

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 199
3045151

BETWEEN KORBYN DE'HAR
 Applicant

AND DAVE SATINI & LYNETTE
 SATINI t/a DAVE'S
 AUTOELECTRICAL AND
 MECHANICAL SERVICES
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Dave Vinnicombe, Advocate for the Applicant
 Dave Santini, Representing the Respondent

Investigation Meeting: 3 April 2019

Date of oral Determination: 3 April 2019

Date of written
determination: 4 April 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

This determination is a written record of an oral determination delivered on 3 April 2019.

Employment Relationship Problem

[1] The Applicant, Mr Korbyn De'Har, claims that he was unjustifiably dismissed by the Respondent, Dave Satini and Lynette Satini trading as Dave's Autoelectrical and Mechanical Services (DAEMS).

[2] DAEMS denies that it dismissed Mr De'Har and claims that he was advised that it could not pay his wages until such time as the company's financial situation improved.

The issues

[3] The issue requiring investigation and determination is whether or not Mr De'Har was unjustifiably dismissed by DAEMS.

Background

[4] DAEMS is an Autoelectrical and Mechanical Vehicle Servicing business based in Hamilton. It is a partnership operated by Dave and Lynette Satini. Mr Satini is the Manager.

[5] Mr De'Har commenced employment as a Mechanical Labourer with DAEMS on 28 April 2018. He was not provided with a written employment agreement but his hours of work were 30 per week and the rate of pay was \$16.50 per hour.

[6] On 23 August 2018 Mr De'Har sustained an injury and he provided a medical certificate covering his period of absence from work to Mr Satini.

[7] Mr De'Har returned to the workplace on or about 28 August 2018 and said he was informed by Mr Satini that his employment was being terminated because Mr Satini told him he could no longer afford to employ him and his employment was being terminated for that reason.

[8] When he protested, Mr Satini told him that a back injury was serious and his employment was being terminated as a result of his injury and absence from work.

[9] Mr Satini said that Mr De'Har had commenced employment as an apprentice in accordance with a WINZ apprenticeship scheme. He said that the agreement he had reached with WINZ was that he could decide at the end of a three month trial whether or not to continue employing Mr De'Har or to terminate the arrangement.

[10] Mr Satini said in his written evidence that he had some issues with Mr De'Har's performance during the period of employment and had given him verbal warnings. However in his oral evidence he said that he had no issue with Mr De'Har's work performance other than his failure to do as instructed on occasion.

[11] Mr De'Har agreed that Mr Satini had told him he was too slow in completing the jobs he had been given, and agreed that he had refused to obey some work instructions, but there had been no formal disciplinary process followed and he had received no written warnings.

[12] Mr Satini said that during August 2018 he and Ms Satini had discussed the loss of DAEMS's main customer and the view had been reached that it was no longer financially viable to continue employing Mr De'Har.

[13] When Mr De'Har returned to work following his injury absence, Mr Satini said he had explained that he (Mr De'Har) was being temporarily 'laid off' because of 'financial hardship'.

[14] Mr Satini said he had told Mr De'Har that he would assist him with finding alternative employment and call him when DAEMS was in a financial position to be able to employ him again.

Was Mr De'Har unjustifiably dismissed by DAEMS?

[15] Mr De'Har was dismissed on 28 August 2018. DAEMS was under a duty of good faith towards him pursuant to s 4 of the Employment Relations Act 2000 (the Act) which required it, in a situation in which it was proposing to terminate his employment, to provide him with access to information relevant to the continuation of his employment, and an opportunity to comment upon it before a decision was made.

[16] In addition the Test of Justification in s103A of the Act states:

S103A Test of Justification

1. 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).
2. 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.

[17] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. DAEMS 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.

[18] Mr Satini's evidence was that although he had verbally raised performance issues with Mr De'Har, he had not taken any formal disciplinary action or advised him that his employment was in jeopardy as a result.

[19] Mr Satini's evidence was also that it had been necessary to terminate Mr De'Har's performance as a result of financial issues affecting DAEMS i.e. a redundancy basis for the termination of employment.

[20] Although Mr Satini's evidence was that he had temporarily 'laid off' Mr De'Har, the employer in no longer offering the employee work or paying him wages is in effect terminating his employment.

[21] In a redundancy situation an employer is also expected to act in a procedurally fair manner involving access to all relevant information relevant to the continuation of the employee's employment and consultation.¹

[22] Whilst I accept that DAEMS is a small employer and as such lacks the resources normally available to a larger employer when dealing with disciplinary matters, I consider that there were major rather than minor flaws in the procedure adopted by DAEMS in terminating Mr De'Har's employment which cannot be explained merely by the fact that DAEMS is a smaller employer.

[23] In particular:

- Mr De'Har had not been advised that concerns about his standard of performance might result in the termination of his employment;
- There was no formal meeting held with him to discuss these issues;
- He had not been advised of his right to have a support person present at a formal meeting since one was not held; and
- There is no evidence that Mr Satini genuinely considered Mr De'Har's explanation as he was given no opportunity to present one.
- In respect of the redundancy nature of the decision to terminate, there was no proper process followed, no access to the relevant information and no consultation prior to a decision being made to terminate Mr De'Har's employment.

[24] I determine that Mr De'Har was unjustifiably dismissed by DAEMS.

Remedies

Reimbursement for Lost Wages

[25] Mr De'Har was able to find alternative employment but not until he had been unemployed for a period of nine weeks. In these circumstances I find that he is entitled to lost wages.

[26] Mr De'Har is to be reimbursed for lost earnings for a period of 9 weeks pursuant to s 128(2) of the Act.

¹ Employment Relations Act 2000 s 4

[27] I order that DAEMS pay Mr De'Har the sum of \$4,455.00 gross (calculated as \$16.50 hrs per week x 30 hrs x 9 weeks) pursuant to s. 128 (2) of the Act.

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

[28] Mr De'Har said he had been distraught at the loss of his job at DAEMS, and that it had caused him humiliation in that he had to move back to live with his mother, he was unable to afford the upkeep on his vehicle and had to borrow money from friends and family.

[29] I order DAEMS pay Mr De'Har the sum of \$7,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Costs

[30] This was a straightforward matter determined on well-known legal principles. It occupied a half day of investigation time. I therefore award costs at the usual notional daily rate in the Authority for a half day hearing.

[31] I order DAEMS to pay Mr De'Har a contribution to costs in the sum of \$2,250.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority