

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 172
5352782

BETWEEN PAUL ALLBON
 Applicant

A N D NICHOLSON RACING STABLES
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Simon Scott, Counsel for Applicant
 Graeme Nicholson, Advocate for Respondent

Investigation Meeting: 28 March 2013 at Hamilton

Date of Determination: 8 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Allbon) alleges that he was unjustifiably dismissed from his employment by the respondent (Nicholson Racing Stables or the Stables), and is also owed wages.

[2] The Stables deny that the dismissal was unjustified and contends that the dismissal was effected for redundancy as a consequence of *severe financial difficulties*. The wages claim is also denied.

[3] A preliminary issue, whether Mr Allbon could bring his grievance out of time, was dealt with first.

[4] By determination dated 23 April 2012, the Authority (Member Anderson) granted leave for Mr Allbon to raise his grievance out of time. The matter then went to mediation in the normal way but the parties were unable to resolve their differences

by agreement and the matter then proceeded to a hearing in the Authority. The matter originally proceeded to hearing before Member Anderson on 18 October 2012 but adjourned part heard with Member Anderson excusing himself from further involvement in the matter. The matter then came on to the present Member's list and this determination is based on the evidence given and taken in a complete re-hearing of the matter before the current Member.

[5] The Authority also notes for the sake of completeness, that while the Stables were represented at the aborted October hearing by the advocate Glenys Steele, she did not appear in the March 2013 hearing at all, apparently on the footing that Nicholson Racing Stables were unable to afford further cost. Certainly, neither the Authority nor Mr Allbon's representative were made aware prior to the investigation meeting that Ms Steele was not going to participate. Advice to that effect was received by email at the Authority's offices and Mr Scott's offices after the investigation meeting had commenced.

[6] Mr Allbon was employed by Nicholson Racing Stables in September 2005, initially as a Stable Foreman. Latterly he became a Licensed Horse Trainer.

[7] Mr Allbon says that he was never provided with a written employment agreement although there is a document which purports to be a form of employment agreement but its status is disputed both by Mr Allbon and by a witness to the document, Mr John McKenzie.

[8] The employment provided a wage to Mr Allbon and accommodation adjoining the workplace. Subsequently, Mr Allbon says there was an agreement that he would share in the stakes paid for winning racehorses but that no such payments were ever made. Mr Allbon says that he lent money to the Stables but the extent of that practice is disputed.

[9] Mr Allbon was last paid his weekly wage on 16 September 2010 and Nicholson Racing Stables say that that date was the date that the employment was terminated. Mr Allbon denies that allegation and says that he was not terminated from his employment until 25 February 2011.

[10] Mr Allbon claims wages from 16 September 2010 down to the actual date of dismissal, reimbursement of loans made to the Stables and not repaid, compensation, and costs.

Issues

[11] It will be convenient if the Authority considers the following questions:

- (a) When did the employment end?
- (b) What happened next?
- (c) Was there an employment agreement?
- (d) Was there a counter claim?
- (e) Was Mr Allbon unjustifiably dismissed?

When did the employment end?

[12] The Authority is presented with two alternative versions of events concerning the termination of the employment. Nicholson Racing Stables says that Mr Allbon was told on 16 September 2010 that the Stables *could no longer afford to employ him because there was no money. There were no other options.* Mr Nicholson, who gave evidence for the Stables, said that he had personally told Mr Allbon on 16 September 2010 that the employment was over, that the discussion that took place at the Stables and that Mr Allbon received the advice badly.

[13] Conversely, Mr Allbon does not remember that discussion or, perhaps more accurately, does not remember the particular significance that the Stables put on the discussion. What is uncontested is the evidence that payment of Mr Allbon's wages ceased on and from that date of 16 September 2010.

[14] According to Mr Allbon, far from terminating the employment on 16 September 2010, what Mr Nicholson did was to maintain that he would find the money to make up the payment and that, to quote from Mr Allbon's evidence to the Authority:

He allowed us to stay in the house he provided. Things continued as normal, except for the fact I was not receiving my pay. For the period October 2010 through to February 2011, I continued to train the horses. I continued to carry out all the normal duties that were expected of me, and which I had diligently carried out for the previous five years.

[15] The essence then of Mr Allbon's evidence on this point is that he was told by Mr Nicholson not that the employment relationship had come to an end but that payment had come to an end until Mr Nicholson could access some more money. So while Mr Nicholson says that he was explicit that the employment relationship had ended such that Mr Allbon should have no further expectation of wages, Mr Allbon understood the relationship to be subsisting, albeit that there was a temporary failure to make payment of wages.

[16] Mr Nicholson maintained in his evidence to the Authority that it was simply not true that Mr Allbon continued to perform his normal duties after 16 September 2010. Mr Nicholson told the Authority that Mr Allbon did approximately 2 hours a day of work in the morning and came back to feed a particular horse for 10 minutes at 4pm at night. Mr Nicholson maintained that that was all that Mr Allbon did after 16 September 2010. Mr Nicholson said that Mr Allbon was looking after a particular horse – Waikura Lass, and that was all he was doing. Mr Nicholson's claim is that Mr Allbon was told that Mr Nicholson could not pay him, but that Mr Allbon was determined to look after this particular horse and was doing so effectively in his own time.

[17] Mr Allbon challenged that evidence and produced his diary of the relevant period which was made available to the Authority for inspection. A copy of the pages of the diary for the period in dispute was provided and the Authority was satisfied that the copy provided was an accurate one.

[18] The diary supports Mr Allbon's claim that he was working normally after 16 September 2010. There is nothing in the diary to support the significant discussion which Mr Nicholson claims to have had with Mr Allbon on 16 September 2010, but more importantly the entries after that date have a sameness to them when compared to the entries before that date. There is simply nothing in the diary that would support Mr Nicholson's claim that the employment came to an end when he says it did.

[19] Indeed, the contrary is the case. The diary supports Mr Allbon's evidence that he continued to work normally after 16 September 2010.

[20] Witnesses for Nicholson Racing Stables doubted the veracity of the diary and suggested that it was an after-the-fact reconstruction. There is a particular difficulty with that evidence which the Authority will come to shortly. But as a general

proposition, the Authority has not been pointed to any credible evidence to support this damaging allegation. Further, the diary gives every appearance of having been used as a working diary and therefore maintained contemporaneously.

[21] Furthermore, at the very back of the diary there are a succession of entries relating to payments made to various individuals including, in particular, former staff of the Stables. One of those former staff members attended at the Authority's investigation meeting to give evidence for the Stables, but that individual reluctantly acknowledged that payments against his name and apparently with his signature alongside were made to him. Mr Allbon's evidence was that he had himself made payments to staff after wages stopped. One of the sources of money used to make those payments was the disposal of plant belonging to the Stables. Mr Allbon maintained that he had been given permission by Mr Nicholson to sell plant to provide for wages; Mr Nicholson denied that that permission was ever given.

[22] In any event, the short point is that the Authority is satisfied that the diaries are a contemporaneous written record of the activities of Mr Allbon during the period from 16 September 2010 down to February 2011 and as a consequence the Authority is satisfied that Mr Allbon continued working normally past 16 September 2010.

[23] Notwithstanding the inherent implausibility of an individual working without continuing remuneration, the Authority is satisfied on the balance of probabilities that that is precisely what happened in this case. It will be remembered that another term of Mr Allbon's employment was the provision of accommodation on site and as a family man supporting a partner and four children, that obviously was a major factor in his ability to continue working, notwithstanding the absence of any income.

[24] In fact, it seems that Mr Allbon was able to support his family, at least in part, on Family Tax Credits, and his wife was able to find paid employment as well.

[25] It follows that the Authority is satisfied that Mr Allbon is entitled to remuneration beyond 16 September 2010, that is that the employment did not cease on 16 September 2010.

What happened next?

[26] It will be apparent from the intelligence derived from Mr Allbon's diary that so far as he was concerned, it was *business as usual* and he continued to work

normally through this period. This is so notwithstanding the evidence of Mr Nicholson who allowed only that Mr Allbon was working for 2 hours and 10 minutes a day on average. For the avoidance of doubt, the Authority emphasises that it prefers Mr Allbon's evidence to that of Mr Nicholson.

[27] A further reason for the Authority preferring Mr Allbon's evidence is that Mr Nicholson told the Authority that he did not work a full span of hours at the Stables and even on his own evidence, he left the Stables at 2.30 or thereabouts each afternoon. In fact, the evidence for Mr Allbon was that Mr Nicholson was there even less regularly than Mr Nicholson himself recalled. It was common ground that Mr Nicholson lived half an hour away from the Stables and it seems to the Authority unlikely that given the financial predicament of the Stables, and Mr Nicholson's physical distance from the Stables, that he would have attended the workplace as regularly as he claims.

[28] Another area of dispute between the parties relates to Mr Nicholson's claim that he drove Mr Allbon to the WINZ office in Morrinsville on or about 26 September 2010 so that Mr Allbon could attend there and get an unemployment benefit and subsequently provided Mr Allbon with a letter for WINZ indicating the end of the employment.

[29] Mr Allbon in his evidence was adamant that the visit to the WINZ office just described *did not happen*. Mr Nicholson was equally adamant in his oral evidence that he took Mr Allbon to the Morrinsville office of WINZ, but he acknowledged that Mr Allbon was not in the office very long and he further acknowledged that he remained in the car and did not go in with Mr Allbon. Mr Nicholson recalls Mr Allbon emerging and saying he needed a letter from his employer setting out the position and that Mr Nicholson subsequently provided that to Mr Allbon.

[30] As the Authority has already noted, all that is denied by Mr Allbon who denies both receipt of the letter referred to and the visit to the Morrinsville WINZ office. No copy of the letter has been provided to the Authority as evidence.

[31] The Authority is unable to form any view about what happened in relation to the purported visit to the Morrinsville office of WINZ and the issue is not material to any decision the Authority must make, save around questions of credibility.

[32] What is important is that as a matter of fact Mr Allbon did not apply for and was not granted an unemployment benefit in or around September 2010 at all and the documentary evidence before the Authority is quite explicit on that point. There is a statement before the Authority dated 26 October 2012 from Work and Income which confirms that he *did not receive any financial assistance from Work and Income for the period from September 2010 to 14 February 2011.*

[33] What is more, the information before the Authority confirms that an unemployment benefit was subsequently granted by WINZ on and from 16 March 2011 and the information to support that grant of financial assistance is absolutely consistent with Mr Allbon's evidence to the Authority. The WINZ file note recites that Mr Allbon *has not been paid for the last six months* and that his *last payment was the 16/09/2010 and has been living off IRD FTC (family tax credits) since then because of this* The file note also refers to an *employer letter advising him that work will be finishing as of 25/02/2011* which is presumably the shorthand written letter which Mr Allbon referred to receiving on 15 February 2011.

[34] Again, the Authority also has access to Inland Revenue Department records relating to Mr Allbon which confirms that he received no taxable income from November 2010 to February 2011 and that he received a benefit from Work and Income New Zealand from March 2011 down to May 2011.

[35] Consistent then with the Authority's preference for Mr Allbon's evidence on the final days of the employment, the file note from WINZ supports Mr Allbon's own evidence that the employment continued from 16 September 2010 into the new year, albeit without payment, and that on 15 February 2011 Mr Allbon found an undated letter from Mr Nicholson in the following terms:

To whom it may concern

To Paul & Trich (sic)

Due to financial (sic) problems over the last 4 months I regret to say that the training partnership and employment will cease on 25 February. Payment of what's owed to you will be made as soon as possible (sic).

Yours faithfully,

GA Nicholson

per Nicholson Racing Stables

[36] By this stage, Mr Nicholson's evidence is that he had paid Mr Allbon some of the outstanding wages, a total amount of \$2,150. In addition, Mr Nicholson maintained in his evidence that he had paid \$1,000 which Mr Allbon had loaned him. The Authority is satisfied that those sums were in fact paid to Mr Allbon. Although Mr Allbon has no recollection of these payments being made, the Authority is satisfied on the balance of probabilities that they were made and these payments are taken into account in the final calculations at the conclusion of this determination.

[37] Dealing now with the undated February 2011 letter from the Stables to Mr Allbon, it seems clear that the Stables are indicating that the employment relationship is to cease on 25 February 2011. That is the plain and ordinary meaning of the words used.

[38] However, as Mr Nicholson himself admitted in his evidence to the Authority, the termination of the employment relationship as such did not automatically carry with it the implication that Mr Allbon and his family would leave the residence belonging to the Stables and the evidence is plain that they continued to reside there until 4 August 2011. Much of the engagement between the parties after the February 2011 letter concerns the various attempts by Nicholson Racing Stables to evict Mr Allbon and his family from the Stables property.

[39] That then is the context of the next series of communications. The first of those is a letter dated 10 March 2011 from Nicholson Racing Stables Limited to Mr Allbon. It is in the following terms:

10 March 2011

Dear Paul Allbon

This letter is a follow up from the previous letter which was handed to you dated 10th of February 2011 stating the reasons and conditions for the termination of your partnership and employment with Nicholson Racing Stables due to the financial constraint of the business. This is your final notice. You will sign the following shares of these horses over the GA Nicholson today:

*10% O'Reilly Express
10% Volkshah
10% Star Chaser
10% Racey Lady*

You will be given \$1,000 once you vacate the premises at Nicholson Racing Stables by Sunday 13th of March 2011 and not to return to this property. A trespass warrant will be issued if this is not adhered

to. The power to the house will be disconnected on Monday 14th of March 2011.

*Yours faithfully
GA Nicholson*

[40] There was a space provided for Mr Allbon to accept the terms and conditions set out in this letter. He chose not to do so.

[41] Then there was yet another undated handwritten letter which was also unsigned. That letter seems to have been delivered to Mr Allbon about 7 April 2011.

It is in the following terms:

Paul,

As you have made no efforts to move out of the house on 63 Lovegrove Road, Te Aroha, I have no other option than now put this in the hands of the Tenancy Tribunal. This has been done so if you have made any other arrangements some discussion would be grateful. Otherwise an eviction notice will be served to you. Enclosed accounts to you for rent and agistment (sic) since the 25th of February as your extended stay is costing me on a daily basis.

Regards,

[42] Mr Allbon responded with his own letter of 12 April 2011, the terms of which relevantly provide:

You gave me a letter of end of employment on 16th February with employment to end 25th February. Did you really expect me to uproot my family and move out in 9 days. You never paid me for 23 weeks. How could you expect me to have the money to find a place to move in to a rental house. You need at least \$1,500 for bond etc ...

[43] The letter continues by making the point that Mr Allbon had lent Mr Nicholson money and those sums are documented in the letter and then raises the question of whether Mr Allbon should charge Mr Nicholson interest for the unpaid wages, but concludes with an offer to meet to try to resolve matters by agreement.

[44] There was then a letter from Mr Nicholson dated 15 April 2011 and the matter was then referred to professional advisers. Mr Nicholson declined Mr Allbon's suggestion of a meeting to resolve matters in his letter of 15 April 2011.

Was there an employment agreement?

[45] Mr Nicholson maintains that a document discovered stuffed down the back of an old chair at the Stables was the employment agreement signed by the parties in 2008. The difficulty with this claim is that Mr Allbon denies that the document in question is the relevant employment agreement.

[46] Even more mysteriously, the purported agreement seems to be witnessed by John McKenzie who was at the relevant time the Chief Racing Inspector. His involvement is relevant presumably because the purported agreement, although hardly fulsome, does refer to the training role that Mr Allbon had.

[47] The Authority has before it an affidavit sworn by Mr McKenzie, who is now retired, which says that he (Mr McKenzie) had never seen the document before it was provided to him in anticipation of swearing this affidavit, and that the signature on the document is not his.

[48] The Authority has no reason to doubt Mr McKenzie's affidavit, and indeed on the most cursory of examinations about the signature issue, it is plain that the signature on the affidavit sworn by Mr McKenzie is materially different from the purported signature on the so called employment agreement.

[49] The Authority has no hesitation in setting that agreement aside and concluding that it is in no sense a record of any arrangement between Mr Allbon and Mr Nicholson. Clearly Mr McKenzie had no involvement in the document and one would have thought that if Mr Nicholson were going to rely upon it as an employment agreement relevant to his employment of his most senior employee, he might have kept his own copy of the document in a safe place rather than produce one that was stuffed down the back of an old chair. Having made that observation, the Authority does note that a copy of the document was held by the New Zealand Thoroughbred Racing Agency.

Was there a counter claim?

[50] When the matter first came before the Authority, a counter claim was part of the Stables' response. That counter claim included a claim for the return of monies apparently obtained by Mr Allbon for the sale of property belonging to Nicholson Racing Stables. In addition, agistment fees and rent is sought.

[51] In the second and concluded investigation meeting, there was a discussion between the parties at the beginning of proceedings the effect of which was that the Authority concluded there was an understanding that the counter claim was withdrawn. The Authority's notes record that understanding.

[52] Subsequently, there has been an email exchange between counsel for Mr Allbon and the former representative of the Stables wherein the purported agreement between the parties is put into question. In particular, the former representative of the Stables maintained that the counter claim had not been withdrawn and that if it had, she would have advised the Authority of that fact.

[53] Of course, as the Authority noted earlier, that representative did not appear in the second hearing and the Authority is satisfied it cannot now hear her, formally or informally, in relation to a matter in which she is no longer a representative.

[54] As a matter of fact, there was an understanding at the commencement of the substantive concluded hearing, that the counter claim was no longer alive. Further, the reason there appears to have been any discussion about that matter was that at the first aborted hearing, Member Anderson opined that the counter claim was outside the Authority's remit and accordingly, the counter claim could not be dealt with in the Authority. For the avoidance of doubt, the Authority confirms that that is and remains the position.

Was Mr Allbon unjustifiably dismissed?

[55] The evidence before the Authority is redolent that Nicholson Racing Stables was in serious financial difficulty. Some of the accounts for the business have been made available to the Authority for the years 2010, 2011 and 2012. It is apparent to the Authority that none of those years were successful trading years. The first two of them (2010 and 2011) resulting in six figure losses, while in 2012 the loss had been cut in half, but that was on the back of a 50% reduction in activity.

[56] The Authority is satisfied then that it was appropriate for the Stables to review their expenditure and that one of the costs which could be taken out of the system was wages.

[57] Accordingly, the Authority accepts that this was a genuine redundancy situation because it is apparent on the evidence that the business simply could not sustain the sort of losses that were being incurred. It is a significant achievement in itself that the loss was cut in half from the 2011 financial year to the 2012 financial year.

[58] But the fact that the Authority accepts that there was a genuine need for a business to make positions redundant does not, of course, justify any behaviour on the part of the employer. In the present case, while the Authority is persuaded that the restructuring of the business was absolutely imperative, the way in which Nicholson Racing Stables went about disestablishing Mr Allbon's position was a complete travesty of the appropriate way of treating a worker whose position was potentially to be done away with.

[59] The Stables ought to have had a series of meetings with Mr Allbon commencing with an intimation that the financial position of the business was such as to require dramatic remedial action, providing Mr Allbon with information about the nature of the business' situation and inviting him to comment on alternatives to the possible disestablishment of his position.

[60] Then the Authority would expect there to be a further meeting with Mr Allbon at which any alternatives that he might have could be provided and the Authority would expect that the Stables would go away and review what Mr Allbon had to say to see if that alternative strategy (if any) could assist in achieving the necessary savings without disestablishing his position.

[61] It is axiomatic that an employee whose position is under threat must have an opportunity to comment on alternatives to the disestablishment of the role. In this particular case, the evidence is plain that Mr Allbon was interested, potentially, in running the Stables himself. If he had been given any opportunity to comment on the possible need to disestablish his position, he might have been able to put together a proposal to take the business over. But he was deprived of that opportunity and on the evidence the Authority heard, was simply given an undated letter received on 15 February 2011 telling him he was to finish up on 25 February 2011. The Authority has no hesitation in concluding that that thoroughly truncated process does not comply with the law. Mr Allbon is entitled to compensation for that failure.

Determination

[62] The Authority is satisfied that Mr Allbon is owed wages for the period from the last wages payment of 16 September 2010 down to the date of dismissal. In addition, while the Authority is satisfied that the redundancy was itself genuine, being brought about as it was by a very serious financial decline in the business, the process by which the Stables undertook the redundancy fell far short of the minimum requirements of New Zealand law. That being the position, Mr Allbon has a personal grievance for the disadvantage he suffered as a consequence of being treated unjustifiably by the Stables in the process by which Nicholson Racing Stables disestablished his position. It follows that Mr Allbon is entitled to compensation.

[63] Before that issue can be considered, the Authority must consider whether Mr Allbon has contributed in any way to the circumstances giving rise to the dismissal. The Authority is not satisfied that there is any contribution to the circumstances giving rise to the dismissal. No doubt it could be said that Mr Allbon was less than helpful over the tenancy aspect, but that was after the employment had been terminated on the Authority's analysis of the facts and so cannot be brought to bear. In any event, arguably, given the way that Mr Allbon was treated, any reluctance on his part to vacate the Stables premises was an understandable response.

[64] The Authority is satisfied that the amount of wages owed to Mr Allbon for the period from the last date of payment (16 September 2010) down to the date the Authority is satisfied dismissal became effective (25 February 2011) is \$10,350. The Authority has already noted it is satisfied that \$2,150 was paid to Mr Allbon by the Stables after 16 September 2010 but before the dismissal. The Authority considered whether to deduct that sum from the total amount owed to Mr Allbon, but concluded that because the pages of the wage book made available in the evidence suggest short payment of wages on a regular basis in the period up to 16 September 2010, that sum of \$2150 should be set off against those short payments rather than deducted from the amount due and owing from 16 September 2010 onwards. On this footing the set off nearly balances the short payment.

[65] In respect to wages then Mr Allbon is entitled to receive payment for his work for the period from 16 September 2010 down to 25 February 2011 in the sum of \$10,350. Further, Mr Allbon is to receive \$450 additional as one week's notice for the dismissal. The sum of these two amounts is \$10,800.

[66] On that footing, Nicholson Racing Stables Limited is to pay to Mr Allbon the total sum of \$10,800 net by way of wages. As wages were expressed to be net throughout the employment, the Authority notes that Mr Allbon is responsible for accounting to the Inland Revenue Department for his own tax in relation to that income.

[67] Mr Allbon is entitled to compensation for the unjustified action causing him disadvantage but not for compensation for an unjustified dismissal because the Authority is satisfied that, although the procedure adopted by the employer was completely unsatisfactory, the genuineness of the redundancy is difficult to question. On that basis, then the compensation available to be paid to Mr Allbon is more modest. Further, there can be no allowance for lost wages since the dismissal.

[68] The Authority awards Mr Allbon the sum of \$5,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000. There was little doubt in the Authority's mind about the injury to feelings caused by the unsatisfactory way in which the Stables addressed the issue; a consideration of the correspondence from Mr Allbon to the employer is sufficient on its own, to establish that.

[69] Accordingly, Nicholson Racing Stables Ltd is to pay to Mr Allbon the following sums:

- a) Compensation of \$5000 net
- b) \$10, 800 net in unpaid wages

Costs

[70] Costs are reserved.

James Crichton
Member of the Employment Relations Authority