

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 363
3100712

BETWEEN JOSH HIGGINS
 Applicant

AND SLOAN’S SADDLERY AND
 CANVAS LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Adrian Plunket, advocate for the Applicant
 Digby Livingston, advocate for the Respondent

Investigation Meeting: 14 October 2020 at Napier

Submissions: On the day of the investigation meeting.

Date of Determination: 13 August 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Josh Higgins says he was summarily and unjustifiably dismissed when he provided his employer, Sloan’s Saddlery and Canvas Limited (“The Saddlery”) with four weeks’ notice of his resignation.

[2] Mr Higgins’ claim for lost wages was withdrawn in the lead up to the Authority’s investigation. He now seeks compensation for humiliation and injury to feelings, and costs.

[3] The Saddlery denies Mr Higgins was dismissed. It says Mr Higgins resigned and left the following day on his own volition. Counterclaims for monies said to be owed by Mr Higgins for damage to company property and for a penalty were also withdrawn.

Information relevant to Mr Higgins' claim

[4] The Saddlery specialises in saddlery, upholstery and canvas repair, and function hire services. Mr Neil Sloan is the managing director of the company.

[5] Mr Higgins was employed by The Saddlery for approximately three years. For the two years immediately prior to the end of his employment he undertook an apprenticeship in his position as Motor Trimmer. The apprenticeship was overseen by the Motor Industry Training Organisation ("MITO") with Mr Sloan and Factory Foreman, Stephen Bradley, each supervising various components of the training.

[6] The employment agreement between the parties required that each provide 4 weeks' notice to terminate the employment relationship, albeit there was provision to agree to shorter notice period. The Saddlery could, at its sole discretion, elect to pay wages in lieu of notice. The agreement further provided that if Mr Higgins failed to give, or work out, the required notice he would either pay or have deducted from final wages the sum equal to each day of the notice period not worked.

The events leading to the end of Mr Higgins' employment

[7] On 13 August 2019, the last day of the apprenticeship, Mr Higgins asked Mr Bradley to sign off his final unit papers. He advised Mr Bradley he had been offered work as a motorcycle mechanic and was going to hand in his resignation. They discussed how best to inform Mr Sloane of this matter.

[8] Later in the day Mr Higgins approached Mr Sloan at the front desk. He placed a letter in front of him, and advised "*you won't like this*" or words to that effect. The letter recorded the following:

Dear Neil,

I am sorry I have to do this but I will be leaving Sloan's on the 10th of September due to receiving an offer for a bike mechanics apprenticeship close to home. I have enjoyed my time here and appreciate everything you have done for me over the past 3 years and I appreciate the opportunity to learn this trade.

Sincerely
Josh Higgins

[9] There are some differences about exactly what exactly was said in the ensuing but there is common ground on the following points. Mr Sloan accepts he did not respond well to the

letter of resignation. Mr Higgins expressed his passion for motorbikes as reason for the resignation but Mr Sloan was unreceptive to this explanation. Mr Sloan voiced disappointment in Mr Higgins for resigning on the last day of his apprenticeship, and told Mr Higgins to “fuck off”. Mr Higgins went out to the factory floor and collected tools, some of which belonged to Sloan’s. Mr Sloan continued to remonstrate with Mr Higgins over this period.

[10] Mr Higgins placed the tools into his car and left. He returned to the workplace at his usual start time the following day. When Mr Sloan arrived, the discussion largely picked up where it had been left.

[11] Mr Higgins recorded this conversation on his mobile phone but did not advise Mr Sloan that he was doing so. A transcript of the recording has been provided to the Authority. It has not been necessary to set out the exchange in full, but I have referred to aspects of their discussion at various points in this determination.

[12] Their discussion begins with the following:

Mr Sloan: What are you doing here, you don’t work for us anymore?

Mr Higgins: I’m here to tell you that I’ll work out my four weeks’ notice if you want me to. If you don’t then I’m going to need that in writing.

Mr Sloan: I’ve got the Apprenticeship Board coming to see me today about you.

Mr Higgins: Okay

Mr Sloan: And erm, so I’ll talk to them about what you need

[13] Their exchange lasts approximately 5 minutes or thereabouts. A substantial portion of the discussion was premised on Mr Sloan’s (mistaken) belief that the decision as to whether Mr Higgins worked out the notice period (or not) required MITO’s input “because it involves them as well”. Mr Sloan’s view appears to be held on the basis that the apprenticeship is not completed until signed off by MITO.

[14] Mr Sloan told Mr Higgins he remained hurt by his resignation and advised he was “seriously not happy about signing your apprenticeship off.” He advised that if he worked out his notice there will be little by way of take home pay. I understand this was because some wages had been previously paid in advance.

[15] On several occasions over the course of the conversation Mr Sloan advised that the choice to “stay and work out the back” until the MITO representative arrived lay with Mr Higgins. It is apparent Mr Sloane was not aware the final papers had already been executed by Mr Bradley until Mr Higgins advised him of this fact at the end of the discussion.

[16] The conversation concluded with Mr Sloan advising Mr Higgins “But that’s over to you [whether to stay or not]. You can sit there and decide what you want ...”

[17] Nothing further was communicated between them. Mr Higgins left the workplace soon after and did not return. He commenced in his new role three working days later.

The Authority’s investigation

[18] In accordance with s 174C(4) of the Act, the Chief of the Authority has formed a view that exceptional circumstances exist for issuing this determination outside the statutory timeframe specified in s 174C(3).

[19] Mr Higgins attended the Authority’s investigation meeting as did Mr Sloan and Mr Bradley, and another employee, Owen Potter. The Authority was provided with written statements from each witness. Where needed, witnesses answered questions from the Authority and the parties’ representatives.

[20] It was evident there was a number of factual disputes between the parties. It has not been necessary to determine those discrepancies which have no real bearing on the events which form the basis to Mr Higgins’ claims. This determination is therefore limited to recording findings of fact and law on those matters crucial to disposing the employment relationship problem between the parties.

The issues to be decided

[21] Mr Higgins’ claims he was dismissed either on 13 or 14 August 2019.

[22] Because The Saddlery denies it dismissed Mr Higgins, the onus lies first with him to demonstrate on the balance of probabilities that he was in fact dismissed. If that matter is established the onus shifts to The Saddlery to justify the dismissal.

[23] It is useful to briefly set out the accepted definition of a dismissal before assessing the evidence relevant to Mr Higgins’ claim.

[24] A dismissal is a termination of employment at the employer's initiative.¹ An actual dismissal is typically achieved by an unequivocal statement by the employer to the employee that amounts to a sending away.

[25] In cases where there is a dispute as to whether an employer's statement(s) amounted to an unequivocal sending away, the Authority must examine not only what was communicated, but also the circumstances in which the communication was made.

Was Mr Higgins dismissed on 13 August 2019?

[26] Mr Higgin's written evidence is that he was dismissed when Mr Sloan told him to "fuck off". He further says that after having packed up his tools and was proceeding towards his car, Mr Sloan said "Oh you're off to your car ... well that's good". He says this statement confirmed the dismissal as it was a "good riddance type of comment".

[27] On the evidence before the Authority, I am not persuaded that the words used by Mr Sloan to Mr Higgins were sufficiently explicit that they could be objectively regarded as an unequivocal dismissal for the following reasons.

[28] Firstly, there is no real dispute that Mr Higgin's resignation prompted a heated and confrontational exchange. I accept Mr Bradley's evidence that "both sides were swearing". Mr Higgins conceded that the word "fuck" was commonly used in the workplace including by Mr Sloan and by himself. He says however, that he did not expect to be sworn at, albeit he accept he had anticipated (as has Mr Bradley) that Mr Sloan would not be happy about the resignation. He says Mr Sloan's reaction caught him off guard.

[29] Mr Slone says his use of the expletive phrase "fuck off" was an emotional outburst to the resignation, borne out of disbelief that Mr Higgins would resign at this point in the employment relationship where it was expected he would remain, at least in the short term following the end of his apprenticeship. Mr Higgins agreed he was aware of Mr Sloan's expectation but says he had made no promises to this end.

[30] Taking into account the acceptable use of robust language in the workplace alongside the circumstances in which the phrase was used, I do not consider those words, on their own, were sufficient for Mr Higgins to conclude, without doubt, that he had been summarily

¹ *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965

dismissed. I am further not persuaded that Mr Sloan's comment as Mr Higgins was proceeding to his car adds (or detracts) to the claim. The comment was sarcastic but does not, objectively viewed, amount to a permanent sending away by itself or in combination with Mr Sloan's expletive.

[31] Next, Mr Higgins says he would not have taken his tools home if he hadn't been dismissed. There is some strength to this aspect of his evidence where there was some consensus that it was his practice to take tools home when leaving work. During questioning Mr Higgins' conceded he did not clarify with Mr Sloan what was meant by telling him to fuck off or question whether he was dismissed. Mr Higgins accepted also the expletive was capable of several different meanings and outcomes. Mr Higgins' testimony that he was caught off guard alongside heightened emotions on both sides leads me to conclude it more likely that Mr Higgins simply sought to extract himself from the quarrel and, where he was uncertain as to Mr Sloan's intentions, he took his tools with him.

[32] Mr Higgins says the following day he "decided to give Mr Sloan a chance to rehire him and he went back to offer to work out his notice". The difficulty with this evidence is that there is nothing in the transcript to indicate he perceived himself to have already been dismissed, nor did he advise Mr Sloan of this view. On balance I do not find Mr Higgins' reason for returning to the workplace is credible. I consider it more likely that Mr Higgins attended work at his usual start time where there was some uncertainty in his mind as to where he stood.

[33] I am not persuaded Mr Sloan's expletive statement can be fairly regarded as an unequivocal sending away by Mr Higgins in the particular circumstances. It follows I am unwilling to conclude Mr Higgins was dismissed on 13 August 2019.

Was Mr Higgins dismissed on 14 August 2019?

[34] Submissions made on Mr Higgins' behalf point to several statements made by Mr Sloan to Mr Higgins when they met again on 14 August 2019 as evidence of a dismissal.

[35] The first of these concerns an initial comment made after greetings had been exchanged. The focus is on Mr Sloan's statement: "... *you don't work for us anymore*". I am unwilling to assess this comment in isolation to Mr Sloan's preceding inquiry asking Mr Higgins why he was a work. In context, I find the comment forms part of an exchange in which each party voiced an opinion as to the cause of Mr Higgins' departure the day before. Mr Sloan was of

the view Mr Higgins had resigned and left, whereas Mr Higgins advised he had left because he had been told to fuck off. As already noted Mr Higgins made no mention that he thought he had been dismissed. I am not persuaded the comment is an unequivocal sending away. Nor am I unwilling to find the Saddlery at fault for not providing an assurance the employment relationship remained on foot where there is nothing in the transcript to indicate Mr Higgins held a contrary view.

[36] The next comment on which Mr Higgins relies is Mr Sloan's advice that MITO was "*bringing me a termination letter today*". From the surrounding sentences I am confident the statement concerned the apprenticeship agreement, not the employment relationship.

[37] It is further submitted that it was made clear to Mr Higgins that the Saddlery did not wish for him to work out his notice by the statement "*I don't believe we will be working time off unless the apprenticeship board forces my hand to it.*" However, it was permissible under the employment agreement for the Saddlery to decide against Mr Higgin's working out his notice period.

[38] Moreover, it is apparent from the statement itself, as well as the contents of the transcript, that no firm decision was made one way or another about Mr Higgins' notice period during this conversation. Whilst Mr Sloane was mistaken in his view that MITO had any control over how and when the employment relationship between the parties would end, it was not unreasonable to seek to ascertain the status of the apprenticeship with MITO at this juncture and ascertain what, if any, obligations were owed towards Mr Higgins on that matter before any decisions were made by it regarding the notice period.

[39] Having considered the exchange on 14 August 2019 as a whole, it is reasonably plain that each party held a tentative view that if the employment relationship had been terminated on 13 August 2019 it was at the behest of the other. But Mr Higgins then sought clarity from Mr Sloane on 14 August 2019 as to how his notice period should be treated. Concurrently, Mr Sloan had arranged to meet with MITO to obtain advice about what needed to be done to finalize the apprenticeship. I must find both actions were more consistent with the employment remaining on foot at this point in time than not. It follows that there is insufficient evidence to establish Mr Higgins was unequivocally sent away by the Saddlery's at its initiative at this juncture.

[40] Mr Higgins has not been able to establish he was dismissed. His claim must therefore fail.

Costs

[41] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority