

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 76
5429937

BETWEEN NAPOLEONE TAMALEAOA
Applicant

A N D A1 ONEHUNGA TOWING
SERVICES LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: No appearance for Applicant
I M Davidson, Advocate for Respondent

Investigation Meeting: 3 March 2014 at Auckland

Submissions Received: 27 February 2014 from Applicant
26 February 2014 from Respondent

Date of Oral
Determination: 3 March 2014

DETERMINATION OF THE AUTHORITY

- A. The application for personal grievance is dismissed.**
- B. The respondent's counterclaim is dismissed.**
- C. Costs are reserved. If a party seeks costs, they shall have 7 days from the date of this determination to file submissions. The other party shall have 7 days thereafter to file any reply. The decision shall be made on the papers.**

Employment relationship problem

[1] Napoleone Tamaleaoa filed a personal grievance alleging constructive dismissal. He resigned following a disciplinary procedure about his conduct which resulted in two vehicles being damaged while being manoeuvred on to his tow truck. He alleges he was constructively and unjustifiably dismissed.

[2] The respondent denies it constructively or unjustifiably dismissed the applicant.

Applicant's failure to appear

[3] At the start of hearing of this matter today, the applicant and his representative failed to appear.

[4] The Authority has the power to proceed if a party fails to attend a hearing "*without good cause shown*" (clause 12, Schedule 2 Employment Relations Act 2000). No good cause has been shown for the failure to attend by the applicant.

[5] This investigation meeting date was set down at a teleconference with the parties on 19 December 2013. Directions confirming the investigation meeting date and timetabling of evidence and the notice of hearing were sent out thereafter. The applicant filed evidence in accordance with the timetabling.

[6] The hearing was adjourned at 10.15 am to allow the Authority's Support Officer to try to contact the applicant to ascertain his whereabouts. He was unsuccessful. His telephone went to voicemail.

[7] In view of the notice given of the hearing date and efforts to contact the applicant, the Authority is satisfied it may continue to hear this matter today.

Issue

[8] The single issue for determination is namely, whether the applicant was constructively and unjustifiably dismissed.

[9] The respondent has also filed a counterclaim for the cost of repairs totalling \$2,768.00.

Determination

[10] The respondent witnesses were sworn in and their briefs of evidence confirmed under oath.

[11] The respondent's evidence was the conduct of the applicant was misconduct capable of justifying dismissal. They say there was no equipment failure because Mr Tamaleaoa's tow truck was used to remove the damaged vehicle. They say he had sufficient training and knowledge on how to safely remove vehicles. There were two disciplinary meetings. He was legally represented.

[12] Following legal advice, Mr Tamaleaoa decided to resign rather than be dismissed.

[13] In the circumstances, the Authority determines Mr Napoleone Tamaleaoa was not constructively unjustifiably dismissed. The application for personal grievance is dismissed.

[14] The respondent produced invoices in support of its counterclaim for the costs of repairs to the vehicles and a fence totalling \$2,768.00. The claim arises allegedly from Mr Tamaleaoa's negligent actions. It is assumed this gives rise to a breach of contract. What term of his employment contract has been breached is not articulated adequately. It is not for the Authority to guess the jurisdictional basis for this claim. In the circumstances the counterclaim is dismissed.

Costs

[15] Costs are reserved. If a party seeks costs, they shall have 7 days from the date of this determination to file submissions. The other party shall have 7 days thereafter to file any reply. The decision shall be made on the papers.

Addendum

[16] Following the above delivery of the above oral determination, Mr Tamaleaoa's legal representative contacted the Authority at 4.38 pm seeking a rehearing.

[17] Any application for rehearing should be in the form of a memorandum setting out the grounds including reasons for the non-appearance. The applicant shall arrange

for service upon the other party and file confirmation this has occurred. It shall then be referred to another member for determination.

T G Tetitaha
Member of the Employment Relations Authority