

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 266
5349453

BETWEEN KEVIN DAVID ROSS
 Applicant

A N D R & B TRANSPORT
 SERVICES LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: M Nutsford, Advocate for Applicant
 W Reid, Counsel for Respondent

Investigation Meeting: 7 February 2012 at Tauranga

Submissions Received 22 February 2012 and 13 March 2012 for Applicant
 6 March 2012 for Respondent

Date of Determination: 3 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Kevin Ross, claims that he was unjustifiably dismissed on 14 July 2010. Mr Ross asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of wages for three months and compensation of \$6,000, under the provisions of s 123 of the Employment Relations Act 2000 (the Act). Mr Ross also claims that he is owed \$98.79 in regard to cellphone calls made on behalf of the business at the relevant times. Mr Ross also claims wage arrears of \$175 and holiday pay of \$242.36. Finally, Mr Ross says that he was not provided with an employment agreement pursuant to s 65 of Act and he asks that a penalty be imposed. Conversely, R & B Transport Services Limited say that Mr Ross was not dismissed, rather he left his employment after a number of performance related concerns were raised with him.

Background

[2] R & B Transport Services Limited is a small transport business. The sole shareholder and managing director is Mr Robert Ohlson. Mr Ohlson operates the business on a “hands-on” basis with the assistance of his partner. Mr Ohlson started the business in April 2010. He works unusual hours driving a 5 tonne truck making freight and newspaper deliveries mainly. The business also purchased a van that had a carrying capacity of 1500 kgs. The main role for the van was delivering newspapers. Mr Ohlson employed another person (Keith) to drive that van.

[3] The evidence of Mr Ohlson is that he was considering purchasing a second van and following an initial discussion with him about this, Mr Ross commenced employment with Mr Ohlson on 3 June 2010. Mr Ohlson says that the employment was to be on a trial basis as he had not seen a CV or any references and, apparently, he had not asked for such from Mr Ross. There is no evidence of the parties entering into a trial or probationary agreement, but this is not an issue before the Authority.

[4] The evidence is that Mr Ross did not get off to a good start in his new employment. Problems arose in regard to him mis-counting the number of units or bundles of newspaper that he was supposed to take from the Roadstar truck that delivered the newspapers; for subsequent delivery by Mr Ross, to various retail outlets. The evidence of Mr Ohlson is that Mr Ross made a number of mistakes (mis-counts) on almost a weekly basis. Mr Ohlson says that he was receiving complaints from the New Zealand Herald, who had in turn, had received complaints from retailers about not receiving the correct number of newspapers. Mr Ohlson contracted to a parent company (ECL) and concerns were expressed by this company, on 11 June 2010, about a mis-count made by Mr Ross and the possible negative effect on re-tendering for the contract with the New Zealand Herald. Mr Ross downplays the miscalculations in regard to the bundles of newspapers and apportions some blame to the Auckland truck driver and also a mistake being made by an employee of one of the retailers. However, I conclude that there was, most probably, some fault on the part of Mr Ross and Mr Ohlson was entitled to have concerns about the effect on his business. I also note (and accept) the evidence of Mr Ohlson that when he discussed the problems in question, Mr Ross: *...would never take responsibility for the mistakes always coming up with excuses for the short deliveries.*

Mr Ohlson gave evidence about checking the explanations given by Mr Ross and found them to be wanting. An issue also arose in regard to Mr Ross overloading the van on at least one occasion: possibly more than once.

[5] Mr Ohlson gave evidence about a matter that arose concerning the cost of repairs to the van that Mr Ross was driving. Mr Ross was to get the work done on the van and he was given a blank cheque by Mr Ohlson, who anticipated that the cost of the repairs would amount to \$500-\$600. Mr Ross subsequently wrote the cheque out for more than \$1,000 without prior consultation with Mr Ohlson.

Conflict between Mr Ross and Mr Ohlson

[6] While it appears that some differences arose between Mr Ross and Mr Ohlson before this date, matters escalated somewhat on 25 June 2010. This was as a result of the cheque that Mr Ross wrote out for the repairs to the van. The evidence of Mr Ross is that at about 4:30pm, while driving the van, he received a phone call from Mr Ohlson. Mr Ross says that Mr Ohlson was “swearing and shouting abuse” at him while he tried to pull the van over to the side of the road. Mr Ohlson wanted to know why Mr Ross had not contacted him before filling out the cheque for the repairs. Mr Ross says that Mr Ohlson became “more and more heated” and as it was a Friday on a busy road, he told Mr Ohlson that he could not talk to him in the circumstances and hung up.

[7] The further evidence of Mr Ross is that at 4:48pm, he received a text on his phone from Mr Ohlson:

*FINAL PAY NEXT WEEK KEV U DNT EVA HANG UP ON ME AND
DNT EVEN THINK COME ROUND MY SONS AT HOM*

[8] The oral evidence of Mr Ross is that he was “pretty upset” when he received the text and he felt that this was going to be the end of the relationship.

[9] The overall evidence about what happened immediately after the receipt of the text by Mr Ross is unclear. It appears that later that day (25 June 2010) Mr Ross transferred the van to the other person employed by Mr Ohlson (Keith) but nothing in particular can be read into that as it appears that the transfer was pre-arranged. In any event, Mr Ross received the van back on Sunday, 27 June 2010, “under duress” he says. Mr Ross told the Authority that Keith came round to his house and asked if he would continue working for Mr Ohlson. However, under cross-examination by

Mr Reid, Mr Ross acknowledged that Mr Ohlson had apologised to him for the incident on 25 June 2010 and that he: "thought we had moved on".

[10] According to the evidence of Mr Ross, when he received the van back on Sunday, 27 June 2010, there was some damage to the passenger side wing mirror. Mr Ross says he was also told that the radiator needed two litres of water. A subsequent inspection of the radiator by a specialist revealed it required a substantial repair.

[11] On 5 July 2010, a meeting took place between Mr Ross and Mr Ohlson. While there is a lack of detail in regard to what was discussed it appears that there was a fairly frank discussion about the things that had gone wrong in the relatively short period that Mr Ross had been employed, including vehicle maintenance issues. The evidence of Mr Ross is that things got "a little bit heated" but he also says that he felt it was a good meeting and that they: "now could move forward".

[12] However, it seems that any resolution that may have been arrived at on Monday, 5 July 2010, was short-lived, as on Tuesday, 6 July 2010, there was a problem with a business receiving their newspapers; and an issue arose pertaining to the Te Puke Times deliveries. Mr Ross makes mention of "shouting and offensive language" being directed towards him from Mr Ohlson via a phone call. The evidence of Mr Ohlson is that Mr Ross was doing the Te Puke Times run in more than one load and it was not economically viable to do this. Mr Ohlson says that he told Mr Ross "in no uncertain terms" not to do this as there was an alternative method available.

Warning letter

[13] The evidence of Mr Ohlson is that as he was not achieving anything through his conversations with Mr Ross in regard to the problems that continued to arise, he decided to put his concerns about the work performance in writing. A document was prepared by his partner (Brenda) via a notepad program; that apparently, can be used for "jotting down thoughts in a hurry." Mr Ohlson says that it was not his intention to embark on a disciplinary process; rather, the document was designed to give him notes to discuss the problems that had arisen, and for Mr Ross to then sign the document in acknowledgement that a conversation had taken place. The document in question is set out below:

Warning Kevin Ross

Kevin David Ross Dated 12/07/10

Written Warning

1. Failing to follow instructions: was told to keep up daily checks and has not.
2. Lack of maintenance [sic] of company vehicle [sic]:
Van was in a poor standard, 3 tyres were unwarrantable, 1 was barely [sic] legal and failed to inform Director.
Overloading of van – according to APN Print Tauranga.
Not having company vehicle available for runs.
3. Lack of responsibility and Poor Performance [sic]:
Miss counting [sic] of loads which means having to double back on runs.
Making decisions on runs without Director's approval.
Does not take responsibility for when things go wrong but instead blames others.
Over-estimating run times.
Authorised a cheque for over \$1,000.00 without confirmation from Director.
Two serious emails from Auckland regarding miss counts [sic].
Also got van back only to find out the universal joints were ready to fall out making it extremely difficult to drive.
Speeding on company vehicle (have got gps records to prove this.

All areas above are considered serious and can damage the Company's credibility [sic]. Performance needs to seriously improve.

R & B Transport Services Limited
Director (Signed) Robert Ohlson

Employee.....

The Authority has received two versions of this document. One is undated and appears to be a draft. The other is as reproduced above,¹ but has the following additional content, most probably made sometime after the departure of Mr Ross:

Kevin was given this written warning on Monday the 12/07/10 and had the chance to come and see me that afternoon but he didn't then on the tuesday [sic] against my wishes [sic] and did his thing with the tepuke [sic] times run so wednesday [sic] we had a disagreement on the phone Kevin then said to me would you like me to drop the van of [sic] to my house and I said Yes he has threatened to drop the van off twice previos [sic] to this situation and I have had enough.

[14] The evidence of Mr Ohlson is that he phoned Mr Ross in the early hours of the morning² of Monday, 12 July 2010 and informed him that he had a document that he

¹ While it is not entirely certain, the Authority understands that it is the above reproduction that was given to Mr Ross.

² The role of delivering of newspapers required both men to start work in the very early hours of each morning.

wished to discuss with him. Mr Ohlson also says that he informed Mr Ross about the content of the document relating to performance concerns and that he needed to talk to him. The letter was left in Mr Ohlson's mailbox for Mr Ross to pick up and read, before a discussion took place.

[15] Mr Ohlson attests that it was his expectation that Mr Ross would meet with him that afternoon, given that both men started very early in the morning. Mr Ohlson says that Mr Ross would have finished his shift at 6:00am that morning and hence he would have had plenty of time to consider the content of the document. However, the evidence of Mr Ohlson is that when he returned home at approximately 2:30pm, after finishing his shift, the document was still in the mailbox.

[16] There is a conflict in the evidence about when Mr Ross picked up the document in question. Mr Ross acknowledges that he received a phone call from Mr Ohlson requesting him to pick it up but he says that Mr Ohlson did not tell him what it was about. The oral evidence of Mr Ross is that he picked the letter up from Mr Ohlson's mailbox at about 1:50pm; but this is at odds with Mr Ohlson's evidence that the letter was still in his mailbox at 2:30pm. In the round, I conclude that it is more probable that Mr Ohlson's version of events is correct and that Mr Ross probably picked up the document some time after 2:30pm on 12 July 2010.

13 July 2010

[17] The evidence of Mr Ross and Mr Ohlson is again at odds in regard to what happened on this day. The evidence of Mr Ross is that he started work as usual early in the morning and at some point, received a GPS text message³ from Mr Ohlson. The substance of the message was that Mr Ohlson was querying why Mr Ross delivered the Te Puke Times in two loads; and then he went on to inform Mr Ross that:

I really had enough of your I'll do whatever I want shit Keith can do that run as of next week and if you keep this up you can start looking for another job.

[18] The evidence of Mr Ohlson is that "to the best of his recollection" he contacted Mr Ross and asked him to come and see him as he wanted to discuss the

³ The Authority understands that the van Mr Ross was driving was fitted with a GPS system that could be used to monitor his position and receive text messages.

content of the document left for Mr Ross as it had now gone from the mailbox. Mr Ohlson says that he was home from 2:30pm onwards and that Mr Ross would have known this. Mr Ohlson attests that the only communication he had with Mr Ross on 13 July 2010 was a text message advising that Mr Ross was going to a doctor's appointment with his girlfriend. On the matter of the visit to a doctor by Mr Ross, it is his evidence that the previous day (12 July):

At 1:54 I got a text from Rob saying "Kev did you go and get the radiator sized up today". This message was sent three or four minutes after picking up the warning letter. I was unable to attend a follow-up meeting on this day as I had a doctor's appointment I was told that was ok and we would do it later.

[19] At this point I have to say that I found the evidence of Mr Ross on various matters to be disjointed and often out of context; whereas the evidence of Mr Ohlson, while not entirely clear at times either, was, on the whole, more direct and generally presented in a reasonably logical context. But in any event, as far as Mr Ohlson was concerned, he had not received a satisfactory explanation from Mr Ross as to why he did not come to meet with him, particularly given that he only lived a few blocks away from Mr Ohlson's residence. Mr Ohlson says that he believed that Mr Ross was avoiding him.

[20] The further evidence of Mr Ohlson is that as Mr Ross had not communicated with him properly for two days, he was becoming frustrated about not being able to address the performance issues that had arisen. Mr Ohlson says that he had also checked the GPS/Navman records on his computer for that day and discovered that Mr Ross had been exceeding the speed limit down the Matata straights with a full load of units on board. Mr Ohlson attests that this was another indication that Mr Ross was performing his duties "in an irresponsible and dangerous manner". Mr Ohlson phoned Mr Ross. He says that he:

Demanded to know why Mr Ross had not come to see him as requested; and why he had been driving the van at high speeds in Matata.

[21] Mr Ohlson's evidence is that the only response from Mr Ross was:

...to tell me that he would bring the van to my house. I didn't say anything to indicate to Kevin that he had been fired and didn't tell him to bring the van back.

[22] The evidence of Mr Ross is that he received a phone call from Mr Ohlson at 12:15pm. Mr Ross says that (in regard to Mr Ohlson):

He was very aggressive in manner and didn't want to listen to my side of the story – a long tirade of bad language followed⁴. He wanted to know why I hadn't signed his warning letter and why I was driving at 120kph past Matata etc. He was screaming down the phone at me and wouldn't listen to anything I was trying to say. I asked him if he wanted me to bring the van back to his house and he said yes. I considered I had been fired at that point.

[23] However, the oral evidence of Mr Ross at the investigation meeting was:

That's when I realised I couldn't work for him any longer.

[24] Mr Ross says that Mr Ohlson told him:

To put the keys and the warning letter (signed) in the letterbox.

The return of the van

[25] Following the phone conversation with Mr Ross, Mr Ohlson says that as far as he was concerned things were still up in the air. Mr Ohlson's evidence is that apart from Mr Ross telling him that he was bringing the van back, he intended to talk to him when he arrived at Mr Ohlson's house. Mr Ohlson says that:

When Kevin arrived, I got up and stood in the entrance way to the house. He drove halfway down the driveway and then got out of the van and walked towards me. On reaching me, he reached out and put the keys in my hand and then turned and walked away from me. I asked him to come inside and talk about it, but he did not respond physically or verbally, but just continued to walk away.

[26] Mr Ohlson says that when Mr Ross handed him the keys he wasn't aggressive towards him and says that his earlier anger had subsided when Mr Ross came to his house and up until this time, he assumed that he would be able to talk things through. Mr Ohlson says that he was disappointed that Mr Ross walked away because if he had come into the house, and acknowledged that there were problems; and agreed to work harder towards eliminating them, he was still prepared to continue working with Mr Ross. Mr Ohlson says that:

⁴ However, when pressed under cross examination about what Mr Ohlson purportedly said, Mr Ross was unable to recall.

If Kevin had talked to me and if his performance had improved, he would still be working for me now.

[27] The further evidence of Mr Ohlson is that the behaviour and the silence of Mr Ross indicated to him that at this point, Mr Ross had walked away from his job. Mr Ohlson says that his first thought was to arrange for Keith to take the delivery run the following morning and while checking the van, he noticed that the fuel card was not in its usual place. Mr Ohlson says that he tried to communicate with Mr Ross by phone but received no response and so went around to his house to get the fuel card back from him.

[28] The evidence of Mr Ross is quite different. He says that after the phone conversation regarding the return of the van, he received several texts from Mr Ohlson as follows:

*12:33pm DRP THE VAN OFF LETTER SIGNED AND PUT KEYS
IN MAILBOX.*

12:47PM WERZ MY VAN

1:08PM WERZ THE LETTER

1:24PM WERZ THE GAS CARD KEV

[29] The oral evidence of Mr Ross at the investigation meeting was that he took the van to Mr Ohlson's house but never saw him; and he put the keys in the mailbox. But his written statement is that:

I gave him the keys only but would not sign the warning letter as I did not agree with it.

[30] Mr Ross attests that he ignored several texts and phone calls from Mr Ohlson and that later that day, Mr Ohlson arrived at his home and "demanded" the fuel card for the van.

[31] The common evidence of both men is that there was no conversation between them, apart from Mr Ohlson asking for the fuel card.

Analysis and conclusions

[32] It appears to be largely accepted by both parties that the primary issue to be determined by the Authority is: Was the departure of Mr Ross from his employment on 14 July 2010 a voluntary resignation, or was the resignation in actual fact brought about in such a manner that it was, in reality, a constructive dismissal?

[33] It is argued for Mr Ross that he was constructively dismissed. In support of this proposition the submissions for Mr Ross refer to the “habit of angry phone calls” to Mr Ross from Mr Ohlson, whereby the latter expressed his obvious frustration at the continuing failure of Mr Ross to fulfil his duties in the manner required. Mr Ohlson has acknowledged that he vented his frustrations to Mr Ross in “no uncertain terms” on at least one occasion. I conclude that it is more probable that he did so on a fairly regular basis and there is no real excuse for his aggressive behaviour; albeit one can easily understand the frustrations that he would have been experiencing. Nonetheless, this was an employment relationship in which both parties must bear equal responsibility for their general actions and behaviour.

[34] On the one hand it is clear that Mr Ross had his own (and mostly wrong) way of doing things, while on the other hand Mr Ohlson was lacking in the necessary skills to ensure that the lack of essential performance, by Mr Ross, was properly managed. But in fairness to Mr Ohlson, he did attempt to put something in writing for Mr Ross to consider, as evidenced by the document dated 12 July 2010. But of course, on the surface, this document was effectively a pre-determined written warning which could have prompted an unjustifiable disadvantage grievance, albeit Mr Ohlson says that the document was intended to ensure that Mr Ross took seriously the various concerns that he had.

[35] This is a rather odd case in that both parties appear to have had some difficulty in coming to grips with their responsibilities, albeit the action and behaviour of Mr Ohlson was clearly in response to the generally poor performance of Mr Ross, during the short time he was employed to do, what appears to be a relatively simple job. But I accept, in principle, the submissions for the respondent that the initiative for the departure of Mr Ross on 14 July 2010, came from him, rather than Mr Ohlson. I also accept the evidence of Mr Ohlson that Mr Ross had previously offered to “bring the van back” inferring that he was going to resign. Overall I prefer Mr Ohlson’s version of the events regarding the return of the van on 14 July 2010; and I accept that he probably invited Mr Ross to have some discussions about the issues that arose. Unfortunately Mr Ross did not see fit to enter into any further discussions about the obvious performance concerns that Mr Ohlson had.

[36] Given the respective behaviour and actions of Mr Ross and Mr Ohlson, there are elements that make this an arguable case for constructive dismissal. But on

balance, I conclude that the departure of Mr Ross from his employment was a voluntary resignation. In *Wellington etc Clerical etc IUOW v Greenwich*⁵ it was held that:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[37] And while the manner in which Mr Ohlson spoke to Mr Ross could be seen to be “inconsiderate conduct causing some unhappiness or resentment” for Mr Ross, I do not find that Mr Ohlson crossed the “borderline” to an extent that his behaviour was dismissive or repudiatory to the degree that Mr Ross was entitled to resign and consequently sustain a claim of constructive dismissal. But even if I am wrong about that (and I think not), and Mr Ross was unjustifiably constructively dismissed, given the substantial contribution made by him to the circumstances, it is unlikely that he would be entitled to much (if anything) in regard to remedies. It also strikes me that this relationship was never going to last very long as the two protagonists were largely incompatible and Mr Ross was probably not suitable for the work that he was employed for.

The wage arrears, holiday pay and telephone calls claims

[38] Mr Ross claims wage arrears of \$175 (gross) calculated on the basis of a total of 12.5 hours at \$14 for the last three days of his employment. While the parties have not addressed this wage arrears claim in their closing submissions, I conclude that it is most probable that this sum is owed to Mr Ross.

[39] Mr Ross also claims the sum of \$242.36 being unpaid annual holiday pay. I understand that the respondent concedes that this sum is owed to Mr Ross.

[40] Finally, Mr Ross claims he is owed the sum of \$98.79 as reimbursement for the cost of cellphone calls made on behalf of the business while carrying out his duties. A summary of the calls made has been provided via a Vodafone account. I accept that this is a legitimate claim and the sum of \$98.79 should be paid by the respondent.

⁵ (1983) ACJ 965; ERNZ case (pre-1991) 95.

The failure to provide an employment agreement

[41] If he has not already done so, Mr Ohlson should make himself aware of the obligations of an employer, under the Employment Relations Act 2000, to produce an appropriate employment agreement for all employees, given the very short duration of this employment relationship and the no evidence about any discussion during the employment of Mr Ross, regarding the absence of an employment agreement, and no obvious disadvantage to him, I decline to make any findings in favour of Mr Ross on this matter.

Determination

[42] For the reasons set out above, I find that the termination of the employment of Mr Ross was a voluntary resignation and not a constructive dismissal. The claim of unjustifiable dismissal is unsuccessful.

[43] R & B Transport Services Limited is ordered to pay to Mr Ross, within 28 days, the following sums:

- (a) \$175 (gross) as unpaid wages for the period 12–14 July 2010 inclusive.
- (b) Annual holiday pay in the gross sum of \$242.36.
- (c) Reimbursement of cellphone calls in the sum of \$98.79.

Costs

[44] Costs are reserved. The parties are invited to resolve that matter if they can, taking into account the outcome and that the investigation meeting was completed within one day; and the usual tariff approach adopted by the Authority. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority