

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 125
5344202

BETWEEN BRUCE CRAIG
Applicant

AND DIRECT FREIGHT LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Shayne Boyce and Kevin Murray, Advocates for
Applicant
Mary Lindstrom, Advocate for Respondent

Investigation Meeting: 20 April 2012

Additional Evidence
Supplied: 18 June 2012

Determination: 25 June 2012

DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Bruce Craig, says he has been unjustifiably dismissed by the respondent, Direct Freight Limited (“the company” or “Direct Freight”). Mr Craig also claims:

- he has been unjustifiably disadvantaged;
- there has been a breach of s 120 Employment Relations Act 2000 in that a request for reasons for the dismissal was not provided within 14 days;
- there has been a breach of s 130 (2) Employment Relations Act 2000 in that wages records have not been provided;
- he is owed arrears of wages being 3 days for which he was not paid, 4 days in lieu, 20 days unpaid overtime, unpaid notice of one week’s salary;
- he has not been paid holiday pay;
- a breach of good faith.

[2] The conduct of the respondent has been less than satisfactory. A Statement in Reply was not filed in time; and when a document did arrive it did not provide a response to all the matters in the Statement in Problem. Only a single pay slip has been supplied, not time and wages records as requested. The records were not supplied despite an undertaking that they would be supplied by 1 December 2010.

[3] During the hearing Ms Lindstrom undertook to supply documents relating to the employment of Mr Paul Saunders. No documents have been received. The respondent did not supply any briefs of evidence. These actions considerably extended the time required for the hearing.

Mr Craig's employment

[4] Mr Craig was employed on 18 October 2010 as a truck driver. His wages were to be \$800 net for the first five days of employment each week. If a sixth day was worked he would be paid \$160 net.

[5] Mr Craig drove the Picton to Christchurch run. Occasionally he did additional trips to Foxton.

[6] At the hearing Ms Lindstrom claimed Mr Craig abandoned his employment on 7 March 2011 but the Statement in Reply gives the date of abandonment as 12 March 2011.

[7] Mr Craig said he was asked by Ms Lindstrom to help the company out by working in Christchurch for four weeks from the beginning of March while the company found two new drivers. Ms Lindstrom denies that she made any arrangement with Mr Craig for him to work in Christchurch for four weeks.

[8] The circumstances regarding how Mr Craig came to move to Christchurch are unclear. Mr Craig was somehow under the impression that he was needed in Christchurch. He spoke to Mr Derek Poynter, the South Island Manager responsible for the day to day running of the Christchurch yard, about the move. However, Mr Poynter did not have any conversations with Ms Lindstrom about Mr Craig working from Christchurch. Mr Poynter said he did not know any of the details, only that Mr

Craig was going to Christchurch to help the company out. This was based on what Mr Craig had told him.

[9] Mr Craig says that in response to a request from Ms Lindstrom, he agreed that he would go to Christchurch. After a period of two weeks, when there was no sign of any additional drivers, he told her he would stay on. Ms Lindstrom denies this and says that the first time she became aware that Mr Craig was no longer doing the Christchurch/Picton run was when she spoke to Mr Craig on 18 March and he asked to be paid for a working a statutory day in Christchurch.

[10] Ms Lindstrom said there were 3 full time and 6 relief drivers in Christchurch at the end of February so there was no need for Mr Craig to go to Christchurch.

[11] Ms Lindstrom maintained that when Mr Craig stopped doing the Christchurch/Picton run he had abandoned his employment and his employment agreement was terminated. From the time he went to work in Christchurch she regarded him as a relief driver and his contract of employment as no longer being in existence. Ms Lindstrom asserted that as Mr Craig had become a relief driver he needed to supply his log book records in order to be paid.

[12] Mr Craig organised a Mr Paul Saunders to take over his driving role doing the Christchurch to Picton run. Mr Saunders said Mr Craig told him it would be only for a month and it was to help Mr Poynter out.

[13] Ms Lindstrom said she had not authorised the employment of Mr Saunders and was not aware of his existence until she went to Christchurch on 28 March. Despite the fact that she had not interviewed him or entered into an employment agreement with him she put him on the payroll. She said the arrangement was a backdoor deal between drivers and that if she had not paid Mr Saunders for the work he had done he could take legal action against the company.

[14] Mr Craig arranged accommodation in Christchurch with Mr Tharron Sutton, paying him \$170 a week. Mr Craig said it was his understanding that the company would meet any expenses incurred. This understanding appeared to be based upon a comment by Mr Poynter that he was sure Ms Lindstrom would see Mr Craig right.

[15] Ms Lindstrom said that if drivers were required to spend nights away from home the company would make the accommodation arrangements and pay for them. An employee gave evidence that this was the case.

[16] Mr Craig said that on 24 March he tried to have wage talks with Ms Lindstrom and was only offered \$10 a day more. On Friday 25 he rang Mr Lionel Smith, the South Island Manager, and asked about the possibility of doing a floating run. He asked that the conversation be kept confidential.

[17] Mr Craig said that on 31 March he received a message on his cell phone from Ms Lindstrom at 1.50pm saying that his employment was terminated. He phoned and asked why. She told him it was because he had talked to Mr Smith and run her down and that he was stirring up trouble in the staff room. He contacted her on 3 more occasions and asked her to change her mind. She reiterated that he was sacked.

[18] Ms Lindstrom said Mr Craig wanted to go return to Blenheim and pick up the Christchurch to Picton run but that was not possible because she had confirmed Mr Saunders in that position. There was no work for Mr Craig in Blenheim.

[19] I find that Ms Lindstrom did not ask or instruct Mr Craig to go to Christchurch. If she had wanted him there she would have spoken to Mr Poynter, she would have made arrangements for Mr Craig's accommodation in Christchurch and she would have arranged a replacement driver to cover the job Mr Craig normally did, the Christchurch to Picton run.

[20] I accept that Mr Craig, for reasons that remain unclear to me, genuinely but mistakenly believed that he would be helping Mr Poynter out by going to Christchurch.

[21] Mr Craig did not abandon his employment. Ms Lindstrom cannot rely upon the abandonment clause in the employment agreement. Mr Craig was still working for the company. His employment agreement did not terminate when he took up work in Christchurch as claimed by Ms Lindstrom.

[22] Ms Lindstrom was under no legal obligation to provide continuing employment for Mr Saunders. She chose to offer him the work that had been carried out by Mr Craig.

[23] The process leading up to the dismissal was marked by a lack of fairness. Ms Lindstrom accepted there was no investigation. She said she did not need to do one. Mr Craig was dismissed and the dismissal was unjustified.

Remedies

[24] Mr Craig found other employment on 4 April 2011.

[25] Mr Craig believes he is owed \$5,832.04 net. The manner of calculation of this amount is unclear. Ms Lindstrom said Mr Craig was paid till 27 March but as there are no records there is no evidence of this.

[26] Section 132 (2) Employment Relations Act 2000 provides that if an employer has not supplied time and wages records the Authority may accept as proved all claims made by the employee in respect of wages paid, and days, hours and time worked by the employee.

[27] Mr Craig claims 3 days' unpaid wages totalling \$480 net. He is owed this by the respondent.

[28] Clause 10 of the employment agreement provides for payment in lieu of one week's wages if the employment is improperly terminated. The respondent is to pay Mr Craig the sum of \$800.00 net.

[29] Mr Craig claims payment for working Boxing Day, Labour Day and Waitangi Day. He also seeks payment for working Christchurch Remembrance Day. This is not a public holiday. Mr Craig is to be paid \$480 net for 3 days in lieu.

[30] Mr Craig is to be paid \$1,600 for working 20 days' overtime, for which he was paid at the reduced rate of \$80 net, not the contractual rate of \$160.00 net per day.

[31] Ms Lindstrom deducted annual leave without Mr Craig's agreement. Pursuant to s 19 Holidays Act 2003 employees may be required to take annual holidays if the employee and employer are unable to reach agreement under s 18 (3) or if s 32 which relates to closedown periods applies. Mr Craig had not been employed for 12 months and no annual leave entitlement had arisen. Section 32 does not apply as there was no closedown period and there was no evidence that the requisite 14 days' notice was given.

[32] I calculate Mr Craig's correct earnings during his period of employment to have been \$18,060.00 net. Eight per cent is \$1,444.80 net.

[33] The claim for payment of expenses cannot be substantiated as I am satisfied Mr Craig was not instructed to go to Christchurch and incur those expenses.

[34] Mr Craig was distressed and humiliated by his dismissal. The Respondent is to pay him \$5,000.00 pursuant to s 123 (1) (c) (i).

Contribution

[35] I am satisfied that Mr Craig did not contribute to the situation giving rise to the personal grievance. His behaviour was not blameworthy.

Penalty

[36] A penalty for failure to supply the time and wages is sought. Pursuant to s 130 (4) I order the respondent to pay the sum of \$5,000 as a penalty. Half this amount (\$2,500.00) is to be paid to Authority pursuant to 136 (1) and then into the Crown Bank Account. Pursuant to s 136 (2) the other half, being \$2,500, is to be paid to the applicant.

[37] The applicant has claimed a penalty for failure to provide a statement of reasons. However, there is no provision in the Act for the award of a penalty for this breach.

[38] The submission I received on the alleged breach of good faith was not adequate to enable me to determine the breach or to award a penalty.

Interest

[39] Mr Craig is entitled to interest on the total amount owed to him for unpaid notice, days in lieu, unpaid wages and holiday pay, being \$4,804.80 net. He is entitled to this at the rate prescribed under s 18 (3) Judicature Act 1908 being 5% per annum from the date that proceedings were lodged in the Authority being 20 September 2011 to the date of payment.

Summary

[40] The respondent is to pay the sum of \$2,500.00 to the Authority.

[41] The respondent is to pay the following sums to Mr Craig:

- a. \$1,600 net for unpaid overtime;
- b. \$480 net for 3 days' unpaid wages;
- c. \$480 net for 3 days in lieu;
- d. \$800 net for one week's notice;
- e. \$1,444.80 annual leave payments;
- f. Interest on the above amounts at the rate of 5 %, the interest to run from the date of the lodging of proceedings until the amounts are paid in full;
- g. Compensation of \$5,000.00;
- h. Penalty of \$2,500.00.

Costs

[42] The applicant is to file a memorandum on costs within 28 days of the date of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority