

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 415
5330026

BETWEEN NEIL WILLIAM
 ROBERTSON
 Applicant

AND IRVINE HOSKIN
 Respondent

Member of Authority: K J Anderson

Representatives: David Hayes, Counsel for Applicant
 Irvine Hoskin, In Person

Investigation Meetings: 28 June 2011 and 21 July 2011 at Hamilton

Determination: 21 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Robertson, claims that he was constructively dismissed on or about 12th November 2010 and that the dismissal was unjustified. He asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of lost wages and compensation pursuant to section 123 of the Employment Relations Act 2000. Mr Robertson also claims that he has not been paid the wages that are owing to him; being the gross sum of \$2,700 – plus a further amount for holiday pay. Finally, Mr Robertson claims the sum of \$500 being the estimated value of personal possessions that he left behind following the termination of his employment.

Background facts and evidence

[2] Mr Robertson is a truck driver by occupation. During October 2010 he was unemployed and whilst seeking employment via WINZ, he was contacted by Mr

Irvine Hoskin who offered a job. Mr Hoskin had a truck and he had obtained a contract with another transport company (Hookers), to transport beer from Auckland to Wellington. The evidence of Mr Robertson is that Mr Hoskin told him that the contract with Hookers would provide work for “at least six months” through to April 2011. Mr Robertson accepted the job offer. It was agreed that he would be paid \$20.00 per hour. There is no written employment agreement.

[3] Mr Robertson drove a beer delivery run from Auckland to Wellington (return) on 28th and 29th October 2010. Mr Hoskin paid him \$400 in cash as wages for working those two days. Mr Robertson continued to drive for a further two weeks earning a total of \$2,700. The last day of driving was 12th November 2010. The evidence of Mr Robertson is that he was told by Mr Hoskin that the truck had to go into the workshop for a period to have clamps fitted, to enable it to carry containers. Mr Robertson says that a period of two weeks elapsed and the truck was still in the workshop and he concluded that he no longer had a job. He had also asked Mr Hoskin for the \$2,700 he was owed but this was not forthcoming. Mr Robertson was informed by Mr Hoskin that the wages could not be paid because Hookers had not yet paid him for the cartage that had been completed. Mr Hoskin accepts that Mr Robertson is entitled to the monies claimed (plus 8% holiday pay) but despite several requests from Mr Robertson, and his lawyer, payment has still not been made.

[4] The evidence of Mr Hoskin reveals that there is a bit more to why the truck driven by Mr Robertson was taken off the road, following the last return trip to Wellington, on 12th November 2010. It is established that part way on the journey to Wellington, the motor of the truck overheated due to a burst water hose. Subsequent to a repair being carried out and the provision of water containers, Mr Robertson was able to complete the trip to Wellington and return again to Mr Hoskin’s premises near Huntly. The evidence of Mr Hoskin is that the truck was subsequently assessed by a local garage as to the damage that had been incurred to the motor, due to it overheating. It was the opinion of the garage mechanic that it would cost \$20,000 - \$30,000 to carry out the necessary repairs. Mr Hoskin says that given the age of the truck, its running costs and the income from the beer cartage contract, it was not an economical option to repair the truck, hence it remained off the road. Mr Hoskin told the Authority that the truck (and a trailer) have now been “repossessed” by the

receivers that were appointed in regard to the affairs of a company associated with Mr Hoskin; Mole Drainage Services (NZ) Limited.¹

[5] By his own admission, Mr Hoskin did not see fit to inform Mr Robertson that the truck was seriously damaged and would not be repaired.² Rather, it seems that Mr Robertson was left under the impression that the reason for the truck being unavailable was that clamps were being fitted to enable containers to be carried. It seems that Mr Robertson was simply left to form his own conclusions about why he was not being offered further driving work, with the obvious consequence that he then had no choice but to seek other employment.

Was Mr Robertson constructively dismissed?

[6] The general principles applying to constructive dismissal are well established and are derived from a number of leading cases.³ The majority of cases, where a constructive dismissal is found to exist, involve circumstances in which the employee resigns and it is subsequently found that the resignation was caused by an unjustified action (or inaction) by the employer that is so unacceptable, the employee resigns. In this case, Mr Robertson did not resign, rather he was effectively left to his own devices and was not given any tangible indication as to the true reason why his services were no longer required. Effectively, he was “sent away” by his employer. As was held in *Actors Variety etc IUOW v Auckland Theatre Trust Incorporated*:⁴

As Judge Williamson said in *Wellington Taranaki and Marlborough Clerical Workers Union v Greenwich* (1983) ERNZ Sel Cas 95; [1983]ACJ 965, 973, dismissal is a word of wide meaning; literally it is or includes a sending away.

[7] But in any event, while Mr Robertson did not actually resign, given the total failure of Mr Hoskin to reasonably communicate with him about why his services were no longer required, Mr Robertson was entitled to treat the employment relationship as being repudiated (terminated). It follows that I find that Mr Robertson

¹ However, it is acknowledged that Mr Robertson was not employed by this company. Rather, he was employed by Mr Hoskin acting as an individual in his own right.

² There is no fault attributed to Mr Robertson.

³ For example: *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] ACJ 963 and *Auckland Electric Power Board v Auckland Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

⁴ (1998) Sel Cas 247.

was constructively dismissed and that the dismissal was unjustified; hence he has a personal grievance.

Remedies

[8] Having found that Mr Robertson has a personal grievance, pursuant to section 123(1) of the Act:

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for 1 or more of the following remedies.

Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then at s.128(2) of the Act, if the Authority determines that an employee has a personal grievance, and there has been lost remuneration because of the grievance, the Authority:

[... must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(a) *Reimbursement of wages*

[9] Mr Robertson claims reimbursement of wages until April 2011. This is on the basis that he was told by Mr Hoskin that the contract with Hookers would last until then. But there was no written employment agreement and clearly the employment of Mr Robertson was entirely dependent on there being a vehicle for Mr Robertson to drive. Notwithstanding the abject failure of Mr Hoskin to inform Mr Robertson of the fact that the truck was no longer able to be driven, and hence his services were no longer required, the reality is, that as there was only one truck and no other employment options available for Mr Robertson, his driving position was redundant. It follows that I find that the redundancy was genuine. Therefore, the reimbursement of wages that Mr Robertson is entitled to requires the determination of a reasonable notice period in the circumstances, given that there was no employment agreement in existence. I conclude that two weeks' notice is appropriate in the circumstances, but I also take into account that Mr Robertson was left completely uninformed for a period of two weeks while being led to believe that the truck was having clamps fitted for container cartage. Therefore, I conclude that it is appropriate that Mr Robertson is entitled to four weeks' pay. Because Mr Robertson only worked for a very short period of time, it is difficult to accurately assess what his average weekly earnings might have been, but in the two weeks that are assessable, he worked an average of

67.5 hours and there is nothing to suggest that this would be other than normal given the repetitive nature of the cartage involved. Therefore, I order that Mr Hoskin pay to Mr Robertson the gross sum of \$5,400 (67.5 hours x \$20 per hour x 4 weeks) plus holiday pay (8%) in the sum of \$432; a total of \$5,832.

(b) *Compensation*

[10] In regard to compensation under s 123(1)(c)(i) of the Act, Mr Robertson seeks the sum of \$15,000 for hurt and humiliation but there is no evidence to support such an award in all the circumstances. Indeed, there is only a small amount of tangible evidence from Mr Robertson as to the affects of the loss of his employment. Therefore, it is appropriate that only a moderate sum should be awarded. Mr Hoskin is ordered to pay to Mr Robertson the sum of \$1,000.

(c) *The outstanding wages*

[11] It is acknowledged by Mr Hoskin that the gross sum of \$2,700 is owing to Mr Robertson for the two weeks that he worked, but he has given no good reason why the wages have not been paid, despite the time that has elapsed. It is established that the sum of \$2,700 is due to Mr Robertson along with an additional 8% for holiday pay. Mr Hoskin is ordered to pay to Mr Robertson the sum of \$2,700 plus an additional sum of \$216 for holiday pay; a total of \$2,916.

(d) *The claim for reimbursement of the purported cost of personal items*

Mr Robertson says that he left a number of personal items in the truck he was driving and these have not been returned to him. The items include: a clip board, overalls, a high visibility vest, a hat, shorts, jeans, shirt, a jumper and underwear. He estimates that in total they are valued at \$500. But there is no real evidence in regard to the condition or the material value of these items. I also conclude that Mr Robertson could have recovered these items, in the time available to him, if he had chosen to do so. Therefore, I decline this claim.

Determination

[12] For the reasons set out above, I make the following findings and orders:

1. I find that Mr Robertson was constructively dismissed and that the dismissal was unjustified.

2. Pursuant to section 123(1)(b) of the Employment Relations Act 2000 (the Act), Mr Hoskin is ordered to pay to Mr Robertson the gross sum of \$5,832.00, being the payment of lost wages and holiday pay.
3. Pursuant to section 123(1)(c)(i) of the Act, Mr Hoskin is ordered to pay to Mr Robertson the net sum of \$1,000.00.
4. Mr Hoskin is ordered to pay to Mr Robertson the gross sum of \$2,700.00 as outstanding wages along with holiday pay of an additional sum of \$216.00, a total of \$2,916.00. Further, pursuant to clause 11 of Schedule 2 of the Act, interest is payable on the calculated net sum at the rate of 5% per annum from 14th December 2010 until such sum is paid.
5. The above sums must be paid within 28 days of the date of this determination.
6. The claim for reimbursement for the purported value of Mr Robertson's personal items is declined.
7. I find that Mr Robertson did not contribute towards the situation that gave rise to the personal grievance and the remedies awarded should not be reduced pursuant to section 124 of the Act

Recommendation pursuant to section 123(1)(ca) of the Act

[13] The Authority recognises that Mr Hoskin may have been less than well informed as to his legal obligations under the Employment Relations Act in regard to the employment relationship he entered into with Mr Robertson. However, it is a well-worn cliché that ignorance is no defence in the eyes of the law. But I would not wish to find Mr Hoskin in a similar situation in the future and I strongly recommend to him that before entering into any future employment relationship, he should obtain appropriate professional advice, pertaining to providing compliant and signed employment agreements, and other such matters, including the timely payment of wages and holiday pay entitlements and keeping a record of such.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account that the two investigation meetings occupied approximately a half a day in total, and the usual daily tariff (\$3,000 per day) approach of the Authority.

In the event a resolution cannot be reached, Mr Robertson has 28 days from the date of this determination to file and serve submissions with the Authority. Mr Hoskin has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority