

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA163/09
5157762

BETWEEN HARALD KLEIVEN
Applicant
AND RUSSELL MOORE
Respondent

Member of Authority: James Crichton
Representatives: Applicant in person
Respondent in person
Investigation Meeting: 5 August 2009 at Nelson
Determination: 1 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Kleiven) alleges that on 9 February 2009, he was prevented from continuing in the employment of the respondent (Mr Moore) because of a decision by the Nelson City Taxi Society Limited (of which Mr Moore is a member) to exclude from driving duties any person or persons who refused to wear the Society's new uniform which comprises, amongst other things, a black shirt.

[2] Mr Moore, responding through the Nelson City Taxi Society Limited (the Society), simply says that the Society's rules require all drivers to wear the Society's uniform and that from the operative date, 9 February 2009, the Society took the decision that, given Mr Kleiven's refusal to wear the black shirt, he would be precluded from driving Mr Moore's taxi as Mr Moore's employee driver.

[3] Mr Kleiven purchased a taxi and became a member of the Society in August 1995 and continued as a member for a period of some 10 years until shoulder surgery forced him to relinquish his taxi business and commensurate membership of the Society.

[4] On recovery from his surgery, Mr Kleiven commenced employment as a driver with Mr Moore.

[5] In calendar 2008, the Society determined to adopt a new uniform standard which comprised, amongst other things, a black shirt. Members and employees who drove for members were given an appropriate lead in time to acquire and wear the new uniform.

[6] Mr Kleiven objected to the portion of the new uniform which involved the wearing of the black shirt as he considered it an offensive reminder of the wickedness perpetrated by agents of the Nazi Reich throughout continental Europe.

[7] Mr Kleiven is not simply taking a point of principle on this matter. He is a Norwegian national and he is old enough to have been a child during the Nazi occupation of his country during the Second World War. He described at my investigation meeting a particularly unpleasant exchange in which his whole family (himself as a small boy included) were put up against a wall outside their home and threatened with summary execution by black-shirted Norwegian collaborators, for some minor transgression against the occupying Nazi forces. In the result, Mr Kleiven's father stood up to the potential executioners and calamity was averted but Mr Kleiven remembers the incident vividly and others like it.

[8] Mr Kleiven sees the black shirt to be worn by the Society staff and members as a reminder of those tragic days in the Second World War and he does not wish to traumatise himself, or indeed be seen as perpetuating the black shirt myth by wearing a uniform comprising a black shirt.

[9] In effect, Mr Kleiven seeks to remain in Mr Moore's employment but to have a dispensation from the Society's requirement that a black shirt be worn.

[10] For his part, Mr Moore, who attended my investigation meeting with representatives of the Board of the Society, simply said that the Society had made a decision which was available to it to make to select a particular garment as part of its new uniform and that the Society sought uniformity in relation to the wearing of these garments.

[11] I was provided with copies of the constitution of the Society and directed to the appropriate rules. I am satisfied that the Society has the legal right to make rules

governing the operation of its taxi business and that, included in that right, is an ability to determine a uniform which will apply to all of its staff or members. The issue of uniformity is, of course, important in the marketplace; just as the Society seeks to have all its vehicles painted and signwritten in the same way so it seeks to have all its drivers dressed in like fashion.

[12] Having satisfied myself that the Society has the power to make rules in respect of the uniform to be worn by members and staff, I then considered the powers of the Board of the Society to make more particular rules about the control of members and staff. Again, having studied the documentation helpfully provided to me by the parties, I am satisfied that the Society has appropriate legal power to direct members and staff to wear a uniform as such uniform may be decided upon by the Society in accordance with its rules of operation.

[13] I also note from the evidence available to the Authority that the Society went through a thorough consultation process in determining to change the old Society uniform to the new one which causes the present difficulty. The new standard uniform became the norm with effect from 1 January 2009.

[14] It is evident from the constitution of the Society that there is a power reserved to the manager of the Society to exempt a particular member or staff member from wearing a particular item of uniform. Of course, during the investigation meeting, I inquired of the Society representatives whether, given Mr Kleiven's philosophical objection to the wearing of the black shirt, there could be an exemption made in his case.

[15] The Society representatives indicated that while they had the highest regard for Mr Kleiven and felt that he had been an asset to its business when he was employed in it, they did not think it appropriate to make an exemption to enable Mr Kleiven to continue his employment but without wearing the uniform shirt. Despite Mr Kleiven's visceral connection with the historical images that he so strongly associated with black shirts, the Society felt unable to assist. It was suggested to me that the power reserved to the manager to exempt staff from wearing particular items of uniform was to be used for health and safety reasons rather than for reasons of the sort Mr Kleiven had advanced. For example, the Society representatives agreed with my suggestion that if the nature of a particular fabric was

such as to cause a dermatological reaction in a staff member, then an exemption might well be granted in those circumstances.

[16] Mr Kleiven seeks compensation for unjustified dismissal and claims to have lost wages and to be owed outstanding holiday pay as well. Mr Kleiven also considers that he was effectively made redundant by Mr Moore and he seeks redundancy compensation as well.

Who was Mr Kleiven's employer?

[17] Mr Kleiven was employed by Mr Moore as an employed driver and it is to Mr Moore that Mr Kleiven must look for any remedies, assuming that he has a legal claim to those remedies.

Was Mr Kleiven unjustifiably dismissed?

[18] I am satisfied on the evidence before the Authority that Mr Kleiven was not unjustifiably dismissed, or indeed dismissed at all. The evidence put before me by the Society on behalf of Mr Moore is that Mr Moore remains ready, willing and able to re-engage Mr Kleiven just as soon as the uniform issue (to put it loosely) is resolved.

[19] Furthermore, the Society makes clear that Mr Kleiven is not dismissed but simply *black listed* (no pun intended). By this expression, the Society means that unless and until Mr Kleiven chooses to comply with the Society's uniform code, he will not be able to be actively involved in the driving of taxis for the Society or its members. In effect, it seems that Mr Kleiven is suspended from duty.

[20] Mr Kleiven contended that he had been dismissed from his employment by Mr Moore because he can no longer work for the Society or its members. But the Society's view of the same facts is that Mr Kleiven has rather withdrawn his labour because of the *black shirt* issue. Certainly I was not satisfied that the evidence supported a conclusion that the Society had promulgated the notion that Mr Kleiven was *fired* or *dismissed*. Mr Kleiven contended that those words were used and that people in the community were aware that that was the situation but on this point I prefer the Society's evidence that Mr Kleiven was *black listed* not dismissed.

Does Mr Kleiven have any financial entitlement?

[21] Given my finding that Mr Kleiven has not been dismissed (whether unjustifiably or otherwise), there can be no issue of compensation because there is no evidence to support a personal grievance in the usual way. Further, any claim for wages lost as a consequence of an unjustified dismissal must also fail.

[22] However, Mr Kleiven also claims that he has outstanding holiday pay owing to him of \$500 representing one week's holiday pay. Mr Moore denies that, has checked with his accountant and is adamant that everything owing to Mr Kleiven has been paid. I am satisfied that no holiday pay is owing to Mr Kleiven.

What else can the parties do?

[23] I was impressed with the integrity and commitment of all of the people who engaged with me at my investigation meeting. Mr Kleiven is an impressive individual who feels passionately about this uniform issue. Similarly, the representatives of the Society were equally impressive. They spoke warmly of Mr Kleiven's long service to the Society and of his popularity with the clients.

[24] However, despite the evidence of good faith on both parties, the principal protagonists each maintained their position and was not able to see a way forward in which the employment relationship might continue.

[25] It is not for the Authority to advise parties about how they might conduct themselves, but in the unusual circumstances of this case, it does seem to me that with large compensatory claims firmly off the table as being inappropriate in an environment where I find there has been no dismissal, it may be possible for the Society and Mr Kleiven to come to terms where perhaps the Society might re-think its refusal to give Mr Kleiven an exemption, given his passionate belief that the present uniform shirt is a symbol of past evil.

Determination

[26] Mr Kleiven has not been successful in his claim against Mr Moore, but I have suggested that the parties may feel able to talk to each other to see if they can reconnect in an employment relationship now that the claim for significant compensation is no longer to be considered.

[27] In the particular circumstances of this case, I direct that any costs incurred by either party in their pursuit of this matter or its defence are to be borne by the party incurring the cost in the first place.

James Crichton
Member of the Employment Relations Authority