Determination Number: AA 461/05
File Number: AEA 329/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Brett Peary (Applicant)
AND	ME & SE Jones Transport Limited (Respondent)
REPRESENTATIVES	Tania Waikato, for Applicant Mark Beech and Katie Ashby-Koppens, for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	16 September 2005
DATE OF DETERMINATION	1 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr Peary submits he was unjustifiably disadvantaged in his employment and unjustifiably constructively dismissed. To remedy his alleged grievance he seeks lost remuneration, loss of benefits and compensation pursuant to s.123 (1) (c) (i). He also seeks penalties in respect of the respondent's failure to keep proper wage and time records and to provide a written employment agreement.

Mr Peary seeks a penalty for an alleged breach of s. 4 (1) (a) of the Act.

Mr Peary also seeks arrears of holiday pay alleged to be owing to him.

Mr Peary seeks costs in the matter

The respondent denies it disadvantaged the applicant and states he resigned his employment. It states that little, if any, holiday pay is owed to him.

Background

Mr Peary commenced employment with the respondent ME & SE Jones Transport Ltd (JTL) on 14 January 2002. There was no written employment agreement. He was employed as a driver and regularly drove the respondent's truck that carried freight between Mt Maunganui and Wellington overnight. I find he was paid a trip rate and undertook two trips one week and three the next. His pay was evened out over the two week cycle and he received $1066 gross per week. Initially he freight carried by Mr Peary for the respondent was carried pursuant to a verbal agreement between

JTL and Owens Transport. With effect from 1 August 2004 Owens was taken over by Mainfreight and the verbal arrangement to carry freight continued between JTL and Mainfreight.

On 17 August in a discussion with a member of Mainfreight's staff Mr Peary took issue with the time it was taking to get freight loaded for departure to Wellington. In the course of that conversation Mr Peary said he was sure the Police CVIU (Commercial Vehicles Investigation Unit) would care if he was held up and as a result went over his allowable weekly duty hours. The next day Mainfreight's Operations Manager rang Mark Jones of JTL to advise him of the "threat" made by Mr Peary to bring the Police into Mainfreight. Mr Jones was advised to have a talk to Mr Peary and tell him "to pull his head in". Mr Jones had a discussion with Mr Peary and explained the importance of Mainfreight's business to JTL. (Mainfreight is JTL's only client). He also outlined the reality to Mr Peary that if he didn't do the Mount Maunganui/Wellington run the only other options for him were to move to the day run or leave.

On the evening 24 August 2004 Mainfreight advised Mark Jones for the respondent that Mr Peary was to be removed from the Tauranga/Wellington run by the end of the week. This was because Mr Peary had neglected to take priority freight destined for Wellington on his latest run. Mr Jones had no choice but to comply. His business was wholly dependent on the good will of Mainfreight.

Mr Jones was then faced with the question of finding alternative employment for Mr Peary.

Mr Peary was offered the day run – making deliveries to Taupo and Tokoroa. This was the only other work JTL had available. It attracted fewer hours and Mr Peary was offered the new run at remuneration of $990 gross per week. Mr Jones evidence was that this rate was unsustainable long term and that it was agreed Mr Peary would be paid $990 gross per week on the understanding that he - having previously advised he intended to resign for new employment with Provincial Freightlines - would be resigning within a month. Mr Peary agrees he had applied for a job with Provincial but denies agreeing that he would resign within a month. He submits he accepted the alternative position but never accepted the reduction in his remuneration. His evidence is he told Mr Jones that he didn't believe the respondent had the right to unilaterally reduce his remuneration and he would be contacting his lawyer.

In the event Mr Peary commenced working the day shift on 31 August 2004. He worked and was paid under the new arrangements for three weeks. During the week beginning 13 September Mr Jones spoke to Mr Peary and advised him he could not continue paying him at the rate of $990 gross per week as it was uneconomic (the truck did not make that much). He advised that that from the week beginning 20 September Mr Peary would be paid $762 gross per week.

On 16 September Mr Peary's lawyer wrote to Mr Jones detailing what was described as unilateral changes in Mr Peary's employment and stating that Mr Peary would consent to the variation in his employment (i.e. the change of runs) on condition that his remuneration was reinstated to $1066 gross per week with payment of his fuel costs and an assurance of a long term commitment to the Tokoroa/Taupo run with a transfer back to the Wellington run if the Tokoroa/Taupo run was lost.

On 21 September Mr Jones wrote back to Mr Peary's lawyer. He explained that Mr Peary had had to be removed from the Wellington run after Mainfreight had instructed him to remove Mr Peary from the run. He said it had been agreed with Mr Peary he would do the Tokoroa/Taupo day run as a temporary measure whilst he waited for a formal offer from another transport operator. He said that with this change of run Mr Peary's hours changed from 60-70 per week to 30-35 per week. However, it was agreed that Mr Peary would be paid $990 gross per week and that he would resign within a month. He advised it was a short term arrangement to see Mr Peary right until he took a new position. Mr Jones also advised that as Mr Peary had not resigned to take that new position

within the month agreed that JTL could not afford to continue paying him at the rate of $990 gross per week and he had advised Mr Peary that his remuneration would be dropped to $762 gross per week.

On 22 September Mr Peary's lawyer again wrote to the respondent. The respondent was advised that Mr Peary had denied agreeing to transfer to the Tokoroa/Taupo run as a temporary measure. The respondent was advised that Mr Peary considered his employment had been disadvantaged and that the respondent's decision to reduce Mr Peary's hours and remuneration was unjustified. The respondent was advised to restore Mr Peary's remuneration and forthwith pay him the shortfall (from date of reduction of his remuneration).

The employer had taken no action in respect of this matter when Mr Peary resigned his employment on 26 September to take effect on 2 October 2004. On 30 September Mr Peary left the workplace. Having ascertained he would not be paid at $1066 gross for his last week he did not work the last day of his notice.

On 16 November Mr Peary's lawyer wrote to the respondent alleging unjustified disadvantage and unjustified constructive dismissal.

Positions of the Parties

It is Mr Peary's position that the respondent's actions in removing him from the Wellington run and reassigning him to the day run together with the reduction in his remuneration amounted to an unjustified disadvantage. The subsequent further reduction in his remuneration amounted to an unjustified constructive dismissal.

It is the respondent's position that the applicant agreed to the changes in his employment and remuneration and that he resigned his employment.

The respondent accepts that Mr Peary was not provided with a written employment agreement. This situation has now been rectified and employees are provided with written agreements. The respondent also states that it does keep wage and time records.

Issues to be Decided

The onus rests with Mr Peary to establish he was disadvantaged in his employment.

In respect of his claim for constructive dismissal applicant also bears the onus of proving (on the balance of probabilities) that the termination was, as matter of law, a dismissal and not a resignation. *NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holding Limited* [1991] 2 ERNZ 267.

In *Wellington Clerical Workers' Union v Barraud & Abraham Ltd* [1970] 70 BA 347, Horn SM (as he then was) held that:

> *"An apparent resignation can also amount, notwithstanding the words used, to a dismissal. For example, if the employer's actions or words oblige or strongly tend to induce an employee to proffer a resignation, the result can still be a dismissal in reality."*

In *Western Excavating Ltd v Sharp* [1978] 1 All ER 713 at 717 per Lord Denning MR, Lawton and

Everleigh LJJ concurring it was held that:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct which he complains of; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*

In *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 the Court of Appeal held that constructive dismissal included, but was not limited to, cases where:

(i) An employer gives an employee a choice between resigning or being dismissed;

(ii) An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;

(iii) A breach of duty by the employer leads an employee to resign.

For Mr Peary to establish that his resignation was in fact and law a dismissal he needs to show there was a breach of duty by the respondent of such magnitude that it entitled him to terminate the contract of employment.

In arriving at a determination in this matter I have also had regard to the case law relating to what are sometimes referred to as triangular employment relationships i.e. when one party to a commercial relationship tells another party to that relationship that it does not want its work done by a worker employed by the second party. (See *Anderson v Eastern Institute of Technology & Ors* unreported, Shaw J, WC 23/01; *Ward v Spotless Services (NZ) Ltd & Anor* unreported, CA 87/03; *Crawford v Airport Shuttles Ltd & Ors* unreported, WA 100/03; *G&H Trade Training Ltd v Crewther* [2002] 1 ERNZ 513).

These decisions recognise the difficult position an employer is in when a third party advises that an employee will no longer be permitted to undertake its work and/or be permitted on site. Goddard J in the *G&H Trade Training* case (cited above) stated that an employer in this situation is entitled to sympathy. However, it is also clear that employers in such situations remain bound to follow a fair procedure if disciplinary action/dismissal is contemplated or otherwise to follow appropriate procedures and to consult with the worker where alternative work must be considered.

Also to be decided are Mr Peary's claims for arrears of holiday pay and allowances and the claims for penalties and interest.

Discussion & Findings

In arriving at findings in this matter I have had regard to the evidence, submissions and relevant case law.

I find that from early 2004 Mr Peary became increasingly unhappy in his employment. The reason for this is not clear but certainly the evidence discloses no breach of duty by his employer that contributed to his general unhappiness. The result of this unhappiness did however impact on his attitude and conduct at work. He agreed with the proposition put to him that he was lethargic and grumpy and agreed he made it obvious when he was upset.

From mid 2004 Mr Peary took active steps to obtain new employment. He applied for a position with Provincial Freightlines and was hopeful of receiving an offer of employment from that company. He saw the work as being easier, there would be no problems in getting out late and that he would be given his work for the day and that would be it. He also saw a position with Provincial Freightlines as being more secure. I find that from mid 2004 Mr Peary was open regarding his intention to obtain work with Provincial and that he expected an offer of employment in the relatively near future.

I also that find the takeover of Owens by Mainfreight was unsettling for the staff of JTL and Owens requiring them to come to grips with different operational practices. I find that Mr Peary became increasingly moody and difficult on the job. On 17 August Mr Peary was annoyed at what he saw as a delay in getting away to Wellington from the Mount depot. I find that in a debate with a member of Mainfreight's staff Mr Peary threatened Mainfreight with a complaint to CVIU. I have examined the logbooks provided to the Authority by Mr Peary. On the basis of the logbooks before me there are no grounds for Mr Peary to say he was being asked to work over his allowable duty hours. He did not seriously push the limits of those hours

Mr Smith Mainfreight's Operations Manager contacted Mr Jones to advise him that Mr Peary's remarks were being viewed a as threat. He requested Mr Jones to talk to Mr Peary and tell him *"to pull his head in"*.

I find that Mr Jones discussed the situation with Mr Peary. The evidence shows that Mr Peary was in no doubt as on 18 August that if he didn't do the Wellington job happily the only alternative was the day run to Tokoroa/Taupo.

Very shortly after the discussion between Mr Jones and Mr Peary, Mr Peary left the Mainfreight depot for Wellington without priority freight. I find that it was Mr Peary's responsibility together with the store man to proactively manage the loading of freight to maximize the load carried. If all designated freight could not be carried then it was Mr Peary's responsibility to at least ensure all priority freight was carried.

That night the Manager of Mainfreight Mount Maunganui rang Mr Jones. I am satisfied from the evidence and questioning of Mr Jones and Mr Chadwick that Mr Jones was put on notice that Mainfreight would be contracting with someone else if Mr Peary remained on the Wellington run. I find that JTL was in a particularly vulnerable situation here. Mainfreight is JTL's only client. The company is carrying a huge debt burden and does not even have the security of a formal commercial contract to underpin its relationship with Mainfreight. Mr Jones had no option but to respond to this ultimatum and remove Mr Peary from the Wellington run.

However, that did not absolve Mr Jones for JTL of his obligation to treat Mr Peary fairly and reasonably in the circumstances and he certainly was obliged to consider if he had other work that he could make available to Mr Peary. That he did. I find the parties held discussions. I also find on the evidence that Mr Peary did agree that he would transfer to the Tokoroa/Taupo day run. I also find that he accepted – albeit reluctantly that there would be a reduction in his remuneration. If I am wrong on this point I find that that Mr Peary affirmed the new arrangements by commencing and continuing to work in accordance with the new terms offered. (*Western Excavating Ltd v Sharp*, cited above). I also find that Mr Jones was genuinely under the belief that Mr Peary intended to be resigning in the near future albeit he probably did not notify a specific date for his resignation.

I find too that Mr Peary was advised he could increase hours and his remuneration by undertaking other runs and doing weekend work. Mr Peary refused additional hours offered to him.

On 16 September Mr Jones informed Mr Peary he could not maintain his remuneration at $990 gross per week and that from 20 September it would be dropped to $762 gross per week. I find that Mr Peary notified Mr Jones that this was unacceptable and advised he would be contacting his lawyer. On 22 September Mr Jones was put on formal notice by Mr Peary's lawyer that (among other things) Mr Peary did not accept the reduction in his salary and requesting that his remuneration of $1066 gross per week be reinstated and arrears paid forthwith.[1]

I find that Mr Peary was by now actively looking for new employment. Over the weekend of 25-26 September he was approached by Sandy Pari with an offer of employment. That offer was accepted by Mr Peary who resigned his employment with JTL giving one weeks notice. He did not work the last day of his notice because JTL did not restore his pay rate.

Shortly thereafter the expected offer from Provincial Freightlines came through and Mr Peary resigned his employment with Mr Pari and commenced full time employment with Provincial.

Conclusion

Mr Peary's removal from the Wellington run was a problem of his own making. JTL is a small, vulnerable employer and Mr Jones had no choice but to respond to the ultimatum given by Mainfreight.

As I have noted JTL then had an obligation to treat Mr Peary fairly and reasonably in the circumstances. Mr Jones response to look at alternative work he could make available to Mr Peary was an entirely fair and reasonable approach to the problem.

The work in question required fewer hours but in the belief that Mr Peary planned to resign in the near future Mr Jones agreed to maintain Mr Peary's remuneration at a level which represented a relatively modest reduction in Mr Peary's pay but which was unsustainable in the long term for JTL. Mr Peary agreed with these changes albeit he was unhappy. When Mr Peary did not resign as expected Mr Jones saw himself as having no choice but to adjust Mr Peary's remuneration to a level commensurate with the hours Mr Peary was working on the day run and the return on the truck.

This was a unilateral decision taken by Mr Jones and notified to Mr Peary. It was unacceptable to Mr Peary who made his lack of agreement clear and followed this with his resignation. This was entirely foreseeable given there was no doubt that Mr Peary reluctantly accepted the initial drop in

[1] Contrary to the statements contained in this letter which was written on 16 September after Mr Jones had proposed the second reduction in remuneration I find that Mr Peary agreed to the first reduction in his remuneration.

his salary. A constructive dismissal is one in which *"the employer's actions are equivalent or tantamount to a dismissal"*. The proposed reduction in remuneration (from $990 to $762 gross per week) was a substantial unilateral change to Mr Peary's contract which, in law, amounts to a serious breach of duty and a repudiation of the employment contract. The intention to repudiate the contract may be inferred even where – as was the case here - there was a desire on the part of Mr Jones to obtain a contract with the Mr Peary on different terms *Wellington etc Clerical & Related Workers IUOW v Greenwich* ACJ 1983, 965.

The appropriate course for the respondent to have taken in response to the difficult situation he faced was to formally consult with Mr Peary regarding the reality of the situation having allowed him the opportunity for representation. If after consulting Mr Peary he still declined to accept the only position available at the rate offered Mr Jones could justifiably have terminated Mr Peary's employment on notice (at the remuneration previously agreed between them on 25 August i.e. $990 gross per week). Essentially at this point Mr Peary would have been redundant within the meaning described in *Energy Enterprises Ltd t/a Coastline 93.4 FM v Newland* [1997] ERNZ 162. There the then Chief Judge described redundancy in the following terms:

> *"Redundancy does not mean only the superfluity of a particular employee's function or position, but can include a no-fault incompatibility or superfluity in the employment relationship".*

I accept that Mr Jones had a genuine and well-founded belief that Mr Peary was on the verge of resigning his employment for a job he had actively sought. Nevertheless, whilst Mr Perry remained in the employment of JTL the obligation rested with respondent not to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employee and employer. Mr Jones failed to proactively manage the difficult situation he was faced with. He hoped Mr Peary would resign and when he didn't he unilaterally reduced his remuneration thereby repudiating the employment contract. That constitutes an unjustified constructive dismissal. As a result I must find that Mr Peary has a personal grievance against the respondent.

Determination

Mr Peary agreed to be reassigned to the Tokoroa/Taupo run and he agreed albeit reluctantly with the associated reduction in his pay. He did not suffer a disadvantage in his employment over these changes.

Mr Peary did not agree to the second unilateral reduction in his remuneration and he resigned his employment. Mr Peary was constructively dismissed from his employment with JTL and he has a personal grievance.

Remedies

Lost remuneration

Mr Peary is entitled to remuneration lost as a result of his grievance.

However, I must find that the remuneration lost by Mr Peary is limited.

After Mr Peary declined the only work available in the business at the rate the respondent could sustain there was a "superfluity in the employment relationship" such that a genuine situation of redundancy existed. That being the case there is no ongoing entitlement to lost remuneration.

However, Mr Peary did not agree to the reduction in his remuneration from $990 to $762 gross per week. He was paid $762 gross for the last two weeks of his employment and to that extent he is to be reimbursed the loss involved i.e. $228 gross per week X 2 == $456 gross.

I also find that while there was no explicit agreement that Mr Peary would receive a $50 per week allowance for petrol Mr Jones did not challenge Mr Peary's actions in charging the company for a tank of petrol every 7-10 days. However, Mr Peary's own evidence is that this was a perk of the Wellington run. He was not doing that run from 30 August 2004 so I decline to reimburse Mr Peary for petrol money.

Mr Peary has not established to the required standard of proof that he was entitled to an additional $50 per week as a non taxable payment. I therefore make no award in respect of this claim.

Accordingly I direct the respondent to pay to Mr Peary the sum of $456.00 gross to reimburse him for remuneration lost as a result of his grievance.

Note: For the sake of certainty in this matter I note that if I am wrong in my analysis relating to the remuneration lost by Mr Peary no loss could have been awarded from the point Mr Peary commenced with Provincial. This was employment he was actively seeking for a variety of reasons and which paid a lower rate in the initial probationary period. The loss of income during this period was not income lost by the employee as a result of the grievance.

Compensation pursuant to s123 (1) (c) (i)

In setting a remedy under this head I am required pursuant to s.124 of the Act to consider the extent to which Mr Peary contributed to the situation that gave rise to the grievance.

The chain of events that culminated in Mr Peary's grievance started with his actions in departing the Mainfreight depot without priority freight. His removal from that run and his consequent loss of remuneration were essentially of his own making. Thereafter the respondent who was operating a small and vulnerable business made a commendable effort not just to provide Mr Peary with alternative work but to maintain his remuneration as far as possible albeit it was unsustainable for this small business as anything but a short term arrangement.

I note too that Mr Peary was working significantly fewer hours on the Tokoroa/Taupo run than he had been on the Wellington run He also had the option of increasing his hours for the benefit of the employer and to ameliorate his loss of income. He declined the additional hours offered and to that extent contributed to his reduction in income.

Taking all the facts of this case into account I am setting Mr Peary's contribution in the matter at 50%.

Had there been no contribution to bring to account I would have awarded the applicant $3000 net under this head. Reducing this sum by 50% leaves an award in the sum of $1500 net

Therefore, I direct the respondent to pay to Mr Peary the sum of $1500 net under this head.

Holiday Pay

I am satisfied on the evidence provided that Mr Peary took paid annual leave in over Christmas/New Year 2002-2003.

That being the case, and in reliance on the Labour Inspector's calculation of arrears of holiday pay owed the respondent is directed to pay to Mr Peary the sum of $46.00 gross as arrears of holiday pay.

Penalties

The applicant seeks penalties for the respondent's failure to provide him with a written employment agreement and in respect of an alleged failure by the respondent to keep a proper wage and time record pursuant to s.130 (1).

I find that s.135 (5) of the Act imposes a 12-month limitation on action taken to recover a penalty. The obligation to supply a written agreement under s.64 was fixed to the pre-contractual period, or the period "before" entry into the agreement. (Under the current s.63A it is fixed to the period of bargaining which ends when the agreement is entered into.) The claim for a penalty was not commenced until after the employment ended. The breach has not been expressed in the Act to be a continuing one for penalty purposes. The limitation period began running from 14 January 2002 and expired 12 months later, while Mr Peary remained employed.

I also decline to award a penalty in respect of the claim that the respondent did not keep a wage and time record that fully complied with the provisions of s.130 of the Act. The respondent did have wage records albeit the Labour Inspector described them as 'scant'. I note too that the arrears in holiday pay owed to Mr Peary are minimal. In all the circumstances I do not consider that a penalty is called for.

Other Remedies

I make no orders in relation to interest or penalties in respect of the claimed breach of s.4 of the Act.

Respondent's Counterclaims

I understood these claims had been withdrawn by the respondent. If I am wrong in this understanding I reserve the right for the respondent to return to the Authority on this matter.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott
Member of Employment Relations Authority