

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 185
5568614

BETWEEN ANTHONY BOND and
STUGGIE McPHAIL
Applicants

A N D LFH CONSTRUCTION
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Mike Harrison, Advocate for Applicants
Semisi Ngauamo, Advocate for Respondent

Investigation Meeting: 26 July 2016 at Christchurch

Submissions Received: Orally from both parties at the investigation meeting

Date of Determination: 11 October 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Bond and Mr McPhail were not unjustifiably dismissed from their employment.**
- B. LFH Construction Limited does not owe Mr Bond or Mr McPhail any wage arrears for days worked, holiday pay or payment for any notice period.**
- C. Costs are reserved with a timetable for submissions if required.**

Employment relationship problem

[1] The applicants, Mr Bond and Mr McPhail, complain that the respondent, LFH Construction Limited (LFH), unjustifiably dismissed them from their employment. They both say this dismissal arose because they questioned the terms of employment presented to them in a draft employment agreement after they had commenced work.

They say because they questioned the terms of employment, Mr Ngauamo of LFH, responded by telling them not to bother signing the agreement as their employment was over.

[2] In addition to compensation and reimbursement for the alleged unjustified dismissal, Mr Bond and Mr McPhail seek payment of holiday pay, wage arrears for work completed for which they were not paid and a payment for one week's notice that they say they were entitled to.

[3] LFH simply says it did not dismiss Mr Bond or Mr McPhail. Rather, it says, both Mr Bond and Mr McPhail resigned because it had failed to pay them their wages for their first week of work. Mr Ngauamo denies dismissing Mr Bond and Mr McPhail.

The issues

[4] The first issue for any personal grievance for unjustified dismissal is, was there a dismissal? The onus of proving a dismissal rests with the employee.

[5] If there was a dismissal then the second issue is, can the employer justify the dismissal? The onus of proving that a dismissal was justified rests with the employer.

[6] What is clear to me from the evidence is that this matter does not turn on any legal issues but is a straightforward evidential dispute. On one version of events, LFH dismissed Mr Bond and Mr McPhail and on the other version of events, Mr Bond and Mr McPhail resigned from LFH. If LFH dismissed Mr Bond and Mr McPhail as alleged, there is no justification for the dismissal and therefore a finding that it was unjustified will necessarily follow.

[7] Therefore, this is one of those cases where my determination turns solely on an assessment of the evidence and in particular, an assessment of credibility of the witnesses so I can establish which version of events occurred.

Facts giving rise to the alleged unjustified dismissal

[8] The parties agree on very little in terms of what occurred. Initially even the basic premise that Mr Bond and Mr McPhail were employees was not accepted by LFH. In addition, Mr Bond and Mr McPhail did not accept that they were casual employees and had been paid holiday pay incorporated as part of the hourly wage.

[9] In the course of questioning in the investigation meeting these two fundamental points were resolved thus narrowing the issues for determination.

[10] The facts that were agreed in evidence are:

- a. LFH employed Mr Bond and Mr McPhail as casual employees. They were paid \$20.00 per hour and this included the 8% uplift for holiday pay in the hourly rate as their employment status was casual;
- b. Mr Bond was employed as a supervisor and Mr McPhail was employed as a labourer. They were both employed to work on a construction project that LFH had been engaged to provide labour hire services for;
- c. Whilst their employment was casual, Mr Bond and Mr McPhail were employed to work full time five days per week and were told that their employment would last the extent of the construction project, which LFH estimated to be a few months;
- d. Both Mr Bond and Mr McPhail commenced work on 29 June 2015¹;
- e. Both Mr Bond and Mr McPhail worked five days in the first week of their employment and recorded 42 hours of work;
- f. Both Mr Bond and Mr McPhail were to be paid for their first week's work on the following Wednesday, 8 July 2015;
- g. LFH did not provide Mr Bond and Mr McPhail with written employment agreements prior to the commencement of their employment and only provided a draft employment agreement for them to consider when the Site Supervisor for the company running the construction project queried whether they had employment agreements;
- h. Mr Bond and Mr McPhail were unhappy with the draft employment agreements, as they did not record the agreed hourly rate of \$20.00.

¹ I note that in the course of questioning Mr Bond suggested that he and Mr McPhail may have started a week earlier based on the time sheets produced but he was not sure of this and there was no other evidence to support the suggestion.

[11] The parties differ on a number of events including how many weeks Mr Bond and Mr McPhail actually worked, the day on which the key events occurred (which I will outline further below) and then of course the outcome of the key events, that is, whether Mr Bond and Mr McPhail resigned or LFH terminated their employment.

[12] Of the factual matters in dispute, Mr Bond and Mr McPhail state in their written witness evidence:

- a. They had both worked for two weeks without receiving payment from LFH;
- b. It was in the third week of their employment, that is the week commencing 13 July 2015, that matters came to a head;
- c. During this week, Mr Bond and Mr McPhail were approached by the Site Supervisor for the company managing the construction project and told that unless they had valid employment agreements they would not be allowed to work on site. They understood that the Site Supervisor then discussed the issue of employment agreements with LFH. Following this, Mr Bond and Mr McPhail were given draft employment agreements;
- d. Mr Bond and Mr McPhail were unhappy with the draft employment agreements specifically because the draft agreements did not record the hourly rate of pay which had been agreed at \$20.00;
- e. They both approached Mr Ngauamo of LFH and requested that he amend the draft employment agreements to put in the rate of pay and then they would be happy to sign the employment agreements;
- f. On 16 July 2015 at 11am, Mr Ngauamo came to Mr Bond and Mr McPhail and paid them for their first week of work. Once he had given them their money he said *“don’t worry about signing the agreement because it is over”*;
- g. Both Mr Bond and Mr McPhail took this to mean that they had been dismissed but state that they still waited the following day to be

collected for work but Mr Ngauamo did not arrive to collect them at the usual place and at the usual time;

- h. They both deny resigning from LFH.

[13] Mr Ngauamo of LFH says:

- a. He accepts that LFH did not have written employment agreements for Mr Bond and Mr McPhail but he dealt with this when the issue was raised by the Site Supervisor;
- b. LFH hired both Mr Bond and Mr McPhail because it had obtained the work on the construction project and Mr Ngauamo knew that that would be a few months' work. However, LFH only hired Mr Bond and Mr McPhail as casual employees as it could not guarantee that work depending on how long the construction project would last;
- c. Mr Ngauamo was initially confused in his witness evidence as to the dates when events occurred but confirmed in oral evidence that Mr Bond and Mr McPhail commenced work on 29 June 2015. They worked one week which equated to 42 hours and were due to be paid the following Wednesday, 8 July 2015;
- d. On Wednesday, 8 July 2015, Mr Ngauamo checked the LFH business account and found that LFH had not been paid by the construction company and therefore there were insufficient funds to pay the employees;
- e. When Mr Ngauamo advised Mr Bond and Mr McPhail that they would not be paid that day they became very angry and swore at him. He was very clear that they told him that they were finishing work and would not come back. They threatened to take him to the Employment Tribunal;
- f. Mr Ngauamo asked Mr McPhail about attending a Site Safe training course that he was due to attend the following day. Mr McPhail said

not to worry about it he was not coming back and confirmed he was leaving and looking for another job;

- g. Mr Ngauamo also said that Mr Bond and Mr McPhail told him that they could get other work working for Mr Bond's brother, for which they would be paid cash, and that they were going to do that;
- h. Mr Ngauamo then drove both Mr Bond and Mr McPhail home (as they did not have transport at the construction site). Rather than dropping Mr Bond and Mr McPhail to their respective homes they asked to be dropped off at their local MP's office and he understood they were going there to seek assistance to be paid for the work they had done.

Credibility

[14] In order to resolve the conflicting evidence and determine the events that occurred on the balance of probabilities, I must consider the credibility of the three witnesses, Mr Bond, Mr McPhail and Mr Ngauamo.

[15] I am reminded of the factors that may be relevant in the assessment of credibility by a decision of Judge Harding in the District Court in *R v Biddle*² that was cited with approval on appeal to the High Court³.

[16] In order to assess the credibility of the witnesses in this matter I have considered the following:

- a. What each witness said – reviewing how each witness expressed his evidence both orally and in writing, considering what was said and how the witness said it.
- b. Consistency – looking at whether the witness's evidence was consistent throughout; and whether the witness's evidence was consistent with other evidence such as contemporaneous documents or agreed or known facts.

² [2015] NZDC 8992

³ *Biddle v R* [2015] NZHC 2673 at [21]

- c. Reliability – considering whether the witness appears reliable and was accurate in his perceptions and recall of events.
- d. Concessions – looking at whether the witness made appropriate concessions.
- e. How plausible – asking, overall, how reasonable, plausible or probable the witness’s evidence was; and whether the witness’s evidence hangs together and has a degree of truth or is persuasive.
- f. Demeanour – considering the witness’s bearing, appearance and attitude but noting that this is limited as genuine witnesses may be mistaken in their memory and those who do not tell the truth can still be convincing, i.e. looks can be deceiving.

Mr Bond and Mr McPhail’s evidence

What each witness said

[17] Both Mr Bond and Mr McPhail lodged witness statements with the Authority dated 22 June 2016. Mr Bond’s statement is 24 paragraphs long and Mr McPhail’s is 25 paragraphs long. The two witness statements are in essence identical for 24 paragraphs. The only changes are references to the individuals, so that each refers to themselves and the other, rather than having any differences in the description of events. The one additional paragraph in Mr McPhail’s statement refers to contact he had had with Mr Ngauamo’s family in January 2016.

[18] The witness statements also include language which I am satisfied is not the language that either Mr Bond or Mr McPhail would use so, for example, in paragraph 16 of both statements, Mr Bond and Mr McPhail state (emphasis added):

... a personal grievance letter on my behalf dated 28 July 2015 declaring, *inter alia*, that the termination of my employment amounted to an unjustified dismissal.

[19] Both witness statements record limited information regarding the impact of the alleged dismissal on the individuals. There is one paragraph in each statement addressing this and they are identical. Both Mr Bond and Mr McPhail state:

To be treated in this manner and punished for insisting on an employment agreement, recording my wage rate, which is something which has been very difficult to accept. It was very difficult to explain to my friends and family when I had to inform them that I no longer had employment.

[20] It is simply implausible and not credible that both Mr Bond and Mr McPhail expressed their views in this matter in identical terms, particularly in relation to the impact that the alleged dismissal had on them. It is logical that they would have referred to some of the events that occurred in similar terms, and in fact, this should be the case. However, it seems to me that the language is too precise and replicated to such an extent that it suggests the statements do not reflect each witness's actual recollection of events that occurred but have been formulated to fit a story that supports the claim.

[21] I am assisted in this conclusion by the fact that Mr McPhail, when questioned about particular parts of his witness statement, changed his evidence significantly. As an example, in paragraph 13 of his statement Mr McPhail says:

On the 16 July 2015 at 11am my employer, [Mr Ngauamo], came to Anthony and I with our pay for the previous week. He gave us the money and said, "Don't worry about signing the agreement because it is over."

[22] In answer to questions from me about this incident, Mr McPhail said that Mr Ngauamo came to see him on Thursday evening, which is the evening of 16 July 2015 rather than the morning at work. He said that Mr Ngauamo came to his house to pay him and when he arrived, he asked him for the amended employment agreement (which he described as a contract). Mr McPhail said that Mr Ngauamo's response to him was "*don't worry for working*".

Consistency

[23] The contemporaneous documents do not support some of their assertions in the evidence of Mr Bond and Mr McPhail. For example, both Mr Bond and Mr McPhail say that they commenced work on 29 June 2015 and worked some 2½ weeks. However, LFH produced weekly timesheets and payslips that show both Mr Bond and Mr McPhail only worked one week and three days. That is, they worked from 29 June 2015 until Wednesday, 8 July 2015. Both Mr Bond and

Mr McPhail have signed the timesheets and these days are consistent with the subsequent payslips identifying the payments made to them.

[24] When I put this inconsistency in their written evidence against the contemporaneous documents to Mr Bond, he did not accept that he was mistaken and nor did he concede that he may be incorrect in claiming that he worked for 2½ weeks. He was adamant there was an additional week and suggested that it may have been before 29 June 2015. This is inconsistent with his written evidence and inconsistent with the contemporaneous documents as there is no timesheet from LFH which indicates this.

[25] The written statements of Mr Bond and Mr McPhail are also inconsistent with accepted facts. For example, all three witnesses accepted that the terms of their employment included that they would work one week and then be paid on the following Wednesday. Therefore, in this instance, Mr Bond and Mr McPhail worked the week commencing 29 June 2015 and should have been paid on 8 July 2015. Mr Bond and Mr McPhail say in their written evidence that they worked two weeks and were due to be paid on Thursday, 16 July 2015.

[26] Not only is this inconsistent with what they accepted were the terms of their employment it is inconsistent with 8 July 2015 being the last day of work for Mr Bond and Mr McPhail, which is recorded in the signed timesheets.

[27] The number of weeks worked and the date on which the key events occurred is pivotal to my analysis of the evidence. The fact that Mr Bond and Mr McPhail's evidence does not reconcile with the contemporaneous documents or the agreed evidence is significantly influential on my assessment of credibility.

Concessions

[28] Mr Bond did not make any concessions particularly in light of the inconsistencies in his evidence compared to the contemporaneous documents. His insistence on trying to explain the inconsistency with an improbable explanation, that both he and Mr McPhail had actually started a week earlier, reflects badly on his credibility.

[29] Mr McPhail conceded a number of matters in oral evidence including that he had discussed the pending Site Safe training course with Mr Ngauamo. Mr McPhail's

concession was appropriate and gave some credibility to his oral evidence. Overall, I was more persuaded by Mr McPhail's oral evidence than his written evidence.

Reliability of witness

[30] The advocate for Mr Bond and Mr McPhail attempted to confirm Mr Bond's view of the dates worked and the key event in re-examination. He did so by a series of quite precise leading questions that I allowed. All this did was confirm to me a view that Mr Bond was not genuinely recalling what occurred but rather he was reciting what he wanted to be able to say had occurred as that fitted the claim being made.

[31] It is also clear that Mr Bond and Mr McPhail left out relevant evidence in their written statements that became apparent in my questioning and through cross-examination by Mr Ngauamo. So for example, they failed to advise that Mr Ngauamo took them home on the afternoon of their last day of work and they asked to be dropped off at their MP's office so they could make inquiries about receiving payment for the work they had done. Neither of the witnesses mentioned the discussion around Mr McPhail attending the Site Safe course in their witness statements yet when questioned Mr McPhail admitted that this was discussed and he told Mr Ngauamo that he would not attend the course.

[32] There is inconsistency here as well. Based on Mr McPhail and Mr Ngauamo's evidence the discussion about attending the Site Safe training course took place on the last day of work. Yet, based on Mr McPhail's oral evidence Mr Ngauamo had not told him, at that point, that he had been dismissed. There was no reason why Mr Ngauamo would have asked about the Site Safe course and no reason why Mr McPhail would not be attending the Site Safe course unless there had been an earlier discussion about either termination of employment by Mr Ngauamo or resignation by Mr McPhail.

[33] Because of the leading questions and the selective nature of Mr Bond and Mr McPhail's account of events, I have serious doubts about whether their evidence comes from genuine recall of events and therefore serious doubts about its reliability.

How plausible is the witness's story

[34] The overall position of Mr Bond and Mr McPhail is that Mr Ngauamo dismissed them because they queried the inclusion of an agreed term in the employment agreements. This does not seem like a probable event because all they were asking for was that the \$20.00 per hour rate be included in the agreement. This was an agreed rate, so Mr Ngauamo would have had no issue with it being in the employment agreement and it is not plausible that he would dismiss them because they asked for this.

[35] In addition, the suggestion that Mr Ngauamo dismissed them because of their request is inconsistent with Mr Ngauamo's uncontested evidence that he had offered Mr Bond and Mr McPhail (as well as other employees) work because he wanted to help people out. Mr Ngauamo's evidence was that he had previously employed Mr McPhail, who he knew through family, to undertake mussel-cleaning work and he wanted to give him an opportunity to earn more money in the off-season. This is why he offered Mr McPhail the labouring work. Again, it is not plausible that Mr Ngauamo would respond to a reasonable request to record the agreed wage rate by firing two employees who he was trying to help.

[36] I have also noted that Mr Bond and Mr McPhail's version of events is not supported by Mr McPhail's subsequent admission that he told Mr Ngauamo that he was not attending the Site Safe training course prior to Mr Ngauamo actually dismissing him. Not only is it inconsistent it means that the evidence does not hang together and the version of events is less plausible.

[37] I am also concerned that Mr Bond and Mr McPhail's evidence regarding the impact that the alleged dismissal had on them is identical in written form and very limited in oral form. There is also no supporting evidence from any family, friends nor is there any medical evidence to support the evidence that came out at the investigation meeting.

[38] Mr Bond's evidence, in the investigation meeting, is that he suffered from stress because of the alleged dismissal and subsequently went to the doctor to obtain medication. However, he waited some 10 months before he went to the doctor. He did not produce any medical evidence such as doctor's notes or a report to support his

contention that he was still suffering from stress, which required that medical intervention some 10 months after the alleged dismissal.

[39] Mr McPhail's evidence to supplement his written brief regarding the impact that the alleged dismissal had on him was that he no longer trusted people and was not able to find other employment as a result.

[40] In summary:

- a. The written evidence about the effect of the alleged dismissal is identical;
- b. This evidence is very limited;
- c. The subsequent oral evidence on this issue given in the investigation meeting is also brief;
- d. In respect of Mr Bond the additional evidence has no medical evidence to support it and on the face of it implausible in terms of the delay; and
- e. Overall, there is no other evidence from family or friends to support any effects on each of them of the alleged dismissal.

[41] This calls into question whether the witnesses suffered any effects of the alleged dismissal and therefore whether the dismissal occurred at all.

[42] Put simply, if there had been a dismissal and it had an effect as alleged then both witnesses would have been able to speak in terms that are more explicit about the impact on them. I expect that other people would have been able to describe the impact on them. And, I expect if Mr Bond suffered stress that required medical intervention he would have required that medical intervention more immediately and could have produced written evidence to support it.

[43] Given all of the above, Mr Bond and Mr McPhail's version of events is not reasonable, plausible or even probable, their evidence simply does not "hang together" and I do not find it to be overly compelling or persuasive.

Demeanour

[44] I have considered to a limited extent the demeanour of both Mr Bond and Mr McPhail in the investigation meeting. I note here that I found Mr Bond to be an engaging person who spoke well yet was in part too adamant about his recollection particularly where events he described were inconsistent with documents or with known facts.

[45] Mr McPhail on the other hand was more reticent and appeared to struggle with recalling events. He also became quite emotional when talking about the dismissal and the effect it had on him. I did not find this to be very credible - he started crying when I asked about the impact of the alleged dismissal on him yet he could not explain how he felt at the time.

Mr Ngauamo's evidence***What Mr Ngauamo said***

[46] Mr Ngauamo's use of language was poor, this is not a criticism just a reflection on the way he expressed himself. His statement was clearly in his own words and appeared more genuine as a result. He spoke in similar terms when questioned by me, adding to the overall credibility of his evidence.

Consistency

[47] There was the same major inconsistency in Mr Ngauamo's witness evidence regarding the date that the main events occurred. However, Mr Ngauamo accepted that his written statement was wrong. When I referred him to the relevant timesheets and payslips, he accepted that he had put the wrong dates in his witness statement and was adamant that the timesheets would be a correct reflection of the events. I believe his mistaken understanding was caused by the assertion by Mr Bond and Mr McPhail in the statement of problem as to the dates that they worked.

[48] Mr Ngauamo's evidence was also consistent with admissions he was able to obtain through cross-examination. So for example, he described Mr Bond and Mr McPhail as being angry when he told them that LFH could not pay them. When questioned about this, Mr Bond accepted he got angry when Mr Ngauamo told him he would not be paid.

Concessions

[49] Mr Ngauamo also made relevant concessions, not just about the inconsistency in his witness evidence that I have described, but also about what he had done wrong. So he accepted that he did not have employment agreements when Mr Bond and Mr McPhail commenced work and that when he provided them with a draft agreement he had not properly considered, he was simply more concerned with getting a draft agreement to them to look at. He accepted that that was a failing on his part and he wanted to fix that to the extent that after the alleged resignation by Mr Bond and Mr McPhail he approached them both to see if he could remedy or fix the situation.

Reliability

[50] Mr Ngauamo was quietly spoken but in my view, he was clear in his own mind and in his evidence as to what occurred in this matter. He identified relevant points that Mr Bond and Mr McPhail had failed to reference and made an effort to draw these out in cross-examination.

[51] So, for example, he explored with both Mr Bond and Mr McPhail the events that occurred in the drive from the construction site to the local MP's office and the conversation in particular around Mr McPhail not attending the Work Safe certificate course. His insistence on questioning on these matters and getting some concessions from both witnesses in respect of that suggested to me that he was adamant in his recollection of what occurred and wanted to ensure that I was aware of this, both because it was relevant and it showed that the two witnesses were not being clear in their evidence.

[52] I was persuaded by this and by his insistence with dealing with these two matters. It suggests to me that his recollection of events was more reliable.

How plausible is the LFH story

[53] Objectively it appears more likely that an employee would resign because an employer tells him it cannot pay him for work done. It seems less likely that an employer would dismiss an employee for asking for an agreed hourly rate to be recorded in the employment agreement.

[54] In this case, other agreed facts support the LFH version of events. For example, that Mr Bond and Mr McPhail were angry at not being paid, that they asked to be taken to their local MP's office in order to seek assistance with being paid for the work they had done and that Mr McPhail said he was not attending the Site Safe training course.

[55] It is also the case that the LFH version of events is consistent with the contemporaneous documents.

Demeanour

[56] As I have already described, Mr Ngauamo was quietly spoken but firm in the way in which he expressed his evidence. He appeared to be genuine in the manner in which he answered questions.

Conclusion on credibility

[57] Overall, when I assess the written witness evidence, the documentary evidence and what I was told in the investigation meeting I find that I prefer the evidence of Mr Ngauamo.

[58] As a result I am satisfied that Mr Bond and Mr McPhail resigned. I do not need to turn my mind whether LFH acted justifiably or not as there was no dismissal by LFH.

[59] I also find that Mr Bond and Mr McPhail worked one week and three days for which LFH paid them in full including any holiday pay. As they resigned without giving notice, they are not entitled to payment for one week's notice as they claim. There are no wage arrears owing.

[60] The final point I note is that it may have been that LFH acted unjustifiably to the disadvantage of both Mr Bond and Mr McPhail by failing to pay their wages due on 8 July 2015. This may have supported a claim for unjustified action causing disadvantage or for constructive dismissal. However, neither Mr Bond nor Mr McPhail raised grievances to this effect at any time. On this basis, I cannot consider claims of unjustified action causing disadvantage or constructive dismissal.

Determination

[61] In all the circumstances, I am satisfied that there was no dismissal and therefore no unjustified dismissal.

[62] As Mr Bond and Mr McPhail resigned they are not entitled to payment for one week notice.

[63] Mr Bond and Mr McPhail did not work the additional week alleged and are not owed wage arrears.

[64] Mr Bond and Mr McPhail were paid holiday pay included in their hourly wage and are not owed any additional amounts for accrued holiday pay.

Costs

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[66] If they are not able to do so and a determination of costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum. I will not consider any application for costs outside this timetable unless leave is sought and granted.

Peter van Keulen
Member of the Employment Relations Authority