

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Darren Peter Cotes (Applicant)

AND P R Driving Services Limited (First Respondent)
AND Lochore Contractors Limited (Second Respondent)

REPRESENTATIVES James Parlane for the applicant
Simon Menzies for the respondents

MEMBER OF AUTHORITY James Wilson

INVESTIGATION MEETING 29 March 2006

DATE OF DETERMINATION 15 May 2006

DETERMINATION OF THE AUTHORITY

Darren Cotes' employment relationship problem

1. PR Driving Services (PRDS) is an employment agency which provides relief drivers to transport firms. Mr Cotes signed an employment agreement with PRDS on 20 December 2005 and on that day commenced driving a truck for Lochore Contactors Ltd (LCL). He worked 4 night "shifts" - a total of 50 hours, the last shift finishing on the morning of 23 December 2005. He was expecting to recommence driving for Lochore Transport on the evening of 4 January (after the Christmas - New Year break) but on the morning of 4 January 2006 he was advised that his drivers licence had been suspended for three months as result of accumulated demerit points. Mr Cotes immediately advised LCL's Transport Manager, Mr Gareth Synnott that he would not be able to drive that evening. Mr Synnot apparently indicated that he would be willing to support Mr Cotes application for a limited licence.
2. On the day he was advised that his licence was suspended Mr Cotes contacted Mr James Parlane, solicitor, who immediately started the process of applying for a limited licence. As part of this process Mr Parlane also spoke with Mr Synnott and subsequently drafted an affidavit which Mr Synnot agreed to sign. (It is this affidavit which Mr Parlane says formed an employment contract between Mr Cotes and LCL). After some discussion with the police, including revisions to the draft licence, Mr Cotes was granted a temporary licence on or about Monday 9 January 2006. Mr Cotes says that Mr Synnott at first agreed that he could recommence work on the evening of 9 January but later advised him that no work was available.
3. Following the advice to Mr Cotes that LCL were unable to provide work on the particular driving assignment some discussion took place regarding an alternative assignment. It appears that LCL were prepared to support an application by Mr Cotes for an amendment to his temporary license to carry out this alternative assignment. However this arrangement would have required Mr

Cotes to relocate, at least temporarily, to the Waikato which he was either unable or did not wish to do.

4. On 17 January, Mr Cotes filed a statement of problem with the Authority alleging that he had been constructively dismissed by both LCL and PRDS. Mr Cotes asked the Authority to order that either he be reinstated or paid compensation for lost earnings and stress and humiliation. He subsequently found alternative employment and withdrew his application for reinstatement.

The relevant documents

5. On 20 December 2005 Mr Cotes signed a document headed **Individual Employment Agreement – Casual Driver**. The parties to this document were *Darren Cotes* and *PR Driving Services Ltd*. The duties of this position were stated to be “*any work required in connection with the employer’s transport and contracting operations and any other a reasonable duties as required by the employer*”. The place of work is: *Any place where clients are to be serviced for PR driving Services Limited*. The *Times and Hours of Work* clause says:

The parties agree that because the Employee is being employed on an as required basis, the Employee has no fixed hours of work, nor any minimum number of hours of work. The hours of work and days to be worked will be agreed between the employer and employee from time to time. The employee shall take all reasonable steps to be available for consultation when required.

In a covering letter, also dated 20 December 2005, Mr Cotes was advised:

If you accept this position, please note that it is for a fixed term. This is because your job will be to relief drive for a wide variety of our clients.

Please note that you are entitled to discuss this offer and the attached terms of employment with your family, a union, a lawyer or someone else you trust. ...

6. The affidavit signed by Mr Synnott on a 5 January 2006 included the following statement:

The applicant has worked for our firm Lochore Contractors Ltd (LCL.) on an agency contract basis for the past few weeks as a “temp” having come to us from another employer. We are very happy with his performance. He has worked as a relief driver however we can have him here almost full-time for the next 3 to 4 months at present as good drivers are hard to find at this time of the year.

The affidavit went on to set out the particular duties and hours that Mr Cotes could carry out and requested that he be granted a limited license to cover those duties.

The respective arguments

Mr Cote’s argument

7. Mr Parlane, on behalf of Mr Cotes, says that LCL, through the affidavit signed by Mr Synnott, became Mr Cotes’ employer. He argues that this “employment agreement” was for a term of at least *3 to 4 months* as set out in the affidavit. He contends that Mr Cotes was employed by the *partnership of the two defendants* (PRDS and LCL), and that they acted in concert to terminate his

employment. Mr Parlane also argues that the little weight should be put on the “casual” employment agreement signed by Mr Cotes on 20 December. He says that Mr Cotes signed a standard form of contract on a “take it or leave it basis” and was not given an opportunity to read the document before he signed it.

8. Mr Parlane says that the intention, before the Christmas break, of all parties was that Mr Cotes would continue *for the intervening period*. (I presume Mr Parlane to mean by this that the parties expected Mr Cotes to continue to be employed at LCL after the Christmas break. This is not disputed by the respondents). Mr Parlane says that Mr Synnott confirmed Mr Cote’s ongoing employment *for at least three to four months* and that the agreed terms of this employment were confirmed in Mr Synnott’s affidavit. Despite at first confirming Mr Cote’s recommencement date Mr Synnott then advised that no work was available. Mr Parlane says that no evidence was produced to the Authority that there was in fact a reduction in the work required or that LCL could not have rearranged its drivers to ensure that Mr Cotes continued to be engaged on duties consistent with his temporary license. In effect, Mr Parlane says, Mr Cotes was dismissed.

PRDS’ and LCL’s response

9. Mr Menzies, on behalf of PRDS and LCL, submits that the employment agreement, signed by the PRDS and Mr Cotes in December 2005 specifically provided that Mr Cotes would be provided to the PRDS customers, such as LCL, for temporary assignments. Following the loss of his license Mr Cotes was prevented from continuing any form of driving.

10. Mr Synnott was unwise to have sworn an affidavit which he now accepts was inaccurate. Mr Synnott says that he signed the affidavit because he *felt it was the right thing to do* in order to support Mr Cotes’ application for a limited license. However, Mr Menzies says, Mr Synnott had little knowledge of employment law and no authority to hire employees. He had no intention of creating an employment agreement and the affidavit was not an offer of employment. At the time he agreed to sign an affidavit he assumed that LCL would have work for Mr Cotes. He originally estimated one to two and perhaps three months. When Mr Parlane indicated that this would be insufficient to support a limited license application he agreed that the affidavit should indicate three to four months.

11. Mr Menzies also argues that, even if Mr Synnott’s affidavit could be said to be some form of offer, that offer could only be that Mr Cote’s employment would continue on the same basis as that applying prior to the Christmas break i.e. on the terms set out in the employment agreement signed on 20 December.

12. LCL’s client indicated at short notice that they would not require the level of services previously provided. This resulted in fewer drivers being required to provide that service. The termination of Mr Cotes employment was in accordance with the employment agreement. In other words LCL did not require a casual driver, PRDS were not required to supply a driver and there was no work to which Mr Cotes could be assigned.

Discussion and determination

13. After considering all the evidence, including verbal responses from the various witnesses at the investigation meeting, I have come to the conclusion that Mr Cotes does not have a grievance against either of the respondents.

14. Firstly I do not accept Mr Parlane's argument that little weight can be given to the original employment agreement signed by PRDS and Mr Cotes. Despite the rather clumsy wording of the agreement (it is obviously a standard form amended to suit the PRDS circumstances) I have no doubt whatsoever that Mr Cote's knew exactly the nature of his employment when he signed this agreement. He understood that his employment, by PRDS, was of a *casual* nature. He knew that PRDS could allocate him to driving duties for various clients. He knew that his employer, PRDS, would pay his wages and would invoice those clients for his services. He knew that if there was no work he would not get paid. Despite his protestations of surprise at the cancellation of his license Mr Cotes is an experienced driver and should have known that his license was under threat and the consequences that would follow its cancellation.

15. Secondly I do not accept that Mr Synnott's affidavit created a new employment agreement. It was, of course, unwise to say the least for Mr Synnott to sign that affidavit.. I accept that he did so with the best of intentions – *to help out a fellow human being* is how he expressed it – but an affidavit is a serious and formal legal document, not to be sworn lightly. However the affidavit did not purport to be an offer of employment and did not create an employment agreement.

16. Even if I am wrong, and Mr Synnott's affidavit did constitute an offer, this offer can only have been that Mr Cotes would continue to be engaged by LCL on the same terms as those applying to the original employment agreement between Mr Cotes and PRDS. That agreement provided that Mr Cotes would be employed on an *as and when required* basis. The Directors of LCL told me, on oath, that their client had, at short notice, advised that they would not need the level of services previously provided. I accept their evidence. It is regrettable that Mr Synnott had indicated that, in his estimation, work would continue to be available for Mr Cotes. As it turned out that work was not available and no other suitable assignments were available. Mr Cote was not dismissed. Rather his employer was unable to offer him further work. This was clearly a possibility envisaged by the employment agreement.

17. Mr Cotes does not have a personal grievance against either PR Driving Services or Lochore Contractors Ltd and is therefore not entitled to the remedies he seeks.

Costs

18. Costs are reserved and parties are urged to settle this issue themselves. If they are unable to do so the respondents may file and serve an application for an award of costs within 28 days of the date of this determination. Should such an application be received Mr Cotes will be given 14 days in which to respond.

James Wilson
Member of Employment Relations Authority