IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 68
5367731

	BETWEEN	MURRAY GEORGE McGILL Applicant
	AND	CYRUS HOLDING LIMITED trading as NO 1 MOTORS Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Applicant in person Je Cho, advocate for Respondent
Investigation Meeting:	28 March 2012
Determination:	17 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the employment of the applicant Mr Murray McGill by the respondent Cyrus Holding Ltd, a company trading as No 1 Motors.

[2] In particular, the investigation has been concerned with the way Mr McGill's employment ended in or around late November 2011. He considered that was by dismissal which he challenged by raising a personal grievance. When the claim remained unresolved he lodged an application with the Authority and the investigation was commenced, leading to a meeting with the parties on 28 March 2012.

[3] Mr McGill took full part in person without an advocate and Cyrus Holding was represented by Mr Je Cho a director of the company. He is Korean with limited written and spoken English but was assisted by an interpreter and his friend Mr Ron Wright.

[4] There is no dispute that Mr McGill was employed in a full time position by Cyrus Holding as a Warrant of Fitness inspector at No 1 Motors, commencing work in March 2011. The occurrence that led to the termination of his employment was Mr McGill's absence from work for a period of several weeks from about 18 September 2011.

[5] There is also no dispute that at the commencement of the employment Mr McGill and Mr Cho had agreed that starting in September Mr McGill would take leave during some of the whitebaiting season. Mr McGill claims that the period agreed to was approximately two months, from 18 September to 13 November, while Mr Cho claims it was four weeks only.

[6] About five weeks after he had commenced the leave, on 26 October a text message was sent by Mr McGill to Mr Cho (who was called Stepano) as follows:

> *Hello stepano hows work going and wofman* [Warrant of Fitness man] *does yr wofman want to do an extra week ie 9 wks not 8 or does he need to get back to Auckland bad whitebait season so far*

[7] Mr Cho replied on 27 October with the following text:

> *I cant keep u anymore business was very bad. and I 2 sell workshop by 28th oct. Ple find ur job urself*

[8] Mr McGill sent another text:

> *I don't understand you need to sell by 2moro but know things weren't easy 4 u if u sell im available 4 new owner I presume ur still open and trading wot is Jack going to do murray.*

[9] Mr Cho replied:

> *U already left our workshop and I paid everything to u. So I will not work with u*

[10] I find from the evidence that Mr Cho did consent to Mr McGill having about two months off from about 17 September to go whitebaiting. His agreement to that is recorded in a statement Mr Cho has confirmed he signed on 13 September 2011, which begins:

> *Murray McGill commenced employment at No 1 Motors, 1A Normans Road, on 14-3-11. He is taking approx two month leave on 17-9-11 to approx 13-11-11. Leave granted & discussed at time of employment interview approx 7-3-11.*

[11] The statement also recorded Mr McGill's earnings and a calculation of holiday pay agreed to be paid into his account by Mr Cho, on behalf of No 1 Motors, at the start of the leave on 19 September.

[12] Although Mr Cho accepts that he signed the statement, he told the Authority he had not read it properly or kept a copy of it.

[13] A further piece of documentary evidence is a calendar that had been hung on the wall in the workplace at No 1 Motors. On it about eight weeks were marked off in biro, starting from 19 September and finishing on Friday 11 November. Mr McGill said he had done that to show when he would be away from work on leave. Mr Cho accepted that the calendar had been hung on the wall by him and that Mr McGill had marked off the weeks in question, but he said he had not looked at the calendar or taken much notice of the period marked on it.

[14] Mr Ron Wright told the Authority he had been present at the initial job interview in March 2011 and that Mr McGill had only asked for one month off in September for whitebaiting, although Mr Wright added "I didn't hear the exact time he wanted off". He thought it had been four or five weeks but said he had told Mr McGill to reach agreement about that with Mr Cho.

[15] I find that the initial discussion about the length of time to be taken off for whitebaiting was followed up with the statement signed by Mr McGill and Mr Cho which clearly recorded about two months as the period to be taken on leave. I therefore find that Mr McGill's employer had agreed to him being away for that time.

[16] When Mr McGill sought to return to work he was told in a series of text messages that his job was no longer there for him. He was also told that Mr Cho was selling the business. Although this did not happen I accept that Mr Cho had tried to bring about a sale but the deal had fallen through because of problems over the period of lease left to run on the premises.

[17] I find that while Mr McGill was absent whitebaiting a replacement inspector had been engaged to fill in temporarily during his absence. When Mr McGill did not return to work, the temporary worker was permanently employed by Mr Cho. I also find that Mr Cho did not ask Mr McGill to return to work after two months but, to the contrary, made it plain that he was no longer employed.

[18] It is unfortunate that Mr Cho did not try to understand the writings words he had signed, or take enough notice of the weeks marked off on the calendar hanging in the workplace. Communication with Mr McGill was also difficult because Mr Cho had to have his text messages compiled for him by his daughter, who followed his instructions about what he wanted to say to Mr McGill but may not have had much personal knowledge of the circumstances surrounding the situation he was talking about.

[19] I must therefore conclude that the employment of Mr McGill ended by dismissal. Some justification for the dismissal was advanced by the employer. It was claimed that Mr McGill had failed to return to his employment after the two month period of annual leave and that he was therefore in breach of his employment agreement. I must reject that as I have found that Mr McGill sought to return to work inside the two month period but was turned away by the employer. Had the business been sold there may have been a redundancy situation but I can find no justification for the dismissal when Mr Cho did not comply with the agreement he had made to allow Mr McGill two months off on annual leave.

[20] The second basis for justification related to allegations of poor performance by Mr McGill. This ground must also be rejected as the matters raised by Mr Cho were not taken up by him with Mr McGill at the time they occurred. Mr Cho seems only to have found out about them after Mr McGill had brought his claim to the Authority. The matters, many of which related to failures to ensure that the Warrant of Fitness sticker was securely attached to the vehicle windscreen so that the owner did not receive a ticket for failing to display the permit, were not the subject of warnings or any other disciplinary process. Another matter related to a Subaru car, but Mr Cho accepted that he did not have any involvement in discussions with the customer about that.

[21] It is fundamental in employment law that if an employer believes it has grounds for disciplining or dismissing an employee then it must tell the employee what those grounds are, seek an explanation from the employee and investigate further if necessary, before deciding what action to take. The failure was in relation to a matter of such basic or fundamental importance as to amount to a lack of substantive justification.

[22] I therefore determine that Mr McGill was unjustifiably dismissed around the end of November 2011 when, without good cause, No 1 Motors refused to let him return to work after he had sought to do that at the end of the agreed two month whitebaiting holiday. I find that the test of justification at s 103A of the Employment Relations Act has not been met in the circumstances.

[23] Initially as a remedy to resolve his grievance Mr McGill sought reinstatement. He abandoned that at the investigation meeting upon hearing and accepting that Mr Cho was selling his business and moving from Christchurch to Auckland. He said he intended ceasing to trade from 1 April 2012 and would not have a business in which to employ a mechanic.

[24] Monetary remedies amounting to the reimbursement of six weeks' lost wages were sought by Mr McGill. I do not consider this is a case where any reduction is required to be made for contributory fault or conduct on the part of an employee. The matters raised as contributing to the situation that gave rise to the dismissal were not known to Mr Cho when he refused to allow Mr McGill to return to work and thereby dismissed him. They were discovered subsequently and therefore may not be taken into account under s 124 of the Employment Relations Act, as they were not causative of the personal grievance.

[25] The Authority is satisfied that the period of six weeks lost wages claimed by Mr McGill is appropriate in the circumstances. Although he did not seek employment during that time, in my view his inactivity in this regard was not unreasonable as he had hoped to be successful with his claim to be reinstated. He had remained registered with the NZ Transport Agency to provide automotive mechanical services at the site of No 1 Motors, which allowed him to test vehicles for a Warrant of Fitness there. It was reasonable for him to expect to return to that site if he was reinstated. The period of six weeks is also less than half of the 13 weeks for which a claim can be made under the Act. In the circumstances, I consider it is a reasonable remedy, especially as there was no claim by Mr McGill for compensation under s 123(1)(c)(i) of the Act.

Determination

[26] For the reasons given above, the Authority finds that Mr Murray McGill was unjustifiably dismissed. To resolve the grievance Cyrus Holding Ltd is ordered to pay to Mr McGill the sum of $5,760 in reimbursement of lost wages. The company is also ordered to pay $71.56 to reimburse Mr McGill the application fee paid by him to bring his claim.

A Dumbleton
Member of the Employment Relations Authority