

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

CA 31/10
5158539

BETWEEN MICHAEL McKENZIE
 Applicant

AND GARETH DALLEY
 CONTRACTING LTD
 Respondent

Member of Authority: James Wilson

Representatives: Michael McKenzie in person
 Gareth Dalley for the respondent

Investigation Meeting: 20 October 2009 at Christchurch

Determination: 16 February 2010

DETERMINATION OF THE AUTHORITY

Michael McKenzie's employment relationship problem

[1] On 3 November 2008 Michael McKenzie commenced employment with Gareth Dalley Contracting Ltd (Dalley's) as a machinery operator. On 7 November 2008 Mr McKenzie and Mr Gareth Dalley (Dalley's Managing Director) signed an individual employment agreement which included the following provisions:

- a. Mr McKenzie was to receive an annual salary of \$45,000 per annum.
- b. Hours of work would be:
...as directed by the employer to best suit management and may be on any, or all, days of the week ... outlined in schedule 5. The employee accepts that there may be seasonal fluctuations in the hours to be worked and rostered days off, and agrees to comply with the employer's specific requirements.

...Where the nature of the operation requires a varying time commitment from the employee according to the time of year, the hours normally worked during each time of the year are outlined in schedule 5

(Note: Schedule 5, although attached to the agreement, was not completed.)

- Dalley's was to pay \$1000 to Mr McKenzie for use as an accommodation bond *which will not need reimbursing if employment stays continuous after 6 months.*

[2] On 22 December 2008 Mr McKenzie wrote to Mr Dalley saying:

Thank you for the opportunity to work for you during the past 2½ months but due to a lot of amalgamating factors I am sorry but I am handing in two weeks notice as of today.

Although he had given two weeks notice, due to the proximity to the Christmas break Mr McKenzie worked only until midday on Tuesday, 23 December 2008. Early in the New Year, Dalley's paid Mr McKenzie's final pay. This calculation included payment for the period to 6 January 2009 plus holiday pay, calculated at Mr McKenzie's base salary rate. The final payment however was reduced by the deduction of the \$1000 bond payment and a further \$800 for *personal fuel used*.

[3] On 18 February 2009 Mr McKenzie wrote to Dalley's raising a personal grievance for *constructive dismissal in regards to several main issues*. The letter went on to spell out several issues of grievance:

(i) That the hours he had been required to work were excessive and that while he accepted that the hours during the summer period would be high and offset during the winter, he found it *quite unrealistic that any employer would expect to have an employee work that period of time and not be acknowledged for it*. He says that he had approached Mr Dalley on several occasions but had been told that he had signed a contract and it would not be changed. He said that this left him with no option but to terminate his employment.

(ii) That his final pay should have included an additional 40 hours being the “surplus” hours he had worked during his employment.

(iii) That he had been *required on numerous occasions*, and with Mr Dalley’s knowledge, to drive trucks with loads that were heavier than allowed by his drivers licence and that his resignation had been partly precipitated by his *not being prepared to take any further risks*.

(iv) That the deduction of the \$1000 bond money from his final pay was illegal. (Mr McKenzie accepts that he had agreed to the deduction of \$800 for petrol)

In this letter Mr McKenzie sought:

- \$846.00 in unpaid wages and holiday pay.
- \$600 being (a proportion of) the bond money “illegally” deducted.
- 6 weeks wages lost from the time of the termination of his employment until his requested reinstatement.
- Reinstatement, effective immediately, *on the original agreed terms*.
- \$2000 in compensation for stress and inconvenience.

[4] Dalley did not agree to any of Mr McKenzie’s requests and on 8 April 2009 he lodged a statement of problem with the Authority seeking:

- Wages owed*
- Compensation for breach of contract*
- Reimbursement of illegally deducted wages*
- Compensation for loss of wages (i.e. post termination)*
- Full reinstatement of job.*

The issues for determination

[5] Mr McKenzie has raised a number of issue which will be addressed in this determination:

- Was he (unjustifiably) constructively dismissed and does he a have a personal grievance against Gareth Dalley Contracting?
- If he has a personal grievance what remedies is he entitled to?
- Whether or not he has a personal grievance is he entitled to any further payments for the period he was employed?

- Is he entitled to be reimbursed for all or any of the bond money which was deducted, he says illegally, from his final pay?

Was Mr McKenzie constructively dismissed?

Legal principles

[6] The law regarding constructive dismissal is well-established. In 1985 the Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woodworth (NZ) Ltd* (1985) ERNZ Sel Cas 136, held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and/or
- (c) A breach of duty by the employer causes an employee to resign.

The “amalgamating factors” that Mr McKenzie says gave him no option but to resign

[7] Mr McKenzie is not suggesting that Mr Dalley gave him *a choice between resigning or being dismissed*. Nor is he suggesting that his employer *followed a course of conduct* deliberately designed to *coerce him to resign*. What he does say is that the combination of extremely long hours at a lower rate than he had been led to believe, and the "requirement" to drive vehicles which were outside his license provisions, taken together placed him in a position of having no option but to resign.

Dalley Contracting’s position regarding Mr McKenzies termination

[8] In response to Mr McKenzies suggestion that his hours of work were excessive, Mr Dalley says that the arrangements regarding hours was made quite explicit at the commencement of Mr McKenzie’s employment. While the hours of work during the summer, contracting, season would be long, this would be offset during the winter downtime. He points out that Mr McKenzie's employment agreement says that he is to be paid a salary -- the implication being that there would be no payment for "overtime". In respect to Mr McKenzie’s claims that he was required to drive vehicles outside of his legal license provisions, Mr Dalley says that Mr McKenzie had made no objection to driving the various vehicles and, had he done so, alternative arrangements would have been made.

[9] Mr Dalley also points out that on 17 December 2008 (just a few days before Mr McKenzie resigned) he had had occasion to raise a number of issues with Mr McKenzie regarding his behaviour and performance. These issues included smoking in company vehicles (despite the company's non-smoking policy), consuming alcohol while driving vehicles in work time and using abusive and threatening language. The implication from Mr Dalley is that it was the raising of these issues which caused Mr McKenzie to resign.

Discussion regarding constructive dismissal

[10] I do not accept that Mr McKenzie had no option but to resign. Although Mr McKenzie may not have been particularly happy with the extent of the hours he was required to work, I accept Mr Dalley's assertion that Mr McKenzie knew full well what the working arrangements were. Also when he accepted the position he was aware that Dalley Contracting operated a range of vehicles and I have no doubt that he raised little objection at the time to bending the rules imposed by his license. While I cannot condone what was, if it occurred, a breach of the law I find that it was well within Mr McKenzie's power to refuse. His objections at the time seem at best to have been half hearted. It is disingenuous of Mr McKenzie to suggest in hindsight that he was *required* to break the law and therefore had no option but to resign.

[11] **Mr McKenzie was not constructively dismissed.** When faced with several issues raised by his employer he resigned and, in hindsight, *amalgamated* a number of issues to justify a claim that he had no option but to resign, in the hope that he could receive some compensation for what had been an unsatisfactory employment situation.

[12] **As Mr McKenzie was not constructively dismissed but chose to resign, it follows that he does not have a personal grievance and is not entitled to be reinstated, recover any wages lost as a direct result of that resignation nor receive compensation for the hurt and humiliation he says his employer's actions caused him.**

Is Mr McKenzie entitled to receive any further wages for the period during which he was employed.

[13] Mr McKenzie argues that during the time he was employed at Dalley's his hours of work averaged in excess 40 hours per week and that he should be paid for these additional hours - which he calculates at 40.. The logic of Mr McKenzie's argument is that a salary set out in his employment agreement was based on a 40 hour week at \$20 per hour plus holiday pay. Although the arrangement was that he work additional hours during the summer and this would be offset by shorter hours and leave during the winter, it was apparent to him that the excessive hours he worked would be impossible to offset. Finally in any event, because of his resignation he didn't have the opportunity to have the time off and should therefore be paid for the additional hours.

[14] Mr Dalley points out that Mr McKenzie signed an employment agreement which included the payment of a salary and the parties understood and agreed that the hours of work would be averaged over a full year. He says that he paid Mr McKenzie his legal entitlement, as required by his employment agreement. In addition, Mr Dalley says, despite Mr McKenzie not working out the two weeks notice he was required to give (he finished work at midday on the 23rd of December 2009) he was paid until 6 January 2009, plus the requisite holiday pay. Mr Dalley has also drawn my attention to correspondence from a Department of Labour Labour Inspector who, at Mr McKenzie's request had reviewed Dalley's records and concluded that Mr McKenzie had been correctly paid in accordance with his employment agreement.

[15] I agree with Mr Dalley and the Labour Inspector. Mr McKenzie has been paid as per the agreement he entered into with his employer. There is no provision in that agreement for the payment of a hours in addition to 40 a week or for that matter any maximum, or minimum per year -- simply an arrangement that over a full calendar year, excess hours worked during the summer would be offset during the winter. Mr McKenzie chose to resign before that agreement had been given sufficient time to properly balance out his hours of work as had been intended. Under the circumstances Dalley Contracting was entitled to rely on the employment agreement i.e. that Mr McKenzie was to be paid a salary of \$45,000 per year. **Mr McKenzie is not entitled to any further payments for hours worked during his employment with Dalley Contracting.**

Is Mr McKenzie entitled to be reimbursed for the bond money deducted from his final pay?

[16] In this instance I must disagree with the Department of Labour Inspector. The Wages Protection Act requires an employer to pay the entire amount of an employee's wages without deduction. Deductions are permitted for any lawful purpose with the written consent of the employee. In Mr McKenzie's case Dalley's relies on a provision in Mr McKenzie's employment agreement in which he agreed that, if he did not continue to work for Dalley's for more than six months the bond would be repayable. However that provision does not include agreement by Mr McKenzie that any outstanding amount could be deducted from his final pay. That is not to say that the amount deducted is not owing to Dalley's -- only that Dalley's was not authorized to deduct it from Mr McKenzie's pay without his agreement. I accept that Dalley's had in fact paid Mr McKenzie more, in final wages, than he was legally entitled to. Unfortunately for Dalley's the law does not allow for an offset of monies owed by an employee against wages owed to them.

[17] **Dalley Contracting is to pay Mr McKenzie \$1000 being bond money deducted without Mr McKenzie's agreement from his final pay.** I would emphasize that this money is owing to Dalley Contracting and Mr McKenzie should immediately enter into discussions with Dalley's regarding how he intends to make the necessary payment.

[18] For completeness I record that Mr McKenzie does not dispute, and is not seeking to recover, the deduction of \$800 being reimbursement for personal fuel use during his employment.

Costs

[19] As neither party was legally represented during the course of the Authority's investigation, there is no question of costs to be determined.

James Wilson

Member of the Employment Relations Authority

