

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 179/09
5166005

BETWEEN	DAVID BUCHANAN Applicant	WILLIAM
AND	BA LOGGING LIMITED Respondent	

Member of Authority: James Crichton

Representatives: Jim Stringleman, Advocate for Applicant
No appearance for Respondent

Investigation Meeting: 15 October 2009 at Timaru

Determination: 16 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Buchanan) claims unpaid wages and also considers that he was constructively dismissed from his employment for which he seeks compensation, wages lost as a consequence of the dismissal and costs.

[2] The respondent (BA Logging) has not filed a statement in reply and has not contributed in any way to the Authority's investigation. As a consequence, it is fair to categorise BA Logging's behaviour towards the Authority's process as lacking in good faith.

[3] Notwithstanding the absence of a statement in reply, I am satisfied that the evidence before the Authority allows me to conclude that BA Logging does not consider that it owes Mr Buchanan anything and indeed BA Logging accuses Mr Buchanan of having misappropriated funds belonging to it by a failure to account. While that allegation is not before the Authority in the sense that the Authority is

seized of it by evidence from BA Logging, I am satisfied on the evidence of Mr Buchanan that that is BA Logging's position.

[4] Because BA Logging failed to cooperate in any part of the Authority's investigative process, and failed to attend at the investigation meeting itself, the Authority must consider whether the failure to attend was deliberate or caused by some supervening event which prevented attendance. I have reached the conclusion that the former explanation is more likely than not, given the behaviour of BA Logging in relation to this whole matter. I conclude that BA Logging has deliberately chosen not to attend the investigation meeting and accordingly, having started the investigation meeting some 30 minutes later than the appointed time, I am satisfied that BA Logging made a deliberate decision not to engage in the Authority's process and was not simply delayed or otherwise late.

[5] Mr Buchanan commenced his employment with BA Logging on 10 February 2009 as a firewood delivery truck driver. The essence of the role involved picking up split wood from a site in Cave near to where the timber was felled and then removing it to various locations around South Canterbury as requested by customers. Mr Buchanan told me in his evidence that the bulk of the firewood was delivered to homes in Timaru City, but there were also a number of deliveries to rural centres around the city within the wider South Canterbury district.

[6] The arrangements for payment of the firewood were hardly sophisticated. Mr Buchanan collected payment from the customer when he delivered the wood (typically in cash) and then he either left the moneys collected in BA Logging's vehicle as the employer had instructed, or placed it in Mr Adcock's diary within his vehicle. Mr Adcock is the sole shareholder and director of BA Logging.

[7] Mr Buchanan worked for BA Logging for a total of about seven weeks and in that period was paid wages just once on 24 February 2009. Despite diligently performing his duties for the total period of time that he was in the employment and, according to his records, generating approximately \$12,000 in revenue for BA Logging, he was only ever paid that once.

[8] Mr Buchanan's evidence is that he reminded Mr Adcock regularly about the need to pay him money due to him for wages, but Mr Adcock always seemed to have an excuse and towards the end of the relationship became convinced that

Mr Buchanan had failed to account for all of the money he had received. Mr Buchanan denies any wrongdoing and I accept his evidence on that point. He presented as an intelligent and well spoken man who kept precise records in his own diary of what he had done and where he had done it, and I formed the view that his evidence was both straightforward and truthful.

[9] Mr Buchanan agreed with me that the arrangements for repatriating money taken by him to the employer were not well thought out and he noted, for instance, that given the preponderance of cash that he was paid and which he left for Mr Adcock to collect, it was quite possible that some third party had helped themselves to some or all of that money, given that it would frequently be left in an unlocked vehicle, often with the windows rolled down. Mr Buchanan's position (and I agree) was that it was not his fault that the arrangements for collecting the money by the employer were not robust.

[10] On 22 March 2009, Mr Buchanan sought permission from Mr Adcock for Mr Buchanan's partner to assist on an occasional basis with delivering loads of firewood. In the result, BA Logging agreed to that suggestion and Mr Buchanan's partner assisted on two occasions at an agreed rate of \$50 per load but she also was never paid.

[11] The employment relationship came to an abrupt end on 30 March 2009 by which time Mr Buchanan calculated that he had been working without pay for 26 days. There was a heated discussion between Mr Buchanan and Mr Adcock in which Mr Adcock accused Mr Buchanan of failing to account for moneys received for some of the firewood loads. Mr Buchanan responded by saying that he had always put the money in BA Logging's truck as instructed and a kind of impasse seems to have been reached whereby Mr Adcock was saying that he was not going to pay wages until the allegedly missing payments were sorted out and Mr Buchanan threw his helmet in the cab of the truck on the basis that he was going to finish up.

[12] It seems that Mr Adcock thought better of this disagreement and told Mr Buchanan to get back to work which the latter did. The heated discussion then reconvened some time later when Mr Adcock again accused Mr Buchanan of withholding payment of some moneys, Mr Buchanan denying the allegation and making his own allegation that Mr Adcock was failing to pay his wages.

[13] At this point, I accept Mr Buchanan's evidence that Mr Adcock told Mr Buchanan that if that was his attitude (or words to that effect), he could finish up and one of the other drivers would drive him home. Mr Buchanan's position was subsequently advertised four days later on 4 April 2009 in the *Timaru Herald*.

[14] Having tried on a number of occasions to resolve the issue by direct negotiation with BA Logging, Mr Buchanan subsequently filed his statement of problem in the Authority on 18 June 2009 and the matter proceeded in the normal way from there.

Determination

[15] I am satisfied on the balance of probabilities that Mr Buchanan is owed the wages he claims. He keeps meticulous records in his own diary and these have been transferred from the diary to a handwritten sheet prepared for the Authority which I am satisfied is a true record of the diary's notes. In addition, I am satisfied on the evidence before me that there is holiday pay owing on the total amount of wages that ought to have been paid to Mr Buchanan and that his wife was not paid for the sum owing to her either. There will be orders in relation to those amounts.

[16] Mr Buchanan says that he was unjustifiably dismissed by BA Logging. His claim is actually for a constructive dismissal. I do not consider that the facts disclose a constructive dismissal at all; I think that BA Logging actually sent Mr Buchanan away and therefore it is an actual dismissal in the ordinary sense. Given that finding, it falls to me to consider whether the dismissal was justified or not. I conclude that a fair and reasonable employer would not have dismissed Mr Buchanan in the circumstances arising at the time. I reach that conclusion because there was no investigation whatever of the issues in dispute between the parties (and in particular the untested allegations against Mr Buchanan in respect of withholding moneys), and the decision to tell Mr Buchanan to leave the workplace was made in the heat of the moment by Mr Adcock without any proper process at all. It seems to me apparent that Mr Adcock intended the dismissal to take effect because he promptly advertised the vacancy in the *Timaru Herald*.

[17] I have considered whether Mr Buchanan has contributed to his dismissal in any way. Nothing in the evidence before the Authority suggests that. Accordingly I find no contribution.

[18] I conclude then that this was an unjustified dismissal and therefore Mr Buchanan has a personal grievance in respect of that unjustified dismissal and is entitled to remedies. He makes an extremely modest claim of \$2,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000. I intend to make an order for that sum.

[19] Next, Mr Buchanan seeks an award of lost wages caused by the dismissal from his employment. He seeks a sum of \$5,400 being three months loss of wages at 30 hours per week for 12 weeks. Thirty hours per week was the average number of weeks that Mr Buchanan worked while in the employment. Mr Buchanan gave up living on a benefit in order to take this position and was assured by BA Logging that he would be provided with full time work including work at the Christchurch sawmill when the firewood season was quiet. In the circumstances then, I think it appropriate that Mr Buchanan receives wages for that three month period.

[20] Mr Buchanan seeks a reimbursement of the filing fee of \$70 and there will be an order in that regard also.

[21] Finally, Mr Buchanan asks for a contribution to his costs. The figure sought again is a modest one and I intend to order payment of that sum as well. In the particular circumstances of this case, I think it appropriate to fix costs at this juncture.

Summary of orders

[22] I make the following orders to remedy Mr Buchanan's personal grievance:

- (a) A payment of \$1,807.50 gross in unpaid wages;
- (b) A payment of \$214.20 gross in holiday pay;
- (c) A payment of \$100 gross for Mr Buchanan's partner;
- (d) A payment of \$5,400 gross as a contribution to wages lost as a consequence of the unjustified dismissal;
- (e) A payment of \$2,000 compensation for hurt, humiliation and injury to feelings as a consequence of the unjustified dismissal;
- (f) Reimbursement of the \$70 filing fee;

(g) Costs are fixed at \$1,000.

[23] BA Logging is to pay to Mr Buchanan the above sums to remedy Mr Buchanan's personal grievance.

James Crichton
Member of the Employment Relations Authority