

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 331

5462424

BETWEEN

IAN CLINKER  
Applicant

A N D

SHERLOCK CONTRACTING  
LIMITED  
First Respondent

DARREN SHERLOCK  
Second Respondent

Member of Authority: T G Tetitaha  
Representatives: W McPhail, Advocate for Applicant  
No appearance by Respondent  
Investigation Meeting: On the papers  
Submissions Received: No submissions received  
Date of Determination: 21 October 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. Sherlock Contracting Limited was the applicant's employer.**
- B. The personal grievance application is dismissed.**
- C. Sherlock Contracting Limited is ordered to pay Ian Clinker wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$8,816.72.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

## **Employment Relationship Problem**

[1] Ian Clinker alleges he was disadvantaged by the respondent employer's refusal to provide a minimum of 50 hours per week for 45 weeks per annum and removal of a telephone benefit totalling \$800. He also alleges he was constructively and unjustifiably dismissed.

## **Respondents' failure to attend or be represented**

[2] There is a preliminary issue regarding the failure of the respondents to attend or be represented before the Authority. The Authority has the power to proceed if a party fails to attend or be represented *without good cause shown*.<sup>1</sup> No good cause has been shown.

[3] The first respondent is a company registered in New Zealand. Its registered office is 1268 Arawa Street, Rotorua. The second respondent is the sole director of the first respondent.

[4] The statement of problem was served upon the respondents at the first respondent company's registered office on or about 16 March 2015. That document was signed for by *Debbnairn MacKenzie*. No statement in reply was filed by either respondent.

[5] Notice of a teleconference was couriered to the first respondents registered office. Neither respondent attended the teleconference. A Minute dated 11 May 2015 from the teleconference identified the issues for hearing, timetabled the filing of evidence and notified the respondents if they took no further steps, I would continue to determine the matter on the papers pursuant to s.174D of the Employment Relations Act 2000. The Minute was couriered to the first respondent's registered office. On 13 May 2015 *Debbnairn MacKenzie* signed and received the Minute.

[6] A further Minute was issued on 11 August 2015 directing the respondents to file the applicants wage and leave records by 25 August 2015 3 pm. A copy of the Minute was couriered to the first respondent's registered office. The respondents have failed to file the wage and time records.

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<sup>1</sup> Clause 12, Schedule 2, Employment Relations Act 2000

[7] In view of the above efforts to contact the respondents and their failure to file any documents or attend the teleconference and/or provide evidence for the investigation meeting, I am satisfied I may continue to hear this matter.

### **Facts leading to dispute**

[8] Mr Clinker advertised in the local paper in 2010 seeking work. He was approached by Darren Sherlock, second respondent and director of the first respondent, Sherlock Contracting Limited. Sherlock Contracting Limited specialises in earthmoving services.

[9] Mr Sherlock said Mr Clinker could work as a driver for 50 hours a week for approximately 45 weeks of the year. He also said that on odd occasions there would not be 50 hours a week, if the weather was bad or they were between jobs. There was initially some disagreement about the rate of pay of \$18 an hour. Mr Sherlock said the \$18 per hour included holiday pay but Mr Clinker said he would not work at that rate and his holiday pay was on top of this amount.

[10] Although Mr Clinker never received an employment agreement he commenced work in April 2010.

[11] In February 2012 his hourly rate increased to \$19.52.

[12] During his employment he used his personal cellphone for business purposes. The cellphone was on a pre-paid plan topped up using vouchers. No receipts were kept verifying the purchase of vouchers for his cellphone. He estimates he spent an average of \$5 per week on calls for the company totalling \$850.00.

[13] In July 2013 his hours allegedly reduced over a ten week period. Instead of working 10 days a fortnight he was only required to work between three and seven days a fortnight.

[14] On 23 October 2013 Mr Clinker told Mr Sherlock he had no choice but to resign by way of email stating:

*I have resigned due to the reduced hours of work from approximately 90 hours per fortnight to the latest fortnight of 28 hours. I cannot survive on these reduced hours. I believed I was a full time permanent employee for the last three plus years and as there been no communication regarding the downturn in hours, I feel this is an unacceptable position you have placed me in.*

[15] He received no reply to his email.

[16] On 8 December 2013 Mr Clinker raised a personal grievance through his representative.

[17] Mr Clinker filed a statement of problem on 16 March 2015. The matter is now before me for determination.

### **Issues**

[18] The issues are:

- (i) Which of the respondents was Mr Clinker's employer?
- (ii) Was Mr Clinker's employment or one or more of the conditions of employment affected to his disadvantage by the respondent employer's refusal to offer a minimum of 50 hours per week for 45 weeks per annum?
- (iii) Whether Mr Clinker was constructively and unjustifiably dismissed on 21 October 2013 for a reduction in his above hours?
- (iv) Whether Mr Clinker is entitled to recover the costs of the use of his mobile telephone for work purposes estimated at \$850.00?
- (v) What wages (if any) are owed?

### ***Which of the respondents was Mr Clinker's employer?***

[19] Throughout his evidence Mr Clinker accepts his employment was with the company.<sup>2</sup> His letter raising his personal grievance also refers to the company as his employer.<sup>3</sup> Mr Sherlock is listed as the first respondent's director. There is no evidence suggesting he was seeking to personally engage Mr Clinker as his employee.

[20] In the circumstances I determine Mr Clinker's employer was the first respondent, Sherlock Contracting Limited.

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<sup>2</sup> Affidavit of Ian Clinker sworn 8 June 2015, para.5-6

<sup>3</sup> Statement of Problem Document 3 Letter Accord Employment Law Services dated 8 December 2013.

***Was Mr Clinker's employment or one or more of the conditions of employment affected to his disadvantage by the respondent employer's refusal to offer a minimum of 50 hours per week for 45 weeks per annum?***

[21] Mr Clinker submits he was offered and accepted a minimum of 50 hours per week over 45 weeks. His correspondence and gross wages do not support this submission. His email dated 23 October 2013 resigning from his job states he had reduced hours of work *from approximately 90 hours per fortnight to ...28 hours*<sup>4</sup>. This infers he was at most working 45 hours each week not the 50 hours alleged.

[22] His gross earnings show he did not consistently work 50 hours minimum per week at the beginning of his employment. From April 2010 to 31 March 2011 he earned \$34,540 gross which over 45 weeks divided by \$18 gross per hour results in an average of 43 hours per week.

[23] From April 2011 to March 2012 he earned a total of \$43,021 at \$18 per hour until February 2012 when he received a pay rise to \$19.52 gross per hour. There is no breakdown between the amounts earned pre and post February 2012. Taking an average hourly rate of \$18.60 over 45 weeks results in an average of 51 hours per week.

[24] From April 2012 to March 2013 he earned \$46,232.11 over 45 weeks at \$19.20 gross per hour results in an average of 54 hours per week; and in the last six months between April and October 2013 he earned \$20,717.34 over 23 weeks resulting in an average of 46 hours per week.

[25] His own evidence states he was told there would not be 50 hours per week work on the odd occasion *if the weather was bad or they were between jobs*.<sup>5</sup>

[26] The evidence about the terms of the agreement and the evidence of his actual hours worked does not support any agreement to a minimum of 50 hours per week work. Therefore Mr Clinker could not have been disadvantaged by any reduction in hours below 50 hours per week.

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<sup>4</sup> Affidavit of Ian Clinker sworn 8 June 2015, para.21

<sup>5</sup> Affidavit of Ian Clinker sworn 8 June 2015, para.3

***Whether Mr Clinker was constructively and unjustifiably dismissed on 21 October 2013 for a reduction in his above hours?***

[27] Constructive dismissals include cases where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign or there is a breach of duty by the employer causing an employee to resign.<sup>6</sup>

[28] The essential questions in constructive dismissal cases are:<sup>7</sup>

- (a) What were the terms of the contract?
- (b) Was there a breach of those terms by the employer that were serious enough to warrant the employee leaving?

[29] In answering the first question I must examine all the circumstances of the resignation, not merely the terms of the notice or other communication whereby an employee has tendered the resignation. If there was a breach, the next question is whether a substantial risk of resignation is reasonably foreseeable having regard to the seriousness of the breach.<sup>8</sup>

[30] Mr Clinker's resignation appears to have proceeded on the basis he believed he had been given less hours than he had been promised. Given my above finding that there was no agreement to 50 hours minimum work per week, there was no breach of duty when he was offered less than 50 hours.

[31] The personal grievance application is dismissed.

***Is Mr Clinker entitled to recover the costs of the use of his mobile telephone for work purposes estimated at \$850.00?***

[32] There was no written agreement to reimburse his phone expenses. Mr Clinker's evidence confirms this was discussed but not necessarily agreed to on several occasions:<sup>9</sup>

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<sup>6</sup> *Auckland Shop Employees Union v. Woolworths (NZ) Limited* [1983] 2 NZLR 372, (1985) ERNZ SEL CAS 136 (CA)

<sup>7</sup> *Wellington etc Clerical etc IUOW v. Greenwich (Trading as Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ SEL CAS 95 (AC) at 112-113

<sup>8</sup> *Auckland Electrical Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA)

<sup>9</sup> Affidavit of Ian Clinker sworn 8 June 2015, para 5.

*Another problem I had with the Company was related to the use of my mobile phone for business purposes. The phone was never discussed at our initial interview but it became apparent after I started working for the Company that I had to use my cell phone frequently to ring suppliers such as various quarries for metal, work sites etc. I raised this issue with Darren [Sherlock] on a number of occasions, as it was costing me money to use my phone for the work I was doing for the Company. Darren said to me on a number of occasions “yeh I will get on to it.”*

[33] The above evidence at best infers an agreement to look at the issue in future. There does not appear to be any express or implied agreement to reimburse cell phone expenses. While I have sympathy for Mr Clinker, I cannot unilaterally impose upon an employer expenses it had not expressly or impliedly agreed to reimburse as a term of his employment. More particularly Mr Clinker has no details about the expenses incurred because he kept no records. To award an estimate of \$850 in absence of evidence would be unprincipled and unlawful. The application to recover cell phone expenses is dismissed.

***What wages (if any) are owed?***

[34] Mr Clinker seeks wages arrears of holiday pay comprising eight weeks annual leave of \$7,112.56 based on his average earnings for the year ended 31 March 2013 and a further payment of 8% for the period March 2013 through to November 2013 being \$1,657.38. He also seeks and payment of \$500.04 for three alternative days when he worked on public holidays on 28 December 2010, 27 December 2011 and 3 July 2012. Mr Clinker denies any agreement in February 2012 when his pay increased to \$19.52 an hour that this was for *pay as you go* holiday pay.

[35] On 11 August 2015 I directed the respondent to file its wage and leave record. It has failed to do so.

[36] Where an employer has failed to keep or produce a wage record, and the failure has prejudiced the employee's ability to bring an accurate claim under section 131 of the Employment Relations Act 2000, I may *unless the defendant proves that*

*those claims are incorrect, accept as proved all claims made by the employee in respect of wages actually paid and hours, days, and time worked by the employee.*<sup>10</sup>

[37] Employers must keep a holiday and leave record that complies with s81 of the Holidays Act 2003. If, after hearing the evidence, the Authority is satisfied that the employer failed to comply with section 81 and that the failure prevented the claimant from bringing an accurate claim, the Authority may make a finding to that effect. It may then accept as proved, in the absence of evidence to the contrary, statements made by the employee about holiday pay or leave pay actually paid to the employee and annual holidays and public holidays actually taken by the employee.<sup>11</sup>

[38] I find the respondent employer has failed to comply with and produce a copy of the wage and leave records as directed by me and this has prevented the applicant from making an accurate claim for wage arrears of holiday pay.

[39] As a consequence I accept Mr Clinker's evidence, there being no other evidence to the contrary of his hours and days worked and annual leave not taken. I also accept his evidence there was no agreement to a "pay as you go" regime for holiday pay. Therefore he is owed holiday pay given the termination of his employment.

### ***Calculation of Holiday Pay***

[40] If employment ends and an entitlement to holidays has arisen, an employer must pay for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of—

- (a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or
- (b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.<sup>12</sup>

[41] If employment ended before the 12 month anniversary of the employees accrued annual leave, the value of any annual leave entitlement must be determined by 8 % of his gross earnings for the period since the employee last became entitled to

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<sup>10</sup> Section 132 Employment Relations Act 2000.

<sup>11</sup> Section 83(3) and (4) Holidays Act 2003.

<sup>12</sup> Section 24 Holidays Act 2003

the annual holidays less any anticipated annual leave and paid with his usual pay (s25 and 28 Holidays Act 2003).

[42] There is no breakdown to show the average weekly earnings during the 12 months immediately before the last pay period before the end of Mr Clinker's employment. From 1 April to 23 October 2013 \$20,717.34 over a 23 week period earning his average weekly earnings were \$900.75. He earned in the twelve months from 1 April 2012 to 31 March 2013 \$46,232.11 producing an average of weekly of \$889.08. The average weekly earnings from both figures will be \$894.92.

[43] Mr Clinker's evidence was he is owed 8 weeks holidays as at 1 April 2013. Using the average weekly earnings calculated above of \$894.92, he is entitled to \$7,159.33. He is also entitled to 8% of his gross wages of \$20,717.34 earned between 1 April and 23 October 2013 in the amount of \$1,657.39.

[44] Sherlock Contracting Limited is ordered to pay Ian Clinker wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$8,816.72.

[45] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

[46] Parties are reminded they must file copies of their invoices and/or time records in support of a costs application. Given this matter was dealt with on the papers, was no complex and undefended, I estimate a half day hearing at most would have been required. This is likely to attract an award costs equivalent to half of the Authority's daily notional rate of \$3,500 or \$1,750. If the party seeking costs believes there should be an uplift submissions should be filed setting out the basis.

**T G Tetitaha**  
**Member of the Employment Relations Authority**