

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 92
5520103

BETWEEN HUGH BRITTON
 Applicant

AND MULCHING CRUSHING &
 SCREENING LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Shabnum Rashid, Counsel for Applicant
 David McLeod, Advocate for Respondent

Investigation Meeting: 22 May 2015 at Napier

Submissions Received: 29 May 2015 from the Applicant
 5 June 2015 from the Respondent
 12 June 2015 from the Applicant

Determination: 14 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mulching Crushing and Screening Ltd (MCS) is a small company involved in crushing organic material and waste disposal. Mr Barry Maunder and Mr Gareth Fryer are directors of MCS.

[2] The applicant Mr Hugh Britton was already known to the directors of MSC when he was offered employment in January 2014. The parties negotiated minimum terms and conditions of employment although these were not recorded in writing.

[3] Three months later, or thereabouts, Mr Britton alleges he was unjustifiably dismissed. The events that give rise to his claim occurred between Tuesday 22 April 2014 (following the Easter holiday weekend) and 28 April 2014.

[4] Mr Britton's work required him to operate heavy machinery on MCS's clients' sites. In the early hours of 22 April 2014 he went to a quarry in Awatoto on the outskirts of Napier. On realising that he may not be at the correct location he sent a text message to Mr Maunder who was with Mr Fryer at the time.

[5] Mr Maunder placed the call on speaker. The exchange was brief but volatile. There is no dispute that the parties swore at each other although each says the other initiated the abuse. Mr Britton recalls Mr Maunder stating "*It's not my job to chase you up, do you want a job or not?*". The telephone conversation ended with Mr Britton stating "*I am not in the mood for this f... bullshit, you can stick this up your f... arse, I'm going home*".

[6] Mr Maunder and Mr Fryer both independently testified that after the phone call they discussed whether Mr Britton had resigned and concluded he probably had. Mr Maunder's evidence is that Mr Britton's decision to go home impacted on MSC's work schedule and that the immediate focus was to find alternative labour, and transportation for whoever was available to do the work.

[7] Twenty minutes later Mr Maunder sent Mr Britton a text message stating "*can you please drop the ute back at the workshop*". Mr Britton replied "*yip*". No additional communication was had on the matter and Mr Britton returned the vehicle to the workshop soon after.

[8] On or about 1pm that afternoon Mr Britton called Mr Fryer and told him he had been dismissed. There is a factual dispute about what exactly was communicated between them which I shall return to. Neither party discussed what should occur next and the telephone call finished.

[9] Later that evening Britton left a voice message on Mr Maunder's mobile phone. He says he recorded his view that he had been fired and his expectation that he would receive holiday pay and a week's pay in lieu of notice.

[10] Mr Britton did not attend work the following day nor did MSC make inquiry as to his whereabouts. There was further communication between the parties until Saturday 26 April 2014 when Mr Britton called Mr Maunder, who was unable to converse at the time and asked if he could call him back later.

[11] Mr Maunder did not return his call and Mr Britton left a further voice message on Sunday 27 April 2014 stating that he wanted to pick up his phone and remaining personal items from the workplace. Mr Maunder responded on Sunday evening and suggested he collect his belongings from the workshop the following morning and “*have a talk about last week*”.

[12] The parties met the next day as planned. The meeting did not go well and Mr Britton left abruptly saying he was unwilling to engage any further. MSC say at this point they accepted that the employment relationship was over.

[13] On 14 May 2014 Mr Britton raised a personal grievance. MSC denies there was an actual or constructive dismissal and say Mr Britton resigned voluntarily. The parties have been unable to resolve their differences.

Issues

[14] The Authority is required to determine whether Mr Britton was dismissed by MSC, either actually or constructively, or whether he voluntarily resigned from his employment. In determining the matter the following issues need to be examined:

- (a) was Mr Britton dismissed, either actually or constructively, when MCS requested the return of the vehicle?
- (b) was Mr Britton dismissed, either actually or constructively, by MCS’ omission to affirm the employment relationship?
- (c) if Mr Britton was unjustifiably dismissed, what remedies is he entitled to and are there issues of contribution and mitigation?
- (d) should a penalty be imposed for MCS’s failure to provide Mr Britton with an employment agreement?

Was Mr Britton dismissed, either actually or constructively, when MSC requested he return the vehicle to the workshop?

[15] Mr Britton’s claim was progressed on the footing that the request by text message to return the vehicle was, in effect, an actual dismissal.

[16] In evidence Mr Britton agreed that that he had made an assumption as to the meaning of the text although he maintains his assumption was correct and cemented

by later events. He acknowledges that he did not make contact with MSC as to whether it wanted the vehicle returned for the duration of the day or permanently.

[17] I accept Mr Britton experienced some heightened concern when he received the text message, particularly given the morning's events. But without further inquiry about the precise purpose of the message I am not persuaded that the words used allows for only one meaning; an unequivocal sending away. I do not find the text message asking Mr Britton to return the vehicle can, on its own, be objectively regarded as an actual dismissal in the circumstances.

[18] Nor do I find that Mr Britton was constructively dismissed by the request. Mr Britton says when terms of employment were negotiated it was agreed he would have personal use of the vehicle. He adds that this arrangement was confirmed in practice and he had continuous use of ute throughout his employment including during his days off. His evidence was undermined by his own statement (and concession during questioning) that the agreement to provide a vehicle was on the basis that "*some*" personal use was allowed¹.

[19] MSC says it was never a term of employment that Mr Britton have unbridled use of the vehicle. It acknowledges that during pre-employment negotiations some personal use was recognised as inevitable, such as travelling to the supermarket on the way home. MSC agrees that it had never limited Mr Britton's access to the vehicle including its custody over weekends but says this was to ensure Mr Britton had transportation to work sites on Mondays and in any event Mr Britton often worked during weekends.

[20] I find the parties' contractual agreement about the use of the vehicle favours MSC. It follows that Mr Britton could not have expected unfettered use of the vehicle and MSC's request, in circumstances where Mr Britton had indicated he was not available to work, cannot be regarded as of such a serious breach to his employment that he could regard himself as dismissed.

[21] My finding that Mr Britton was not dismissed by MSC's direction to have him return the vehicle does not conclude Mr Britton's claim however.

¹ Para 5 of his written statement

Was Mr Britton dismissed, either actually or constructively, by MCS' omission to affirm the employment relationship?

[22] Next, Mr Britton points to events after he returned the vehicle between 22 and 28 April 2014 and says that at no point did MSC affirm that the employment relationship remained intact.

The telephone discussion on 22 April between Mr Britton and Mr Fryer

[23] The first contact between the parties following the disagreement was between Mr Britton and Mr Fryer by phone at approximately 1pm on 22 April 2014. There is a dispute about whether Mr Fryer informed Mr Britton that he had not been dismissed.

[24] Mr Britton says he relayed the morning's events including that he found Mr Maunder's behaviour unreasonable and that he had been fired. He says Mr Fryer told him that Mr Maunder has advised he had quit but that he made no further comment about whether he remained employed or not.

[25] In oral evidence Mr Fryer says he told Mr Britton that he "*hadn't been fired*" but advised him "*we took it you quit*". He agrees the matter wasn't discussed any further.

[26] I am not satisfied that Mr Fryer's disclaimer followed by an immediate assertion that he had resigned, can fairly be characterised as an affirmation by MSC that the employment relationship remained on foot. Nor do I accept that Mr Britton could have reasonably regarded Mr Fryer's statement as an assurance to that effect.

[27] I further conclude that had Mr Fryer advised Mr Britton in any meaningful and way that his employment remained secure, I consider it unlikely that Mr Britton would have left a voice message with Mr Maunder later that evening requesting entitlements associated with termination of employment. Mr Maunder says he did not receive Mr Britton's voice message and says his phone indicated only that he had missed a call.

[28] Whether or not Mr Maunder was able to access Mr Britton's voice message, he was advised by Mr Fryer sometime during the evening of 22 April 2014 that Mr Britton considered himself dismissed. Mr Maunder accepts that MSC did not initiate contact with Mr Britton until the evening of Sunday 27 April. He says he was largely preoccupied with additional work pressures as a consequence of Mr Britton's absence.

Cooling down

[29] Mr Maunder says that he was advised by a Ministry of Business, Innovation and Employment (MBIE) call centre person on the afternoon of 23 or 24 April that a “cooling down” period following an argument with an employee may be advisable². I regard this aspect of Mr Maunder’s evidence with a degree of scepticism given this explanation had not been asserted prior to the Authority’s investigation meeting. In any event I am not satisfied that MCS can justify its failure to communicate with Mr Britton, on grounds it was allowing him a cooling down period.

[30] Firstly there is a problem with timing. If I accept Mr Maunder received advice on 23 or 24 April, a minimum of 24 hours had passed since Mr Fryer had engaged in a civil conversation with Mr Britton. There is no prescriptive length of time that an employer should apportion to allow an employee to cool down, but Mr Britton’s initiated contact with Mr Fryer on 22 April should have indicated to MSC that Mr Britton had calmed down and any obligation to allow for a “cooling down” period was redundant.

[31] Secondly, a decision to allow a cooling down period does not entitle an employer to avoid its duty of good faith towards an employee to be “*active and constructive...and maintaining a productive employment relationship in which the parties are, amongst other times, responsive and communicative*”³. When Mr Britton informed Mr Fryer that he had been dismissed, this should have prompted MSC to take immediate steps to maintain a productive employment relationship with Mr Britton.

[32] I accept that MSC was under pressure with its work schedule but it would have been prudent to at least inform Mr Britton that he remained employed and that he would be contacted in the near future. The parties frequently communicated by text message and a simple text could have achieved this result. MSC’s failure to communicate with Mr Britton for almost 6 days, in the knowledge that he viewed himself as dismissed, was a breach of its duty to be responsive and communicative.

² Employment case law recommends an employer should provide for a cooling down period in circumstances where an employee has purported to resign during a work place argument. See for example: *Boobyer v Good Health Wanganui Ltd* EMC Wellington WEC3/94; *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164

³ Section 4(1A)(b) Employment Relations Act 2000

The meeting of 28 April

[33] Nor do I find the meeting on the morning of 28 April 2014 restored the employment relationship or remedied the breach as suggested in submissions. There is no real disagreement between the parties about the content of the meeting. Mr Maunder began by asking Mr Britton “*who said you were fired*”. Mr Maunder acknowledges he raised various matters of concern with respect to Mr Britton’s reliability, but says he wanted to deal with all issues of concern to clear the air. Although not as heated at the disagreement on 22 April Mr Britton was unhappy with MSC’s approach at the meeting and left.

[34] An employer is entitled to raise issues of concern, but in the circumstances of this matter MSC’s first priority should have been to clarify whether it considered the relationship remained on foot. Having assessed the evidence on behalf of MSC and Mr Britton I am not satisfied that this occurred at any point of the meeting.

Determination

[35] I consider the contents of the quarrel between the parties together with Mr Britton’s parting statement were interpreted by MSC as Mr Britton likely ending his employment, and as conduct that fractured MSC’s trust and confidence in him. When Mr Britton later asserted he had been dismissed, MSC did not dispel or oppose that statement.

[36] I accept that the directors of MSC may have been more than a little irritated by Mr Britton’s conduct on the morning of 22 April 2014. However it is difficult to imagine a more definitive breach to an employment relationship than the refusal of one party to confirm with the other that the relationship remains in existence.

[37] MSC’s failure on 22 April 2014 (and subsequently) to advise that it regarded the employment relationship as intact was a repudiation of contract and not the actions of a fair and reasonable employer. The omission amounted to a constructive dismissal. My finding is further supported by the fact that Mr Britton was not, with the exception of accrued holiday pay, paid wages due on 28 April for the preceding week.

[38] Mr Britton was unjustifiably dismissed.

Remedies

Wages and lost benefits

[39] Mr Britton began alternative employment on 30 April. He seeks \$1789.32 comprising lost wages, and the benefit of holiday pay and kiwisaver for the period between his dismissal and starting new employment. I find he is entitled to be reimbursed for that sum subject to an assessment as to contribution. It was unclear from the evidence whether Mr Britton was eventually paid for the Easter Monday on 21 April 2014. If he was not, he is entitled to payment for that statutory holiday.

Compensation

[40] Mr Britton seeks \$2,500 in compensation pursuant to s 123(1)(c)(i). He was demonstrative in his description of the distress he felt at suddenly finding himself without a job, particularly his concern about what financial impact that it might have on him. I accept that he was affected by the loss of employment but note he was without work for a very short period⁴ and his evidence was undermined by Mr William Carswell's testimony whom Mr Britton visited in the early afternoon of 22 April 2014. Mr Carswell says Mr Britton told him he "*had been given the shunt*" and they discussed options for obtaining alternative work. His evidence is that Mr Britton was calm throughout their conversation and showed no outward indicia of distress. I found his contemporaneous evidence to be reliable. Subject also to an assessment as to contribution I assess an award of \$1,000 is appropriate.

Contribution

[41] I am required to assess whether Mr Britton's actions contributed to the situation that led to his dismissal⁵.

[42] The parties dispute whether Mr Maunder told Mr Britton before the Easter break where he was likely to be required to work on Tuesday 22 April following the Easter weekend. Mr Britton does not deny that Mr Maunder left a voice message for him during the afternoon of Easter Monday 21 April and asked him to call when free so that timesheets could be sorted as well as a work plan for the week.

⁴ 6 week days

⁵ Section 124

[43] Counsel for Mr Britton submits it was unreasonable for MSC to require Mr Britton to respond to work matters on a statutory holiday and the voice message did not indicate it was imperative for Mr Britton to return the call.

[44] The evidence revealed it was common for Mr Britton and Mr Maunder to briefly discuss the following week's work on a Sunday. I accept Mr Maunder called on the afternoon of a statutory holiday but I do not find the call can have been a surprise or that it was unduly onerous for Mr Britton to respond given the usual practices within the relationship.

[45] Mr Britton conceded that he had ignored Mr Maunder's call but had accessed the message. He says he was drinking at the time and decided to contact him after he taken a sleep. By the time he woke up he thought it was too late to call. Had Mr Britton contacted Mr Maunder, the argument of 22 April may have been entirely avoided.

[46] Mr Britton accepts his language towards Mr Maunder on 22 April 2015 was inappropriate and he reports he has some regret about the way he spoke. Mr Britton's decision to go home and his language towards Mr Maunder are causative and blameworthy in that those events led to a breakdown in the relationship but I do not consider he substantively contributed to MSC's failure to affirm the employment relationship and . I assess Mr Britton's contribution as 20%.

Should a penalty be awarded for MSC's failure to provide an employment agreement?

[47] Mr Britton seeks a penalty against MSC for its failure to provide him with a written employment agreement. MSC accepts that no written agreement was furnished to Mr Britton.

[48] Mr Britton was MSC's first employee. At the time Mr Britton was appointed MSC says it was endeavouring to draft a standard employment agreement which met with the approval of its contracting clients. It produced a copy of the employment agreement intended for Mr Britton had he remained in its employment. I do not regard MSC's failing to provide a written employment to Mr Britton was deliberate and flagrant. I consider the omission to be inadvertent and a consequence of inexperience. I am not persuaded that this matter warrants punishment by way of a penalty and I decline to make an order to that effect.

Summary of Orders

[49] Mulching Screening and Crushing is ordered to pay:

- (a) pursuant to s 123(1)(b) and s 128(2) reimburse Mr Britton the sum \$1432.68 (gross) as reimbursement of lost wages and benefits;⁶
- (b) pursuant to s 123(1)(c)(i) compensate Mr Britton the sum of \$800 for humiliation, loss of dignity and injury to feelings;⁷
- (c) if Mr Britton was not paid for the public holiday of 21 April 2014 he must be reimbursed for the event calculated according to his average daily pay.⁸

Costs

[50] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

⁶ The awarded sum of \$1789.32 minus 20%

⁷ The awarded sum of \$1,000 minus 20%

⁸ Section 49 Holidays Act 2003