

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number  
WA 30/08  
File Number 5088850

BETWEEN                    MATHEW ALLEN  
   Applicant  
  
AND                            HMA LIMITED  
   Respondent

Member of Authority:     P R Stapp

Representatives:         Charlie Clayton for Applicant  
   Les Spellacey and Karen Fox Company Directors for  
   Respondent

Investigation Meeting:    Wellington 26 February 2008

Determination:            17 March 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Mathew Allen's employment relationship problem is a claim of unjustified dismissal. He is seeking compensation and costs. The Respondent denied all the claims. It has rejected any remedies for a personal grievance.

[2]     During the investigation it became apparent that Mr Allen had not received his final pay and holiday pay. It was agreed that I should make an order on the holiday pay and outstanding wages. Also, there is an issue on the factual background and lawfulness of an arrangement for the payment of extra hours used to off set any hours not worked on rainy days and this is not an issue for determination.

## Issues

[3] What were the circumstances in which Mr Allen's employment ended? Was there sufficient reason for Mr Allen to reasonably reach a conclusion and understand that he had been dismissed?

Also factual findings are required in regard to:

- What days fell on 15, 16, 17 18, 19 and 20 May 2007 and what happened on these dates?
- What did Mr Les Spellacey, a director of the company say to lead Mr Allen to understand he was dismissed, and when did the conversation occur?
- Did Mr Spellacey and Ms Fox, also a director of the company deliberately and wilfully try to cover their tracks on what happened to make it look like Mr Allen resigned or abandoned his employment?
- What wages and holiday pay are due to Mr Allen?
- Did Mr Allen get an employment agreement and did he see the "health and safety agreement" and manual?

[4] I put the parties on notice that under s 122 of the Act the nature of a personal grievance may be found to be a different type from that alleged and I pointed out that there may be an unjustified action in the way in which Mr Spellacey sent Mr Allen home, and Mr Allen had been disadvantaged where his employment became less secure and he had not been paid, instead of a claim for unjustified dismissal.

## The Facts and Findings

[5] Mr Allen started work with HMA Limited (HMA) on 2 April 2007. HMA is an earth moving business. Mr Allen was employed to work 40 hours per week. He was paid \$12 per hour for the hours worked. It was Mr Allen's responsibility to hand in his time sheets for his pay to be calculated. HMA has produced an employment agreement and a health and safety policy that it says were given to Mr Allen, but Mr Allen denied seeing them. However, Mr Allen did recall seeing a written offer of employment but says it was not signed.

[6] Les Spellacey and Karen Fox work in the business: Mr Spellacey supervises on the job and Ms Fox carries out the administrative affairs of the business.

[7] Mr Allen told me that he enjoyed his work but became concerned about the way Mr Spellacey treated him during his employment. For example, Mr Allen says Mr Spellacey told him to dig a hole that was over his height in depth without any shoring and Mr Spellacey stomped on the side of the hole causing it to collapse on him. He told me that three people had to dig him out when he was covered up to his waist in material. Mr Spellacey denied this and says the trench fell away when he returned to check the work, and the dirt fell in, and covered their legs, and they got themselves out and brushed off the dirt from their pants.

[8] Also, Mr Allen says that Mr Spellacey picked on him for things that went wrong, despite him not being involved. He says that he was abused by Mr Spellacey when he refused to carry work material in his private vehicle. Mr Spellacey denied this claim and says that they treated Mr Allen well including lending him the company's station wagon when his own car was off the road until 14 May when he returned to using his own car to and from work sites, despite the company providing transport for this purpose. He says Mr Allen was asked once to carry a concrete saw and he was paid for that.

[9] Mr Allen says Mr Spellacey abused him for refusing to carry work material in his private car and called him a "*fuck wit*" and that he was "*fucking useless*" and questioned "*why didn't [Mr Allen] fuck off and not come back until [he] had reflected on [his] position with the company*". Mr Allen says Mr Spellacey was yelling at him and Mr Allen considered that he had been "*sacked*". Mr Spellacey denied these allegations and informed me that he considered Mr Allen performed well enough at work until 16 May when he turned up to work lacking focus and concentration that affected his usual standards of competency and ability. Prior to this time he had not received any complaints from Mr Allen. Mr Spellacey says that Mr Allen had forgotten some basic operations about carefully driving the truck that morning and tipping building mix without concentrating and potentially causing a safety issue. He says there were some difficulties with Mr Allen and transport between work sites because he used his own car (having brought his own car to work that day) and Mr Allen had not made arrangements to enable a truck to be parked off the road as he had been requested.

[10] Mr Spellacey says he told Mr Allen to "*knock off and go home and reflect on the day as I can't have another day like this*". Mr Spellacey told me that Mr Allen had a bad day and that he (Mr Spellacey) was frustrated to find Mr Allen had not carried out the instruction to clear and arrange the cars to enable the truck to be parked off the road and on the job site. He denied abusing and swearing at Mr Allen.

[11] Mr Allen has not been able to establish that he was sent home early for refusing to take his own car in to town on Tuesday 15 May and told not to come to work on Wednesday 16 May (SOP). Mr Allen was at work on 16 May and other witnesses confirmed that date. Ms Fox says that on 16 May Mr Allen was sitting in his car when she arrived back at the work site around 3.00pm and they exchanged a “thumbs up” gesture and she says she thought every thing was OK. Mr Allen’s mother, Mrs Ruth Allen confirmed going to help Mr Allen on 16 May because he had run out of petrol and she says she met him at the bottom of the Belmont Hill on the motorway. Mrs Allen and Applicant’s father, Mr Steve Allen suggested Mr Allen had used all the petrol he had put in the car the night before, implying that he used it to carry out errands for the company. There was no evidence produced to conclude what the reasons were as to why he had run out of petrol, especially given that Mr Allen was confused about the date he says he was required to carry out errands. Also there was no evidence to refute Ms Fox’s evidence that she and Mr Allen had exchanged “thumbs up” around 3.00pm while he was sitting in his car and when she had arrived back at work and before Mrs Allen came to Mr Allen’s aide with the petrol.

[12] Mr Allen says that he told his mother and father about what he says happened with Mr Spellacey. Mr Allen says he followed his parents’ advice and telephoned Karen Fox to find out what his position was and he says she told him “*not to come back as Les was not happy with [him] and there would be a meeting held*”. She denied making the comment “*not to come back*”. In any event I hold that that comment has to be read in context and likely to have been confused with another telephone call later. No arrangements were made for a meeting at that stage.

[13] Ms Fox and Mr Spellacey say that Mr Allen telephoned them on 16 May and asked what was happening and where they would be working the next day. The telephone call did take place on 16 May. Ms Fox says she told Mr Allen to go to the same job site at Belmont to start at 7.30 am. Ms Fox says she asked Mr Allen for his timesheet because she needed it to complete that week’s pay. Mr Allen denied being asked for his time sheet and where to go to work. He did not return to work on 17 and 18 May.

[14] I prefer Ms Fox’s evidence because she was consistent about days and dates of different events, her notes were taken at the time and because she and Mr Spellacey followed up a telephone call she made to Mr Allen on 19 May with a visit to Mr Allen’s house on 20 May.

[15] Mr Allen says he received a telephone call on 18 May at home around tea time from Ms Fox who queried what he was going to do and why he was not working. He says he told her he would ring her back, but did not do so. In the meantime he had obtained representation and because his representative was dealing with the matter decided not to ring back on the advice of his parents.

[16] Mr Spellacey and Ms Fox say they rang Mr Allen on Saturday 19 May around tea time. I accept that it is more than likely this telephone call that Mr Allen referred to was on 19 May because Mr Allen had not turned up for work on the previous two days and Mr Spellacey and Ms Fox had not heard from him. Mr Allen's mother confirmed the date was 19 May 2007, also. It is common ground amongst the witnesses, other than Mr Allen that the call occurred on the Saturday 19 May. Mr Allen could not recall which day it was and he was wrong about the date.

[17] Mr Allen says that Mr Spellacey and Ms Fox arrived unannounced on 19 May at his house and 'loudly banged' on his front door. It was common ground amongst the witnesses, except for Mr Allen, that the visit was on the Sunday 20 May.

[18] Ms Fox wrote her notes quickly after the events. They are as a result more reliable compared with Mr Allen's evidence where he was relying on his memory and information put in notes by his parents for him and written much later without much detail. She was also certain and consistent about what days and the dates were involved. Mr Spellacey, although he accepted he was not much good at remembering dates had sufficiently detailed them in his statement and the statement in reply for me to accept his evidence as being more reliable than Mr Allen's about the days and the dates of the events which he referred to. This contrasts with Mr Allen, who was not very good at remembering the days and dates and had not made any effort to try and piece together the days and dates he related the events to.

[19] There are a lot of differences between the parties on what was said during the visit of 20 May. Mr Allen says Mr Spellacey said that he had resigned and says it was Mr Spellacey who asked why he had got his representative involved and referred to the representative by name. The Allens concluded that Mr Spellacey and Ms Fox must have received Mr Allen's representative's letter. Mr Allen says he denied resigning and saying his representative was taking his personal grievance. This conflicted with Mr Allen's written evidence where he told me he had referred by name to his representative, said he had not resigned and that his representative was taking a personal grievance (paragraph 17). He says he asked why he had not been paid and they said he had not given in his time sheet.

[20] Mr Spellacey and Ms Fox say Mr Allen was asked if he wanted the job with HMA. They say Mr Allen informed them that he would not be returning to work and that he had a new job to start on Monday 21 May; so they accepted this as a resignation. Mr Allen denied telling them he had another job and was to start on Monday. He also denied resigning saying that that was what Mr Spellacey wanted him to accept. Mr Allen says he had registered for employment with an agency. He says he did not start work in a new job until about two weeks later so he would not have said that he was not returning to work and had a new job starting on Monday. Mr Spellacey and Ms Fox could not contradict this, but Mr Allen had no details of his actual start date in any new job and he raised this for the first time at the Authority's investigation.

[21] Mr Allen's parents say they heard and saw what happened during the visit and supported Mr Allen. However, given that there were no independent witnesses I have preferred Mr Spellacey's and Ms Fox's evidence because:

- Mr Allen has never previously raised his complaints and allegations about Mr Spellacey's conduct and behaviour before providing his statement of evidence in the Authority's investigation.
- There are differences in the Allens' documents, statements and the statement of problem. Tellingly the first notes prepared make no reference to any belief by Mr Allen that he had been dismissed and the reasoning for being sent home is different to the allegations made in his written statement.
- Mr Allen's recollection of events was affected by his failure to remember precisely the dates, times and days of events without making an effort before the Authority's investigation meeting to piece together the information. Ordinarily if these were just typographical errors or omissions nothing would turn on it. However, I consider it significant in this case because the days and dates are significantly tied to the events.
- There was no corroborating evidence from Mr Allen other than what Mr Allen says he told his parents, who did not in the initial paperwork corroborate that there was any swearing and abuse, and did not include the days and dates involved. They never heard the alleged comments Mr Allen says Mr Spellacey made.

- Mr Allen has included in his evidence the reference to the word “*reflecting*” that Mr Spellacey says he used to get Mr Allen to think about what he was doing. It is therefore more than likely Mr Allen was sent home early to “*reflect*” on his work and what he was doing because of the problems that arose on 16 May. That is also consistent with Mr Allen being told there would be a meeting later, which there is common ground on, even although it was not arranged. It follows that Ms Fox probably also told Mr Allen this during her telephone conversation with him. The Allens’ notes are consistent with this evidence because they refer to Ms Fox saying: “*they would have to talk to him about his job*”, “*not to come back until things were talked around*”, “*not to come back until they had arranged a meeting on his position at work*”, and a reference to Ms Fox asking Mr Allen “*when he was coming back to work*”. There is also a reference that Mr Allen was told “*to go home and think about his position*”.
- No one else has given any evidence that they heard the alleged comments that Mr Allen says involved him considering he thought he had been “*sacked*”, that he was allegedly told “*not to come to work*” and that there “*was no work for him*”. It is probable that Ms Fox’s telephone call was to reinforce that he had to reflect on what he wanted and not that he was not to return to work to end his employment.
- I am also supported in my conclusion by a question that Mr Spellacey says he put to Mr Allen on 20 May on whether or not he wanted his job with HMA. It is probable that at least in Mr Spellacey’s and Ms Fox’s minds Mr Allen was asked to take time to decide what he wanted to do that related to Mr Spellacey’s frustration with Mr Allen on 16 May.
- There were attempts made by Ms Fox to contact Mr Allen on 19 and 20 May.
- Mr Spellacey and Ms Fox tried to follow up Mr Allen’s non attendance at work, which supports Ms Fox’s evidence of what was said by her during that telephone call. Both sides say they tried to make other attempts to telephone each other but there have been no records produced of any such other attempts.
- By 20 May, it was probable Mr Spellacey and Ms Fox did not know that Mr Allen’s representative had written to them because they say they received his letter dated 18

May on 21 May. The Allens were not able to refute this, or prove that Mr Spellacey and Ms Fox had received Mr Allen's representative's letter earlier than 21 May. Mr Spellacey and Ms Fox probably did not know that Mr Allen had engaged a representative to raise a grievance for a dismissal before their visit and until someone amongst the Allens must have raised it, if Ms Fox and Mr Spellacey had not received the letter. By this stage Mr Allen probably believed he had been dismissed, because he had been to see his representative and I am supported by his representative's letter dated 18 May saying he had been dismissed and that a grievance for \$5,000 was being pursued.

- The order of the events that occurred on 16 May supports my conclusion that it is less than probable that Mr Allen was sworn at when he was sent home, despite it being submitted the work place was robust, which I am not in a position to fully gauge given that Messrs Mathew Allen and Les Spellacey disagreed about the level of swearing at work. Even if I am wrong any such swearing and being told to *"knock off and go home and reflect on the day as I can't have another day like this"* were not enough for Mr Allen to conclude or understand he was being dismissed. Indeed his own references to what was said make it more likely he was being sent home: for example to *"...not come back until [he] had reflected on [his] position with the company"*.
- There was never any issue of any significant or major performance problems prior to 16 May to cause Mr Spellacey to dismiss Mr Allen. They seemed to have got on well and Mr Allen was loaned the company's station wagon when his own car was off the road and he had permission to possess an engine and trailer owned by Mr Spellacey.

[22] The evidence falls short of proving that Mr Spellacey and Ms Fox purposefully tried to get Mr Allen to say that he had resigned or that they were covering their tracks. It is open to conclude that they considered Mr Allen had decided not to return, whether or not he had another job. The reference by them to his resignation was incorrect in my opinion because Mr Allen denied resigning and there is no evidence of him actually doing so.

[23] The employer should have been given the opportunity to respond and try and work out the facts as Ms Fox wanted. It would have been reasonable to expect a meeting to have been organised

and allowed to occur before Mr Allen pursued a personal grievance and any allegations should have been put in the letters that preceded the statement of problem. It may well be that by Friday 18 May Mr Allen's real gripe was that he had not been paid when there was an outstanding issue on his timesheet and an issue that neither party covered on whether or not Mr Allen would be paid waiting for Mr Spellacey to be available to meet him.

[24] Mr Allen also says he tried to get his pay. He says he is owed his last week's wages and holiday pay. Since 17 May Mr Allen has not been paid.

### **Determination**

**What were the circumstances in which Mr Allen's employment ended? Was he dismissed?**

[25] It is my finding that Mr Spellacey's and Ms Fox's evidence was more reliable than Mr Allen's evidence. I have preferred their evidence as to the events on Tuesday 15, Wednesday 16, Thursday 17, Friday 18, Saturday 19 and Sunday 20 May. Mr Allen has not satisfied me that he was dismissed. It was probable he decided not to return to work upon getting advice that he had a personal grievance and had a gripe about not being paid and decided to look for other work.

### **Other matters**

[26] Also I have taken into account the existence of an employment agreement and health and safety policy produced and relied upon by the Respondent. These contain detail of employment relationship problem procedures and disciplinary procedures a good employer would have been expected to follow, including being proactive on the use of mediation. In that context a good employer would have prearranged a meeting to deal with the matter as it suggested it would and would not resist mediation. Mr Allen denied having seen these documents.

[27] There are also other matters that have come up involving a missing diary that Mr Allen says he returned in a folder he had been given, including his time sheets, and had tax taken out of his pay when the employer was still supposedly waiting on his tax number. I heard the evidence that Mr Allen gave his tax number that was consistent with the informal way he was appointed. He denied seeing a document requesting him to return the various documents that he denied receiving. Also,

the employer failed to provide wage and time records as requested by Mr Allen's representative and provided no adequate reason.

[28] Whether or not Mr Allen obtained an employment agreement and health and safety policy and what happened to the diary and timesheets remains unexplained. Given the parties differences over these matters and the employer's failure to provide the wage and time record I have not been able to find anything that would cause me to change my findings.

### **Nature of Personal Grievance may be Found to be Different Type from that Alleged**

[29] Mr Spellacey's way of dealing with sending Mr Allen home early was unjustified because Mr Spellacey was frustrated and it was without consultation, unilaterally decided and Mr Allen had no input but to accept it. Mr Allen could hardly be expected to know what Mr Spellacey wanted and the reasons for being sent home where Mr Spellacey was frustrated with Mr Allen. Mr Spellacey's handling of the situation was not adequate, I hold. I am supported by his failure to have a plan and organisation for the meeting he wanted to have later. The situation clearly also put Mr Allen's security of employment at risk and he was not subsequently paid. Mr Spellacey's action was tantamount to a suspension without pay. This gives rise to a personal grievance for unjustified action and disadvantage.

### **Failure to pay wages and holiday pay**

[30] HMA failed to pay wages and holiday pay. The failure to pay wages and holiday pay was unlawful. It was also unhelpful not to have provided the wage and time record until these proceedings. Ms Fox and Mr Spellacey attempted to show me that their failure to pay the wages and holiday pay was genuine as they say they had a problem over completing the week's wages when Mr Allen had failed to hand in his time sheet. Also they say they had feelings about the grievance being raised with a threatening claim for \$5,000 or be taken to mediation from Mr Allen's representative for a personal grievance. They say all they wanted to do was to get details of the allegations being made by Mr Allen and his timesheet to help them determine the facts, particularly by Ms Fox who had not been directly involved at the work place with Mr Spellacey's decision. Whatever happened to the timesheet remains unexplained. While Ms Fox's and Mr Spellacey's evidence explains why no payment has been paid, it does not excuse such an omission, especially where an estimate had been calculated upon which a payment could have been made.

[31] The calculation has been made on an estimate of Mr Allen's hours that he accepted during the Authority's investigation meeting was fair. The amount Ms Fox estimated and calculated is \$661.13 nett of tax for wages and holiday pay with tax to be paid by the employer. Mr Allen accepted the sum seemed fair and had no evidence that the estimate on his hours was incorrect.

### **Orders of the Authority**

[32] The Applicant's claim for an actual dismissal has not been successful, but what I have found is that the nature of the grievance is different to that alleged (applying s 122 of the Employment Relations Act), which I raised during the investigation meeting.

[33] The decision by Mr Spellacey to send Mr Allen home early without making arrangements for a meeting over the issues he had with Mr Allen was unjustified and disadvantaged Mr Allen causing him uncertainty in his employment and he was not paid.

[34] There was no claim made for lost wages. The claim for compensation was modest. However, Mr Allen's evidence including from his parents was too general to establish his claim. Mr Allen told me that there was a financial impact on him but produced no records to substantiate his claims. He clearly was able to make a decision to move on and look for other work. I must consider any contribution on Mr Allen's part. He cannot be blamed and said to have contributed to Mr Spellacey's decision to send him home. Mr Spellacey as the employer had the responsibility to find other ways to deal with his concerns and not get frustrated.

[35] On the other hand, considering that I preferred Mr Spellacey's evidence that he sent Mr Allen home to reflect on his situation Mr Allen did not help the situation by instructing his representative to write to his employer pursuing a personal grievance for a monetary remedy when the real issue was to sort out what had happened and explore the best practice for the employer to follow if there were performance difficulties.

[36] I grant Mr Allen that when he was told to stay away until a meeting was arranged he had every reason to believe that his employment was less secure. A more informal, but constructive approach using his representative before needing to write a letter seeking compensation might have assisted to help determine what was at issue in the employment relationship and resolve it earlier and amicably without leaving it open to the employer to reasonably believe it was being threatened to pay out compensation.

[37] I have decided to resolve the matter by making an order on the agreement reached on the sum of wages and holiday pay to be paid and awarding a sum for costs. This is not a matter for compensation because I have not been satisfied that there was any impact on Mr Allen to compensate him.

[38] The Applicant is owed \$661.13 nett wages and holiday pay. HMA Limited is required to pay Mathew Allen the sum of \$661.13 nett wages and holiday pay (the tax has been calculated separately and should be paid in addition to the above sum by the employer). Mr Allen was represented during the investigation. He has been successful and needed an investigation to get his lawful entitlement to holiday pay and wages. He was put to unnecessary cost to do that. Reasonable costs for Mr Allen's representation for a 6 hour investigation meeting and preparation would amount to \$1,485: (\$150 per hour times 6 hours for attendance and multiplied by 1.65 for preparation). A contribution to these costs would be 66% of reasonable costs. HMA Limited is to pay \$980 contribution to Mr Allen's reasonable costs and the filing fee of \$70.

[39] HMA Limited is to pay Mr Mathew Allen:

\$661.13 nett wages and holiday pay

\$980 costs and \$70 filing fee

P R Stapp  
Member of the Employment Relations Authority