

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE LOCATION OFFICE**

BETWEEN Andrew John Boost (Applicant)
AND Carbine Milk Limited (Respondent)
REPRESENTATIVES Andrew John Boost in person
John Murdoch, Advocate for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 23 March 2006
DATE OF DETERMINATION 28 March 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] From 29 March 2005 until early September 2005 Mr Boost was employed by the respondent to deliver milk products to retailers. He lodged this matter on 13 October 2005. In his statement of problem he said that he finished his job by giving and working one week's notice but that when he left he did not receive his final pay or holiday pay. In his written statement to me he claimed the following remedies:

- Holiday pay at 6% of net earnings less payment for two days leave which he acknowledges he took during the employment;
- Arrears of wages for one unpaid day of work being \$114.20 net.

[2] The director of the respondent company, Mr Paul Williams concedes that Mr Boost was not paid for his final day of work. He says that Mr Boost gave not the minimum one week's notice required by his employment agreement, but two. However he says that Mr Boost worked only one day of the second week of the notice period before abruptly abandoning his employment at great inconvenience to the respondent. Mr Williams claims that Mr Boost has forfeited payment for the final day worked pursuant to the following clause in the employment agreement:

“Termination of employment

One week's notice of termination of employment shall be given by either party or paid in lieu or forfeited, but this shall not affect the employer's right to dismiss you without notice for misconduct. If the required notice is not given by either party then one week's wages shall be paid or forfeited by the party improperly terminating the employment.”

- [3] Mr Williams also makes a counter claim against Mr Boost for the balance of that week's wages which he says is forfeit to him. As for the holiday pay claim, Mr Williams says that during his employment Mr Boost had taken, in advance, in excess of his entitlement to holiday pay. He says that he was owed nothing more upon termination.
- [4] The issues for determination are therefore whether arrears of wages and holiday pay are owed and/or whether Mr Boost forfeits a week's wages for failing to give notice. Since the credibility of the parties is critical in this case I begin with some comments about that issue before going on to set out what happened between Mr Boost and Mr Williams.

Credibility

- [5] Mr Boost has altered his position several times as a result, he told me, of his difficulty in recalling details of what took place six months ago. In his statement of problem he told me that he gave and worked a week's notice, but did not give the dates of his employment. In his further written statement (to which I have referred in paragraph [1]) he told me he gave notice on 26 August, finished on Tuesday 13 September (18 days notice) and was owed one day's wages. He also said he had taken two days leave during his employment.
- [6] At the beginning of my investigation meeting he said that after seeing Mr Williams's written statement he realised he had made a mistake about the date of his final day at work, and that it was in fact Tuesday 6 September. He said he was owed wages for that day. The wage and time records show that he was paid up to and including Friday 2 September, but also worked Monday 5 September, without payment. When I asked him to comment on this he said that he now believed he had actually worked both the Monday and the Tuesday and had not been paid for either day. Mr Williams disputes this, saying that Mr Boost did not come in to work at all on the Tuesday.
- [7] As for annual leave, the wage and time records show Mr Boost as having had not two but seven days during his employment. When I asked him to comment on this he agreed that he had had two further days in addition to the days he had previously mentioned (that is, four in all) but said he did not know when these were.
- [8] Overall, Mr Boost was a very confused witness. As I explained to him at the meeting, I cannot make findings in his favour in relation to matters about which he is not sure himself. For want of better evidence, I have relied heavily on the wage and time records. The wage book was presented at the investigation meeting and was a complete record of all the wages for the staff of the respondent (five people in all.) Mr Boost told me that he had never seen his records before and believed them to be a fabrication. (He was paid directly into his bank account and neither he nor any of the other employees had ever signed the book.) The entries for Mr Boost were set out in the same way, in the same hand, in the same book as for all the other employees. I have nothing except a suspicion on Mr Boost's part to suggest that these records are fabrications. I must accept that they were genuine and accurate.

What happened

- [9] Both parties agree that Mr Boost gave notice on Friday 26 August. Mr Boost now says he gave one week's notice and intended to finish on 2 September. However he says the following week he and Mr Williams varied this arrangement so that he would take Thursday 1 and Friday 2 September off, and work Monday 5 and Tuesday 6 to make up for this.

- [10] Mr Williams says when Mr Boost gave notice on 26 August he requested 1 and 2 September off as he was required at his new job on those days. Mr Williams says that he agreed on the basis that in return, Mr Boost would work right through until Friday 9 September. This termination date was feasible as Mr Boost was not due to start his new job until Monday 12 September (which was in fact when he did start.)
- [11] It is not in dispute that Mr Boost took off the Thursday and Friday, as planned, and worked the Monday. I have concluded on balance that I cannot accept that he worked the Tuesday as well. It is not consistent with the wage and time records nor with Mr Boost's original claim that he was owed one day's pay. I therefore proceed on the basis that the Monday was his final day of work.
- [12] On his last day of work, Mr Boost finished and left the premises as though it were any other day. He did not return his uniform, keys or swipe card, or mention anything to anyone about it being his final day. Later that night his supervisor, described to me only as Terry, called him with some details about the next day's deliveries. Mr Boost told Terry that he was not working the next day. Terry was surprised and told Mr Boost he was needed at work, however Mr Boost replied that he was not coming back. Mr Boost told me that at this stage he had simply had enough of the demands of the job with its early starts and long hours.
- [13] Although Terry did not give evidence, Mr Williams told me Terry had relayed this conversation to him in similar terms to those in which Mr Boost described it to me. Mr Williams told me that over the next few days he tried unsuccessfully to get Mr Boost by telephone and then sent him a text message asking him to return the keys, uniform and card. A week or two later Mr Boost came in to work when no-one was there and dropped these items off. He received no further payment from the respondent.
- [14] Mr Boost is adamant that he never agreed to work all of the week beginning 5 September, but only the first two days. Mr Williams is equally adamant that Mr Boost agreed to come in all of that week.

Arrears of Wages and Holiday Pay

- [15] I have already indicated that I have relied heavily on the wage and time records in coming to my determination. On that basis I have accepted that Mr Boost worked one day, Monday 5 September 2006, without payment. Subject to the question of forfeiture therefore one day's pay remains outstanding.
- [16] On the same basis I accept that he took seven days leave (excluding sick leave) during his employment. Since he was employed for only six months, this leave exceeds his statutory entitlements and there is no holiday pay outstanding.

Forfeiture

- [17] As the person with the most daily contact with Mr Boost, Terry was in a good position to know his plans. The fact and content of Terry's call (as described by Mr Boost himself) demonstrates a genuine belief by Terry that Mr Boost was to be working for the remainder of the week. This is consistent with what Mr Williams told me he believed he had agreed with Mr Boost. It is also consistent with the way Mr Boost left on his last day, without returning his things (which would have taken seconds) and without any final goodbye.

[18] Taking all these factors together I must conclude that Mr Boost did not convey to either Mr Williams or the supervisor, Terry, any intention to finish when he did. Given Mr Boost's behaviour on his last day I cannot accept that this was because of some unfortunate misunderstanding on the part of Mr Williams or Terry. I am satisfied that Mr Boost originally gave notice that he would finish work on Friday 9 September. Instead he left on Monday 5 September without notice.

[19] Pursuant to the forfeiture clause he therefore forfeits one week's pay in lieu of notice. One day of this has already been withheld. The respondent is entitled to a further four days pay in lieu of notice. I therefore make the following order.

[20] **Mr Boost is ordered to pay to the respondent the sum of \$540.00 being four days wages in lieu of notice.**

Y S Oldfield
Member of Employment Relations Authority