

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 225  
5320413

BETWEEN

KIEREN JANES  
Applicant

AND

WAIHI BEACH SERVICE  
STATION LIMITED T/A GAS  
WAIHI BEACH  
Respondent

Member of Authority: Vicki Campbell  
Representatives: Applicant in Person  
Jo Phipps for Respondent  
Investigation Meeting: 21 March 2011 at Tauranga  
Submissions Received: 11 April 2011 from Applicant  
29 March 2011 from Respondent  
Determination: 26 May 2011

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**DETERMINATION OF THE AUTHORITY**

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- A Mr Janes was unjustifiably dismissed.**
- B Waihi Beach Service Station Limited t/a Gas Waihi Beach is ordered to pay Mr Janes the sum of \$1,500 pursuant to section 123(1)(c)(i) within 28 days of the date of this determination.**
- C The Counter-claim by Waihi Beach Service Station Limited t/a Gas Waihi Beach has not been established.**
- D Costs are reserved.**

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[1] Mr Kieran Janes was employed by Waihi Beach Service Station Limited t/a Gas Waihi Beach (WBSSL) as a pump attendant in early July 2010. Mr Janes, was on a WINZ course for driving trucks when he was offered the opportunity to work at WBSSL.

Initially he was paid on a cash only basis, however, from 2 August 2010 Mr Janes was paid through the payroll system.

[2] Mr Janes employment ended on or about 4 September 2010. Mr Janes says his employment was terminated by Mr Colin Smith a director and owner of WBSSL. Mr Janes is challenging that dismissal which he says was unjustified.

[3] WBSSL says Mr Janes was not dismissed but rather he left of his own accord on or about 4 September 2010. WBSSL also says Mr Janes failed to perform his duties with reasonable skill and care and has lodged a counterclaim for the cost of damages paid in resolving two incidents for which Mr Janes was responsible.

The issues for the Authority are:

- Was Mr Janes dismissed?
- If so, what, if any, remedies should be awarded?
- Is Mr Janes liable for the costs associated with the repairs on the vehicles?

#### **Was there a dismissal?**

[4] I am satisfied Mr Janes was dismissed from his employment on Saturday 4 September 2010 following two incidents which led to Mr Janes inadvertently putting diesel instead of petrol into two separate cars on two separate occasions.

##### *First incident*

[5] In Monday 23 August 2010 Mr Smith was advised by a customer that on 7 August his daughter's car had been filled with diesel instead of petrol. The CCTV surveillance tapes were checked and Mr Janes was identified as being the person responsible for the error. This was later confirmed by the customer's daughter.

[6] On Tuesday 24 August 2010 Mr Smith advised Mr Janes of the incident and showed him the CCTV footage. Mr Smith explained to Mr Janes that it was a serious matter and inexcusable, however, no formal action was taken at that time in the hope that it would be a lesson to Mr Janes and it would not happen again.

[7] Mr Janes was not subject to a warning for this incident and no disciplinary action was taken.

*Second incident*

[8] On Friday 3 September 2010 Mr Janes assisted another customer and again, put diesel into a petrol car. The customer drove the car away from the service station but stopped a short distance down the road.

[9] The customer returned to the service station and advised Mr Smith of what had happened. Mr Smith asked Mr Janes what had happened and was told the customer had handed him the diesel pump and he filled the car up thinking he was doing the right thing.

[10] Mr Smith says that he then inspected of the CCTV footage which showed that the vehicle was parked in front of the petrol pump and it was Mr Janes who picked up the diesel bowser.

[11] Mr Smith approached Mr Janes and told him what he had viewed. Mr Janes immediately towed the customer's car back to the service station where it was put into the workshop. Mr Janes attempted to drain the fuel out and then tried to restart the vehicle but was unsuccessful. Mr Janes continued to work on the vehicle for about 1 ½ hours. During this time Mr Smith was present at the service station as was the customer. Both men were aware of what Mr Janes was doing. Eventually Mr Smith left the service station. The customer's car was still in the workshop. Mr Janes drove the customer home in his own vehicle about 20 minutes after Mr Smith had left the service station.

[12] On Saturday, 4 September 2010, Mr Janes arrived at work on or about 7.00am with his tool box. He was not due to start work until 10.00am however, he wanted to fix the problems caused to the customers car the day before.

[13] At or about 7.10am Mr Smith phoned the service station and asked the employee working at the time not to let Mr Janes do any work on the vehicle. Mr Smith was advised that Mr Janes was already at work and was at that time trying to restart the customer's vehicle.

[14] Mr Janes says Mr Smith then spoke to him and told him he could no longer afford to keep him on, that he was sorry things did not work out and he should leave his keys and go. Mr Janes says it was clear to him that he had been dismissed.

[15] Mr Smith's account of the phone conversation is that he simply told Mr Janes that he could not afford to keep him on but denies the words amounted to a dismissal, denies telling Mr Janes he was sorry things did not work out and denies asking Mr Janes to leave his keys and uniform.

[16] Mr Janes, believing he had been dismissed returned his uniform and keys to the office and left the workplace. He returned home and explained to his partner what had happened. Mr Smith found Mr Janes uniform and keys when he arrived at the service station later that morning.

[17] At or about 9.00am Mr Janes' partner telephoned Mr Smith and spoke with him. Mr Janes' partner told Mr Smith she didn't think it was fair to instantly dismiss Mr Janes after one mistake. Mr Smith acknowledged at the investigation meeting that he did have a telephone conversation with Ms Janes, but denies she raised with him that Mr Janes believed he had been dismissed.

[18] I am satisfied it is more likely than not that Mr Jane's partner did raise with Mr Smith the fact that she believed it was unfair that Mr Janes had been instantly dismissed. It follows therefore, that at or about 9.00am that morning, Mr Smith was on notice that Mr Janes believed he had been dismissed that day.

[19] Despite this notification from Mr Janes' partner Mr Smith says he still expected Mr Janes to attend work at 10.00am for his rostered shift. When he did not turn up Mr Smith took no steps to make contact with Mr Jane. This action by Mr Smith supports my conclusion that Mr Smith was aware Mr Janes believed he had been dismissed and was not returning to work.

[20] At or about 11.00am that morning Mr Janes was rescued by emergency services after attempting to take his own life. He returned home that same day and was able to enjoy a family get together the following day.

[21] On Monday 6 September 2010 after seeking advice, Mr Janes made contact with Mr Smith where he asked Mr Smith to meet with him to discuss the situation. Mr Smith declined Mr Janes invitation for a meeting, as he believed Mr Janes to be unstable. Mr Janes then became angry and made a threat of physical violence against Mr Smith. During that telephone call Mr Janes advised Mr Smith that he would be seeking the assistance of the Employment Relations Authority.

[22] Mr Smith was under an obligation to clarify with Mr Janes as to his employment status. In his oral evidence Mr Smith told the Authority that as far as he was concerned Mr Janes was still an employee when he phoned him on the Monday and physically threatened him. Mr Smith relies on this threat to support his contention that it was Mr Janes who terminated the employment relationship. He submits that the threat destroyed the fabric of the employment relationship and that at that point the employment relationship came to an end, not by Mr Smith's actions, but by those of Mr Janes.

[23] I do not accept that submission. Mr Smith had adequate opportunity to contact Mr Janes on the Saturday morning after Mr Janes' partner had advised him of Mr Janes belief that he had been dismissed and after he did not turn up for work for his normal shift.

[24] On the Monday morning, Mr Smith had a further opportunity to find out why Mr Janes had not attended work on Saturday or Sunday to work his rostered shifts. He did not take that opportunity, instead refusing a reasonable invitation to meet with Mr Janes and discuss the matter. If Mr Smith did not believe he had dismissed Mr Janes on Saturday 4 September 2010 it seems only logical that when presented with an opportunity to discuss it with Mr Janes an employer acting fairly and reasonably would have taken that opportunity.

[25] On the balance of probabilities I find that Mr Janes was dismissed on Saturday 4 September 2010. Further, the actions of Mr Smith on the Saturday and Monday were not the actions an employer acting fairly and reasonably would have taken in all the circumstances of this case. Mr Janes is therefore entitled to a consideration of remedies.

### **Remedies**

[26] Mr Janes does not claim reimbursement of wages lost as a result of the dismissal. He does however, seek the payment of \$15,000 by way of compensation for hurt and humiliation. Mr Janes evidence does not support a claim at that level, indeed the evidence as to hurt and humiliation was remarkable for its paucity. However, I have taken into account Mr Janes state of mind after his dismissal on the Saturday morning in setting the level of award to be made and consider that Mr Smith's actions in dismissing him contributed to his state of mind.

[27] As required by the Employment Relations Act I have also taken into consideration the extent to which the actions of Mr Janes contributed to the actions giving rise to his dismissal. I am satisfied, from the evidence gathered during the investigation meeting that Mr Janes was careless in the way in which he undertook his duties on Friday 3 September 2010. Also, the threat of physical violence during the telephone call on Monday 6 September 2010 only aggravated the situation between himself and Mr Smith. I have taken that into account in determining an appropriate award for Mr Janes which I determine to be \$1,500.

### **Counter-claim**

[28] Mr Smith says Mr Jane's attempts to restart the customer's vehicle on 3 September 2010 caused considerable damage. Mr Smith says the cost of repairing the damage to this vehicle was \$656.40 including GST and seeks reimbursement from Mr Janes by way of counter-claim.

[29] I am not satisfied that the evidence supports a claim for damages from Mr Janes. The evidence shows that while Mr Janes was working on the vehicle for 2 ½ hours on the Friday night, Mr Smith and the customer were both present at the worksite. If Mr Smith was concerned about Mr Janes ability to handle the vehicle correctly then it was within his power to stop Mr Janes from working on it. By taking no action at the time, Mr Smith condoned Mr Janes attempts at fixing the problem caused by filling the car with diesel.

[30] The evidence has not established to my satisfaction that the damage to the vehicle occurred as a result of a breach of duty owed by Mr Janes to WBSSL

### **Costs**

[31] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Mr Janes may lodge and serve a memorandum as to costs within 28 days of the date of this determination. WBSSL will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[32] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell  
Member of Employment Relations Authority