

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 413
5316058

BETWEEN ROBERT LESLIE VILJOEN
Applicant

AND BARRY WILLIAMS t/a BAZ'S
PRIVATE HIRE
Respondent

Member of Authority: K J Anderson

Representatives: Mark Nutsford, Advocate for Applicant
Barry Williams, In Person

Investigation Meeting: 23 June 2011 at Hamilton

Interview with the
Respondent: 8 September 2011

Determination: 20 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Viljoen, claims that he was unjustifiably dismissed, on the ground of redundancy, effective from 15th October 2009. He asks the Authority to find that he has a personal grievance and award him the remedies of 3 months' loss of wages and compensation of \$8500. Mr Viljoen also claims that he was not paid holiday pay for the period of 5 years that he worked for Mr Williams.

Background facts and evidence

[2] At the material times relating to the claims of Mr Viljoen, Mr Williams operated a service conveying children to and from the Tirohia School for five days each week during the school terms. The children were transported in a 10 seat Toyota van (9 seats plus the driver) with two runs in the morning and two at the end of the

school day. Mr Viljoen drove the van in the morning and afternoon each school day and that was largely the extent of his employment with Mr Williams. It appears to be commonly accepted that Mr Viljoen drove the school runs for approximately 5 years. Mr Williams says that Mr Viljoen was employed on a casual basis, but I find that the nature of the employment was effectively part-time employment, albeit Mr Viljoen was not employed during the school holidays; and it appears that he may have done some casual driving in regard to airport transfers and some other driving as and when available. Mr Viljoen told the Authority that he was initially paid \$80 in cash each week and this was increased to \$100 per week.

[3] It appears that the arrangement between the two men was mutually satisfactory until some time in September 2009, when Mr Williams informed Mr Viljoen that the school run might have to close down because 7 of the 18 children using the service would be going to college in 2010. Mr Williams was of the view that there would not be enough children to make it worth continuing with the service. Mr Williams indicated that Mr Viljoen should see if he could secure a driving job with another business; Paeroa Taxis. But Mr Viljoen informed that he would not do that until a final decision was made to cease the school run. Mr Viljoen says that he asked Mr Williams to give him “plenty of notice” prior to the Christmas holiday break. Mr Williams says that “*about a month later*” Mr Viljoen told him that he had had a discussion with the owner of Paeroa Taxis at the local tavern and: “... *his words were that she had a spare 13 seater van and that he could start on Monday. At this point I said take it and wished him luck.*” However, a written statement provided by the owner/operator of Paeroa Taxis (Ms Keri Lane) informs that Mr Viljoen commenced employment with that business “*on a very casual basis*” on 4th December 2009.

[4] On Friday, 16th October 2009, Mr Viljoen did not work as he attended a wedding. On Sunday, 18th October, there was a telephone conversation between Mr Viljoen and Mr Williams. Mr Viljoen says that he indicated that would see Mr Williams the next day, but was informed that he should not come to work on Monday, 19th October, as Mr Williams was going use a bigger bus that he owned and hence reduce the school run to one trip in the morning and afternoon, rather than the two trips that were the current practice with the van. Mr Viljoen says that Mr Williams told him he would see how that works out and “*we will leave it like that for now.*” Mr Viljoen then enquired of Mr Williams: “*Are you trying to tell me that I am finished*

up?” Apparently, there was some further discussion about Mr Viljoen going to work for Paeroa Taxis but the evidence about this is inconclusive.

[5] The evidence of Mr Viljoen is that on 19th October 2009, he received a phone call from a parent of one of the children. She indicated that she had become aware that Mr Viljoen was leaving and that she had obtained this information from a notice from Mr Williams (Baz’s Private Hire), dated 16th October 2009, as distributed to the parents and caregivers of children using the school run service. The notice states:

Dear Parents & Caregivers,
We hope all children have had a good holiday & are ready for term four the end of 2009. As of Monday 19th October there will be a slight change of pick-up’s. I’m sorry that I can’t tell you how it’s going to work till then, so may all the children be ready for school by 8:00am.

It is with great regret that we say goodbye to Bob, but wish him all the best for the future.

Thanking You
Baz & Nina

[6] It seems that there was no further discussion between the two men and Mr Viljoen did not drive again for Mr Williams, hence his last day of work for Mr Williams was 15th October 2009.

Analysis and Conclusions

[7] Mr Viljoen accepts that because of the reduction in the number of children that would require the school bus service in 2010, Mr Williams was entitled to make a change to how he run his business accordingly, including using a different vehicle and Mr Williams doing his own driving. However, Mr Viljoen says that he was not treated fairly and reasonably in regard to the manner in which his part-time position was terminated. I accept that this is so.

[8] I find that it is more probable than not that the loss of Mr Viljoen’s employment was on the grounds of a genuine redundancy due to the forthcoming reduction in the number of children requiring the school run service, and the decision by Mr Williams to use a bigger bus and do the driving himself. I also conclude that given the conversations that took place between the two men, it would not have come as a surprise to Mr Viljoen that his part-time employment was going to come to an

end. However, I accept that Mr Viljoen understood this would not happen until the end of the last school term for 2009. It then seems that Mr Williams concluded that he would use the bigger bus as a replacement for the van, beginning from 19th October 2009. But he did not discuss this with Mr Viljoen, and he only became aware of this by chance during the phone discussion with Mr Williams the day before.

[9] I find that the manner in which the termination of the part-time employment of Mr Viljoen occurred was not what a fair and reasonable employer would have done in all the circumstances.¹ While Mr Williams says that because Mr Viljoen was a “casual” employee, notice of the termination of his employment was not required. But I find that this is not so and despite the relative informality of the arrangement that existed; Mr Viljoen was entitled to fair and reasonable notice of the loss of his employment. Furthermore, the circulation of a notice to users of the school run service notifying of the departure of Mr Viljoen, before it had been confirmed with him, was most unreasonable and I suspect it was this that particularly upset Mr Viljoen. Because of the lack of notice to Mr Viljoen and the sudden manner of the termination of his employment I cannot help but find that his dismissal was unjustified and he has a personal grievance.

Remedies

[10] As I have found that Mr Viljoen has a personal grievance I am obliged to determine the remedies that may be available to him under section 123 of the Employment Relations Act. This section of the Act provides firstly, that there is a remedy available for:

the reimbursement to the employee of a sum equal to the whole or any part of the wages or any money lost as a result of the grievance. [s.123(1)(b)]

Mr Viljoen claims for loss of wages for 3 months but the school year finished on Friday 18th December 2009 and it is commonly accepted that Mr Viljoen’s employment would not have survived beyond that point in any event, hence the maximum claim that can be entertained is for nine weeks loss of wages. And then given that the redundancy of Mr Viljoen’s position was genuine, then it was appropriate for his employment to be terminated on reasonable notice. Given that Mr Viljoen was very dependant upon the income that he received from his driving duties,

¹ Pursuant to section 103A of the Employment Relations Act 2000.

and given the overall circumstances, it seems to me that fair and reasonable notice to Mr Viljoen would have been four weeks. Therefore, that is the extent of the wages that can be awarded and Mr Williams is ordered to pay to Mr Viljoen the net sum of \$400 (\$100 per week x 4).

[11] Then at section 123(1)(c)(i) of the Act it is provided that a remedy available to an employee with a proven personal grievance is:

the payment to the employee of compensation by the employee's employer, including compensation for-
humiliation, loss of dignity, and injury to feelings of the employee ...

Mr Viljoen gave some evidence of the affect of the sudden loss of his employment, mainly related to the loss of income. It was also clearly humiliating to him to discover that he was no longer employed via the notice that was sent to parents of the children that used the school run service. I also must take into account the small scale of Mr William's business and he has told me that he now only uses a car to take children to school. In the round I conclude that an award of \$500 is appropriate.

The holiday pay claim

[12] Mr Viljoen has not produced any detailed evidence of his earnings over the period of five years that he claims holiday pay for. It is also clear that he entered into an arrangement whereby he was paid cash in the hand for his role as a driver and that he did not pay any tax. I cannot help but conclude that Mr Viljoen accepted the cash rate of pay as an all inclusive rate and given the lack of any material evidence to the contrary, I decline his claim for holiday pay.

Costs

[13] I was informed by Mr Nutsford that the total costs incurred by Mr Viljoen are approximately \$2,700. Regrettably, there are some claims that, while appearing to be sound in principle, require an applicant to seriously consider whether the remedies that may be achieved will justify the costs of obtaining them, particularly when the nature of the business of the respondent is taken into account. Unfortunately for Mr Viljoen, this is such a case and regrettably he will end up out-of-pocket, so to speak. The investigation meeting was of very short duration and required very little preparation, and I accept that Mr Nutsford took an economical approach. The usual practice of the Authority is to apply a daily tariff relating to awarding costs; usually

\$3,000 a day. Applied to the circumstances pertaining to this matter, I conclude that an award of costs in the sum of \$750 is appropriate.

Summary of Orders

[14] For the reasons set out above, Mr Barry Williams is ordered to pay to Mr Robert Viljoen the following:

- (a) Payment of four weeks' notice in the net sum of \$400.00.
- (b) Payment of \$500.00 (net) as compensation for humiliation, loss of dignity and injury to feelings.
- (c) As a contribution to the costs incurred by Mr Viljoen, the sum of \$750.00

K J Anderson
Member of the Employment Relations Authority