

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 95
5379992

BETWEEN ROBERT RAWIRI KEREOPA
Applicant

A N D ELRICH ENTERPRISES
LIMITED t/a HANSON
REMOVALS
Respondent

Member of Authority: Christine Hickey

Representatives: Meghan Zetko, Counsel for Applicant
No appearance for Respondent

Investigation meeting: 20 February 2013 at Dunedin

Submissions Received: At the investigation meeting from Applicant and further
evidence submitted on 20 March 2013, 22 & 30 May
2013

Date of Determination: 30 May 2013

DETERMINATION OF THE AUTHORITY

- A. Robert Kereopa has a personal grievance for unjustified dismissal.**
- B. Elrich Enterprises Limited to pay Robert Kereopa within 28 days of the date of this determination:**
- (a) \$435.00 unpaid wages,**
 - (b) \$1,001.80 holiday pay,**
 - (c) \$7,212.10 lost remuneration,**
 - (d) \$5,000.00 distress compensation and**
 - (e) \$71.56 reimbursement for the filing fee.**

Employment relationship problem

[1] Robert Kereopa began work as a driver and loader for Elrich Enterprises Limited t/a Hanson Removals (Elrich) in October 2011. Richard Wichman (also known as Desmond Wihongi) is a director of Elrich Enterprises and Hanson Removals' operations manager and was Mr Kereopa's direct supervisor.

[2] Mr Kereopa claims he was assaulted by Mr Wichman at the 2011 Christmas party. He claims that he was summarily dismissed by Mr Wichman after he injured his ankle at work on 26 April 2012 and could not drive the truck from Port Chalmers back to Dunedin. Alternatively he claims that he was constructively dismissed by Mr Wichman on 1 May 2012 when Mr Wichman told him he was going to come to his house and *beat the shit out of* him.

[3] Hanson Removals advertised in the *Otago Daily Times* on 5 May 2012 for an experienced loader/driver. Mr Kereopa believes that it was advertising his job.

[4] The investigation meeting was set down by agreement between both parties to be held on 20 February 2013 in Dunedin. This agreement was reached on Monday, 29 October 2012 during a teleconference between the Authority Member, Ms Zetko and Mr Wichman. The parties were sent an official notice of the investigation meeting on 30 October 2012. The notice stated that the investigation meeting would occur on Wednesday, 20 February 2013 at 9.30am at the Southern Cross Hotel in Dunedin. The parties were advised:

If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.

[5] After receiving copies of Mr Kereopa's witness statement Mr Wichman provided a written statement dated 4 February 2013, which I have read.

[6] At 9.20 a.m. on Wednesday, 20 February 2013, the Authority Member was given a message by a Southern Cross Hotel staff member that:

Mr Wichman

Tribunal held here at 9.30am

Won't be attending

(03) 453 6575

[7] I was not given any reason for Mr Wichman not attending. Mr Wichman did not request an adjournment of the matter. I had no telephone with a speaker in the room used for the investigation meeting and was unable to telephone him. I held the hearing as I am authorised to do under clause 12 of Schedule 2 of the Employment Relations Act 2000. Therefore, the investigation meeting began at 9.40 a.m. and ended at 10.50 a.m.

[8] By way of remedy for his claimed unjustified dismissal Mr Kereopa claims:

- three months' lost wages for the period after he was dismissed and before he found another job,
- one week's wages for a week that he was unable to work after being assaulted by Mr Wichman in December 2011,
- one day's sick leave in the week after 26 April 2012 when his ankle was injured,
- payment of his final pay and his holiday pay which he says are still being withheld by Hanson Removals, and
- compensation of \$8,000 for humiliation, loss of dignity and injury to his feelings.

[9] Mr Kereopa was represented by the Community Law Centre and has not incurred any legal costs but wishes to be reimbursed for the Authority filing fee of \$71.56.

[10] In correspondence attached to the statement in reply the respondent denies that Mr Kereopa was dismissed on 26 April 2012. It denies that Mr Wichman assaulted Mr Kereopa in December 2011 and says that Kelvin Harris assaulted him. It says that Mr Kereopa abandoned his employment with it.

[11] Mr Wichman provided a statement of evidence in advance of the investigation meeting. In that signed statement Mr Wichman says that Mr Kelvin Harris struck Mr Kereopa on the left side with a chair at the 2011 Christmas party. Mr Wichman makes allegations against Mr Kereopa of theft and unpaid for private calls on the mobile telephone provided by Hanson Removals. Mr Wichman accuses Mr Kereopa

of breaking his work mobile phone. Mr Wichman also makes other allegations against Mr Kereopa that were not supported by evidence. However, the respondent has not made any counter-claim against Mr Kereopa so I cannot determine any of those informal claims.

[12] Mr Kereopa did not bring any witnesses to the investigation meeting. There were no witnesses for the respondent present either. Both parties provided written statements supporting their cases. However, I have not placed any weight on these statements¹ because, unlike Mr Kereopa, the statement makers were not present at the investigation meeting to have their evidence tested.

[13] After the investigation meeting Ms Zetko sent the Authority a report of Mr Kereopa's hours worked and wages paid. That is dated 18 March 2013 and was provided to her by Hanson Removals for the period 14 August 2011 to 29 April 2012. She also sent confirmation of Mr Kereopa's earnings at Forbury Park Trotting Club in June and July 2012. On 30 May 2013 I also received confirmation that Mr Kereopa did not work on Anzac Day 2012.

Issues

[14] The issues that the Authority needs to determine are:

- (a) whether Mr Kereopa was unjustifiably dismissed by Mr Wichman's words and actions on 26 April 2012; or
- (b) whether Mr Kereopa was constructively dismissed on 1 May by Mr Wichman or by a combination of Mr Wichman's behaviour and comments on 26 April 2012 and 1 May 2012;
- (c) If Mr Kereopa was unjustifiably dismissed or constructively dismissed, what remedies is he entitled to?

Factual findings

[15] Under section 174 of the Employment Relations Act 2000 I do not need to set out a record of all the evidence or the findings on credibility of any evidence. Having said that, it is clear that because the respondent was not represented and presented no witness evidence at the investigation meeting my findings of fact are based largely on

¹ Apart from the e-mail referred to in paragraph [59]

Mr Kereopa's evidence. Mr Kereopa gave sworn evidence and I was able to test his evidence by questioning him. I find the following to be the relevant facts.

[16] On 15 December 2011, there was an end of year work function. This took place on the back of one of the trucks. Mr Kereopa says that he and Mr Wichman got into an argument. At that stage both were standing on the ground. Mr Kereopa moved away from Mr Wichman and attempted to get back onto the truck. Someone yelled to him to duck and as he turned around he saw Mr Wichman swinging a metal stepladder towards him. He raised his arms to protect his head and Mr Wichman hit him with the stepladder, catching his left ribs and left arm. The Police were called but Mr Kereopa did not press charges.

[17] Mr Kereopa was unable to work the following day because of his injury. He went to the hospital emergency department on 17 December. He made an ACC claim and was off work after the incident for three weeks in total; one week due to the injury and then two weeks' annual leave. Mr Kereopa returned to work after the Christmas and New Year break.

[18] On Thursday, 26 April 2012, while Mr Kereopa was helping to shift a piano, the piano dropped onto his foot injuring his ankle. Mr Kereopa told Mr Wichman that he could no longer drive the truck because he had dropped the piano on his ankle. Another staff member who was administering first aid also told Mr Wichman that Mr Kereopa would not be able to drive. Mr Wichman told him he must drive despite his injury. Mr Kereopa again refused. Then Mr Wichman got into the truck cab. Mr Kereopa hopped over to the driver's side and Mr Wichman said *f*** you, you're fired.*

[19] Mr Wichman then said:

*No, I'm not going through this shit. I've been taken too many times.
It's your call. But hand in your f***ing keys.*

[20] Mr Kereopa returned the keys to Mr Wichman. Mr Wichman then drove the truck away, leaving Mr Kereopa at the job site without transport back to Dunedin.

[21] On Tuesday, 1 May 2012, Mr Kereopa went to the Hanson Removals' office and left a note requesting his final pay. That evening, Eleanor McGregor, Mr Wichman's business partner, telephoned Mr Kereopa. He told her that he needed his final pay because he had been fired by Mr Wichman the previous Thursday.

Ms McGregor then passed the telephone to Mr Wichman. Mr Wichman asked Mr Kereopa why he was not at work. Mr Kereopa explained that that was because Mr Wichman had fired him on the Thursday. Mr Wichman denied having fired him and said that Mr Kereopa had abandoned his employment. Mr Wichman then said:

*F*** this. I'm going to your f***king house and I'm going to smash you.*

[22] The following day, 2 May 2012, Mr Kereopa reported Mr Wichman's threat to the Police and, with their assistance, issued a Trespass Notice preventing Mr Wichman from going to Mr Kereopa's home.

[23] On 3 May 2012, Mr Kereopa went into the Hanson Removals office hoping to collect his final pay. However, he was presented with a letter written by Mr Wichman on 2 May 2012 which referred to two prior verbal warnings for failure to attend work on several occasions. Mr Wichman also wrote:

You have not been issuing delivery dockets as instructed, resulting in delays in invoicing jobs.

On Thursday last week 26th April you hurt your ankle on a job, but we have been unable to contact you until last evening as you don't answer phone calls.

This means it has been 3 full working days with no contact from you.

You indicated last night you are on ACC which is understood but your inability to say what your future intentions are regarding continuing employment means I have no alternative but to conclude you have abandoned your employment with Hansons.

Your general sullenness and confrontational attitude indicates to me you would prefer to be sacked so you can go back onto WINZ payments without a waiting period

Your last week's pay is being held in safety until I am informed of your intentions.

So please get in touch as soon as possible as I need to look at continuing staff requirements this week.

Please see this as your written and final warning.

[24] Mr Kereopa has not been back to Hansons and has not received any final pay.

Was Mr Kereopa unjustifiably dismissed by Mr Wichman's words and actions on 26 April 2012?

[25] A dismissal is the termination of an employment relationship at an employer's initiative².

[26] In his written statement Mr Wichman denies having told Mr Kereopa that he was fired. He agrees he told him to *f*** off*. However, he says Mr Kereopa then asked *are you sacking me?* to which he replied *it's your call Rob I am fed up with your behaviour and I will not go down that path* again before demanding Mr Kereopa's keys. However, in an earlier letter Mr Wichman denied that the *f word* was used.

[27] Mr Wichman's view is that in not coming to work on the days after 26 April 2012 Mr Kereopa abandoned his employment.

[28] Ms Zetko submits that once Mr Wichman said *f*** you, you're fired* and demanded Mr Kereopa's keys, not only to the truck, which he could not drive that afternoon, but to the office, the gate to the yard and the store, Mr Wichman made it clear that Mr Kereopa no longer had a job.

[29] I find that Mr Wichman dismissed Mr Kereopa on 26 April 2012 at Port Chalmers by the combination of the words *f*** off you're fired* and the action of taking his keys and driving off and abandoning Mr Kereopa at Port Chalmers without transport. If Mr Wichman did not intend to dismiss Mr Kereopa, as he asserts was obvious by his use of the words *it's your call*, he needed to contact Mr Kereopa after the Port Chalmers' events Mr Kereopa and explain that to him.

[30] For the avoidance of doubt, Mr Kereopa did not abandon his employment. Mr Wichman knew that Mr Kereopa was injured and that it was likely his ankle would not be healed enough to allow him to work for some time. I do not accept that Mr Wichman had made reasonable attempts to contact Mr Kereopa to find out how he was and when he would be returning to work. It is not credible in all the circumstances that Mr Wichman considered Mr Kereopa to have abandoned his employment.

[31] Whether Mr Kereopa's dismissal was justified is determined under the test in s.103A of the Employment Relations Act 2000. The test requires the Authority to decide the question of justification objectively.

² *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Case 95

[32] The Authority needs to consider whether Mr Kereopa was guilty of serious misconduct that could justify a summary dismissal, as well as whether the process used means that the decision to dismiss was one that a fair and reasonable employer could have made in all the circumstances at the time.

[33] The Authority may not substitute its opinion for that of the employer³, but in applying the test it must consider whether Mr Wichman acted fairly in deciding to summarily dismiss Mr Kereopa and in particular whether, before deciding to dismiss him, Hansons:

- a. sufficiently investigated the allegations against Mr Kereopa,
- b. raised its concerns with him,
- c. gave him a reasonable opportunity to respond to the concerns, and
- d. genuinely considered any explanation regarding the allegations⁴; and
- e. had reasonable grounds for concluding that, there was some serious misconduct on Mr Kereopa's part and
- f. whether there are any other relevant factors.

[34] The Authority must not determine that a dismissal is unjustified solely because of minor process defects which did not result in the employee being treated unfairly.

[35] Mr Wichman did not comply with any of the minimum requirements for fair process set out in s.103A(3) when deciding to dismiss Mr Kereopa. That in itself renders the dismissal unjustified.

[36] Summary dismissal is limited to situations in which serious misconduct has fundamentally undermined the trust and confidence inherent in an employment relationship. That is not the case here. A work injury that rendered Mr Kereopa incapable of driving the truck could never meet the criteria of serious misconduct. The decision to dismiss Mr Kereopa was not one a fair and reasonable employer could have made in all the circumstances at the time.

³ *Angus v Ports of Auckland* [2011] EmpC 160

⁴ Section 103A(3) of the Act

Was Mr Kereopa constructively dismissed by a combination of Mr Wichman's behaviour and comments on 26 April 2012 and 1 May 2012?

[37] Mr Harris did not assault Mr Kereopa on 15 December 2011, as asserted by Mr Wichman. Mr Wichman did. The incident in December 2011 is relevant to Mr Kereopa's belief about whether Mr Wichman would make good on his threat to assault him made over the phone on 1 May 2012.

[38] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer⁵.

[39] It is not every breach of a duty or every unjustified action by an employer that can entitle an employee to cancel their contract of employment:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.⁶

[40] If I am incorrect that Mr Wichman summarily dismissed Mr Kereopa on 26 April 2012 then I find that he constructively dismissed Mr Kereopa by a combination of the 26 April incident and Mr Wichman's own admission that on 1 May 2012 he

... lost my temper with him and told him I'd like to beat the shit out of him

[41] Mr Wichman's actions were certainly more than inconsiderate conduct. Even in the context of a fairly robust workplace his actions were dismissive and repudiatory. His actions were very far from the standard of a fair and reasonable employer. Mr Kereopa's dismissal was unjustified.

Remedies

Unpaid wages, sick leave, holiday pay and time off work on ACC

⁵ *Northern Hotel etc IUOW v Little Ponsonby Tavern Ltd* (1990) ERNZ Sel Cas 712 (LC) at 728

⁶ *Wellington Taranaki and Marlborough Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC) at 104

[42] Mr Kereopa was paid \$15.50 per hour. He was guaranteed a minimum of 30 hours work per week. His employment agreement said that he would be paid weekly on a Tuesday into his nominated bank account.

[43] Under clause 8.3 of his employment agreement Mr Kereopa became eligible for five days' sick leave over the subsequent 12 months once he had been employed for six months. His employment started on 2 October 2011, after a trial period. Mr Kereopa was eligible for sick leave as at 2 April 2012.

[44] Mr Kereopa says Hansons has not paid his last pay including any holiday pay owed. Mr Kereopa only has one pay slip that he was able to give the Authority. That is for the pay period ending 29 April 2012 and says that \$299.52 was paid to him. However, Mr Kereopa says he was never paid that amount. In the letter dated 2 May 2012 Mr Wichman says that Hansons was withholding Mr Kereopa's *last week's pay*. I accept the last week's pay was withheld and has not been paid.

[45] The wages and time records were received from Hansons after the investigation meeting. In the absence of any of financial records from Mr Kereopa, such as his bank statements, I rely on the Hansons'⁷ report as a record of all payments and deductions made.

Deductions

[46] Mr Kereopa queries deductions made from his pay by Hansons. So far as the pay for his last week of work is concerned deductions made are recorded on the pay slip as:

- a. Student loan - \$46.50
- b. Ministry of Justice court fines - \$20
- c. Work and Income deduction - \$10

[47] On 14 May 2012 Work and Income wrote to Mr Kereopa noting that he had arranged to pay back a debt to it at \$10 per week and that the last payment it had received was \$50 on 1 May 2012 but that payments had stopped after that. Mr

⁷ Mr Kereopa was given the opportunity to supply his bank statements or any other financial records or records of hours worked. However, he was unable to do so. After the investigation meeting I was told via Ms Zetko that Mr Kereopa was usually paid by a cash cheque which he would cash rather than bank so the bank statements may have been of limited use to me anyway.

Kereopa assumes Hansons paid that and queries how it was able to pay more than \$10 on his behalf. He assumes that amount has come out of his withheld pay. However, it is not clear where that amount came from. If it was paid by Hansons that was not with Mr Kereopa's permission and should not have been paid.

[48] Hansons wages and time record shows that apart from student loan deductions that were made weekly another amount of \$30 per week (from 22 January 2012 – 29 April 2012) was also deducted; totalling \$450. Mr Kereopa asserts that he did not authorise any deductions from his pay. However, I am satisfied that the amount of \$30 per week was made up of \$10 per week to WINZ and \$20 per week to the Ministry of Justice for Mr Kereopa's fines. Therefore, Hansons does not owe Mr Kereopa the \$450 he believes he is owed.

[49] Mr Wichman says that Mr Kereopa received advances of \$50 and \$180 and was asked to sign the *diary* (which appears to be to Mr Kereopa's time sheets) to acknowledge those advances so that they could be repaid out of Mr Kereopa's pay. However, Mr Kereopa says he did not receive any advances or authorise any such deductions from his pay. The wages and time records supplied by Hansons do not show any deductions other than those already accounted for above. Therefore, I have not taken the amounts into account.

Pay for week ending 29 April 2012

[50] Hansons must pay Mr Kereopa a total of \$435.00 gross in unpaid wages made up as follows:

- a. 21 hours worked at \$15.50 per hour = \$325.50, plus
- b. Anzac Day (not worked) at 6 hours x \$15.50 = \$93.00, plus
- c. Sick day for 27 April 2012 at 6 x \$15.50 = \$93.00, less
- d. Student loan of \$46.50, less
- e. Ministry of Justice fines of \$20.00, less
- f. WINZ payment of \$10.00.

Holiday pay and pay for week in December 2011 off on ACC

[51] Mr Kereopa earned a total of \$18,819.38 gross during his employment at Hansons. He is entitled to be paid 8% of his gross pay amounting to \$1,505.55 less any annual leave taken. Mr Kereopa took two weeks of paid leave in December and January 2011-2012 and one week of ACC injury recovery time. Over that period he was entitled to be paid for four statutory holidays which were in addition to his annual leave entitlement.

[52] Mr Kereopa's minimum hours that he should have been paid in any one week were 30. When that is multiplied by his hourly rate of \$15.50 he should have been paid a minimum of \$465 per week.

[53] From the Hansons hours and wages report I am satisfied that Mr Kereopa was paid \$480 gross for the week ending 18 December 2011; the week after Mr Kereopa was assaulted by Mr Wichman. He was also paid \$465 gross for the week ending 25 December 2011. Mr Kereopa believed that he had not been paid for that week but I am satisfied that Hansons has paid him for the week he was off on ACC in December 2011.

[54] The subsequent two pay weeks ended on 1 and 8 January 2012. Mr Kereopa was on annual leave in those weeks. Two weeks pay (for 60 hours) would be \$930.00 gross. The total Mr Kereopa was paid for those two weeks was \$875.75.

[55] I calculate that Mr Kereopa is due an amount of \$1001.80 in holiday pay made up as follows:

- a. 8% of gross pay = \$1,505.55, less
- b. \$875.75 paid for two weeks annual leave, plus
- c. Pay for 4 statutory holidays at \$93 per day = \$372.

[56] If the parties do not agree with the Authority's calculations they may come back to the Authority with further information for a recalculation.

Lost wages

[57] Having determined Mr Kereopa has a personal grievance under s.124 of the Act I must now consider whether he contributed to the situation which gave rise to his dismissal and if so reduce remedies accordingly. The evidence fails to establish that

Mr Kereopa engaged in any blameworthy conduct leading to his dismissal, so remedies are not to be reduced on the grounds of contribution.

[58] At the investigation meeting Mr Kereopa candidly disclosed a serious criminal conviction. He says that Mr Wichman was aware of the conviction and the sentence he received for it before he began his employment at Hansons. Mr Kereopa acknowledges that his criminal record makes it difficult for him to obtain employment.

[59] I find Mr Kereopa properly mitigated his loss by diligently seeking work after he was dismissed by the respondent. That view is supported by a copy of a 15 February 2013 e-mail to Ms Zetko from John Fitchett of the Ministry of Social Development stating that Mr Kereopa was a:

very motivated job seeker ... in regular contact ... to check on any possible job opportunities that may have been suitable for him.

[60] Because Mr Kereopa has a personal grievance s.128 of the Act requires me to order Hansons to pay him the lesser of a sum equal to his actual lost remuneration or to 3 months' ordinary time remuneration. Mr Kereopa was unemployed for more than three months. Thirteen weeks is the equivalent of three months.

[61] Over a period of 28 weeks Mr Kereopa worked an average of 37.4 hours per week. I consider that number of hours is a reasonable measure of his ordinary time amounting to an average wage of \$579.70 per week. He was paid \$15.50 per hour. Therefore, thirteen weeks of ordinary time remuneration amounts to \$7,536.10. However, in that time Mr Kereopa earned \$324 from work at Forbury Park Trotting Club. Therefore, Hansons must pay Mr Kereopa \$7,212.10.

Compensation

[62] Mr Kereopa has claimed \$8,000 compensation under section 123(1)(c)(i). He says:

I was just really gutted; quite hurt, eh, ...felt small and useless and as if I couldn't provide for my kids and embarrassed. What will my children think?

[63] Mr Kereopa was very emotional when telling me about the effect of his dismissal on him.

[64] I consider that \$5,000 is a fair amount of compensation for Mr Kereopa's for humiliation, loss of dignity and injury to his feelings arising out of his unjustified dismissal.

Costs

[65] Mr Kereopa is not claiming legal costs. However, Elrich Enterprises Ltd should reimburse Mr Kereopa the filing fee of \$71.56 he paid to lodge his application with the Authority.

Christine Hickey
Member of the Employment Relations Authority