

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Robert Osborne (Applicant)
AND J A Ramsay Transport Limited (Respondent)
REPRESENTATIVES Trent Petherick for Applicant
Gary Tayler for Respondent
MEMBER OF AUTHORITY G J Wood
**INVESTIGATION
MEETING** Napier, 9 November 2006
SUBMISSIONS Due by 20 December 2006
**DATE OF
DETERMINATION** 21 December 2006

DETERMINATION OF THE AUTHORITY

Introduction

1. The applicant, Robert Osborne, claims that he was unjustifiably constructively dismissed by the respondent (Ramsay Transport), after it underpaid him from the outset; required him to drive excessive hours without proper payment (also being unsafe as Mr Osborne was required to work outside the hours permitted under the Land Transport Act 1998); employed additional staff to make his job uneconomic and conspired to have another employee threaten him. Claims for penalties were withdrawn as they were out of time. Ramsay Transport denies all the claims.

Credibility

2. In any case there can be no certainty about what occurred when there are differing recollections. In this case there have been a number of areas where there are differences between the witnesses that can only be resolved by the Authority making a

credibility assessment. Wherever possible, I have relied on evidence external to the oral evidence of the witnesses and on logic. This is because there are difficulties with the evidence of all witnesses. In relation to any particular event, the Authority can not be certain what occurred some years ago. Memories may fade and even memories that are particularly strong may have been simply buttressed by the process of time, even if mistaken in the first instance. What the Authority must do is stand back and determine each matter on the balance of probabilities, i.e. what is more likely to have occurred than not.

3. On the one hand, Mr Osborne was adamant that he was right on all matters, even where it differed from his written brief of evidence. On the other, while Mr Jim and Mrs Marie Ramsay and Mr Eddie Kirikiri were inclined to make concessions where appropriate and be more equivocal over other matters, given the passage of time, I have concerns over Ramsay Transport's failure to keep and maintain records, such as written employment agreements and running sheets, and the fact that it has in the past failed to respond to correspondence.
4. Where I can not ascertain from other evidence what was more likely to have occurred than not, I have preferred the evidence of Mr Kirikiri over all other witnesses as he was not responsible for the documentary issues raised above.

The Facts

5. The Ramsays own J A Ramsay Transport Limited, which operates a refrigerated line haul service trading under the name Cooltrain. It employs Mr Kirikiri as its operations manager. The back office operations are run by Mr and Mrs Ramsay. Ramsay Transport also employs a number of drivers.
6. Ramsay Transport operates, amongst other things, a service between Napier and Auckland. Drivers were paid \$100 per trip each way, together with a non-taxable allowance of \$30 (although greater for some staff). \$11.50 per hour was paid for extra work done at the time Mr Osborne was engaged in March 2004, which was later increased to \$13.50 per hour.

7. Mr Osborne expressed an interest in working for Ramsay Transport after seeing an advertisement for a Cooltrain line haul position in a local newspaper and having a conversation with Mr Ramsay at a local industrial site. At the time Mr Osborne was working for Tony Smith Limited, earning a salary of \$840 gross per week. As he worked 60 hours per week, his hourly rate was \$14 per hour. At that time, he had a wife and children to support.
8. Mr Kirikiri was also involved in discussions between Mr Osborne and Mr Ramsay. During those meetings, Mr Osborne's duties were explained to him. These were that he would be paid \$100 per trip each way between Napier and Auckland, starting in Napier, stopping at certain points along the way and unloading at either end. It was expected that this would take six to seven hours as it took place mostly at night. To the \$100 would be added the untaxed \$30 allowance.
9. I note that at six to seven hours per trip the equivalent hourly rate would be around \$15, before the allowance. I do not accept, however, that Mr Osborne was promised \$15 per hour for additional work, despite the evidence that Mr Osborne in fact often ended up earning less at Ramsay Transport than he did at Tony Smith Limited. There are a number of reasons why a worker might choose to change employer, not just expected income. In any event, because of the amount of extra work on offer, Mr Osborne was potentially able to earn more with Ramsay Transport rather than with Tony Smith Limited.
10. Mr Osborne was never provided with a written employment agreement as he should have been. I make the point to employers generally, for future reference, that a key rationale for the requirement on parties to have a written employment agreement is so that disputes such as the one that has arisen here between Mr Osborne and Ramsay Transport can be minimised, if not eliminated.
11. In all the circumstances, I prefer Mr Kirikiri's evidence that the figure of \$11.50 per hour was offered and accepted. My reasons for this are that that was what other drivers were paid, Mr Osborne did not complain about the situation in writing (at least for many months) and for general credibility reasons, as set out in the section above.

12. I further conclude, as Mr Kirikiri gave evidence, that the employment operated on a reasonably good footing until mid-2004. I therefore find that Mr Osborne was mistaken in his recollection about the amount he would be paid for extra work and that this mistake has subsequently coloured his employment relationship with Ramsay Transport.
13. From time to time, either because Mr Osborne was given a lot of work to do, or because he took regular and sometimes long breaks, or because of exigencies such as traffic accidents, Mr Osborne, with the at least implicit consent of Ramsay Transport, did work hours in excess of that required under the Land Transport Act. On no occasion, however, did he raise this as a concern with Ramsay Transport until well after his employment ended. I find that Mr Osborne, as with many other workers, often wanted to work extra hours so as to increase his income.
14. A few months after he started, Mr Osborne did take up concerns over the way he was paid, in particular short payment for additional work done, the structure of pay arrangements and whether matters such as public holidays were being properly addressed. He took up this latter point with a Labour Inspector and it was subsequently resolved.
15. On 24 July Mr Osborne wrote to Mrs Ramsay about payment for four sugar refinery trips, other separate trips he had done and not been paid for, the criteria for paying the allowance and the fact that he was due for a pay rise. I note that there was no mention of the \$15 per hour that Mr Osborne claimed had been agreed prior to his employment.
16. On 27 July Mrs Ramsay replied, claiming that Mr Osborne was not yet due for a pay review and defending the pay system. Ms Ramsay reminded Mr Osborne that her husband had already told him that he needed to provide dates for the extra sugar refinery trips.
17. It was clear that four side trips to the sugar refinery should have been paid by Ramsay Transport, even although there is a dispute as to whether the proper claims were put in by Mr Osborne. In order to conclude matters between the parties, I find that 12 hours paid work, namely \$162 gross, is owed. This sum is set at the rate of \$13.50 per hour, which came into place during the course of Mr Osborne's employment.

18. Mr Osborne remained dissatisfied with aspects of his employment and accordingly wrote a letter, as notice of a personal grievance, on 5 September. In the letter he raised concerns that he had not been told at the interview about loading in Auckland, but had been promised that additional work would be paid at \$15 an hour. He raised other concerns about the way payments, particularly the allowances, were structured. He wanted to be paid \$15 an hour for all extra work done and noted that he would not do any more work outside log book hour regulations. He indicated that in the long term he would continue to work at the rates agreed at the interview, otherwise the matter would “*proceed to the Employment Court*”. He noted that when he had raised concerns previously he had been given the less favourable jobs compared with his run partner, as opposed to having the work shared equally between drivers. Mr Osborne also sought a complete weekly breakdown of his wages.
19. For its part, Ramsay Transport was concerned about certain aspects of Mr Osborne’s performance, including the time it took him to complete his runs and his allegedly not following instructions. On 13 October he was given a written warning, which he disputed by letter dated 15 October. In that letter Mr Osborne also replied to a number of other accusations that had previously been raised with him.
20. In the letter Mr Osborne also claimed that Ramsay Transport was trying to drive him out, particularly by the engagement of another worker. He further noted that he had complained to the Privacy Commissioner about management telling staff that he had raised a personal grievance. He concluded with the following:
- “I believe that the company’s actions amount to attempted constructive dismissal and any further actions along these lines shall be considered seriously.*
- Please note this letter as a written warning to the company!!!**
21. I also note that in October, following the involvement of the Labour Inspector, Ramsay Transport had, extremely belatedly, decided to offer its employees written individual employment agreements. Mr Osborne declined to sign his, quite rightly noting, in particular, that it involved a three month probation period, even though he had already been employed for longer than that period already.

22. As a result of all of the concerns of both parties, they quite properly decided to attend mediation, which occurred on 20 October. What took place in mediation occurred for the purposes of mediation and is therefore confidential.
23. Mr Osborne failed to turn up for work on 21 October, ringing Mr Kirikiri to tell him that he had a sore back. Mr Kirikiri told Mr Osborne to get a medical certificate and also to come in and sign a new offer of employment. This document was entitled "*Offer of Employment – Retraining Programme*". It states, amongst other things:

"As agreed by both parties we are pleased to offer you a one month retraining programme commencing 21 October 2004 until 17 November 2004.

A review of this retraining programme will take place with mediator Marie Wheatley at 10am 17 November 2004.

The agreed remuneration is \$13.50 per hour taxable minimum 40 hours per week."

24. This document was signed by Mr Ramsay and Mr Kirikiri, and then signed by Mr Osborne when presented to him on 21 October. Mr Osborne claimed that he was required to sign the document under duress, but I can find no independent evidence that this was the case and prefer Mr Kirikiri's evidence that Mr Osborne accepted it without question. In making this conclusion I note in particular that the document states that the retraining programme offered by Ramsay Transport was as agreed by both parties. This must relate to events that occurred before 21 October. Therefore I find it unlikely that Mr Osborne was under duress to sign the document. What is clear, however, is that Mr Osborne had already been to see his doctor two days before the mediation and was in a much stressed state.
25. When Mr Osborne came in he also stated that he was unable to get a doctor's appointment until 26 October, the day after Labour Day. Mr Osborne did not turn up for work that day, however - nor did he respond to calls from Ramsay Transport, nor provide a medical certificate. He did, however, attend his doctor on 27 October, who noted that he was even more stressed than before. The doctor provided medication and suggested a month off work. Mr Osborne told his doctor that he had decided to leave work anyway and the doctor then suggested that he go onto the sickness benefit.

26. Thus it is clear that Mr Osborne had decided to resign before he went to his doctor on 27 October. He then went in to Ramsay Transport that same day with a letter of resignation, which states:

“On professional advice I believe that it would be in my best interests to give you my resignation effective immediately. ... I have been advised not to enter into any more verbal communication with you.”

27. The resignation was accepted by Ramsay Transport “in good faith” by letter dated the same day. The letter also stated that Ramsay Transport wanted restitution for the excessive use of “*the fleetlink*”.
28. Mr Osborne wrote back stating that he had never agreed to pay this money, noting that the matter could be “*decided by the Employment Court in due course, along with my claim for back pay and damages*”. He also indicated that he would be laying a complaint with the Privacy Commissioner about attempts to speak to his doctor and his now ex-wife.
29. On 29 October, Mr Osborne also wrote to Ramsay Transport to complain about the way the final pay was to be paid.
30. On 27 October, Mr Osborne had written to a local lawyer, Mr Bill Calver, concerning the issues between him and Ramsay Transport. Mr Calver replied on 5 November noting that the major issue was whether Mr Osborne had a case for constructive dismissal. He noted also that there was a claim for short-payment of wages. The letter states as follows:

*“Not having resolved matters at mediation, I advise that if you wanted to take matters further what you would need now to do is file an application in the Employment Authority. That must be done on a prescribed form. I **enclose** a copy of this form for you. You indicated that you had issued a personal grievance but it is unclear which document actually constitutes the notification of a personal grievance. Was it your letter of 15 October 2004 to Jim Ramsay? Essentially, a personal grievance letter should specify what the employee considers to be the matters in dispute, and what remedies the employee seeks. I take it you do not seek reinstatement, and if that is the case then presumably what you would be seeking is lost wages from the time you resigned (or, in your argument, were constructively dismissed) down to the time you were able to obtain alternative employment, and no doubt also you will be seeking damages under s.123(c)(i) which allows the Authority to give compensation for humiliation, loss of dignity, and injury to the feelings of the employee.*”

The address of the Employment Relations Authority is P O Box 2458, Wellington. You should enclose an extra copy of the signed application for service on J A Ramsay Transport Limited. A filing fee of \$70 is required with an application.

It is possible for you to appear for yourself in the Employment Authority, although it would of course be better if you had an employment advocate.

Unfortunately, I do not do civil cases on legal aid, and I would not be able to act for you. ...

In the meantime, please do not hesitate to contact me if there is any matter you want clarified. I will wait to hear from you before I close my file and send you an account."

31. Mr Osborne states that as a result of receiving that letter, he then prepared a letter dated 18 November, which Mr Calver suggested he send direct. No application was filed with the Employment Relations Authority as Mr Calver had recommended.
32. The letter was addressed to Ramsay Transport at its Post Office box number. It states that Mr Osborne was instructing Mr Calver on employment matters. It then states, amongst other things:

"Specific matters involved are as follows:

1. *Not being paid for extra work undertaken (as noted on run sheets).*
2. *Failure by you to stick to the agreement as discussed at interview in relation to what is covered by the "trip rate" and your ability to change "terms of that contract (pay)" as you wish.*
3. *Constructive dismissal based on threats made by your mate Willie shortly after I gave you written notice of "personal grievance" and your re-hiring of Matt effectively forcing me out of work as Willie stated would occur. I also believe that the non payment of wages would also form part of this claim. ...*

Should you wish to settle this matter out of Court please contact Bill Calver directly – I have no wish to speak you."

33. Nothing occurred for the rest of the year, except that the Office of the Privacy Commissioner determined on 23 December 2004 not to investigate Mr Osborne's complaints any further, given that Mr Osborne had not responded to correspondence seeking further information from him.

34. In early February 2005 at least, it was very clear that Mr Calver was acting for Mr Osborne. He wrote to Ramsay Transport on 2 February stating the following:

“Please note that I act for Mr Osborne in relation to a personal grievance which was raised by our client in September 2004.

In order that we can fully advise Mr Osborne on the matter, I would be grateful if you would provide all running sheets for the days worked by Mr Osborne since the commencement of his employment in March 2004 down to his ceasing work in October 2004.

I look forward to receiving these documents as soon as possible. Could you please also include with the running sheets a copy of our client’s personnel file and all our client’s wage records.”

35. Ramsay Transport failed to respond to this letter. No acceptable explanation has been given for Ramsay Transport’s failure to do so.
36. I find that Ramsay Transport decided not to respond to the issues raised in the hope that they would go away. They did not.
37. On 3 March Mr Calver wrote to Mr Osborne advising him that he had received no response from Ramsay Transport and handed over the file to Mr Trent Petherick, because he was retiring from his previous firm.
38. On 29 March, Mr Petherick wrote on Mr Osborne’s behalf, noting that he intended to apply to the Employment Relations Authority to enforce Mr Osborne’s statutory rights and to seek a penalty against Ramsay Transport if a response was not immediately forthcoming.
39. It was only at this stage that Ramsay Transport took advice and responded, enclosing copies of Mr Ramsay’s personal file and wage records, but denying access to the company’s running sheets on the basis that they were commercially sensitive. The letter also stated, verbatim:
- “In terms of the alleged grievances raised in September. All issues were dealt with by the Employment Relations Service mediator, Marie Wheatley in October 2004.”*
40. Mr Petherick responded on 12 May noting that he did not consider that the running sheets were commercially sensitive, but that they would show that Mr Osborne had been systematically underpaid. Furthermore, he claimed that Ramsay Transport had

created an unsafe work environment by requiring Mr Osborne to work outside the hours permitted by the Land Transport Act.

41. Ramsay Transport responded stating that the documents had been shredded. The shredding of these documents may have been done as a matter of course, but it is of concern to the Authority that such materials would be destroyed when they could have assisted in determining matters at issue.

42. A statement of problem was filed by Mr Petherick with the Authority on 30 June 2005. The facts giving rise to the problem were essentially set out in one paragraph. It states:

“My employer required me to break the law in travelling as a driver between Napier and Auckland return per day. This could not be safely achieved within the hours legally able to be on duty as a driver. The employer’s continual refusal to pay what wages were owing undermined the employment agreement and destroyed the relationship of trust and confidence essential within that agreement. I do not agree that any reasonable employee should be forced to tolerate being paid less than the minimum wage effectively for the hours worked and be required to break the law during work. Accordingly I believe that the dismissal was constructive.”

43. I note that Mr Osborne was not in fact required to travel between Napier and Auckland return per day, although that did occur on a couple of occasions. Therefore the essence of the claim set out in the statement of problem was incorrect. Furthermore, the statement of problem attached 10 documents relating to Mr Osborne’s concerns, and in particular the issues he raised over his pay. Significantly, I find, the letter of 18 November was not included nor referred to.

44. In its statement in reply, Ramsay Transport noted that Mr Osborne had never raised a constructive dismissal grievance with it at all. It did not consent to the grievance being raised out of time. It objected to any application for leave to raise a grievance out of time and proceeded under a protest to jurisdiction.

45. Following a conference call, Mr Petherick took advice from Mr Osborne, who assured him that a letter of grievance was submitted on 18 November. On behalf of Ramsay Transport, Mr Taylor responded stating that it had received no letter from Mr Osborne dated 18 November. It also claimed that the issues raised in it were resolved at mediation on 20 October.

46. All matters have remained unresolved since and it therefore falls to the Authority to make a determination.

Determination

47. I find that Mr Osborne has not taken reasonable steps to make Ramsay Transport aware that he was alleging a constructive dismissal that he wanted Ramsay Transport to address. Such a claim could not be raised, except in prospect, before he resigned. Furthermore, I do not accept that his statement that the Employment Court would be deciding Ramsay Transport's claim that he had made excessive use of "fleetlink" in due course, along with his claim for back pay and damages, constitutes more than simply notice of an intention to make a claim (which in that inchoate form would be better categorised as a wages claim). As a result there was nothing specific for Ramsay Transport to address. After all, Mr Osborne had only resigned the day before. It is therefore insufficient to constitute the raising of a grievance.
48. On the balance of probabilities, I find that it is more likely than not that the letter dated 18 November was not sent, consistent with the fact that it was never referred to by Mr Osborne or his representatives until after Ramsay Transport protested as to the 90 day period. No application was made to the Employment Relations Authority as recommended by Mr Calver. His letter of 2 February refers only to a letter of grievance being written in September, which was before Mr Osborne actually left. Furthermore, the later application to the Authority makes no reference to the 18 November letter either. I note also that Mr Osborne's delay is consistent with his failure to respond to the Privacy Commissioner at around the same period. These factors outweigh the possibilities that the letter was sent and received (given that Ramsay Transport produced one letter that it had never replied to) or was misaddressed or misdirected (as the address in the body of the letter was correct). Furthermore, any such scenario does not provide an explanation as to why no follow up action, such as another letter, was taken.
49. Despite agreeing on several occasions that no claim for exceptional circumstances would be made, Mr Petherick made submissions that exceptional circumstances did exist, on the basis of Mr Osborne's poor health and his ignorance of the law.

Ignorance of the law can not apply in this case as Mr Ramsay took legal advice very soon after resigning. Furthermore, there was no medical evidence to support a claim that Mr Osborne was so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising the grievance within the 90 day period. Mr Osborne's doctor's letter indicated simply that while Mr Osborne was extremely stressed at the time, he considered that a month off work was desirable and then he did not see Mr Osborne again for six months. At that point, the immediate crisis seemed to have passed, although he did not think Mr Osborne had returned to normal by then. That is not sufficient evidence to meet the legal test. In any event, Mr Osborne's own evidence was that he did send the letter of 18 November, and he also took advice from Mr Calver in the relevant period, which negates the exceptional circumstances claim.

50. In the alternative, in the event that I am wrong, I find that there was no constructive dismissal. In the letter of 18 November, two of the issues related to Mr Osborne's pay, which is better dealt with in terms of a wages arrears claim. The claim for constructive dismissal was based on those matters as well, but also on hours of work, threats by one employee and the re-hiring of another.
51. Here I accept Mr Kirikiri's evidence that when he heard of there being trouble between the two employees, he ensured that they did not work together any more. Given that any threats could not easily occur again and they were not in fact repeated thereafter, I find that the issue of alleged threats did not cause ongoing concerns for Mr Osborne. Furthermore, I note that as the two were not working together any more, this could not have been the cause of Mr Osborne's leaving.
52. While there was a new worker employed in mid-September, the wage records show that Mr Osborne did not suffer financially as a result. Furthermore, the fact that Mr Osborne was offered and agreed to the one month "retraining programme" demonstrates that Ramsay Transport was not utilising other staff to try and get rid of Mr Osborne.
53. Mr Osborne's claim that he was required to leave work on medical advice was misleading. In fact, Mr Osborne decided to leave for his own reasons, which were

principally, I find, his concern over the amount of money he was earning compared with what he mistakenly believed he should have been paid. That is not grounds for a constructive dismissal, because there has been no breach of duty by Ramsay Transport paying what was actually agreed between the parties, rather than what Mr Osborne believed, mistakenly, was to be paid.

54. Mr Osborne's other concerns about working in excess of the driving hours legislation were not of significant concern to him, as noted above, and thus were not the reason for him resigning from Ramsay Transport. Thus while this issue does not reflect well on either party, it can not constitute grounds for constructive dismissal, as it was not the real reason for Mr Osborne leaving.
55. Finally, given that I have found that Mr Osborne was properly paid on all but four occasions, it follows that he can not rely on this issue as grounds for constructive dismissal either. After all, even on the four trips issue, Ramsay Transport was prepared to pay Mr Osborne for the hours in question if he provided further details, which he did not.
56. It therefore follows that Mr Osborne's claim for a personal grievance is dismissed. J A Ramsay Transport Limited is, however, ordered to pay the applicant, Mr Robert Osborne, \$162 gross in lost wages.

Costs

57. Costs are reserved.

G J Wood
Member of Employment Relations Authority