

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

AA 312/08
5115260

BETWEEN REGAN FRANCIS JOHNSON
Applicant

AND SUPA TRAVEL EXPRESS
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Regan Johnson in Person
No appearance for Respondent

Investigation Meeting: 14 August 2008 at Tauranga

Determination: Friday 29 August 2008

DETERMINATION OF THE AUTHORITY

History

[1] Mr Johnson lodged his application in the Authority on 11 February 2008. As the parties had not attempted mediation, they were referred to mediation on 26 February 2008. Unfortunately mediation was not successful in assisting the parties to resolve their employment relationship problems.

[2] On 11 June 2008 a minute, together with a copy of the Authority Practice Note, was sent to the parties explaining that a conference call would be convened for the purpose of setting down a timetable for the Investigation Meeting.

[3] The efforts of the Authority Support Staff to make contact with Mr Harris to arrange the telephone conference call failed. Therefore, I set this matter down for investigation meeting.

[4] As at the scheduled commencement time for the 14 August 2008 investigation meeting, no representative of Supa Travel Express Limited was present. I am satisfied Supa Travel Express Ltd received the notice of investigation meeting. The Authority contacted the respondent on the morning of the investigation meeting and was advised that no one would be attending.

[5] Supa Travel Express Ltd has not shown good cause for its failure to appear or be represented. I proceeded under clause 12 of Schedule 2 to the Employment Relations Act 2000 to hear and determine the matter as if Supa Travel Express Ltd had attended or been represented.

Employment Relationship Problem

[6] Mr Johnson was employed by Supa Travel Express Limited as a Driver, transporting the respondent's clients from Tauranga to the Auckland Airport. Mr Johnson's first day of work was 3 December and his last was 24 December 2007. There was no written employment agreement between the parties. A copy of an individual employment agreement was produced by the respondent with its statement in reply. However, I am satisfied that Mr Johnson had never seen this document prior to lodging his employment relationship problem in the Authority.

[7] Mr Johnson seeks payment of wages which remain outstanding and claims he suffered a disadvantage in his employment by an unjustifiable action of his employer and was then unjustifiably dismissed from his employment.

[8] In its statement in reply the respondent denied the claims and set out a brief paragraph making a counter-claim against Mr Johnson for \$5,737.00 relating to the costs associated with the towing and the repairs to two the vehicles driven by Mr Johnson on 18 December and lost company property.

Arrears of wages

[9] Mr Johnson claims his wages were subject to an unlawful deduction on 18 December and that the respondent unlawfully withheld his wages on 20 and 24 December 2007.

[10] On 18 December 2007 Mr Johnson got the vehicle he was driving, stuck in the grass at a residence which turned out to be the wrong address for clients he was to pick up and transport to Auckland.

[11] After Mr Johnson made contact with the respondent's office, Ms Mary Strawbridge the company's administrator, arrived in a van which was normally used personally by Mr Harris. Ms Strawbridge had detoured on her way to where Mr Johnson was located, and had picked up the clients who were with her in the van. Mr Johnson was instructed to drive Mr Harris's van to Auckland and to deliver the clients to Auckland International Airport, while the other van was rescued from its predicament.

[12] Mr Johnson says that as he was driving to Auckland, specifically down the Ngatea straight, the oil light came on. He stopped the van but unfortunately the engine had already seized. Understandably, the clients became concerned about getting to Auckland International Airport in time for their flight. Mr Johnson contacted Mr Harris to ascertain if there was any oil in the van. There wasn't.

[13] Mr Johnson says the clients wanted to speak with Mr Harris, however, Mr Harris refused to communicate with them. The clients, with Mr Johnson's assistance, then flagged down a passing motorist who offered to take them to the Airport. Mr Johnson, obtained the details of the driver just in case he needed them and the clients were taken to Auckland International Airport.

[14] Once he had seen the clients safely on their way to Auckland, Mr Johnson contacted Ngatea Impound Towing, who towed the van back to Papamoā. Before leaving Ngatea Mr Speedy, of Ngatea Impound Towing, checked the vehicle and determined that the oil problem arose not as a result of driver error, but as a result of a possible leak in the crankshaft.

[15] On his return to the office Mr Johnson says he was abused by Mr Harris and reprimanded for allowing the van to run out of oil. Later than evening, and against his better judgement, Mr Johnson, on request from Mr Harris, completed a second shift which was against LTSA driving rules as it took him over the legal driving hours

limit. Mr Johnson was told that the hours he had already worked that day would be deducted from his wages.

[16] Section 4 of the Wages Protection Act 1983 requires, when any wages become payable to an employee, that the employer pay the entire amount of those wages without deduction. The only exception to that obligation is where the employee has provided written consent or made a written request for deductions. In the face of having no written consent, the Respondent is therefore obliged to pay Mr Johnson for the hours that he worked.

[17] Mr Johnson provided copies of his Driving Hours Logbook. I am satisfied Mr Johnson has proven that he worked for the respondent for a total of 100.95 hours between 3 and 24 December 2007. At \$14.00 per hour Mr Johnson should have been paid a total of \$1,413.30 gross. Mr Johnson has established to my satisfaction that he received only \$902.13 gross and is therefore entitled to be paid the outstanding amount of \$517.17 gross.

Unjustified disadvantage

[18] Mr Johnson claims the respondent affected his employment, or one or more conditions of his employment, to his disadvantage by requiring him to drive an unsafe vehicle on 18 December 2007.

[19] As set out earlier in this determination Mr Johnson was required to drive Mr Harris's personal van from Papamoa to Auckland and the van broke down when it ran out of oil due to a cracked crank shaft. I am not satisfied Mr Johnson was disadvantaged in his employment. There was no evidence to suggest anybody knew the van was about to seize due to the van running out of oil. Mr Johnson's claim for unjustified disadvantage fails and I am unable to be of further assistance to him in that regard.

Unjustified dismissal

[20] Pursuant to section 103A the Authority must actively scrutinise Supa Travel Express Limited's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the

Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[21] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[22] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*White v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

[23] Mr Johnson's last shift for Supa Travel Express Limited was on 24 December 2007. At the end of his shift, Ms Strawbridge asked if Mr Johnson was available to work during the Christmas week. Mr Johnson acknowledged that he was available but asked to receive at least 24 hours notice.

[24] Mr Johnson says he got one telephone message during the week which he returned on 27th December. Mr Johnson's wages from 20 and 24 December were still outstanding and so when he made contact with Mr Harris, and before he agreed to undertake any further work, he enquired as to when he would be paid the outstanding wages. Mr Harris responded by telling Mr Johnson that he was sick of him and did not want him to work anymore. The conversation ended and Mr Johnson has undertaken no further work from Supa Travel Express Ltd.

[25] I am satisfied that on 27 December 2007 Mr Harris dismissed Mr Johnson without notice when he advised Mr Johnson that he no longer wanted him to work for him.

[26] In its statement in reply the respondent relies on the 18 December incidents and the related expenses for the towing and repairs as justifying the dismissal. I am

not satisfied Mr Johnson was in breach of his obligations as an employee in either of the incidents on 18 December.

[27] In the first incident, Mr Johnson had been sent to an incorrect address and had been endeavouring to turn the van around on wet grass. Unfortunately for Mr Johnson the back wheels could not get enough traction on the wet grass to move the van and it became stuck.

[28] The second incident resulted in the engine seizing as a result of having no oil. As I have found earlier, this incident was not the result of driver error, but of a crack in the crankshaft.

[29] In any event, neither of these incidents were ever put to Mr Johnson in the context of a disciplinary enquiry and there was a total lack of any procedural fairness in implementing the decision to dismiss.

[30] The respondent has failed to discharge the burden of showing that its actions were those which a fair and reasonable employer would have taken in all the circumstances. Viewing matters objectively, I find that a fair and reasonable employer would not have dismissed Mr Johnson in the manner that he was dismissed.

[31] I find that Mr Johnson was unjustifiably dismissed and he has a personal grievance for which remedies are available.

Remedies

[32] Mr Johnson is entitled to receive a payment for the wages lost as a result of his dismissal. He seeks the payment of three weeks lost wages and I am satisfied that level of reimbursement is appropriate. Mr Johnson worked irregular days and irregular hours. I have therefore calculated his lost wages by averaging the hours and days he worked between 3 and 24 December 2007. I find that Mr Johnson worked on average, 9 hours per day and 33 hours per week. At \$14.00 per hour that equates to \$1,386.00 gross.

[33] Mr Johnson claims compensation for hurt and humiliation. I accept that Mr Johnson suffered injured feelings and a deep sense of frustration when he was dismissed. Mr Johnson's distress was exacerbated by the fact that he was undertaking a driver training course at the Bay of Plenty Polytechnic which required him to be employed in the industry. When he lost his job Mr Johnson no longer met all the conditions of his training course. In all the circumstances, I find that a suitable sum for compensation for Mr Johnson pursuant to s.123(1)(c)(i) of the Act is \$3,000.

[34] The Authority is bound by s.124 of the Act to consider the extent to which the actions of Mr Johnson contributed towards the situation that gave rise to his personal grievance, and if those actions so require, to reduce the remedies. I am satisfied Mr Johnson has not contributed to the actions giving rise to his personal grievance. It follows that the remedies awarded to Mr Johnson will not be reduced.

Counter-claim

[35] As set out earlier in this determination the respondent claims against Mr Johnson for the expenses incurred in towing both vehicles from their predicaments and for the repairs to the second van. There is no evidence to support the claim by Supa Travel Express Ltd and it therefore fails.

Costs

[36] Mr Johnson shall have the lodgement fee on this application.

Summary of orders

[37] Supa Travel Express Limited is ordered to pay Mr Johnson the following amounts within 28 days of the date of this determination:

- \$517.17 gross being arrears of wages;
- \$1,386.00 gross being reimbursement of wages lost as a result of a personal grievance for unjustified dismissal;
- \$3,000.00 compensation for unjustified dismissal;
- \$70.00 filing fee on this application

Vicki Campbell
Member of Employment Relations Authority

