

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 48/08  
5079248

BETWEEN                      RAYMOND HARDING  
   Applicant  
  
AND                                V & A KEEFE LIMITED  
   Respondent

Member of Authority:     James Crichton  
  
Representatives:           Robert Thompson, Advocate for Applicant  
   Michael Kyne, Advocate for Respondent  
  
Investigation Meeting:    7 February 2008 at Christchurch  
  
Determination:             30 April 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Harding) was employed as a truck driver by the respondent, V & A Keefe Limited (Keefes).

[2]     Mr Harding says that he was unjustifiably dismissed by Keefes on 4 December 2006. Mr Harding also alleges that he was not paid holiday pay in accordance with the requirements of the Holidays Act 2003 in that his holiday pay was paid in his hourly rate. He seeks holiday pay on the gross earnings while in the employment. Mr Harding's gross earnings during the course of the employment were \$91,066.

[3]     Keefes tacitly acknowledge that the dismissal was procedurally unfair, although it denies that strictly speaking the holiday pay was paid in the hourly rate, claiming that in fact it was paid into a separate bank account, albeit that it was calculated as part of the hourly rate.

[4] Mr Harding commenced employment in March 2005, having previously worked as a driver for Mainfreight. Keefes contracted to Mainfreight to service a particular run and it recruited Mr Harding from Mainfreight to drive one of its vehicles.

[5] For most of the employment, Mr Harding lived in Cheviot, some 70 miles north of Christchurch, and the run for which he was responsible involved a handover point at Waipara, some 30 miles south of Cheviot. When Mr Harding moved to Cheviot, Keefes provided a vehicle to enable Mr Harding to leave the truck at the appropriate point and then get back home again after the end of his run.

[6] However, Keefes' business was in financial difficulty and there was a need to reduce costs. Mrs Keefe gave evidence at the Authority's investigation meeting and indicated that she had told her husband (the other director of Keefes), that they would need to stop running the car (the one that Mr Harding used) in order to defray costs.

[7] There was a discussion between Mr Keefe and Mr Harding on 1 December 2006 at which Mr Keefe made it clear to Mr Harding that the car would have to be withdrawn. Mr Harding told Mr Keefe that he was *holding you to the agreement on the car* by which he meant that he regarded the employment agreement as including the use of the employer's car as an essential term.

[8] The discussion clearly became heated but by all accounts there was no agreement about the car. Although Keefes allege that Mr Harding had resigned his position in protest at the end of that discussion, that is not Mr Harding's evidence and indeed there was a subsequent conversation at which the relationship certainly came to an end which suggests that it was not Keefes' view either. This subsequent conversation happened on 4 December 2006, during which Mr Keefe rang Mr Harding, clearly believing that the employment relationship was still extant.

[9] There was another discussion about the car in which Mr Keefe made it clear that Keefes had to withdraw the vehicle because of cost but there were discussions about various other options that might have enabled Mr Harding to fulfil his obligations to the employer and get home.

[10] Again, there was argument between the parties and I accept Mr Harding's evidence that Mr Keefe said that as Mr Harding was not prepared to change and *be part of the team*, he (Mr Harding) was fired.

[11] Mr Harding then raised the personal grievance through his advocate.

### **Issues**

[12] The following matters need to be inquired into:

- (a) Was there an unjustified dismissal;
- (b) What are the consequences of any unjustified dismissal?

### **Unjustified dismissal?**

[13] There can be little doubt that the dismissal of Mr Harding by Mr Keefe in the telephone discussion on 4 December 2006 is unjustified by reason of procedural unfairness. This was a dismissal in the heat of the moment, over the telephone, without any opportunity for Mr Harding to be heard or to be represented or indeed any reasonable process for working through the difficulty.

[14] Mr Harding's view was that it was an essential term of his employment agreement that he be provided with transport in order to fulfil his obligations and that transport had been provided by the employer for the bulk of the period that Mr Harding was living in Cheviot and was working for Keefes. Mr Harding's view that that transport was arbitrarily and unilaterally withdrawn, thus impacting on the continuity of the employment relationship, is fundamental to his view of the fairness of the dismissal.

[15] Of course, from the point of view of Keefes, it withdrew the car not out of any capricious or arbitrary wish to disadvantage Mr Harding but simply because the economic circumstances the firm was then in were so grave as to require the tightening of belts all around. Keefes felt it had no choice but to cut costs wherever possible.

[16] I do not find it necessary to determine whether or not Keefes could withdraw the vehicle without Mr Harding's consent because it is plain on its face that the dismissal, which took place in the telephone discussion on 4 December 2006, is unfair in itself.

**What consequences should flow?**

[17] By virtue of its grave financial position, Keefes has limited ability to meet any award made by the Authority. Since the investigation meeting, further information has been made available to me which suggests that the financial position of the employer has deteriorated still further.

[18] That being the position, I intend to take an unusual course in dealing with the issue of remedies and I come to that shortly, but before turning to that issue, I wish to deal briefly with the question of the holiday pay entitlement.

[19] There can be no doubt that the way in which Mr Harding was paid his holiday pay is in breach of s.28 of the Holidays Act 2003. I am satisfied, on the balance of probabilities, that Mr Harding is neither a fixed term worker pursuant to s.66 of the Employment Relations Act 2000 or an intermittent or irregular worker as defined in the second leg of s.28(1)(a) of the Holidays Act 2003.

[20] I do accept the submission made on the employer's behalf, however, that the arrangement made in respect of holiday pay was not done to disadvantage Mr Harding although Mr Harding now says that he was not aware of the arrangement. The description of the process used by the employer falls within the terms of s.27, which prescribes that workers should be paid for their holidays before they take them. However, the failure to comply with s.28 is fatal to the employer's submission that its action is excusable.

**Determination**

[21] I am satisfied on the balance of probabilities that Mr Harding has a personal grievance by reason of having been unjustifiably dismissed from his employment by Keefes. As a consequence, Mr Harding is entitled to remedies.

[22] Because of the financial difficulties of Keefes, there is a real question as to whether it is in any position to meet an award of the Authority. That being the position, I order that the parties' representatives are now to engage with each other with a view to endeavouring to resolve the question of remedies by agreement.

[23] Mr Harding may be comforted by the fact that the Authority has made a determination in his favour and may see the benefit of reaching an accommodation

with Keefes which meets his needs and which Keefes is able to cope with in its present straightened circumstances.

[24] In that connection I refer now to the issue of contribution which the law requires me to consider. Mr Harding did, I find, contribute to his personal grievance by adopting an attitude with his employer which, given the employer's other difficulties of a financial nature, made resolution all the more difficult. I consider contribution of 30% appropriate in all the circumstances.

[25] Leave is reserved for the parties' representatives to come back to the Authority in the event that the matter of remedies is not able to be resolved by agreement.

### **Costs**

[26] Costs are also reserved; the parties' representatives are encouraged to see if the matter of costs can be dealt with in the context of the overall settlement of the remedies issue, but in the event that that is not possible, the parties may revert to the Authority to have costs determined as well.

James Crichton  
Member of the Employment Relations Authority