

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 25/10
5280145

BETWEEN

MICHAEL REEVES
Applicant

AND

HARBOUR CITY TOW AND
SALVAGE (2003) LTD
Respondent

Member of Authority: G J Wood

Representatives: David Patten for the Applicant
No appearance by or for the Respondent

Investigation Meeting: 9 February 2010 at Wellington

Submissions Received: 9 February 2010

Determination: 11 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr. Michael Reeves, was employed by the respondent (Harbour City Tow and Salvage) between March 2007 and August 2009. Harbour City Tow and Salvage's Managing Director, Mr. Stephen Okeby, controls the company as its sole shareholder. Mr. Reeves claims that he was unjustifiably summarily dismissed when Mr Okeby told him to leave and not come back, and refused to pay him his outstanding wages and holiday pay, when he turned up for work on 14 August 2009. Harbour City Tow and Salvage appears to argue that Mr. Reeves abandoned his employment, having left work early, straight after lunch the previous day, after a disagreement with Mr. Okeby.

[2] Harbour City Tow and Salvage did not attend and was not represented at the investigation meeting. I am satisfied that the notice of the investigation meeting was served on the physical address of Harbour City Tow and Salvage and signed for, as well as served on the registered company address. Mr. Okeby had also agreed to this date on the first case management conference held with him and Mr. Patten. Mr. Okeby did not attend on a second case management conference call, held to set the timetable and make any other such directions as were necessary.

[3] An Authority support officer tried to contact Mr Okeby by telephone yesterday on both his work and cell phone numbers, but without success. This was consistent with Harbour City Tow and Salvage's attitude to the Authority's investigation, at least in the latter period. For example, despite being notified of a second conference call, it did not attend the conference call, although it did furnish a late statement in reply, as directed on the first conference call.

[4] Despite it subsequently being referred to the provisions of s.181 of the Act, which require it to facilitate rather than obstruct the Authority's investigation and to act in good faith, and the provisions of s.182 of the Act, which provide for certain consequences for not participating in a manner designed to resolve the issues involved, the Authority's directions as to the provision of written statements and wage and time records were not complied with.

[5] I was satisfied accordingly that no good cause for Harbour City Tow and Salvage to have failed to attend or be represented had been shown. Pursuant to clause 12 of Schedule 2 of the Act, I therefore proceeded to act as fully in the matter as if it had been represented.

The Facts

[6] I have determined the facts as set out below on the basis of my acceptance of the evidence of the applicant Mr. Reeves, the only witness in this matter. Having questioned Mr. Reeves on his written statement of evidence, and as against Harbour City Tow and Salvage's statement in reply and an email from its office manager, I have no reason to disbelieve his evidence. He appeared to answer my questions fully and frankly, making concessions and admissions about his own behaviour that were not necessary given the absence of Harbour City Tow and Salvage. I have therefore accepted Mr. Reeves' evidence in full.

[7] When employed as a tow truck driver in March 2007 the terms of Mr. Reeves' employment were never committed to writing. The oral terms included his hours of work being from Monday to Friday from 8am to 5.30pm at the rate of \$14 per hour, plus \$25 per vehicle towed.

[8] Mr. Okeby was inclined to take issues up with employees out of the blue and in front of other staff. In 2008 Mr. Okeby and Mr. Reeves had an altercation over Mr. Okeby wrongfully accusing Mr. Reeves of reading his private correspondence. Mr. Reeves tried to explain that while he accepted that he should not read private correspondence, he was required to open and deal with emails from clients who would, for example, send lists of cars not to be towed away from their premises that day. This altercation happened in front of other staff and Mr. Reeves felt belittled. He left early for the day and did not return the next day (a Friday) for work.

[9] On the Monday Mr. Reeves received a letter from Mr. Okeby, couriered to his home address, stating that Harbour City Tow and Salvage had not heard from him since the incident and would like to offer him the opportunity to come in and discuss the matters that he was upset about. The letter went on to say that Harbour City Tow and Salvage was unsure about his intentions and would like the matter clarified.

[10] Upon returning to work as requested, Mr. Reeves explained that he was upset over being abused and singled out for unfair treatment by Mr. Okeby. Mr. Okeby indicated that Mr. Reeves had left him in the lurch, but did not reprimand him in the sense of giving him a formal warning, or even warning him that if he left like that again he would be subject to disciplinary action.

[11] Over a year later, at lunch time on 13 August 2009, Mr. Reeves was minding the office while taking a lunch break with other staff and one of their children. He was on the computer looking at the Trade Me site, which he had never been told he was not to visit.

[12] Mr. Okeby came in and asked why all of those present, around five, were sitting there and not at work. Mr. Reeves made the point that they were having a lunch break, and that weren't they allowed to do so? When Mr. Okeby replied that he was entitled to a lunch break Mr. Reeves re-emphasised that that was what they were doing. Mr. Okeby then looked at Mr. Reeves and asked him why he wasn't in his truck, because he should be out earning income, not sitting around in the office. It

was clear that Mr. Okeby was addressing this issue solely at Mr. Reeves, as he was the only tow truck driver there at the time. Mr. Okeby asked Mr. Reeves how many cars he had towed that morning. Mr. Reeves answered that he had done four, which was a common number to have towed in a morning's work.

[13] Mr. Okeby then told him that he needed to get out and drive around until he found something to tow away. Mr. Reeves reacted negatively to this, and told him that if he didn't like the way he did his job he should go out in the truck and do it himself if he thought he could do any better. Mr. Okeby then questioned why Mr. Reeves was not upstairs in the lunch room and he was told that he was sitting in for the office manager, who was outside having a cigarette.

[14] By this time people were starting to get up to leave. Mr. Reeves then told Mr. Okeby that it was unbelievable that he would treat staff, who had been very reliable, hardworking and loyal to him, so rudely, which made Mr. Okeby even angrier, to the point where he was shaking with rage. At that point Mr. Reeves said that he had enough that day, and that he was going home. Mr. Okeby made no comment, which he easily could have, had he wanted to question him about it or insist on permission being granted first.

[15] Mr. Reeves now accepts that his comments were disrespectful, but that he believed that his job was stressful enough out in the truck, without having to take abuse from his own employer when in the office. He left in order to cool down and defuse the situation, but also as a way of punishing Harbour City Tow and Salvage, as he was the only tow truck driver on duty that afternoon.

[16] The next day Mr. Reeves turned up to work as usual. Mr. Okeby rushed over to him in the courtyard and asked him what he thought he was doing. When told by Mr. Reeves that he was getting ready for work, Mr. Okeby told him that that was not the case, as he had walked out yesterday and that meant that he had abandoned his job and was no longer welcome there. Mr. Okeby had already prepared for this eventuality by arranging for one of the existing staff to do Mr. Reeves' shift, which is understandable given Mr. Reeves' absence for one a half working days the previous year.

[17] Mr. Okeby said that he would not put up with the way Mr. Reeves had spoken to him the day before and repeated that he had abandoned his job. Mr. Reeves replied

that there needed to be an absence of three days before there could be an abandonment. Mr. Okeby then told him that he could not walk in and out as he pleased and asked him why he had walked off the day before. Mr. Reeves replied that he had gone home to cool off after he had been spoken to rudely and embarrassed in front of his colleagues.

[18] Mr. Okeby denied directing his comments of the day before to Mr. Reeves, which for the reasons given above, I do not accept. Mr. Reeves then stated that if he did not want him to work at Harbour City Tow and Salvage any more he simply had to pay him his outstanding wages and holiday pay. Mr. Okeby said that he had to be *dreaming*. Mr. Reeves then mentioned that he had made Mr. Okeby *hundreds of thousands of dollars* over the years and that this was a great way to treat staff. Mr. Okeby responded that the staff hated working with Mr. Reeves, and that he didn't do his job properly.

[19] Mr. Reeves then approached a number of staff on site, who said that they had no problem working with him, which he told Mr. Okeby. He responded that he wasn't talking about those staff, but other staff. Mr. Reeves then asked again for his outstanding monies, but Mr. Okeby refused to pay him anything. Mr. Reeves responded by saying that he would see him *in Court*.

[20] Mr. Reeves subsequently tried to contact Mr. Okeby through his lawyer, but Mr. Okeby refused to engage with him, or (later) attend mediation. A statement of problem was then filed in the Authority.

[21] Harbour City Tow and Salvage has also failed to comply with a request from Mr. Reeves, and a direction of the Authority, that it provide him with his wage and time records. Mr. Reeves was not paid for his last part week of work, a sum of \$686.00 gross. It took him three weeks to find another job. He claims for 45 hours per week for the three weeks he was out of work, totaling \$1,890.00 gross, without any claim for the expected number of towing fees that he would have earned. He also claims \$3,493.00 gross for 6.24 weeks of unpaid holidays.

The Law

[22] The leading case on abandonment is the judgment of the Court of Appeal in *E N Ramsbottom Ltd v. Chambers* [2000] 2 ERNZ 97. At para.21 it was held:

An employment contract may terminate in a variety of ways apart from dismissal. Thus, it may end through the relinquishment of the employment by the employee. The employer here believed that the employee had abandoned the employment. "Abandoned" in its ordinary dictionary sense simply means "to give up". Whether in an employment abandonment constitutes misconduct and so a breach of contract, or whether it is an allowed means of ending the contract, depends on the express or implied terms of the particular contract. In some circumstances it may be an agreed informal mode of immediate resignation ...

[26] ... Mr Cressey submitted that where the issue is whether the employee abandoned the employment, the employer should be cautious in drawing that inference and must face a high threshold of contending that the employment ended on the employee's initiative in that way. There is substantial force in that submission and clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment.

[23] The terms of the parties' agreement must be ascertained through evidence. Whether or not there has been an abandonment is a matter of the Authority to assess on the basis of what an objective bystander would reasonably conclude in all the circumstances of the case.

[24] As the Employment Court held in *Boobyer v. Good Health Wanganui Ltd* (unreported) Goddard CJ, WC 17/94, 24 February 1994, an employer is not simply entitled to rely on words spoken that are ambiguous or made in an emotional state to assert that the employee has resigned and thus can not return to work. The Court held:

... where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so, or takes advantage of words of resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. In that kind of case, the employer cannot safely insist on its interpretation of what the employee said or wrote. That is also the position if words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once 'the heat of the moment' had passed and taken with it any 'influence of

anger or other passion commonly having the effect of impairing reasoning facilities' Chicken and Food Distributors (1990) Ltd v. Central Clerical Workers Union [1991] 1 ERNZ 502, 507. Examples of a sudden flare-up being treated as a resignation are scattered through the books. Some feature either extreme actions by the employee including emphatic language and expressive conduct extending to actually walking out or using words of resignation, only to return to recant later. Each case turns on its own facts but it is at least clear that "[a]n apparent resignation can also amount, notwithstanding the words used, to a dismissal".

Determination

[25] This was clearly an unjustified dismissal. This was not a case of abandonment or resignation. Harbour City Tow and Salvage knew exactly what to do in a situation where Mr. Reeves absented himself from work without authority. It had followed that process in 2008 by sending him a letter and asking him to explain himself. Only at the end of such a process could Harbour City Tow and Salvage have fairly and reasonably concluded that Mr. Reeves had abandoned his employment. Nothing he said on the day could have given rise to a reasonable conclusion that he was resigning.

[26] He had certainly absented himself without approval, and for that he was liable to be called to account by way of a disciplinary investigation, but that was not what happened here. When Mr. Reeves turned up for work as normal the next day, he was simply told that he had abandoned his employment, which on the plain facts of the situation he had not. Mr. Okeby had simply decided that he no longer wanted Mr. Reeves there and was not prepared to investigate the situation that led to his leaving early the day before.

[27] Mr. Okeby was quite entitled to take the precautionary step of engaging a temporary replacement for Mr. Reeves for that day, because he could not be sure that he was going to return. When he did, however, it was then incumbent on Harbour City Tow and Salvage to investigate the situation. Any investigation would have concluded, as Mr. Okeby must have well understood, that there was fault on both sides. He had unfairly attacked Mr. Reeves, but Mr. Reeves had similarly made unwise comments to Mr. Okeby and then sought to punish Harbour City Tow and Salvage by removing himself from the workplace for the afternoon.

[28] None of that justifies Mr. Okeby seizing upon Mr. Reeves' actions as abandonment, when he knew very well, at least by the next morning, that that was not

the case. Furthermore, there were no agreed provision for abandonment and it could not be an implied term that abandonment could be deemed to have occurred after only half a day.

[29] While on the previous afternoon Mr. Reeves' anger and embarrassment may have got the better of him, the next morning it was Mr. Okeby's anger which got the better of him. He therefore dismissed Mr. Reeves with summary effect. Such a dismissal can never be justified, because a fair and reasonable employer would have properly investigated the situation and determined whether or not, with full input from Mr. Reeves, disciplinary action (and what level) was required.

[30] It therefore follows that Harbour City Tow and Salvage's actions and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal (s.103A).

Remedies

[31] Harbour City Tow and Salvage is fortunate that no claim for penalties for failure to keep, or provide on request, wage and time records under s.130 was made until the date of the investigation meeting, as if it had been made on proper notice it would have been successful. However under s.132, if an employer fails to keep or produce wage and time records and if that failure prejudices the employee's ability to bring an accurate claim, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of the wages actually paid to the employee and the hours, days and times worked by the employee. Clearly in this case, in the absence of any direct evidence from Harbour City Tow and Salvage, it has been unable to prove that Mr. Reeves' claims are incorrect. Given that I have accepted Mr. Reeves' evidence it therefore follows that he is entitled to the sums claimed for unpaid wages and holiday pay.

[32] Mr. Reeves clearly mitigated his loss by getting a job some three weeks later and is therefore entitled to claim lost remuneration at the level he has set out.

[33] Mr. Reeves claims \$10,000 compensation for humiliation, loss of dignity and injury to feelings. He stated that he was embarrassed and humiliated by the way Mr. Okeby treated him in front of his colleagues, and aggrieved at the way he was dismissed. In particular, he stated that he thought that he was an integral part of the company and felt embarrassed and intimidated when treated in such a rude manner by

Mr. Okeby on the day before his dismissal. After being dismissed he felt worthless and feels awkward when meeting former colleagues. He has suffered financial hardship as a result of being paid less in his new job, although he has not claimed continuing loss of wages. Finally, he noted that the whole matter has been very stressful and has taken its toll on family life.

[34] Taking all the circumstances of this case into account I consider that compensation in the sum of \$8,500 is appropriate, given the dismissive way that Mr. Reeves was treated and the obvious impact it had on him.

Contribution

[35] In relation to remedies sought over the unjustified dismissal the Authority must consider the extent to which the actions of Mr. Reeves contributed towards the situation that gave rise to the personal grievance and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[36] In this case I consider that there have been two instances of contributory fault by Mr. Reeves. In the first case (even although under provocation) he was quite rude to Mr. Okeby in suggesting that Mr. Okeby should go out and do the work that he himself was paid for and telling him, using blunt language, that he should not be treating staff the way he did.

[37] More significantly, however, Mr. Reeves should not have removed himself from the workplace for reasons of punishing Harbour City Tow and Salvage financially, even if that was not his predominant motive. He was entitled to remove himself from the situation because of Mr. Okeby's abusive behaviour, but he could have done so by simply going back to work, when he would have been out in his truck and out of range of Mr. Okeby's abuse.

[38] While these were significant faults they are, however, nowhere near as significant as the abuse by Mr. Okeby on the day of the dismissal in claiming Mr. Reeves had abandoned his employment when he well knew he had not, in order to create a fiction that he had done so, so that he would not have to justify his dismissal of Mr. Reeves, which was done without any semblance of fair process.

[39] Furthermore, given the heated situation that occurred the previous day, which had been initiated by Mr. Okeby, Mr. Reeves' absence would have been unlikely to

have been grounds, in and of itself, for summary dismissal of Mr. Reeves, which is what in fact occurred.

[40] I therefore consider that a reduction of 30% in the remedies for the personal grievance is required. The reduction does not of course apply to the holiday pay and unpaid wages owing, as they would have been owing to Mr. Reeves even if he had abandoned his employment as Mr. Okeby claimed.

Costs

[41] On behalf of Mr. Reeves Mr. Patten sought full costs, in the sum of \$2,650.00 plus GST, and \$70 in expenses for the filing fee. He did so on the basis that Harbour City Tow and Salvage had ignored all Mr. Reeves' requests for information and mediation, ignored the Authority's directions for wage and time records, and had not participated in the Authority's investigation meeting at all.

[42] Given Harbour City Tow and Salvage's failure to provide information on wage and time records, which clearly increased Mr. Reeves' preparation costs, and its failure to attempt to defend the claim of unjustified dismissal, I conclude that Mr. Reeves ought to be able to recover all of his reasonable costs.

[43] Mr. Reeves needed to be represented and to come to the Authority to get a determination. Given that this matter has only taken two hours to investigate I determine that a reasonable sum for costs in this case would total \$2,531.25, being the amount that Mr. Patten calculated constituted Mr. Reeves' actual costs were, once the original instructions had been taken from him and correspondence sent to Harbour City Tow and Salvage. In the particular circumstances of this case all of Mr. Reeves' reasonable costs should be met. He is also entitled to the \$70 filing fee.

Conclusion

[44] Mr. Reeves was unjustifiably dismissed by Mr Okeby on behalf of Harbour City Tow and Salvage. Remedies have been reduced by 30% for contributory conduct by Mr. Reeves. Mr. Reeves is also entitled to his outstanding wages and holiday pay, plus costs.

[45] I therefore order the respondent, Harbour City Tow and Salvage (2003) Ltd, to pay to the applicant, Mr. Michael Reeves, the following sums:

- \$686.00 gross in unpaid wages; and
- \$3,493.00 gross in unpaid holiday pay; and
- \$5,950.00 net in compensation under s.123(1)(c)(i); and
- \$1,323.00 gross in lost remuneration; and
- \$2,531.25 net as a contribution to legal costs; and
- \$70 net in expenses.

G J Wood
Member of the Employment Relations Authority