

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 655

3057312

BETWEEN JAMES HIGGS
 Applicant

AND BR & SL PORTER LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Paul Matthews for Applicant
 Mark Beech for Respondent

Investigation Meeting: 10 September 2019

Submissions Received: 13 and 25 September 2019 from Applicant
 20 September 2019 from Respondent

Determination: 14 November 2019

DETERMINATION OF THE AUTHORITY

- A. Mr Higgs has failed to establish one or more conditions of his employment were affected to his disadvantage by the unjustified actions of BR & SL Porter Limited.**
- B. Mr Higgs was unjustifiably dismissed.**
- C. BR & SL Porter Limited is ordered to pay to Mr Higgs the following amounts within 28 days of the date of this determination:**

**a) Lost wages of \$1,480.77 gross under s 123(1)(b) of the Act;
and**

b) \$10,000 under s 123(1)(c)(i) of the Act.

D. Costs are reserved.

Employment relationship problem

[1] BR & SL Porter Limited (Porters) operates a fleet of vehicles including insulated tanker units, dangerous goods tanker units, container units, truck and trailer units and tipping units for bulk animal feeds. Porter's provides services to a number of industries including dairy, grain, tallow, fat and oils.

[2] Mr Higgs was self-employed driving trucks and was located in Christchurch. While visiting Tauranga in October 2018 Mr Higgs contacted Mr Bruce Porter, Porters' Managing Director, regarding the possibility of taking up work as a truck driver.

[3] Mr Higgs met with Mr Porter on 11 October. The meeting ended with an informal offer of employment as a Freight Dispatcher. The following day, following an invitation by Mr Porter, Mr Higgs met with Mr Porter again and was formally offered the position discussed the previous day.

[4] In anticipation of his new job Mr Higgs was emailed a copy of the proposed employment agreement on 12 October 2018. After starting work on 17 October Mr Higgs claims he was dismissed on 16 November 2018. He challenges his dismissal and claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Porters.

[5] Porters denies the claims. It says it did not dismiss Mr Higgs but rather, he resigned or abandoned his employment. If there was a dismissal Porters says Mr Higgs signed a written employment agreement which included a 90 day trial period and on that basis he is barred from taking a personal grievance in relation to his alleged dismissal.

[6] In its statement in reply Porters made a counter-claim against Mr Higgs and sought damages arising out of Mr Higgs use of his work iPad. This claim was withdrawn at the investigation meeting.

[7] In submissions Porters has asked the Authority to impose a penalty on Mr Higgs for alleged breaches of good faith. The allegations relate to covert recordings Mr Higgs made on three separate occasions during his employment. Submissions are not the appropriate place to make new claims. The issue of whether the making of the recordings constituted a breach of good faith requires a fact-based assessment of the relevant circumstances.¹ Because the claim was not properly before the Authority it did not form part of the investigation and accordingly no determination about it has been made.

Issues

[8] In order to resolve Mr Higgs' application I must determine the following issues:

- a) Were one or more conditions of Mr Higgs' employment affected to his disadvantage by the unjustified actions of Porters and if so what if any remedies should be awarded?
- b) Was Mr Higgs dismissed or did he resign or abandon his employment?
- c) If Mr Higgs was dismissed is he barred from pursuing a personal grievance for unjustified dismissal?
- d) If the answer to c) is no, was Mr Higgs unjustifiably dismissed and if so what if any remedies should be awarded?

[9] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received but all have been carefully considered in reaching conclusions on the issues.

¹ *Talbot v Air New Zealand Ltd* [1995] 2 ERNZ 356 (CA).

Disadvantage

[10] Mr Higgs claims one or more conditions of his employment were affected to his disadvantage when he was subjected to bullying. By way of example he told me that on his first day a colleague referred to his shoes as “gay”. He told me there were multiple times during his employment when he was referred to or introduced to others as “cock boy” and two employees threatened him with violence.

[11] Mr Higgs bears the onus of establishing on the balance of probabilities that he was disadvantaged in his employment. If Mr Higgs discharges that onus then the burden of proof moves to Porters to establish on the balance of probabilities that any disadvantage Mr Higgs may have suffered was justified.

[12] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Porters actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[13] Of relevance to this issue is Schedule D to the employment agreement which sets out the expected standards of behaviour of Porters’ employees. Porters’ expects high standards of courtesy will be maintained to other employees free from any forms of harassment, prejudice or intimidation and all general behaviour will be friendly and considerate at all times. The schedule requires any problems occurring at work to be notified immediately to one of three listed managers including the General Manager, the Operations Manager and the local manager.

[14] Mr Jack Paki is the Dispatch Supervisor. He was concerned that Mr Higgs did not seem to be listening to Mr Tony Kidd who was providing training to Mr Higgs on aspects of Mr Kidd’s job. Mr Kidd was about to depart on a period of leave and Mr Higgs was to be filling in for him during his absence.

[15] On 15 November 2018 Mr Paki invited Mr Higgs to go outside where Mr Paki explained to Mr Higgs that he needed to listen to what he was being told as Mr Kidd

and others had been in the role a long time and knew what they were doing. Unknown to Mr Paki at the time, Mr Higgs recorded their conversation on his phone.

[16] Mr Higgs did not stop the recording when the discussion outside concluded. He left the recording on after he and Mr Paki returned to the dispatch office. Because it was left on the recording captured a conversation between Mr Paki and Mr Kidd when Mr Higgs was absent from the office. During this conversation the two employees referred to Mr Higgs in less than positive terms. Mr Higgs heard the conversation when he replayed the recording later that day.

[17] The recording also captured a further discussion between Mr Higgs and Mr Paki after Mr Higgs returned to the dispatch office. During this discussion Mr Higgs asked Mr Paki several times to stop calling him names. Mr Paki acknowledged at the investigation meeting that he called Mr Higgs “cock boy” and that this nickname had developed as a result of his boasting about his ability to attract women.

[18] Mr Higgs formed the view that the conversations in the dispatch office were proof he was being bullied by Mr Paki and Mr Kidd. After listening to the recordings Mr Higgs raised his concerns with Mr Paul Manson, the Compliance Manager about how he was being treated.

[19] Mr Higgs replayed the recording of the conversations for Mr Manson. It was common ground that Mr Higgs was upset when he met with Mr Manson and for that reason Mr Manson escalated the matter to Mr Porter. Mr Manson said he was very concerned and acknowledged there had been a number of complaints coming out of the dispatch office.

[20] Mr Manson and Mr Higgs attended Mr Porter’s office where they explained about the name calling and Mr Higgs unhappiness with what was happening in the dispatch office. After Mr Manson and Mr Higgs left Mr Porter’s office, Mr Porter met with Mr Paki and Mr Kidd and instructed them to stop the banter and name calling.

[21] Mr Porter was concerned that when he met with Mr Higgs he appeared agitated. After his discussion with Mr Paki and Mr Kidd, he invited Mr Higgs to meet with him once more. At this meeting Mr Porter asked Mr Higgs if he wanted to remain in

employment at Porters. Mr Higgs confirmed he did. Because of his agitated state Mr Porter invited Mr Higgs to take the rest of the day off. Mr Higgs declined as he wished to return to his work.

[22] That evening Mr Higgs rang Mr Porter to provide an explanation about why he was so upset with the name calling. Unknown to Mr Porter, Mr Higgs recorded this conversation. Curiously Mr Higgs asked several times during the conversation whether he still had a job. The answer was a sounding 'yes' from Mr Porter who confirmed, when asked by Mr Higgs, that he should return to work as usual the next day.

[23] It was common ground that the workplace was robust with considerable banter between those working in the dispatch office. Mr Higgs' himself, engaged in the banter when he referred to at least one other colleague by a nickname rather than their given name. However, the terms of the employment agreement make it clear that employees are expected to meet a high standard of courtesy free from harassment, prejudice or intimidation. Clearly the way Mr Paki and Mr Kidd conducted themselves toward Mr Higgs did not meet this expectation.

[24] It is arguable that as a result of his colleagues conduct one or more conditions of Mr Higgs employment were affected to his disadvantage. However, it is not the actions of the colleagues so much as how Porters responded once Mr Higgs complained about the conduct that is under scrutiny in this case.

[25] In accordance with the terms of his employment agreement Mr Higgs, correctly, raised his concerns with Mr Manson who escalated them to Mr Porter. Mr Porter took immediate steps to put an end to the situation.

[26] Porters' actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. Mr Higgs has failed to establish to my satisfaction that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Porters.

Dismissal, resignation or abandonment

[27] Porters claims it did not dismiss Mr Higgs on 16 November 2018. Porters says Mr Higgs either resigned or abandoned his employment.

[28] Mr Higgs attended Mr Porter's office on the morning of 16 November 2018. Mr Higgs recorded this conversation, a fact he made known to Mr Porter near the end of the discussion.

[29] At the meeting Mr Porter informed Mr Higgs he had decided to amalgamate the work being done by Mr Higgs with the other dispatch work meaning Mr Higgs role was disestablished. Mr Porter handed Mr Higgs a letter which had been written some time before the meeting setting out a number of concerns Mr Porter held about Mr Higgs ability to perform the job in dispatch and confirming his duties had been reallocated.

[30] Mr Porter offered Mr Higgs a role truck driving and advised him that if he wished to accept the change of role he would be offered a new contract and job description which would be discussed the following Monday.

[31] Mr Higgs asserted during the discussion that Mr Porters' actions constituted an unjustified dismissal and he would be seeking legal advice. Mr Porter did not deny he was dismissing Mr Higgs. Instead he referred to the 90 day trial period provision contained in the employment agreement and told Mr Higgs the clause would be enforced.

[32] Mr Higgs then disclosed to Mr Porter that he was recording the meeting. Mr Porter became angry, attempted to take the phone off Mr Higgs and instructed Mr Higgs to leave his office and the depot.

[33] I am satisfied Mr Higgs did not resign from his employment and neither did he abandon it. The recording of the meeting did not disclose any indication by Mr Higgs that he intended to resign from his employment. Rather, Mr Higgs asserted he was being dismissed.

[34] In relation to the claim of abandonment, the employment agreement required Mr Higgs to be absent without notification for more than three days before he would be deemed to have abandoned his employment. Porters did not wait three days. On the contrary, it took immediate steps on 16 November to require the return of all company property in Mr Higgs possession including his keys, work clothing and cell phone.

[35] The decision to reallocate the work undertaken by Mr Higgs and take him out of the dispatch office was in reality a dismissal. During the meeting Mr Higgs disclosed he was recording the meeting. At that point Mr Porter reacted by instructing Mr Higgs to leave his office and the depot. These were not the actions of an employer believing an employee had resigned.

[36] Mr Higgs left Mr Porter's office and returned to the dispatch office to collect his personal belongings. When he attempted to leave the depot another employee, Mr Bill De Renzy parked behind his car and blocked him from leaving.

[37] Mr De Renzy told me he was in the office when he heard loud voices coming from Mr Porter's office. He told me Mr Porter asked him to retrieve the company property from Mr Higgs. Mr De Renzy says he did park his car behind Mr Higgs but did not intentionally block him in. Whether it was intentional or not, I have concluded Mr Higgs could not leave the depot without Mr De Renzy moving his car.

[38] Mr De Renzy demanded the return of the company property in Mr Higgs possession. Mr Higgs responded by demanding Mr De Renzy move his car or he would call the police.

[39] Later that day and after Mr Higgs had left the worksite Mr De Renzy made contact with him and again requested Mr Higgs return all of his company property. In response Mr Higgs sent a text message to Mr Porter enquiring about his final pay and undertaking to return all company property when his final pay had been received. Mr Porter demanded the property be returned immediately or he would put the matter into the hands of the police and have him charged with theft.

[40] The decision to reallocate all of Mr Higgs duties and to offer him a new position of driver was made after the telephone discussion on 15 November 2018 and before the meeting on 16 November. In the letter given to Mr Higgs on 16 November 2018 Mr Porter referred to Mr Higgs' "new role" meaning the driving position. Clearly there was no intention that Mr Higgs dispatch role would continue to be available to him.

[41] Given the circumstances set out above I have concluded Mr Higgs was dismissed.

90 day trial period

[42] The employment agreement provided for a trial period in the following terms (verbatim):

- 5.2
- (a) the Employee is initially to serve a trial period not exceeding 90 days from the beginning of employment;
 - (b) should the Employer dismiss the Employee during that trial period the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal;
 - (c) notwithstanding the general notice period in this agreement, if the employee's employment is terminated during the trial period then the period of notice required shall be one week.

[43] During the meeting with Mr Porter on 16 November 2018 Mr Higgs challenged Mr Porter about his decision to reallocate his duties maintaining he was being dismissed. Mr Porter reminded Mr Higgs there was a 90 day trail period which he would enforce.

[44] Although Porters did not rely on the 90 day trial period during my investigation, for the sake of completeness I have considered whether the 90 day trial period clause contained in the employment agreement acts as a bar to the Authority investigating and determining Mr Higgs personal grievance in respect of his dismissal.

[45] The obligations set out in ss 67A and 67B of the Act are to be interpreted strictly. This is because these provisions of the Act remove a right of access to justice.² I am satisfied the 90 day trial period clause set out in the employment agreement meets the requirements of s 67A of the Act. The question then is whether Porters is able to rely on it.

[46] Mr Higgs says when he signed the employment agreement he had commenced work and was already an employee. I disagree. It was common ground Mr Higgs arrived to start work at 8 am on 17 October but did not start work immediately. Mr Porter asked Mr Higgs if he had signed the employment agreement. Mr Higgs had not

² *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386 at [26].

and so Mr Porter immediately provided him with a second copy which Mr Higgs then signed.

[47] The purpose of the trial period is to allow an employee to be assessed while working. As noted by the Court in *Roach v Nazareth Care Charitable Trust Board* the reference to an employee having been “previously employed” is where there has already been an opportunity to assess the employee’s suitability for the work.³

[48] Mr Higgs had not been previously employed by Porters when he signed the employment agreement on 17 October 2018. He had not undertaken any work for Porters’ before signing the employment agreement.

[49] As an alternative Mr Higgs says the trial period provision should have no effect because when he was dismissed Porters did not adhere to the notice requirements contained in the trial period provisions.

[50] Section 67B of the Act applies where an employer terminates an employment agreement containing a trial provision by giving notice of the termination of employment prior to the end of the trial period.

[51] The employment agreement required one week’s notice of termination during the trial period. Porters did not provide the required notice, accordingly it is unable to rely on s 67B(1) of the Act to justify its decision.⁴

[52] There is no barrier to Mr Higgs challenging his dismissal.

Was the dismissal justified?

[53] In order to justify Mr Higgs dismissal Porters must demonstrate its decision to dismiss him was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether Porters met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.

³ *Roach v Nazareth Care Charitable Trust Board* [2018] NZEmpC 123 at [45].

⁴ *Ibid* at [62].

[54] Relevant to my consideration are the provisions in the employment agreement at Schedule B which expressly requires consultation before any decision regarding suitability for a position held by an employee. The employment agreement defines consultation as "...provid[ing] the employee with a chance to be heard and for their views to be considered before making a decision relating to the employee."

[55] Mr Higgs was invited to meet with Mr Porter on 16 November 2018 but was not told what the reason for the meeting was or what the potential ramifications on Mr Higgs might be. When Mr Higgs attended Mr Porter's office he did so on the understanding that his job was secure. That understanding was based on Mr Porter's assertions the previous night during their telephone discussion.

[56] I have concluded that when Porters made the decision to remove Mr Higgs role it failed to meet its own obligations set out in the employment agreement and has failed to establish Mr Higgs's dismissal was substantively justified. There was no consultation with Mr Higgs and he did not have the opportunity to have his views considered before that decision was made.

[57] The evidence shows there may have been some performance and/or conduct issues that needed to be addressed. However, instead of addressing those issues in accordance with the employment agreement which required Porters' to provide Mr Higgs an opportunity to improve, Mr Porter made the decision to reallocate Mr Higgs duties to others in the dispatch office and offer Mr Higgs a driving position with a new employment agreement and job description.

[58] The defects in the process used by Porters in dismissing Mr Higgs were not minor and resulted in Mr Higgs being treated unfairly. I find in all of the circumstances of this case the actions of Porters' in dismissing Mr Higgs including the way the dismissal took place were not actions an employer acting fairly and reasonably could take. Mr Higgs was unjustifiably dismissed.

Remedies

[59] To remedy his personal grievance Mr Higgs seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

[60] Mr Higgs found alternative employment and started working for his new employer on 27 November 2018. I am satisfied Mr Higgs took steps to mitigate his loss. He is entitled to reimbursement of lost wages for the period of one week which amounts to \$1,480.77 gross.

[61] Mr Higgs told me he became depressed immediately following the dismissal. He had moved from Christchurch to Tauranga to start afresh and felt that everything was lost to him. He felt alone as he did not know anyone in Tauranga and felt ashamed at being dismissed and he turned to alcohol for solace.

[62] Taking into account the suddenness of the dismissal including the way it was carried out a fair and just award in this case is \$10,000.

[63] I am required under s 124 of the Act to consider whether any remedies awarded should be reduced due to the conduct of Mr Higgs if his conduct contributed to the situation giving rise to his grievance. Mr Higgs had a difficult relationship with his colleagues and a number of them had indicated to Mr Porter that they struggled to work with him.

[64] Mr Porter made the decision to reallocate Mr Higg's tasks after the issues regarding bullying had been raised and dealt with. During the meeting on 16 November 2018 Mr Porter told Mr Higgs he didn't believe Mr Higgs was the right person for the dispatch job because it was a pressurised job and Mr Higgs was not coping with it. He also raised concerns about his interactions with his colleagues and a customer. These are performance issues and appear to have strongly influenced Mr Porter's decision to disestablish Mr Higg's job. Given Porters' failure to address these concerns in a constructive manner I have concluded Mr Higgs' conduct does not amount to blameworthy contributory conduct. No reduction to the remedies will be made.

[65] BR & SL Porter Limited is ordered to pay to Mr Higgs the following amounts within 28 days of the date of this determination:

- a) Lost wages of \$1,480.77 under s 123(1)(b) of the Act; and

b) \$10,000 under s 123(1)(c)(i) of the Act.

Costs

[66] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Higgs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Porter's shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[67] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority