

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 101
3010753**

BETWEEN BURGERT GILDENHUYS
Applicant

AND CORNISH TRUCK & VAN
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Dave Vinnicombe, Advocate for Applicant
Kevin Cornish/ No appearance by, Representing the
Respondent

Investigation Meeting: 1 and 8 March 2017 at Auckland

Submissions received: 15 March 2018 from Applicant
None from Respondent

Determination: 29 March 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Burgert Gildenhuis, claims that he was unjustifiably dismissed by the Respondent, Cornish Truck & Van Limited (CTVL), on 24 January 2017.

[2] CTVL denies that Mr Gildenhuis was dismissed and claims that he left voluntarily on 24 January 2017.

Issue

[3] The issue for determination is whether or not Mr Gildenhuis was unjustifiably dismissed by CTVL.

Note

[4] Mr Cornish was unable due to health issues to attend the Investigation Meeting on 1 March 2018 and his statement was taken in person on 8 March 2018 at an interview with the Member accompanied by an Authority Officer at his place of work.

[5] As agreed with the Applicant, the interview was recorded and a transcript sent to Mr Cornish and the Applicant for comment prior to the submissions date.

Background Facts

[6] At the time Mr Gildenhuis was employed CTVL was an automotive repair centre for commercial and private use vehicles. The Director is Mr Kevin Cornish, who is a joint shareholder with his wife. Mr Cornish said that the private use vehicle part of the business, known as Autotech, currently services and repairs small vans and larger vehicles rather than private cars.

[7] Mr Gildenhuis said he had been previously employed by CTVL. This was for a 6 month period before leaving to start his own business. After being approached by Mr Cornish, he had rejoined CTVL as Manager for the Autotech department in June 2016, reporting to Mr Cornish.

[8] Mr Cornish confirmed that Mr Gildenhuis had previously been employed as a mechanic in the Autotech department, but stated that this was for a short period of three to four weeks. He had asked Mr Gildenhuis to return to work at CTVL after the previous Autotech Manager had left.

[9] Mr Cornish had been hospitalised in 2016 during the period when Mr Gildenhuis employment commenced, and had returned to work approximately two weeks later.

[10] Mr Gildenhuis had been provided with an individual employment agreement (the Employment Agreement); however he said he had not signed it because he wanted to change some of the terms it contained. The copy of the Employment Agreement provided by the Applicant to the Authority has handwritten annotations which I find indicate that Mr Gildenhuis was familiar with the terms of it.

[11] Mr Cornish confirmed that Mr Gildenhuis had been provided with the Employment Agreement; however he had not signed or returned it.

Salary payment day

[12] Clause 7.1 of the Employment Agreement states:

... The Employee's pay shall be paid weekly on TUESDAY into a bank account nominated by the Employee.

[13] Mr Cornish said that CTVL transferred the salary payments into the employees' bank accounts at the beginning of a week, but since in some cases the bank credit was made

overnight and not available in the employees accounts until the following day, the employment agreements stated the contractual payment date as Tuesday.

[14] Mr Gildenhuis stated in his written evidence that his usual payday was a Monday, and bank statements provided by him confirm that his salary payment from CTVL was present in his bank account on a Monday. However his oral evidence at the Investigation Meeting had been that he had thought the payment went into his bank account on a Wednesday.

[15] Mr Gildenhuis said that a short time after he had commenced employment, Mr Cornish had asked him to take on joint responsibility managing the Truck department and the Autotech department. He had done so until 24 January 2017 when his employment with CTVL had ended, however there had been no increase in pay.

[16] Mr Cornish agreed that he had asked Mr Gildenhuis to take on responsibility for the Truck department; however this had been a trial which had not been successful.

Events on 23 – 24 January 2017

[17] On the evening of Monday 23 January 2017 Mr Gildenhuis said his bank card had been declined when he and his partner were grocery shopping. He had found this upsetting and embarrassing. He had initially thought this had been a bank issue but subsequently discovered that it was due to the fact that his salary had not been paid into his bank account by CTVL.

[18] The following day, 24 January 2017, he said Mr Cornish had come to see him and after discussing work issues, he had raised the issue of the salary payment. In response Mr Cornish had said that his wife who dealt with the payment of wages had not been at work to process the salary payments, but that she would process the payroll that evening.

[19] Mr Gildenhuis said Mr Cornish had become angry and asked him to go to his office with him. When they had reached the driveway between the Truck and Autotech workshops, Mr Cornish had started to shout and swear at him and told him to leave, telling him to '*F*** off*'.

[20] Mr Gildenhuis said Mr Cornish had a raised voice, and he had asked if he (Mr Cornish) was '*firing*' him, to which Mr Cornish had responded by asking him to return the CTVL keys and mobile telephone in his possession. Since he had had to return the CTVL keys and been ordered to leave the premises, Mr Gildenhuis said he had been unable to return to the Autotech workshop and retrieve his tools.

[21] Mr Cornish said he had heard Mr Gildenhuis in his office on 24 January 2017 which he shared with his wife. Mr Gildenhuis was shouting and using foul language towards Mrs Cornish about his wages being paid late.

[22] Mr Cornish had entered the office and told Mr Gildenhuis to leave the office. They had moved outside the office and he had told Mr Gildenhuis that CTVL was 'not a prison camp' and if he was unhappy, he could leave at any time. Mr Cornish said that Mr Gildenhuis had responded that he would leave.

[23] Mr Gildenhuis had started packing his personal belongings and at that point he had asked him to return his keys. Mr Cornish said that Mr Gildenhuis had not collected his toolbox for three weeks after he had left CTVL.

25 January 2017

[24] Mr Gildenhuis said he had been aware that Mr Cornish had a tendency to anger prior to his illness and his current medical condition had increased it, and he had therefore returned to CTVL the following day, 25 January 2017, with his partner to meet with Mr and Mrs Cornish.

[25] At that meeting Mr Cornish had informed him that his position was being made redundant as the Autotech department was being closed and that CTVL would be dealing with commercial goods only.

[26] Mr Gildenhuis said he had not been asked to return to CTVL, or to work his contractual two weeks' notice.

[27] Mr Cornish said he did not recall meeting with Mr Gildenhuis on 25 January 2017, however he did believe that Mr Gildenhuis and his partner had visited the premises and he thought he recalled Mr Gildenhuis speaking to Mrs Cornish about redundancy pay.

[28] Mr Cornish said he had not told Mr Gildenhuis he was redundant, however on a regular basis he had told him that if the Autotech department continued losing money, it would be closed.

[29] Mr Gildenhuis salary had been paid into his bank account on 24 January, and a payment was made into his bank account on 30 January 2017, which represented a payment in respect of his notice period and all accrued holiday entitlement.

Determination

Was Mr Gildenhuis unjustifiably dismissed by HFL?

[30] Mr Gildenhuis claims that he was unjustifiably dismissed by CTVL. The test of justification in s 103A Employment Relations Act 2000 (the Act) states:

103A Test of justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is 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.*

[31] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. CTVL must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[32] This is a case in which there is little in the way of supporting documentary evidence, and no witness corroboration of events. The evidence of Mr Gildenhuis and Mr Cornish is in direct conflict in a number of areas.

[33] The issue of credibility was examined in *Lawson v New Zealand Transport Agency* in which it was stated:

Briefly, when assessing credibility, the Court must carefully evaluate all the evidence, looking for inconsistencies between witnesses, and whether there are any external indications which can assist in a determination as to what occurred. As has frequently been observed in the past, the evidence has to be evaluated in a commonsense but fair way. All aspects of the evidence have to be assessed. A finding of credibility is unlikely to be based on only one element to the exclusion of all others, and will instead need to be based on all the factors by which it can be tested in a particular case. The Court must also bear in mind whether a given witness is correct on some matters and incorrect on others.

[304] This is not a case where the demeanour of witnesses when giving their evidence is determinative. There are well recognised difficulties in assessing credibility through demeanour alone. Important also are contemporary materials, objectively established facts and the apparent logic of events.¹

¹ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165

[34] In that context I note that the conflict in the evidence between Mr Gildenhuis and Mr Cornish in which Mr Gildenhuis claimed his period of previous employment was 6 months and Mr Cornish stated it was 3-4 weeks. PAYE records provided by Mr Gildenhuis confirm that the period was 6 months during January to May 2015 – 2016.

[35] Turning to events on 24 and 25 January 2017 which lead to the termination of Mr Gildenhuis, I note that the evidence of Mr Gildenhuis and Mr Cornish is that there was a heated exchange between them on 24 January 2017.

[36] Mr Gildenhuis' evidence is that he was dismissed by Mr Cornish after a heated exchange about the late payment of his salary on Monday 23 January 2017. Mr Cornish's evidence confirmed that there was a heated exchange during which he advised Mr Gildenhuis that he had the right to walk away from his employment, and he had done so.

[37] There was no written documentation between the parties which assists in establishing how the employment ended. However there is an agreement in the evidence that Mr Cornish asked Mr Gildenhuis to return his set of CTVL keys.

[38] In the case of *Boobyer v Good Health Wanganui Ltd* which concerned an employee's resignation 'in the heat of the moment', the Employment Court said of that in this type of case that the employer cannot safely insist on what the employee may have said:

This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this issue or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties".

[39] The discussion between Mr Gildenhuis and Mr Cornish had been heated. Whilst Mr Cornish's evidence was that he understood Mr Gildenhuis had exercised his right to terminate his employment, there is no evidence that he attempted to contact Mr Gildenhuis to ascertain his intentions. Rather, by asking Mr Gildenhuis to return his CVTL keys he had effectively prevented Mr Gildenhuis from continuing his employment.

[40] I find it more likely than not that Mr Gildenhuis employment was terminated by CTVL on 24 January 2017.

[41] The fact that CTVL terminated Mr Gildenhuis employment is strengthened by the evidence of events on 25 January 2017.

[42] Mr Gildenhuis said he had recognised that the exchange between him and Mr Cornish had become heated, and he had also been aware of Mr Cornish's health situation which exacerbated his propensity to angry outbursts in stressful situations. This had been the reason he had returned to CTVL the following day, 25 January 2017, and met with Mr and Mrs Cornish.

[43] On that occasion his evidence was that he had been informed that his position had been made redundant, and he was to leave immediately.

[44] Whilst Mr Cornish had no recollection of that meeting, he did accept that Mr Gildenhuis had returned to CTVL on 25 January 2017 and there had been some discussion between him and Mrs Cornish about a redundancy entitlement.

[45] It is also clear from Mr Cornish's evidence that there had been regular allusions to the Autotech department being closed for financial reasons in the weeks preceding 24 January 2017 which makes it more likely than not that Mr Gildenhuis recollection of the meeting on 25 January 2017 at which he was informed his position was redundant is credible.

[46] In a redundancy situation the fair and reasonable employer is expected to present the affected employees with the redundancy proposal and consult with them, providing a reasonable opportunity for feedback, which is then given full consideration prior to being confirmed.

[47] There is no evidence that this process occurred in this case.

[48] I determine that Mr Gildenhuis was unjustifiably dismissed by CTVL.

Remedies

[49] Mr Gildenhuis has been unjustifiably dismissed and he is entitled to remedies.

[50] Mr Gildenhuis said he started searching for alternative employment immediately.

Lost Wages

[51] Mr Gildenhuis obtained alternative employment on 7 March 2017 after a period of six weeks.

[52] In the submissions made on behalf of Mr Gildenhuis it is stated that his hourly rate of pay was \$32.00 per hour. Whilst the Employment Agreement hourly rate of pay has been altered in handwriting from \$30.00 per hour to \$32.00 per hour, the payslips provided by Mr Gildenhuis set out his hourly rate of pay as being \$30.00 per hour.

[53] Mr Gildenhuis' evidence was that there had been no increase in pay when he took on responsibility for managing the Truck department. On that basis I determine that Mr Gildenhuis hourly rate of pay was \$30.00.

[54] I order that CTVL pay Mr Gildenhuis the sum of \$7,200.00 (calculated as \$30.00 per hour x 40 hours x 6 weeks) pursuant to s 128(2) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i) of the Act.

[55] Mr Gildenhuis said he had the discussion between him and Mr Cornish which took place on the CTVL driveway to be humiliating and embarrassing.

[56] The termination of his employment had caused him distress and had impacted upon his relationship with his partner.

[57] The termination of his employment had affected his self-confidence and suffered depression for which he had been prescribed medication.

[58] I accept that Mr Gildenhuis experienced hurt and humiliation.

[59] I order CTVL to pay Mr Gildenhuis the sum of \$7,000.00, pursuant to s 123(1)(c)(i) of the Act.

Contribution

[60] I have considered the matter of contribution as I am required to do under s124 of the Act.

[61] Mr Gildenhuis had been the person on 24 January 2017 to raise the fact that his salary payment had not taken place when he had expected it to do so. That had resulted in a situation in which he had completed his shopping for groceries with his partner, but been unable to pay for the goods. I find it probable that he was feeling quite emotional himself when he raised this issue with Mr Cornish.

[62] Mr Gildenhuis had raised the payment issue with Mr Cornish despite being aware of the contractual pay day being a Tuesday, and whilst knowing that raising the issue with Mr

Cornish, whom he stated had a tendency to angry outbursts which had been heightened by his medical condition, might provoke an angry response.

[63] The result of raising the issue had indeed been a heated exchange between the two men in which Mr Gildenhuis' evidence was that he also had raised his voice.

[64] I find that Mr Gildenhuis had contributed to the situation in which had led to the termination of his employment and reduce the amount ordered as compensation by 20%.

Costs

[65] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent 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.

[66] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority