

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 6/09  
5110754

BETWEEN                      STEPHEN WHITEHEAD  
   Applicant  
  
AND                                METALLIC SWEEPING  
   (1998) LIMITED  
   Respondent

Member of Authority:        Yvonne Oldfield  
  
Representatives:              Tony Beach for Applicant  
   Tim McGinn for Respondent  
  
Investigation Meeting and    7 November 2008  
Submissions:  
  
Determination:                9 January 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     This employment relationship problem concerns an allegation of constructive dismissal. The applicant, Mr Whitehead, was employed by the respondent (the company) to operate a specialised vehicle used for civic cleaning including the sweeping of roads and footpaths. Mr Whitehead resigned his employment on 9 July 2007 at the start of a meeting called by his employer to discuss purported concerns with his performance. He says he did so in anticipation that the respondent intended to dismiss him and to avoid the stigma of dismissal.

[2]     Mr Whitehead says that any performance issues arose as a result of problems with the sweeper truck and that the company had failed to address concerns he had previously raised about the state of the truck. From his point of view it was therefore unfair for the company to call him to a disciplinary meeting at all. He also notes that on the same day that he was notified of the meeting, his supervisor collected the truck from him and (so he understood at the time) used another driver to operate it in Mr

Whitehead's area. To Mr Whitehead, this indicated that the company was setting out on a sham investigation and had predetermined to dismiss him.

[3] In submissions for Mr Whitehead, Mr Beach says that the company breached the following implied terms:

- i. that it would not, without reasonable and proper cause, conduct itself in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, and
- ii. That it would provide a safe workplace (including a safe vehicle.)

[4] Mr Beach says that the breaches were sufficiently serious to make it reasonably foreseeable that Mr Whitehead would resign. In the alternative, he argues that the company effectively gave Mr Whitehead a choice between resigning and being dismissed and/or followed a course of conduct with the deliberate and dominant purpose of coercing Mr Whitehead to resign. Either way it is submitted for Mr Whitehead that the company initiated the ending of Mr Whitehead's employment.

[5] The company denies a constructive dismissal. It says that at the time of the events in question, it was falling behind on its contractual obligations in relation to the area for which Mr Whitehead was responsible and had received complaints from the principal contractor. It says Mr Whitehead did not properly inform the company of his concerns about the state of the truck and there was no reason, at that stage, to think that this was the cause of the problems in meeting the company's contractual obligations. It arranged to meet with Mr Whitehead to discuss any relevant issues but did not have a chance to hear from Mr Whitehead or to consider his concerns about the vehicle because he resigned at the very start of the meeting.

[6] Mr Whitehead lost three weeks wages (\$1,680.00) before finding other work. He seeks reimbursement of this sum along with \$7,500.00 compensation for hurt and humiliation. Mr Whitehead also makes a separate claim for losses arising out of the

sale of a motorbike which was undertaken to meet a shortfall in cash flow while he was looking for another job.

## **Issues**

[7] The issues for determination are:

- i. whether there has been a breach or breaches of duty on the part of the company of sufficient seriousness to make it reasonably foreseeable that the applicant would not be prepared to continue to work for the company;
- ii. whether the applicant was effectively given a choice between resigning or being dismissed, and
- iii. whether the company followed a course of conduct with the deliberate and dominant purpose of coercing Mr Whitehead to resign.

[8] If one or more of these questions are answered in Mr Whitehead's favour the issue of remedies will then fall to be determined.

### **(i) Breaches of duty**

[9] Mr Whitehead was employed by the company in December 2006 to work as a sweeper driver in a defined geographical area, with responsibility for supervising one labourer. Mr Whitehead reported to Operations Manager Merv Ferguson, who was based outside Auckland and managed the company's sweeper drivers throughout the country.

[10] The first few months of Mr Whitehead's employment passed without problems from the company's point of view but by June 2007 it had become concerned that his productivity and quality of work had dropped off and that the company was not meeting its contractual obligations in respect of the area he and his truck serviced. Shortly before this Mr Whitehead had put in a request for a rise in his

hourly rate (which sat at \$14.00.) This request had been declined and Mr Ferguson suspected that Mr Whitehead's performance dropped because he did not get the pay rise he sought.

[11] From his side, Mr Whitehead says that at that time he was experiencing problem after problem with the truck, which frequently broke down and required regular repairs. He said that he was told that a new truck was planned and was very disheartened when, by June, it had not yet eventuated. He acknowledged however that he had not told Mr Ferguson how "fed up" he felt.

[12] Mr Whitehead also believed that there was a health and safety issue with the truck in that the sprinkler (designed to keep dust down) was broken. This meant that he had to keep the windows up if he did not want to breathe dusty air. Otherwise he identified no specific safety concerns with the truck, which received a certificate of fitness on 30 May 2007.

[13] The respondent company operates 18-20 sweeper trucks throughout the country. I was told that they are all high maintenance units, with monthly maintenance costs averaging \$2,740.00 per truck. The level of repair work required on the sweeper truck operated by Mr Whitehead was comparable to this figure.

[14] In early to mid June Mr Clive Peter, managing director of the company, received calls from the principal contractor saying that work in Mr Whitehead's area had not been completed on time or to a satisfactory standard. Mr Peter decided to tackle these issues and the issue of Mr Whitehead's pay in a letter dated 15 June 2007 and headed "additional income." In it he noted that "*we are concerned that you are not working the actual hours recorded on your timesheet as the level of productivity from you seems to be low*" and that Mr Whitehead had told the principal contractor that his sweeper truck was not operationally sound. He instructed Mr Whitehead to bring any problems with the truck to Mr Ferguson's attention and to obtain Mr Ferguson's authority for any repairs needed.

[15] Mr Peter also noted in this letter that Mr Whitehead had an opportunity to increase his income by attending to the sweeping of intersections as an extra and encouraged him to take advantage of this. The letter concluded with:

*“your hourly rate will be reviewed when we can see that you are displaying initiative and that you are completing all that is required of you.”*

[16] Mr Whitehead told me he was concerned to receive this letter but made no response to it. On 4 July, following another complaint from the principal contractor, Mr Peters prepared a further letter for Mr Whitehead. He said that this letter was not intended as a formal warning but was intended to put Mr Whitehead on notice of the seriousness of the situation. However, Mr Whitehead says that he never received that letter and had no knowledge of it until after his employment had already ended. Mr Peters has accepted that he did not check and does not know whether the letter reached Mr Whitehead. Because this letter was not a factor in Mr Whitehead’s decision to resign I make no further comment about it.

[17] Meanwhile, during routine invoice checking the office administrator had uncovered indications that some weeks earlier, Mr Whitehead had submitted a full eight hour timesheet for a day when he had not worked. Sometime between 4 July and 6 July she took these concerns to Mr Peter who decided as a result that the time had come to conduct a formal disciplinary meeting to address all his concerns. On Friday 6 July he wrote to Mr Whitehead calling him to a meeting on Monday 9 July and advising him that his explanations would be sought for a range of issues including telling the principal contractor that the truck was broken when it was not, missing a meeting with the principal contractor, filling in timesheets incorrectly, low productivity, and failing to comply with work requests made by the principal contractor.

[18] As already noted, Mr Whitehead felt that it was unfair for him to be blamed for productivity losses which he believed arose because of the malfunction of the truck. He also considered the allegation about timesheets to be completely without foundation.

[19] In my meeting with the parties, it became clear that there was a major disagreement between Mr Whitehead and Mr Peter about what hours Mr Whitehead could and could not claim as worked. Mr Peter’s understanding of the terms of employment (pursuant to the parties’ written contract) was as follows. When the truck was off the road for whatever reason, Mr Whitehead was expected to complete

alternative duties (if available) or (if not) to take time off without pay. Mr Whitehead, on the other hand, believed he was entitled to 40 hours pay regardless of whether work was available. He was completely open about having always entered this in full on his timesheet even if the truck was off the road and he had gone home. Unfortunately, this difference in understanding about the terms of employment was not identified or discussed during the employment.

[20] Usually Mr Whitehead had the sweeper truck seven days a week and would normally do some scheduled cleaning over the weekend. On Friday 6 July, however, Mr Ferguson picked up the truck and took it away. Mr Ferguson told me that he spent the weekend working personally on the truck to remedy the concerns the principal contractor had raised. Mr Peter told me that Mr Ferguson was by far the quickest and most efficient sweeper truck operator and could do in two days what took most other staff a week to complete.

[21] Over the weekend, a friend of Mr Whitehead's called him and said that he had seen someone else driving his truck. Mr Whitehead told me that on hearing this he jumped to the conclusion that he had been replaced. He already felt that the letter of 6 July was unfair; now he felt that his dismissal was inevitable. He decided to pre-empt any attempts to dismiss him by resigning at the very start of the meeting of 6 July, and did so.

[22] Mr Whitehead was further shocked to learn, within a few weeks of leaving the company, that it had advertised for a sweeper driver on 4 July. Although, like the contents of the letter of 4 July, this was not known to him at the time of his resignation, he says it is further support for the contention that the company had already decided to dismiss him.

[23] Mr Peters disputes this, saying that the company did not want to lose Mr Whitehead and his sudden departure caused it great difficulties. He said that the company had needed to act to address the principal contractor's concerns or risk losing its business. It says it proposed to tackle the problems by running a second shift on the sweeper (additional to Mr Whitehead's shift) and so catch up on the work to be done. It says this was why it advertised for a sweeper driver in July 2007. In any event, Mr Peters and Mr Ferguson told me, the advertisement did not bear fruit. After

Mr Whitehead left a replacement was eventually found by word of mouth. In addition, Mr Ferguson spent a month in Auckland so that a double shift could be run on the sweeper truck and the backlog cleared.

[24] Mr Whitehead now accepts Mr Ferguson's assertion that it was him driving the truck. He told me that if he had known this at the time he would not have resigned.

### **Determination**

[25] In submissions the company argued that given the seriousness of its concerns regarding his timesheets and given the complaints from the principal contractor it was reasonable for the company to seek to convene a disciplinary meeting with Mr Whitehead. It also says that the performance issues were put to him in a reasonable way.

[26] The respondent argues that Mr Whitehead's resignation prevented it from conducting an investigation of all the issues between the parties. The company says that Mr Whitehead never set out his concerns about the state of repair of the sweeper truck, or its safety, and should have (rather than discussing them with the principal contractor.) It says it was incumbent on him to put these matters forward by way of explanation of the performance issues.

[27] I accept these submissions. The company's concerns were not insignificant. It was reasonable for Mr Peter to seek to meet with Mr Whitehead to discuss them, hear from him and consider his response. As it has since turned out, Mr Whitehead had several things to say which might have influenced the outcome of the meeting in his favour. Unfortunately, he did not take up the opportunity to respond and consequently, it is not possible to say what the result would have been if he had.

[28] I find no breach of duty by the employer associated with the fact that it summoned Mr Whitehead to a disciplinary meeting.

[29] As for the truck, it had a current certificate of fitness at the time the employment ended and the evidence does not indicate that it was in a worse state than the rest of the company's fleet. Any harm to Mr Whitehead was limited to the

discomfort of having to have the truck windows up during the day, and he never told anyone about this. I cannot find that this amounted to a failure to provide a safe and healthy workplace.

[30] In short, no breach of duty by the employer, serious or otherwise, has been established.

**(ii) Was the applicant effectively given a choice between resigning and being dismissed?**

[31] This issue turns on whether (at the time of resignation) the company had already determined that Mr Whitehead would be dismissed, and conveyed as much to Mr Whitehead.

[32] Mr Whitehead has explained that the principal cause of his belief that his dismissal was predetermined was the report that someone else had been seen driving the sweeper truck. Although he subsequently heard that a job had been advertised, this was not known by him prior to his resignation and did not form any part of the basis of his decision.

[33] It has now been established that it was Mr Ferguson driving the truck. This leaves insufficient evidence to support a conclusion that the dismissal was predetermined, or that this was conveyed to Mr Whitehead. It cannot therefore be said that he was given a choice between resigning and being dismissed.

**(iii) Did the company follow a course of conduct with the deliberate and dominant purpose of coercing Mr Whitehead to resign?**

[34] I accept Mr Peter's evidence that at the time in question (mid 2007) it was not proving easy for the company to find staff, and that the company did not want to lose Mr Whitehead. I conclude rather that it simply wanted the problems in his area resolved so that it did not lose its contract.

[35] There is no other evidence to support the submission that the company engaged in a course of conduct with the deliberate and dominant purpose of coercing Mr Whitehead to resign. It has not therefore been established that it did so.

### **Summary**

[36] Mr Whitehead has not shown that he was constructively dismissed in any of the three ways alleged. He has not made out a personal grievance. I can do nothing more to assist with his employment relationship problem.

### **Costs**

[37] This issue is reserved. In the event the parties cannot resolve it between themselves, they have a period of 28 days in which to make submissions in relation to costs.

Yvonne Oldfield

Member of the Employment Relations Authority