

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 2
5354746

BETWEEN DAMIAN BANNISTER
 Applicant

AND TOP NOTCH PRODUCTS
 LIMITED t/a
 THOROUGHbred FLOATS
 Respondent

Member of Authority: James Crichton

Representatives: Dave Vinnicombe, Advocate for Applicant
 Tracey Blackmore, Advocate for Respondent

Investigation Meeting: 7 December 2011 at Auckland

Determination: 5 January 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Bannister) alleges that he was unjustifiably dismissed from his employment by the respondent (Thoroughbred Floats) on 1 April 2011. That claim is resisted by Thoroughbred Floats. It says that Mr Bannister abandoned his employment.

[2] Mr Bannister commenced his most recent period of employment with Thoroughbred Floats in August 2010. Matters came to a head in March 2011 when Mr Bannister considered he had not been paid for work on 11 March 2011. He said this was because the time clock provided by the employer was “erratic”. He produced some supporting evidence from co-workers to confirm this view, although that evidence is hotly contested by Thoroughbred Floats.

[3] Mr Bannister's evidence is that when it became evident to him on 18 March that he had not been paid for the eight hours work that he performed on 11 March, he spoke first with Chris Sorrell (one of the then principals of Thoroughbred Floats, the business having now been sold on), who allegedly declined to deal with the matter and referred him to the other principal, Tracey Blackmore, who was allegedly then away. Mr Bannister says that he finally talked to Ms Blackmore on 24 March when she confirmed that he was not paid for 11 March because he was not at work that day.

[4] Ms Blackmore's evidence is that she spoke to Mr Bannister much sooner than 24 March but nothing turns on when that conversation took place. Both parties are in agreement that Mr Bannister maintained that he had worked on 11 March and was entitled to be paid as a consequence, and Ms Blackmore maintained that he had not worked on that date and therefore was not entitled to be paid. Ms Blackmore gave evidence that she had discussed with the other staff whether Mr Bannister was present on that day and her recollection is that nobody could remember.

[5] However, two former colleagues of Mr Bannister gave evidence to the Authority that, for various reasons, they remember that date and that Mr Bannister was in fact there at the time. Ashlee Tossell worked next to Mr Bannister and was clear that he was at work and working on 11 March. Ms Tossell also said that she sometimes was not paid for work that she had performed and she considered that the time clock system was only operational about three quarters of the time. Mr Barnett, the other co-worker called to give evidence before the Authority, also complained about the time clock system; he said it worked most of the time but occasionally did not work at all. Mr Barnett also confirmed that Mr Bannister was at work on 11 March.

[6] In any event, whatever the position with the evidence around whether or not Mr Bannister worked on 11 March, Thoroughbred Floats refused to pay him for that day, believing that in fact he was not present for work on that occasion. Mr Bannister decided to get advice and accordingly on 24 March 2011, Mr Bannister left the workplace at about 1.30pm in order to attend at the local Department of Labour office to obtain advice on his predicament. Mr Bannister says that he sought the permission of his foreman, Mr Karl Pompey, and that Mr Pompey granted that permission. Mr Pompey did not give evidence at the Authority's investigation meeting but he did furnish a letter through the respondent in which he denied giving permission.

[7] Given the conflict in the evidence between Mr Bannister's recollection of that conversation and Mr Pompey's, the Authority decided to speak directly to Mr Pompey. That conversation took place by telephone on 16 December 2011 and the nature of it was relayed to the parties by Minute for any further submissions they might want to make before this determination issued. In reaching the conclusions it has, the Authority confirms that it has considered the further representations of the parties in response to the Minute.

[8] What Mr Pompey said in the telephone discussion with the Authority was very straightforward and effectively confirmed the evidence that had previously been tendered by Thoroughbred Floats via Mr Pompey's letter. Perhaps he said it in different words, but the effect of it was the same; he denied that he had given Mr Bannister permission to leave the workplace; what he said was that it was not for him to direct Mr Bannister to do or not to do anything. He says that when Mr Bannister indicated he was leaving work on 24 March, Mr Pompey asked where Mr Bannister was going and Mr Bannister told him he was going to the Department of Labour. Mr Pompey was adamant that he was not asked for permission and did not give it. Rather, he sought information and was provided with it.

[9] It follows from the foregoing that the Authority is not satisfied that Mr Bannister did in fact get permission to leave the workplace.

[10] The following day, it seems that Mr Bannister turned up for work at the normal time but by order of Thoroughbred Floats, was excluded from the workplace until the arrival of Mr Sorrell. There was a discussion between Mr Sorrell and Mr Bannister at which Mr Bannister was dismissed. Mr Sorrell told the Authority that he and Ms Blackmore had slept on it the previous night; he said "*I had decided I didn't want him on the staff any more. I had had enough*". Ms Blackmore said that there were "*a lot of issues*" in relation to Mr Bannister and that if he wished to see the Department of Labour "*he should have done it in his own time*".

Issues

[11] The central issue is, of course, whether, in the particular circumstances of this case, the decision made by Thoroughbred Floats to dismiss Mr Bannister was a decision that a fair and just employer could have made after conducting a proper inquiry.

[12] There are also subsidiary issues around the absence of a contract of employment, the failure to provide pay slips and alleged difficulties in respect of Mr Bannister's apprenticeship. Each of these matters will be dealt with sequentially.

Did Mr Bannister have an employment agreement?

[13] It is common ground that there was no written employment agreement between the parties. Mr Bannister worked for this employer previously and a written agreement for that period was put before the Authority. But it was accepted by both parties that in relation to the most recent employment period, there was no such written agreement.

Were pay slips available?

[14] The evidence the Authority heard suggested that Thoroughbred Floats printed pay slips for each worker for each pay period but it did not make a point of distributing them. This was because, allegedly, their employees left them around for other employees to see and there were arguments about comparative rates of pay.

[15] One of Mr Bannister's former co-workers, Mr Barnett, told the Authority that he kept his pay slips in his tool box and he had had no problem with other staff accessing that information.

[16] The Authority is satisfied that pay slips were available to employees.

Is Thoroughbred Floats culpable for Mr Bannister's apprenticeship difficulties?

[17] The Authority is satisfied that the difficulties with Mr Bannister's apprenticeship, which principally revolved around the payment of fees to the Motor Industry Training Organisation (MITO) and the provision of course material in response from MITO to Mr Bannister, was adversely affected not by default of the employer (as Mr Bannister maintained) but as a consequence of the inefficiency of the MITO representative who dealt with Thoroughbred Floats.

[18] It is clear to the Authority that Mr Bannister was not employed as an apprentice but that Thoroughbred Floats offered him the opportunity to continue with (and potentially complete) his apprenticeship while in the employment. The Authority is satisfied that that is a proper and generous motivation on the part of the employer and that the deficits in the progressing of Mr Bannister's apprenticeship

while he was in the employment are as a consequence of defects in the service provided to the employer by MITO and not faults of Thoroughbred Floats.

Was Mr Bannister unjustifiably dismissed?

[19] The Authority has no hesitation in making the finding that Mr Bannister was unjustifiably dismissed from his employment. The employer's contention that he had abandoned his employment cannot be right; the worst that could be said of Mr Bannister's conduct is that he had absented himself from the workplace without authority on the afternoon of 24 March 2011. Given Thoroughbred Floats' own evidence about the flexibility with which it treated its workforce and the latitude it applied to workers taking time off for various reasons, to use this particular incident as a basis for a finding of abandonment of employment is neither fair nor just.

[20] First of all, abandonment of employment, as a matter of law, applies when a worker is absent for a period of days without notice or explanation and may be deemed to have "given up" the employment. In the present case, at worst, Mr Bannister absented himself for half a day without permission. But as the Authority has just noted, there were numerous other examples of that happening, both in respect of Mr Bannister and in respect of other workers, including the two who gave evidence before the Authority. Even the employer's own evidence confirmed that there was a reasonable degree of latitude given to staff to take time off. The correct response to a staff member taking time off is to dock that staff member's pay so that they are not paid for the time they are away from work. Further, if there is a specific request or instruction for that staff member not to absent him or herself for a particular period and the staff member ignores that instruction, then the correct approach would be to issue a warning. To dismiss an employee in the circumstances described is a gross over-reaction and, in the Authority's view, is not the action of a fair and just employer.

[21] This conclusion that a fair and just employer could not have reached a decision to dismiss in these circumstances is supported by the complete absence of any proper process in the dismissal itself. Mr Bannister presented for work the day after the day of his absence. He was there, the Authority is satisfied, at the appropriate start time. The employer's representative was not present until later, but Mr Bannister waited. Then there was a straightforward conversation in which Mr Bannister was told that he was dismissed. There was no opportunity for Mr Bannister to be heard, no

investigation of the circumstances surrounding the alleged basis for dismissal, indeed a complete absence of a proper reflective process.

[22] Furthermore, the law requires that, where it seems that an employee has chosen to end the employment relationship, the employer has an obligation to enquire into the matter further, to be certain that is indeed the employee's position. The duties of trust and fair dealing between the parties require it.

[23] As if that is not enough, the employer through Mr Sorrell gave evidence to the Authority that the decision to dismiss had actually been taken the night before, that the employer had decided that it did not want Mr Bannister on the staff any more and that they had "*slept on it and decided*". This was after Mr Sorrell had spoken to the foreman, Mr Pompey, whose evidence has already been referred to.

[24] In conclusion then, the Authority's view is that the termination of Mr Bannister's employment was predetermined by Thoroughbred Floats, was completely devoid of any proper process, was not an abandonment of employment as Thoroughbred Floats sought to characterise it, and was in truth an unjustified summary dismissal which grounds Mr Bannister's personal grievance. In the final analysis, this determination was a "termination of employment at the initiative of the employer", to use Judge Williamson's well worn phrase from the Arbitration Court decision in *Wellington Clerical Union v. Greenwich* [1983] ACJ 965 at 973. It is difficult for the Authority to resist the conclusion that the only reason that Thoroughbred Floats reacted precipitately in the way that it did was because of its anger at Mr Bannister seeking to involve the Department of Labour in the employment relationship problem.

Determination

[25] For reasons already articulated, Mr Bannister has proved his personal grievance for unjustified dismissal. He is entitled to remedies but before considering remedies, the Authority must turn its attention to a consideration of whether Mr Bannister has contributed in any way to the circumstances giving rise to his grievance. The Authority is satisfied that Mr Bannister has not contributed in any way to those circumstances; Mr Bannister was entitled to consult with the Department of Labour about his rights; he ought not to have been paid for the time that he was talking to the Department of Labour and thus away from the workplace but any other

sanction in the particular circumstances of the case was a gross over-reaction and not the action that a fair and reasonable employer could have taken in the circumstances of the case.

[26] To remedy Mr Bannister's personal grievance, I direct that Thoroughbred Floats is to pay to him the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$4,000;
- (b) A contribution to lost wages in the sum of \$5,000 gross;
- (c) Reimbursement of the Authority's filing fee in the sum of \$71.56.

[27] The Authority has considered whether to levy a penalty against Thoroughbred Floats for the failure to provide an employment agreement and exercises its discretion not to do so. The primary reason for reaching this conclusion is that the Authority is not satisfied that the absence of an employment agreement in writing contributed in any way to the employment relationship problems between the parties.

Costs

[28] Costs are reserved.

James Crichton
Member of the Employment Relations Authority