

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 168/08
5101032

BETWEEN MARTIN BROEKS
 Applicant

AND PETER ROSS TRADING AS
 PETER ROSS CONTRACTORS
 Respondent

Member of Authority: Vicki Campbell

Representatives: Martin Broeks in Person
 Peter Ross for Respondent

Investigation Meeting: 28 March 2008 at Hamilton

Determination: 6 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Martin Broeks' was employed by Peter Ross t/a Peter Ross Contractors ("Peter Ross") on 9 July 2007 as a Driver. Mr Broeks claims he was unjustifiably constructively dismissed by Mr Ross when he failed to honour his obligations under the employment agreement to pay Mr Broeks wages in full. Mr Broeks seeks full payment of the wages owed, his holiday pay and compensation.

[2] Mr Ross denies Mr Broeks was dismissed constructively or otherwise. Mr Ross says Mr Broeks ended the employment relationship after he was successful in obtaining alternative employment.

[3] As the parties had not attended mediation when Mr Broeks lodged his problem in the Authority the parties were referred to mediation. Mediation was scheduled to take place on 22 January 2008, however, the respondent failed to turn up.

[4] The Authority is required to direct the parties to mediation before investigating the matter unless the use of mediation will not contribute constructively to resolving the matter; or will not be in the public interest (s.159 Employment Relations Act 2000).

[5] Taking into the account the requirements of the Authority pursuant to section 159 of the Act and following a conference call with the parties they were directed to mediation on 31 January 2008.

[6] On 15 February 2008 the applicant wrote to the Authority asking for a direction that the mediation service confirm in writing any dates set down for mediation. Mr Broeks explained that he had already had to take 2 days leave without pay to attend 2 separate mediation dates with no appearance from the respondent.

[7] The parties did proceed to mediation, but unfortunately were unable to resolve the matters between them. As agreed during the conference call on 31 January 2008, the matter was then set down for hearing on 28 March 2008.

Relevant terms and conditions of employment

[8] Mr Broeks was subject to a written employment agreement signed in July 2007. The relevant terms and conditions from the employment agreement are:

4. Hours of Work

- 4.1 The Employee will work a minimum of 40 hours per week on Monday to Saturday between the hours of 5.00am and 7.00pm. These hours will vary from day to day.
- 4.2 The employee agrees to work different and/or longer hours as required for the Employer to meet its contractual commitments and to take advantage of weather conditions where outdoor work is involved.

[9] The agreement provided for wages to be paid weekly at the hourly rate of \$17.50 per hour.

Arrears of Wages

Payment for minimum 40 hours per week

[10] Mr Broeks seeks reimbursement of wages he says he is entitled to but was not paid during the period of his employment with Peter Ross. Mr Broeks claims the hours of work clause means he was entitled to receive not less than 40 hours pay at his hourly rate for each week worked, even where he has not worked the minimum number of hours.

[11] As discussed at the investigation meeting, I disagree with Mr Broeks interpretation of the hours of work clause. Clause 4.1 does set as a minimum 40

hours to be worked each week. The clause also allows flexibility in the hours to be worked from day to day.

[12] Further, by entering into the agreement Mr Broeks has also agreed at clause 4.2 that the hours of work can be different depending on the employers needs to meet its contractual obligations. Different could mean more or less hours to be worked. It follows therefore that Mr Broeks claim for payment of wages where his actual hours worked were less than 40 per week must fail.

Payment for time not worked due to the truck being off the road

[13] During July 2007 the truck driven by Mr Broeks was off the road having repairs undertaken. During this period Mr Broeks was not required to attend work and was not paid.

[14] While Mr Ross and Mr Broeks were working together in the truck two wheels came off the truck. Mr Ross says he told Mr Broeks that as the truck would be away having repairs Mr Broeks was not required to attend work and that there would be no pay for the time off. Mr Ross says Mr Broeks agreed to this.

[15] Mr Broeks agrees Mr Ross did tell him that the truck would be off the road and that there would be no work, however, Mr Broeks was adamant at the investigation meeting that Mr Ross told him he would be paid for the days off.

[16] On the balance of probabilities I have concluded that Mr Broeks evidence of this event is more reliable than that of Mr Ross. Mr Broeks had mortgage and other financial commitments to meet on a regular basis. It is unlikely Mr Broeks would have readily agreed to be stood down without pay for three days. Further, in a written statement made by Mr Ross in a letter dated 28 September 2007 and in reference to the period when the truck was off the road, Mr Ross tells Mr Broeks (verbatim):

You new as we talked about the problem of your wages when the wheels feel off the truck that there was going to be a problem finding your wages until I got paid for the months work. Something I witnesses to [2 police officers and 1 mechanic] you made the choice to stay on that day when you had the opportunity to leave and get your full pay.

[17] I am satisfied Mr Broeks is entitled to be reimbursed for lost wages for the period 23-25 July 2007 inclusive. Reimbursement is calculated on the basis of 8 hours per day and equates to \$420.00.

Reimbursement for hours worked

[18] Mr Broeks claims he has not received payment for all the hours he worked for Mr Ross. I am satisfied on the basis of the evidence produced at the investigation meeting that Mr Broeks has not been paid for each hour he worked.

[19] The records available for the Authority show that Mr Broeks received not more than 4 payments during his employment. The payments equate to \$2,356.28. Based on the information provided to the Authority Mr Broeks ought to have received a total of \$4,768.75.

[20] Mr Broeks is entitled to reimbursement of unpaid wages of \$2,412.47.

Peter Ross t/a Peter Ross Contractors is ordered to pay to Mr Broeks unpaid wages of \$2,832.47 gross. Payment is to be made within 28 days of the date of this determination.

Holiday pay

[21] Mr Broeks claims 8% holiday pay on his gross earnings. I am satisfied Mr Broeks was not paid holiday pay at the time he left Mr Ross's employment. I have calculated Mr Broeks gross earnings (including the reimbursement of outstanding wages as outlined above) as \$5,188.75. Holiday pay of 8% equates to \$415.10.

Peter Ross t/a Peter Ross Contractors is ordered to pay to Mr Broeks unpaid holiday pay of \$415.10 gross. Payment is to be made within 28 days of the date of this determination.

Constructive dismissal

[22] Mr Broeks says he had no option but to leave his position, given that he was not receiving his wages as they fell due. The employment agreement between the parties required Mr Ross to pay Mr Broeks his wages on a weekly basis.

[23] In coming to my conclusions under this heading I must determine the following issues:

- Was the resignation caused by a breach of duty on the part of the respondent?; and
- If there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Broeks would resign?

(Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc [1994] 1 ERNZ 168)

Was the resignation caused by a breach of duty on the part of the respondent?

[24] The basis for Mr Broeks claim for constructive dismissal is that he left as a result of a breach of duty on the part of the employer, which is the third of the three non-exhaustive categories of constructive dismissal referred to by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 1 NZLR 372.

[25] The conduct amounting to a breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. (*Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 2 All ER 1 (CA)).

[26] Having considered all the evidence, I conclude that by the time Mr Broeks resigned from his employment, wages remained unpaid for up to five weeks and possibly longer. I regard the conduct of Mr Ross in not paying the wages for this period was a breach of the employment agreement to pay wages weekly. This conduct was dismissive and repudiatory.

Was the breach sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Broeks would resign?

[27] I am satisfied that the non-payment of wages was unjustified and plainly invited both a resignation and a claim that it amounts to constructive dismissal.

[28] Mr Ross demonstrated he was not prepared to complete performance of the contract because he was unwilling to go on paying the contractual wages due to Mr Broek. The only choice available to Mr Broek in those circumstances was to resign.

[29] Pursuant to section 103A of the Employment Relations Act 2000 I have concluded that Mr Ross's actions and the way he acted were not those of a fair and reasonable employer in all the circumstances of this case. Mr Broek was constructively dismissed and that that dismissal was unjustified. Mr Broek is entitled to remedies.

Remedies*Contribution*

[30] I am bound by section 124 of the Act to consider the extent to which Mr Broeks actions contributed towards the situation that gave rise to his personal grievance and if those actions so require to reduce the remedies that would otherwise have been awarded accordingly.

[31] I am not satisfied it is just to reduce the remedies in this case. Mr Broeks actions have not contributed towards the situation that led to the unjustified dismissal such that would require a reduction in either the nature or extent of the remedies to be awarded.

Lost wages

[32] Mr Broek had already found alternative employment before he resigned from his employment with Mr Ross. There is no evidence that Mr Broek was on a lesser rate in his new job. On that basis I am unable to award Mr Broek any reimbursement for wages lost as a result of his unjustified dismissal.

[33] For the sake of completeness I note here that Mr Broeks sought payment of wages for two weeks wages in lieu of notice. Mr Broeks resigned without notice. He is therefore not entitled to a payment in lieu of notice.

Compensation

[34] I am satisfied Mr Broek suffered as a result of the unjustified actions of his employer. It was a distressing time for him. He was unable to meet his mortgage and other financial expenses and had to borrow money to meet these commitments. This exacerbated his embarrassment and humiliation.

[35] Following Mr Broek's notification to Mr Ross that he was leaving Mr Ross accused Mr Broeks of theft and threatened to involve the Police. I am satisfied there was no evidence to support such allegations by Mr Ross. However, the fact that Mr Ross was making these allegations and threats caused further distress to Mr Broeks.

[36] In coming to my conclusions under this heading I have taken into account that Mr Broeks obtained appropriate alternative employment quickly and this must have reduced his ongoing distress.

[37] In all the circumstances I assess compensation for distress at \$5,000.

Peter Ross t/a Peter Ross Contractors is ordered to pay to Mr Broeks \$5,000 without deduction pursuant to section 123(1)(c)(i) of the Employment Relations Act. Payment is to be made within 28 days of the date of this determination.

Costs

[38] Mr Broeks is entitled to reimbursement of the Authority's filing fee of \$70.00. Hair Smith Limited is ordered to pay him that amount within 28 days of the date of this determination.

Summary of orders

[39] **Peter Ross t/a Peter Ross Contractors is ordered to pay to following sums to Mr Broeks within 28 days of the date of this determination:**

- **\$2,832.47 – arrears of wages**
- **\$415.10 – holiday pay**
- **\$5,000 – compensation for hurt and humiliation**
- **\$70.00 - costs**

Vicki Campbell
Member of Employment Relations Authority