

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 162/09  
5133640

BETWEEN                      GRAEME HOOKER  
   Applicant  
  
AND                                STREET SMART LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Melanie Swarbrick for Applicant  
   Gretchen Stone for Respondent  
  
Investigation Meeting:     9 February 2009 at Hamilton  
  
Submissions Received:    20 March 2009  
  
Determination:              22 May 2009

---

**DETERMINATION OF THE AUTHORITY**

---

[1]     Mr Graeme Hooker was employed by Street Smart Limited (“Street Smart”) in November 2006. He was based at the Whitianga Refuse Station. Street Smart contracted to the Thames Coromandel District Council (“TCDC”) for the operations of Council’s solid waste collection services. This involves the collection of refuse and recycling, and operating seven transfer stations throughout the Thames Coromandel district.

[2]     It was common ground that there was no written employment agreement between Mr Hooker and Street Smart. Mr Hooker worked five days per week, Monday to Friday inclusive starting at 9.30am and finishing at 5.00pm each day except when required to perform overtime.

[3]     On 22 June 2007 employees of Street Smart were advised that the company was undertaking a review of its operations in the Coromandel. Street Smart was proposing that the current RTS Operator positions would become new Recovery

Operator positions with a larger focus on reuse, recycling and other waste stream diversion.

[4] Concurrently with the restructuring Street Smart undertook a Mystery Shopper campaign in July 2007 to identify issues relating to staff practices at each Refuse Station. The report from the mystery shopper resulted in Mr Hooker's brother, Mr Robbie Hooker, who was also employed at the Whitianga Refuse Station, facing disciplinary procedures.

[5] In July 2007 Mr Hooker took leave and travelled overseas. On his return he says he was sick and was unable to attend work. Mr Hooker was invited to attend a disciplinary meeting on 27 July 2007 to discuss the following issues:

- Refusal to supply a doctor's certificate for absence from work on 19 July 2007;
- Refusal to obey lawful instructions and attend work on 20 July 2007;
- Lack of respect shown to a manager.

[6] Before 27 July Mr Hooker was suspended without pay and advised of additional issues to be discussed at the meeting:

- Failure to attend work on 23, 24 and 25 July 2007;
- Failure to notify employer of intention to take leave on the above dates;
- Manner of address towards a manager.

[7] Mr Hooker never attended the disciplinary meeting nor did he return to work. He claims he was unjustifiably dismissed through the letter dated 3 July 2007 which advised him that Street Smart were going ahead with the restructuring. Street Smart denies Mr Hooker was dismissed. Despite attempts to meet with Mr Hooker to discuss his absence Mr Hooker refused to meet and held firmly to the belief that he had been dismissed on 3 July.

[8] By way of counter-claim Street Smart seeks recovery of money it says was received by Mr Hooker as a result of the unauthorised sale of scrap metal.

[9] The issues for this determination are:

- Was Mr Hooker dismissed as a result of the restructuring?
- If he was, was that dismissal unjustified? and
- If Mr Hooker was unjustifiably dismissed what, if any remedies should be awarded?
- Was the selling of scrap metal for “beer money” authorised?
- If not, what amounts, if any, are recoverable?

### **Credibility findings**

[10] Before coming to any conclusions or determination on the issues, I need to say something about the credibility of the parties. Mr Hooker’s evidence to the Authority was, at times, contradictory. For example in his written evidence Mr Hooker states, with regard to a meeting held with Mr Peter Grennell on 25 June 2007, that Mr Grennell “...didn’t raise the review of the RTS operators or seek feedback from the staff present. No consultation was entered into.”

[11] Mr Hooker contradicted that when in his oral evidence he told me that at the meeting on 25 June he, his brother Robbie, and another worker, discussed timetables with Mr Grennell. Mr Hooker says he told Mr Grennell he didn’t see how a seven day week would operate with three on three off. He told me Mr Grennell explained that he wanted to put on two guys, seven days a week. Mr Hooker told Mr Grennell he couldn’t see how it was going to work.

[12] That evidence was, again, in stark contrast to responses Mr Hooker then gave to questions at the Investigation Meeting where Mr Grennell’s written evidence on the same point was put to him and Mr Hooker told me he could not recall Mr Grennell taking them through the 7 day roster system.

[13] Mr Hooker then confirmed Mr Grennell’s evidence where Mr Grennell says he went through the rationale for the restructure and asked for any input or comments from Mr Hooker.

[14] I found the respondent’s witnesses to have been the more credible overall. As a result of my findings on credibility where there are disputes between the parties that

impact on my findings in this matter, it is the evidence of the respondent's witnesses that I prefer.

**Was Mr Hooker dismissed as a result of the restructuring?**

[15] Mr Hooker was advised by letter on 22 June 2007 that Street Smart was undertaking a review of its operations. He was advised that Street Smart was looking to implement new recovery operator positions which would have a far greater focus on reuse, recycling and other waste stream diversion as opposed to compacting and sending to landfill. Another area of review was the way in which operators would be rostered and the use of temporary employees on weekends.

[16] The letter advised Mr Hooker that if the restructuring proceeded, all current RTS positions would be disestablished and the new positions would be advertised and a selection process entered into. Mr Hooker was advised that a meeting would be held the following Monday on 25 June at 9.00am to discuss the proposal and to seek feedback. Mr Hooker was invited to seek advice or involve a representative or support person at the meeting.

[17] The meeting on 25 June went ahead. I am satisfied Mr Grennell discussed the rationale for the restructure and invited comments. I am also satisfied that Mr Hooker participated in the meeting and expressed his opinions about the proposal.

[18] On 3 July 2007 Mr Hooker was advised by way of a letter that, after speaking with all RTS operators, Street Smart had decided to implement its proposed new structure. Mr Hooker was advised on the timeframe going forward and that advertisements would be placed in the Hauraki Herald on 6 and 10 July, with a closing date of 22 July. Interviews would be held from 23 – 27 July with final decisions being notified in the week 13-17 August 2007. Mr Hooker was advised that if he wished to be considered for the new Resource Recovery Operator position he simply needed to send a letter indicating his interest. He was also invited to seek advice and involve a representative or support person at future meetings if he required that assistance.

[19] Mr Hooker says that on receipt of this letter he sought legal advice and was advised he had been made redundant and that Street Smarts actions were illegal. Mr Hooker did not advise Street Smart of the advice he had received, at this time. This evidence is also in conflict with Mr Hookers own actions in attending work up until he left on a period of annual leave on 10 July 2007.

[20] Concurrently with the restructuring exercise, and as a result of complaints received from the public and Council about the operation of some of the Refuse Transfer sites, Street Smart arranged for a Mystery Shopper to visit its sites to assess whether procedures were being followed. The Mystery Shopper attended the Whitianga site on 3 July 2007. On 7 July 2007 Mr Grahame Christian, Managing Director of Street Smart, wrote to all staff and advised them that a Mystery Shopper had reported to him and he noted the following areas as being cause for concern:

- Staff have no real interest in the role
- Customer interface is poor
- Theft and bribery are rife
- Charging is either not being made or is being undercharged
- Many visitors on sites
- Secondary industries for personal benefit going on

[21] All employees were advised that affected staff would be required to attend a meeting to discuss the concerns and any action which may be taken by Street Smart.

[22] On 10 July 2007 Mr Hooker proceeded on a period of pre-planned annual leave. He was due to return to work on 19 July. Unfortunately during his absence he says he contracted a topical illness and was unable to return to work on 19 July. He says he attempted to contact Mr Grennell and left a message for him to advise him he was ill and would not be at work.

[23] Mr Grennell says he made contact with Mr Hooker on 19 July when he had failed to turn up for work and after receiving no messages from him. He says Mr Hooker told him he was sick and wanted to see his lawyer. Mr Grennell was suspicious that Mr Hooker may not have been genuinely sick and asked him to provide a medical certificate to which Mr Hooker replied "...get stuffed". Mr Hooker

acknowledges he was asked to get a medical certificate and at the investigation meeting confirmed he never provided one.

[24] Mr Hooker states in his written evidence that he was told by Mr Grennell that day that if he did not turn up for work he would be sacked. Mr Grennell denies saying this to Mr Hooker and says that the truth of the matter was, he needed Mr Hooker at work as he could not get a replacement for him. I have preferred Mr Grennell's evidence on this point.

[25] When Mr Hooker failed to either turn up for work or provide the requisite medical certificate by 23 July, Mr Grennell wrote to him requesting that he attend a disciplinary meeting on 27 July to discuss his absence on 19 July, his refusal to attend work on 20 July and lack of respect shown to his manager during the telephone call on 19 July 2007.

[26] Having received no response to this letter, Mr Grennell wrote again on 25 July suspending Mr Hooker from his employment without pay and reminding him of the meeting to take place on 27 July. Mr Hooker was requested to contact Mr Grennell to confirm his intention to attend the meeting before Friday 27 July 2007.

[27] There was no written document setting out the terms and conditions of employment between Mr Hooker and Street Smart. There was certainly no agreement that Street Smart could suspend Mr Hooker without pay.

[28] Mr Hooker failed to attend the meeting on 27 July 2007 and made no attempt to contact Mr Grennell about his attendance or otherwise at the meeting. Mr Hooker has not returned to work.

[29] In answer to questions at the investigation meeting Mr Hooker told me he was dismissed on the day Mr Grennell told him he would be sacked if he did not attend work. He also relies on the letter of 3 July advising that his RTS position would be disestablished and new roles implemented as indicating that he was dismissed and there was no job for him.

[30] The Courts have long held the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant (*GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, *Simpson Farms v Aberhart* [2006] 1 ERNZ 825).

[31] At the investigation meeting Mr Hooker acknowledged that he had not received any notice that his employment was ending with Street Smart. It was Mr Grennell's uncontested evidence that Street Smart expected many staff would transfer across to the new positions and that those who didn't would possibly be engaged in other roles. Indeed, no redundancies occurred as a result of the restructuring.

[32] Mr Hooker claims the period between receiving the notice of the meeting to discuss the proposals and actually meeting with Mr Grennell was not long enough to allow them to seek advice. I accept that the period was very short. They received the letter on the Friday afternoon and the meeting took place first thing on Monday morning.

[33] However, Mr Hooker was invited to make telephone contact with Mr Grennell to seek further information if they felt it was necessary. As events transpired either Mr Hooker or his brother Robbie Hooker made contact with Mr Grennell on that Friday during which time it was agreed they would meet collectively on the Monday rather than separately. During that conversation there was no issue taken with the timing of the receipt of the invitation and the planned meeting time.

[34] I am satisfied that even with the short notice of the meeting Mr Hooker was able to and did discuss the proposed timetables and rosters and raised questions about overtime etc. He participated fully in the consultation meeting.

[35] Mr Hooker refused to attend meetings to discuss his absence and/or to provide a medical certificate. These actions on the part of Mr Hooker were unreasonable. To now attempt to rely on the letter of 3 July as notice of the termination of his employment is disingenuous. Mr Hooker never raised this issue with Mr Grennell, he simply refused to co-operate and took no steps to be active and communicative with his employer.

[36] I find that Mr Hooker was not dismissed by Street Smart Limited, but that he left his employment of his own accord rather than face the disciplinary enquiry as to his absence and the comments he had made to his Manager.

### **Disadvantage grievance**

[37] Pursuant to s.160(3) of the Act the Authority has jurisdiction to consider whether Mr Hooker has been disadvantaged in his employment in relation to the suspension. The appropriate test can be found in s.103A of the Act.

[38] As already set out in this determination, when Mr Hooker failed to either turn up for work or provide the requisite medical certificate by 23 July, Mr Grennell wrote to him requesting that he attend a disciplinary meeting on 27 July.

[39] Mr Grennell wrote again on 25 July suspending Mr Hooker from his employment without pay and reminding him of the meeting to take place on 27 July. This actions seems premature as Mr Hooker had not yet had an opportunity to discuss with Mr Grennell the possibility of his suspension.

[40] There was no written document setting out the terms and conditions of employment between Mr Hooker and Street Smart. There was certainly no agreement that Street Smart could suspend Mr Hooker without pay. Unless there is an express agreement to the contrary, suspension is usually on pay. There is also an obligation on an employer to discuss the option of suspension with an employee prior to making any decision on the matter.

[41] Street Smart has failed to discharge the burden of showing that the actions it took in suspending Mr Hooker were what a fair and reasonable employer would have done in all the circumstances at the time it occurred. Street Smart's actions were both procedurally unfair and substantively unjustified. It follows that Mr Hooker was unjustifiably suspended.

**Remedies**

[42] Mr Hooker was suspended on 25 July and was expected to attend a disciplinary meeting on 27 July. He did not attend the meeting and has not attended work since he was suspended. Mr Hooker decided for himself not to attend the meeting on 27 July. I am satisfied that he did not intend to return to work and that he considered, wrongly, that he had been dismissed. Mr Hooker is entitled to be reimbursed for the wages he lost for the period of his unjustified suspension being 25 to 27 July 2007 inclusive. The Authority will leave it to the parties to agree on the wages to be paid to Mr Hooker for this period, but leave is reserved for either party to seek the assistance of the Authority in the event that the matter can not be resolved.

[43] The evidence of hurt and humiliation given by Mr Hooker was compelling but related in the main to the misapprehension that Mr Hooker had been dismissed. I have found that was not the case and Mr Hooker simply abandoned his employment when he failed to attend the meeting on 27 July or to attend work at anytime thereafter. In all the circumstances of this case I consider an appropriate award for the disadvantage grievance is the sum of \$1,000.

**Counter-claim**

[44] Street Smart's income was derived from an annual contract payment from TCDC and through the sale of recyclables. As part of its contract with TCDC, Street Smart is entitled to recover from the rubbish and sell recyclables such as glass, paper, metal and plastics and to retain the income from these sales. The income received through gate fees while collected by Street Smart, was paid directly to TCDC. Shortfalls between the cost of the contract amount paid by TCDC and the gate fees collected were met by the rate payers.

[45] When Street Smart took on the contract in 2006, TCDC had made it clear to Street Smart that it held concerns about the way the transfer stations were operated, in particular there were reports of under charging at the gate.

[46] In June 2007, while on a visit to the Whitianga Refuse Station, Mr Christian noticed a pile of scrap metal stacked up beside the gate. He made enquiries of Mr

Hooker and his brother Robbie Hooker as to the reason for the metal being there. Mr Hooker and his brother advised Mr Christian that they sold the metal themselves. On questioning how much they received for the scrap metal the Hooker brothers told Mr Christian it was just “beer money”. It was common ground that the Hooker brothers were told they could not sell metal for which Street Smart had a market.

[47] Following an investigation into the sale of scrap metal from the Whitianga Refuse Station to SJ Metals, the amounts staggered Mr Christian who concluded that the Hooker brothers were effectively operating a sideline business in the gathering and sale of scrap metal.

[48] Mr Hooker says he had the authority of his manager to take recycle from mainstream rubbish as TCDC didn't want heavy metals compacted with household rubbish. This evidence was largely confirmed by Mr Gary Jager and Mr Peter Smets who was Mr Hooker's manager at the time. Mr Smets told me that it was a grey area and that they certainly allowed the practice when staff were employed by Onyx. Mr Hooker however, was not employed by Onyx as he commenced his employment in November 2006 and was employed only by Street Smart.

[49] Both Mr Jager and Mr Smets were clear in their evidence that while the practice was condoned by Onyx, once Street Smart took over it should not have been continuing. While Mr Jager also told me at the investigation meeting that he was not concerned or aware of the money being made out of the sale of the scrap metal he also confirmed that by the time Mr Smets had instructed staff not to sell scrap metal, Mr Jager had little to do with the management of the refuse stations.

[50] I am satisfied on the balance of probability that it is more likely than not that Mr Hooker was aware he was not to sell scrap metal. Mr Smets was clear in his oral evidence that he had instructed staff a month or two after Street Smart took over the management of the refuse stations that the practice of recycling and selling the scrap metal was to stop. .

[51] The company have provided copies of invoices from SJ Metals for the period which shows that during the period Mr Hooker was employed at Whitianga Refuse

Station between February 2007 and July 2007 scrap metal to the value of \$15,036.00 was sold to MJ Metals from the Refuse Station.

[52] At the investigation meeting there were questions about whether all the invoices were for sales directly from the Whitianga station, however, I am satisfied that Mr Hooker and his brother were the only individuals selling scrap metal to SJ Metals.

[53] Also at the investigation meeting both Mr Hooker and his brother addressed the invoices but did not question the quantum and only disputed whether they were entitled to sell the items listed.

[54] Mr Hooker told me he and his brother Robbie would share the cash from the sales, which puts his share at \$7,518.00. The money from the sale of the metals belonged to Street Smart and therefore it is recoverable.

#### **Summary of orders**

- **Street Smart Limited is ordered to pay to Mr Hooker lost wages for the period 25-27 July 2007 inclusive within 28 days of the date of this determination.**
- **Street Smart Limited is ordered to pay to Mr Hooker compensation in the sum of \$1,000 pursuant to s.123(1)(c)(i) of the Act within 28 days of the date of this determination.**
- **Mr Hooker is ordered to reimburse Street Smart Limited the sum of \$7,518 being the total of the proceeds which he wrongly kept from the sale of metal belonging to Street Smart.**

**Costs**

[55] Costs are reserved. Given that both parties achieved some success in this matter I am of a mind to let costs lie where they fall. However, I encourage the parties to resolve the matter of costs between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority