

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Gerry Kostic (Applicant)

**AND** Graham Dodd and Grant Milligan (partnership) trading as Allan Milligan Cars and/or Motoworld Systems Limited trading as Allan Milligan Cars (Respondent)

**REPRESENTATIVES** Timothy J Twomey, Counsel for Applicant  
Michael A Kyne, Counsel for Respondent

**MEMBER OF AUTHORITY** Helen Doyle

**INVESTIGATION MEETING** 16 November 2005

**DATE OF DETERMINATION** 30 January 2006

**DETERMINATION OF THE AUTHORITY**

***Identity of the respondent***

[1] There was an issue as to the identity of Mr Kostic's employer. His employer changed during his employment from a partnership of Graham Dodd and Grant Milligan trading as Allan Milligan Cars to a company, Motoworld Systems Limited, and there was some doubt as to whether Mr Kostic was aware of the change.

[2] It was agreed by both parties and their representatives that I was not required to determine the identity of the respondent but that, if I was to make orders against the respondent, such orders could be made jointly and/or severally against both the partnership and the company.

[3] The respondent therefore by consent is Graham Dodd and Grant Milligan (partnership) trading as Allan Milligan Cars and/or Motoworld Systems Limited trading as Allan Milligan Cars.

[4] I shall refer to the respondent from hereon as Motoworld or the company. Graham Dodd and Grant Milligan are the directors of Motoworld.

***The Employment Relationship Problems***

[5] The applicant, Gerry Kostic, says that he was either actually or constructively unjustifiably dismissed on 8 March 2005 from his employment with the company where he had been employed since April 2003 as a motor vehicle salesman. Mr Kostic had previously worked for Mr Dodd and Mr Milligan in a similar capacity in 1992 for three years. Although there was no formal employment agreement setting out the terms and conditions of Mr Kostic's employment there were signed agreements dated 31 April 2003 and 1 December 2003 setting out the financial arrangements with respect to commission and a retainer to be paid to Mr Kostic and his hours of work.

[6] Mr Kostic also says that he was disadvantaged in his employment by the actions of Motoworld. He says that Motoworld failed to provide control over the workplace which disadvantaged him and that there was discrimination and harassment of him by Mr Dodd.

[7] Mr Kostic seeks lost wages. He was able to obtain alternative employment on 15 August 2005 but at a lower rate of pay. He also seeks compensation of \$15,000.00 for humiliation and injury to feelings and costs.

[8] The respondent, Motoworld, does not accept that Mr Kostic was dismissed but says that he resigned after an angry exchange on 8 March 2005 with Mr Dodd. Motoworld denies any unjustified actions on its part.

[9] I shall consider firstly the claim that Mr Kostic's employment or conditions thereof was affected to his disadvantage by unjustified actions of the employer.

### ***Unjustified actions causing disadvantage***

[10] I turn to whether there was a failure to provide Mr Kostic with assistance in establishing good relationships with his colleagues and a failure to warn him about perceived behavioural problems.

[11] There were some difficulties between Mr Kostic and those he worked with. He had a very good relationship however with Mr Milligan. He had a good relationship with Sam Graham who is a car groomer at Motoworld. I was particularly impressed by Mr Graham as a witness. I place considerable weight on his evidence in gaining my impression of working relationships at Motoworld. Mr Graham considered Mr Kostic to be a friend. He said that Mr Kostic was temperamental, could yell and scream and could react quickly to situations. He said that Mr Kostic did not suffer fools. He admired Mr Kostic though and recalled assistance Mr Kostic had given him. He said that Mr Kostic was thoughtful and prepared in his work. He also said that he thought Mr Milligan and Mr Dodd regarded Mr Kostic positively and were tolerant of him.

[12] A number of the employee's concerns did not come to the attention of the respondent until after the employment relationship had ended. I do not intend to record those concerns. Although Mr Milligan said Mr Kostic had outbursts from time to time he said that he [Mr Milligan] could handle them. Mr Kostic was frustrated at times by the attitude of the other employees. He accepted that he sometimes raised his voice at them and Mr Dodd would intervene on occasions. I am satisfied that Mr Milligan approached an employee who had difficulty with Mr Kostic and told her to try to get on better with Mr Kostic.

[13] I am not satisfied that an unjustified action claim has been made out in terms of any omission by the employer to establish better relationships between Mr Kostic and other employees or to warn him about any behavioural issues. Mr Milligan and Mr Dodd were tolerant of Mr Kostic's behaviour but I do not find that disadvantaged him.

### ***The claim with respect to harassment and discrimination***

[14] Mr Kostic said that Mr Dodd would once or twice a week make comments with reference to Mr Kostic's ethnicity that were hurtful to him. Mr Dodd denied this and said that it was Mr Kostic who would make comments with ethnic reference to those who came in the yard. The first time the matter of harassment was referred to was at the time the personal grievance was raised by letter on 18 April 2005. I am not satisfied from the evidence that Mr Dodd made racial comments or

harassed Mr Kostic and do not find that an unjustified action claim on these grounds has been made out.

***Determination with respect to unjustified actions causing disadvantage***

[15] I do not find that there were unjustified actions on behalf of Motoworld that disadvantaged Mr Kostic in his employment.

***Unjustified Dismissal***

[16] I was provided on behalf of both Mr Kostic and Mr Dodd with several letters and references about their respective characters. They were put forward to establish the likelihood as to whether or not Mr Dodd or Mr Kostic would have acted in a particular way. I have not considered the documents in determining this matter but have relied on the evidence from those that were either present for the whole of the event or could give evidence about what they observed or heard that morning.

[17] The exchange between Mr Dodd and Mr Kostic on 8 March 2005 requires careful analysis as there is a dispute about what took place.

[18] There are two significant factual disputes that I am required to reach a conclusion about. The first is whether Mr Kostic resigned or was dismissed during the exchange. This requires consideration of the language used and the actions of the parties. The second is whether Mr Kostic accidentally or deliberately came into physical contact with Mr Dodd's back as they were walking back toward the office.

[19] The whole exchange was witnessed by Mr Milligan. As there were issues of credibility Mr Milligan was excluded from the investigation meeting until he gave his evidence. In assessing Mr Milligan's evidence I am alive to the fact that he is in a business arrangement with Mr Dodd.

***8 March 2005***

[20] On Tuesday 8 March 2005 Mr Kostic was approached by a client who was interested in a BMW that was for sale in the yard. The client took the BMW for a drive and asked that he be given a trade in value for his vehicle, a Caldina.

[21] Mr Milligan did most of the trade in appraisals for Mr Kostic but he was busy that particular morning with a company representative in his office so Mr Kostic went to see Mr Dodd. Mr Dodd says that Mr Kostic gave him a time frame within which he thought the client would return of 30 minutes. Mr Kostic does not accept that he did give such a time frame. I am not of the view much turns on that. Mr Dodd says he told Mr Kostic that if Mr Milligan was not free in ten minutes to come back to him and he would carry out the appraisal. Mr Kostic understood that Mr Dodd would carry out the trade in appraisal in ten minutes as he was occupied with something at the time that Mr Kostic first talked to him. The conversation between the two men was calm.

[22] Mr Kostic then left the office and drove the Caldina into the back yard and had a cigarette whilst he was waiting for Mr Dodd. He did not see a potential client come into the front yard. Mr Milligan saw her from his office and got up to attend to her leaving the company representative in his office. Mr Milligan showed the client the cars in the back yard and then went to return to the company representative he had left in his office. As Mr Milligan was about to return to his office Mr Kostic called him to have a look at the Caldina. Mr Milligan advised Mr Kostic that he was busy with a company representative but agreed to have a quick look at the Caldina. Mr Milligan

appeared to me to be an accommodating sort of person and he understood from Mr Kostic that there was an element of urgency in terms of undertaking the appraisal because the client could shortly be returning. Mr Milligan was unaware of the earlier conversation between Mr Dodd and Mr Kostic. Mr Milligan duly undertook an appraisal of the Caldina and then went back to Mr Kostic with a price.

[23] As Mr Milligan and Mr Kostic were discussing the price of the Caldina Mr Dodd came out from his office into the yard. He approached Mr Milligan and Mr Kostic. Mr Kostic said that Mr Dodd immediately asked him why he had not followed his instruction although he accepted that Mr Dodd was *assertive not angry* at that time. Mr Dodd says that he talked to Mr Milligan initially about the value for the car and how he came to do the appraisal. He then asked Mr Kostic why he had disturbed Mr Milligan and told him *that was unfair*. I find it was more likely that Mr Dodd spoke to Mr Milligan about the appraisal of the car before questioning Mr Kostic.

[24] From that point on the accounts of what took place differ significantly so I shall set out separately the accounts of Mr Kostic, Mr Dodd and Mr Milligan.

### **Mr Kostic**

[25] Mr Kostic says that he was confused about what Mr Dodd was talking about with respect to the appraisal and responded *What?* He said that when Mr Dodd replied *don't play stupid* he responded *what the fucking hell are you talking about*. Mr Kostic said Mr Dodd then said *don't twist my fucking words I was coming in ten minutes* and called him a *fucking liar*. Mr Kostic said that he asked Mr Dodd not to treat him like that and told Mr Dodd that he could go to *fucking hell*.

[26] Mr Kostic said Mr Dodd told him to *fuck off, goodbye* and that he then proceeded to follow Mr Dodd back to the offices yelling at him *you sell the fucking car or similar words*. Mr Kostic said that he accidentally bumped into Mr Dodd on the way back to the office as Mr Dodd had stopped. Mr Dodd turned around and said *don't you fucking push me* and Mr Kostic said that he replied *you stopped Graham and please stop swearing at me*. He said that he felt he could not discuss the matter with Mr Dodd and was very upset about Mr Dodd's behaviour so he went to his office, got his briefcase and asked Mr Graham to take him home. Mr Kostic was adamant that he never asked for a cheque for his final pay to be made up. Mr Kostic said at the investigation meeting that he had verbally agreed with Mr Milligan at the commencement of his employment he would have a two day cooling off period. Mr Milligan did not accept there was any agreement about this.

### **Mr Dodd**

[27] Mr Dodd's evidence is that after he questioned Mr Kostic about the appraisal, Mr Kostic immediately became extremely angry and began shouting at him and waving his arms around. Mr Dodd said that Mr Kostic said things like *you fucken piss me off, you can sell your own fucking cars and make up my cheque I'll be back this afternoon*. Mr Dodd said that he was concerned for his own safety and took a passive stance to calm the situation down. He said to Mr Kostic *I am going to my office if you want to come and talk*. He said that Mr Kostic followed him back yelling abuse. Mr Dodd does not accept that he stopped on the way back to the office but suddenly got a crash in his back and thought Mr Kostic had *shoulder charged* him. He said that it was the sort of contact that could have tipped him over. Both Mr Dodd and Mr Kostic are in their late 50's. Mr Dodd said in terms of the action *no doubt it was an assault*.

[28] Mr Dodd said that he turned around and said *don't you bloody do that* and that Mr Kostic responded *I slipped*. Mr Dodd said that he responded *no, you didn't*. Mr Dodd said that at this

stage he became again concerned for his safety as Mr Kostic was *really wound up*. He went into his office and said that Mr Kostic stormed past his office toward his own. He did not see what Mr Kostic took from his office but as he was leaving Mr Kostic said to him, *fucking make up my cheque, I'll be back later*.

[29] The office administrator at the car sales yard is Jeanette Brant. She saw Mr Kostic and Mr Dodd enter the office area. She recalled that they both looked angry and that both went into their respective offices. She said that they *may have both used the f-- word*. Ms Brant who I found to be a reliable witness could not recall given the passage of time what exactly was said by both men. She did recall however Mr Kostic stopping at Mr Dodd's door and saying *I'm leaving, make up my cheque*. Ms Brant said that no-one told her a lot that day about what had happened but Mr Dodd did ask her to *get Gerry's wages made up*. Mr Kostic's wages were made up and he banked the cheque on 11 March 2005.

### ***Mr Milligan***

[30] Mr Milligan was discussing the price of the Caldina with Mr Kostic when Mr Dodd came out. Mr Milligan said that he talked with Mr Dodd about the car and then Mr Dodd questioned Mr Kostic about why he didn't wait for him to do the appraisal. He said that Mr Kostic just blew up and was outraged, yelling and out of control. He did not observe any confusion on the part of Mr Kostic. Mr Milligan said that Mr Dodd wasn't saying a lot. Mr Milligan said that he was stunned how Mr Kostic had gone from *zero to a rage*.

[31] He recalled Mr Dodd said to Mr Kostic *lets go upstairs* and that as they proceeded back to the office area with Mr Milligan walking at the back and Mr Kostic in the middle, Mr Kostic continued yelling quite loudly at Mr Dodd. Mr Milligan said that Mr Kostic was saying *stick your fucking job, sell your own fucking cars I'm leaving*. Mr Milligan said that he then saw Mr Kostic try to charge into Mr Dodd and that he felt it was like *a rugby tackle*. Mr Milligan did not accept that Mr Kostic was close enough to Mr Dodd for it to have been an accident but that he must have speed up. He said that he felt stunned and scared throughout the exchange by the waving of hands, body language and charging at Mr Dodd. He saw Mr Kostic get his briefcase from the office and leave asking for his final pay.

### ***Further contact after Mr Kostic left the premises***

[32] Mr Kostic was taken home by Mr Graham. He left a message on Mr Milligan's mobile telephone asking him to call him back. Mr Milligan telephoned Mr Kostic back that evening. Mr Kostic said that he would like to apologise to Mr Dodd for his swearing. Mr Milligan took it as Mr Kostic wanting to apologise for the whole event.

[33] Mr Kostic made it clear that he wanted his job back. I am satisfied that Mr Milligan indicated that was unlikely but said he would talk to Mr Dodd. Mr Milligan said that Mr Kostic then became threatening during the telephone call and threatened to sue the company and Mr Milligan and Mr Dodd. Mr Kostic denies that he did that.

[34] I am satisfied that both Mr Milligan and Mr Dodd expected Mr Kostic would, once he had calmed down, ask to come back. Mr Milligan and Mr Dodd both felt that Mr Kostic's actions had destroyed their trust and confidence and they decided after several discussions together to *accept his resignation*.

[35] Mr Kostic spoke to Mr Dodd on 9 March 2005 by telephone. Mr Dodd said that Mr Kostic asked to be re-employed and that he was prepared to offer a written apology and do an anger

management course if he could come back to work. Mr Kostic denies that he told Mr Dodd that he would undertake an anger management course and says that before they could discuss the incident on 8 March 2005 Mr Dodd said *you fucking left, there is no job for you here* and slammed the phone down. Mr Dodd denies that and says he spoke to Mr Kostic for about five minutes. Regardless of exactly how the conversation went the outcome of both versions was the same in that Mr Dodd said that Mr Kostic could not come back to work at Motoworld.

[36] The company loaned Mr Kostic a car for a short period after that time although that arrangement stopped once a personal grievance had been raised.

### ***Findings***

[37] In making my findings I have been mindful that it is unlikely any of the witnesses recalled verbatim what was said and in what order during the exchange given the passage of time since the event. I am mindful also of the possibility in this case for a witness to honestly but mistakenly reconstruct the exchange to reflect more favourably their role in it. I telephoned the company representative who was in Mr Milligan's office for the duration of the exchange after the investigation meeting to see if she was able to provide any further evidence about the exchange. She was unable to recall any specific details of the exchange although was aware that it was taking place. I make the following findings about the exchange.

- I find that Mr Dodd was upset and annoyed that Mr Milligan had undertaken the appraisal contrary to his earlier conversation with Mr Kostic. He wanted an explanation from Mr Kostic. Looking at the matter objectively I do not find it was unreasonable for Mr Dodd to question Mr Kostic about this and he was entitled to do so. I prefer Mr Dodd's evidence about how he questioned Mr Kostic initially.
- I find that Mr Kostic quickly became very angry when Mr Dodd asked him why he had not waited for him to carry out the appraisal. I have reached this finding because the evidence supports Mr Kostic felt it was unreasonable that Mr Dodd question him about something that he thought was trivial and irrelevant when he was possibly going to secure a sale of a BMW. Given that Mr Kostic had talked to Mr Dodd about the appraisal only a short time previous there is considerable doubt in my mind about the reliability of Mr Kostic's recollection that he was confused about what Mr Dodd was referring to. I find it more probable than not that Mr Kostic would have known exactly what Mr Dodd was asking him about and was angry about being asked.
- I do not find that Mr Dodd dismissed or intended to dismiss Mr Kostic during the exchange. Whilst he did not remove himself from the situation it was Mr Kostic I find who assumed the dominant role during the exchange in terms of the volume of his voice, the language used and the gestures he made with his arms. If the comment *fuck off goodbye* was said by Mr Dodd then I find it was more likely than not in response to Mr Kostic indicating that he was going and Mr Dodd could sell the cars himself. Mr Dodd probably swore as well during the exchange but he did attempt to de-escalate the situation by indicating that they go to the office area, a suggestion inconsistent with him having earlier dismissed Mr Kostic.
- I prefer the evidence of Mr Dodd and Mr Milligan that the contact Mr Kostic made with his back was not accidental but deliberate. Mr Kostic continued to be very angry during the short walk back to the office. Mr Kostic told me that Mr Dodd stopped to hear what he was mumbling. That is inconsistent with the evidence which I accept that Mr Kostic was very loud during the exchange. I do not find that there was any good reason for Mr Dodd

to have stopped on his way to the office. Further it does not seem likely that Mr Kostic, an agile and fit man would have slipped. I also placed some weight on Mr Milligan's answer to my question that he may have considered having Mr Kostic back were it not for the violence. The later actions by Mr Milligan and Mr Dodd of lending Mr Kostic a car and checking on his wellbeing do not as submitted by Mr Twomey throw doubt on whether there was such contact between Mr Dodd and Mr Kostic. Rather I find they are actions that reflect the long relationship between the three men and the previous good friendship between Mr Milligan and Mr Kostic.

- I find that it is more probable than not having heard the evidence that Mr Kostic speed up to crash into Mr Dodd probably with his shoulders. I make this finding because it could be relevant if I find that Mr Kostic has a personal grievance to the question of contribution.
- I find that Mr Kostic did indicate that Mr Dodd could sell the cars and that he wanted his final pay cheque. He was, as Mr Dodd put it, *really wound up*. My impression from the evidence was that Mr Kostic was essentially *out of control*. I find that even after some five or ten minutes in his office Mr Kostic was still angry enough to swear at Mr Dodd on the way out and demand his cheque. He had not calmed down.
- I do not find it likely that a two day cooling off period was a term and condition of Mr Kostic's employment.

### **Conclusion**

[38] Mr Dodd and Mr Milligan knew that Mr Kostic could be quick to anger although he had never received a warning for any previous incident. He could be equally charming and pleasant and was a very good salesperson. Mr Dodd and Mr Milligan said that this incident was quite different than Mr Kostic's other outbursts largely because of the waving of arms, body language, the volume of the swearing and the crashing incident.

[39] It was apparent in my view that Mr Kostic was not acting rationally when he made statements indicative of resignation. There had been a prolonged emotional outburst and Mr Dodd himself recognised that Mr Kostic was wound up. The discussion that was to have taken place when the three moved back to the office area could not sensibly happen.

[40] I am of the view though that there should have been a subsequent attempt to verify the situation with Mr Kostic about his resignation when all parties were calm. Both Mr Dodd and Mr Milligan knew that Mr Kostic would want to come back to work after he had calmed down and they knew his personality. He had walked out previously on at least one occasion.

[41] This case falls into one of the categories of cases in which an employee is, against his or her will, treated by an employer as having resigned as recognised in the unreported judgment of the then Chief Judge of the Employment Court Goddard CJ in *Boobyer v Good Health Wanganui Limited* (unrep) WEC 3/94. Mr Kostic made his comments indicating he was to resign in the heat of the moment. He was perfectly calm before Mr Dodd spoke to him and was in the process of selling a vehicle.

[42] There were opportunities when Mr Kostic talked to Mr Milligan and Mr Dodd on the telephone to arrange a meeting to discuss the matter and I do not find that Mr Kostic stood passively by but let it be known he wanted to return to work - *Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union* [1991] 1 ERNZ 502.

[43] I do not find that it was open to the employer to conclude that Mr Kostic had resigned without further discussion. Mr Dodd and Mr Milligan did not immediately decide to accept Mr Kostic's resignation. They had several discussions with each other and with their wives. They then decided to rely upon Mr Kostic's words because they did not want the employment relationship to continue as a result of Mr Kostic's behaviour on 8 March 2005. I find that Mr Kostic was actually dismissed on 9 March 2005 following his conversation with Mr Dodd.

***Was the dismissal justified?***

[44] For the dismissal to be justified Motoworld must have had grounds to summarily dismiss Mr Kostic and in carrying out that dismissal should have acted in a fair and reasonable way. The justification has to be considered in light of the statutory test of justification set out in section 103A of the Employment Relations Act 2000 (as amended).

[45] The justification put forward by Motoworld in the event that I did not find Mr Kostic resigned was that Mr Kostic was grossly insubordinate to his employer on 8 March, assaulted Mr Dodd and was threatening and intimidating. That is conduct that is capable of amounting to serious misconduct.

[46] In terms of the process however there was no opportunity for Mr Kostic to meet with Mr Dodd and Mr Milligan to provide an explanation for his behaviour and he lost an opportunity to convince them that he was truly remorseful. Mr Dodd said to me that he did not believe from his discussion over the telephone with Mr Kostic that Mr Kostic understood the effect of his outburst and actions on Mr Dodd. It is difficult to conclude that without a face to face meeting.

***Determination with respect to unjustified dismissal***

[47] For those reasons with respect to an unfair process I conclude that the dismissal was unjustified.

[48] Mr Kostic has a personal grievance that he was unjustifiably dismissed.

***Remedies with respect to the claim of unjustified dismissal***

***Contribution***

[49] I must consider the extent, if any, to which the actions of Mr Kostic contributed to the situation that gave rise to the grievance and if the actions require reduce the remedies.

[50] I have found that in all probability Mr Kostic deliberately crashed into Mr Dodd's back following a heated exchange during which I have also found Mr Kostic played a dominant role. I have not found any unreasonable provocation on the part of Mr Dodd. The deliberate crashing into Mr Dodd when his back was turned is a matter which Mr Kostic could have been dismissed for following a fair process and the action further contributed by preventing any sensible and rational discussion when Mr Dodd and Mr Kostic returned to the office on 8 March 2005. This was contributory behaviour within the meaning of section 124 of the Employment Relations Act 2000 because it was blameworthy and it was causally linked to Mr Kostic's dismissal personal grievance.

[51] I intend in this case to adopt the approach that the then Chief Judge Goddard CJ did in the judgment of *Morris v Christchurch International Airport* [2004] 1 ERNZ 336 at pg 349 where in a situation where there was blameworthy conduct on the part of the plaintiff he found that he could do justice to the parties by awarding the plaintiff a contribution to her costs but no other remedy.

[52] I find in this case too that Mr Kostic's contribution to his personal grievance disentitles him to any remedies except a contribution to his costs which recognises that he has established a personal grievance of unjustified dismissal.

### *Costs*

[53] I reserve the issue of costs. I would encourage the parties to reach agreement, failing which the applicant has 20 days from the date of this determination to lodge and serve a submission as to costs and the respondent has a further 20 days to respond.

### *Summary*

- I have not found that Mr Kostic has a personal grievance that his employment was affected to his disadvantage by the actions of his employer.
- I have found that Mr Kostic was unjustifiably dismissed.
- I have found that Mr Kostic's conduct disentitles him to any remedies except a contribution to his costs.
- I have reserved costs.

Helen Doyle  
Member of Employment Relations Authority