

Determination Number: WA 186/05

File Number: WEA 248/05

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Kel Aiken (applicant)
<b>AND</b>	WTL Carriers Limited (respondent)
<b>REPRESENTATIVES</b>	Graeme Ogilvie for the applicant Sue Scott for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 29 November 2005
<b>DATE OF DETERMINATION</b>	1 December 2005

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. Mr Kel Aiken says he is owed wages by the Company and that it unjustifiably dismissed him – statement of problem received on 30 June 2005. He claims compensation of \$8,000 for humiliation, etc lost wages and holiday pay for 1 March 2005, three months' wages and costs.
2. The Company says it never employed Mr Aiken – statement in reply (SIR) received on 15 July.

3. The parties did not settle their employment relationship problem in mediation. Agreement was subsequently reached on a one-day investigation in Wellington on 29 November. Witness statements were usefully provided in advance of the investigation. Efforts by the parties to settle the matter on their own terms during the day were unsuccessful.

### **Chronology**

4. I am satisfied from the investigation that the following is an accurate chronology of key events:

2 February 2005 – after some years of casual, part-time employment as a driver for Willis Traders Limited (WTL), the applicant signs an individual employment agreement providing for his full-time, permanent employment with WTL. Of WTL's 500 shares, 499 are owned by the applicant's son, Mr Gavin Aiken. The applicant owns the remaining share. Both men are listed as directors of WTL: refer to the NZ Companies Office record, as at 30 November 2005.

17 February – WTL (through Mr Aiken Jnr) signs a sale and purchase agreement (SPA) with the respondent in respect of its vehicles and customer relationships/accounts. The SPA provided for possession "*from the close of business*" on 1 March 2005 (SIR).

1 March – notwithstanding the provisions of the SPA, the Company takes charge of WTL's business during the day: it receives the benefit of all revenue earned on that day. The Company also meets all of the costs of that day's trading including the wages for all of the staff previously employed by WTL except for Mr Aiken Snr.

### **Parties' Positions**

5. Messrs Tom Finlay and Everett Fuller represented the Company at the time it entered into the SPA with WTL on 17 February 2005. Mr Finlay is one of the respondent's directors. They say Mr Aiken Jnr was told (by Mr Finlay) on 17 February, at the time of entering into the SPA, that the Company would not be offering permanent, full-time employment to his father, the applicant: Mr Aiken Jnr denies that claim.

6. Mr Finlay says that later, on 22 February, he told the applicant that the Company would not be offering him full-time, permanent work but that casual employment was available. Mr Finlay says the applicant told him he would consider it and get back to him, but that he did not. The applicant confirms that he spoke with Mr Finlay on or around 22 February during which the latter asked if he was interested in part-time or casual work: he says he told Mr Finlay no, but that he needed full-time employment instead. He denies being told by Mr Finlay the Company would not be offering him full-time, permanent employment.
7. Mr Aiken Jnr says that, in the lead up to signing the SPA, (an oral) agreement was reached with the Company that it would employ all of WTL's staff, including his father – the applicant. He says that was why he agreed to delete from the SPA a requirement that *“the vendor will terminate the employment of all staff as at 28 February 2005 ...”* (SOP). He says he originally required that provision because he believed (wrongly, he accepts) it was a term and condition of WTL's employees that they enjoy 28 day's notice of the termination of their employment. He also believed it was fair and reasonable to give the employees that amount of consultation. Mr Aiken Jnr says he agreed to delete that provision only on the understanding that the purchaser would carry on the employment of all existing staff including Mr Aiken Snr.
8. Mr Aiken Jnr does agree that, on 28 February, Mr Fuller told him the Company would not be offering employment to his father. He says he was surprised by that advice but did not tell his father as he relied on what he understood was an existing agreement to employ all staff.
9. Mr Aiken Jnr also says another oral agreement was subsequently reached with the Company that the effective time for them to take over the business would be one day sooner, i.e. from the end of business on 28 February and not the end of business on 1 March. He agrees that payment of the purchase price did not take place until close of business on 1 March.
10. Mr Aiken Jnr says he paid out final wages and holiday pay to WTL's staff, including his father, on 28 February for the period ending 28 February 2005.

11. The applicant says he always understood that all WTL staff, himself included, would continue working with the new owner, the respondent: he attributes that understanding to advice from his son. He says that as the respondent enjoyed the benefit of his labour on 1 March he should be paid for that day. Mr Aiken Snr also claims that an ongoing employment relationship was entered into by himself and the Company on 1 March: as the Company subsequently told him, without investigation and/or reasons, that he was not required, he says he was unjustifiably dismissed.

## Discussion and Findings

12. I am satisfied that Mr Aiken's claims against the Company cannot succeed for the following reasons.
13. I accept the respondent's position that no employment relationship ever existed between it and the applicant. Mr Aiken Snr's claim rests largely on his son's claim that an agreement existed between WTL and the Company to employ his father. The claim is denied by the respondent. There is no written evidence of any such agreement. Separately, Mr Aiken Snr cannot point to any direct discussion with the Company in this respect. What is agreed by the parties is that on 22 February he rejected its offer of part-time or casual employment.
14. By way of a credibility finding, and from the evidence of the discussion between the applicant and Mr Finlay on 22 February, and Mr Aiken Jnr's agreement of advice from Mr Fuller on 28 February, I reach the conclusion that the respondent only ever offered to the applicant part-time or casual work – an offer he declined. It follows that no employment relationship was intended or entered into.
15. The reality is that WTL did not meet its legal and contracted obligations to its staff, including those set out in Mr Aiken Snr's IEA at clause 20, that he be given "*Two (2) weeks **written notice of the termination***" (emphasis added) of his employment.
16. There is no evidence of any discussion by the parties on 1 March as to whether the applicant was or was not working for the respondent. I do not accept that an employment relationship resulted from Mr Aiken Snr working on 1 March, even though the benefits of which were enjoyed by the respondent. This is because, first,

WTL had not given the required notice to the applicant of the termination of his employment. Mr Aiken Snr remained an employee of WTL. Second, I accept Messrs Finlay and Fuller's argument that what happened on 1 March was by way of a *fait accompli* and not by way of any prior agreement. By closing his fuel cards and telephone account, etc on 28 February, Mr Aiken Jnr gave the respondent no option but to undertake WTL's contracted duties so as to protect its future interests. I accept that, at the start of 1 March, the Company intended to rely on the terms of the SPA before realising – as vehicles were running out of fuel and telephones were not being answered, etc – that it had to step into the vacuum.

17. However, despite receiving the benefit of the day's trading, while meeting almost all of the costs of the same, the Company did not trade entirely on its own behalf: it also acted as an agent for WTL by managing the termination of its business affairs.
18. These findings are reinforced by the fact that payment was not made by the Company to WTL for its vehicles and business until close of business on 1 March.
19. In the absence of any other evidence with which to determine the parties' competing contextual claims, I am satisfied that the terms of the written agreement between them, the SPA, properly records the terms of the commercial agreement entered into by WTL and the Company.
20. It is clear that WTL also failed to meet its obligations to at least one of its employees, under the new provisions of the Employment Relations Act 2000, from s. 69K: if an *"... employer restructures its business so that their work is to be performed for a new employer ..."* an employee's *"... employment agreement (must) contain employee protection provisions relating to negotiations between the employer and new employer about the transfer of affected employees to the new employer."* No such provisions exist in Mr Aiken Snr's IEA.
21. It could be said that, in a number of ways, the applicant – as a director – failed to meet the obligations he owed himself as an employee.

22. Being satisfied there was no intention to employ the applicant other than in a part-time or casual sense, and that Mr Aiken Snr refused that offer, I find that his claim against the respondent must fail, in its entirety.

### **Determination**

17. For the reasons set out above, I find against Mr Kel Aiken's claim that he is owed unpaid wages for 1 March 2005 and that he was unjustifiably dismissed by WTL Carriers Limited.
18. As requested by the parties, costs are reserved. In attempting to reach agreement on this matter the parties should have regard to my comments on costs quantum made during the investigation.

**Denis Asher**

**Member of Employment Relations Authority**