

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 285  
5361373

BETWEEN      MARK SELWYN  
Applicant

A N D              EDWARDS DRAINAGE LIMITED  
Respondent

Member of Authority:      Rachel Larmer

Representatives:              Applicant in person  
Jason Edwards, Director of Respondent

Investigation meeting:      23 July 2012

Date of Determination:      21 August 2012

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Mark Selwyn's status as an employee of Edwards Drainage Limited (Edwards Drainage) did not change to that of an independent contractor after he had been employed for three months.**
- B. Edwards Drainage dismissed Mr Selwyn by text message on 3 October 2011. Mr Selwyn's dismissal was unjustified.**
- C. Edwards Drainage is ordered within 30 days to pay Mr Selwyn:**
- (a) \$484 wage arrears;**
  - (b) \$3,025.44 unpaid holiday pay;**
  - (c) \$2,607 lost remuneration;**
  - (d) \$3,400 distress compensation;**

- (e) **\$71.56 to reimburse his filing fee.**

### **Employment relationship problem**

[1] Mr Selwyn claims he was unjustifiably dismissed as a result of four text messages he received on 03 October 2011 which he described as abusive. Mr Selwyn says that throughout his employment Mr Jason Edwards, the sole director and shareholder of Edwards Drainage, regularly sent him abusive text messages. Mr Selwyn also alleges that on 01 August 2011 Mr Edwards threatened to assault him.

[2] Mr Selwyn says he was not paid for his last week of work and he has not been paid any holiday pay, despite not taking any paid annual holidays whilst employed.

[3] Mr Edwards claims that although Mr Selwyn commenced employment with Edwards Drainage as an employee, after three months he says Mr Selwyn's status changed from being an employee into an independent contractor.

[4] Mr Edwards denies threatening to assault Mr Selwyn or sending him any abusive text messages. Mr Edwards says Mr Selwyn was not dismissed. He claims Mr Selwyn ended his employment himself when he did not return to work. Mr Edwards admits Mr Selwyn was not paid for his last week of work and has not been paid any holiday pay.

### **Issues**

[5] The following issues require determination:

- (a) Did Mr Selwyn change from an employee into an independent contractor after he had been employed for three months?
- (b) What is Mr Selwyn owed for his last week of work?
- (c) What holiday pay is Mr Selwyn owed?
- (d) Was Mr Selwyn dismissed?
- (e) If so, was dismissal justified?
- (f) If not, what remedies should be awarded?

**Did Mr Selwyn change from an employee into an independent contractor after three months?**

[6] Mr Edwards agreed Mr Selwyn was initially taken on as an employee but says his status changed after three months because Mr Edwards says he told Mr Selwyn he would have to become an independent contractor and be responsible for paying his own tax if he wanted to continue working. Mr Selwyn denies such a conversation ever occurred. He says he was taken on as an employee and that never changed.

[7] I have resolved this conflict in favour of Mr Selwyn. I consider it unlikely Mr Selwyn would have agreed to change his status. There was no benefit to him in doing so because Mr Edwards confirmed that Mr Selwyn's hourly rate did not change. Mr Edwards was unable to provide a date or location for this alleged discussion. Nor did he provide specifics about what was discussed or why the parties wanted Mr Selwyn's status to change. He was unable to point to any evidence which indicated Mr Selwyn's status had changed.

[8] There was no supporting documentation regarding the alleged change in status. Mr Selwyn continued to be paid in the same manner he had been paid since he commenced employment as an employee and he continued to sporadically receive payslips which clearly recorded PAYE had been deducted from his wages before the nett amount had been paid to him in cash.

[9] The issue of Mr Selwyn changing from an employee into an independent contractor was raised for the first time when Mr Edwards gave his evidence to the Authority. Edwards Drainage did not take issue with Mr Selwyn being an employee in its Statement in Reply.

[10] I consider there was no evidence Mr Selwyn had ever performed any work for Edwards Drainage as an independent contractor. I find Mr Selwyn started work as an employee and his status did not change throughout his employment with Edwards Drainage.

**What is Mr Selwyn owed for his last week of work?**

[11] There is no dispute Mr Selwyn was not paid for his last week of work. Mr Edwards said he did not pay Mr Selwyn because although he was at work he did not actually do any real work. I do not accept that.

[12] There is no dispute Mr Selwyn turned up for work. I accept Mr Selwyn's evidence that his productivity in his last week of work was adversely affected because a pin was missing from the digger which meant he was unable to operate it until the pin could be replaced. Mr Selwyn said that he had called Mr Edwards a number of times to ask for assistance in fixing the digger so he could continue on with his normal duties. Mr Edwards's position was that it was Mr Selwyn's responsibility to fix the pin himself.

[13] I do not accept that. Mr Selwyn was not qualified or experienced in mechanical issues. It was Edwards Drainage's responsibility to provide plant and equipment that was in working order. After Mr Selwyn advised Mr Edwards of the problems with the digger pin which he was unable to fix himself then Mr Edwards should have taken steps to get it fixed.

[14] It was unreasonable for Edwards Drainage to dock Mr Selwyn's pay when Mr Selwyn was at work and ready, willing, and available to work during his scheduled work hours. I consider his failure to be productive can be attributed to Edwards Drainage's failure to fix the problem with the digger pin.

[15] I find Mr Selwyn is entitled to be paid for the hours that he attended work and was available to work, notwithstanding his ability to undertake normal duties was impaired due to a problem with the machinery provided by Edwards Drainage.

[16] I accept Mr Selwyn's claim that he worked 22 hours at a pay rate of \$22 per hour so is owed \$484 for his last week of work. Edwards Drainage is ordered to pay Mr Selwyn \$484 wage arrears.

**What holiday pay is Mr Selwyn owed?**

[17] It was agreed Mr Selwyn has not taken any paid annual holiday during his employment. Mr Selwyn was employed for less than 12 months so he is entitled to

be paid 8% of his total gross earnings with Edwards Drainage which must include the \$484 wage arrears he was awarded for his last week of work.

[18] Mr Selwyn's total gross earnings were \$37,818 (being \$37,334 wages paid plus \$484 wage arrears) multiplied by 8% equals \$3,025.44. Edwards Drainage is ordered to pay Mr Edwards \$3,025.44 unpaid holiday pay.

### **Was Mr Selwyn dismissed?**

[19] On 3 October 2011 Mr Selwyn briefly attended a work site in Mangere to drop off equipment. Mr Selwyn arrived at the site at the same time as a truck sent by Mr Edwards containing hard-fill arrived. There were two other Edwards Drainage employees on site at the time, one of whom was Mr Edward's brother. The men on site did not know where the truck was supposed to dump the hard-fill, so Mr Selwyn called Mr Edwards to ask for instructions. Mr Selwyn then directed the truck to where he thought Mr Edwards had indicated the hard-fill should be offloaded.

[20] As it turned out, Mr Selwyn directed the truck to the wrong place because he got it to offload the hard-fill five houses down the road and on the opposite side of the street from where it should have been offloaded. Mr Selwyn attributes the mistake to difficulties he had hearing Mr Edward's instructions due to background noise.

[21] Mr Selwyn claims after Mr Edwards discovered the mistake he sent Mr Selwyn four abusive text messages to his work phone. The Authority viewed the text messages Mr Selwyn says he received from Mr Edwards because he forwarded them to another phone before he returned his work phone to Mr Edwards. Mr Edwards was shown the texts but denies sending any of them. He also denies ever sending abusive text messages to Mr Selwyn during his employment as alleged.

[22] Mr Selwyn says that these text messages amounted to a dismissal and therefore ended his employment. The content of each text was as follows:

(1) *Hey Mark, you fuckwit U put the metal in the wrong fuckin place U better sort that job out over @ price or U can fuck off;*

- (2) *If U cant even put a pin in a bucket<sup>1</sup> Your fuckin useless then fuck off fuckin asshole you fucked this job up you dumass you fix that fuckin digger;*
- (3) *Weas the bolt cutters fucwit;*
- (4) *Fucoff then idiot.*

[23] Mr Selwyn said he was driving at the time he received these texts so he drove to WINZ to talk to his Work Broker who had placed him with Edwards Drainage. The Work Broker escalated the matter to his manager Mr Joe Thomas. Mr Selwyn says he showed his Work Broker and Mr Thomas the text messages Mr Edwards had sent to his work phone.

[24] Mr Thomas confirmed that Mr Selwyn presented at WINZ on 3 October and reported *his employer fired him*. Mr Thomas confirms he was shown abusive text messages which Mr Selwyn said had been sent by Mr Edwards. Mr Thomas also advises Mr Selwyn reported that he received abusive text messages from Mr Edwards on a daily basis.

[25] Mr John Henry, a former Edwards Drainage employee, confirms he regularly saw abusive text messages Mr Edwards had sent Mr Selwyn. Mr Henry said the gist of the texts he saw was that Mr Edwards called Mr Selwyn useless, said his work was defective, and called him pathetic.

[26] Mr Henry also corroborates Mr Selwyn's evidence about the 1 August 2011 threat of violence. Mr Henry reports Mr Edwards in the context of telling Mr Selwyn to undertake a job in a particular way said *do as I say or I'll punch you in the head*. Mr Henry says Mr Selwyn replied *Okay, you're the boss so I'll do it your way*.

[27] I find Mr Edwards did send Mr Selwyn the four text messages quoted above. I find that was against a background of other abusive texts and subsequent to a threatened assault on 01 August 2011.

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<sup>1</sup> This refers to the problem of why Mr Selwyn's digger was not working.

[28] I also find texting Mr Selwyn *fucoff then idiot* amounted to a dismissal because it was a sending away of Mr Selwyn at his employer's initiative. I therefore find Mr Selwyn was dismissed.

### **Was dismissal justified?**

[29] Justification falls to be determined in light of the s.103A justification test in the Employment Relations Act 2000 (the Act) as it applies from 1 April 2011.

[30] I find that Edwards Drainage is unable to meet any of the four tests identified in s.103A(3) of the Act which relate to natural justice and procedural fairness requirements. In accordance with the full court of the Employment Court's decision in *Angus & McKean v. Ports of Auckland Ltd*<sup>2</sup> failure to meet any one of these four tests rendered Mr Selwyn's dismissal unjustified.

### **What remedies should be awarded?**

#### *Lost remuneration*

[31] Mr Selwyn was out of work from 3-25 October 2011 and obtained new employment as a casual digger operator from 25 October until 20 December 2011. He claims three weeks' lost remuneration based on an average working week of 39.5 hours paid at a rate of \$22 per hour.

[32] I accept Mr Selwyn lost \$2,607 as a result of his unjustified dismissal so he is entitled to be reimbursed for that loss.

[33] Edwards Drainage is ordered to pay Mr Selwyn \$2,607 lost remuneration under s.128(2) of the Act.

#### *Distress compensation*

[34] I accept Mr Selwyn's evidence he was distressed and stressed by his unjustified dismissal prior to the Christmas period and that he was embarrassed and humiliated because he had to borrow to get through Christmas as a result of losing three weeks' remuneration in October. I recognise that this put him under stress and strain.

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<sup>2</sup> [2011] NZEmpC 160

[35] Edwards Drainage is order to pay Mr Selwyn \$4,000 distress compensation under s.123(1)(c)(i) of the Act.

### *Contribution*

[36] Under s.124 of the Act, having found Mr Selwyn has a personal grievance, I must consider whether he contributed to the situation which gave rise to his dismissal grievance and if so reduce remedies accordingly.

[37] I find Mr Selwyn's actions in directing the truck at the Mangere work site to offload the hard-fill in the wrong place did contribute towards his dismissal grievance because it caused Mr Edward's to become frustrated and angry and it was the catalyst for the four text messages he sent Mr Selwyn on 03 October.

[38] I consider Mr Selwyn's award of distress compensation should be reduced by 15% to reflect his contribution to the situation which gave rise to his dismissal grievance. I consider Mr Selwyn's lost remuneration award is minimal so I decline to decrease that award to avoid a double penalty to him.

### **Summary**

[39] Mr Selwyn was employed by Edwards Drainage which unjustifiably dismissed him by text message on 03 October 2011. Edwards Drainage is ordered, within 30 days, to pay Mr Selwyn:

- (a) \$484 wage arrears;
- (b) \$3,025.44 unpaid holiday pay;
- (c) \$2,607 lost remuneration;
- (d) \$3,400 (being award of \$4,000 less 15% reduction for contribution) distress compensation.

**Costs**

[40] Mr Selwyn represented himself so is not entitled to costs. He is however entitled to be reimbursed for his filing fee of \$71.56, so Edwards Drainage is ordered to pay him that amount.

**Rachel Larmer**  
**Member of the Employment Relations Authority**