

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 396/09
5150117

BETWEEN JUNE GORDON-DILL
 Applicant

AND LEITH SISSON TRAVEL
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Leith Sisson for Respondent

Investigation Meeting: 20 October 2009

Determination: 11 November 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] From July 2004 until September 2008 June Gordon-Dill worked as business development manager of North Shore Business Travel, a travel agency operated by Leith Sisson Travel Limited (LTSL).

[2] She seeks an order from the Authority to resolve a dispute with LSTL over two claims she made for reimbursement of expenses. The expenses claimed were mileage for using her own car for business purposes.

[3] Based on a rate of 62 cents per kilometre Ms Gordon-Dill says she is entitled to payments of:

- (i) \$232.20 for 540 kilometres travelled between 28 May and 31 July 2008 (but for which she was paid only 19 cents per kilometre); and
- (ii) \$228.78 for 369 kilometres travelled between 5 August and 10 September 2008 (and for which she has not been paid any amount).

[4] LSTL denies Ms Gordon-Dill is owed what she claims. It says Ms Gordon-Dill had agreed from May 2008 to be reimbursed at the lower rate of 19 cents per kilometre after it was discovered she had been reimbursed for more than LSTL believed she was entitled to in the period from November 2007 to May 2008. The extra reimbursement was for travel between home and work.

[5] LTSL says it did not try to get back that “*overpayment*” at the time of reducing the rate but wants it taken into account now given that Ms Gordon-Dill says she did not agree to any change. It accepts that the second claim – for August and September travel – is owed, but only at the 19 cent rate and totalling \$70.11.

Issues

[6] The issues for resolution are:

- (i) what terms were agreed for reimbursement of Ms Gordon-Dill’s use of her car; and
- (ii) whether any change to those terms was agreed; and
- (iii) whether LSTL is entitled to offset the alleged earlier overpayments against subsequent mileage claims?

Investigation

[7] For the purposes of the Authority’s investigation Ms Gordon-Dill and LSTL’s director Leigh Sisson lodged written statements and a number of background documents setting out their communication and views on these issues. Both women, along with LSTL director Fairfax Moresby, attended the meeting and – under oath or affirmation – answered questions from the Authority. Each party provided an oral closing summary on their arguments regarding the claim.

Agreed terms

[8] From 15 August 2005 Ms Gordon-Dill’s written terms of employment had expressly included a “*company vehicle for business use*”. However in November

2007 the company car she drove broke down and arrangements were made for her to use her own car and receive reimbursement. She asked for written confirmation that she would be “*reimbursed at the government rate of .62 (sic) per km for the use of my personal vehicle in performing my job*”.

[9] This was confirmed by a letter from Ms Sisson on 17 January 2008 stating the business “*will reimburse your mileage at 62c per km for business use of your private vehicle. A monthly log will be required to support this claim*”.

[10] The letter accompanied a revised employment agreement which Ms Gordon-Dill subsequently signed. The agreement recorded a change in normal working hours from five days a week to four days a week. The agreement included clauses on completeness, entirety and variation. The effect of these clauses were that the written terms constituted the “*entire agreement*” between the parties, any “*previous agreements and understandings*” were replaced, and any variation had to be in writing and signed by both parties.

[11] Two points need to be noted about the agreed terms:

- (i) there was no provision for Ms Gordon-Dill to be paid mileage for ordinary travel between home and work; and
- (ii) the reimbursement rate includes no express written reference to any IRD scale for reimbursing employees for work use of their own vehicles.

Was any change to the 62 cent rate agreed?

[12] Before Ms Gordon-Dill had to start using her own car for business purposes, she had used a company car to travel to and from work. She says the company preferred her to take the car home rather than leave it at the office on evenings and weekends. Once using her own car, she “*assumed*” that reimbursement for her travel to and from work each day could be claimed as mileage. She included that travel – a total of an extra 40 kilometres claimed each day – in her monthly expense reports for the period from November 2007 to May 2008.

[13] In that seven month period Ms Gordon-Dill claimed reimbursement for more than 6000 kilometres of travel, including around 2500 kilometres of travel between her home and the office. Until late May 2008 the travel between home and work was reimbursed at the rate of 62 cents per kilometre to a total value of more than \$1550.

[14] By early May 2008 Ms Sisson had questioned the reimbursement costs being paid to Ms Gordon-Dill. I accept Ms Sisson's evidence that she then talked with Ms Gordon-Dill about using the IRD scale regarding reimbursements to employees for use of their personal cars on work matters. Ms Sisson understood that scale to provide for a 62 cent rate to reduce to 19 cents after the employee had claimed for 3000 kilometres in any one year. Ms Sisson then ordered that the rate paid to Ms Gordon-Dill should also reduce to 19 cents for business travel and that no further reimbursement would be made for travel to and from work.

[15] I also accept Ms Gordon-Dill's evidence that she said at the time that she was "*not happy*" with the change and the conversation cannot be characterised as agreement to the change. There was no agreed reduction in the rate.

[16] I find LSTL was not entitled to unilaterally reduce the rate. The reimbursement rate was expressly agreed in January 2008 to be 62 cents an hour. While Ms Gordon-Dill's email of December 2007 had requested that the amount be set at what she called a "*government rate*", there was no agreement to apply any provisions of an IRD scale capping how many kilometres could be claimed.

Can LSTL offset any payments due against earlier overpayments?

[17] Before determining what LSTL might still owe Ms Gordon-Dill, if anything, it is necessary to look at one other aspect of the dealings between the parties.

[18] In May 2008 LSTL did not seek repayment from Ms Gordon-Dill of mileage payments made to her for travel between home and work from November 2007 to May 2008. However, in responding to her claim in the Authority, LSTL did reserve its position on whether it might now be able to counterclaim against Ms Gordon-Dill for those costs.

[19] Ms Gordon-Dill does not accept there was any agreement with her in May 2008 that LSTL would waive repayments of home-work travel reimbursement in return for her accepting the subsequent lower 19 cent of reimbursement for future business mileage. In those circumstances I accept LSTL should not be prevented from resiling from that bargain because Ms Gordon-Dill has not kept her side of what LSTL understood it to be.

[20] I find Ms Gordon-Dill had no entitlement to claim reimbursement of expenses for travel between home and work from November 2007. Her previous travel taking the company car home each night was, as described in her witness statement, “*the company’s preference*” because it did not want the car left at the office overnight and weekends. That business purpose was removed once she started travelling in her own car and receiving reimbursement for its business use. In her evidence Ms Gordon-Dill could put her reason for claiming home-work travel no higher than an “*assumption*”. However, just as there was no agreement to reduce her business travel reimbursement rate, there was no agreement to pay her that rate for ordinary home-work travel. Any assumptions otherwise were clearly removed by the absence of any such provision in her complete and entire employment agreement signed in January 2008.

[21] Accordingly I accept account should be taken of the overpayment made to Ms Gordon-Dill in the period of November 2007 to May 2008. In doing so I note a point fairly made by Ms Sisson in her evidence – LSTL should have picked up those payments to Ms Gordon-Dill earlier than it did. It was tardy and that was part of the reason that it did not pursue any repayment at the time. Neither does it do so now. Rather it has indicated it would pursue a counterclaim only if it were ordered to pay to Ms Gordon-Dill more than the outstanding amount of \$70.11 owed at the rate of 19 cents per kilometre for business travel in August and September 2008.

Determination

[22] Returning to the issues identified earlier I find that:

- (i) Ms Gordon-Dill was entitled to be reimbursed at the rate of 62 cents per kilometre for business travel in her private vehicle

between 28 May and 10 September 2008 with a total value of \$460.98; and

- (ii) LSTL had earlier paid Ms Gordon-Dill around \$1500 more than she was entitled to receive in reimbursements for use of her private vehicle in the period from November 2007 to May 2008; and
- (iii) LSTL waived its opportunity to seek repayment of some or all of that overpayment because of a mistaken belief that it was entitled to reduce the rate of subsequent reimbursements for business travel.

[23] In all the circumstances, and in exercise of the discretion for the Authority to act as it thinks fit in equity and good conscience, I decline to make the order for payment sought by Ms Gordon-Dill.

[24] Neither party was legally-represented at the investigation meeting. Any costs are to lie where they fall.

Robin Arthur
Member of the Employment Relations Authority