

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 241
5321857

BETWEEN JERZY ZIELINKSI
 Applicant

AND AUTOGLAS STIEGER LTD
 Respondent

Member of Authority: Rachel Larmer

Representatives: Mark Nutsford, Advocate for Applicant
 Wayne Kerr, Counsel for Respondent

Investigation Meeting: 5 May 2011 in Auckland

Submissions Received 10 May 2011 from Applicant
 13 May 2011 from Respondent

Determination: 08 June 2011

DETERMINATION OF THE AUTHORITY

- A Jerzy Zielinski was unjustifiably dismissed by Autoglas-Stieger Limited (“Autoglas”).**
- B Autoglas is ordered to pay Mr Zielinski;**
- (i) \$6,635 for lost remuneration; and**
 - (ii) \$4,800 for hurt, humiliation and injury to his feelings.**

Employment relationship problem

[1] Mr Jerzy Zielinski alleged he had been unjustifiably dismissed by Autoglas Stieger Ltd (Autoglas) on 3 August 2010. Mr Zielinski said he was called at home and told to go to the Branch Office, when he arrived there the receptionist took an unsigned dismissal letter off the fax machine and handed it to him.

[2] Autoglas said Mr Zielinski was summarily dismissed because he failed to follow a lawful instruction to perform work it believed he was capable of and which it said formed part of his normal duties.

Relevant Facts

[3] Mr Zielinski was employed on 4 February 2008 as a Windscreen Glazier. His duties included repairing and fixing windscreen chips, replacing car glass in a variety of different makes and models, customer service, and on-road servicing.

[4] Mr Franz Stieger, business owner and Managing Director of Autoglas, said Mr Zielinski held a senior position because he was second in charge to him. Mr Stieger made the decision to dismiss Mr Zielinski after a disciplinary meeting held on 2 August 2010. Mr Stieger said the dismissal letter was in his name but he had not signed it because he was away from the office. He said he asked his wife, who was the receptionist, to give it to Mr Zielinski.

[5] On Thursday 29 July 2010 Mr Stieger told Mr Zielinski to take a new employee, Mr Ali Muhommad, with him to replace the front windscreen and side windows with bulletproof glass in an armoured vehicle for Laudrac, one of Autoglas' major clients. Laudrac wanted its job done as soon as possible, so Autoglas were put under considerable pressure to get it done that day.

[6] Although Mr Zielinski was an experienced auto glazier he was not experienced with armoured vehicles or bulletproof glass. He had previously assisted Mr Stieger to replace bulletproof glass, but had only worked by himself with bulletproof glass once. On that occasion Mr Zielinski installed a small side window whilst Mr Stieger had been on the phone guiding him through the job.

[7] Mr Muhommad had worked for Autoglas for one month, and although he was an experienced auto glazier he had not had any experience with armoured vehicles.

[8] Because Mr Zielinski was concerned about his lack of experience with bulletproof glass he told Mr Stieger he did not feel confident to do the Laudrac job himself. Ms Zielinski said explained he had only previously done that type of work under Mr Stieger's direction and with his supervision, so he was not confident to now do it himself or with just Mr Muhommad, who also had no experience with bulletproof glass, assisting him.

[9] Mr Zielinski said he felt he needed more supervision or assistance than had been offered to him. Mr Zielinski told Mr Stieger he was reluctant to do the job himself because the bulletproof glass was heavy and expensive and “*if something went wrong it would be on [his] head*”. Mr Zielinski asked Mr Stieger if he would come with him to oversee the installation. He suggested he would do the work while Mr Stieger watched from the sidelines to ensure everything was being done correctly.

[10] Mr Stieger was annoyed by Mr Zielinski’s reluctance to do the Laudrac job himself because he considered the job was well within his capabilities. Ms Stieger viewed it as an example of Mr Zielinski trying to get out of work which he should have been doing, which Mr Stieger considered was becoming a bad habit of Mr Zielinski’s.

[11] Mr Stieger was unwell that day so could not do the job himself. He also said he could not leave the office, because the receptionist was away so he had to cover any calls that came in. Mr Stieger was aware Laudrac wanted the job done that day, so he sought to persuade Mr Zielinski to do it.

[12] There was a discussion, which became increasingly heated, during which Mr Stieger responded to Mr Zielinski’s concerns by explaining Laudrac employees would be onsite to help lift the bulletproof into place and Mr Muhommad would be there to assist with the actual installation. Mr Stieger told Mr Zielinski the job was urgent, he could not do it himself, so he needed Mr Zielinski to do it.

[13] Mr Zielinski was not satisfied with Mr Stieger’s assurances and explained he was still concerned it was not an easy job to do and he was going to have to take full responsibility for it, which was why he did not feel confident about it. Mr Stieger became quite angry when, despite his assurances and explanations, Mr Zielinski still maintained he was still not confident to do the job himself. Ms Stieger rebuffed Mr Zielinski’s offer to work on Saturday (which was not a normal working day for him) to assist him with the job.

[14] Mr Stieger decided to see if Mr Muhommad would be prepared to do the Laudrac job. He was, so Mr Stieger told Mr Zielinski to go home for the rest of the day because there was no work for him to do. Mr Stieger told me the only job that day was the Laudrac job so there was not point Mr Zielinski being at work if he was not doing that job. Mr Stieger said he told Mr Zielinski he would do the job himself.

[15] Once he was told to go home, Mr Zielinski then told Mr Stieger he would do the job. However, Mr Zielinski told me that by then he had lost confidence in Mr Zielinski's ability to do the job competently and to the required standard. Mr Stieger said Mr Zielinski's repeated comments about lacking confidence had made him concerned something may go wrong if Mr Zielinski did the job.

[16] Mr Stieger was aware that the bulletproof glass was the only one in New Zealand so if it was damaged during installation it would take about three weeks to get a replacement in to the country. Mr Stieger said that was a risk he could not take with such an important and demanding client as Laudrac. Mr Stieger said he therefore decided he did not want Mr Zielinski to do the job, and that Mr Muhommad should do it.

[17] After deciding to send Mr Muhommad to do the job, Mr Stieger exchanged further cross words with Mr Zielinski, which ended with him yelling at Mr Zielinski to go home before he (Mr Stieger) smashed or threw something. Before leaving Mr Zielinski asked if Mr Stieger wanted him back at work the next day, and Mr Stieger said he would be in contact after 4.30pm that day with instructions for the next day.

[18] On the afternoon of 29 July 2010 Mr Stieger sent Mr Zielinski a disciplinary letter which alleged he had failed to carry out a reasonable instruction to perform work that Autoglas believed he was capable of performing as part of his duties.

[19] Particulars of the allegations were provided and Mr Zielinski was told that if the allegation was established it would amount to serious misconduct which could result in the termination of his employment. Mr Zielinski was advised he was suspended on full pay and he had the right to be accompanied to the meeting by a representative or support person.

[20] The disciplinary meeting was held on 2 August 2010 with Mr Zielinski and Mr Stieger in attendance. There is a dispute about exactly what was said during the meeting. What is not disputed is that Mr Zielinski had prepared a detailed written response to each of the allegations and particulars provided. Mr Zielinski said his written response was just talking notes for him to cover during the disciplinary meeting because it was a stressful situation and he wanted to make sure he did not forget anything.

[21] Mr Stieger took exception to Mr Zielinski's notes. He could see it was not in language Mr Zielinski would normally have used, so he formed the view Mr Zielinski was trying to "*set him up for a personal grievance*". Mr Stieger demanded a copy of the notes, looked at them briefly then threw them down, saying "*it was bull shit*" and "*it was a personal grievance*".

[22] Mr Zielinski said a friend helped write the notes because English was his second language and he could not write very well. Mr Zielinski described Mr Stieger as being extremely upset, with a raised voice. Mr Zielinski said they did not go through all of the points he had written in response to the disciplinary allegations because Mr Stieger said he was going to take the document to his lawyer and would then call him back.

[23] Mr Stieger said he looked at Mr Zielinski's notes and told him they were lies. Mr Stieger said Mr Zielinski agreed his notes were lies. Mr Zielinski denied that and said he agreed the disciplinary allegations against him were lies, not that his response to the allegations was untrue. I have had to resolve this conflict on the basis of what was most likely to have occurred.

[24] I prefer Mr Zielinski's account of the meeting on the grounds it is more likely to be correct. Mr Stieger was clearly upset and he did consider the notes were a personal grievance. I find the notes consisted of a detailed response to every allegation in the disciplinary letter, they were not a personal grievance letter. There was no evidence Mr Stieger went through the various allegations in the disciplinary letter to give Mr Zielinski an opportunity to respond to them. I also consider it unlikely that Mr Zielinski would have readily agreed the detailed notes he had made were untrue.

Issues

[25] The issues for determination include:

- (a) Did Mr Stieger issue Mr Zielinski with a lawful instruction?
- (b) If so, did Mr Zielinski refuse to obey that lawful instruction?
- (c) If so, did Mr Zielinski's refusal to obey a lawful instruction amount to serious misconduct?

- (d) If so, was summary dismissal justified in terms of the s103A justification test in the Employment Relations Act 2000?
- (e) If not, what (if any) remedies should be awarded?
- (f) If Mr Zielinski has a personal grievance, did he contribute to the situation that gave rise to it?
- (g) If so, should remedies be reduced on the grounds of his contribution?

Relevant Law

[26] The deliberate defiance by an employee to obey a lawful and reasonable instruction given by the employer may amount to serious misconduct, depending on the degree of misconduct involved.¹

[27] Whether a direction is lawful is a question of law and whether it is reasonable is a question of fact.²

[28] The Employment Court in *NZ Food Processing ETC IUOW v. Unilever Etc.* [1990] 1 NZILR 35; (1990) ERNZ SEL, CAS 582 stated:

“What is meant by wilful disobedience is an intentional or deliberate act of disobedience. It is to be contrast with casual, accidental and unintentional acts and also with acts which are the result of the exercise of reason as opposed to mere whim. It therefore connotes the absence of any bona fide belief in a right to reject the commands or directions as unreasonable or unlawful or otherwise not binding on the worker.”

[29] The Court of Appeal in *Sky Network Television Ltd v. Duncan*³ recognised an employee’s failure to obey a lawful instruction will not always justify dismissal. It considered that *“there had to be something which amounted to a deliberate flouting of the terms of the employment contract.”*⁴

¹ *NZ Printing ETC IUOW v. Clark & Matheson Ltd* [1984] ACJ 283; *NZ ETC Shipwrights ETC IOUW v. Honda NZ Ltd* {1989} 3 NZILR 791 and *Brownless v. Tasman Pulp & Paper Co. Ltd* [1992] 3 ERNZ 1019.

² *NZ ETC Shipwrights ETC IOUW v. Honda NZ Ltd* {1989} 3 NZILR 791

³ [1998] 3 ERNZ 917 (CA)

⁴ *Laws v. London Chronicle (Indicator Newspaper) Ltd* [1959] 1 WLR 698

[30] Whether an employee's disobedience is wilful is to be determined from their words and conduct and the surrounding circumstances.⁵

[31] The Employment Court in *Wellington etc Clerical etc Workers IOUW v. College Group Ltd*⁶ held that an instruction will be lawful and reasonable if it:

- (a) is not contrary to law;
- (b) falls within the employee's contractual obligations; and
- (c) does not require the employee to perform an impossible or dangerous task.

[32] The test set out by the Employment Court in *Samuels v. Transportation Auckland Corporation Ltd*⁷ was affirmed by the Employment Court⁸ and the Court of Appeal.⁹

[33] *Roydvale Transport Ltd v. Hobson*¹⁰ involved a situation where the employer's instructions were guidelines, but not direct orders or instructions, so the employee's failure to obey them did not amount to serious misconduct.

[34] In *Roydvale* there was no evidence the employee had been warned that their failure to obey the instruction could have serious consequences, including summary dismissal. The Employment Court held the failure to put the employee on notice of the consequences of their disobedience was fatal to the employer's case. It held if instructions are given, they must be clear, and where there is a likelihood of dismissal for failing to follow an instruction, the consequences of the employee's disobedience must be made clear to them.

[35] In *Roydvale* the failure to put the employee on notice of the consequences of the disobedience precluded the employer from arguing that the employee had engaged in wilful misconduct.

⁵ *NZ (with exceptions) Food Processing etc IOUW v. Unilever NZ Ltd* (1990) ERNZ Sel. Case 582 [1990] 1 NZILR 35

⁶ [1984] ACJ 315

⁷ [1995] 1 ERNZ 462

⁸ *Sky Network Television Ltd v. Duncan* [1998] 1 ERNZ 354

⁹ *Sky Network Television Ltd v. Duncan* [1998] 3 ERNZ 917 (CA)

¹⁰ 19/10/95 Travis J, CEC 36/95

[36] In *Board of Trustees of Marlborough Girls' College v. Sutherland*,¹¹ the employee's failure to "go home" when directed to do so by the Board's Chairperson was not wilful disobedience because the employee may have construed the command as a suggestion. The Employment Court held the employee's refusal to go home did not justify summary dismissal.

Outcome

Did Mr Stieger issue Mr Zielinski with a lawful instruction?

[37] I find the Laudrac job did fall within Mr Zielinski's duties and it was work Mr Stieger could have lawfully instructed Mr Zielinski to do. However, the evidence did not satisfy me Mr Stieger ever actually instructed Mr Zielinski to do the Laudrac job.

[38] Mr Stieger's statement said "*when Jerzy refused to follow instructions I told him to go home and that I would do the job myself. On hearing this Jerzy said he would do the job. After Jerzy's earlier reaction to doing the job I no longer felt that Jerzy could or would do the job competently*".

[39] Mr Stieger's statement did not record what, if any, instruction he had given Mr Zielinski.

[40] When Mr Stieger was asked what specific instructions he had given to Mr Zielinski he said he had impressed upon Mr Zielinski how important this job was, because it was for Laudrac which was one of Autoglas' main clients, and that Laudrac wanted the job done immediately. Mr Stieger said that he explained he was sick and was looking after the office so could not go with Mr Zielinski to do the job. Mr Stieger said he spent time talking to Mr Zielinski about his concerns, and he attempted to allay those concerns by explaining assistance would be available to help lift the heavy bulletproof glass window into place.

[41] In response to my question about whether Mr Stieger had specifically told Mr Zielinski he had to do the Laudrac job, Mr Stieger admitted he had not. Mr Stieger said he did not specifically tell Mr Zielinski to do the job because he believed it was clear to Mr Zielinski he had to do it because there was no-one else to do it.

¹¹ [1999] 2 ERNZ 611

[42] I find that what happened was Mr Stieger became increasingly angry and sick of debating the matter with Mr Zielinski, who had kept on saying he did not feel confident without Mr Stieger's assistance.

[43] Mr Stieger certainly asked Mr Zielinski to do the job, and he attempted to persuade Mr Zielinski to do the job. I accept Mr Stieger told Mr Zielinski the job was urgent and important and that he could not do it himself. I find Mr Stieger also asked Mr Zielinski more than once if he was going to do the job, and that Mr Zielinski maintained he was not confident about it. However, these discussions do not amount to the issuing of an instruction.

[44] I find Mr Stieger realised he was not getting anywhere with Mr Zielinski and by that point he had also begun to lose confidence in Mr Zielinski's ability to do the job competently, so he made inquiries with Mr Muhammad.

[45] Mr Stieger told me "*Ali had agreed to do the job, so I decided not to send him [Mr Zielinski]*". He said "*I lost trust and confidence in Mr Zielinski because he told me six times he did not feel confident to do the job, and then when I told him I was sending Ali he suddenly said he could do it. So I told him I had already made my decision and I was sending Ali to do the job*".

[46] Mr Stieger said that whilst he did not expect anything to go wrong, if it did there would be a serious problem because there was not another bulletproof windscreen in New Zealand. He would have to order one and there would be a delay of around three weeks before the job could be done again. Ms Stieger said that that risk caused him to feel concerned in case there was a problem, and ultimately that concern led him to conclude that Mr Zielinski was not the right person to do the job.

[47] Mr Stieger could have decided to specifically instruct Mr Zielinski to do the Laudrac job, and if he had Mr Zielinski would have had to obey that instruction, but Mr Stieger admitted he had never actually given him that instruction.

[48] I find Mr Zielinski could not have breached an instruction if no instruction had been issued.

Did Mr Zielinski refuse to obey a lawful instruction?

[49] Even if Mr Stieger had instructed Mr Zielinski to do the Laudrac job, the evidence did not establish Mr Zielinski had ever refused to do it.

[50] Mr Zielinski stated he never refused to do the job, he simply reiterated his concern that he would feel more confident doing the job with Mr Stieger's help, because Mr Stieger was experienced with that sort of glass fitting whilst he was not. Mr Zielinski said he asked Mr Stieger if he would be able to attend the job to observe the way Mr Zielinski was doing it and to give instructions if it looked like anything was going wrong. Mr Zielinski also offered to come in on Saturday, which was not a working day for him, to assist Mr Stieger to do the installation or to do the installation himself, with Mr Stieger overseeing it.

[51] Mr Stieger did not contradict this evidence and he also admitted that Mr Zielinski did not expressly refuse to do the job. Mr Stieger agreed Mr Zielinski just kept saying he was not confident to do it himself, which Mr Stieger had interpreted as a refusal to do the job.

[52] I find that interpretation was unjustified. The evidence established Mr Zielinski had demonstrated a willingness to do the Laudrac job, but just not in the manner or timeframe Mr Stieger had wanted. For example, Mr Zielinski said he would do the job if Mr Stieger could oversee him from the sidelines. He also offered to do the job with Mr Stieger on Saturday and then, after he had been told to go home, he finally offered to do the job himself.

[53] Although Mr Zielinski was obviously reluctant to do the Laudrac job himself, the evidence established he had never actually refused to do the job. I find that even if he had been instructed to do the job, he did not refuse to do the job, so he could not have refused to obey an instruction.

Did Mr Zielinski engage in serious misconduct?

[54] I find Mr Zielinski did not engage in conduct which a fair and reasonable employer in all the circumstances would have concluded amounted to serious misconduct.

Was summary dismissal justified?

[55] Mr Zielinski's summary dismissal for failing to follow a lawful instruction was substantively unjustified.

[56] Even if Mr Zielinski had refused to obey a lawful instruction, his dismissal would still have been unjustified because Mr Stieger told me he 80% dismissed Mr Zielinski for the failure to obey a lawful instruction and 20% dismissed him for previous performance concerns.

[57] The disciplinary letter sent to Mr Zielinski did not identify any performance concerns. Nor were performance concerns raised during the disciplinary meeting held on 2 August 2010. No information was disclosed to Mr Zielinski about the alleged performance concerns which contributed to his summary dismissal, so it follows he had no opportunity to respond to them.

[58] A fair and reasonable employer would have properly raised all of its concerns with an employee, so the employee had an opportunity to respond to them, before it made a decision to summarily dismiss the employee. It would also have complied with its statutory good faith obligations under the Act to provide access to relevant information and an opportunity to comment on it before a final decision was made to dismiss an employee.¹²

[59] I find Autoglas' actions and how it acted in connection with Mr Zielinski's summary dismissal were not what a fair and reasonable employer would have done in all the circumstances at the time he was dismissed.

Remedies*Mitigation of loss*

[60] I am satisfied Mr Zielinski took appropriate steps to mitigate his loss. He obtained employment as a warehouse store person five weeks after his dismissal at an hourly rate which was \$2.00 per hour less than he had been paid by Autoglas.

¹² S4(1A)(c) of the Act

Lost remuneration

[61] Mr Zielinski sought reimbursement of lost remuneration of \$6,635.00. This consisted of five weeks lost remuneration at \$991.00 per week, plus seven weeks of a continuing lost remuneration of \$240.00 per week.

[62] Autoglas is ordered to pay Mr Zielinski \$6,635 lost remuneration under s.128(2) of the Act.

Hurt and humiliation

[63] Mr Zielinski sought \$10,000 for hurt and humiliation.

[64] I accept that Mr Zielinski suffered hurt, humiliation and injury to feelings as a result of his unjustified dismissal. Mr Zielinski's evidence was he had struggled financially with paying the basics, such as rent and petrol. He was extremely stressed by his dismissal which he said he had created relationship problems with his partner.

[65] Mr Zielinski said immediately after his dismissal he was so upset and stressed he was only sleeping 2-3 hours per day, which had affected his health and wellbeing. He described getting up in the night and sitting there awake thinking about what had happened and trying to figure out why he had been dismissed. Mr Zielinski said his dismissal still affects him now.

[66] I consider an award of \$6,000 under s.123(1)(c)(i) of the Act is appropriate.

Contribution

[67] I find Mr Zielinski's continued unwillingness to accept Mr Stieger's assurances about the technical aspects of the Laudrac job being well within his capabilities, and about the assistance that was going to be provided to him by others, contributed to the situation that gave rise to his personal grievance.

[68] I consider Mr Zielinski's compensation for injury to feelings should be reduced by 20% under s124 of the Act to reflect his contribution to the situation which gave rise to his unjustified dismissal grievance.

[69] Autoglas is ordered to pay Mr Zielinski \$4,800 under s.123(1)(c)(i) of the Act.

Costs

[70] The parties are encouraged to resolve costs between them. If that is not possible, the applicant has 14 days within which to file a costs memorandum, with the respondent having 14 days within which to respond, and the applicant a further 7 days to file a memorandum in reply.

[71] This timetable will be strictly enforced and departure from it requires prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority