IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 19
5315365

BETWEEN	SIDNEY WAYNE ROBINSON Applicant
A N D	FIRST DIRECT LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Rex Hancock, Advocate for Applicant Peter Hall, Advocate for Respondent
Investigation Meeting:	18 January 2011 at Christchurch
Date of Determination:	2 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Robinson) formerly a taxi driver alleges that he was constructively dismissed from his employment by the respondent (First Direct). Mr Robinson also claims that he was not paid the minimum wage during the course of his employment with First Direct.

[2] First Direct acknowledges its obligations under the Minimum Wage Act 1983, refers to the customary usage in the taxi industry concerning the structure of remuneration for taxi drivers and denies the constructive dismissal allegation.

[3] Mr Robinson was employed by First Direct on 6 December 2008 and worked for the employer until his resignation on 31 May 2010. He was employed primarily to drive a wheelchair van specially fitted out for the conveyance of wheelchair-bound passengers.

[4] The employment agreement under which Mr Robinson was employed is consistent with like agreements for the employment of other taxi drivers in the employ of First Direct and also with taxi drivers employed by other taxi companies. In

essence, the agreement provides for remuneration to be based on the taxi driver and the taxi company sharing half the income from the vehicle together with half the costs of running the vehicle. The more occasions the vehicle is running with a fare-paying passenger on board, the more income is made by the taxi driver and the more revenue made by the taxi company.

[5] It is of particular importance for the present employment relationship problem that the operative individual employment agreement between the parties at no point specifies an hourly rate. Instead, the document proceeds exclusively on the footing that the net income earned by the vehicle is shared as to half each by the driver on the one hand and the taxi company on the other.

[6] In a real sense then, the driver's income is determined by how hard he or she is prepared to work within the statutory limits provided by the Land Transport Safety Authority (LTSA) which administers the statutory framework governing the taxi industry. Amongst other things, the longstanding rule that a taxi driver may not drive more than 70 hours per week is an upper limit to the hours that may be worked by a taxi driver.

[7] Mr Robinson says that he became concerned at an early stage about what he described as *unlawful deductions* from his wages and his inability to earn the minimum wage. There were discussions between the parties. The issue of the allegedly unlawful deductions has been resolved by agreement and plays no further part in the present employment relationship problem. However, the parties were unable to resolve their differences in respect of Mr Robinson's allegation that he was not being paid the minimum wage. For its part, First Direct's position was, to put it simplistically, if Mr Robinson worked harder he would have no difficulty in earning a very adequate income, as was the invariable experience of First Direct's other drivers.

[8] The issue of what Mr Robinson was entitled to by way of the minimum wage is further complicated by argument between the parties around when Mr Robinson was actually working and when he was not. First Direct's position, not unnaturally, is that, while it accepts its statutory obligation to pay Mr Robinson for the hours that he was actually working, at the minimum hourly rate provided by law, it was not prepared to pay Mr Robinson for the total time that he was in or around his taxi because its records disclose that he frequently was not actually available for work. This was because Mr Robinson, according to First Direct, regularly set his electronic

meter in the taxi van so as to not be available for work. Over the period of the employment, First Direct claimed that a total of some 400 hours was in this category, that is to say, that over that period of 400 odd hours, Mr Robinson was, for whatever reason, not available to accept work although he might actually have been in the taxi at the relevant time.

[9] A related problem was Mr Robinson's contention that he was entitled to expect payment from First Direct for his journeys in its vehicle from his home and return. Those journeys were of some significance because Mr Robinson lives in North Canterbury and First Direct's catchment area for work, speaking broadly, does not include North Canterbury. It follows that Mr Robinson was not legally able to collect fare-paying passengers on his journey from North Canterbury to Christchurch until he got over the LTSA Christchurch city boundary. In addition, the evidence is that only on one occasion in 18 months was Mr Robinson contacted by despatch and directed to a job once he got into Christchurch city.

[10] Mr Robinson maintains that if he was in the employer's vehicle, whether driving to and from his home or sitting in the vehicle parked up but not ready, willing and able to receive work, then he was entitled to be paid. First Direct's view, as I noted above, was that he was only entitled to receive payment for the hours that he was actually working for First Direct and that travel time was specifically excluded and time with the meter clocked off was also excluded because he was not available to receive jobs during those periods.

[11] The contacts between the parties, always initiated by Mr Robinson, continued during the employment but Mr Robinson was not satisfied with the responses that he received from First Direct which were primarily directed at encouraging him to reduce or eliminate his time off. Mr Robinson laid a complaint with the Labour Inspector on 18 February 2010 in relation to the allegedly unlawful deductions and the minimum wage issues. On 13 April 2010, the Labour Inspector engaged with First Direct.

[12] A meeting between Graham Hodgson, the Labour Inspector, and First Direct took place on 28 April 2010 at which Mr Hodgson proposed, amongst other things, that as all Mr Robinson sought was to be paid the minimum wage, perhaps Mr Robinson might be offered a different form of employment agreement based on the minimum wage, that that new agreement should also provide some performance

criteria and finally that Mr Robinson should be offered further training. Mr Hodgson indicated to First Direct that, in making the proposals he did, he was endeavouring to assist the parties to resolve the employment relationship problem that had occurred and First Direct understood that Mr Hodgson had Mr Robinson's authority to make the proposals that he did. When I spoke to Mr Hodgson after the investigation meeting, he made it clear his aim was to preserve the employment relationship.

[13] First Direct then met with Mr Robinson on 3 May 2010 to explain the nature of the meeting it had had with Mr Hodgson and to present Mr Robinson with a new employment agreement based exclusively on Mr Hodgson's suggestions. First Direct encouraged Mr Robinson to obtain legal advice on the draft employment agreement.

[14] First Direct then proceeded to base Mr Robinson's pay exclusively on the minimum wage for adult workers but paid Mr Robinson against his signing on and signing off of the First Direct despatching system. Mr Robinson sought to be paid against his handwritten manual logbook which, as I previously noted, included the time travelling to and from work and time when he was in First Direct's vehicle but not prepared to accept engagement by fare-paying passengers.

[15] On 19 May 2010, matters came to a head. Mr Robinson was being given further training by First Direct. Although it appears to have started well enough, by the end of the commitment, there had been an exchange between Mr Robinson and a member of First Direct's management which left Mr Robinson in tears and not sure that he was able to carry on. A request for two weeks' annual leave was sent to First Direct on Mr Robinson's behalf and this was agreed to. However, during the course of the period of annual leave, by email dated 31 May 2010, Mr Robinson resigned his position.

Was Mr Robinson constructively dismissed?

[16] I am satisfied on the evidence before the Authority that Mr Robinson was not constructively dismissed from his employment as a taxi driver for First Direct. There is nothing whatever in the factual matrix which would support the constructive dismissal claim save for Mr Robinson's bare assertion. The only possible ground on which he could assert a constructive dismissal is the contention that the employer, by a breach of duty or a succession of breaches of duty, acted so as to cause his resignation in circumstances where that resignation was reasonable foreseeable.

Certainly, there is no suggestion that First Direct actively sought Mr Robinson's resignation or that it acted in a course of conduct with the dominant purpose of driving him out of the employment.

[17] The contention that the constructive dismissal was of the *breach of duty* type seems to me to fail on both bases. First, it is difficult to see where First Direct has breached its duty to Mr Robinson and, second, it is even more difficult to see how his resignation could be reasonable foreseeable.

[18] As to the first, Mr Robinson told me in the investigation meeting that the presentation of the new individual employment agreement (in draft) which he said contained performance standards which were simply unachievable was, in effect, the last straw. Prior to that event, there had been a number of discussions initiated by him with First Direct in which he had raised with it the contention that he was not being paid the minimum wage. As I have already noted, its response broadly was that he was not making himself available for the work that was there and that he needed to do that in order to earn a decent income. First Direct's emphasis throughout was on the customary usages in the taxi industry and the invariable arrangements made for First Direct's staff performing exactly the same work as Mr Robinson and on exactly the same terms and conditions of employment. I am satisfied that nothing in those exchanges could be construed by a reasonable third party as being a breach of the employer's duty.

[19] I think there is little doubt that the parties talked past each other. Mr Robinson continued to argue that he was not being paid the minimum wage (partly because of the fundamental misunderstanding in his mind about the hours he was entitled to be paid for, an issue that I will come to later), and partly because he persisted in making it difficult for First Direct to give him work additional to his scheduled work for wheelchair-bound passengers. First Direct quite properly tried to deal with that latter issue by encouraging Mr Robinson to make himself available, and in particular not to go *off line* on its despatching system for long periods of time, as had been his practice. So, on the one hand, Mr Robinson is saying he was not earning enough money (and therefore not earning the minimum adult wage), and First Direct was essentially saying that Mr Robinson misunderstood the hours that he was entitled to receive payment for and could not expect to be paid for time he was not prepared to accept unscheduled work. It is, I think, a feature of this employment relationship problem

that Mr Robinson seemed to fundamentally misunderstand the way in which the taxi industry worked and taxi drivers were remunerated, despite the best efforts of First Direct which not only subjected Mr Robinson to the initial training that every new taxi driver receives, but also provided him with significant additional training and mentoring advice during the course of his employment to try to get him to change his approach to the working day.

[20] Having determined that the exchanges between the parties relating to the allegation of underpayment could not constitute a breach of the employer's duty, the Authority needs now to consider whether the presentation by First Direct to Mr Robinson of the new employment agreement constituted a breach of duty. Again, I conclude that First Direct's action in this regard could not possibly be construed as a breach of the employer's duty. After all, it is apparent on the evidence that First Direct was proposing a new form of employment agreement absolutely unique to its business, specifically for Mr Robinson to ensure that he received the minimum wage. The reason that First Direct was presenting this new draft agreement for Mr Robinson to consider was not because First Direct had a burning desire to change the payment regime for Mr Robinson; indeed, quite the reverse was the case. First Direct was initially opposed to the notion of providing a unique form of payment regime for Mr Robinson because it would create a precedent within its company, and potentially within the wider taxi industry, a precedent which First Direct was not sure would be helpful to the generation of its business or indeed the business of other taxi companies.

[21] However, First Direct was persuaded to contemplate this special arrangement for Mr Robinson because of the intervention of Graham Hodgson, the Labour Inspector. It will be remembered that Mr Hodgson became involved because Mr Robinson had been to Mr Hodgson to complain about his rate of pay. Mr Hodgson, acting entirely in good faith and in the capacity of what I described at the investigation meeting as *an honest broker* between the parties, met with First Direct and proposed this new employment agreement as a solution to the developing employment relationship problem. First Direct thought that Mr Hodgson was acting for or at least acting in Mr Robinson's interests, as indeed he was.

[22] It is somewhat ironic then that First Direct is criticised by Mr Robinson for presenting to him a new employment agreement which was developed not of its own

motion but at the suggestion of the Labour Inspector who was endeavouring to solve Mr Robinson's problem. A further irony is that the provisions in the new draft employment agreement which Mr Robinson seemed particularly incensed about at the investigation meeting were developed as a consequence of the Labour Inspector's particular suggestion that Mr Robinson needed to see how he might be incentivised.

[23] It is apparent on the evidence before the Authority that both Mr and Ms Robinson were both greatly put out by the proposed new employment agreement, so much so that, in Ms Robinson's case, she apparently locked herself away on receipt of this document and went through it, making handwritten notes about the various provisions. That marked up copy has now been made available to the Authority. It was interesting for me to establish at the investigation meeting that Mr Robinson had not seen the marked up copy with his wife's comments on it, and while he plainly agreed with the thrust of her complaints, he very honestly told me that he could not necessarily commit to agree with everything that she had said, simply because he had not troubled to peruse it.

[24] There is a final ground on which it might perhaps be argued that First Direct has breached its obligations to Mr Robinson. First of all, Mr Robinson started complaining about the failure to be paid the minimum wage, as I have already noted. The employer's response was to point out to him where he was letting himself (and it) down in terms of income generation. Mr Robinson's argument that he was entitled to be paid the minimum wage really got no traction until he went to see the Labour Inspector. Once he met with Mr Hodgson and Mr Hodgson took the matter up with the employer in April 2010, there were various discussions between Mr Hodgson and First Direct, the burden of which Mr Hodgson faithfully passed back to Mr Robinson. In essence, First Direct readily and properly acknowledged that it had an obligation to pay the minimum wage, but that by reason of the way in which its system operated, it was difficult for it to correctly identify where Mr Robinson was entitled to additional payment. This was principally because there was no agreement between the parties about which hours Mr Robinson ought to be paid for.

[25] In essence, the parties fundamentally disagreed about when Mr Robinson was *at work* and when he was not. He said that he was *at work* when he was in First Direct's vehicle even although for reasonably significant periods of time that he was in First Direct's vehicle he was not actually able to perform any work to generate

gainful income. First Direct, not unnaturally, said that he was only entitled to be paid when he was ready, willing and able to accept work from paying customers. That issue remains unresolved and it effectively precluded the payment to Mr Robinson of his claimed entitlement to be paid the minimum wage.

[26] In those circumstances, and particularly because it is plain there is a genuine dispute between the parties about the actual hours of work, I am not persuaded it can be a breach of duty for First Direct to have failed to pay those amounts during the employment. In the normal course, it would seem unreasonable for there to be a delay, but given the failure to agree the actual hours worked based on the usages in the industry on the one hand and Mr Robinson's contrary beliefs on the other, I do not consider First Direct's behaviour as a default.

[27] The final issue then that the Authority must consider is whether a reasonable observer would conclude that Mr Robinson's resignation was reasonably foreseeable as a consequence of the behaviour of First Direct. I conclude that a reasonable observer would not think it was in any way foreseeable that Mr Robinson's resignation would naturally follow from the behaviour of First Direct. As I have already noted, matters came to a head on 19 May 2010 when Mr Robinson was being given a further period of training to try to address the issues that he had raised with First Direct concerning his income generation. Although the training itself seems to have gone well, Mr Robinson became distressed during the course of a discussion with one of First Direct's management and, as a consequence, First Direct agreed to a period of two weeks' leave, which it hoped might *refresh him* and enable him to *come back with a new outlook*. If that failed, First Direct indicated in a lengthy email to the Labour Inspector dated 19 May 2010 that it would be keen to explore mediation *to try and restore the relationship*. Without ever returning to work and towards the end of the two weeks annual leave period on 31 May 2010, Mr Robinson emailed his resignation to First Direct.

[28] It is clear from First Direct's behaviour that, far from conniving at the end of the employment relationship, it sought to maintain it. It gave evidence at the investigation meeting that van drivers were very hard to recruit and, as a consequence, it sought to retain the services of Mr Robinson. It worked hard to provide him with an understanding of what he was doing wrongly in order that he could maximise his income as all its other drivers did. It proposed mediation to Mr Hodgson when

Mr Robinson left the workplace distressed. It readily agreed to a request for two weeks' special annual leave to give Mr Robinson a chance to get things into perspective. None of this seems to me to be behaviour of an employer bent upon the conclusion of an employment relationship, nor is there anything in its treatment of Mr Robinson which, in my judgment, would make his resignation foreseeable.

Is Mr Robinson owed wages?

[29] I am satisfied that the principles used by the employer in calculating the moneys owed to Mr Robinson are the correct principles in the circumstances, and that the aggregate figure derived from those calculations can be relied upon by the Authority in issuing its determination.

[30] The reason it was not possible to achieve this result without the intervention of the Authority was simply that the parties were unable to agree on the principles that ought to apply to the calculation of moneys owed to Mr Robinson and having now heard the evidence of the parties, I am able to confirm that I prefer the evidence of First Direct to the evidence offered by Mr Robinson in regard to his entitlements.

[31] In particular, it is clear to me that Mr Robinson is not entitled to be paid for the time that he was in the employer's vehicle running between home and work. There are two reasons for this. The first is that there is a clear exception which identifies that driving performed by a taxi driver to and from home is not work which falls within the 70 hour weekly maximum that the law allows a taxi driver to be working. It follows that if that time is not to be treated as work time for LTSA purposes, it cannot be treated as for work purposes in terms of the employment relationship.

[32] Mr Robinson maintains that because he was in First Direct's vehicle travelling to and from his home, he was therefore entitled to be paid. But that cannot be the position. The employer, First Direct, is not obligated to make payment to Mr Robinson for time spent driving to and from work in its vehicle when that time is plainly not work time. The only reason that Mr Robinson was driving the employer's vehicle to and from work in the early part of the employment relationship was because the employer sought to make it easy for Mr Robinson and thought the best way it could assist him was by allowing him to take the taxi van home. However, there was no implication that he should be paid for the time involved, especially as his

home was out in North Canterbury, some distance beyond First Direct's legal trading area. Even Mr Robinson accepted, at the investigation meeting, that, on his way home in the taxi, he would turn off the meter at the end of his last job and he was prepared to concede that, having done that, he ought not to be paid thereafter. The point is that he was not able to perform work for the employer between his home and the Christchurch metropolitan area and on the facts, he never did so. It follows that he is not entitled to payment for time spent driving to and from work, even where that is in First Direct's vehicle.

[33] The same principle broadly applies to the 400 odd hours that Mr Robinson spent during the 18 months of the employment logged off the employer's despatching system. For his own reasons, Mr Robinson was disinclined to accept much in the way of unscheduled work from First Direct's despatch system. Sadly, when First Direct endeavoured to provide him specifically with some of that extra work, he seems to have become flustered. In order to avoid that happening, Mr Robinson would log off the system. Once he has logged off, the dispatcher treats him as not being available for work and therefore the available jobs go to other taxis. When Mr Robinson chose to log off the system, he cannot expect to be paid for the privilege of sitting doing nothing. That is not good faith behaviour and is not what a fair and reasonable employee would do.

[34] As I noted earlier in this determination, one of the prevailing themes in this employment relationship problem is Mr Robinson's difficulty in grasping the fundamentals of the industry. Despite First Direct's efforts, he seems to have never been able to understand the principles that ought to apply in order to maximise his income. First Direct's evidence, which I accept, was that Mr Robinson was the first taxi driver it had ever employed in 22 years in the business who had been unable to grasp these fundamental principles. I am satisfied that First Direct used its best endeavours to explain to Mr Robinson what he ought to have done and that, for whatever reason, he was resistant to modifying his behaviour.

[35] One example only of this phenomenon is Mr Robinson's enthusiasm for parking up the taxi van at a particular public park where there was no taxi rank. Mr Robinson said he did this because the van was not air conditioned and it was hot. But presumably he could have sat with the windows down at a taxi rank with his despatching system on so that he was available to accept jobs.

[36] Similarly, a further example is Mr Robinson's enthusiasm for driving around the city aimlessly rather than sitting on a taxi rank in a particular location waiting for the next available job. First Direct presented two very graphic examples of this latter behaviour which showed that Mr Robinson, by driving around the city, was simply ensuring that he was not available to take the next job. The priority system in the industry means that the best possible place for a taxi driver to get his next job is on a taxi rank. In such an environment, the taxi driver has the prospect of a member of the public engaging him or her from the taxi rank and if they are the first car in the rank they get the job and, in addition, the GPS system operated by First Direct enables it to identify where all its vehicles are at any one time so telephone work is allocated on a priority basis to the next available car on the rank in the area in question. Mr Robinson was told very clearly that his habit of not sitting on a rank and either parking up or driving around was virtually ensuring that he was minimising his income rather than maximising it.

[37] Certainly, as a matter of law, I am satisfied that Mr Robinson is not entitled to be paid for time spent in his taxi unless and until he has indicated to the dispatcher through the system used by First Direct that he is ready, willing and able to receive work. In other words, his entitlement to the minimum wage begins at the point at which he logs onto the despatch system and ends at the point at which he logs off. Mr Robinson's belief that First Direct's electronic log was somehow not "approved" and, or, had been "tampered with", are simply misguided conclusions which I reject. The primary record remains the electronic log and it is this material which forms the basis of the First Direct spreadsheet. .

[38] That First Direct spreadsheet is to be used by the parties' representatives to inform their consultation, which I now direct, on any entitlements Mr Robinson may still have, after the effects of the Authority's determination have been assimilated.

Determination

[39] Mr Robinson has no personal grievance for reasons which I have already identified.

[40] The parties' representatives are to confer with a view to assessing whether, in the light of this determination of the Authority and the spreadsheet prepared by First Direct which has been specifically approved by the Authority, Mr Robinson is owed

anything further by way of wages. Leave is reserved for either party to revert to the Authority for further orders should that be necessary.

Costs

[41] Costs are reserved.

James Crichton
Member of the Employment Relations Authority