

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 346  
5312302

BETWEEN                      PAUL DELLER  
   Applicant  
  
AND                                TEXTILE RECYCLING  
   CENTRE LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              M McFadden, advocate for applicant  
   T Doonan, advocate for respondent  
  
Investigation Meeting:        2 June 2011  
  
Additional information        3, 15 and 16 June 2011  
provided:  
  
Determination:                3 August 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Paul Deller says his former employer, Textile Recycling Centre Limited (TRCL), dismissed him unjustifiably and failed to pay him holiday pay to which he was entitled.

[2] TRCL says Mr Deller was not dismissed, rather he resigned. It also denies that Mr Deller is owed any holiday pay.

**Background**

[3] TRCL obtains used textiles and sells them to businesses. The textiles are sold variously in bags, compressed packs or bales, weighing between 5 and 500 kilos.

Some larger customers have standing orders, but otherwise sales are generated following regular cold calling.

[4] Mr Deller began his employment with TRCL in July 2009. He was employed as a sales representative, working door to door. Most of his time was spent on cold calling in the city and South Auckland areas. The procedure was to call on all businesses in his area, obtain information from the business about its need for textiles as well as details of any current supplier, and use the information to complete a 'cleaning rag supply survey' (the survey card). Basic details such as the address of the business and name of the contact person were also included on the survey card. Mr Deller was also to obtain a business card and attach it to the form. If during the course of a visit he obtained an order, the order was to be recorded in a diary.

[5] Mr Deller was still at home at about 8.30 am on 11 May 2010 when Tom Doonan, a director of TRCL, telephoned to enquire where he was. Mr Deller was still at home because he suffered from insomnia - although he was not being treated for any sleep disorder - and had difficulty in sleeping the preceding night. Mr Doonan also enquired about Mr Deller's activities on 10 May, with the reply being Mr Deller had obtained three sales in Manukau.

[6] When Mr Deller arrived at work over an hour later he handed the details of the three sales to another staff member for processing.

[7] Two further discussions between Messrs Deller and Doonan followed that morning, although the order in which they occurred was not clear.

[8] In one of the discussions, Mr Doonan approached Mr Deller to enquire whether he had visited the premises of a customer, AB, the day before. A communication from the contact person at AB indicated there was no visit. The communication referred to AB's receipt of a delivery of textiles which it no longer required, and asked that the textiles be collected. Mr Doonan was concerned because he had instructed Mr Deller to call on AB on 10 May to find out why it had cancelled its standing order. Had Mr Deller made the call, the need for a delivery would have been clarified.

[9] Mr Deller advised Mr Doonan that he had called to see the contact person two or three times, but she was unavailable so he left a message for her and departed.

[10] In the second discussion, Mr Doonan was leafing through a large number of survey cards Mr Deller had brought into the office that morning and which were on his desk. Mr Doonan noted that the cards appeared to cover a widely scattered area and all were dated 10 May. He asked Mr Deller where he had been working, with the reply being 'Manukau'. Mr Doonan did not believe all of the visits noted could be carried out in one day. There was also a discussion about whether Mr Deller had visited a customer, F, with Mr Deller saying he had made an attempt to do so but the contact person at F was not available.

[11] The discussion went no further at the time, although I consider it likely Mr Doonan had a lingering doubt about whether Mr Deller had carried out work-related activities at all on 10 May at least. However Mr Deller attended to other work Mr Doonan had asked him to do, and Mr Doonan left the office for a period.

[12] Early on the afternoon of 11 May a delivery driver reported that he had been abused by a person at another customer company, ACC, because the delivery made by the driver had not been ordered. TRCL was making the delivery in reliance on one of the orders Mr Deller provided for processing that morning. Mr Doonan said the staff member who processed the orders informed him that she had received no orders from Mr Deller for the last two weeks, increasing the concern about what Mr Deller had been doing with his time.

[13] Mr Doonan asked Mr Deller why he had caused the delivery to be made to ACC. Mr Doonan was insistent in his evidence that in response Mr Deller admitted falsifying work records. However I do not accept any such express admission was made. Rather Mr Doonan was giving his view of an exchange in which he asked Mr Deller where he had been the previous day and queried the survey cards on Mr Deller's desk, to which Mr Deller replied he had been suffering from sleep deprivation and could not work. Mr Doonan responded: 'Paul we trusted you, how could you do this to us, you know we have paid you for time off before.' Mr Deller's reply was: 'I'll resign, I'm resigning.' Mr Deller got up and left immediately.

[14] Mr Deller denied that account. He said Mr Doonan came to his desk with the ACC order, shouting and accusing him of lying. Mr Doonan said: *'what am I going to do with you'*, Mr Deller replied: *'I don't know, perhaps change the price again'* to which Mr Doonan said: *'Get out. Get out now'*. There was an exchange about the retention of a file, and Mr Doonan said again: *'You are not taking anything from here and go now.'* As Mr Deller was departing, Mr Doonan referred to the trust reposed in Mr Deller. Mr Deller then referred to having suffered from sleep deprivation.

[15] Mr Doonan's daughter, Joanne Eldrett, gave evidence that she was working in the office that afternoon. She heard Mr Doonan ask Mr Deller why he had put an order through when it was clear the customer had not requested any rags. Mr Doonan also asked Mr Deller about the survey cards. According to Ms Eldrett her father was not behaving angrily, and Mr Deller gave only mumbled responses to questions. The conversation ended with the exchange regarding trust and time off, with Mr Deller saying he would resign and departing immediately.

[16] Another employee, Israel Beder, was also present in the office that afternoon. His desk was near Mr Deller's. He said he did not hear any shouting.

[17] I take a cautious approach to evidence of this kind. That is because Ms Eldrett in particular is not an independent witness - with no criticism of her intended - and because conflicts in evidence are not resolved solely on the basis of the number of witnesses ranged on either side. By the same token, those factors alone are not reasons to disregard such evidence. Overall I am at least satisfied that Mr Doonan was not openly angry and was not shouting at Mr Deller during the conversation.

[18] A few days after 11 May Mr Deller telephoned Charlie Stone, the other TRCL salesperson working in the Auckland area. Mr Deller asked Mr Stone to retrieve a jacket Mr Deller had left behind at TRCL's premises.

[19] Mr Deller's representative raised a personal grievance on the ground of unjustified dismissal by letter dated 24 May 2010. Mr Doonan discussed the letter with Mr Stone, who expressed surprise that Mr Deller was saying he had been dismissed. In a reference to the conversation he had with Mr Deller when Mr Deller

telephoned, Mr Stone said Mr Deller commented he had 'tossed the job in' and did not like 'being told what to do'.

[20] Mr Stone gave evidence. He confirmed in effect that he had expressed surprise to Mr Doonan that Mr Deller was saying he was dismissed, and that he gave Mr Doonan the above account of the conversation with Mr Deller.

[21] There was a further conflict in the direct evidence about the conversation between Messrs Deller and Stone. Mr Deller was adamant that he informed Mr Stone expressly that he had been dismissed, including in response to questions about whether he used different words with the intention of conveying that meaning. For his part Mr Stone accepted that Mr Deller had not used the phrase 'tossed the job in', but also said he did not recall the word 'dismissed' being used.

[22] In the circumstances I take Mr Stone's evidence as a denial that the word 'dismissed' was used, particularly in the light of his reaction when Mr Deller maintained that it was. Otherwise Mr Stone said repeatedly that he was 'under the impression' Mr Deller had left his employment of his own volition. It was clear he was firmly of that impression although he was reluctant to be drawn on precisely why. However other concerns Mr Deller had about TRCL - including one about changing prices which underlay the comment Mr Deller said he made as he departed on 11 May - were referred to or discussed during the conversation. Indeed Mr Deller had prepared a list of his concerns with the intention of raising them with Mr Doonan, and the list was found in his file on 11 May. In those circumstances I consider it likely that Mr Deller told Mr Stone he did not like being told what to do.

[23] Mr Deller suggested that Mr Stone gave the evidence he did out of concern for his own job. There was no evidence to support that suggestion and Mr Stone did not appear to me to be so motivated. He was uncomfortable at times but he impressed me as a genuine person who was concerned about the dispute between Mr Deller and TRCL, would have liked to see it resolved, and would prefer not to have become caught in it.

[24] Overall I do not accept that Mr Deller told Mr Stone he had been dismissed. Nor did Mr Deller tell Mr Stone he had 'tossed the job in'. Instead I find that Mr

Deller spoke to Mr Stone in such a way as to give Mr Stone reasonable grounds for his impression that Mr Deller had left his employment of his own volition.

[25] Finally, Mr Deller's wife gave evidence that Mr Deller came home on 11 May distressed and upset, and told her he had been dismissed. I am prepared to accept that was said, but not necessarily to accept the account was accurate. Again with no criticism intended, her evidence too is not independent.

### **Whether there was a dismissal**

[26] The question of whether Mr Deller resigned or was dismissed is one of fact in the circumstances of this employment relationship problem. It turns on the resolution of the conflict in the evidence about whether on 11 May Mr Doonan told Mr Deller to 'get out', or whether Mr Deller told Mr Doonan he was resigning.

[27] I begin with the underlying dispute. On Mr Deller's view Mr Doonan was angry because he believed Mr Deller had not been at work yet was paid as if he had worked, and that Mr Deller was attempting to cover up that fact. Mr Deller was dismissed as a result. On Mr Doonan's view, Mr Deller reacted on the basis of his guilty knowledge that he had not been at work and had not advised his employer of this as he should have. Mr Deller resigned because he had been 'caught'.

[28] I have accepted that Mr Doonan did not behave angrily on 11 May and not accepted Mr Deller's evidence on that point.

[29] As for the underlying dispute Mr Doonan: believed Mr Deller had not obtained any sales in the preceding two weeks; queried the fact that the survey forms he saw all had the same date of 10 May, yet the calls listed could not all have been carried out that day; had received a complaint from a customer about an unsolicited order; and was concerned because he believed Mr Deller had failed to visit the customer on 10 May contrary to an instruction that he do so. The remainder of the parties' debate about whether Mr Deller had worked during the preceding two weeks concerned information that subsequently came to Mr Doonan's attention. Accordingly his view of that information was not a motivating factor on 11 May,

although unfortunately it interfered with his focus when describing what occurred on 11 May.

[30] The question of whether Mr Deller had worked during the preceding two weeks was not relied on as a justification for dismissal (since the existence of a dismissal was denied), and was not the subject of a counterclaim to recover wages paid for that period. For those reasons I make no finding on whether Mr Deller had worked during the preceding two weeks, although I do not accept that Mr Deller admitted to falsifying work records. Otherwise I take into account Mr Deller's evidence that he had recurring difficulty in sleeping, and reported for work late on 11 May as a result of difficulty the previous night. Although he had not been challenged about the lateness he raised with Mr Doonan his general difficulty in sleeping on 11 May. Since the subject matter of the discussion was work he had or had not done, if he had no guilty knowledge there would be no need to raise the matter at all.

[31] From this I conclude that both parties had reason to behave as the other alleged, and I consider it likely that both have tended to give an account of aspects of the conversation most likely to support their view of it without acknowledging aspects which do not. On their accounts alone, I am not able to prefer one to the other.

[32] Turning to the wider evidence, I find the conversation between Messrs Deller and Stone to be most significant. In particular it comprised a more comprehensive discussion of events than the conversation Mr Deller had with his wife, while still being relatively contemporaneous, and was more capable of amounting to an independent account than the accounts of Ms Eldrett and Mrs Deller. Further, I found Mr Stone to be a credible witness in any event. Overall I consider it likely that the conversation included a frank exchange of views about working at TRCL, that Mr Deller indicated his dissatisfaction with the employment relationship, and that he portrayed the termination of his employment as being at his initiative rather than as being at Mr Doonan's.

[33] My finding about the conversation with Mr Stone provides a context for Mr Deller's evidence that on 11 May Mr Doonan was so angry he reacted to an unrelated taunt about changing prices by telling Mr Deller to 'get out'. That exchange was denied. However Mr Deller had a concern about the way in which Mr Doonan

approached pricing, and had planned to raise it. In all of the circumstances I consider the exchange could have occurred, but I do not accept it amounted to the termination of Mr Deller's employment at Mr Doonan's initiative. At most it occurred after the critical exchange.

[34] For the above reasons I find it more likely that Mr Deller resigned. There was no dismissal.

### **Holiday pay**

[35] TRCL did not pay Mr Deller the final holiday pay he was owed because of its belief that he had not worked for the two weeks before his employment ended. Considerable time was devoted to obtaining and discussing records in support of the parties' positions on whether Mr Deller had worked during this time, but to the extent that TRCL's efforts were intended to justify its failure to pay Mr Deller they were of no assistance. TRCL was not entitled simply to withhold payment from Mr Deller in any event.<sup>1</sup>

[36] Mr Deller was employed at TRCL for a little under 12 months. During that period his total gross earnings were \$41,596.14. According to the company's record, which I accept, he had taken 15 days' paid annual leave.

[37] He is owed  $[\$41,596.14 \times 8\%] - \$3,000 = \$327.68$ . Accordingly TRCL is ordered to pay him that amount.

[38] Mr Deller asserted after the investigation meeting that he was not paid for his final two days of work. That matter was not properly before the Authority, but it should be readily capable of resolution and I leave it to the parties to address.

### **Summary of orders**

[39] TRCL is ordered to pay to Mr Deller:

- i. \$327.68 as unpaid holiday pay; and

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<sup>1</sup> Wages Protection Act 1983 s 4

- ii. interest on the above sum calculated as 5% from 11 May 2010 to the date of payment.

### **Costs**

[40] Costs are reserved.

[41] The parties are invited to agree on the matter. If they seek a determination from the Authority a party seeking an award of costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from receipt of the memorandum in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority