

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 222/09
5146914

BETWEEN CHRISTOPHER JOSEPH
 TAYLOR
 Applicant

AND MILBURN LIME LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Jon Beck, Counsel for Applicant
 Michael Nidd, Counsel for Respondent

Investigation Meeting: 22 October 2009 at Dunedin

Submissions Received: 2 and 16 November 2009 for Applicant
 5 November 2009 for Respondent

Determination: 22 December 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Taylor was employed by Milburn Lime Limited (Milburn) as a head digger driver for the company. On 23 October 2008 he drove a work Ute with three other employees in the back down a hill to the smoko hut for morning smoko. Mr Taylor says that he had a frustrating and heated exchange with some employees and left the work site after morning smoko with the intention of returning either the next day or 28 October 2008 after cooling down. 27 October was a public holiday being Labour Day.

[2] Mr Taylor received on 24 October 2008 a letter from Milburn dated 23 October 2008 that provided:

Dear Chris

I was saddened to hear that you walked off the job and ceased your employment with us as of today.

As you are aware I am away at present and have therefore asked Shona to arrange for your wages to be paid into your bank account today.

Could you please arrange to return your Ute and any keys or property you have in your possession that belongs to Milburn Lime as soon as possible. One of our staff will be available to drive you home if required.

Thank you for your time spent with us and I wish you the best for the future.

[3] Mr Taylor obtained some legal advice on Tuesday 28 October 2008 and then called the Managing Director of Milburn, Roger Mahan, on 29 October and advised that he had not resigned from his employment. Mr Mahan came to see Mr Taylor at his home within an hour or so of that telephone call. It was agreed that Mr Mahan would talk to the other employees in light of his discussion with Mr Taylor to see whether or not what he had been told about the events of 23 October 2008 was correct.

[4] Mr Mahan said that he went back and spoke to the other employees and then sent a further letter to Mr Taylor on 31 October 2008 advising that he was told Mr Taylor had resigned and given the lack of contact regarded Mr Taylor as having abandoned his employment and that another person had been employed in his place.

[5] Mr Taylor says that he did not resign from his employment or abandon his employment but rather was unjustifiably dismissed and he seeks compensation and reimbursement of lost wages and costs.

[6] Milburn say that Mr Taylor resigned and it confirmed that in its letter. The company says that no further contact was received from Mr Taylor until six days later. A subsequent discussion took place between the employees and Mr Mahan and they confirmed that Mr Taylor had resigned by his words and actions and they did not expect to see him back at work. Milburn say that Mr Taylor resigned or alternatively that they were entitled to conclude that he had abandoned his employment.

The issues

[7] The issues for determination are as follows:

- Did Mr Taylor resign on 23 October 2008 or was he unjustifiably dismissed by letter of the same date received by him on 24 October 2008;
- Alternatively, did Mr Taylor's actions entitle his employer to consider that he had abandoned his employment;
- If Mr Taylor was unjustifiably dismissed what remedies is he entitled to and are there issues of contribution and mitigation.

Did Mr Taylor resign on 23 October 2008 or was he unjustifiably dismissed, by letter of that same date received by him on 24 October 2008?

[8] Milburn rely on the words that Mr Taylor spoke on 23 October 2008 at the time he left. There is a dispute about the exact nature of the exchanges. The heated exchange arose following Mr Taylor driving the Ute down to the smoko hut. There is a dispute as to whether the truck on being started jerked forward and stalled before Mr Taylor descended down the hill because it was left in low four wheel drive and was lacking in clutch fluid, or whether Mr Taylor simply drove too fast and in a manner not compatible with the conditions.

[9] The evidence from the three employees in the back of the Ute was that Mr Taylor was driving too fast and that one of them was lucky not to be thrown off, and would have been had another employee not been able to grab him. I do not consider that at this stage of the determination I am required to resolve any conflicts in the facts about the descent down the hill.

[10] There is no dispute though that when Mr Taylor went into the smoko hut there was an exchange between the other employees and Mr Taylor. In particular one employee Richard Lawlor raised issues of concern with him. Mr Lawlor was the one who was almost thrown from the back of the Ute.

[11] The evidence from most of the employees who were present was that the argument had settled down at the time that Mr Taylor left the smoko hut. Mr Taylor said that when he left things were heated. Emphasis was placed in the evidence and

submissions as to whether the conversation had calmed down or not. Regardless of that I am satisfied that in all likelihood Mr Taylor still felt agitated and angry about the events.

[12] There is a dispute about what Mr Taylor said when he left the work site. Mr Taylor said in his evidence that he told the company foreman, Gregory Manson, when he left *I'm leaving; this is getting too heated. I'll sort it out when Roger gets back.* Mr Taylor said that Mr Manson responded and said *fine, do what you have to do.*

[13] Mr Manson said that he heard Mr Taylor say *enough I am out of here finishing.* Mr Manson said that as Mr Taylor was leaving with his bag he said *I'm finished and I am taking the Ute, you will have to get someone to pick it up.* Mr Manson agrees that Mr Taylor did mention that he would get in touch with Mr Mahan and he presumed that was to advise him that he had finished. He did not recall Mr Taylor saying that he would talk to Mr Mahan about sorting it out. Mr Manson said that he told Mr Taylor *if you want to go I am not stopping you.*

[14] Within half an hour of Mr Taylor leaving the work site Mr Manson telephoned Mr Mahan and told him that Mr Taylor had finished.

[15] One of the employees, Daniel Kearney, who was on the back of the Ute provided a statement to the company dated 25 November 2008 and also gave evidence. Mr Kearney no longer works for Milburn but when he did, socialised on a couple of occasions with Mr Taylor outside of work. Mr Kearney said he was standing about two metres away from the front door of the smoko shed and he heard an argument start up between Mr Lawlor and Mr Taylor. He said that Mr Taylor came out of the shed and he heard him say to Mr Manson *fuck this, you can take over. I am out of here.* Mr Kearney said that he presumed Mr Taylor was leaving and not coming back.

[16] Mr Kearney would get a lift from Mr Taylor in the morning in the work Ute. That evening he received a text from Mr Taylor to come and pick up the Ute and went to get the Ute from Mr Taylor at his home. Mr Taylor denies that he discussed the events of the day with Mr Kearney, as Mr Kearney recalled he did, but there was no disagreement that Mr Kearney told Mr Taylor that he was going to get a letter from the company, but that he had been sent to the wrong street address, 38, instead of 58.

[17] Mr Kearney was quite adamant that Mr Taylor said *he could get a job anywhere and that he did not care*. Mr Taylor was equally adamant that he did not make that statement. I find it more likely that Mr Taylor did say words along those lines because it is unlikely Mr Kearney would simply have made that matter up as it does not particularly advance matters one way or the other. Mr Kearney then drove the Ute away.

[18] The other two employees who were in the back of the Ute and were present at morning smoko also gave evidence about what was said by Mr Taylor when he left. John McLachlan, who is no longer employed by Milburn and Mr Lawlor were both in the smoko room. They gave evidence that Mr Taylor got up, packed his bag and said *I am finished, I am out of here* and calmly walked out. Mr McLachlan said that he heard Mr Taylor talk to Mr Manson mainly about making arrangements for the Ute. Mr McLachlan said that he was quite clear that Mr Taylor was leaving and not returning. Mr Lawlor also said in his evidence that Mr Taylor asked Mr Manson to organise someone to pick up the Ute.

[19] I find that Mr Lawlor, Mr McLachlan, Mr Kearney and Mr Manson were left with the impression that Mr Taylor, by his words and actions, had decided to end his employment and they did not expect to see him back again at work.

[20] On reaching that finding I preferred their evidence to the extent that the words Mr Taylor used were along more definite lines of *I am finished and I am out of here* rather than *this is getting too heated I'll sort it out when Roger gets back*. I also prefer Mr Manson's evidence which is supported by Mr McLachlan and Mr Lawlor, that Mr Taylor made mention to Mr Manson about the Ute and the need for Mr Manson to get someone to pick it up. I do this notwithstanding that Mr Taylor ended up making arrangements himself directly with Mr Kearney that evening.

[21] The Managing Director of Milburn, Roger Mahan, was not on site that day but after he had received the call from Mr Manson he advised Mr Manson to carry on with work and then instructed his office assistant to type a letter to Mr Taylor which was the letter Mr Taylor duly received on 24 October 2008. Mr Mahan said he was back at the work site later on the day on 23 October 2008.

What happened next?

[22] Mr Taylor said that he picked up the letter dated 24 October 2008 from the letterbox to which it had been addressed.

[23] He said when asked about why he did not contact Mr Mahan that he was so shocked when he read the letter. Mr Taylor obtained some legal advice on 28 October 2008 and was advised to telephone his employer.

[24] There is a dispute about what happened after Mr Taylor telephoned Mr Mahan on 29 October 2008 and what was discussed between them. Mr Taylor said that Mr Mahan tried to retrieve the letter of 23 October from him. Mr Mahan adamantly denies doing this. It may have been that Mr Taylor thought that was what he was trying to do. It may have been that as Mr Mahan had dictated and organised for the letter to be sent in his absence, he might have been trying to refresh his memory as to its contents.

[25] It is not in dispute however that Mr Mahan agreed he would go and check with the other employees as to what was said at the time when Mr Taylor left the work site on 23 October.

[26] I find that Mr Mahan did go and talk to the other employees. There is a dispute about whether Mr Mahan as promised telephoned Mr Taylor back or whether Mr Taylor telephoned Mr Mahan back. I have considered the evidence from both Mr Mahan and Mr Taylor about this and I consider that it is more likely that it was Mr Mahan who telephoned Mr Taylor and advised that he was of the view that Mr Taylor had resigned having spoken to the other employees.

[27] There is a further dispute as to whether Mr Mahan advised Mr Taylor on that date that he had replaced him with another employee. In any event that does appear in the letter sent to Mr Taylor on 31 October 2008 that provides:

Dear Chris

This is to record that we were advised by the Foreman and other employees that you had resigned from your employment on Thursday 23 October 2008 and I did not hear from you until you phoned me six days later on 29 October 2008.

Since that time you have not attended work and under the terms of your employment agreement you are regarded as having abandoned your employment.

We have had to employ another person in your place and we have paid you your final pay and holiday pay.

Conclusion

[28] The then Chief Judge Goddard of the Employment Court in the employment case of *Boobyer v. Good Health Wanganui Limited* (unreported) WEC3/94 recognised that there are several distinct categories of cases in which an employee is, against his or her will, regarded as having resigned and that these sorts of cases are by no means rare. Indeed counsel has referred me to several such cases in this matter.

[29] It is helpful to start by considering some of the distinct categories that were set out in *Boobyer*. The first are cases where the employee gives an unambiguous resignation and later seeks to resile from it. I do not find that the facts of this case fall into that category. The next category is where the communication is equivocal but the employee learns that the employer has misunderstood it as a resignation, contrary to the employee's intention but does nothing within a reasonable time to correct the employer's false impression – *Sadd v. Iwi Transition Agency* [1991] 1 ERNZ 438. The facts of this case could fall into this category.

[30] Another category is where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so, or takes advantage of words of resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. It was recognised in *Boobyer* that in that type of case the employer cannot safely insist on its interpretation on what the employee said or wrote and that is also the position where words of resignation form part of an emotional reaction or an outburst of frustration. *Chicken and Food Distributors (1990) Limited v. Central Clerical Workers Union* [1991] 1 ERNZ 502, 507 is an example of such an emotional outburst where there was a departure by the employee in that case from the place of work and then a return to work after the heat of the moment had passed. The facts of this case could also fall into these categories.

[31] I find that Mr Taylor's words and actions on 23 October were in all likelihood part of an emotional reaction or an outburst of frustration. It was not unreasonable or surprising though that his fellow employees observing and hearing him, including a discussion about picking up the Ute, thought he was resigning and not intending to

return. I do not find that anything turns in this matter on the fact that Mr Manson told Mr Mahan that Mr Taylor had resigned. I accept Mr Nidd's submission that Mr Taylor was aware of his authority in the absence of Mr Mahan.

[32] Mr Mahan on hearing about the departure of Mr Taylor did not wait and see if Mr Taylor would return or telephone him but had a letter written to him setting out what the company considered the position to be. Although Mr Beck was critical about the timing of the letter and the failure to talk to Mr Taylor before it was sent the letter in my view confirmed that the company believed Mr Taylor had resigned and did not intend to return. The failure to telephone before sending the letter was not unfair because Mr Taylor had an opportunity to make it clear that he was intending to return to work.

[33] I have then considered the period of time before Mr Taylor, to use the words in *Boobyer*, made it plain that he was not resigning and that was not what he intended. Mr Taylor said that he did not advise Mr Mahan that he had not intended to resign after receiving the letter on 24 October 2008 because he was shocked at getting the letter and wanted to seek legal advice. I accept Mr Mahan's evidence that Mr Taylor had often made contact with him by cell phone when there were matters that he needed Mr Mahan to address. Mr Taylor had a right to obtain legal advice but I accept Mr Nidd's submission that when the letter of 23 October 2008 is read it does express regret about the situation and it is difficult to see how Mr Taylor would find that letter so shocking it prevented him telephoning Mr Mahan to disabuse him of his belief he had resigned.

[34] Mr Taylor instead waited until after the passage of two full work days on 24 and 28 October 2008 before telephoning Mr Mahan on 29 October 2008 to advise that he had not resigned.

[35] Mr Mahan in my view was entitled to conclude by that time that Mr Taylor did not intend to return to the workplace and relying on that he transferred another employee to undertake Mr Taylor's work.

[36] Most employees in the emotional/heat of the moment type cases attempt to return to work once the heat has gone from a situation and they have cooled down. It is more difficult to reconcile a cooling off period with the period Mr Taylor was away from the workplace and made no contact. Further Mr Taylor had made arrangements

to have the work Ute picked up and there was no evidence of any discussion with Mr Kearney as to needing the Ute or arrangements for such use in the short term.

[37] Mr Taylor's conduct after 23 October 2008 was more consistent with a resignation rather than an intention to simply take some time to cool off away from the place of employment and in the absence of any communication left him vulnerable to a conclusion that he had resigned.

[38] I find that Mr Taylor did not, when it became clear to him that his employer considered that he had resigned correct that. He stood passively by until 29 October 2008 when he telephoned Mr Mahan. Mr Mahan then talked to him and again to the other employees but maintained on that basis that Mr Taylor had resigned and also that he was considered to have abandoned his employment. The abandonment clause in Mr Taylor's individual employment agreement refers to an employee being absent for a continuous period of two days without the consent or notification to the employer. For completeness there was evidence that there was a previous incident when Mr Taylor threatened to resign. I accept that evidence but this matter turns to be considered in terms of the events in October 2008.

[39] I accept that Mr Taylor may well not have intended on 23 October 2008 to resign but his actions and words reasonably in my view caused others to believe that he had and he did not correct the understanding Mr Mahan had of the events of 23 October 2008 promptly enough. In all the circumstances I am not satisfied that Mr Taylor was unjustifiably dismissed from his workplace. I find that the relationship ended by Mr Taylor walking out of his employment and not correcting Mr Mahan's understanding that Mr Taylor had resigned and did not intend to return to work. Mr Mahan made alternative arrangements in terms of Mr Taylor's role in the circumstances.

[40] Mr Taylor does not have a personal grievance and there is nothing further I can do to assist him.

Costs

[41] I reserve the issue of costs. Mr Nidd, counsel for the respondent has until 28 January 2010 to lodge and serve submissions as to costs and counsel for the applicant has until 11 February 2010.

Helen Doyle
Member of the Employment Relations Authority