IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 216/08
5077049

	BETWEEN	THOMAS BROWN Applicant
	AND	FIVE STAR PORK (NZ) LIMITED First Respondent
	AND	THE PORK MARKET INTERNATIONAL LIMITED Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Grahame Lee for Applicant Chris Newton for Respondent
Investigation Meeting:	18 June 2008 at Auckland
Determination:	23 June 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Second Respondent says it was entitled to terminate the Applicant's employment after he did not turn up at work for three days in a row.

[2] It relies on this clause in its employment agreement with the Applicant:

> *Where the employee is absent from work for a continuous period of three (3) or more days without the consent of the employer or without good cause (sic) to the employer they shall be deemed as having terminated their employment.*

[3] The Applicant says this was an unjustified dismissal because he had let his manager know why he would be away from work on at least one of those days and had telephoned and left messages for his manager about the reason for his absence on one of the other days.

[4] This matter has been investigated by the Authority following the failure of the Respondents to comply with a direction to mediation.

The investigation

[5] Written witness statements were provided by the Applicant, the Applicant's stepfather Ronald Parker, the First Respondent's chief executive Chris Newton, its operations manager Bernie Hemopo and two other employees of the Respondents. I put aside the statements of the latter two witnesses as they did not attend the investigation meeting and I considered their statements added no relevant information that I could not get from other witnesses who were present. The other witnesses, each under oath, answered questions from the Authority and the representatives. The representatives provided oral closing arguments.

The facts

[6] This matter involves events which occurred in September 2006. I accept that each witness has recalled the details of those events as best he can. The Authority's findings are based not on what occurred beyond reasonable doubt but an assessment on the balance of probabilities of what is most likely to have happened. In coming to conclusions on that basis I have, after hearing from and seeing each witness give their evidence, preferred the evidence of Mr Hemopo over that of the Applicant on a number of points. I do so for two reasons. Firstly I considered that Mr Hemopo's responses were frank even when the answers did not necessarily favour the Second Respondent's position. Secondly there were important inconsistencies about who he spoke to and when in the evidence of the Applicant given in his written witness statement dated 14 May 2008, which he swore was true at the opening of the investigation meeting, and his later answers to the Authority's questions about who he says he spoke to on particular days. Some of his evidence was also inconsistent with what was said in a letter to Mr Hemopo dated 30 November 2006 and written, on the Applicant's instructions, by his lawyer at the time.

[7] The Applicant was employed as a packer and trimmer by the Second Respondent in August 2006.

[8] On 15 September 2006 he received a summons to attend the District Court at Manukau to answer drink-driving charges. His Court appearance date was Friday, 22 September 2006.

[9] On 18, 19 and 20 September he attended work as usual. On the evening of 20 September he was dropped off at his brother's house by another employee, Phil Heemi. Following a party for his broth that evening, the Applicant did not attend work the next day, 21 September.

[10] On the morning of 21 September Mr Heemi had called in to pick up the Applicant from his flat and take him to work. The Applicant was not at home. Mr Heemi told Mr Hemopo at work later that day that the Applicant had not been there when he called in to pick him up for work.

[11] On 22 September the Applicant attended court where the matter was adjourned while he sought legal representation.

[12] On Monday 25 September the Applicant did not attend work as he was attempting to find a lawyer to represent him. He was concerned that the charges would result in a prison sentence. He did not go to work on Tuesday 26 September or Wednesday 27 September.

[13] On the afternoon of Monday 25 September Mr Hemopo wrote a letter to the Applicant headed "Termination Letter". It read:

> *It has been brought to my attention that you have failed to arrive on plant to start work as required by your employment contract from the 21st of September 2006 till 25th September 2006, and no further notice of your absence was provided to [the Second Respondent].*
>
> *[The Second Respondent] expect to be advised of any absence from work, it is not acceptable to not attend work without providing notice of your inability to work on any given day.*
>
> *You have failed to make contact with me or leave any messages (sic) to why you have not attended work and as a result of this you have given me no oppositions (sic) but to terminate your employment with [the Second Respondent].*
>
> *Should you wish to discuss this matter further than (sic) please do so*

> *by an arranged appointment within (5) five working days of receiving this letter.*
>
> *Otherwise this letter is to confirm that you are terminated from your employment here with [the Second Respondent] and that all money owing to you will be paid out by the end of next week.*

[14] The letter was posted to the Applicant's residential address. The Applicant says he did not get the letter in late September and did not see it until a copy was provided to his lawyer in November 2006.

[15] Mr Hemopo also tried to contact the Applicant by telephone on 25 September but without success.

[16] On Tuesday 26 September the Applicant rang work and spoke to a supervisor responsible for quality assurance. He explained why he was absent from work and asked that supervisor to pass a message on to Mr Hemopo. Mr Hemopo accepted in answer to a question from the Authority that the quality assurance supervisor had told him of that call.

[17] On Wednesday 25 September the Applicant was told by his stepfather Mr Parker about a telephone call to the Applicant's work. The Applicant's normal residence was at a flat on Mr Parker's property but he had not been there for several days. Concerned about the Applicant's whereabouts Mr Parker had rung the Applicant's work and spoken to a receptionist. The receptionist told Mr Parker that the Applicant was not at work because he was "*suspended*".

[18] The Applicant did not go back to work after that and was paid his final pay. There was an issue about a shortfall in his pay caused by deductions for work equipment that the Second Respondent believed had not been returned but this was resolved between the parties prior to the Authority's investigation.

[19] I do not accept the Applicant evidence that he spoke to Mr Hemopo on one of the three days he worked in the week starting 18 September about his upcoming court appearance or that he had shown his court summons to Mr Hemopo. Rather I accept Mr Hemopo's evidence that he knew nothing of the reasons for the Applicant not being at work on 21 or 22 September.

[20] Similarly I accept Mr Hemopo's evidence that he was not told of any phone calls by the Applicant on 25 September although he agreed that it was "possible" that the Applicant did leave a message with the receptionist asking Mr Hemopo to telephone that day.

[21] I also accept that Mr Hemopo did not tell the receptionist that the Applicant had been suspended. However he agreed that the receptionist may have seen or heard about his letter of 25 September terminating the Applicant's employment before Mr Parker spoke with the receptionist on 27 September.

The law

[22] In *EM Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97 the Court of Appeal concluded that a company's failure to make inquiry of a worker as to his intentions after apparently abandoning the employment cannot constitute dismissal of that worker. The Court also accepted, however, that where the issue is whether the employee has abandoned the employment, the employer should be cautious in drawing that inference and faces a high threshold in contending that the employment ended in that way on the employee's initiative. The Court stated that:

> *clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment.*

[23] In *Lwin v A Honest International Co Ltd* [2003] 1 ERNZ 387 the Employment Court followed the approach in *Ramsbottom*. In *Lwin*, an employer who believed a worker had abandoned her employment was "*duly cautious in drawing that inference and took the very proper step of writing to her … to clarify the position*". Unfortunately the letter did not go to the correct address. If it had the Court considered the employer would have discharged its obligation of trust and confidence in the employment relationship. The result was that the worker was not able to clarify the situation and the employer was not permitted to assume that the worker had abandoned her employment. The Court concluded there was no abandonment of employment and the employer's actions constituted dismissal.

[24] All of the cases make it clear that the specific wording in the employment

agreement and the facts of the case are vital. Also relevant is s4(1A) of the Employment Relations Act 2000 ("the Act"), added in 2004:

> *"The duty of good faith in subsection (1) –*
>
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
>
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; …"*

[25] The good faith obligations in the Act, particularly since the 2004 amendment, place a higher threshold than previously on employers considering whether a worker has abandoned a job. The good faith duty clearly goes beyond the need for trust and fair dealing as identified by the Court of Appeal in *Ramsbottom*. The employer's duty to be responsive and communicative also has to be reciprocated by its employees.

[26] Finally, where there is a dismissal or other action by an employer that is challenged by an employee, s103A provides that the question of whether such a dismissal or action was justifiable must be determined, on an objective basis, 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 the dismissal or action occurred.

The issues

[27] Against this background the following issues require resolution:

(i) did the employer do what a fair and reasonable employer would do in deciding to terminate the Applicant's employment for absences from work?

(ii) If a grievance is found, did the Applicant do all he reasonably could to mitigate any losses?

(iii) If a grievance is found, did the Applicant contribute to the situation giving rise to the grievance in a way that requires reduction of any remedies that may be awarded?

(iv) Is the employer obliged to return to or reimburse the Applicant for some gear left in his locker?

(v) What consequences flow, if any, from the Respondents' failure to comply with a direction to mediation?

(vi) Are either party entitled to an award of costs?

Were the employer's actions justified?

[28] The starting point for determining this matter is considering what the particular employment agreement provides for in the circumstances of absences by a worker. It contemplates the worker terminating his or her own employment by not being at present at work for three or more days without the employer's agreement or a good cause. It may be that the authors of the clause intended the reference to "*good cause*" to be followed by the word "*known*" so that it had to be a reason of which the employer was aware. It would make more sense if that word was there. However it is not and as it reads the absence must be either with employer consent or for some actual good cause (whether known to the employer or not).

[29] However it is not enough in this particular case to rely on the clause simply coming into effect by the worker's own actions in not attending work without having got the employer's consent or there being a good reason. Here the employer took a specific and direct action. At the end of the third day of what he understood to be an unexplained and unsanctioned absence by the Applicant, Mr Hemopo drafted and sent him a letter headed with the word "*termination*" and stating that the Second Respondent had terminated the employment.

[30] Rather than expressing a state of affairs, the letter declared the termination of employment and was an action of dismissal. Mr Hemopo stated that he had "*no oppositions but to terminate*" the employment – a phrase which appears to be a typographical error in the letter he typed himself. He most likely meant to say that he had no "*option*" but to end the employment. That however is not a correct statement of the provisions of the clause of the agreement relied upon. The employer did have other options, including to first seek an explanation from the Applicant. That it chose to do what it did – stating its termination of the employment – was an action that must then pass the test of justification set by s103A of the Act.

[31] I find that the extent of the action taken by Mr Hemopo was not justified. Accepting his evidence that he had no information about the whereabouts of the Applicant or the reason for his absence, there was no consent from the employer for

the absence. However he had not established that there was no "*good cause*" for the absence. His attempts to do so consisted of one unanswered telephone call to what he understood to be the Applicant's phone number, asking the employee with whom the Applicant got a lift to work if he knew any reason for the absence, and checking the night answer phone at the factory to see if the Applicant had left a message (which he had not).

[32] The case law suggests that a more careful inquiry was required. A fair and reasonable employer would have told the Applicant that it appeared that he may have terminated his own employment and given him the opportunity to attend and explain what had happened before taking any further action against him.

[33] In this particular employment agreement an appendix of company rules lists "*unauthorised absences from work*" as an example of misconduct for which a "*first warning*" may be given for a "*first offence*" and termination of employment does not occur until a third offence.

[34] However in this case the Applicant was not given the opportunity to attend and explain himself prior to the declaration of termination of employment by the Second Respondent.

[35] It may have been that had he done so, the Second Respondent may, after fairly investigating and considering any explanation given, have decided the absences on 21, 22, 25, 26 and 27 September 2006 did not amount to "*good cause*" and the employment was therefore terminated by the employee's own actions. Alternatively, while it would no doubt have been very unhappy with the inconvenience caused by the Applicant's absences, I cannot preclude the prospect that the Second Respondent may have accepted that the Applicant was under significant strain because of the serious criminal charges he faced and generously allowed the employment to continue, albeit under a warning. Mr Hemopo's evidence was that he had given the Applicant a chance in the job because he had previously worked in a meat works that Mr Hemopo had connections with and that he was otherwise quite satisfied with the Applicant's work to date. So those prospects were at least possibilities. Neither path could however be considered because the Second Respondent had acted in advance of that process with a decision that was unjustified in the circumstances.

[36] The termination letter did suggest that the Applicant could make an appointment to see Mr Hemopo within five days to "*discuss this matter further*". But Mr Hemopo, quite frankly, said this was not intended to give the Applicant the opportunity to revisit the termination of employment but was so the reasons for it could be explained to him.

Mitigation

[37] The Applicant has a personal grievance and remedies must be considered.

[38] His evidence on his subsequent job search and employment was incomplete. He had secured some temporary work and later spent a period on the unemployment benefit before returning to full-time work in May this year. Having regard to the limited evidence from the Applicant and the relatively buoyant job market in this period, I consider that lost wages could be awarded for up to 12 weeks under s123(1)(b) and s128 of the Act, subject to deductions for actual earnings in that period and reduction for contribution under s124 of the Act.

Compensation

[39] The Applicant gave evidence of being embarrassed by the termination of his employment, upset by the anxiety caused to him and his partner about their financial situation, and further embarrassed by having to borrow money from family and friends as a result of losing his job. Mr Parker also described his observations of the Applicant as being "*gutted*" by the experience.

[40] Weighing the particular circumstances of the case and the general range of awards in cases of this type, I would award $4000 under s123(1)(c)(i) of the Act to compensate for the humiliation, loss of dignity and injury to feelings of the Applicant, subject to reduction for contribution under s124 of the Act.

Contribution

[41] Section 124 of the Act requires the Authority to consider the extent to which

the Applicant's actions contributed towards the situation giving rise to his grievance and, if those actions so require, reduce remedies that would otherwise have been awarded.

[42] In this case I consider the Applicant's actions were sufficiently blameworthy as to require that remedies for the personal grievance be reduced by 100 per cent.

[43] On the balance of probabilities I have not accepted his evidence that he spoke to Mr Hemopo prior to his absences from work or that he showed a copy of his court summons to Mr Hemopo.

[44] He received the summons on 15 September and had adequate opportunity while at work on 18, 19 and 20 September to make proper arrangements for his absence.

[45] I also take account of the reason for his absence on 21 September. It was not to do with his upcoming court appearance. Rather he had attended his brother's party on 20 September and did not make it to work the next day.

[46] Similarly, although it occurred after the event of Mr Hemopo writing a letter of termination on 25 September, the Applicant did not attend work on 26 or 27 September. His own evidence was that he was not aware of his supposed "suspension", via a conversation between Mr Parker and the office receptionist, until well after he was due to start work on 27 September. The reality is that he had simply stopped attending work from 21 September onwards and made no real attempt to return there. It would not be just to award any remedies for the grievance in the particular circumstances.

Personal gear

[47] The Applicant sought an order for return or reimbursement for some equipment that he says was left in his personal locker and had not been returned to him. The equipment was a full length mesh glove, valued by the Applicant at $278, and two boning hooks, worth $40 each.

[48] Mr Hemopo had opened and checked the contents of the Applicant's locker after the employment was terminated. He confirmed there were a number of items of work equipment in it but could not identify whether some were the personal property of the Applicant.

[49] Mr Newton, in closing submissions, accepted that if the issue of equipment remained live, a mesh glove and two hooks would be provided to the Applicant.

[50] As the personal items cannot be definitely identified I consider that money is the suitable remedy.

[51] The Applicant's valuations for the particular items were not challenged and, accordingly, the Second Respondent is ordered to pay to the Applicant, through his solicitor, the sum of $358 in reimbursement for the cost of replacing the particular items sought.

Non-attendance at mediation

[52] It is not acceptable that the Respondents did not attend mediation as directed by notice from the Authority on 18 January 2008. The notice clearly stated the obligation under s159(2) of the Act to comply with a direction to mediation and to attempt in good faith to reach an agreement settlement of differences.

[53] The Respondents, through Mr Newton, took the position that they were not required to attend mediation. He had taken legal advice but gave evidence during the Authority investigation that he had not provided his legal advisors with a copy of the notice of direction.

[54] Mr Newton, as the First Respondent's chief executive, says he now accepts full responsibility for the "*mistake*" of not attending mediation as directed.

[55] The consequences of this mistake are that the parties and the Authority have incurred the costs of an investigation for a result that could readily have been achieved earlier and more cheaply in mediation. It also a factor to be weighed in considering costs.

Costs

[56] Mr Lee, for the Applicant, did not seek an award of costs as representation was provided through a community law centre without charge to the Applicant. He did seek disbursements.

[57] The Respondents are ordered to pay the Applicant's reasonable disbursements in full. The Community Law Centre is to render an invoice to the Respondents for those amounts. If there is any dispute as to the amount, leave is reserved to the parties to refer the matter to the Authority for determination.

Summary of determination

[58] I have found that the Second Respondent's actions in terminating the Applicant's employment in the way that it did were unjustified.

[59] I have found that the Applicant's conduct contributing to the situation giving rise to his personal grievance was so blameworthy as to require a total reduction of any remedies that would otherwise have been awarded to him.

[60] The Respondents are to pay to the Applicant the sum of $358 to reimburse him for replacement of some personal equipment not returned to him.

[61] The Respondents are to pay the reasonable disbursements of the Applicant's legal representative attending to this matter.

Robin Arthur
Member of the Employment Relations Authority