

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 140  
5367889

BETWEEN            MATTHEW HOOK  
Applicant

A N D                GALE CONTRACTING LIMITED  
Respondent

Member of Authority:     David Appleton

Representatives:         Luke Acland, Counsel for Applicant  
Luke Radich, Counsel for Respondent

Investigation meeting:    27 June 2012 at Blenheim

Submissions Received     27 June 2012 from both parties

Date of Determination:    9 July 2012

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**DETERMINATION OF THE AUTHORITY**

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- A.     The applicant was unjustifiably dismissed.**
- B.     The applicant is awarded arrears of wages, together with remedies pursuant to s 123 of the Employment Relations Act 2000, subject to a 50% reduction for contribution.**
- C.     The respondent failed to provide the applicant with an employment agreement but no penalty is imposed in respect of that failure.**
- D.     Costs are reserved.**

**Employment relationship problem**

[1] Mr Hook asserts that he was unjustifiably dismissed on Sunday, 31 October 2011 and claims lost wages and compensation for humiliation, loss of dignity and injury to his feelings. In addition, Mr Hook claims arrears of wages which were unpaid for his last week of employment.

[2] The respondent denies that Mr Hook was dismissed, claiming that he resigned. The respondent also claims a right of set-off in respect of the non-payment of Mr Hook's final week's wages by reference to money that Mr Hook acknowledges is owed to the respondent in the form of a loan of \$1,250 and the purchase of gib boards to the value of approximately \$630.

[3] Mr Hook also claims that he was never sent a copy of an employment agreement, which is denied by the respondent.

**Brief account of the events leading to the termination of Mr Hook's employment**

[4] Mr Hook was employed by the respondent, which carries out forestry contracting work, as a foreman. He was employed by the respondent for approximately four months.

[5] Approximately two weeks after Mr Hook commenced his employment with the respondent, he lost his driving licence for having driven the respondent's vehicle while drunk, causing him to drive it into a ditch. The owners of the respondent company, Matthew and Andrew Gale, decided that they wished to give Mr Hook a chance to redeem himself and so agreed to pick him up and take him home each day from a pre-arranged pick up point to which Mr Hook's wife would drive him and from which she would collect him.

[6] When Mr Hook lost his driving licence, he was disqualified from driving for six months, but was able to apply for a *limited work licence*, 28 days after the date of the loss of his licence. The evidence of the respondent is that the Gale brothers were prepared to assist Mr Hook to travel to and from work but they wished him to apply for the limited licence as soon as possible so as to relieve them of the inconvenience. In addition, the respondent's evidence is that it was an essential part of Mr Hook's role as a foreman to be able to drive while at work. Mr Hook denied this, saying that his role as foreman was no more than a senior bushman, and that his role could be

carried out on foot once he was on the site they were working at. The true position seems to be that Matthew and Andrew Gale expected the foreman to be able to drive while at work so as to arrange the repairs of equipment, pick up supplies and so forth. However, it seems that this requirement was not one that manifested itself on a frequent basis.

[7] In order to assist Mr Hook to obtain his limited licence, Mr Andrew Gale swore an affidavit on 19 September 2011 in the following terms:

*I, Andrew Gale of Blenheim, managing director, swear:*

1. *I am the Managing Director of Gale Contracting Limited.*
2. *I make this affidavit in support of Matt Hook's application of limited licence.*
3. *The applicant is employed fulltime by Gale Contracting Limited as a foreman. He has been employed for approximately 3 months.*
4. *The applicant works between 5.00am and 7.00pm Monday to Saturday at Gale Contracting.*
5. *If the applicant is unable to receive a limited licence to carry out his duties I will have to review his employment status. I have been able to find alternative transport for the applicant, for now which doesn't allow the applicant to carry out his work duties to full extent, unless the applicant is able to drive I can't carry on employing him.*
6. *As his employer it would cause hardship if I had to terminate the applicants employment as I would have to recruit a new foreman and incur expense doing so. It is very difficult finding forestry foreman [sic] who have as much experience and skill as the applicant has.*
7. *The applicant would only be driving our work vehicle for the sole purpose of getting to and from our job.*

[8] On 10 October 2011, Mr Hook obtained an order from the District Court at Blenheim authorising the issue of a limited licence. This order permitted Mr Hook to drive a specified vehicle registered in the name of the respondent within a specified area between specified hours "*solely for the purpose of Travelling to and from work in these hours*". The order also stated that Mr Hook "*will take the most direct route to his destination not stopping except in the case of emergencies*".

[9] On the back of the order (or on a second page; it was not clear which, as the Authority did not have the original order in front of it), there was the following notice:

*NOTICE TO APPLICANT*

1. *This order only authorises you to apply for a licence in the above terms. You are not authorised to drive until you have applied for and obtained such a licence. You should do so immediately.*
2. *Before a limited licence in the terms of the above order can be issued it may be necessary for you to undergo and pass a test. The authority to whom you apply for your limited licence will advise you if this is so.*

[10] For a reason that is disputed between the parties, Mr Hook failed to obtain the licence despite the above notice. Mr Hook's consistent evidence is that he did not read the order properly and believed that the order itself was the licence and was sufficient to enable him to drive legally. Mr Hook's wife, Megan Hook, who dealt with the family's paperwork, gave credible evidence that she too did not see or read that notice and also believed that the order in itself constituted a right for Mr Hook to drive. It is the respondent's assertion that Mr Hook knew all along that he did not have the limited licence and that he did not obtain it because of the cost. This view was superficially corroborated by the evidence of a constable who later stopped Mr Hook on 29 October 2011.

[11] On this particular point of whether or not Mr Hook genuinely believed that the Court order alone gave him the right to drive, on the balance of probabilities, I believe that he is telling the truth. Although the Police constable gave evidence to the Authority that Mr Hook had told him that he had not obtained the pink licence card because of the cost, Mr Hook's evidence was that he had believed that the card was just a more convenient way to show that he had a limited licence and was not mandatory. He said that he probably had delayed obtaining that licence because of the cost. Therefore, the evidence of the Police constable does not necessarily contradict the evidence of Mr Hook and I accept Mr Hook's evidence that he genuinely believed that he had the right to drive in accordance with the Court order.

[12] Having obtained the Court order, Mr Hook advised Mr Andrew Gale that he had obtained the limited licence. He also asked, either at the same time or separately, whether he could now have access to a work vehicle again. (It had been part of his terms and conditions of employment that a work ute would be provided to Mr Hook.

When Mr Hook had lost his licence, this had been taken away from him by the respondent.) The evidence of Mr Andrew Gale was that he told Mr Hook that he could have access to the work vehicle again once he was satisfied that Mr Hook truly had a limited licence. For a reason that is not readily understandable, although Mr Andrew Gale gave evidence of the inconvenience that was being caused by having to take Mr Hook to and from work, he continued to do so even after Mr Hook had told him he had his limited licence and Mr Andrew Gale did not insist on being shown a copy of it. It is possible that there is nothing sinister in this and that this was merely as a result of a combination of inertia and habitude on the parts of Mr Andrew Gale and Mr Hook.

[13] The key event which led directly to Mr Hook leaving the employment of the respondent occurred on Friday, 29 October 2011 when the Police constable who gave evidence to the Authority happened to stop Mr Hook while he was driving his own vehicle to the pick up point, where Mr Andrew Gale was waiting to collect him. The Police constable realised that Mr Hook did not have a proper limited licence and therefore impounded the vehicle. It also turned out that the vehicle was unregistered and unwarranted.

[14] Mr Hook's evidence is that he called Mr Andrew Gale to tell him what had happened but had told him that his car had been impounded because of the lack of a warrant of fitness and valid registration. Mr Hook admits that he probably did not mention the issue of driving whilst disqualified because, at that point, he had thought he was allowed to drive (relying on the Court order) and had been at a loss as to why the constable had told him he was disqualified. Mr Hook's evidence was that he did not work out that he had been driving while disqualified due to his failure to obtain the pink licence card until he had appeared before a Judge in December 2011 in respect of the matter. He said that the Judge had explained to him how he had failed to finalise an administrative step in obtaining the licence card and so the Judge declined to disqualify him further.

[15] Mr Andrew Gale's evidence was that he and his brother, Matthew, were suspicious that Mr Hook's car should have been impounded merely for not having an up-to-date warrant of fitness and registration and suspected that he probably had not obtained the limited licence despite the fact that Mr Hook had told Mr Andrew Gale that he had. Mr Andrew Gale therefore spoke to someone in the local Police station

and was told that Mr Hook had had his car impounded because he had been driving whilst disqualified. On learning this, Mr Andrew Gale told his brother. Mr Andrew Gale also gave evidence that, when he had spoken to Mr Hook on Friday, 29 October 2011, Mr Hook had stated that he could not work for the respondent company any more because he did not have a car and so was going to head back to his home town of Nelson. The constable who gave evidence stated that Mr Hook had also mentioned, when the constable had stopped him on 29 October 2011, that he was "*fed up with living in Blenheim and was going to go back to Nelson*" or words to that effect.

[16] Mr Andrew Gale and Mr Matthew Gale both gave evidence that they had believed that Mr Hook's words about returning to Nelson indicated a resignation. Mr Hook's evidence is that he did not remember saying that he was returning to Nelson but that he probably would have said that he was going back to Tapawera, around 50 kilometres from Nelson, where he owned a house, to do some work on it that weekend to get it into shape for renting. Mr Hook said that he would go back to his house in Tapawera every weekend and that if he had said that he was going back to Nelson or Tapawera, that would have been what he had meant, and not that he was going to do so permanently. It appears to be uncontested between the parties that Mr Hook was working on his house in Tapawera every weekend to get it in a fit state for renting and, indeed, the respondent had bought approximately \$630 worth of gib board for Mr Hook to enable him to achieve that aim.

[17] Mr Hook's evidence was that, on Sunday, 30 October 2011, he received a message on the work mobile that was in his possession from Mr Matthew Gale saying words to the effect that as Mr Hook had no driving licence, he now had no job. Mr Matthew Gale's evidence on this point was that he did leave a message for Mr Hook saying "*something about the fact that a licence was an essential part of his job, as was obvious, and as we had agreed that he would obtain a work licence after his drink driving incident*". According to Mr Matthew Gale, he had left this message after Mr Hook had already said to Mr Andrew Gale that he was not going to work for the company anymore.

[18] Mrs Hook stated that she had heard the message that had been left on the work mobile by Mr Matthew Gale and confirmed that it had said that, as Mr Hook no longer had a driving licence, he had no job.

**The issues to be determined**

[19] The following are the issues that the Authority must determine:

- a. Did the respondent dismiss Mr Hook on Sunday 30 October 2011 or did Mr Hook indicate on the preceding Friday that he was resigning?
- b. If the respondent did dismiss Mr Hook, was that dismissal unjustified?
- c. Was an employment agreement given to Mr Hook? If not, should a penalty be imposed upon the respondent?

**Did the respondent dismiss Mr Hook on Sunday 30 October 2011 or did Mr Hook indicate on the preceding Friday that he was resigning?**

[20] Taking into account the credibility of the respective witnesses, I am of the firm view that I prefer Mr Hook's evidence. Whilst there were some aspects of Mr Hook's evidence that appeared unlikely to be correct (such as whether he had only had two drinks when he had been stopped for driving drunk), his evidence appears to be more candid and consistent than the respondent's evidence, and especially Mr Andrew Gale's. Two examples may illustrate this. First, Mr Andrew Gale told the Authority during cross examination in the investigation meeting that he had called the Police station and had asked only general questions about a car being impounded, and had not asked anything specifically about Mr Hook. However, his own brief of evidence stated that a Police officer had told him that "*Matthew [Hook] had been stopped while driving while disqualified and charged*".

[21] A second example of an inconsistency was the fact that Mr Andrew Gale insisted that the ability to drive at work was an important part of a foreman's job and that Mr Hook needed his limited licence because of that. However, Mr Andrew Gale's own affidavit, cited above, made it clear that the applicant would only be driving the respondent's work vehicle "*for the sole purpose of getting to and from our job*". Mr Andrew Gale was unable to cogently explain this inconsistency. These inconsistencies lead me to doubt the credibility of the respondent's evidence where it conflicts with that of Mr Hook.

[22] Furthermore, I find it unlikely that Mr Hook would have spontaneously resigned on the basis that his car had been impounded. Losing his employment with

the respondent caused him some financial difficulty and I do not believe he would have resigned before he had known the considered view of his employer to the news that the car had been impounded. Mr Hook may well have expressed some frustration to the Police constable about Blenheim when his car was impounded, but that does not constitute a resignation.

[23] Therefore, taking all these factors into account, I do believe on balance that Mr Matthew Gale left a message on his work phone messaging system indicting that Mr Hook no longer had a job. I believe that this was probably motivated by a belief on the part of the two Gale brothers that Mr Hook had lied to them about obtaining a limited work licence.

**Was the dismissal unjustified?**

[24] In light of my finding that Mr Matthew Gale had left a message on Mr Hook's work phone effectively telling him that he no longer had a job, I must inevitably find that this constituted a dismissal of Mr Hook and, furthermore, given that no process had been followed whatsoever, that the dismissal was unjustifiable. If the two Gale brothers had spoken to Mr Hook first in order to understand why he had not obtained his limited licence, they may have come to the conclusion that there had been no intended deception by Mr Hook. A small amount of research may also have ascertained that the licence card could have been easily obtained and the problem rectified. Those basic steps were not, however, taken by the respondent. That failure renders the dismissal unjustified.

**Was an employment agreement given to Mr Hook and, if not, should a penalty be imposed on the respondent?**

[25] No written copy was produced to the Authority and the respondent's accountants, which produces the respondent's agreements, had no copy retained either according to the respondent. This suggests that none had been prepared for Mr Hook, as one would expect the accountants to have kept a copy. Therefore, I conclude that no employment agreement was ever produced. However, no penalty was sought by Mr Hook in relation to this failure in his statement of problem and so I decline to order that one be paid by the respondent.

**Remedies**

[26] Mr Hook does not seek reinstatement. I therefore turn to the question of sections 123 (b) and 128 of the Employment Relations Act 2000. Mr Hook claims that he had suffered loss of remuneration as a result of his dismissal. Mr Hook did obtain temporary work after his dismissal and so I am satisfied that he made reasonable efforts to find a replacement position, and so has made reasonable efforts to mitigate his losses.

[27] S 128 (3) of the Act provides that the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that provided in subsection 128 (2), namely the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. However, in light of the fact that Mr Hook was employed by the respondent for less than four months, it is not appropriate to exercise a discretion to order the respondent to pay Mr Hook more than a sum equal to his actual lost remuneration or three months' ordinary time remuneration.

[28] Mr Hook earned the net sum of \$2000 per fortnight. Over a space of 13 weeks, that amounts to a sum of \$13,000 lost wages after tax. Mrs Hook, who looks after the family's finances, gave evidence that, during that 13 week period, Mr Hook earned a total of \$6,503.90 after tax. This leaves a net loss of net earnings of \$6,496.10.

[29] Mr Hook also claims lost holiday pay for the period of 13 weeks, which equates to a net sum of \$1,040.

[30] In terms of compensation for humiliation, loss of dignity and injury to feelings, Mr Hook gave some evidence of the stress that had been caused to him by being dismissed given that he was the sole breadwinner and that he had a wife and four children to support. He gave evidence that this stress had caused some marital discord which he had found upsetting.

[31] I believe that it is appropriate to award Mr Hook compensation under s.123(1)(c)(i) of the Act, and I believe that an appropriate award would be \$7,500, in recognition of the moderate amount of humiliation, loss of dignity and injury to feelings that I assess Mr Hook to have suffered as a result of his unjustified dismissal.

**Contribution**

[32] Section 124 of the Act requires the Authority, in deciding both the nature and extent of the remedies to be provided in respect of a personal grievance, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[33] It is my view that Mr Hook's actions contributed directly to the situation giving rise to the personal grievance in two respects:

- (a) Mr Hook driving while drunk which led to the loss of his driving licence in the first place; and
- (b) Mr Hook failing carelessly to carry out all the steps to enable him to obtain a valid limited licence.

[34] Both of these actions by Mr Hook are blameworthy and, in my view, should reduce the remedies to a reasonably significant extent. I do not believe, however, that that contribution should be 100% as has been argued by the respondent, as the situation could have been remedied had Mr Hook been given a chance and not been dismissed so soon after his car had been impounded. In addition, I do not find that his failure to obtain the licence card was a deliberate act on his part. Accordingly, I reduce the compensation and the award of lost wages and lost holiday pay by 50%.

**Arrears of wages claim**

[35] Mr Hook also claims that he was not paid wages for the period he worked between 20 and 28 October 2011. The respondent does not deny this is the case but has withheld the wages on account of the money that is owed to it by Mr Hook. Mr Hook does not deny that he owes the respondent the sum of \$1,250 in respect of a contribution to a bond for his rental of a house in the Blenheim area together with the sum of \$630 in respect of the cost of gib board purchased by the respondent to assist Mr Hook to make his own house near Tapawera suitable for renting.

[36] Mr Hook does, however, deny that he owes the respondent a further sum of \$1,000 in respect of the cost of repairing Mr Hook's chainsaw when he commenced work with the respondent company. Mr Hook maintains that, in the forestry industry,

the chainsaw is a piece of equipment that is provided by the employer and that, although he owned the chainsaw in question, it was the responsibility of the respondent to make it useable. The respondent denies this. However, in light of the fact that the respondent is expressly not counterclaiming against Mr Hook for this or any other sums, this is not something that the Authority need consider any further.

[37] However, Mr Hook, whilst agreeing that he owes the respondent the sums of \$1,250 and the further sum of \$630, has still included in his claim arrears of wages in respect of the period of 20-28 October 2011 in the net sum of \$1,282.14.

[38] Mr Hook's counsel has not expressly referred to the provisions of the Wages Protection Act 1983 but the Authority is bound to take its provisions into account. Section 4 of the Wages Protection Act provides that, subject to ss.5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[39] Section 5(1) of the Wages Protection Act states that:

*An employer may, for any lawful purpose,*

*(a) with the written consent of a worker; or*

*(b) on the written request of a worker –*

*make deductions from wages payable to that worker.*

[40] Section 6 of the Wages Protection Act relates to the right of an employer to recover overpayments from wages, which is not relevant in this case.

[41] Mr Andrew Gale conceded for the respondent that no documentation had been put in place recording the arrangements between the respondent and Mr Hook in relation to the sums that Mr Hook owes it. Therefore, under the Wages Protection Act, the withholding of the wages for the period 20-28 October 2011 was unlawful as no written consent or request had been obtained from Mr Hook for the deductions. Accordingly, I order that the respondent pay to Mr Hook the further net sum of \$1,282.14 in relation to unpaid wages for the period of 20-28 October 2011. This sum is not to be reduced by way of contribution as it relates to pay already earned.

[42] Insofar as the sums owed by Mr Hook to the respondent is concerned, as no counterclaim has been lodged with the Authority, I am unable to make any orders in respect thereof.

**Orders**

[43] After taking into account the 50% reduction for contribution on the lost wages, lost holiday pay and s 123 (1)(c)(i) compensation, I order the respondent to pay to Mr Hook the following net sums:

- (a) \$1,282.14 in respect of unpaid wages;
- (b) \$3,248 in respect of lost wages;
- (c) \$520 in respect of lost holiday pay;
- (d) \$3,750 in respect of s.123(1)(c)(i) of the Act.

**Costs**

[44] Costs are reserved. The parties should attempt to agree how their respective costs should be dealt with. However, in the absence of such agreement within 28 days of the date of this determination, Mr Hook may lodge and serve a memorandum in relation to a contribution towards his costs and the respondent will have a further 28 days within which to respond to that memorandum.

David Appleton  
Member of the Employment Relations Authority