

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 14  
5428316

BETWEEN

KEN SMITH  
Applicant

AND

DAVIES WASTE  
SOLUTIONS LIMITED  
Respondent

Member of Authority: P R Stapp

Representatives: Piers Hunt Advocate for Applicant  
Gary Tayler Advocate for Respondent

Investigation Meeting: 22 January 2014 at Napier

Submissions received: 22 January 2014

Determination: 5 February 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This case is about Mr Smith's resignation from his employment with Davies Waste Solutions Limited (Davies) allegedly on 1 June to take effect on 3 June 2013. He claims that his employer did not act in good faith and breached their employment agreement. First he claims that the job was misrepresented and Davies failed to meet an assurance that arrangements would be made to get him home to Hastings on Wednesday 5 June 2013 when the work should have finished. Second he claims that he was subsequently abandoned by Davies in Gisborne on 5 June 2013 and that he incurred the cost to return to Hastings.

[2] Mr Smith claims \$6,000 compensation for constructive dismissal; \$130 gross lost wages for 6.5 hours to arrange alternative travel home; the costs for alternative

travel; and \$5,000 compensation for unjustified disadvantage. Both parties are seeking costs.

[3] Davies denies all Mr Smith's claims. Its defence is that his employment was continuous until he decided to leave the work in Gisborne.

[4] For completeness the applicant withdrew a holiday pay matter from the claim, but there may be a live issue about that for the future.

### **Issues**

[5] Was there a resignation by Mr Smith on Saturday 1 June 2013? In other words was there a break in the continuity of Mr Smith's employment or did it continue under the existing terms?

[6] Was there a new two day employment agreement entered into between Mr Smith and Mr Jon McGregor, supervisor, for work on 3 and 4 June 2013 in Gisborne?

[7] Was there an assurance given by Mr McGregor that Mr Smith could return home on Wednesday 5 June 2013? Was there any obligation on the employer to provide transport home for Mr Smith?

[8] At whose initiative was any resignation for constructive dismissal caused by Davies and was Mr Smith's resignation reasonably foreseeable?

[9] Has there been a significant breach by the employer for the claim of constructive dismissal?

[10] Is Mr Smith entitled to lost wages for arranging alternative travel home?

[11] Is there a contractual requirement for Davies to pay the actual travel costs and/or are there other remedies for the loss available to Mr Smith?

[12] Has Davies acted unjustifiably disadvantaging Mr Smith?

**Facts**

[13] Mr Smith was employed by Davies Waste Solutions Limited (Davies) and commenced work on 15 April 2013 as a driller operator of vacuum trucks and drilling equipment based in his home town, Hastings, but required to work in other reasonable locations. There was an advertisement for the position, but Mr Smith says he heard about the job by word of mouth and approached Davies about the position and was interviewed by Mr Evan Davies, the owner and sole director of the business. There was some discussion about travel, work on Saturdays and work to be carried out in Gisborne.

[14] Davies provides services for fibre optic drilling and hydro excavation. It has approximately nine employees and an administration clerk for pay. It advertised vacancies on 18 March 2013, primarily for new work in Gisborne. Mr Smith was a successful applicant for a full time position and the parties signed off an employment agreement ("the agreement") with Mr Davies. Under the agreement Mr Smith was required to work in various locations out of town, and this included Gisborne. A new truck had to be arranged for Mr Smith to drive with the equipment for the Gisborne work. During his employment his pay was increased from \$19 to \$20 per hour. There was provision for a travel allowance of \$20-\$100 per day to be paid on a weekly basis. There has been no proper explanation about how this applied and no claim has been brought in regard to the clause. Mr Smith worked in Gisborne for three weeks, and it was the first time he had ever been to Gisborne. The crew stayed in a motel arranged by Davies.

[15] Mr Smith says that as he had to work out of town more regularly than he first thought, as well as on Saturdays and Sundays. He claims the job was misrepresented to him because of the extent of the travel and Saturday work. First, he went to see Mr Davies on 26 May 2013 to discuss his concerns. It is common ground that he was disgruntled that included the crew drinking after hours and that he was thinking of leaving because of the time in Gisborne and the Saturday work. Second, Mr Smith telephoned Mr Jon McGregor (supervisor) on Saturday 1 June 2013 and says that he resigned then and that they then entered into agreement for him to help out with the work to be carried out in Gisborne for an extra two more days and to return to

Hastings on Wednesday evening. There was no written employment agreement entered into for the extra 2-3 days work.

[16] Mr McGregor says Mr Smith told him he was unhappy and thinking of leaving. Mr McGregor says that he requested Mr Smith to stay on until the Gisborne job had been completed, which was part of the deal, and his decision was letting everyone else down. Mr McGregor estimated that the work could take 2-3 days more to complete without any guarantee that it would finish then.

[17] There is a dispute that Mr Smith resigned and that the resignation had been accepted by Mr McGregor on 1 June 2013. Mr McGregor does not have responsibility for hiring and firing. The responsibility is Mr Davies'. The basis for this is proved by Mr Davies signing the first employment agreement and both Mr Davies and Mr McGregor were consistent about it. Mr Smith had no other evidence to contradict the responsibility resting with Mr Davies.

[18] Mr Smith's partner deposed (affirmation tabled at the Authority's investigation meeting) that Mr Smith had said to her that work was not working out. She deposed that she was present when he telephoned Mr McGregor (1 June 2013). She deposed that Mr Smith gave one day's notice under the agreement and his last day for work would be 3 June 2013. Mr Smith claims that part of the telephone conversation included a discussion about Evan Davies, the owner, and ended with "OK, (are you sure)". Mr Smith says that Mr McGregor agreed to tell Mr Davies the outcome. Mr Smith's partner deposed that she heard of the new arrangements for the work on Tuesday and Wednesday in Gisborne, later. It is more likely than not that Mr Smith's partner was not present for the entire telephone conversation having regard to her affirmation, Mr Smith's answers in cross examination and that his partner was not able to be present for any cross examination.

[19] Mr Smith says that Monday 3 June 2013 would be his last day (a public holiday) when he gave one day's notice. Mr Smith says that he had appointments with his lawyer (and accountant) on Tuesday 4 June 2013, and he says he changed the lawyer's appointment when he agreed with Mr McGregor to stay on. He rearranged his appointment for the Thursday (6 June 2013) when he would have been back in Hastings.

[20] There is a dispute between Mr Smith and Mr McGregor that Mr Smith said that he had to be back in town to meet his lawyer on Thursday 6 June 2013 and that the meeting could not be changed. Mr McGregor says there was no discussion about this at all. This is more likely true than not because Mr Smith put in his evidence during the Authority's investigation meeting for the first time that he also had an accountant's meeting to arrange, and that this was scheduled for the Thursday too. Mr Smith says he had an assurance from Mr McGregor that he would be driven back to Hastings on Wednesday evening (5 June). Mr Smith says he only agreed to work the two days as he had the assurance of being returned to Hastings, but Mr McGregor says that the arrangement was for the work to be completed. Mr Smith says that the crew had to be back in Hastings anyway, because there was a new job with Downer UFB due to start on Thursday. Mr Davies says that there was no contractual timing around that work, which Mr Smith was not able to contradict. Mr McGregor supported Mr Davies' evidence. I hold that there was no new arrangement but a continuation of existing employment.

[21] Returning to the factual narrative, the crew travelled to Gisborne early on Tuesday morning (4 June 2013).

[22] Mr Smith says that on Wednesday he questioned Mr McGregor about the estimate of time to complete the Gisborne work. Mr Smith believed there was too much work for completing it by Wednesday evening. Mr McGregor says there was never any guarantee the work could be completed in the time. (The work was actually finished on Saturday 8 June).

[23] Mr McGregor says that Mr Smith informed him at about 11.am on Wednesday 5 June that he was leaving and wanted transport home. Mr McGregor declined to provide any transport because the vehicles were required for work. Mr McGregor says that Mr Smith walked away and phoned someone, and then returned to confirm that he was leaving immediately.

[24] However, Mr Smith says that Mr McGregor told him to phone Mr Davies. He did so, and says that Mr McGregor was standing beside him when he made the telephone call to Mr Davies. Mr Smith says learnt from Mr Davies that he had no knowledge of any new arrangements. In other words he was led to believe that Mr

McGregor had not complied with their earlier arrangement to telephone Mr Davies and inform him of the decision to resign and handed in his notice and that he had agreed to work two extra days under an agreement with the assurance to be returned to Hastings on the Wednesday. Mr Smith says Mr McGregor showed him his telephone record of calls and Mr McGregor indicated that he did place a call to Mr Davies about Mr Smith thinking of leaving and the work in Gisborne. Mr McGregor accepted this happened. Mr Smith says that as they were standing together Mr McGregor was listening to his call to Mr Davies on 5 June, and made his response about the call to Mr Davies. I hold that whether or not Mr McGregor was present when Mr Smith made his first call to Mr Davies is immaterial because I was informed that there were at least three calls between Mr Davies by Mr Smith after 11 am on Wednesday and that Mr Smith and Mr McGregor talked to each other in the same timeframe. Mr Smith says that Mr Davies accepted that Mr McGregor had indeed telephoned him and passed the information on about resigning and agreeing to work the extra days in Gisborne and be returned to Hastings once he realised Mr McGregor's position on it with the record of the call. However, Messrs Davies and McGregor say that Mr Smith never actually said that he was resigning, but instead only indicated that he was considering leaving, until the Wednesday when he did decide to leave. Mr Smith had no other proof that their evidence was incorrect.

[25] There was no agreement about how Mr Smith could return to Hastings without finishing work in Gisborne first, and he decided to leave immediately. He removed his work gear and left and made his own arrangements to return to Hastings. This involved him attempting to get a seat on a plane to fly home, but there were no seats available on a plane on the Wednesday; the buses had gone for the day; and instead he had to purchase a vehicle from Gisborne Wreckers that cost him \$1,000 plus registration and petrol. He says he registered the vehicle and had to buy petrol for it. In the meantime Mr McGregor had left it to Mr Davies to get a replacement driller. Mr Davies says he contacted one of the applicants who had applied previously, and who was available. Arrangements were made for the person to get to Gisborne with a Davies vehicle and that person arrived on the Thursday morning to do the work. There was another person designated as a driller at work as a back-up for Mr Smith at the time, but he was found not to be fully capable of doing the work, and thus could not be relied upon to replace Mr Smith.

[26] The parties attended mediation services provided by MBIE, but the matter remains unresolved and it falls to the Authority to make a determination.

### **Determination**

[27] This is a matter of credibility between Messrs Smith, McGregor and Davies about whether or not there was a resignation in the first place, second whether or not Mr Smith had a new employment agreement for two days and an assurance to be returned to Hastings and the various conversations that took place between each of them.

[28] First there is no certainty that Mr Smith actually resigned with effect on 3 June 2013 because he agreed to continue work at least until Wednesday. A resignation was not required in writing under the terms of the agreement, but Mr Smith's failure to put it in writing means that he is exposed to the difference of opinion with Mr McGregor's version of events. I hold that it is more likely than not that there was some confusion over Mr Smith's intentions given that the evidence from both Messrs McGregor and Davies say that Mr Smith told them of the possibility of leaving. I hold that Mr Smith was disgruntled about various matters including the crew drinking while they were in Gisborne (raised for the first time in the Authority's investigation meeting); the travel and time he was in Gisborne and that he was required to work on Saturdays. I hold there was no clear arrangement for Mr Smith to return to Gisborne under any new terms on the Tuesday, and also it is more likely than not that the arrangement was a continuity of existing employment before it ended. This is because:

- i. There was nothing put in writing by Mr Smith about resigning to confirm anything.
- ii. There was no new employment agreement put in writing.
- iii. The existing employment agreement was for an indefinite term and was not a fixed term.
- iv. Mr Davies had not made any arrangements to replace Mr Smith until he learnt that Mr Smith had decided to leave.

- v. Mr Smith could not contradict Mr Davies' evidence that the person appointed to replace him was arranged after Mr Davies learnt that Mr Smith was leaving on the Wednesday. Mr McGregor's evidence was consistent with Mr Davies on the matter. Mr Smith was not able to prove his understanding that the replacement was in or came from Australia with the inference that the replacement was pre-arranged before the Wednesday.
- vi. There was no certainty around alternative terms for employment based only on two days' work when the rest of the terms of the employment agreement presumably continued to apply. Indeed Mr Smith did not assist when he said that he reached an agreement with Mr McGregor to get paid \$60 a day and \$60 a night for the two days for the first time at the Authority's investigation meeting. Messrs McGregor and Davies denied it when they had the opportunity to reply at the investigation meeting. With nothing in writing and the rebuttal from Messrs Davies and McGregor Mr Smith has not been able to prove his claim. It does not help him that Mr McGregor would not have had any authority to offer such a term, I hold.

[29] As such Mr Smith has not established that he was constructively dismissed due to his employer breaching his employment agreement on 1 June 2013. Indeed if there was any question about what comprised reasonable travel outside Hastings and a dispute over the amount of Saturday work between the parties an alternative to resigning was for Mr Smith to invoke a dispute that could have helped resolve any differences. The terms of the agreement provided for work in other locations and flexible hours including Saturday work that makes it unlikely that there was any misrepresentation. Indeed Mr Smith is not helped by the fact that he had already been working in Gisborne for at least three weeks before he raised his concerns. Also, he was appointed to a position largely based on work to be provided in Gisborne considering the truck that needed to be purchased to transport equipment there and that Mr Smith would be driving the vehicle.

[30] Second it follows that whatever the arrangements were between Mr Smith and Mr McGregor there is the possibility of a misunderstanding given that Mr Davies and Mr McGregor knew that Mr Smith had concerns about his employment and they referred to him in their evidence of him thinking of leaving. There is no proof of any

certainty around any arrangements for Mr Smith to leave his employment except that Mr Smith says that he changed the arrangements on Tuesday to meet with his lawyer and accountant on the Thursday and that he said to his partner that he would be home. It is likely that the work had to be completed and the time proved to be longer than what Mr Smith wanted. He decided to leave for his own reasons to get back to Hastings for his meetings and as he had said to his partner that he would be home. He was pressed to get back because the meeting with the lawyer was an important one for him and he would not go into any details about it either with the employer at the time and the Authority during the investigation meeting.

[31] Mr Smith has not established that the employer seriously breached any term of employment and/or the employment agreement to cause him to resign. I hold that the job did not work out to his satisfaction, and as such any dissatisfaction cannot be grounds to claim a constructive dismissal, and I hold this was an underlying reason for his thinking to leave and final decision to do so. Another reason advanced by Mr Smith is that he said to his partner he would be home, but this too is not enough to resign and claim constructive dismissal, I hold. The employer would have had an obligation to meet the travel arrangements especially as the employer arranged the travel to Gisborne, if it had not been for Mr Smith's own actions and that he left before any opportunity arose to make any arrangements without notice. The travel allowance in the employment agreement, and whether or not it has been properly paid, has not been covered by either party in the current case. However Mr Smith decided to leave first without making any arrangements with both Mr Davies and Mr McGregor as to the cost to get back to Hastings and there is no certainty about what he says he arranged with Mr McGregor for finishing work on 1 June. Mr Smith had no proper discussion on any alternatives for travel and became steadfast in deciding what he was going to do to get home when Mr McGregor said that he had no vehicle for him to use, and after he decided to leave work. There was an obvious option that was not considered by them at least in the short time Mr Smith remained at work for a short period before he left to look into the arrangements to get home. The obvious option involved the vehicle arrangements since the replacement driller used a company vehicle to get to Gisborne on Thursday morning. The disadvantage to Mr Smith involved him being put to the expense of making his own arrangements when he understood Davies would arrange to get him home; the purchase of a cheap vehicle, plus the cost of registration and petrol, but where Davies had no say at all in

any such arrangements. I hold that Mr Smith was the author of his own misfortune in the matter and that he has not proved that he had been abandoned by Davies in Gisborne.

**Conclusion**

[32] Mr Smith's claims are dismissed.

[33] Costs are reserved.

P R Stapp

Member of the Employment Relations Authority