

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 210  
5417154

BETWEEN                      JAMES ANDREW HOBSON  
   Applicant  
  
A N D                              THE CORNER STORE 2009  
   LIMITED  
   Respondent

Member of Authority:        Helen Doyle  
  
Representatives:              Applicant in person  
   Kelvin Campbell, Counsel for Respondent  
  
Investigation meeting:        1 October 2013 at Oamaru  
  
Submissions Received:        On the day  
  
Date of Determination:        8 October 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.     The applicant was unjustifiably dismissed from his employment with the respondent.**
- B.     The applicant is to be paid the sum of \$2692.30 gross being reimbursement of two weeks lost wages and \$3500 without deduction for compensation for hurt and humiliation.**
- C.     The counterclaim is dismissed.**
- D.     Costs are reserved and a timetable set.**

**Employment relationship problem**

[1] James Hobson was employed by The Corner Store 2009 Limited (The Corner Store) as a sales engineer/project manager from 25 September 2011. Mr Hobson's employer was at the material time referred to as Think Water Oamaru. Mr Hobson was provided with a written individual employment agreement by the The Corner Store. It was never signed by both parties but it was accepted that it contained the terms and conditions of Mr Hobson's employment.

[2] On 20 February 2013, Mr Hobson tendered his resignation in a letter that provided:

*Attn Tim Connor  
Thinkwater Oamaru Manager*

*Tim it is with regret that I tender my resignation. Effective 30th April 2013.*

*Andrew Hobson*

[3] Mr Hobson says that after he had handed the resignation letter to Mr Connor, he believed that he would be able to work for The Corner Store until 30 April 2013 which would give his employer time to find a replacement and use his skills on a dairy shed project known as Corriedale. Mr Hobson had confirmed with his new employer that he would not commence work until 1 May 2013.

[4] On 1 March 2013, Mr Connor gave Mr Hobson a letter that provided as follows:

*Dear Andrew*

*We are in receipt of your resignation letter from your position at Think Water Oamaru. You kindly offered notice to work till the end of April 2013.*

*Management has decided to exercise our right to terminate your employment with Think Water. In line with your employment contract you are given 2 week's notice effective from 5pm today, Friday 1<sup>st</sup> March 2013. In lieu of notice you will be paid for the two weeks ahead plus annual leave/lieu days owing.*

*You are required to;*

- 1. Immediately submit your company mobile phone and charger*
- 2. Leave your computer in its present condition*

3. *Immediately empty the company car and office of your personal possessions*

*If required, a staff member will drive you home or somewhere local.*

*We would like to thank you for your efforts during your employment with Think Water Oamaru. A certificate of service and/or a written reference can be forwarded to you if required.*

*Yours sincerely  
Tim Connor*

[5] Mr Hobson says that he was dismissed and/or disadvantaged as a result of his employment terminating on 1 March 2013. Mr Hobson attempted to mitigate his loss by negotiating an earlier start date for his new employment and was able to commence work for his new employer on or about 2 April 2013.

[6] Mr Hobson seeks loss of salary for a period of two weeks between 1 March and 1 April 2013, taking into account the two weeks paid to him in lieu of notice by The Corner Store. He also seeks compensation for humiliation, loss of dignity and injury to feelings and costs.

[7] The Corner Store says that it was entitled to terminate Mr Hobson's employment by giving two weeks' notice under clause 8 of Schedule A of Mr Hobson's employment agreement. Clause 8.1 provides:

*The employee shall give or receive two weeks' notice of termination of employment.*

[8] The Corner Store counterclaims against Mr Hobson in the sum of \$4,000 plus GST because it says he was responsible for failing to ensure that a vehicle he drove supplied by The Corner Store was repaired in a timely manner. It says that as a result of the failure to have the vehicle repaired in a timely manner, extensive engine damage was caused. It says that had the engine been repaired, then it would have only incurred costs of \$1,000 plus GST by way of a replacement head gasket and not \$5,000 plus GST for a full engine replacement. Mr Hobson does not accept that he was responsible for the failure to ensure the vehicle was repaired in a timely manner and denies the counterclaim.

## **Issues**

[9] The Authority is required to determine the following issues:

- Was Mr Hobson disadvantaged and/or dismissed as a result of the termination of his employment on 1 March 2013;
- If Mr Hobson was dismissed was the dismissal justified;
- If the dismissal was unjustified, what remedies is Mr Hobson entitled to;
- Did Mr Hobson breach his employment agreement with The Corner Store by failing to report any issues with his vehicle;
- If Mr Hobson was in breach of his employment agreement, was the damage to the vehicle caused by Mr Hobson's actions;
- If the damage was caused by Mr Hobson, has The Corner Store made out its claim for damages in the sum of \$4,000 plus GST?

**Was Mr Hobson disadvantaged and/or dismissed by the termination of his employment on 1 March 2013?**

[10] Mr Hobson accepted under questioning that Mr Connor had not agreed with him as such that his end date would be 30 April 2013. Mr Hobson does not accept, however, that Mr Connor advised him that agreement to the notice period would be subject to any decision by the directors of the company or that there was any discussion about a two week notice period.

[11] Mr Connor took the letter of resignation to the directors after it was handed to him by Mr Hobson and it may have been that as a consequence of that he believed he had told Mr Hobson that any agreement about length of notice was subject to the directors approval. I found Mr Hobson to be a straightforward witness who readily conceded matters that were unhelpful to his case. I am not satisfied that Mr Hobson was actually told that the directors had to approve the notice period or that there was discussion about the notice period in the employment agreement of two weeks at the time he tendered his resignation. Not too much turns on that matter anyway I find in this case.

[12] I find that Mr Hobson would not unreasonably have concluded that the giving of longer notice would have been advantageous to the company in both finding a replacement and his continued involvement in a significant dairy shed project and there would not be an issue with it. Mr Hobson was not going to work for a

competitor but was intending to work in a different sort of area. The view that there would not be difficulty with the notice period I accept was strengthened in Mr Hobson's mind when he saw two directors of The Corner Store the day after he had tendered his resignation and they acknowledged to him that they were aware he was leaving but made no reference to the notice period.

[13] On the morning of 1 March 2013, Mr Hobson had been pricing an irrigation job which, he explained, involved about 200 hectares of sprinklers on poles. Mr Hobson said that he would have had about two weeks' worth of pricing to do on this job alone.

[14] On his return from pricing the irrigation job, Mr Hobson was called to Mr Connor's office and handed the letter that he says summarily dismissed him. There was agreement that a conversation took place along the lines of Mr Hobson asking Mr Connor if he was joking and Mr Connor responded *no* and said words to the effect *how do you think I feel, I thought we would have had lots of time to hand over*. Mr Hobson was taken home from the premises in the vehicle which he normally drove and he removed his personal items from the truck and handed over the keys.

[15] The Corner Store says that the directors could simply rely on the individual employment agreement and give Mr Hobson notice, without any further discussion or negotiation, that his employment would terminate on 1 March with two weeks' notice paid in lieu. The issue arises as to whether Mr Hobson was dismissed on 1 March.

[16] Mr Hobson referred the Authority to a determination of the Authority *Mike Whitson v. Sabre Corporation Ltd* AA 104/01 Member Gardiner as relevant to the issue of whether what occurred was a dismissal. This was a case in which the employee gave his manager notice of a period longer than that contained in the employment agreement. In the determination, there was reference to the Arbitration Court case of *Auckland and Gisborne Amalgamated Society of Shop Employees and Related Trades (other than Auckland Butchers, Grocers and Chemists Employees) Industrial Union of Workers v. Bos Upholstery Ltd* [1985] ACJ 477, Finnegan J. Judge Finnegan stated:

*The Court is of the view that what occurred was a dismissal. In our view the employee finished reluctantly on a day chosen by the employer. This in our view was a dismissal by the employer which*

*forestalled the employee's announced desire to resign on 24 December, and the only reason which has been given to the Court in evidence for the imposition of an earlier date unilaterally by the employer was the fact that the employee had given notice of his intention to terminate his own employment. The fact was that the date did not meet the approval of the employer, and so the employer imposed its own date. In our view the worker was entitled to resign on 24 December, and he was entitled to give notice longer than seven days and there is no evidence of anything that justified the employer in unilaterally deciding that he would be sent away immediately.*

[17] Mr Hobson gave longer notice than that stipulated in his agreement. The Corner Store was not satisfied with the period of notice. Instead of discussing this with Mr Hobson a finish date was unilaterally imposed on him of 1 March 2013 and he was paid two weeks in lieu of notice. The Corner Store says it invoked clause 8 of the notice period in schedule A of the employment agreement as it was entitled to do.

[18] I find that Mr Hobson was entitled to give a longer period of notice than the two weeks stipulated in his employment agreement. The Corner Store did not accept the longer period of notice and required Mr Hobson to leave immediately on 1 March a date he did not agree to. I find that constituted both a disadvantage and a dismissal.

[19] I find that Mr Hobson was disadvantaged and dismissed by The Corner Store on 1 March 2013. The disadvantage claim I find is absorbed in the finding that there was a dismissal.

### **Was the dismissal justified?**

[20] The only justification advanced in evidence by The Corner Store about the dismissal was the reliance on the notice provision of two weeks in the employment agreement. Mr Hobson put forward a different reason as to why he was dismissed but Mr Connor did not accept that was the reason.

[21] The Authority needs to consider this matter in accordance with the test of justification under s.103A of the Employment Relations Act 2000. The Authority has to objectively determine whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The obligations of good faith in s. 4(1A) (c) of the Employment Relations Act 2000 required, in circumstances where The Corner Store was proposing to make a decision that will have an adverse effect on the

continuation of Mr Hobson's employment, that it provide access to him information about that decision and an opportunity to comment on that information.

[22] Mr Campbell submitted that The Corner Store followed a fair procedure because it considered Mr Hobson's request to extend the notice period at the first available Board meeting and decided not to. It then fairly and reasonably invoked clause 8 in schedule A of the employment agreement and gave two weeks' notice paid in lieu.

[23] I do not accept that there was a fair and reasonable process. The Corner Store did not raise any concerns it had with Mr Hobson about his extended notice period. It did not talk about any options that may exist before dismissing him on 1 March and it did not genuinely consider, because it had not talked to Mr Hobson, his explanation as to why he needed the extended notice period. These failures were not in accordance with the requirements set out in s. 103A (3) for a fair process and were in breach of the good faith obligations.

[24] I find the complete absence of any process was not of a minor nature and it did result in Mr Hobson being treated unfairly. It led Mr Hobson to form a view that he had been dismissed because of another matter. I cannot be satisfied that that was the reason for his dismissal, but he became concerned about that matter. Procedural fairness is important otherwise it can lead to confusion and therefore speculation about the very reason for the dismissal itself as it did in this case. Mr Hobson said if he thought his extended notice was unlikely to be accepted then he would not have resigned until two weeks out from commencing new employment. He said, and I have no reason to doubt this, that he gave extended notice to be fair and reasonable.

[25] Mr Campbell submitted that any extension of the notice period required agreement under the employment agreement and that in the absence of mutual agreement to vary there can be no unjustified dismissal or legitimate expectation of on-going employment. I do not accept that submission. Mr Hobson chose to resign on extended notice and was then I have found dismissed without any process with two weeks payment in lieu of notice on a date unilaterally selected by The Corner Store. He was required to leave immediately on that date.

[26] In conclusion, I find that Mr Hobson was unjustifiably dismissed from his employment with The Corner Store because the dismissal was not what a fair and

reasonable employer could have done in all the circumstances at the time the dismissal occurred.

## **Remedies**

### ***Lost wages***

[27] Mr Hobson was paid two weeks' in lieu of notice. I am satisfied that he made every attempt to mitigate his loss by contacting his new employer to see if his start date could be brought forward. He was successful in getting an earlier start date. I find that Mr Hobson is entitled to be reimbursed for two weeks' pay. Mr Hobson advised me that his gross annual salary was \$70,000 and his weekly take home pay was about \$1,000 net. I find it is helpful to make an award in a gross amount. On the basis of the salary I have calculated that to be \$1346.15 gross per week.

[28] I order The Corner Store 2009 Limited to pay to James Andrew Hobson the sum of \$2692.30 gross being two week lost wages.

### ***Hurt and humiliation***

[29] I accept that there was a degree of hurt and humiliation on the part of Mr Hobson as a result of the abrupt ending of his employment. Regardless of the differences in the evidence from both parties, I accept that the handing to Mr Hobson of a letter on 1 March 2013 advising that his employment was at an end came as an unpleasant and quite shocking experience for him. There were two weeks when Mr Hobson was without any work or payment before he could commence with his new employer. Mr Hobson gave evidence that he received some calls from Mr Connor wanting updates on various matters and he was helpful to him although reached a point where he considered it would not be appropriate to continue giving assistance. I do have to take into account that the relationship was going to end in any event given the resignation tendered.

[30] I find that a suitable award, given that the employment was due to end in any event, is the sum of \$3,500.

[31] I order The Corner Store 2009 Limited to pay to James Andrew Hobson the sum of \$3,500 without deduction being compensation for hurt, humiliation and loss of dignity.

**Counterclaim**

[32] In his written evidence, Mr Connor stated that shortly after Mr Hobson left his employment, within one to two weeks, another employee advised him there was a problem with the Ford Ranger vehicle that Mr Hobson had been using during his employment. He stated that he was advised by employee Rolly Blair that the vehicle was using excessive water and was difficult to start. Subsequently, the vehicle was inspected by Southern Motor Court in early August which provided some quotes for supplying and fitting of a second hand engine.

[33] The Authority heard from Mr Blair who was called by Mr Hobson. Mr Blair is a qualified and experienced mechanic. Mr Blair requested and was given the use of Mr Hobson's truck after Mr Hobson's departure from The Corner Store. He said there was nothing unusual about the truck but it was taken away from him and given to a new employee, Donna. Some period later, I find it likely to be a period of four to six weeks, Donna left and Mr Blair asked for the truck again. His evidence is that at that stage the anti-freeze had very little colour, indicating fluid loss and regular top-ups. Mr Blair advised Mr Connor about this and stated that it was his belief the engine had a cracked head or blown head gasket. Shortly after this, Mr Blair went back to using his old truck. I could not be satisfied as to what exactly happened with the truck after that time and before the engine was replaced.

[34] I am satisfied that the truck was regularly serviced whilst Mr Hobson was driving it.

[35] There is nothing in the evidence about the counterclaim to satisfy me that Mr Hobson breached his obligations to The Corner Store with respect to the truck. There was no evidence to satisfy me of any causal connection between anything that Mr Hobson did and the subsequent damage to the vehicle repaired months after Mr Hobson left his employment. The standard of proof required to establish the counterclaim was not met. Indeed Mr Blair's evidence supported that the damage could and in all probability had occurred well after Mr Hobson had left his employment. I find the appropriate course of action is to dismiss the counterclaim in its entirety.

**Costs**

[36] I reserve the issue of costs. Although Mr Hobson was unrepresented at the investigation meeting he had counsel acting for him up until this time. Mr Hobson is to provide detail of any legal expenses incurred by 23 October 2013 and Mr Campbell is to make any submission in reply by 6 November 2013.

Helen Doyle  
Member of the Employment Relations Authority