

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 127
5340180

BETWEEN NATHAN FRANCIS FORDE
 Applicant

AND ELRICH ENTERPRISES
 LIMITED T/A HANSON
 REMOVALS
 Respondent

Member of Authority: M B Loftus

Representatives: Mr Nathan Forde, in person
 Mr Richard Wichman, for the Respondent

Investigation Meeting: 17 August 2011 at Dunedin

Submissions Received: At the investigation meeting

Determination: 23 August 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Nathan Forde, claims that he was unjustifiably dismissed by the respondent, Elrich Enterprises Ltd (Elrich), on 15 December 2010.

[2] He also claims that his final pay was deficient by one days' pay and there is, accordingly, an arrears claim.

[3] Elrich denies that it dismissed Mr Forde. It claims that Mr Forde stormed from its premises after a disagreement with Mr Wichman and subsequently asked that his final pay be prepared. Elrich's view is that Mr Forde's actions constituted a resignation.

Background

[4] As its trading name suggests, Elrich is in the business of transporting household effects from one place to another. As of the date that Mr Forde claims to have been dismissed it had two directors and shareholders: Mr Wichman and Ms Eleanor MacGregor. Since that time Ms MacGregor has ceased to be a director but remains a shareholder.

[5] Mr Forde was engaged as a Driver/Loader. His hours of work varied from day to day and week to week. Mr Forde estimates that he averaged 25 hours work per week but his employment agreement states that regardless of the hours actually worked, he should be paid a minimum of 30 hours.

[6] Mr Forde claims to have been dismissed on 15 December 2010 but the parties recollection of the days events differ markedly.

[7] Mr Forde states that while still at home he received a telephone call from Ms MacGregor advising the work she expected him to do that day. He says that he was asked to pick up two items in Dunedin which would be delivered to Central Otago and to deliver some cartons to another customer.

[8] Mr Forde goes on to say:

As I arrived at work I could sense tension in the room [a reference to an alleged altercation with Mr Wichman the previous day and a claim that he (Forde) had commented on (or more correctly 'dobbed in') Mr Wichman's behaviour to Ms MacGregor]. He asked me what jobs I was doing and if I had spoken to Elanor [sic], I explained the phone call we had to him and advised him of the 2 pickups, to which he replied 'why are you doing that pick up if it is not going on the truck till Friday?' I replied 'this is what Elanor [sic] told me to do, why don't you ring her and find out?' He then rung her and I could hear shouting on the phone alone the lines of 'I've already told Nathan what he is going to do'. Richard then turned to me and said 'so why am I f...ing ringing her if you know what you are doing'. I then said because you question me and I told you to ring Elanor [sic] to clarify, he replied No I didn't, I could feel the tension rising so I grabbed the paperwork and said to Trevor, who was and currently still is a Hanson employer [sic] 'come on mate let's go Im [sic] not going to stay here and have petty arguments'.

[9] He continues:

By then Richard was off the phone and said to me 'Yea f...off' to which I replied 'what was that Richard' he then got out of his chair in

an intimidating way and said 'You heard, F.... off', at this stage I felt a bit worried for my safety and replied "fine then ill [sic] go if that's what you want' to which he replied 'Yea f... off and leave your keys and uniform here'. I did not leave my keys etc as I just wanted to get out of there as I was worried about my safety

[10] Mr Forde claims that having left the premises he tried to contact Ms MacGregor but was unsuccessful until the fourth or fifth attempt which occurred around 5pm. Mr Forde states that Ms MacGregor was nasty toward him and:

... told me when I asked if I was fired that 'you can take it how you want it, if you think that Richard telling you to f... off is being fired then that is your decision. I said 'fine I will settle this in court and I wish my holiday pay and last weeks wages ... to be put into my account. She honoured this agreement which made me come to the conclusion I had been dismissed. I had no contact with Richard that day or after that day, as I did not try contact him and he did not try contact me.

[11] Mr Forde's evidence about how he requested his final pay altered under questioning during the investigation meeting. He stated that he made the request for his final pay a couple of days after his dismissal and confirmed it by writing upon his timesheet *Please pay my 30 hours as no notice was given for my dismissal as per my contract and please pay my holiday pay with this on Wednesday Thanks. I would like pay slips for both holiday pay and my last week please. Thanks.*

[12] The arrears claim relates to the pay period ending 27 December 2009. Mr Forde is recorded as having taken 5 days annual leave that week. He claims that was an error and only have had 4 days leave should have been deducted as the fifth day was a public holiday, Christmas Day.

[13] Elrich has a very different view about what occurred on 15 December. Mr Wichman claims that it was not he, but Mr Forde, who questioned why he (Forde) was to collect one of the items to be delivered to Central Otago as the recipient would not be available for delivery for another couple of days.

[14] Mr Wichman agrees that he phoned Ms MacGregor but claims that he did so to confirm that the item in question should be picked up that day and then placed in storage until it could be delivered on the Friday (two days later).

[15] Mr Wichman accepts that the ensuing conversation with Mr Forde got quite testy. He says that Mr Forde did not want to do as instructed and that he told Mr

Forde *if you will not do as asked then you can f..... off you are no use to me if you don't want to do what is required.*

[16] Mr Wichman also claims that as Mr Forde left the premises he attempted to persuade Trevor to hand in his resignation. Mr Wichman states that Trevor advised he didn't want any part of it and stayed.

[17] Mr Wichman states that this was not the first such altercation between himself and Mr Forde but, being friends, they had previously managed to patch things up once their tempers had cooled. He claims that he tried to contact Mr Forde on a number of occasions after the events of 15 December but was unsuccessful and that his next contact with Mr Forde was in March 2011. Mr Forde's evidence would suggest the date was 17 March.

[18] Mr Forde claims Mr Wichman did not attempt to contact him (at least not until 17 March). He did, however, attempt to pursue the disagreement in writing. On 22 December 2010 he wrote to Elrich asking why he had been dismissed and advising that he wished to raise a personal grievance. Having received no response he sent a reminder on 26 January 2011, enclosing a copy of the first letter, and advising that if a response was not forthcoming by 31 January he would be pursuing the matter in the Employment Relations Authority. Elrich again failed to respond.

Determination

[19] As said earlier, the parties differ markedly over what occurred on 15 December. There was, however, an independent witness to the events: Trevor. Trevor did not want any part of these proceedings given split loyalties. Whilst remaining an employee of Elrich, he is related to Mr Forde.

[20] Whilst I can understand Trevor's reluctance, I concluded it would be remiss of me not to speak to him as his evidence could easily unravel what would otherwise be a credibility lottery. I advised that parties that while I could not compel him to attend on the day, it was within the Authority's power to adjourn the meeting and subpoena Trevor so that his evidence could be taken at a later date. I asked the parties whether one or other would telephone Trevor, advise him of the situation and ask whether, on a voluntary basis, he would be willing to attend that day.

[21] Both rang. Mr Wichman advised that Trevor was on his way to Oamaru and therefore not available. Mr Forde said that was not the case: Trevor was still in Dunedin but did not wish to participate. Somewhat confused, I chose to telephone Trevor.

[22] Trevor was, as Mr Wichman had claimed, on his way to Oamaru but when the situation was explained he agreed to give evidence by telephone. That could be facilitated given the existence of a speaker phone.

[23] Trevor's recollection of events is entirely consistent with that of Mr Wichman. He states that Mr Forde threw down his keys and stormed off having been spoken to rather harshly for refusing to do as instructed.

[24] Given the above, I conclude that Mr Forde was not dismissed as he claims.

[25] That said, I must turn my mind to whether or not the respondent's comments and actions could be considered to have amounted to a constructive dismissal.

[26] For the information of the parties, I am now considering whether or not the respondent's course of conduct was such that it had, as a deliberate and dominant purpose, the goal of coercing Mr Forde to resign and/or breached its duties to him thus causing the resignation.

[27] In layman's terms, I am asking myself whether or not Mr Wichman gave Mr Forde no choice as to whether or not he should resign.

[28] I conclude that the answer is no.

[29] The reason I so is that Mr Wichman gave Mr Forde a choice. He could comply with the instruction – the choice was his. If he had complied with Mr Wichman's instruction I have no doubt that there would be no dispute, no claim of dismissal and no possibility of a constructive one.

[30] Even if I am wrong I do not believe it would matter. The reason for that is that it is unlikely any remedies would accrue to Mr Forde. Whilst Mr Forde initially stated that it took him some days to find alternate employment that claim was negated by the documentary evidence. The new job is essentially the same as that vacated with Elrich. It is as and when required employment with a removal firm and the employment agreement was signed on the day that he was allegedly dismissed by Mr

Wichman, 15 December 2010 though Mr Forde claims that his earnings in the new job are less than those he got from Elrich by virtue of the fact that he no longer has a minimum payment guarantee and he is working slightly less hours than he did with Elrich. I place little weight on this claim given the number of other inaccurate assertions made by Mr Forde – namely his evidence about the events of 15 December; his claims about Trevor's whereabouts; his initial claim about when he obtained replacement employment; and the change over when he requested his final pay. In other words there would be no award for lost wages.

[31] Likewise, it is doubtful that I would have awarded a compensatory payment. Mr Forde's actions, in refusing to work as instructed, contributed significantly to the situation in which he found himself.

[32] Finally there is the possibility that Mr Wichman's comments could be considered a disadvantageous action. I will consider this no further as once again, and for the same type of reason explained above, it is unlikely any remedies would accrue.

[33] For these reasons, Mr Forde's claim that he was unjustifiably dismissed by Elrich Enterprises on 15 December 2010 is rejected.

The arrears claim

[34] Mr Forde claims that his final pay was short by one day due to a clerical error that had occurred in December 2009. Elrich does not deny the claim and the documentary evidence supports it. One days' pay is \$99.00 and I conclude that amount is owing.

Costs

[35] Neither party has had the assistance of professional representation and given both reside in Dunedin there was no significant cost in attending the investigation meeting. Indeed, the only apparent cost was that for filing incurred by Mr Forde. Given that his claim was largely unsuccessful, I see no reason to order its recompense.

[36] For the reasons above, and given that a costs award can be reviewed, I conclude that any costs that may have been incurred by either party should lie where they fall.

Orders

[37] For the reasons above, I make the following orders:

- (a) Mr Forde's claim that he was dismissed by Elrich Enterprises Limited is dismissed;
- (b) Elrich is ordered to pay Mr Forde the sum of \$99.00 gross, being one days pay improperly deducted from his final pay;
- (c) Costs shall lie where they fall.

M B Loftus
Member of the Employment Relations Authority