

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 113
5361145

BETWEEN VINCENT VILLARETE
Applicant

A N D WATER'S EDGE SERVICE
CENTRE LIMITED t/a
WANAKA TYRES &
AUTOMOTIVE
Respondent

Member of Authority: Helen Doyle

Representatives: Michael Guest, Advocate for Applicant
Gregory Noye, Advocate for Respondent

Investigation meeting: 2 May 2012 at Queenstown

Submissions Received 9 May 2012 from Applicant
4 May 2012 from Respondent

Date of Determination: 11 June 2012

DETERMINATION OF THE AUTHORITY

Identity of the respondent

[1] With the agreement of the parties, I amend the name of the respondent to Water's Edge Service Centre Limited t/a Wanaka Tyres & Automotive.

Employment relationship problem

[2] Water's Edge Service Centre Limited (Water's Edge) owns and operates a mechanical workshop in Wanaka. The trading name of that workshop is Wanaka Tyres & Automotive. The owner and director of Water's Edge is Gregory Noye.

[3] Vincent Villarete is from the Philippines. Mr Noye agreed to employ Mr Villarete as a mechanic at his workshop for a two year period. Mr Villarete's visa

reflected an entitlement to work in New Zealand as an automotive technician for Water's Edge.

[4] An individual employment agreement was entered into between Water's Edge and Mr Villarete. The written agreement provided that Mr Villarete's employment commenced on 31 March 2011 and that his employment would end on 31 March 2013. The work Mr Villarete was to perform was expressed in the individual employment agreement as all mechanical duties as directed by the owner and paperwork. The hours of work that Mr Villarete was to work each week were 40 and the hourly rate was \$18. There was an expectation that Mr Villarete may be required to work on an occasional Saturday.

[5] Mr Villarete says that on Thursday, 29 September 2011, he was unjustifiably dismissed following an exchange with Mr Noye when Mr Noye told him to go and look for another job and further that he did not like Mr Villarete's attitude. He seeks three months lost wages in the sum of \$9360 gross together with compensation in the sum of \$35,000 and costs.

[6] Mr Noye does not accept that he dismissed Mr Villarete but says instead that Mr Villarete resigned from his employment saying that he *quit*. Mr Noye says that there were issues with Mr Villarete's competence and performance throughout much of his employment. He does not accept that Mr Villarete is entitled to remedies.

[7] There is some urgency with this matter as I understand from Mr Guest that Mr Villarete is facing deportation under s.157 of the Immigration Act 2009. Mr Guest advised the Authority that this has been placed on hold by Immigration New Zealand until Mr Villarete's employment relationship problem has been determined.

The issues

[8] The Authority has to determine the following issues in this case:

- How did the employment relationship between Mr Villarete and Water's Edge end;
- If it is found that Mr Villarete was dismissed, then was that dismissal unjustified (s.103A of the Employment Relations Act 2000);

- If it is found that the dismissal was unjustified, then what remedies should be awarded to Mr Villarete and are there issues of mitigation and contribution.

How did the employment relationship between Mr Villarete and Water's Edge end?

[9] Mr Villarete said in evidence that he is a qualified mechanical technician and had experience working for both Ford and Nissan overseas. He explained that at the other companies he had worked for, there were clear procedures and if a difficulty did arise then there would be a discussion about ways to solve the problem rather than an individual being blamed for a mistake. He said that was a different approach to that which he experienced with Mr Noye.

[10] Mr Noye, in his evidence said that, after the initial period of employment, he found that there were issues with Mr Villarete and his ability to carry out basic mechanic procedures and felt Mr Villarete had misrepresented himself as a qualified skilled technician. He had some other concerns regarding cellphone use, the temporary removal by Mr Villarete of Mr Noye's hair clippers from the premises and the expiring and failure by Mr Villarete to subsequently renew his driver's licence that Mr Noye considered was essential for a mechanic to have.

[11] On 19 August 2011, Mr Villarete was given a written warning by Mr Noye for him to read over the weekend. The written warning set out some specific concerns and concluded with the following:

*There are a few other situations that are of concern to me, the first few weeks your communication was good but as time has gone by you have not reported clearly to either myself or other technicians if you are having difficulty carrying out your work, or if you have questions about the process or procedures that need to be carried out in our shop to complete your work effectively & efficiently.
With the issues mentioned above I can only evaluate your performance on a daily basis and I will need to see some major improvement in performance to be assured that this working arrangement has any future.*

[12] After being handed the written warning, Mr Villarete put it into his overalls and forgot about it. When he washed his overalls the letter was still in one of the pockets and he had to ask Mr Noye for another copy of the letter.

[13] When giving his evidence initially, Mr Villarete could not recall any further discussion about the warning with Mr Noye but then did accept that there was a discussion with Mr Noye about the warning contents on or about 26 September 2011. I shall come to that discussion shortly. After Mr Villarete read the warning letter, he said he became unhappy and went and obtained some advice from a community service organisation. At that stage, he said he wanted to get another job because he had become depressed working at the workshop. Mr Villarete said he was advised to stay at the workshop for a while and then resign.

[14] The evidence supports that, following receipt of the warning letter, Mr Villarete's job satisfaction began to diminish and Mr Noye continued to become dissatisfied with Mr Villarete's performance and concerned about his attitude when performance concerns were raised with him.

[15] Mr Noye spoke to Mr Villarete on 22 September 2011 about an issue related to the incorrect fitting of a steering rack bolt. Mr Noye said in his evidence that the incorrect fitting should have been noticed by Mr Villarete and that if it had not been picked up by another technician it could have had a catastrophic result in the loss of steering control. I find this led to a discussion on 26 September 2011 about the issues in the warning letter. Mr Noye took a note of Mr Villarete's responses. Mr Villarete did not accept that many of the matters set out in the warning letter were fair and that the specific mechanical issues he said were either not his fault or not significant issues.

[16] On 29 September 2011, Mr Villarete was fitting a tyre using the workshop's new tyre machine. He was having some difficulty getting it into the rim. Mr Noye went over to the tyre machine and asked Mr Villarete to step away. There was a 5mm tear in the inner part of the tyre. Mr Noye took over and the tyre was still able to be fitted as any damage was minimal. Mr Noye then approached Mr Villarete to talk to him about the situation. Mr Noye said that Mr Villarete advised him that the problem was with the machine and I find in all likelihood that Mr Noye said words to the effect that the machine was not the problem but Mr Villarete was. There was then a discussion about Mr Villarete's abilities as a mechanic and at some point Mr Villarete walked away. I find that he then turned and moved toward Mr Noye accusing him of being racist and disrespectful to Filipinos. He called him a *bad man*. I think it likely that Mr Villarete raised his voice at this time and when standing fairly close to

Mr Noye shook his finger at him. Mr Noye then advised Mr Villarete that he could leave and find a job elsewhere advising that he did not like Mr Villarete's attitude. Mr Noye said that Mr Villarete removed his gloves, threw them on the table and said *you can't fire me, I quit* and stormed out of the door. Mr Villarete denies that he used the words *I quit*. This exchange occurred at about 11am on the morning of 29 September 2011. Mr Noye said that if Mr Villarete had come back and apologised he felt that there would be a possibility of sorting things out if Mr Villarete's work improved significantly. Mr Villarete said that he in turn thought Mr Noye would contact him and apologise and sort things out.

[17] About 15 minutes after Mr Villarete left the premises on 29 September 2011 he sent a text message to Mr Noye. Mr Noye considered the text was threatening in nature and he called the police. Mr Villarete explained to the policeman who discussed the complaint with him that he had not meant to be threatening.

[18] I find that very shortly after Mr Villarete left the workshop a letter terminating his employment was written by Mr Noye. The timing of the writing of this letter is an important issue going to Mr Noye's belief at the material time about how the relationship ended. I find it likely that this letter was written before Mr Villarete sent his text. This is supported by the time on the email copy of the letter Mr Noye sent to his own email address on 29 September - 11.04am. In any event, even if that time is unreliable, that a decision to dismiss was made before the text was received is supported by an email Mr Noye sent to the Immigration Department on 4 October 2011 at 4.36 p.m in which he states amongst other matters:

To Immigration Department,

*After I dismissed Vincent Martin E Villarete he texted a message (at 11.15am 29/09/2011) to me that read
U will pay me everything, See u around! Watch your mouth by discriminated filipino. Who do you think you are by judging us! You better watch out! Respect!*

[19] The letter Mr Noye wrote to Mr Villarete and faxed to the Immigration Department terminating his employment made no mention of a belief that Mr Villarete had resigned from his employment. It provided as follows:

*Following previous written warning letter dated 19/08/2011
This letter is to terminate your employment effective immediately.*

This is due to repeated failure to carry out instructions and work effectively & efficiently.

Recent problems was today new tyre torn while fitting to an alloy rim, when I questioned you about it you blamed the machine yet again, then you proceeded to verbally abuse me, saying I am a bad man & that I am racist towards Filipinos.

Last week a steering bolt fitted incorrectly which is a critical component that I was fortunate to see and to direct you in fitting a new bolt correctly.

I am giving you two weeks pay and your entitled holiday pay as full and final payment.

Gregory Noye

[20] Mr Noye put a copy of this letter at Mr Villarete's doorway in Wanaka. He says that he did this on 30 September 2011. Mr Villarete did not receive a copy of the letter. After taking some legal advice, Mr Noye said he removed the letter from Mr Villarete's flat a few days later.

[21] On 4 October 2011 at 1:53 p.m Mr Villarete emailed Mr Noye advising that he wished to raise a grievance with respect to his *unfair and untimely* dismissal. He advised Mr Noye that he wanted 6 weeks notice of termination as set out in his employment agreement and compensation for having to relocate and find another job. He asked for a reply within 3-5 days of the date of the letter. Mr Noye did not respond to that email about his dismissal or a further email sent by Mr Villarete at 2.30pm on the same day until his then representative, in a letter dated 26 October 2011, advised for the first time that Mr Noye did not accept he had terminated Mr Villarete's employment but rather that Mr Villarete resigned. Mr Noye then knew from 4 October 2011 that Mr Villarete believed he had been dismissed and he did not say Mr Villarete was not within a reasonable time.

[22] The letter of termination provided that Mr Noye would pay to Mr Villarete a sum equal to two weeks payment in lieu of notice. Mr Noye said that he was advised by his representative not to make the payment to Mr Villarete and the only sum paid to date has been for holiday pay.

[23] In conclusion I find that the evidence as set out above supports that Mr Noye dismissed Mr Villarete from his employment on 29 September 2011. It was not until 26 October 2011 following Mr Villarete raising a grievance about his dismissal on 4 October 2011 that there was any reference to Mr Villarete resigning.

[24] I find that Mr Villarete was dismissed from his employment.

Was that dismissal unjustified?

[25] Under s. 103A of the Employment Relations Act 2000 the Authority must, in determining whether a dismissal was justifiable, objectively determine whether the actions of Mr Noye and how he acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The Authority must in applying the test set out above consider the four specific matters set out in s.103A (3) of the Act.

[26] Before assessing those specific matters I turn to the reasons for dismissal. This is a case where I have found a dismissal notwithstanding Mr Noye said he did not dismiss Mr Villarete. He stated in his evidence that he needed Mr Villarete to stay on because the other technician's were leaving. Mr Noye was clearly upset when Mr Villarete referred to him as a bad man and alleged that he was racist. He said that he felt threatened by Mr Villarete turning and coming towards him. Although there had been a formal warning given about performance there would have to be further conduct on the part of Mr Villarete to justify dismissal on the basis of performance. Mr Noye accepted under questioning at the Authority investigation meeting that the tyre issue was not a reason for dismissal. The steering bolt matter had been discussed on 22 September and was not revisited on 26 September when there was a discussion confined to the matters in the warning so that could not be a reason for dismissal. I find that the reason for dismissal was because of Mr Villarete's emotional outburst on 29 September 2011 rather than for performance issues regarding the tyre or the steering bolt.

[27] Having regard then to the specific matters in s. 103A (3) of the Act Mr Noye did not put the allegations about the conduct on 29 September 2011 to Mr Villarete before dismissing him. Mr Villarete had no opportunity to respond to the concerns and Mr Noye could not genuinely consider the explanation and whether or not the employment relationship could continue. Mr Noye accepted that with an apology and improved performance the relationship could have continued. These were not minor defects and Mr Villarete was treated unfairly as a result.

[28] I find that the dismissal was unjustified. I do not find that the actions of Mr Noye in dismissing Mr Villarete without a fair process were what a fair and

reasonable employer could have done in all the circumstances at the time the dismissal occurred. Mr Villarete has a personal grievance that his dismissal was unjustified.

Remedies

Lost Wages

[29] Mr Villarete did not obtain other employment. He did attempt to find other employment but his immigration status prevents that without sponsorship and there was evidence that he was declined a visa for similar mechanical technician roles. Mr Villarete claimed three months lost wages in the statement of problem but in final submissions Mr Guest submits an award of six months would be justified. I am not satisfied that this relationship would have lasted beyond three months. The text I have earlier referred to was sent by Mr Villarete after the decision was made to dismiss but I have had regard to it in forming that view. In those circumstances and subject to any findings I may make about contribution I award three months lost wages. I have calculated the loss on the basis of a 40 hour week at \$18 per hour for 13 weeks. That is the sum of \$9360 gross.

Compensation

[30] Mr Villarete explained that as a result of having no income from 29 September 2011 he could not pay his rent or buy food and he had to rely on the kindness of others to provide him with meals and accommodation. He was ineligible for any government assistance. Mr Villarete had borrowed money to pay for the travel from the Philippines to New Zealand and could make no payments on his loan after his employment relationship ended. As a result of that non payment he is incurring penalties at a very high interest rate. He was not able to send any money back to the Philippines to support his wife and child. Some documents subsequently obtained from Immigration and supplied by Mr Noye refer to emails from Mr Villarete and the relevance of these in *considering his visa status*. It was properly acknowledged though by Mr Guest that Mr Noye was obliged to inform Immigration New Zealand of the termination of employment although this could be seen as going beyond that

step. One of the concerns for Mr Villarete is that he was not paid anything whatsoever by Mr Noye.

[31] Mr Guest properly acknowledged that the sum claimed for compensation of \$35,000 was too high. I agree. The financial effect on Mr Villarete of his dismissal though was considerable. In all the circumstances and subject to any findings with respect to contribution I award the sum of \$6000 compensation.

Contribution

[32] The Authority must under s. 124 of the Employment Relations Act 2000 consider the extent to which the actions of Mr Villarete contributed towards the situation that gave rise to the personal grievance and if required reduce the remedies that would otherwise have been awarded.

[33] Mr Noye raised a concern about the tyre in a manner Mr Villarete found inappropriate. It would have been better if Mr Noye had taken Mr Villarete to a quiet place to talk about the incident at a later time. Mr Villarete's reaction in walking towards Mr Noye, shaking his finger and accusing him of being a *bad man* and *racist* was threatening. It was I have found the reason for the dismissal. I was not satisfied from the evidence that Mr Noye raised performance concerns because of Mr Villarete's race even if he raised them in a way which was unacceptable to Mr Villarete. Mr Noye and his wife Helen had been good to Mr Villarete when he first arrived in New Zealand and he had lived in their home for several weeks whilst he settled in New Zealand. Mr Villarete's reaction to Mr Noye was inappropriate.

[34] I find that Mr Villarete did contribute to the personal grievance I have found in a blameworthy way. The remedies that I have awarded are to be reduced by 40%. Applying that now to the awards for lost wages and compensation I make the following orders:

- I order Water's Edge Service Centre Ltd trading as Wanaka Tyres and Automotive to pay Vincent Villarete the sum of \$5616 gross being reimbursement of wages lost under s.123(1)(b) of the Employment Relations Act 2000.

- I order Water's Edge Service Centre Ltd trading as Wanaka Tyres and Automotive to pay Vincent Villarete the sum of \$3600 without deduction being compensation for humiliation and loss of dignity under s. 123 (1) (c) (i) of the Employment Relations Act 2000.

Costs

[35] I am minded in this case to proceed to make an award on the basis of the usual daily tariff but I have made an adjustment to reflect that the matter was able to be investigated in under half a day and the Authority did not ask for statements of evidence.

[36] I order Water's Edge Service Centre Ltd trading as Wanaka Tyres and Automotive to pay to Vincent Villarete the sum of \$3000 being costs.

Helen Doyle
Member of the Employment Relations Authority