

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 146
3059453

BETWEEN

THOMAS WILLIAMS
Applicant

AND

METALLIC SWEEPING (1998)
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Robert Morgan, advocate for the Applicant
Tim McGinn, counsel for the Respondent

Investigation Meeting: 21 January 2021 at Timaru

Information Received: 10 February 2021 from the Applicant
27 January 2021 from the Respondent

Date of Determination: 14 April 2021

DETERMINATION OF THE AUTHORITY

A. The claims are dismissed.

B. I reserve costs, subject to the timetable set for submissions.

Employment relationship problem

[1] Thomas Williams worked as a driver for Metallic Sweeping (1998) Limited from November 2018 until his employment ended in March 2019.

[2] On 14 March Mr Williams was at morning smoko with other workers. His direct manager (Mr Mason, known as “JJ”) arrived. JJ had an exchange with Mr Williams. What Mr Williams then said is disputed, but it is common ground that Mr Williams left the work truck and went home. Mr Williams later communicated his intention to return to work to JJ and then to the managing director (Clive Peter). However, Mr Peter first required to meet with Mr Williams. After the meeting, in his letter dated 20 March to Mr Williams, Mr Peter concluded that Mr Williams had resigned without notice and declined to allow Mr Williams to withdraw his resignation. Mr Williams was asked to return any company property so that his final pay could be processed.

[3] Metallic Sweeping withheld Mr Williams’ final wages. By his representative’s letter of 22 March, Mr Williams raised personal grievances, arising from the incident on 14 March incident. The representative also required the wages to be paid. In response, counsel for the company confirmed that wages would be paid. A payment was made to Mr Williams on 5 April.

[4] Mr Williams’ statement of problem was lodged in April 2020. He says he was unjustifiably dismissed on or about 20 March 2019. Lost wages and compensation are claimed. Mr Williams also claims arrears of wages and holiday pay, and a penalty for “failure to pay wage arrears”. Costs are sought.

[5] Metallic Sweeping says that Mr Williams resigned without notice. In any event, the company says that Mr Williams’ actions would have amounted to serious misconduct justifying summary dismissal. It also says that the employment agreement permitted a deduction because Mr Williams resigned without notice, but it paid all wages and holiday pay before the statement of problem was lodged.

[6] Despite mediation, these problems were not resolved. This determination resolves Mr Williams’ personal grievance, arrears and penalty claims. The issues are:

- (a) Did Mr Williams resign on 14 March?
- (b) Does Mr Williams have a personal grievance?
- (c) If so, what remedies is Mr Williams entitled to?

- (d) Are there any arrears?
- (e) Is Metallic Sweeping liable for a penalty?

Did Mr Williams resign on 14 March?

[7] On 14 March workers assembled at a location in Hayes Street for a morning smoko break, as usual. Mr Williams was doing rubbish collections and drove the truck to smoko. Several other workers attended.

[8] George Morrison (“Mick”) worked for the company as a driver and more recently worked casually as a fill-in driver and a driver-trainer. On 14 March he was doing some training at the company yard. Mick and JJ arrived at the smoko location. A worker called Phil was driving the recycling truck and a worker called Dion was sorting the recycling. Dion, Phil and Mr Williams were there when Mick and JJ arrived.

[9] Mr Williams’ evidence is that JJ “starts to give me a hard time about my performance...telling me that I was useless and that I needed to make sure I was back at the depot by 5.00pm”. Mr Williams says that this was said “really loud so all the other guys could hear it”. The 22 March letter stated that “J[JJ] arrived and in front of the other staff started to tell [Mr Williams] that he was taking too long and that he needed to ensure he was back at the depot by 5.00pm”. The statement of problem says that JJ “turned up and in-front of the other staff aggressively to [Mr Williams] that he was taking too long on the job and he needed to be back to the depot by 5.00pm”.

[10] I do not accept Mr Williams’ evidence that JJ told him he was “useless”. If that had been said, it is likely to have been included in the 22 March letter and the statement of problem. Mr Williams in responding to my questions did not include that assertion as part of his description of what JJ had said. When questioned by counsel, Mr Williams accepted that JJ had not said this. He said that it was an “inference”, when pressed about his evidence in chief. However, his evidence in chief was not that JJ implied that Mr Williams was “useless”. This inconsistency in evidence causes me to treat Mr Williams’ evidence with caution.

[11] Mr Williams' statement of evidence is that "[JJ] turns up. [JJ] starts to give me a hard time...". In response to my questions, Mr Williams said that JJ was talking to "all of us, Mick said something, [JJ] told Mick to shut up, then he started on me". However, Mr Morrison (Mick) in his evidence does not corroborate that account.

[12] The company position is that JJ called a team meeting with drivers to discuss areas of job performance where he addressed concerns to individual drivers. JJ commented on Mr Williams' performance productivity saying he was taking too long to complete the jobs. Mr Morrison's evidence is that smoko was a time when JJ would "pass on feedback and complaints about bins... [a]nd to remind guys of the timetable for the routes". He also says in evidence "As Tom [Williams] was a slow operator there is a good chance this would also come up". Mr Morrison properly introduces his evidence by saying that he cannot specifically remember what JJ brought up with Mr Williams. I formed the view that Mr Morrison was careful to ensure his evidence reflected his genuine recollection.

[13] The picture that emerges is that JJ spoke to other staff and Mr Williams as a matter of routine about meeting the timetable for the rubbish and recycling collection. It is unlikely that JJ would have told Mr Morrison to "shut up". Mr Williams took offence at being told that he needed to make sure his route was finished for him to be back at the depot by 5.00pm. He considered that JJ was criticising him. He also took offence at this being said in front of others. It was not a factor at the time, but Mr Williams now makes the point that the break was his own time. More significantly, Mr Williams thought that JJ, as a new, young manager, wanted to "be the man, and impress the boss". He and JJ did not see "eye to eye". That sets the context for what was said next.

[14] Mr Williams' evidence is that he was getting frustrated so he got up and went to the cab of the truck. He says that JJ followed him. He said to JJ he should get someone else to drive the truck or do it himself. Mr Williams says he grabbed his bag out of the truck, "Then the other guys came over and started shaking his hand". He wondered if it had been "a bit of a set up" and he walked home. A similar account is given in the 22 March letter and the statement of problem.

[15] In response to my questions, Mr Williams said that JJ told him it was not good enough and he had to do better. That was in response to Mr Williams saying he was on time and doing well. Mr Williams was "really upset" and said "I'm outta here, not listening to this!"

Mr Williams also said in evidence that he stated “The way things are going, I might as well quit.” He then went and got his bag out of the truck, ate his sandwich but did not say anything to anyone else after getting his bag. Mr Williams says “I was listening to JJ. The boys came over to shake my hand. I thought something was going on there so I walked away”.

[16] In response to counsel’s questions, Mr Williams repeated his evidence that he had said “I may as well quit”. He reinforced it was a “may”. Mr Williams in later exchanges with the company¹ specifically denied saying “That’s fine, I quit”. He declined to explain what he had said.

[17] The same day as the incident, Mr Morrison signed a statement² confirming that Mr Williams had said “That’s fine, I quit.” That is also his evidence. I prefer this evidence to Mr Williams’ evidence on this point. There is no reason to think that Mr Morrison would have been forced to sign something he did not agree with. Mr Williams’ account changed when questioned. If he had said “I may as well quit”, one might expect him to have given that explanation on 19 March or even earlier.

[18] I find that the account confirmed by Mr Morrison on 14 March and supported in his evidence is what was said. Mr Williams told JJ “That’s fine, I quit”. He said “I will leave the truck here and I will walk.” JJ asked “Is that how you feel”. Mr Williams said “It suits me better.” Mr Williams went and collected his bag out of the truck. He came back to where the others were and shook everyone’s hand. Mr Morrison confirmed in evidence that Mr Williams initiated this gesture. Mr Williams then walked off. The time was approximately 8.35am.

[19] I find by these words and actions³, Mr Williams unambiguously resigned.

Does Mr Williams have a personal grievance?

[20] I set out events that followed.

¹ I refer to Mr Peter’s handwritten notes and his 20 March letter.

² JJ typed out an account of the incident. It was signed as correct by three staff (including Mr Morrison).

³ Mr Williams commuted to and from work in the company truck. Having resigned, he left the truck and walked home.

[21] Mr Williams sent txt messages to JJ. There is an undelivered message timed at 9.36am and a delivered message at 9.40am. This was an hour or so after the smoko incident. The delivered message reads:

Hi Jay. I needed a bit of time away. Just off to carry on my shift. Just like to ask that any personal matters is not discussed in front of the other staff.
Thanks Tom

[22] JJ responded:

Sorry Tom but in front of 3 witnesses, you told me you quit and walked off so I have had to make alternative arrangements to insure our contract is fulfilled.

[23] Mr Williams then sent a txt message timed at 10.03am to Mr Peter:

Hi Clive. Tom Williams here. I HAVNT resigned. Just needed time out. I am able and willing to work. I will be back for my shift tomorrow morning.
Thanks Tom

[24] Mr Williams also says he and JJ spoke by phone. Mr Williams was not able to provide a call record to confirm the fact and time of the call. There is no evidence that anything was said that would cast events in a different light.

[25] At 2.53pm JJ sent an email to Mr Peter. Attached was JJ's typed account of events from the morning, signed by the three staff. Mr Peter decided he should meet with Mr Williams to investigate what had happened. He arranged for JJ to deliver a letter to Mr Williams at home on 14 March. The letter under the heading "NOTICE OF DISCIPLINARY MEETING" referred to JJ's account being attached. It set a meeting for 18 March to discuss four questions: whether Mr Williams had resigned without notice; whether the company should agree to Mr Williams withdrawing that resignation; whether Mr Williams had abandoned his employment; or whether Mr Williams walked off the job which might amount to serious misconduct.

[26] Mr Peter made notes of the 18 March meeting. There is no reason to doubt their accuracy. In summary, Mr Williams wanted to proceed, even though he did not have a support person present. Mr Williams said he did not resign. He would only answer the questions in the letter and declined to explain what he meant by saying "I quit". It was apparent that Mr Williams had not received JJ's account with the 14 March letter. Mr Peter suggested adjourning the meeting for Mr Williams to review the attachment. The meeting ended, with Mr Peter to write with a new time for the following day. On 18 March Mr Peter wrote and rescheduled the meeting for 19 March.

[27] Mr Peter made notes of the 19 March meeting. Mr Peter also set out an account of the meeting in his 20 March letter. Mr Williams in evidence specifically disputed parts of the notes and account. However, that does not cause me to doubt that the notes and account, supported in evidence by Mr Peter, correctly record events. I will outline what happened. Mr Williams confirmed that he wanted to continue, without a support person. He denied saying he “quit”. Mr Peter asked Mr Williams what he did say. Mr Williams said he did not want to talk “about that”. Mr Peter asked if Mr Williams was saying that the three staff witnesses were mistaken or lying? Mr Williams said he had no view on that. Mr Peter asked what caused Mr Williams to walk off. Mr Williams said he was upset. Mr Peter asked “What with?” Mr Williams said he would “not go there”. Mr Peter asked if JJ had asked “Is that how you feel?” Mr Williams said he vaguely recalled that. Mr Peter asked why JJ would asked that. Mr Williams said he could not remember. Mr Peter asked why Mr Williams left the truck on the road and walked off. Mr Williams said that those were Mr Peter’s words, not his. Mr Peter said it was Mr Williams’ opportunity to explain the circumstances of the resignation. Mr Williams said “Fuck the opportunity!” Mr Peter explained he needed to decide on the facts and was giving Mr Williams the opportunity to put his side. Mr Williams said he was not willing to discuss that. Mr Williams said “Clive, you are nothing, you are nothing”. Mr Peter repeated it was Mr Williams’ opportunity to put his side but Mr Williams again said “You are nothing”. The meeting ended, with Mr Peter saying he would make a decision on the evidence available.

[28] In the letter dated 20 March Mr Peter confirmed his view that Mr Williams had resigned without notice. Mr Peter also stated that he could not see any reason to allow Mr Williams to withdraw his resignation. He also expressed the view that, but for the resignation, Mr Williams would have been dismissed for serious misconduct for walking off the job.

[29] The employment agreement permitted either party to terminate the agreement on two weeks’ notice in writing. Mr Williams did not comply with that requirement. However, his words and actions on 14 March were unambiguous. He resigned, with immediate effect. The circumstances fall within the first type of case mentioned in *Boobyer v Good Health Wanganui Limited*:⁴

⁴ *Boobyer v Good Health Wanganui Limited* WEC 3/94, 24 February 1994, WEC 3/94 (Employment Court).

First there are the cases where the employee gives an unambiguous resignation and later seeks to resolve from it. In such a case, of which *NZ Labourers IUOW v Hodder & Tolley Ltd* [1989] 1 NZILR 430 is an instance, the resignation cannot be withdrawn without the employer's consent, at any rate where there has been no breach of duty by the employer giving rise to the reactive resignation amounting to a constructive dismissal.

[30] The case for Mr Williams is that his words and actions were part of a reaction, in the heat of the moment, to criticism. Mr Williams promptly made it clear that he did not intend to resign. However, this was not a case of an employer seizing upon ambiguous words not intended to amount to a resignation. The use of the smoko break by JJ was not a breach of duty by the employer giving rise to a reactive resignation amounting to a constructive dismissal. Mr Williams' unambiguous resignation could only be rescinded with his employer's consent. Mr Peter gave an opportunity for Mr Williams to explain why he had resigned. Mr Williams was not responsive and communicative with a view to re-establishing and maintaining the employment relationship.

[31] Mr Williams' case differs materially from *Taylor Milburn Lime Ltd*.⁵ There, the employee's words and actions were not sufficiently clear to constitute an unequivocal resignation or repudiation.

[32] No personal grievance arises from the events on and after 14 March 2019.

[33] As there is no personal grievance, I need not consider remedies.

Are there any arrears?

[34] Wages were paid fortnightly by direct credit. Wages for the period ending 3 March 2019 were paid on 5 March. The payslip for the period ending 17 March shows wages for time worked, less annual leave taken in advance, plus holiday pay (8% of gross earnings since Mr Williams last became entitled to annual holidays), less PAYE, less student loan repayment, less 85 hours (\$1,508.75 gross) for "Short notice of Resignation". These came to a negative balance, so Mr Williams received no final wages.

[35] Mr Williams sent a txt to Mr Peter on 20 & 21 March saying that he had not been paid. Mr Williams' representative raised the issue in the 22 March letter. At some point,

⁵ *Taylor Milburn Lime Ltd* [2011] NZEmpC 164.

Mr Williams received the 17 March payslip showing the deduction. The representative's letter of 1 April asked that Mr Williams be paid wages due by 9 April.

[36] Counsel wrote on 5 April. He referred to the provision in the employment agreement which permitted a deduction from final wages for deficient notice. This was said to be compliant with the Wages Protection Act 1983. Counsel advised however that Metallic Sweeping had reversed the deduction so payment would be made that evening.

[37] There is a payslip dated 31 March 2019. It shows a payment for 85 hours (\$1,508.75 gross), the deduction from the final pay period. Mr Williams' bank records show he received \$1,423.80 net on 5 April. That was the amount due, after offsetting the negative balance shown in the previous payslip. The payment made by Metallic Sweeping on 5 April put Mr Williams in the position he would have been in, if no deduction for lack of notice had been made from his final wages.

[38] Mr Williams started work in October 2018. His anniversary was in October 2019. He then was entitled to annual holidays of four weeks. There is no evidence that Mr Williams was owed holidays from that entitlement. Mr Williams has no claim under s 24 of the Holidays Act 2003 (HA).

[39] Under s 25 of the HA, Mr Williams was entitled to 8% of gross earnings since his anniversary date. There is no evidence that holiday pay of \$1,198.84 as shown on the 17 March payslip was incorrect. An employer is entitled under s 25 of the HA to deduct payments for holidays taken in advance. Metallic Sweeping deducted two days (16 hours) for annual leave taken in advance. There is no evidence to dispute that deduction. Mr Williams has no claim under s 25 of the HA.

[40] Mr Williams says he was entitled to payment for his notice period. However, he resigned without notice. Mr Williams was not entitled to payment for a notice period.

[41] No arrears of holiday pay or wages arise.

Is Metallic Sweeping liable for a penalty?

[42] In response to the representative's 22 March and 1 April demand for payment of wages, Metallic Sweeping fully paid what had been deducted on 5 April.

[43] Even if the deferred payment was seen as a breach of the statutory and contractual obligations to pay final wages without deduction in a timely manner, it is not a circumstance where it would be appropriate to impose a penalty. That problem was resolved directly between the parties promptly. It would be inconsistent with the Act's objects to impose a penalty at this stage.

[44] The penalty claim must be dismissed.

Summary

[45] Mr Williams does not have a personal grievance against Metallic Sweeping. No arrears are due to Mr Williams. His claims must be dismissed.

[46] I am asked to reserve costs. If necessary, the party claiming costs may lodge and serve a submission within 14 days and the other party may lodge or serve a reply within a further 14 days. I will then determine costs.

Philip Cheyne
Member of the Employment Relations Authority