

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 31
5396092

BETWEEN WAYNE ROGER GREEN
Applicant

A N D PHIL ANDERSON CARRIERS
1986 LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: C Mateer, Advocate for Applicant
J Riddle, Counsel for Respondent

Investigation Meeting: 18 September 2013 at Auckland

Submissions Received: 27 September 2013 and 18 October 2013 from Applicant
11 October 2013 from Respondent

Date of Determination: 30 January 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Wayne Green, claims that he was unjustifiably dismissed on or about 22 April 2012. The actual date of the alleged dismissal has not been clearly identified by Mr Green. Indeed, whether or not Mr Green was dismissed is an issue for the Authority to determine as Mr Christopher Powle, the Managing Director of Phil Anderson Carriers 1986 Limited (the Company), says that Mr Green was not dismissed; rather it is alleged that he abandoned his employment on or about 10 May 2012.

Background

[2] The Company is a small transport operator employing four or five drivers operating a fleet of nine trucks, carrying out general freight cartage in the metropolitan Auckland area.

[3] Mr Green was initially employed by the Company as a driver for a short period: from August 2010 to February 2011. The evidence of Mr Green is that he “walked off” the job in February 2011 because he was not happy about the way he was being treated by Mr Powle. The evidence of Mr Powle is that Mr Green left as a result of a disagreement with another driver employed by the Company.

[4] However, Mr Green was employed by the Company again later in 2011; following an approach to Mr Powle by another senior driver for the Company, Mr Rob Dahl. During the material times relating to this matter, Mr Green lived at Mr Dahl’s house.

The absence of Mr Green from his employment

[5] The common evidence of Mr Powle and Mr Green is that it was agreed that the latter would take some annual leave during April 2012. It was agreed that Mr Green would (and did) finish work on Thursday, 5 April 2012. Mr Green was entitled to two public holidays: Good Friday (6 April 2012) and Easter Monday (9 April 2012). Following the observance of these two public holidays, Mr Green was to take annual leave and he was due to start back at work on Monday, 30 April 2012.

[6] The evidence of Mr Powle is that a relief driver was employed by the Company to provide cover for Mr Green’s annual leave break. Mr Powle attests that he asked Mr Dahl to obtain the Company’s fuel card and cellphone from Mr Green so that these items could be provided for the use of the relief driver.

[7] The evidence of Mr Powle is that he was expecting Mr Green to be back at work on Monday, 30 April 2012, but he failed to appear. And Mr Green was not present on Tuesday, 1 May or Wednesday, 2 May 2012.

[8] Given that Mr Powle knew that Mr Green lived at Mr Dahl’s house, he inquired from Mr Dahl if he had heard from Mr Green and if he knew why he had not

returned to work as expected. Mr Powle says that he was advised by Mr Dahl that Mr Green had injured himself.

A conflict in the evidence

[9] As previously indicated, there is a primary issue to be determined. This is whether Mr Green was dismissed or did he abandon his employment? And there is a substantial difference between the evidence of Mr Green as compared with that of Mr Powle and Mr Dahl.

The evidence of Mr Powle

[10] Mr Powle attests that he recalls that when he inquired of Mr Dahl about the whereabouts of Mr Green, he was informed by Mr Dahl that Mr Green had phoned him on the night of 2 May 2012. Mr Green had informed that he had fallen over while drinking at the Buffalo Club at Ngaruawahia, on Sunday, 29 April 2012. Mr Powle attests that he gained the impression from Mr Dahl that Mr Green had incurred a serious injury. But then, Mr Powle says that on Friday, 4 May 2012, Mr Dahl advised him that Mr Green “was fine” and had ridden with Mr Dahl in his truck that day.

[11] The further evidence of Mr Powle is that given the information received from Mr Dahl on Friday, 4 May, he expected to hear from Mr Green on Monday, 7 May 2012, but there was no contact from him. Mr Powle says that he did not have a contact phone number for Mr Green as the Company cellphone had been returned for the use of the relief driver while Mr Green was on leave. Mr Powle attests that the only way that he could contact Mr Green was via Mr Dahl and Mr Dahl had advised that Mr Green had specifically told him that Mr Powle was not to be given Mr Green’s personal mobile phone number. Mr Powle says that he took this to mean that Mr Green no longer wanted to have an employment relationship with the Company.

[12] Mr Powle attests that Mr Dahl informed him that he had told Mr Green to get in contact with Mr Powle to explain why he had not returned to work. Finally, Mr Powle told the Authority that when Mr Green was still employed by the Company, he became aware that he was looking for employment with another transport business; Toll New Zealand. When Mr Green never returned to work, Mr Powle made some inquiries and discovered that Mr Green had taken employment with an owner/driver who was contracted to Toll New Zealand, albeit it seems that the nature of the work may have been casual relief driving.

[13] There was also an odd twist in regard to the events. While Mr Green had, apparently, taken up employment with another transport operator, during June 2012, Phil Anderson Carriers had a surplus of work and was short staffed. Mr Dahl suggested to Mr Powle that Mr Green could be engaged to carry out two or three days' work. Mr Powle agreed to this but it seems that the details of the arrangement were worked out between Mr Dahl and Mr Green and after a few days, Mr Green ceased working for the Company again.

The evidence of Mr Dahl

[14] Mr Dahl confirms that Mr Green never came back to work on 30 April 2012. The written evidence of Mr Dahl is that Mr Green had not come back to his house by 30 April 2012. But Mr Dahl's oral evidence is that Mr Green was at the house on 23 April 2012 and left again on 29 April 2012. The evidence of Mr Dahl is that he received a phone call from Mr Green on the evening of 2 May 2012. Mr Green informed that he had been drinking at the Buffalo Club in Ngaruawahia and had fallen over while drunk, and hurt his leg¹. Mr Dahl says that he told Mr Green that he should contact Mr Powle as to why he had not returned to work as expected on 30 April 2012. Mr Dahl told the Authority that it was obvious Mr Green had hurt his leg as he was hobbling and it was his opinion, following a question from the Authority, that Mr Green would have had difficulty climbing into a truck.

[15] The evidence of Mr Dahl is that he told Mr Green "on a number of occasions" that Mr Powle wished to talk to him and that he should ring him; but Mr Green did not make any contact with Mr Powle.

[16] Mr Dahl attests that Mr Green was: "...sitting around the house doing nothing and watching TV" until he asked Mr Green if he wanted to accompany him in his truck. Mr Green accepted the offer as he said he was "bored stiff". While the evidence about when Mr Green first accompanied Mr Dahl as a passenger in his truck is a little uncertain, it seems it was about 3 May 2012. Mr Dahl attests that Mr Green also accompanied him on 7, 8, 9 and 10 May 2012; but he was not working, simply a passenger. It seems that Mr Powle was not aware of this arrangement between Mr Green and Mr Dahl.

¹ However, it now appears that Mr Green injured his leg at a location in Manurewa.

[17] Mr Dahl confirms that Mr Green told him not to give Mr Green's mobile phone number to Mr Powle and he adhered to this request. However, Mr Dahl says that he offered his Company mobile phone to Mr Green to use to contact Mr Powle but the offer was rejected. Mr Dahl attests that: "*I did everything I could to get Wayne [Mr Green] to ring Chris [Mr Powle]*", as it was in Mr Dahl's interests for Mr Green to be working as he owed him rent.

The evidence of Mr Green

[18] First, Mr Green is inconsistent about when the alleged dismissal was deemed to have occurred. In his *Statement of Problem* received by the Authority on 24 September 2012, Mr Green says that he was dismissed on or about 16 April 2012. Mr Green records that he returned to Mr Dahl's home on this date after three weeks holiday. Mr Green states in his statement of problem that he was informed by Mr Dahl on 16 April 2012 that Mr Powle required the Company mobile phone and the fuel card to be returned and that this was because Mr Green was "sacked".

[19] However, in an amended statement of problem received by the Authority on 1 February 2013, Mr Green alleges he was dismissed on or about 22 April 2012. And in this statement, Mr Green says that he returned home on 22 April 2012 and he was then informed that he was required to return the Company phone and fuel card because he had been dismissed.

[20] But in his evidence to the Authority, Mr Green confirms that he was treated for an injury to his knee following his attendance at the V8 car racing in Hamilton that took place on 20-22 April 2012.

[21] Mr Green's written evidence to the Authority is that he returned to Mr Dahl's home on 23 April 2012. However, his oral evidence to the Authority is that he returned home "*quite late*" on Sunday, 22 April 2012. Mr Green attests that he was "*sorting out*" his work clothing in preparation to return to work on 30 April 2012 when he was informed by Mr Dahl that he had been sacked²; but this was on 23 April 2012.

[22] Mr Green attests that he phoned Mr Powle on Thursday (26 April 2012) or Friday (27 April 2012) and inquired from him if he had been dismissed. Mr Green

² Mr Dahl denies that any such discussion took place.

says that Mr Powle told him that there was not enough work for him to be “*kept on*” and that his job had “*ended*”.

[23] The further evidence of Mr Green is that on 30 April 2012 he went to WINZ to apply for the unemployment benefit but was informed that there would be a stand down period of 13 weeks. Mr Green attests that, because Mr Powle had informed him that he should do so, he met with “Rex” from Listers Transport; and Rex informed him that Mr Powle had contacted him about a job for Mr Green.

[24] Firstly, Mr Powle denies ever receiving any contact from Mr Green and secondly he attests that he never spoke with Rex at Listers Transport.

[25] Mr Green says that he commenced a new driving job with Toll New Zealand [most probably a contractor to Toll New Zealand] on 15 June 2012.

Analysis and conclusions

[26] The primary issue that requires determination is: **Was Mr Green dismissed?**

[27] Balancing the evidence, I conclude that Mr Green was not dismissed. In reaching this conclusion I have had to assess the credibility of the three witnesses as set out in their evidence above, and generally, I prefer the evidence of Mr Powle and Mr Dahl to that of Mr Green. This is because the evidence of Mr Green was inconsistent, and at times simply lacking in credibility. In particular, Mr Green’s statements about when he was allegedly dismissed were inconsistent to the extent that one can only conclude that his version of events is at best, confusing, and at worst, something less than plausible.

[28] And while it should not be taken that the evidence of Mr Powle and Mr Dahl is accepted in its entirety, on balance their evidence was largely credible, consistent and logical when compared with that of Mr Green.

Determination

[29] I find that Mr Green was not dismissed. It logically follows that he was not unjustifiably dismissed and his claim to the contrary fails.

[30] I conclude that it is more probable than not that Mr Green abandoned his employment and while I cannot be certain, it is quite likely that Mr Green did not

return to work on 30 April 2012, as expected, because he had injured his leg during his holiday break to such a degree that he was unable to drive. There is also some evidence that Mr Green was dissatisfied with his employment with Phil Anderson Carriers Limited and that he was looking for alternative employment.

[31] Finally, I find that no fault can be attributed to Mr Powle for not making contact with Mr Green before concluding that the latter was not going to return to his employment. I accept that Mr Powle made reasonable attempts, via Mr Dahl, to have Mr Green contact him. And I accept that Mr Dahl made concerted efforts to convince Mr Green to contact Mr Powle; all to no avail.

[32] In regard to the failure on the part of the Company to provide Mr Green with an employment agreement, it is accepted that Phil Anderson Carriers Limited was in breach of the requirements of s.65 of the Employment Relations Act 2000 (the Act). However, given the overall circumstances, it is not appropriate to impose a penalty as while the Company failed to meet its legal obligations under the Act, the failure was remiss rather than deliberate or wilful. Nonetheless, it would be prudent for Mr Powle to ensure that the Company takes appropriate steps to provide suitable employment agreements for all employees; in order to ensure compliance with the requirements of the Act, and to avoid future potential disputes.

[33] Mr Green also alleges that he is owed wage arrears, based on his view that he was not paid appropriately for the hours that he worked. However, the evidence presented by Mr Green regarding this matter is not of sufficient weight to persuade the Authority that he has any entitlement due to him.

Costs

[34] Costs are reserved. The parties are invited to resolve this matter if they can. In the event that a resolution is not possible, the respondent has 28 days from the date of this determination to file submissions with the Authority. The applicant has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority