

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 181/10
5145839

BETWEEN GEORGE CLIFFORD SPICE
Applicant

AND FIRTH INDUSTRIES A
DIVISION OF FLETCHER
CONCRETE AND
INFRASTRUCTURE LTD
Respondent

Member of Authority: Dzintra King

Representatives: David Flaws, Advocate for Applicant
John Rooney, Counsel for Respondent

Investigation Meeting: 10 March 2010 at Whangarei

Submissions Received 26 March 2010 from Applicant
13 April 2010 from Respondent

Determination: 20 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Spice says he was unjustifiably dismissed by the respondent, Firth Industries (“Firth”); and that he was unjustifiably disadvantaged. Mr Spice was employed by the respondent from 15 August 1990 until his dismissal on 2 December 2008. He worked at the respondent’s Whangarei site in the position of Certified Driver.

November 2008 altercation

[2] On 12 November 2008 Mr Spice delivered a load of concrete to a customer and while on the customer’s site noticed that a previous docket which he had left with his customer had been altered. His signature had been crossed out and the word *narc*

had been written in its place. He immediately came to the conclusion that another employee, Mr Paul Williams, had written the word *narc* on docket. Rather than approach a manager Mr Spice returned to the Whangarei site and aggressively confronted Mr Williams who was in the lunch room at the time. Mr Spice accused Mr Williams of defacing the applicant's docket, yelled at Mr Williams and physically assaulted Mr Williams, grabbing him and pushing him backwards.

[3] The company commenced an investigation into the incident. It considered the role of both Mr Spice and Mr Williams in the incident. During the investigation the company gathered statements from other employees who had been present in the lunch room at the relevant time. These statements confirmed that Mr Spice had aggressively confronted Mr Williams and that a physical altercation had occurred between him and Mr Williams.

Disciplinary meetings

[4] By letter dated 24 November 2008 Firth asked Mr Spice to attend a meeting to discuss the incident and its concerns about what had occurred. He was encouraged to bring someone with him to the meeting and was advised that the allegations, if proven, could lead to dismissal.

[5] On 27 November 2008 a disciplinary meeting occurred. Mr Spice had a support person present with him at the meeting. He was asked to give his version of the events which had occurred. He was given an opportunity to respond to statements made by other employees about the incident. Mr Spice said he was not actually given copies of the statements made by other employees but had them read out to him. The company disputes this and says that they were given to Mr Spice but they were also read out to him because Mr Spice's reading ability was limited.

[6] A second disciplinary meeting took place on 28 November to allow Mr Spice a further opportunity to provide any information about the incident. Following these meetings, Firth gave Mr Spice's explanation of what had happened careful consideration. While Mr Spice alleged that Mr Williams had punched him in the chest he also admitted that he had confronted Mr Williams rather than drawing his concerns to a manager, and had also grabbed Mr Williams and pushed him backwards. In those circumstances the company reached the provisional view that dismissal was warranted.

Discussions about possible outcomes

[7] On Monday 1 December 2008 the company met with Mr Spice and his support person. He was informed that the company had considered his explanation, but it was inclined to consider dismissal given the seriousness of the situation. Mr Spice indicated that he wanted to keep his job but acknowledged that the company's decision on the matter was final.

[8] The meeting was then adjourned to allow Firth to reflect on Mr Spice's comments. After a further brief discussion with Mr Spice a further meeting was scheduled for 9am on Tuesday 2 December. At the request of Mr Spice and Mr Williams both employees were present at this meeting along with their respective support people. Mr Spice and Mr Williams proposed an alternative to dismissal. They proposed that they remain employed but that they would be on a good behaviour bond for a two year period. Mr Spice also offered to accept suspension without pay for a one week period.

[9] Firth considered the proposal which had been put forward, but ultimately reached the view that dismissal was appropriate in the case of Mr Spice, bearing in mind:

- (i) The seriousness of the incident itself involving physically aggressive behaviour;
- (ii) The need to ensure that other employees were not exposed to aggressive or abusive behaviour in the work place; and
- (iii) The fact that Mr Spice had been involved in a previous incident with Mr Williams in November 2007 which involved Mr Spice receiving a verbal warning.

[10] Mr Spice denied that he had received a previous verbal warning. However, on consideration of the evidence I accept the company's position that such a warning was given. Mr Spice was dismissed and Mr Williams was also dismissed following his disciplinary process. Both men were offered access to counselling upon their dismissals.

November 2007 incident

[11] The company says it dealt with that incident appropriately and fairly. It carried out a thorough investigation, it considered the mitigating factors which both men brought to its attention and it issued Mr Williams with a written warning and Mr Spice with a verbal warning, both of which were appropriate sanctions in the circumstances.

[12] If Mr Spice had confirmed that there were ongoing issues between him and Mr Williams following this incident he did not raise them with his managers. Instead he remained silent and ultimately took matters into his own hands in November 2008.

[13] When I asked Mr Flaws at the beginning of the investigation meeting on what the challenge to the dismissal was based he told me it was based on the fact that Mr Spice had been subjected to ongoing bullying by Mr Williams, which he had brought to the attention of the company and that the company had done nothing about it. Mr Flaws accepted that the dismissal process itself was exemplary.

[14] Mr Spice said that Mr Williams began work at the company around 1998. The relationship began to deteriorate and he increasingly felt bullied and harassed by Mr Williams. Mr Williams had been regularly abusive and sarcastic towards him and he dreaded having to deal with him in the day-to-day exchanges. Over the last three or four years he felt Mr Williams had begun to do things to niggle him deliberately. He would often push the left hand mirror on whatever truck Mr Spice happened to be driving out of alignment. He often spoke to Mr Williams about this, but Mr Williams would also smirk and deny that it had been him.

[15] Gradually he became more and more unhappy with the situation at work and it started to affect his home life. Mr Spice said eventually he talked about the matter to Wayne Flintoff. He did not know what action was taken, but Mr Williams' behaviour did not change. He then complained to Mr Tony Bowles, the Manager Despatch at the time. He told him Mr Williams was hassling him and that he wanted him to sort it out and stop it. He said he would but as far as Mr Spice knew nothing happened.

[16] He next complained to Mr Dayhal Williams, the Supply Manager. He did nothing to improve the situation. He then complained to Mr Tom Bryant who also took no action. Mr Kayne Young then became Mr Spice's manager and Mr Spice said he regularly complained to him about Mr Williams' behaviour.

[17] In October 2007 Mr Spice's own car was interfered with it was parked outside work in Hewlett Street. He made a complaint to the Police and named Mr Williams as a suspect.

[18] Later Mr Williams wrote *narc* on his locker. On 2 November 2007 Mr Williams stood in front of his truck and forced him to stop in the yard, yanked his driver's door open, called him a *fucking tosser and threatened to get me*. Mr Spice said he was threatened and upset and angry all at the same time. He got out of the truck. As he did so Mr Williams grabbed him by the front of his shirt collar and screwed it tight. Mr Williams came up and intervened.

[19] The company carried out an investigation and Mr Young maintained that Mr Spice had caused some of the problems with Mr Williams. Mr Spice said that he was not given a verbal warning. The only verbal warning that he had had was years ago when he was warning for not turning up to work when he was still intoxicated from the previous night.

[20] Mr Spice said he kept asking the company for meetings but none were held. In late October he found the word *narc* written in felt pen on his locker over the top of his name. On 13 November he was involved in a further incident with Mr Williams when he found his signature defaced with the word *narc* written on a customer's docket. Mr Spice said he decided to try and talk to Mr Williams. He went up to the table he was sitting at in the lunch room in the course of a break with a cup of coffee in his hand. It all went wrong and they started yelling at each other. Mr Spice alleged Mr Williams punched him in the chest, he then grabbed him by the shirt front and shouted to him but he did not kick him. He kept hold of his coffee all the time.

[21] The company held a series of disciplinary meetings.

[22] I do not accept that Mr Spice was bullied during the course of his employment. This was a notion that had come to Mr Spice since he consulted Mr Flaws. He had also downloaded a document from the Department of Labour site about bullying and harassment.

[23] The previous incident with Mr Williams in November 2007 had been dealt with appropriately by the company. They had held an investigation and warned both people involved. Mr Spice maintained he did not go to management about the latest incident but went to Mr Williams directly because management had not done anything

previously. This is clearly contradicted by the fact that in November 2007 Mr Williams was issued with a written warning.

[24] Even if Mr Spice had been bullied in the course of his employment it does not excuse or justify his behaviour in confronting Mr Williams. It is clear that a physical altercation took place between the two men.

[25] Mr Spice was justifiably dismissed and does not have a personal grievance. He was not unjustifiably disadvantaged.

Costs

[26] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority