation for lost benefits arising from the unjustified action (\$12,000.00); a penalty under s. 4 for the breach of good faith; compensation for a loss of benefits (\$120.00), and penalty for failing to provide a written employment agreement; and costs. This is all based on the assertion that Mr Young's manager attempted to get him to resign from late February 2009 and then suspended him on 18 March 2009 after an incident in the manager's office where

Mr Young defended himself from an imminent assault by the manager. On Mr Young's account it is not clear when the dismissal occurred.

[2] The company's position is straight forward. It says that it summarily dismissed Mr Young on 18 March 2009 after he assaulted his manager Geoff Haywood. Rooney's says that was a justified dismissal; or alternatively, Mr Young's conduct contributed to any grievance to such an extent that any remedies must be reduced to zero.

[3] Mr Young's claims were rationalised somewhat as a result of our phone conference. The first two claims were collapsed into one single claim for reimbursement for lost wages arising from a personal grievance; the allegation of unlawful discrimination was withdrawn and with it the associated claim for compensation; the claims for lost benefits compensation for an unjustified disadvantage and a penalty for breach of good faith continue; the \$120.00 lost benefits claim and the penalty for failing to provide an employment agreement were withdrawn; and the costs claim also continues.

[4] To resolve this problem I must first determine whether Mr Young was dismissed on 18 March 2009 or later. If he was dismissed I will consider whether he was justifiably dismissed in accordance with the statutory test. If there was no dismissal I will need still to consider whether an unjustified disadvantage grievance arises on the facts as found. If a grievance is established I will then need to assess remedies including the issue of contribution. The breach of good faith claim overlaps with the grievance claims so I will deal with that after assessing the grievance issues. Before turning to those issues I should first mention the people involved.

### **The people involved**

[5] Susan Young is Mr Young's mother. She was not present during the incident but spoke to her son when he was taken home afterwards. She also had a discussion with her son's manager (Geoff Haywood) when he came to her place a little while after the incident. She then rang Gary Rooney (a director of the company). Jamie McDougal and Dean Dunbar worked for Rooney's at the time. They both went upstairs to the office where the incident occurred and intervened but neither saw the alleged assault. Mr Dunbar also took Mr Young home. Nicholas Bennett works for Rooney's. He spoke to Mr McDougal and Mr Dunbar immediately before they

intervened and witnessed events downstairs afterwards. Andrew Rae is Mr Haywood's manager and was phoned by him soon after the incident. As mentioned Mr Rooney is a director of the company and was also phoned by Mr Haywood after the incident.

### **Was Mr Young dismissed?**

[6] Rooney's says that there was a dismissal on 18 March 2009 at the end of the incident in Mr Haywood's office when Mr Haywood told Mr Young *You're finished!* Mr Young's evidence is that Mr Haywood yelled out *You are on suspension from today!* There is no reliable evidence from anyone else to assist with what was said at the time. Mr Dunbar said in his written statement that Mr Haywood told Mr Young he was *finished* or something similar. However, when questioned he said he could not remember whether such a thing had been said. I prefer his response when questioned to his written statement. Mr McDougal could not recall what was said and Mr Bennett says he heard nothing.

[7] Mr Young in general did not impress as a reliable witness so caution is needed before accepting his evidence. Mr Haywood generally impressed as a more reliable witness than Mr Young. However I consider that the key to resolving this dispute lies in the context rather than whoever of these two witnesses impressed more as reliable. Mr Haywood is not overly familiar with employment law subtleties but does have the power to hire and fire. He believed himself to have been assaulted by Mr Young. Summary dismissal rather than suspension is a more probable response. Instructions were given to Mr Dunbar to take Mr Young home and collect his keys. Mr Haywood spoke to his managers soon afterwards. If he had told them of a suspension rather than a dismissal there probably would have been some follow up by Rooneys, but there was not. That lack of action supports dismissal rather than suspension. Mrs Young's evidence is that Mr Hayward told her *Sean seems to think he can take us to the cleaners.* That implies a dismissal rather than a suspension. From all this I conclude that Mr Hayward summarily dismissed Mr Young on 18 March 2009.

### **Justification**

[8] Justification for this dismissal must be assessed objectively by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[9] I am referred to the company's *Code of Conduct* which says that an employee who commits an act of serious misconduct is liable for *immediate dismissal*. The argument for Rooneys is that *immediate* should be given its literal meaning so that no investigation or disciplinary process was required. I do not accept that interpretation. Elsewhere in the *Code* are the *Principles* that must be followed when dealing with disciplinary matters. They include a right to representation and advice of that right prior to any formal interview, advice of the allegation, an appropriate investigation before substantive disciplinary action, and suspension if the allegation is sufficiently serious. In addition the phrase *immediate dismissal* is well known as a synonym for *summary dismissal*. Here, the employment agreement permits the employer to terminate the agreement *summarily and without notice for serious misconduct*. That makes it clear that there was no power to dismiss without investigation even for serious misconduct.

[10] There are rare cases where a dismissal without any investigation has been found to be justified: see for example *Northern Clerical etc Union v Manukau Knitting Mills Ltd* [1990] 2 NZILR 428. In the present case I do not accept that such a dismissal could be justified. I have already mentioned the *Principles* in the *Code of Conduct*. Those principles are binding on the company. They make it clear that there must be a full and fair investigation into every disciplinary allegation prior to disciplinary action. That did not happen in the present case. A fair and reasonable employer would have followed its own *Code* even in the circumstances as alleged by Mr Hayward. It follows that Mr Young was unjustifiably dismissed and has a personal grievance.

### **Remedies**

[11] I am obliged to assess the extent to which Mr Young contributed in a blameworthy manner to the circumstances giving rise to his grievance and reduce any remedies accordingly.

[12] There is a conflict in the evidence between Mr Young and Mr Haywood about their altercation. I will return to that shortly. Mr Bennett gave evidence about what he saw from his car through the upstairs window in Mr Haywood's office. He says that he saw Mr Young with Mr Haywood *pinned up against the window*. I am satisfied that he was able to see through that window as he arrived at work. He went inside and he and Mr McDougal went directly upstairs and intervened. By that time

the two men were scuffling just inside the door into Mr Haywood's office. It is common ground that they ended up at that point because Mr Haywood drove Mr Young there from where their scuffle had started. Mr Young's evidence is that he pushed Mr Haywood away towards the window so that they separated before Mr Haywood came at him. Mr Haywood's evidence is that Mr Young launched himself at him and pushed him up against the wall while maintaining contact throughout. He may have caused Mr Haywood to bite his lip. Mr Bennett's evidence is consistent with Mr Haywood's account but inconsistent with Mr Young's account. On balance I prefer the picture that emerges from the evidence of Mr Haywood and Mr Bennett. That leads to the conclusion that Mr Young started the physical part of the confrontation by using his arms on Mr Haywood's chest to force him back against the window before Mr Haywood reacted by pushing Mr Young back towards the door. I do not accept that there was any element of self defence or provocation sufficient to justify Mr Young starting the physical confrontation. Shortly after the two men were separated, Mr Haywood, still in the heat of the moment, dismissed Mr Young. All of this leads me to conclude that Mr Young's contribution to the situation was such as to disentitle him to any remedies for his personal grievance.

### **Other matters**

[13] In evidence, Mr Young mentioned a number of events from 25 February 2009 up to just before the altercation in Mr Haywood's office on 18 March 2009. I do not intend to canvass the evidence other than to note that much of it is in dispute. To the extent that the matters are related to the allegation of constructive dismissal that was a feature in the correspondence from Mr Young's representative, it is now not necessary to canvass them. Mr Young did not resign – he was dismissed. None of the matters can give rise to an unjustified disadvantage personal grievance because there is no evidence to establish that Mr Young was disadvantaged in any way even assuming the truth of his version of those events.

[14] I have mentioned the exchange between Mrs Young and Mr Haywood that occurred later on the day of the dismissal. There is a conflict in the evidence. Mr Haywood says that he went to the house to offer Mr Young a chance to have the dismissal withdrawn in favour of an agreed resignation. Mrs Young's evidence is that Mr Haywood threatened to report the matter to the police unless Mr Young resigned. In light of the earlier finding about a dismissal it is not necessary to resolve the

evidential disputes between Mr Haywood and Mrs Young. Later, Mrs Young spoke to Gary Rooney, the company's principal. It is not necessary to canvass that evidence.

[15] It may be that Mr Young was not paid all the wages for his last week of work up to the dismissal and holiday pay. There appears to have been an issue about whether or not Mr Young completed his timesheet. Counsel is to confirm that point. Leave is reserved in case of any difficulty.

### **Penalty claim**

[16] There is a poorly defined claim for a penalty for breach of good faith. It seems to arise from the events that culminated in Mr Young's dismissal. On the previous findings there was no breach of good faith so serious as to engage the penalty jurisdiction. In any event no penalty would be appropriate in light of Mr Young's conduct.

### **Summary**

[17] Mr Young has a personal grievance because he was unjustifiably dismissed by Mr Haywood on 18 March 2009. Mr Young's contribution to the situation was so significant that he is not entitled to any remedy for his grievance.

[18] Mr Young has no other sustainable grievance or any other meritorious claim against the company; except that he must be paid for time worked and holiday pay with leave reserved in case of any difficulty.

[19] Costs are reserved. If the matter cannot be resolved any claim should be made by lodging and serving a brief memorandum within 28 days and the other party may lodge and serve a reply within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority