

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 14/10
5166856

BETWEEN DION MANSON
 Applicant

AND TOM RYAN CARTAGE
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Tim Twomey, Counsel for Applicant
 Wayne Jones, Advocate for Respondent

Investigation Meeting: 27 November 2009 at Christchurch

Determination: 26 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Manson) alleges that he was unjustifiably dismissed and subjected to an unjustified action causing him disadvantage by his employer, the respondent (Tom Ryan). Tom Ryan denies both allegations and says that Mr Manson was dismissed for serious misconduct after a proper investigation.

[2] Mr Manson was employed by Tom Ryan as a mechanic at its Christchurch premises and was subject to an individual employment agreement dated 22 September 2008.

[3] Mr Manson had stored a bus at his work premises with the knowledge of Tom Ryan's then manager, Mr Pedersen. Mr Manson was restoring the bus and intended to use it as a recreational vehicle for himself and his family.

[4] On 2 June 2009, Mr Manson removed the existing tyres from the bus and fitted truck tyres from Tom Ryan's store. Mr Manson's evidence was that he wished to see if the truck tyres would fit the bus and if they would, he would arrange to

purchase them through Tom Ryan. Mr Manson thought he had some tacit understanding with his supervisor to do this. In fact, the truck tyres did not fit the bus and Mr Manson intended to remove them and replace them with the original tyres (according to his evidence) but this did not happen because Mr Manson became seriously ill two days later and on 4 June 2009 he was rushed to hospital with pneumonia.

[5] When Mr Manson's condition was stabilised by hospital treatment, Mr Manson attended a health and safety meeting on Saturday, 6 June 2009 which was convened by Mr Wayne Jones of Tom Ryan's Auckland office. At that meeting, Mr Manson raised issues about his health and indicated his view that his pneumonia had been caused or at least contributed to by the unreasonable cold in Tom Ryan's Christchurch workshop. Tom Ryan undertook to fix that problem by providing heating in the workshop.

[6] Tom Ryan wrote to Mr Manson by letter dated 9 June 2009 setting out its anxiety about Mr Manson's health, proposing that he remain on sick leave until he was well, but also making a number of other observations which Mr Manson considered were conveyed in an aggressive and unhelpful tone. One of those matters was the request that Mr Manson remove the bus from the workshop.

[7] Because Mr Manson was so concerned about the tone of this letter, he sought the support of his father-in-law, Mr Rudkin, in writing a letter in response.

[8] When Mr Manson finally returned to the workplace after his period of ill health, he was told by Tom Ryan through its Christchurch manager, Mr Pedersen, that a stock take had been undertaken while he was on sick leave and that it appeared that four tyres were missing from the stock. Mr Manson readily conceded that the four tyres were on his bus and then Mr Pedersen told Mr Manson to return to a formal meeting with a support person.

[9] This disciplinary meeting took place at noon on 16 June 2009. Mr Manson was supported by Mr Rudkin. At the disciplinary meeting, Mr Manson was accused of stealing the tyres in question from Tom Ryan which Mr Manson denied. The evidence from Tom Ryan was that in putting the tyres on his bus, Mr Manson had effectively converted them to his own use and that that action fatally destroyed the

trust and confidence that must exist between employer and employee and resulted inevitably in his dismissal.

[10] For his part, Mr Manson claimed to have made it clear to Tom Ryan in the disciplinary meeting that he had no intention of taking the tyres and that he was simply trying them out to see if they fitted his bus. If they had fitted, he would have arranged to buy them either through Tom Ryan or through some other source. As it happened, the tyres did not fit and so he was intent upon removing them but had been prevented from doing that because of ill health.

[11] During the course of the 16 June disciplinary meeting, Tom Ryan made the decision to dismiss and Mr Manson was advised of that at the meeting.

[12] Personal grievance claims were promptly raised and the matter proceeded to the Authority in the usual way. The claim for unjustified dismissal relates, of course, to the circumstances in which Mr Manson was dismissed from his employment. The claim for an unjustified disadvantage relates to Tom Ryan's alleged failure to provide a safe workplace in that it is contended that Mr Manson suffered his bout of ill health as a consequence of Tom Ryan's failure to provide adequate heating in the workshop.

Issues

[13] It will be convenient for the Authority to consider the two claims separately so the first issue is the alleged unjustified dismissal and the second is the alleged unjustified disadvantage.

[14] However, before dealing with the substance of the two personal grievances, it is necessary to comment on the behaviour of Tom Ryan in addressing this matter through the Authority's process.

The employer's approach

[15] Tom Ryan participated fully in the preliminaries to the investigation meeting. In particular, the principal of Tom Ryan personally participated in the telephone conference I convened on 9 November 2009 which, amongst other things, set the timetable for the receipt of statements of evidence and provided a general qualification that if difficulties were experienced with the orders made, either party was to communicate immediately with the Authority.

[16] In the result, no briefs of evidence at all were filed by Tom Ryan and when the matter proceeded to the investigation meeting, only Mr Wayne Jones, the Operations Manager of Tom Ryan, was present on behalf of the employer. Accordingly, Mr Jones was in the invidious position of having to advocate for Tom Ryan and to give what evidence he could of Tom Ryan's position in respect of the alleged grievances. As Mr Jones had had no more than a tangential involvement in the matters complained about by Mr Manson, this placed him in a position of real difficulty. The Authority is grateful to Mr Jones for the efforts he made on behalf of Tom Ryan and the courtesy he showed to the Authority and to the applicant party and the latter's counsel.

[17] However, there can be no doubt that Tom Ryan failed to be adequately represented at the investigation meeting, failed to file briefs of evidence, failed to provide witnesses and indeed failed throughout to act in good faith in respect of the Authority's process.

[18] There was no intimation at the telephone conference that Tom Ryan would not participate fully and frankly in the investigation meeting and there was no request for extension or any other indulgence in relation to the timetable set by the Authority. In those circumstances, with Mr Jones sent along to provide what representation he could for Tom Ryan, and in the absence of any request for an adjournment, I elected to proceed and determine the matter.

[19] I must say that if the Court were to seek a good faith report pursuant to the power to do so in s.181 of the Employment Relations Act 2000, such a report would reflect the absence of good faith in respect of Tom Ryan as employer, save for the positive contribution made by its Operations Manager, Mr Wayne Jones. There can be no doubt that the absence of proper evidence of the employer's position contributed to the difficulty the Authority had in determining this matter.

[20] It follows from the foregoing observations that the evidence before the Authority in the present matter comes primarily from Mr Manson and his witnesses. One of Mr Manson's witnesses, his father-in-law, Mr Rudkin, gave particularly helpful evidence about the nature of the final disciplinary meeting wherein Mr Manson was dismissed. That evidence was not challenged by Mr Jones on behalf of Tom Ryan. Mr Jones' own evidence on behalf of Tom Ryan helpfully confirmed the thrust of Tom Ryan's position on the matter without giving the Authority the level

of detail that would normally be available in a matter of this kind. Mr Jones was able to depose particularly to the alleged failure of Tom Ryan to provide a safe workplace for Mr Manson because that was a matter Mr Jones was personally involved with.

[21] Accordingly, it could be said that Tom Ryan's whole engagement with the Authority's process was at best half-hearted and in the Authority's view, fundamentally lacking in good faith.

Was Mr Manson unjustifiably dismissed?

[22] I am satisfied on the evidence before the Authority that Mr Manson was unjustifiably dismissed. I conclude that a fair and reasonable employer, after conducting a proper investigation, would not have dismissed Mr Manson in the particular circumstances of this case.

[23] Tom Ryan says that the employer conducted a stock take while Mr Manson was on sick leave and that that stock take disclosed four missing tyres. Because no record of that stock take was ever produced, either to Mr Manson during the disciplinary process or to the Authority, Mr Manson invites me to conclude that there was, in truth, no stock take at all and that Tom Ryan simply chose to rely on the fiction of a stock take to give credibility to the allegation that Mr Manson had *stolen* the four Tom Ryan tyres.

[24] In the letter to Mr Manson from Tom Ryan dated 9 June 2009, the employer indicates that *upon your return to the workplace* there will be *a full stock take*. In fact, that never happened and Tom Ryan alleged during the disciplinary process that a stock take had been conducted while Mr Manson was on sick leave. Because no evidence of that stock take was ever provided, Mr Manson suggests the stock take was a fiction.

[25] Whether the stock take ever took place or not is not the issue. Certainly, the stock take was unnecessary if its only purpose was to obtain evidence against Mr Manson. If that were the purpose of the proposed stock take, such a process would have been unnecessary because it was plain to any casual observer that Mr Manson's bus had four tyres on it which belonged to Tom Ryan.

[26] When Mr Manson was confronted with the allegation that he had put Tom Ryan tyres on his bus, he immediately accepted that was precisely what had happened

and although he maintains that he had some sort of tacit authority from a supervisor to do that, when I pressed him at the investigation meeting on that point he agreed that he had no authority at all to try the new tyres out. Tom Ryan relies on two facts to ground its decision to dismiss, viz the fact that Mr Manson acknowledged placing Tom Ryan tyres on his bus and the fact that Mr Manson did that entirely without Tom Ryan's authority. That allegedly grounded the decision to conclude that Mr Manson was guilty of serious misconduct and the complete failure of trust and confidence was said to follow from that conclusion.

[27] But while that is the basis on which the letter of dismissal starts, it is clear from the balance of the letter that the allegation against Mr Manson is actually that he stole the tyres in question. That conclusion is supported by the final paragraph of the dismissal letter which notes that Tom Ryan is referring *this theft* to the Police for them to investigate.

[28] Whatever else is true, I am satisfied that this is not a theft of Tom Ryan's property. The evidence is clear that Mr Manson tried the tyres on the bus to see if they fitted and he said on oath (and I accept) that his intention was to remove them thereafter because they plainly did not fit. However, because Mr Manson was taken ill immediately after fitting the Tom Ryan tyres, he was unable to remove the tyres and so they remained on the bus for the whole period that Mr Manson was unwell down to his return to work on 16 June when he was confronted with the allegation that he had stolen the four tyres.

[29] Given that the tyres were still on the employer's property (as were the original tyres, despite what Tom Ryan alleges), it follows that there can be no theft. Certainly Mr Manson was ill advised to try the Tom Ryan tyres on his bus without getting formal permission to do so, and undoubtedly Tom Ryan could have concluded that Mr Manson was guilty of ordinary misconduct for putting tyres on the bus without permission, but the allegation is actually one of theft and that is simply not able to be sustained.

[30] Aside entirely from the legal elements of the offence of theft itself, it is clear law in the employment jurisdiction that any allegation of the magnitude of theft by an employee must be subject to the most rigorous investigation. As Chief Judge Goddard said in *Honda New Zealand Ltd v. New Zealand Boilermakers' etc Union* [1991] 1 NZLR 392:

... where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave.

[31] Applying that dictum, I am satisfied that no reasonable employer would have concluded that Mr Manson was guilty of theft in the particular circumstances of this case. The property was still within the power and control of its owner (Tom Ryan), there was, on Mr Manson's evidence, no intention to deprive the employer of the property anyway, and so the conclusion was simply wrong.

[32] More importantly though, the conduct of the disciplinary meeting was, in my judgment, unfair. I reach this conclusion primarily because of the evidence tendered to the Authority by Mr Rudkin, the support person for Mr Manson at the final disciplinary meeting. I formed the view that Mr Rudkin's evidence was straightforward and honest and could be relied upon. Mr Rudkin is very clear that the approach adopted by Mr Pedersen for Tom Ryan at the disciplinary meeting was truculent, aggressive and hectoring. It seemed to Mr Rudkin that Tom Ryan had already made its decision. Certainly, Mr Rudkin and Mr Manson himself were apparently precluded from offering any comments or explanations for the alleged wrongdoing. That is not the behaviour of a fair and reasonable employer.

[33] Furthermore, I accept Mr Rudkin's point that the logic of Mr Pedersen's reasoning was unsustainable. The conclusion Mr Pedersen essentially reached was that the bus's original tyres were no longer in the workshop and that on receipt of the instruction to remove the bus, Mr Manson intended to take the bus away on Tom Ryan's tyres. But that is not the factual position at all. The bus's original tyres were indeed in the workshop and were sighted there prior to the meeting by Mr Rudkin.

Was Mr Manson unjustifiably disadvantaged?

[34] I conclude that Mr Manson was unjustifiably disadvantaged in the totally unsatisfactory nature of the work environment which, on the evidence before the Authority, seems to have been a contributing factor in Mr Manson's pneumonia. Mr Manson also alleges disadvantage in a number of minor ways. As to these less important matters, they essentially originate in the letter sent by Tom Ryan to Mr Manson dated 9 June 2009 which purports to be a letter expressing concern about Mr Manson's pneumonia but which actually makes a number of changes to Mr Manson's terms and conditions of employment on a unilateral basis. In that letter,

Mr Manson was advised that his reporting line was to change, that his ability to purchase was removed, and that his hours of work were to change. While these matters are undoubtedly actions of the employer which disadvantaged Mr Manson (especially the change to hours of work), the legal questions of course are whether those changes were, in the circumstances, justified or not, and whether Mr Manson accepted the changes or not.

[35] No doubt Tom Ryan would contend that the changes were made to address Mr Manson's ill health and were necessary for that very purpose, but it is difficult to see how a change in reporting lines would have any impact in that regard, although amending hours of work might, to some extent, be seen as attempting to address the need to keep Mr Manson away from a very cold workshop during the less temperate hours of the day. On balance, I conclude that the changes were unjustified and that there was no reasonable basis on which Tom Ryan could unilaterally impose these amendments to Mr Manson's terms and conditions of employment in circumstances where it was perfectly possible for the parties to meet and agree on new arrangements. At the time that the letter was written, there was no apparent defect in the employment relationship and nothing would seem to preclude the parties from sitting down and addressing the changes which Tom Ryan thought it appropriate to make. Even where those changes were alleged to respond to Mr Manson's ill health, there is no reason in law why those changes must be made unilaterally, particularly where no attempt has been made to negotiate the changes. Furthermore, not all of the unilateral changes would seem to have any effect on Mr Manson's ill health, including in particular the change in reporting lines and the removal of Mr Manson's right to purchase for the workshop.

[36] However, when Mr Manson received Tom Ryan's letter of 9 June 2009 unilaterally changing his conditions of employment, rather than protesting the changes (as he was entitled to do), he accepted them by his letter of 10 June 2009 in response. That being the position, he can hardly be heard to complain about the changes now and partially base his disadvantage grievance on matters he has accepted.

[37] As to the main element of complaint by Mr Manson under this head, there can be little doubt that the evidence discloses that the workshop was cold to the point of being injurious to health and that there was inadequate heating in that facility to such an extent that Mr Rudkin felt obliged to lend a gas fired heater to Mr Manson to lift

the temperature in the workshop. A curious aspect of this issue is that as a consequence of Mr Manson attending the health and safety meeting on 6 June 2009, arrangements were made for a commercial grade space heater to be purchased for the workshop and this heating was actually delivered to Tom Ryan but then prior to Mr Manson's return to work after his period of ill health, was directed to be returned to the supplier by Tom Ryan. Because of the inadequacies of the evidence offered to the Authority by Tom Ryan, I am unable to identify why the heater was sent back; however, the fact that it was sent back allows Mr Manson to contend that his dismissal was a sham and that Tom Ryan had made the decision to disestablish the Christchurch workshop as part of a general restructure.

[38] In any event, every employer has an obligation to provide a working environment which is reasonably free of obvious health and safety deficits and a large unlined hangar type vehicle workshop without adequate heating operated by a sole charge mechanic in the depths of a Christchurch winter does not meet the employer's obligation in this regard.

Determination

[39] I have concluded that Mr Manson has satisfied the Authority that he has a personal grievance, both on the grounds of unjustified dismissal and on the grounds of being disadvantaged by unjustified actions of Tom Ryan, in respect of the unsatisfactory temperature in his work environment. In principle then, Mr Manson is entitled to remedies. He claims a global compensatory sum of \$20,000 together with a contribution to his lost wages in the sum of \$8,100. The first issue is one of contribution.

[40] As to the unjustified disadvantage personal grievance, I conclude that Mr Manson has not contributed in any way to *the situation that gave rise to the personal grievance*; when Mr Manson suddenly became ill with pneumonia, a contributing factor for which was the very cold work environment that he was forced to operate in, he immediately, as soon as he was able, took the matter up with the employer and it undertook to provide clean overalls and a commercial grade heater for the working space. As to the other matters relied upon by Mr Manson to ground his unjustified disadvantage personal grievance, these were referred to for the first time in the employer's letter of 9 June 2009 and Mr Manson promptly responded to that letter with his own letter of 10 June 2009 accepting those changes to his employment. As I

have already made clear, those matters can not ground part of this personal grievance, given his acceptance of those changes..

[41] I find no evidence of contribution in relation to the disadvantage grievance. However, I think the position is otherwise in relation to the dismissal grievance. While I have reached the conclusion that the dismissal of Mr Manson was unfair and not in accordance with the test required in s.103A of the Employment Relations Act 2000, I have also been clear that it seemed to me Mr Manson was very ill advised to fit his employer's tyres onto his own vehicle without his employer's explicit consent to that process. Clearly, by Mr Manson's actions, it was available to Tom Ryan to conclude (as in fact it did) that Mr Manson was intent upon stealing the tyres and I conclude that by his own foolish actions, Mr Manson has materially contributed to *the situation that gave rise to the personal grievance*.

[42] I think the proper course of action is to identify compensation amounts for the two separate grievances and only reduce the dismissal grievance compensation by the contribution figure which I consider ought to be 50%. The remedies awarded to respond to Mr Manson's personal grievances are as follows:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$4,000 for the unjustified dismissal, that amount having been rebated by 50% as a consequence of Mr Manson's contribution; and
- (b) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$4,000 for the unjustified disadvantage grievance; and
- (c) A contribution to lost wages in the sum of \$4,050 being 50% of the actual loss claimed as a consequence of the unjustified dismissal; and
- (d) Payment of the \$70 filing fee.

Costs

[43] Costs are reserved.

James Crichton
Member of the Employment Relations Authority