

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 111
5450928

BETWEEN

MAURICE HODGE
Applicant

A N D

HIBISCUS COAST
SCAFFOLDING LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Mark Donovan, Counsel for the Respondent

Investigation Meeting: 18 December 2014 at Auckland

Date of Determination: 17 April 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Hodge) alleges that he was unjustifiably dismissed by the respondent (Hibiscus Coast Scaffolding) on 31 January 2014. Hibiscus Coast Scaffolding denies the allegation and maintains that Mr Hodge resigned his employment.

[2] A preliminary issue was also raised on behalf of Hibiscus Coast Scaffolding concerning Mr Hodge's status as an undischarged bankrupt. I referred counsel to a decision of the Chief Judge in *Young v. Bay of Plenty District Health Board* [2013] NZEmpC 131, the effect of which is to identify the scheme of the Insolvency Act 2006 as a vesting of the property of a bankrupt in the Official Assignee: para.[44], and then subsequently identifying personal grievance remedies such as reinstatement and compensation as not being "*property*": paras.[52] and [53].

[3] To be absolutely certain of the position, I caused inquiries to be made of the Insolvency Service which confirmed that it had no interest in the bankrupt's personal

grievance claim but that if the bankrupt was unsuccessful and costs were awarded against the bankrupt, the successful party could not look to the Official Assignee to satisfy any costs award. Costs would need to be pursued against the bankrupt separately.

[4] In addition to advancing that issue concerning Mr Hodge's bankruptcy, Hibiscus Coast Scaffolding also mounted a counterclaim seeking compensation for Mr Hodge's alleged failure to return company property and for an insurance excess which Hibiscus Coast Scaffolding says it incurred as a consequence of Mr Hodge's behaviour during the employment.

[5] Mr Hodge is an experienced scaffolder and was engaged by Hibiscus Coast Scaffolding, in that capacity, initially as a contractor.

[6] However, on 11 April 2013, Mr Hodge was adjudicated bankrupt although it was not until January 2014 that Mr Hodge made this information available to Hibiscus Coast Scaffolding.

[7] It seems common ground that Mr Hodge spoke with the Official Assignee about his circumstances and as a consequence of that discussion, approached Hibiscus Coast Scaffolding in January 2014 to seek to continue the association but on the basis that he be employed by Hibiscus Coast Scaffolding rather than contracting to it.

[8] That new arrangement was agreed to and in consequence, Mr Hodge commenced employment with Hibiscus Coast Scaffolding on 13 January 2014 and it is the employment relationship from that date to the termination of the employment on 31 January 2014 that this determination is concerned with.

[9] Hibiscus Coast Scaffolding says it had prepared a draft employment agreement for Mr Hodge but that that agreement had not been finalised and presented to Mr Hodge before the employment came to an end.

[10] Hibiscus Coast Scaffolding was engaged in January 2014 by a construction company called Focus to erect scaffolding around Papatoetoe High School to facilitate building works that Focus was to undertake at the school. Focus asked for the scaffolding to be completely erected by 24 January 2014.

[11] From 14 January 2014, Mr Hodge was working on the Papatoetoe High School job. He was put in charge of the scaffolding team onsite because of his considerable experience.

[12] On 26 January 2014 (two days after the scaffolding job was supposed to be completed at Papatoetoe High School), Mr Hodge sent to the director of Hibiscus Coast Scaffolding, Mr Mathers, a text message which Hibiscus Coast Scaffolding took as “a clear indication” that Mr Hodge wished to resign from his employment and return to being a contractor. That text is in the following terms:

Big dramas with your job ... I can't continue building something that doesn't work ... I want to contract again with my crew ... !!! I don't want to work for Hibiscus in the capacity I am currently employed ... can't deal with the dramas I'm presented with each day ... but before anything changes I want you to draw on your plans how you were going to build that roof with 8 x 8.0m 2 x 6.0m ladder beams. I've had enough ... ! But I will complete job but Mark Pat Bill Phil Cairo are also accountable but they escape your wrath ... !!! I will try and forward the bullshit I have to try and complete. I'm way better than this ... EXCELL will rise again better than before ... !!! But I still want to work in some capacity with you but scaffolding wise contract only ... !!!

[13] Mr Hodge told me that the text message was the consequence of a build-up of frustration and while he accepted the text message conveyed his anxiety about the structure that he was being asked to erect at the Papatoetoe High School, he denied that he was also seeking to convey the message that he wanted to stop being employed and go back to contracting, despite the clear words in the text message which appeared to say precisely that. Mr Hodge told me in his evidence that he was in no position to go back to contracting because the Official Assignee had told him that he could not work on his own account as an undischarged bankrupt.

[14] In any event, Hibiscus Coast Scaffolding clearly took the text message at face value, believing it signalled Mr Hodge's intention to resign his employment. To clarify matters, Mr Mathers went to visit Mr Hodge at his home on Monday, 27 January 2014 (Auckland Anniversary Day) and Mr Mathers says there was agreement that Mr Hodge would finish the Papatoetoe High School job in a further day and a half, do that on wages, and then revert to being a contractor. A further agreement was that, as a contractor, Mr Hodge would no longer have the use of the company vehicle.

[15] Mr Hodge agrees that Mr Mathers called around to his home on that day but denies that the outcome of the meeting was as Mr Mathers remembers it.

[16] Mr Hodge, as I have already mentioned, noted that he was unable to return to contracting for legal reasons and so denies having agreed to do any such thing but also maintained that Mr Mathers' visit was to do with the purchase of some scaffolding gear.

[17] The following day, 28 January 2014, Mr Mathers left for an overseas holiday and delegated the operation of his company in his absence to his daughter, Ms Mathers, and Nick Vitasovitch, Hibiscus Coast Scaffolding's leading hand.

[18] On 29 January 2014, Hibiscus Coast Scaffolding received a complaint from Focus pointing out that the scaffolding was due to have been erected by 24 January 2014 and was still not complete. Focus also complained that Mr Hodge was not arriving at work on time and leaving early, which contributed to the unsatisfactory progress on the job.

[19] Hibiscus Coast Scaffolding says that it made a number of attempts to contact Mr Hodge by telephone but Mr Hodge denies this. The telephone records that I have sought from the cellphone providers appear to show calls to one of Mr Hodge's cellphones by Mr Vitasovitch but those calls all predate the critical period from 29 January 2014 onwards.

[20] In any event, in the expectation that the job would be able to be finished by Mr Hodge alone on the afternoon of 29 January 2014, Mr Vitasovitch removed two of the co-workers from the site and allocated them to another job.

[21] The GPS records available to Hibiscus Coast Scaffolding disclose that Mr Hodge left the Papatoetoe High School job at 1.14pm on that day and did not return. That intelligence was confirmed to Hibiscus Coast Scaffolding by Focus which rang at about 1.30pm on the same day, to say that Mr Hodge had left the site.

[22] Ms Mathers then proceeded to try to track Mr Hodge's vehicle using the GPS system and while there is dispute about precisely what it was that Mr Hodge was doing in that afternoon, it is apparent on its face that Mr Hodge was not at the workplace working. What Mr Hodge says is that given the removal of the two

labourers by the employer, he was unable to complete the job single handed and accordingly left the site.

[23] Ms Mathers and two staff members eventually tracked Mr Hodge where they sought to repossess the company vehicle. Mr Hodge was cooperative. Mr Hodge says that Ms Mathers told him that her father had decided that his employment must come to an end and that she said something like *“Dad says you’re sacked. I’ve come to get the vehicle”*. Hibiscus Coast Scaffolding denies that the first part of that statement was made at all and the witnesses who were available to the Authority who were present at the exchange did not hear the suggestion that Mr Mathers conveyed to Mr Hodge that he was sacked.

[24] Hibiscus Coast Scaffolding was eventually able to take possession of its vehicle again later that night and it says that Mr Hodge was clearly told to speak to Mr Mathers on his return from holiday to organise further contracting work.

[25] Mr Mathers himself gave evidence at my investigation meeting that on his return from holiday he tried to contact Mr Hodge by phone to offer further work as a contractor but Mr Hodge did not return those calls.

[26] Mr Hodge did call into the business premises of Hibiscus Coast Scaffolding to ensure that his final pay was direct credited (it was) and to obtain a letter documenting the termination of the employment.

Issues

[27] The first question for the Authority to resolve is whether Mr Hodge was unjustifiably dismissed or not.

[28] Next, I will need to consider whether the counterclaim has been made out.

Was Mr Hodge unjustifiably dismissed?

[29] Mr Hodge says that the text message he sent to the employer has to be seen as no more and no less than a build-up of frustration and ought not to be taken literally. In particular, he denies that that message is evidence for the view that he wanted to cease being employed and go back to being a contractor. The difficulty with that evidence is that it is directly contrary to what the plain words of the text message say.

[30] The second piece of the puzzle is the meeting that Mr Mathers had with Mr Hodge on Auckland Anniversary Day, 27 January 2014. Mr Hodge says that there was no agreement reached on that day that is relevant to the present proceeding. Conversely, Mr Mathers says that Mr Hodge undertook to finish the Papatoetoe High School job on wages and wanted to then revert to contract and Mr Mathers said that Hibiscus Coast Scaffolding would look after Mr Hodge. Mr Mathers was very clear to me in his evidence that Mr Hodge was a very good scaffolder and that as scaffolders were in scarce supply, he was keen to continue to have a relationship with Mr Hodge however Mr Hodge wanted to organise it.

[31] It follows from the foregoing that so far as Hibiscus Coast Scaffolding is concerned, the text message it received from Mr Hodge strongly indicated a wish to cease employment and to continue the relationship but as a contractor. Moreover, in a clear attempt to be sure that it had got that message clear, Mr Mathers visited Mr Hodge at home on Auckland Anniversary Day and Mr Mathers's evidence is that Mr Hodge reiterated what he had said in the text message, agreed to continue the present job on wages, and that once that was finished to revert to contract jobs. Once he reverted to contract, the agreement reached at the Auckland Anniversary Day meeting was that the company vehicle would no longer be provided.

[32] While there is some inherent commonsense in Mr Hodge's evidence that he could not have agreed to go back on contract because of the advice of the Official Assignee, that evidence is in conflict with what he said in the text message and also conflicts with what Mr Mathers said happened at the Auckland Anniversary Day meeting. I have no reason to doubt the evidence of Mr Mathers who struck me as a straightforward and honest man and I cannot imagine why he would have made up a story to the effect that he had secured an agreement from Mr Hodge to cease employment and go back on contract.

[33] There is an internal consistency in the evidence of what Mr Mathers said took place at the Auckland Anniversary Day meeting on the one hand with the evidence of the text message on the other. Whatever the practicalities about Mr Hodge going back onto contract, it is clear that the evidence of the text and Mr Mathers' evidence about the meeting are on all fours.

[34] I conclude then that the text message must be interpreted by any reasonable person as evidence for the view that Mr Hodge sought to relinquish his role as an

employee but continue the relationship with Hibiscus Coast Scaffolding as a contractor. Having reached that conclusion, the next question is whether Mr Hodge, by his behaviour on 29 January 2014 when he, by common consent, left the workplace between 1pm and 1.30pm and did not return, was indicating somehow that the employment relationship had ended at that point.

[35] I do not consider that that analysis is in any way plausible. Mr Hodge's evidence is that he left the job at that time because he physically could not complete the work by himself and given that the employer had removed the two labourers from the site, he was simply unable to continue with the work. Moreover, Mr Hodge says that he was endeavouring during part of the afternoon anyway to get some alternative workers to assist him so that he could in fact finish the job. While he told me that in evidence, it is equally apparent that he never bothered to tell the employer that and given the apparent difficulty that the employer had in getting Mr Hodge to take its calls at any point during the days in dispute, it is difficult for me to understand why Mr Hodge did not make a better effort to communicate appropriately with the employer.

[36] A further reason that I reject the suggestion that Mr Hodge's behaviour was evidence of an act of resignation is that, having accepted the evidence of Mr Mathers about what happened at the meeting on Auckland Anniversary Day, which amongst other things included an understanding between the two men that Mr Hodge would continue on wages until he had completed the Papatoetoe High School job and then go onto contract, it seems illogical to then claim that before the High School job was finished, Mr Hodge would unilaterally decide to bring the employment relationship to an end.

[37] I am satisfied then that insofar as Hibiscus Coast Scaffolding took Mr Hodge's behaviour on 29 January 2014 as evidence of an act of resignation, it was mistaken and in seeking apparently to rely on Mr Hodge's behaviour as evidence of the end of the employment relationship, it was also mistaken.

[38] I am not attracted by Mr Hodge's evidence that he was told by Ms Mathers that her father had told her to tell Mr Hodge that he was sacked. There is no independent evidence that that was indeed said to Mr Hodge and also no evidence from Mr Mathers that he ever said any such thing. His instructions to his daughter were clear enough; he wanted the company vehicle back but that was not because he

had determined that Mr Hodge was sacked but rather because he erroneously believed that Mr Hodge had resigned.

[39] My analysis then is that Mr Hodge did not resign his employment, he having agreed to finish employment when he finished the particular job he was on and that job was not finished at the point it is contended by the employer that he brought the employment relationship to an end. Given the way in which the employer acted in apparent reliance on Mr Hodge's behaviour, a finding that Mr Hodge was unjustifiably dismissed and therefore has a personal grievance is inevitable. However, Hibiscus Coast Scaffolding can properly point to Mr Hodge's behaviour on 29 January 2014 as contributing to the events giving rise to the personal grievance and I consider those matters further at the end of this determination.

What about the counterclaim?

[40] As I have already noted, Hibiscus Coast Scaffolding raises a counterclaim seeking compensation for Mr Hodge's failure to return company property and for an insurance excess payment which it became liable for when Mr Hodge damaged a vehicle while driving on company business.

[41] Mr Hodge himself also raises a claim that Hibiscus Coast Scaffolding owes him money for fittings that he provided to it. This claim is raised for the first time in Mr Hodge's closing submissions. As I understand the position, part of the reason that Mr Hodge refused to engage with his former employer in respect of its property was his contention that Hibiscus Coast Scaffolding had his property which it had not paid him for. Mr Hodge values that lost property at \$1,180.

[42] Conversely, Hibiscus Coast Scaffolding says that Mr Hodge has property belonging to it valued at \$1,121.60 and it was acknowledged at my investigation meeting by Mr Hodge that he had retained the subject property.

[43] In addition, Hibiscus Coast Scaffolding seeks a further sum of \$1,000 as a contribution towards its costs in endeavouring to recover its property from Mr Hodge and a further sum of \$500 being the insurance excess that Hibiscus Coast Scaffolding had to pay when an accident caused by Mr Hodge resulted in Hibiscus Coast Scaffolding having to pay that sum as an insurance excess.

[44] While issues around the return of property ought to be able to be resolved by the parties in face-to-face discussion, the relationship between these parties is such that it seems to me I have to make orders.

[45] I observe first that as far as the property owned by Hibiscus Coast Scaffolding is concerned, Mr Hodge admitted at the investigation meeting that he had it in his possession.

[46] However, the position is otherwise in regard to the 370 scaffold fittings which Mr Hodge says Hibiscus Coast Scaffolding used but did not pay for. The evidence for Hibiscus Coast Scaffolding is that Mr Hodge told Mr Mathers when the two men met on Auckland Anniversary Day that he (Mr Hodge) had scaffold fittings to sell and Mr Mathers said that he could buy them. It seems common ground that Hibiscus Coast Scaffolding did use some of Mr Hodge's fittings but there was no agreement in the evidence about how many of those fittings were involved, nor was there any agreement about the value to be placed on any fittings that were used by Hibiscus Coast Scaffolding.

[47] Having reflected on the matter, I think the only proper course is to direct that Mr Hodge returns the property that he has belonging to Hibiscus Coast Scaffolding and for Hibiscus Coast Scaffolding to return any property it has of Mr Hodge's, if indeed it has any. I hesitate to make orders about the value to be attributed to the scaffold fittings as it seems to me to be a commercial matter outside the terms of the employment relationship between the parties and which in any event is subject to a conflict in the evidence.

[48] I am also not drawn to the notion that I should make an order for Mr Hodge to contribute to the costs of trying to recover property from him; I am not persuaded that that is a proper exercise of my discretion. I think the sum involved is a normal cost of doing business.

[49] Nor am I attracted by the notion that Mr Hodge should reimburse Hibiscus Coast Scaffolding for the insurance excess of \$500 for a similar reason. In my opinion, that sum is simply one of the exigencies of doing business.

Determination

[50] For reasons that I have already made clear, I am satisfied that Mr Hodge has a personal grievance because he was unjustifiably dismissed from his employment and in principle, that means that Mr Hodge is entitled to have me consider what remedies ought to apply.

[51] However, first, I must apply the law pertaining to contribution as that is set out in s.124 of the Employment Relations Act 2000 (the Act), the broad effect of which is that the Authority is required to consider whether a grievant has contributed in any way to the circumstances giving rise to the personal grievance.

[52] Here, I am satisfied on the evidence before me that Mr Hodge contributed in a material respect to the personal grievance for unjustified dismissal by virtue of two factors in the process leading up to the termination of the employment. The first of those factors is Mr Hodge's continuing failure to contact his employer and engage with his employer, particularly at the end of the employment relationship, and the concomitant failure of Mr Hodge to be available to take the employer's calls when the employer sought to discuss matters with him. It seems to me self-evident that if the parties had been able to talk to each other during the last days of the employment it is almost certain that the unjustified dismissal would not have taken place at all.

[53] I base this conclusion on the clear evidence of Mr Mathers to the effect that he wanted to retain a relationship with Mr Hodge, that he regarded Mr Hodge as a competent tradesman, and that he had no reason whatever to seek to bring the relationship to an end.

[54] What Mr Mathers understood (erroneously on my decision) was that Mr Hodge was seeking to conclude the relationship, that for whatever reason, Mr Hodge had chosen not to engage further with Hibiscus Coast Scaffolding and that Mr Hodge had actively chosen to bring the employment relationship with Hibiscus Coast Scaffolding to an end.

[55] If the parties had had a single conversation about Mr Hodge's intentions, this whole dispute could have been avoided. On the evidence I heard, Mr Mathers, Ms Mathers, and Mr Vitasovitch all made numerous attempts to talk to Mr Hodge by telephone, entirely unsuccessfully and there is no evidence before me to suggest that Mr Hodge made any attempt to contact the employer to discuss what his intentions

were, or what he was up to. As I say, if there had been just one discussion, this whole dispute might well have been avoided.

[56] The second reason that I think Mr Hodge contributed manifestly to the personal grievance is his departure from the Papatoetoe High School work site on 29 January 2014 without explanation to the employer. Again, if Mr Hodge had simply telephoned the employer and indicated that he was unable to complete the assigned work without the labouring assistance that had been removed from the site, Hibiscus Coast Scaffolding would not have been able to form the erroneous belief that Mr Hodge was seeking to bring the employment relationship to an end by walking off the job and again the dispute would not have occurred, or at least would not have occurred in this form.

[57] Not only is it apparent to me on the evidence I heard that Mr Hodge was not seeking to bring the employment relationship to an end, but also that he was using his best endeavours during part of the afternoon when he was not onsite to try to find some alternative labourers who could assist him to complete the job.

[58] But again, Mr Hodge did not tell the employer that was what he was doing and so the employer acted on the mistaken belief that he had literally walked off the job and had therefore abandoned his employment.

[59] Although that conclusion made by Hibiscus Coast Scaffolding is an understandable conclusion in all the circumstances (given Mr Hodge's refusal to talk to the employer or make himself available for it to talk to him), but it is nonetheless a wrong conclusion because I am satisfied on the evidence that Mr Hodge was not walking off the job because he had decided to finish up, but was walking off the job because he was unable to complete it without the labourers who had previously been there but had been removed by Mr Vitasovitch.

[60] Mr Hodge seeks compensation of \$10,000 for the unjustified dismissal. That is a sum out of all proportion to the evidence for any hurt, humiliation or injury to feelings which is slight indeed.

[61] Moreover, this was an employment relationship which lasted barely a fortnight so the amount claimed is just unrealistic given average awards in the Authority for significant hurt and humiliation in employment of longstanding, would typically range from \$5,000 to \$10,000.

[62] In all the circumstances, I confess to seeing Mr Hodge as the architect of his own misfortunes and having regard to his extensive contribution to the circumstances giving rise to his grievance, the short duration of the employment, and the absence of any evidence of hurt and humiliation, I conclude that no order of compensation can be justified.

[63] Mr Hodge has a personal grievance for unjustified dismissal but is not entitled to any compensation for the reasons just advanced.

[64] Mr Hodge also claims lost wages on the footing that he was dismissed effective 29 January 2014 and he says he did not get new employment until 1 April 2014, so was out of work for 8 weeks and 3 days. However, there was no evidence of lost wages before the Authority until Mr Hodge's closing submissions were received, that is, the statement of problem contained no quantification of such claim and there was no evidence advanced to support this claim at the investigation meeting.

[65] In their closing submissions, Hibiscus Coast Scaffolding point to the absence of evidence in support of the claim, the fact that the evidence did disclose that Mr Hodge apparently started working for another entity within a matter of days of the end of the employment with Hibiscus Coast Scaffolding and the absence of any quantified claim in the statement of problem which they could have rebutted at hearing, had it been made. Taken together, it is alleged that it would be unjust for the Authority to impose an obligation on Hibiscus Coast Scaffolding to contribute to Mr Hodge's wages.

[66] The law in this regard is clear; by virtue of Mr Hodge having been unjustifiably dismissed, the Authority is required to consider the reimbursement to the employee of any sum of wages lost (s.123(1)(b) of the Act) and in terms of s.128 of the Act, where the Authority is satisfied that an employee has a personal grievance and has lost remuneration as a consequence of that personal grievance, then subject to the law relating to contribution, the Authority must require the employer to pay to the employee the lesser of the sum lost or three months' ordinary time remuneration.

[67] I did not award Mr Hodge any compensation because there was no evidence of hurt and humiliation in relation to the dismissal, and in addition, the employment was of short duration and the contributory factors were significant.

[68] I decline to award Mr Hodge any lost wages because I am not satisfied on the evidence I heard that Mr Hodge has lost wages as a consequence of the dismissal. It is not enough to just claim the loss; like all claims made in the Authority, the loss must be proved on the balance of probabilities. As I have already noted, here the evidence is that Mr Hodge was working within days of dismissal and I heard no evidence from Mr Hodge that would support his claim of being out of work for 8 weeks and 3 days.

[69] In respect to the arguments around property, Mr Hodge is directed to return to Hibiscus Coast Scaffolding its property and Hibiscus Coast Scaffolding is to return to Mr Hodge his property if they have any.

Costs

[70] Costs are reserved but I observe this may well be a case where costs should lie where they fall given that while Mr Hodge has been successful in proving his personal grievance, he has not achieved any remedies and in consequence, it might be said that both parties have been partially successful.

James Crichton
Member of the Employment Relations Authority