

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 253/08
5104744

BETWEEN GARY YUILL
 Applicant

AND G&K FOWLER LTD T/A
 FIRST AVE PANEL AND
 PAINT
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Hamish Russ for Applicant
 Tim Kinder for Respondent

Investigation Meeting: 18 June 2008

Submissions received: 25 June 2008, 9 July 2008 from Applicant
 8 July, 9 July 2008 from Respondent

Determination: 16 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This case involves a dismissal as a result of what the parties have referred to as a “homer.” Mr Yuill, a qualified tradesman, worked for the respondent as a spray painter. One weekend in July last year company director Gary Fowler received a phone call from a staff member who told him that he had been in to the yard and found Mr Yuill and others using the respondent’s premises, equipment and paint to complete a private job. Over the next few days Mr Fowler spoke about what had happened to Mr Yuill, to other staff who appeared to have been involved, and to his workshop manager. Having satisfied himself that the alleged conduct had taken place without permission he proceeded to dismiss Mr Yuill.

[2] Mr Yuill does not dispute doing the job in question, and getting paid for it, but he says that he did not organise it and thought the co-worker who did had obtained permission. He says that if he had been asked, he would have reimbursed the respondent for the cost of the paint. He also says that though it has since transpired that the job had been quoted by the respondent, he did not know this at the time. He says that Mr Fowler's disciplinary process was defective and he did not get an adequate opportunity to explain any of these things before he was dismissed. For these reasons, he says, the termination of his employment was both procedurally and substantively unjustified.

Issues

[3] Section 103A sets out the test of justification as follows:

"...the question of whether a dismissal or an 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."

[4] The principal matter for determination is whether this test for justification has been met. There is in addition an issue as to precisely when the employment was terminated and, depending on the answer to that, a question may arise as to whether a purported suspension was justified. If the dismissal is not justified the question of remedies will fall to be determined along with whether these should be reduced for contributory conduct.

[5] In his statement of problem, Mr Yuill raised a further issue relating to alleged incorrect payment of overtime. I was not however given evidence to support this claim. I am unsure whether it remains a live issue but if so it is reserved.

The termination of employment

[6] Mr Fowler told me that on Saturday 21 July 2007 he was driving from Tauranga to Auckland when Terry Fagg (who managed the business for him) called to

say that he in turn had been rung by foreman Dion Handley with the information that two staff members were in the paint shop working on a car without authority. Mr Fowler immediately telephoned Mr Handley who confirmed that he had seen Mr Yuill and another worker, Leith Miles, working on a vehicle that day.

[7] When Mr Fowler got to the paint shop first thing on the Monday morning he found Mr Miles present and spoke to him briefly. Mr Miles confirmed that he, Mr Yuill and one of the panel beaters, Darren Hoyte, had as alleged done some work on the car of a friend and been paid cash for it. Mr Fowler told Mr Miles that *“he was within an inch of being dismissed and that if he did anything like this again he could expect to be fired.”* The reason Mr Fowler did not fire Mr Miles was simple. He had been employed only a short time since leaving school and was working as a general hand in the hope of getting an apprenticeship. He was 16 years old. Mr Fowler felt that because of Mr Miles’s age and experience he could not be held fully responsible for what had happened.

[8] Mr Fowler then confronted Mr Yuill who admitted that he had worked on the job. Mr Fowler instantly reacted by telling him he was fired. Mr Yuill’s evidence is that he responded with the protest that, as far as he knew, *“Leith had organised the job and got all the permission necessary”*. Mr Fowler’s evidence is different. He says that Mr Yuill told him only that Mr Fagg had given permission, and that it was not until later (he was not clear when) that he heard the suggestion that Mr Yuill thought Mr Miles had obtained the permission.

[9] No records have been kept of any part of the disciplinary process. Partly because of this, and partly because Mr Fowler could not recall exactly when he heard Mr Yuill’s explanation, I prefer Mr Yuill’s account of this exchange.

[10] Despite his initial reaction, Mr Fowler accepted the need to check out the explanation and set about trying to get hold of Mr Fagg (who was not at the workshop that day) in order to do so. Having had no success by about mid morning, he sent Mr Yuill home for the rest of that day. Meanwhile Mr Fowler had also spoken to Mr Hoyte who at first denied the allegation but later admitted what he had done, at which point he was dismissed. After a few heated words he left the shop and did not return.

[11] It had previously been arranged for Mr Yuill to start a two day painting course on the Tuesday. Early on the Monday evening Mr Fowler telephoned Mr Yuill and told him to go ahead with the course. He told him they would meet to discuss the alleged misconduct when Mr Yuill came back to work on Thursday morning.

[12] Over the next two days Mr Fowler discussed the situation with Mr Fagg and heard that he had not given permission for the job. Mr Fagg also told Mr Fowler that the job had been quoted by the respondent just the week before and that Mr Yuill was in the workshop when the vehicle came in. Mr Fowler concluded that Mr Yuill must have known the job had been quoted for.

[13] On the morning of Thursday 26 July Mr Yuill arrived with his support person (a friend) to meet with Mr Fagg and Mr Fowler. He was told that Mr Fagg denied having given permission for the job to be done. Then, almost immediately even by the respondent's account, he was handed a letter which read in part:

“On Saturday 21 July 2007, you...confirmed working on a vehicle [identified]. You had not been requested to carry out work on the vehicle in question...

Not only were you carrying out work without authorisation, you were also using the Company's plant and materials without authorisation...

The Company consider the above named actions constitute serious misconduct and we herewith terminate your employment with the Company...’

[14] Mr Yuill says it was never put to him that he knew that the job had been quoted for and if it had he would have denied any knowledge of this. Mr Fowler told me that he believed this was put. Once again, in the absence of any written record, and because the letter was handed to Mr Yuill so quickly, I give Mr Yuill the benefit of the doubt on this issue.

[15] Mr Yuill was paid up to and including the Thursday. He told me that although he thought at the time that Mr Fowler had “*withdrawn the termination*” he now

considers his employment to have been terminated on the Monday morning. I do not accept this assertion. Mr Fowler did tell Mr Yuill that he was sacked, but when Mr Yuill responded that the job had been authorised Mr Fowler retracted what he had said and sent Mr Yuill off on full pay on a course that was paid for by the respondent. If Mr Yuill had been dismissed he was clearly reinstated, as he himself perceived it at the time. By his conduct in attending the course, and reporting for work on the Thursday, he signalled that he accepted that.

[16] I conclude that Mr Yuill's employment was not terminated until the Thursday.

The suspension

[17] Mr Yuill also says that on the Monday morning he was kept hanging around the workshop with nothing to do for some time before Mr Fowler sent him home, all of which he found humiliating. He says that if he was not dismissed then being kept waiting, before being sent home, was unjustified.

[18] I reject this proposition also. Before suspending Mr Yuill, Mr Fowler had put the alleged misconduct to Mr Yuill who confirmed doing the private job and proffered an explanation. To suspend Mr Yuill while he investigated this explanation was a reasonable and appropriate thing to do. In addition, over the course of the Monday morning, there had been heated words spoken between Mr Yuill, Mr Hoyte and Mr Handley. Mr Yuill confirmed this to me, saying he felt angry with Mr Handley for going to Mr Fagg about the private job. In such circumstances, I accept that it was best for Mr Yuill to be out of the workshop until the investigation was complete.

[19] I conclude that the suspension was both fair and reasonable in all the circumstances.

Was the dismissal justified?

[20] It is submitted on Mr Yuill's behalf that the respondent's process was seriously deficient, being hasty, informal, and with neither allegations nor findings

reduced to writing. Noting that the letter of dismissal was prepared in advance of Thursday's meeting Mr Russ argues that the dismissal itself was predetermined. He says that the allegations were not clear to Mr Yuill and he was not given a proper opportunity to respond.

[21] I do not accept that the respondent's process was completely deficient. Indeed, I consider that Mr Fowler made a genuine and creditable effort to be fair to Mr Yuill when he pulled back from dismissal and set about checking his explanation before making a final decision. I consider that Mr Yuill knew what the allegation was and was aware of the possible consequences for his employment. This is borne out by the fact that he took steps to arrange a support person for the Thursday morning meeting.

[22] Unfortunately, this reasonable start to the process did not carry through to the final stage. The letter of termination was prepared and handed it to Mr Yuill without first putting to him the further information Mr Fowler had gathered and without giving him a full opportunity to comment. It follows that the decision to terminate was predetermined and the dismissal was procedurally unfair.

[23] Because of this finding I will address issues relating to substantive justification under the next heading.

Contributory conduct

[24] The duties of trust and confidence and of fidelity give rise to certain obligations on employees, as set out by the Court of Appeal in *Tisco Ltd v Communication & Energy Workers Union [1993] (2) ERNZ 779*, in which a television repair man had operated a small business of his own in his spare time. The Court noted at p.780 that:

“The employment relationship gives rise to reciprocal duties among which are the employee's duty of fidelity and good faith. Any conduct by an employee which is likely to damage the employer's business could constitute a breach of duty. The duty of fidelity and good faith carries with it a duty not to undermine the relationship of trust and confidence.”

[25] It is well established that conduct of the type alleged in this case may constitute a breach of these duties. One factually similar example to the present case can be found in *New Zealand Electrical etc IOUW v The Car Stereo Co Ltd [1991] (1) ERNZ 183* in which one of the reasons for dismissal related to unauthorised private use of the employer's workshop outside work hours. The dismissal was held to be justified.

[26] Mr Yuill says that his dismissal was substantively unjustified because he had a reasonable explanation for his conduct: he had not known the job had been quoted for, and he thought Mr Miles had obtained permission. Mr Yuill's representative argued that:

“Leith Miles... should have made all the provisions and arrangements with management to grant permission for the job to be done.”

[27] Mr Fowler told me that if Mr Yuill knew about the quote (and Mr Fowler still believed he must have) this only compounded what would have been serious misconduct in any event. Mr Fowler said he would never permit staff to use the workshop to perform outside work for reward; the job should not have been done on his premises using his paint and equipment. Mr Fowler said he was willing for staff to use the workshop for family jobs but only with permission and only if materials were reimbursed. Mr Yuill himself had done so previously, which Mr Fowler said showed that he knew what was expected of him.

[28] As for the explanation regarding Leith Miles, Mr Fowler said it was not reasonable for anyone to think that Mr Miles would ever have been given permission to do a private job; he did not have the relevant skills and was incapable of completing the necessary work.

[29] I unreservedly accept the respondent's position on these issues. The undisputed facts indicate serious misconduct. Mr Yuill participated in a private job, using the respondent's resources, for which he was paid and did not, at the time, offer to reimburse the respondent. He never checked with the foreman, the manager, or the

owner of the business to confirm whether permission had been given or what resources he could use in completing the work. I do not consider it acceptable for a fully qualified and experienced tradesman (as Mr Yuill was) to abdicate responsibility to the most junior person in the workshop. At the time, Mr Miles's duties did not extend much beyond sweeping the floor. He did not have access to the workshop after hours and on the Saturday the job was done, he had to wait for Mr Yuill to arrive and let him in¹. The suggestion that a private job should be performed on his say so is certainly not something I think any "fair and reasonable employer" would be prepared to accept. For the same reason, any argument relating to the disparity of treatment between Mr Yuill and Mr Miles must fail.

[30] In short, this is a case where nothing has come to light since the dismissal which would indicate that it was not, in substance, totally justified. I consider this an appropriate case therefore for a 100% reduction in remedies. There will be no order for remedies.

Costs

[31] This issue is reserved at this stage. If the parties cannot resolve it between themselves they have a period of 28 days in which to lodge submissions.

Yvonne Oldfield

Member of the Employment Relations Authority

¹ In submissions for Mr Yuill this assertion was challenged however I note Mr Yuill's own statement includes: "*Saturday 21 July I showed up to work around 8am. Leith was there waiting for me to unlock work to let him in.*"