

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 415
5398671

BETWEEN LESLIE MICHAEL DILLON
 Applicant

AND STAR TRANS LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: S Lee, advocate for applicant
 K Casey, counsel for respondent

Investigation Meeting: 29 July 2013 at Gisborne

Date: 13 September 2013

DETERMINATION OF THE AUTHORITY

A. Star Trans Limited did not dismiss Leslie Dillon.

Employment relationship problem

[1] Leslie Dillon says his former employer, Star Trans Ltd (Star Trans) dismissed him unjustifiably during an argument about the servicing of the truck Mr Dillon drove. Star Trans says Mr Dillon walked off the job and either resigned or abandoned his employment.

[2] Star Trans employed Mr Dillon as a casual driver in or about March 2012. In or about May 2012 it acquired a truck and trailer unit to deploy on line haul runs between Gisborne and Auckland, Tauranga or Palmerston North respectively. From about early June 2012 Mr Dillon was employed to drive the line haul run, under an agreement stated to be in force for three months.

[3] On Saturday 21 July 2012 Mr Dillon found the truck had 780 km to go before the next service was due. He knew service requirements were to be notified 1,000 km in advance. He was scheduled to take the truck on a return run to Palmerston

North - a journey of some 800 km - departing on the evening of Monday 23 July. He said he raised the need for a service with John Lord, a transport manager contracted to Star Trans, who advised the matter would be addressed when Mr Dillon returned.

[4] When Mr Dillon returned to Gisborne on the morning of Tuesday 24 July, he went to the smoko room to have a cup of tea and complete his paperwork. According to him Dave McLauchlan, the general manager and a shareholder in the company, entered the room. The first thing Mr McLauchlan did was tip Mr Dillon's cup of tea down the sink. An argument about the servicing of the truck followed, before Mr McLauchlan told Mr Dillon he was only a casual employee and he was to get out. Mr Dillon responded by saying 'I quit'. He left the premises.

[5] According to Mr McLauchlan, he wanted to ask Mr Dillon about the servicing as Mr Dillon had not followed the required procedure in several respects. Mr McLauchlan said Mr Dillon became extremely angry and abusive, and kicked a chair across the room. Because Mr Dillon was so agitated, Mr McLauchlan told him to go home. Mr Dillon told Mr McLauchlan he could stick his f- job. Mr McLauchlan's concern about Mr Dillon's conduct was such that he asked Mr Dillon for his keys.

[6] Mr McLauchlan wanted to give Mr Dillon an opportunity to calm down. He asked his wife, Elaine McLauchlan (who was nearby), to write a letter inviting Mr Dillon to a meeting to discuss the incident. Mrs McLauchlan duly drafted a letter also dated 24 July. It read:

We would like to get in touch with you to arrange a discussion as to your return to work. We are happy to discuss the events of this morning in a mediated environment. If you would like to arrange a meeting please contact either myself or John Lord

[7] Mr Dillon denied receiving the letter. Mr and Mrs McLauchlan said they delivered it to his home on the afternoon of 24 July. They knocked on the door, and when there was no reply they left the letter in the mailbox.

[8] Mr and Mrs McLauchlan said further that, on 25 or 26 July 2012, they received a text message from Mr Dillon saying he had quit and asking for his final pay. No record of that message was retained, and the effluxion of time meant the Authority was unable to obtain it from the service provider. Mrs McLauchlan said

she acted on the text and deposited Mr Dillon's final pay, including holiday pay, into his account.

[9] Mr Dillon agreed he sent a text message on 25 July. He said it was his usual weekly text, detailing his hours of work for payment purposes. He denied saying anything in the message about quitting.

[10] Mr McLauchlan asked Mr Lord to confirm with Mr Dillon whether he intended to return to work. Mr Lord duly contacted Mr Dillon later in July, although it is not clear precisely when. Mr McLauchlan said the response reported to him was that Mr Dillon had quit and would not be returning. Mr Lord is no longer associated with Star Trans, his whereabouts are unknown although he is believed to be out of New Zealand, and he did not give evidence.

[11] For his part Mr Dillon accepted that Mr Lord contacted him, but only to discuss working what Mr Dillon called a period of notice.

[12] In a letter to Mr McLauchlan dated 29 July, Mr Dillon began by saying

I am writing this to tell you that I do not understand why you dismissed me and to say I have no idea what I did wrong.

[13] Mr McLauchlan replied by emailed message dated 30 July, saying:

... at no stage were you dismissed. We forwarded a letter to your address outlining the events as the(y) occurred on the morning you left, requesting an opportunity to meet with yourself to remedy any difficulties. When you requested your holiday pay a further three days I believed that you had decided not to return to work. ...

[14] Mr Dillon responded by emailed message dated 11 August. He said:

Your telling me I was only casual, to go, and leave my keys behind was taken by me to mean dismissal.

[15] The message went on to refer to the approach from Mr Lord, saying Mr Lord had offered work for the next two weeks. The message also said Mr Dillon had not received the letter of 24 July, and repeated that Mr Dillon did not know what he had done wrong. It ended by saying Mr Dillon was in Auckland, and sought a meeting in Auckland.

[16] Mr McLauchlan replied on 12 August, saying Mr Dillon was not a casual, and had received his final pay because he had not come back to work.

[17] The matter remained unresolved and Mr Dillon did not return to work.

[18] The issues are:

- (i) was there a dismissal on 24 July;
- (ii) if there was no dismissal on 24 July, did the subsequent failure to resolve the matter amount in all the circumstances to a termination of employment by dismissal; and
- (iii) if there was a dismissal, was it justified.

Was there a dismissal on 24 July

[19] Mr McLauchlan was terse and annoyed with Mr Dillon on the morning of 24 July, and conveyed as much to Mr Dillon. However Mr Dillon was the person who became angry to the point of being enraged. He was loud enough and angry enough to cause concern to Mrs McLauchlan and other female staff members in the vicinity.

[20] Mr Dillon's behaviour caused Mr McLauchlan to tell him to go home. This finding is supported by the evidence of one of the female employees, who said she heard Mr McLauchlan tell Mr Dillon to calm down and go home. Mr Dillon responded by saying 'you can stick your f- job'.

[21] Mr Dillon's evidence suggested an argument that he was a casual employee, and that his employment was terminated in the way it was in reliance on that status.

[22] Although Mr Dillon was a casual employee initially, from June 2012 he was employed on the three-month fixed term agreement. I understood an allegation that the agreement was a sham to have been raised in support of Mr Dillon's casual status. There was no evidence the agreement was a sham and I have no hesitation in finding it was not. The agreement did not comply with the provisions in the Employment Relations Act 2000 concerning fixed term agreements,¹ but that matter was not raised

¹ These are found in s 66.

in argument and in any event it does not affect the circumstances of the termination of Mr Dillon's employment.

[23] As for whether Mr McLauchlan told Mr Dillon on 24 July he was a casual employee - and any suggestion that meant Mr Dillon was being told not to come back in reliance on that - Mr McLauchlan advised in his 12 August message that he did not consider Mr Dillon to be a casual employee. I find it unlikely he said to Mr Dillon on 24 July that Mr Dillon was a casual employee.

[24] At most I find there was a misunderstanding about what Mr McLauchlan meant when he told Mr Dillon to go home. Mr McLauchlan did not intend to dismiss Mr Dillon and I do not construe his words as words of dismissal.

[25] For these reasons I find there was no dismissal on 24 July.

Did the failure to resolve the matter amount in all the circumstances to a termination of employment by dismissal

[26] It is likely Mr and Mrs McLauchlan prepared and delivered the 24 July letter as they said they did. Their evidence on the point was convincing, and the letter was referred to in a communication only a few days later. There is no explanation for why it was not received. In the circumstances, at the very least I regard the letter as supporting the position that Mr McLauchlan was not seeking to dismiss Mr Dillon.

[27] Whether or not Mr Dillon received the letter, when he made it plain on 29 July that he thought he had been dismissed the prompt response on 30 July was that he was not dismissed.

[28] The response also contained the reference to the 24 July letter, and indicated the nature of the contents. Even if Mr Dillon had not received the letter, he should have responded to the indication by accepting the opportunity to address the 'work place difficulties'. Secondly, if he believed his dismissal was confirmed by the making of a final payment to him, then the reason for that payment was explained by the 30 July message and he should have taken that into account. Finally, even if Mr Dillon was correct when he maintained Mr McLauchlan told him he was a casual employee and was to go, he should not have continued in effect to insist he had been dismissed after being told he was not dismissed.

[29] Further, not only did Mr McLauchlan convey directly to Mr Dillon that he was not dismissed, he also had Mr Lord make contact about a return to work. I am unable to make further findings about what Mr Lord said to Mr Dillon, except that I find it unlikely Mr Lord discussed working out a notice period of two weeks. Mr Dillon believed he should have been given two weeks' notice of the termination of his employment, and raised that matter in his emailed messages. Since Mr McLauchlan denied at the time that there was a dismissal, it is unlikely that he would have had Mr Lord discuss arrangements for a notice period associated with the dismissal.

[30] Overall Mr Dillon should have acted on the information that he was not dismissed. There was no reason to continue to insist on being told what he had done wrong, and effectively to maintain the notion that he had been dismissed. He should have seen the company's communications as an attempt to repair and resume the employment relationship. He should have acted on that attempt.

[31] For these reasons I find there was nothing in the circumstances of the 24 July incident to warrant a finding of dismissal.

Costs

[32] Costs are reserved.

[33] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for 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 the date of receipt of the memorandum in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority