

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 117
5391072

BETWEEN

MURRAY DOUGLAS
TEBBUTT
Applicant

A N D

NORTHLAND REGIONAL
TRANSPORT LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: C Eckard, Counsel for Applicant
Respondent in person, Q Weatherup

Investigation Meeting: 22 March 2013 at Whangarei

Date of Determination: 8 April 2013

DETERMINATION OF THE AUTHORITY

Orders

- A. A determination Mr Tebbutt was made redundant by Northland Transport.**
- B. Northland Transport is to pay to Mr Tebbutt redundancy compensation \$3,920 and holiday pay \$313.62 totalling \$4,233.62 gross (s131 of the Act).**
- C. Interest on the judgment sum set out in paragraph B at the rate of 5% per annum calculated from 9 July 2012 until payment (clause 11, Schedule 2 of the Act).**
- D. Northland Transport is to pay to Mr Tebbutt costs of \$1,821.56 (clause 15, Schedule 2 of the Act).**

Employment relationship problem

[1] Mr Murray Douglas Tebbutt was employed by Northland Regional Transport Limited on 16 July 2011 as a transport operator. He drove trucks from Northland to Auckland. His duties were primarily carting containers and steel product and other work as required. Mr Tebbutt's employment allegedly ended on or about 30 May 2012. Mr Tebbutt claims he was made redundant and seeks wage arrears in the form of redundancy payments. Northland Transport denies this saying work was available.

[2] This employment relationship problem arises from an incident on 30 May 2012. Mr Tebbutt was driving a truck to Dargaville which broke down. This caused the late delivery of goods to a client in Auckland. The client F¹ suspended Northland Transport's contract due to poor performance and declined to have Mr Tebbutt back on its worksite. There were allegations of previous poor performance by Mr Tebbutt.

[3] The parties agreed on or about 31 May 2012 Mr Tebbutt would take one week's holiday while Northland Transport's director, Mr Quin Weatherup, sorted out what had occurred with the client contract.

[4] Between 10 to 12 June 2012 Mr Tebbutt and Mr Weatherup spoke again. There is dispute regarding the content of this conversation. Mr Weatherup says he offered further work but Mr Tebbutt was non-committal. Mr Tebbutt says no further work was offered at all. He agreed to continue taking holidays because there was a work shortage.

[5] Three weeks later Mr Tebbutt alleges he called Mr Weatherup again to discuss his pay and redundancy owed. Mr Weatherup denies this call occurred at all.

[6] Between 5 June and 9 July 2012 Mr Tebbutt received \$2,506.86 from Northland Transport.²

[7] In the interim, Mr Weatherup hired another driver. He initially thought he'd hired this driver mid to end of June 2012 to start in July. At the end of the hearing he was less sure of the dates and had not brought any paperwork.

¹ By consent the Authority makes an order anonymising the name of the client pursuant to Clause 10 Schedule 2 of the Act.

² Exhibit 1, applicant's bank statements dated 10 May – 9 July 2012 produced at hearing showing payments of 3 x weekly wage of \$761.04 plus \$223.74.

[8] On 19 July 2012 Mr Tebbutt's solicitor sent a letter to Northland Transport demanding payment of \$3,920 redundancy compensation as set out in his employment agreement or proceedings would be filed in the Employment Relations Authority.

[9] Mr Weatherup called Mr Tebbutt on or about 20 July 2012. There is a dispute about its content. Mr Weatherup says he told Mr Tebbutt he was not made redundant as work was available. Mr Tebbutt says Mr Weatherup was abusive and told him he had no money to pay.

[10] The matter was not resolved at mediation. It has now come before the Authority for determination.

Issues

[11] Northland Transport failed to file any statement in reply or evidence but attended the hearing seeking to present evidence. The Authority has powers while investigating any matter to call for evidence and information from the parties and to follow whatever procedure the Authority considers appropriate (s160(1)(a) and (f)). The Authority exercised its power to allow Northland Transport to provide oral evidence at hearing despite non-compliance with timetabling orders.

[12] There are two issues which arise in this investigation. They are:

- a. Was Mr Tebbutt made redundant?
- b. If yes, what remedies are available to him?

Legal framework

[13] There is a substantial conflict of evidence between the parties. This requires express findings of credibility upon evidence given by brief and orally at hearing.

[14] Credibility can be assessed upon two bases – the witness personally, and the story the witness tells. Relevant factors to personal credibility are inconsistencies and contradictions; prevarication; motivation to lie; concessions made where due, despite risk to the witnesses own credibility in giving that evidence.

[15] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?

[16] The Authority may draw inferences and fill gaps in evidence by application of commonsense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation. Bearing this framework in mind, the Authority turns to consider the matter before it.

Issue 1: Was Mr Tebbutt made redundant?

[17] The Authority determines Mr Tebbutt was made redundant. This is because:

- a. Redundancy is defined as termination “... *attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer*” and can include having more staff in an organization than is necessary.³
- b. Client F suspended Mr Tebbutt from working on its site. This meant Mr Tebbutt lost most of his work.
- c. Another employee had been hired by Northland Transport in or about June/July 2012 to cover work Mr Tebbutt had been doing. Mr Tebbutt was superfluous unless other work was available. There is a dispute whether additional work was available at all given other staff were covering this at the time.
- d. The new employee’s employment was terminated a few months later due to insufficient work. This evidence indicates there would have been no work available to Mr Tebbutt in June/July 2012.
- e. Mr Tebbutt accepted he was on holiday because there was no further work available to him. Mr Weatherup accepted he was paying Mr Tebbutt holiday pay. There was no logical reason to pay Mr Tebbutt holiday pay if work had been available.
- f. Mr Tebbutt was never advised his contract had been terminated, either through absence from work or otherwise nor was he required to attend work.

³ Per Cooke P in *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA) at 155, 848.

[18] Taking into account all of the above matters, the Authority determines Mr Tebbutt was made redundant and is entitled to redundancy compensation. Given the agreement Mr Tebbutt was to take holidays, his last day of work would have been the date he received his last holiday pay being 9 July 2012.

Issue 2: What remedies are payable to Mr Tebbutt?

[19] Given the above determination, the Authority determines Northland Transport shall pay to Mr Tebbutt the sum of \$3,920 being wage arrears (redundancy compensation) pursuant to section 131 of the Act.

[20] There is also outstanding holiday pay owed of \$313.62.⁴

[21] There shall be an order for interest on the judgment sums set out above at the rate of 5% per annum calculated from 9 July 2012 until payment (clause 11, Schedule 2 of the Act).

[22] Mr Tebbutt seeks reasonable costs. He has been successful and is entitled to an order for costs. Northland Transport was given an opportunity to make submissions in reply. No further submissions were made.

[23] The Authority has a notional daily costs tariff of \$3,500. This hearing took ½ a day. He is also entitled to reasonable disbursements including his filing fee.

[24] An order for the respondent to pay \$1,750 in costs and to reimburse the applicant's filing fee in the Authority of \$71.56 is made (clause 15, Schedule 2 of the Act).

T G Tetitaha
Member of the Employment Relations Authority

⁴ There are no holiday and wage records produced. It is estimated Mr Tebbutt is owed a further two-thirds of a week pay. This equates to \$313.62.