

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 399
5331597

BETWEEN STEPHEN WATSON
 Applicant

AND THE GREEN ENERGY
 CORPORATION LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Danny Gelb, Advocate for Applicant
 David Creamer, Director of Respondent

Investigation Meeting: 21 July 2011 at Auckland

Submissions Received: 26 July 2011, from Applicant
 29 July 2011 from Respondent

Additional evidence: 14 September 2011

Determination: 15 September 2011

DETERMINATION OF THE AUTHORITY

- A. Mr Stephen Watson was unjustifiably dismissed from his employment with The Green Energy Corporation Limited (“GEC”).**
- B. GEC is ordered to pay Mr Watson:**
- (a) \$5,000 for lost remuneration;**
 - (b) \$2,800 for distress compensation;**
 - (c) \$71.56 as reimbursement of the filing fee.**
- C. GEC’s counterclaim against Mr Watson is successful and he is ordered to reimburse it \$174.29.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Watson claimed that he was unjustifiably dismissed by Mr David Creamer from his job as a licensed gasfitter with GEC. Mr Watson said that Mr Creamer summarily dismissed him after being told one of GEC's competitors had offered Mr Watson a job. Mr Watson said that Mr Creamer unilaterally ended his employment without good reason and without following any kind of process.

[2] Mr Watson also claimed that GEC had failed to provide him with a copy of his individual employment agreement and he sought a penalty be imposed for a breach of s65(2)(a) and (3) of the Employment Relations Act 2000 ("the Act").

[3] Mr Creamer admitted summarily dismissing Mr Watson on 13 December 2010 and said he did so because he did not trust him anymore. Mr Creamer accepted that the catalyst for dismissal was advice he received via a contact in the industry that Mr Watson was going to work for one of GEC's competitors.

[4] However, the explanations given by Mr Creamer for dismissing Mr Watson have varied. In an email Mr Creamer sent to Mr Watson on 24 December 2010 he referred to a number of issues which he said had damaged the employment relationship and which had contributed to his dismissal. These included;

- a. *"Incorrectly filled time sheets"*;
- b. *"Bringing our company into disrepute"*;
- c. *"Bad service to Green Gas customers"*;
- d. *"Damaging company equipment and property"*;
- e. *"Driving a company vehicle at speed within a built up area endangering other road users"*.

[5] In its Statement in Reply GEC stated that it did not have "*a normal employer/employee relationship or contract*" with Mr Watson because Mr Creamer had incurred costs (borrowing to purchase a vehicle, tools, and equipment) to take him

on and had only done so as an act of kindness to help Mr Watson, who had been without work since being laid off by his previous employer.

[6] Mr Creamer said he only offered to help Mr Watson in return for a commitment from Mr Watson that he would apply his expertise as a licensed gasfitter honestly and loyally. Mr Creamer said it was a condition of Mr Watson's employment that he be licensed as a gas fitter.

[7] Both parties accepted they had been in an employment relationship so it is not in dispute that Mr Watson has the rights and protections afforded to employees under New Zealand employment law legislation. The fact GEC may have borrowed to take Mr Watson on does not negate that.

[8] The Statement in Reply stated GEC "*had been let down by [Mr Watson] on two fronts, firstly in that he was not and had no intention of being a currently licensed gas fitter whilst in [GEC's] employ, even though this was a condition of his contract. Secondly, I [Mr Creamer] felt [Mr Watson] had let me down with regard to our verbal agreement that he would be honest and loyal in his dealings with me, knowing full well the position I had put myself in by the expenses I had incurred to employ him, and keeping in mind [Mr Watson] had approached me, not the other way around.*"

[9] Mr Creamer's written statement said he decided to immediately dismiss Mr Watson because "*he had not complied with his employment contract and our verbal agreement.*"

[10] In his evidence during the investigation meeting Mr Creamer stated he had dismissed Mr Watson because;

- a. His timesheets were inaccurate;
- b. He had failed to send his registration form to the Plumbers, Gasfitters and Drainlayers Board;
- c. He had obtained a job with a rival gasfitting company.

Counterclaim

[11] GEC filed a counterclaim against Mr Watson seeking reimbursement of personal spending he had put on the company fuel card and for two speeding tickets he had incurred whilst driving the work van.

[12] Mr Watson admitted he owed GEC for the two speeding tickets and for some personal spending on the company fuel card. However, he disputed that he should have to pay for a map he purchased with the fuel card which he used to find the location of a job he had been sent to.

New issues

[13] Mr Gelb's closing submissions raised for the first time allegations that Mr Watson had not been paid correctly for all of the hours he worked. No wage arrears claim had previously been raised so it was not an issue GEC had responded to or which the Authority had investigated. No view is expressed on the merits of such a claim, because it has not been investigated.

[14] Because this was an entirely new claim, if Mr Watson now wants to pursue that as a claim then he must raise it in the normal way by filing a Statement of Problem. Mr Watson's dismissal occurred nine months ago so I do not consider it appropriate to delay the determination in respect of this matter in order to accommodate a new wage arrears claim, particularly when that new matter would be unlikely to be heard before February 2012.

Further inquiries

[15] Subsequent to the investigation meeting, Mr Gelb filed new evidence about the status of Mr Watson's gasfitter licence and registration. This new evidence contradicted the evidence given by both parties during the hearing.

[16] The parties agreed that I would deal with this new evidence by contacting Mr Kern U'ren Deputy Registrar Plumbers Gasfitters and Drainlayers Board ("the Board") by telephone to obtain Mr Watson's licensing information and to discuss the Board's licensing issues. A timetable for my discussion with Mr U'ren was set and the parties were invited to attend by telephone conference. Both declined to do so and were happy for me to proceed to question Mr U'ren without them.

[17] I took evidence from Mr U'ren under affirmation and a Support Officer was present for the duration of the call. He confirmed the accuracy of the new information presented by Mr Gelb after the investigation meeting.

Alleged failure to provide an employment agreement

[18] During the investigation meeting both parties accepted that Mr Watson had been provided with a copy of his individual employment agreement at the outset of his employment. Accordingly, there is no breach of s.65 of the Employment Relations Act 2000 ("the Act").

[19] Mr Watson's complaint was directed at GEC's delay in providing him with a further copy of his signed agreement after his employment had ended, but that did not result in a breach of the Act.

Background

[20] Mr Watson approached GEC for work twice. Although GEC was not looking to take on an employee, Mr Creamer said he offered Mr Watson a job out of compassion.

[21] GEC employed Mr Watson as a licensed gas fitter from 26 October 2010 to 13 December 2010. Although his agreement was stated to commence "*at receipt of a copy of your current gas fitter registration permit*", Mr Watson actually started work before providing the said permit to GEC.

[22] At the time Mr Watson was employed by GEC both parties believed he had to apply for a gasfitter licence from the Board. The terms of such licence required Mr Watson to be supervised by a nominated supervisor. GEC arranged for one of its contractors to supervise Mr Watson. Mr Creamer also said he wrote Mr Watson a cheque for the licensing fee and asked him to send the licensing application off to the Board. Mr Watson denied he had been given a cheque for the licensing fee and said he had not sent his application off to the Board because he could not afford to pay the licensing fee.

[23] Subsequent inquiries with the Board have determined that Mr Watson was licensed as a gasfitter on 20 May 2010 and his license was valid until 18 March 2011.

His nominated supervisor was his former employer Mr Brian Phillips. He therefore did not have to apply for a new licence.

[24] However, what should have occurred is that Mr Phillips should have advised the Board he was no longer supervising Mr Watson after his employment with Mr Phillips company had ended. GEC's new nominated supervisor should have informed the Board he was responsible for supervising Mr Watson from 26 October to 13 December 2010 whilst GEC employed him. The Board told me that responsibility for supervision rests with the supervisor, who is responsible for advising the Board of any changes to the supervisions relationship.

[25] What this means is that, contrary to both parties' beliefs at the time, Mr Watson was able to undertake work as a licensed gasfitter and Mr Phillips (who I note is a competitor of GEC's) was legally responsible for the work Mr Watson did whilst employed by GEC by virtue of the fact that no-one had advised the Board of the change in status of the supervisory relationship.

[26] Mr Creamer said that Mr Watson's failure to send off his licensing application to the Board was a major factor in his decision to dismiss him. The information I obtained from the Board established that could not be a ground for dismissal because there was no requirement on Mr Watson to do so. The responsibility for communicating any changes to the Board rested with the supervisor – either Mr Phillips and/or the new GEC contract supervisor.

[27] GEC alleged that Mr Watson submitted incorrect timesheets which meant that he claimed payment for hours he did not actually work. Mr Creamer relied on four instances where he said he found out that Mr Watson was not on site when and where he was supposed to be. None of these incidences were raised with Mr Watson as disciplinary concerns at the time, but Mr Creamer said that at least twice he had reminded Mr Watson of the importance of keeping accurate time sheets.

[28] Mr Creamer told me that Mr Watson's failure to fill out his timesheets honestly destroyed the trust GEC had in him and contributed to his dismissal.

[29] Mr Watson denied he had been dishonest when filling out his timesheets, but he did accept that one of his timesheets was misleading because it recorded him as being at a job working when he had actually left work for the day.

[30] It was against this background that Mr Creamer received information that Mr Watson had accepted a job offer with one of GEC's competitors. Mr Creamer said the concerns about inaccurate timesheets and Mr Watson's failure to send off his licensing application together with information he had a new job lead him to conclude that Mr Watson could not be trusted. Mr Creamer said he decided to dismiss Mr Watson immediately because he did not want to expose GEC to someone with Mr Watson's "*obvious lack of character.*"

[31] Mr Watson agreed that he had had an interview with one of GEC's competitor's but he said he had not decided whether or not to work for them.

Dismissal

[32] At around 9.20am on Monday 13 December 2010 Mr Creamer called Mr Watson and accused him of having a job interview with a rival gas fitting company. Mr Watson said that he informed Mr Creamer that he had been offered a job with the competitor but that he had not yet made up his mind as to whether or not he should accept it because he wanted to discuss that with his wife first. Evidence from the competitor company confirmed that.

[33] At around 11.00am that same day Mr Creamer arrived unannounced at the job site where Mr Watson was working. Mr Watson did not know why Mr Creamer had visited him on site and he had no idea his ongoing employment was in jeopardy. Mr Creamer again referred to his understanding that Mr Watson had already accepted a job with one of GEC's competitors and told him he was dismissed immediately.

[34] Mr Watson offered to work until GEC had found a replacement for him, but that was declined. Mr Watson asked to take the work van home overnight and that was agreed. Arrangements were made for Mr Watson to return the van and tools the next morning.

[35] When Mr Watson returned the van the following morning, Mr Creamer raised a number of concerns with him, namely:

- (a) incorrect timesheets;
- (b) bringing the company into disrepute;
- (c) bad service to customers;

- (d) damage to company equipment and property;
- (e) driving the vehicle at speed in a build up area endangering other road users.

[36] It is accepted by the parties that by the time this conversation occurred on 14 December 2010, Mr Watson's employment had already been terminated.

Outcome

[37] It was accepted by both parties that there was no process before Mr Watson was dismissed, that he had not known his employment was in jeopardy, and he had not been told what it was that Mr Creamer was concerned about. Mr Watson was given no information, so he did not have any opportunity to respond to Mr Creamer's concerns, in breach of GEC's s.4(1A) duty of good faith.

[38] I find that the termination of Mr Watson's employment was substantively and procedurally unjustified. Mr Watson had not accepted employment elsewhere, but even if he had, that did not constitute serious misconduct which would justify his summary dismissal.

[39] The applicable test is the pre 1 April 2011 justification test because Mr Watson's dismissal occurred before the new justification test came into effect. GEC's actions and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time Mr Watson was dismissed.

[40] Mr Creamer stated that he took the precipitous action that he did against Mr Watson because he was concerned about all of the matters which he raised with Mr Watson on 14 December 2010. These matters should have been properly raised with Mr Watson while he was employed so that he had an opportunity to respond to them.

[41] I find that Mr Watson's dismissal was unjustified and he is entitled to remedies.

Remedies

Lost remuneration

[42] Mr Watson obtained new employment on 17 January 2011. He claimed lost remuneration of \$5,000. I am satisfied that Mr Watson took appropriate steps to

mitigate his loss and that given the intervening Christmas period he found new work quickly.

[43] Mr Watson lost remuneration as a result of his unjustified dismissal so he is entitled, pursuant to s.128(2) of the Act, to an order for lost remuneration of \$5,000.

Interest

[44] Mr Watson claimed interest on his lost remuneration and I consider this is an appropriate case to exercise my discretion to award the interest because Mr Watson has been deprived of the use of money he has lost.

[45] The Authority may award interest under clause 11 of Schedule 2 of the Act. I order GEC to pay interest at 5% per annum¹ on the amount of \$5,000 from 17 January 2011 until that amount is paid in full.

Hurt and humiliation

[46] Mr Watson claimed \$10,000 distress compensation. An award of distress compensation must have an evidential basis, and such compensation is not to be used to penalise an employer or to signal disapproval of its conduct. Distress compensation is to compensate an employee for the effects of the dismissal on them.

[47] Mr Watson's written statement did not deal with the effects of the dismissal on him. The evidence he gave at the investigation meeting of his distress was limited but it was also supported by evidence from his wife.

[48] Mr Watson told me that he was shocked by his immediate dismissal and that it put him and his wife under considerable pressure because they were without income over the Christmas period. He said they had to borrow money until he started earning again. Mr Watson did not require medical attention, although he said his "*nerves were shot*" and that he had trouble sleeping.

[49] I order GEC to pay Mr Watson \$3,500 pursuant to s123(1)(c)(i) of the Act as compensation for his humiliation, loss of dignity and injury to feelings.

¹ This is the prescribed interest rate as per the Judicature (Prescribed Rate of Interest) Order 2011 SR2011/177

Contribution

[50] Having found that Mr Watson has a dismissal grievance, the Authority must now consider:

- (a) The extent to which Mr Watson's employees contributed towards the situation that gave rise to his grievance; and
- (b) If those actions so require, reduce the remedies that would otherwise have been awarded.

[51] An assessment of contribution enables the Authority to look at Mr Watson's actions to determine whether they contributed to the situation which resulted in his dismissal. This connotes some blameworthy conduct.

[52] I consider that Mr Watson did contribute to the situation that gave rise to his grievance because I consider it more likely than not that he provided Mr Creamer with inaccurate timesheets, despite having been told on a number of occasions the importance of keeping accurate timesheets.

[53] I find that the distress compensation award should be reduced by 20% (i.e. from \$3,500 to \$2,800) to reflect Mr Watson's contribution to the situation that gave rise to his unjustified dismissal.

Outcome of counterclaim

[54] GEC counterclaimed against Mr Watson for personal spending he had put on its fuel card and for speeding fines which it had paid on his behalf.

[55] Mr Watson admitted undertaking some personal spending on the company's fuel card. I consider Mr Watson should reimburse GEC for his purchase of a map because it was not authorised. He could have used his GPS or he could have called the office for directions. There was no need for him to purchase a map, so GEC should not bear the cost of that.

[56] I find that the personal purchases Mr Watson made on GEC's fuel card amounted to \$64.29.

[57] Mr Watson accepted that he was responsible for reimbursing GEC for speeding tickets incurred in its work van whilst he was employed. There were two speeding tickets, one for \$80 and one for \$30.

[58] I order Mr Watson to reimburse GEC \$174.29.

Costs

[59] Mr Watson, as the successful party is entitled to a contribution towards his actual legal costs. Costs will be dealt with by exchange of memoranda. Mr Watson has 14 days within which to apply for costs, GEC has 14 days to respond and Mr Watson has a further 7 days within which to reply.

[60] Strict adherence to this timetable is required and departure from it requires the prior approval of the Authority.

Rachel Larmer
Member of the Employment Relations Authority