Determination Number: WA 132/06
File Number: WEA 414/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Ronald Harvey (Applicant)
AND	Darryl Smith and Majti Nola trading as D M Transport (Respondents)
REPRESENTATIVES	G Irwin for Applicant No appearance by or for Respondents
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	Wellington, 5 October 2006
DATE OF DETERMINATION	9 October 2006

DETERMINATION OF THE AUTHORITY

1. The respondents operate as a partnership, running DM Transport, a trucking operation that subcontracts to Toll Holdings. The applicant, Mr Harvey, was employed after Toll decided to engage more transport contractors and Mr Smith and Ms Nola took on another driver. Previously, Mr Smith was the sole driver for the partnership, which subcontracted to Toll, doing a "general run". They then also took over what was known as the "carpet run". Mr Smith engaged Mr Harvey, who had previously worked as a driver on a general run for Toll, to take over the general run, while he concentrated on the new carpet run.

2. This matter has had a troubled history. It was originally filed against DM Transport (which is of course not a legal entity). A statement in reply was subsequently filed by Ms Nola on behalf of DM Transport. After discussions with the Authority's Senior Support Officer, Mr Smith and Ms Nola reluctantly agreed to mediation. They did not, however, attend the mediation at the scheduled time and place.

3. An amended statement of problem was subsequently filed in February 2006, when the matter was referred to me. I noted the fact that the purported respondent was not a legal entity and required a new statement of problem to be provided with Mr Harvey's legal employer identified.

4. A new statement of problem was filed on 18 May, identifying Darryl Smith and Majti Nola trading as DM Transport as Mr Harvey's employer. Service of the statement of problem was subsequently effected by Morley Investigations on Mr Harvey's behalf. No statement in reply was ever received.

5. A conference call was then held on 7 July, at which neither of the respondents attended. A notice of directions was subsequently issued. I noted there that leave was required for Mr Smith and Ms Nola to now be able to respond to the matter. I referred them to s.181 of the Act, requiring them to facilitate the Authority's investigation, and gave notice of the investigation meeting on 5 October.

6. From the information provided by Mr Harvey and by the support staff, I accept that the notice of hearing was subsequently served by Morley Investigations on Ms Nola. I also note that correspondence from Ms Nola, and the parties' employment agreement, make it clear that Ms Nola operates in partnership with Mr Smith. Furthermore, service was clearly provided to Ms Nola and service on any particular member of a partnership is sufficient to constitute service on all partners. Despite service, neither Ms Nola nor Mr Smith made any attempt to comply with any of the Authority's directions as to witness statements and documents etc.

7. Neither Mr Smith nor Ms Nola attended the investigation meeting. When an Authority support officer contacted Ms Nola to remind her that the investigation meeting was on and asked her whether she intended to attend, Ms Nola replied in the negative. She gave no indication that the investigation meeting was any surprise to her, which is consistent with service having been properly effected. Ms Nola responded with the word "okay" to the Support Officer's advise that the meeting would proceed and a determination would be made.

8. I therefore determined that Mr Smith and Ms Nola had failed to attend or be represented without good cause. I then proceeded to act as fully in the matter before the Authority as if they had duly attended or been represented.

9. Evidence was given by Mr Ronald Harvey and his wife Carol. I have accepted their evidence wherever it clashes with the written statements of either Mr Smith or Ms Nola, given that they were present to give evidence and I was satisfied, in particular, with Mr Harvey's answers to searching questions.

10. Mr Harvey began his employment on 2 April 2005 and was paid $14 per hour. Perhaps because Ms Nola and Mr Smith were new employers, there were some difficulties in arranging the method of Mr Harvey's pay, and also later over taxation arrangements. Mr Harvey was concerned that he was paying far more tax than he ever had and took this up with Mr Smith. Mr Smith responded that the sum paid was what the Inland Revenue had told them to pay. This dispute went on for several weeks with both parties getting further advice on the matter, but it was in fact never resolved. Furthermore, Mr Harvey had to produce his own timesheets, which showed he worked approximately 55 hours per week on average.

11. Soon after beginning employment, Mr Harvey was summoned to attend a High Court trial in Hamilton as a witness. Mr Smith agreed to pay him for the time off, which was one week. I do not accept that there was any arrangement by which Mr Harvey was expected to pay this money back.

12. In early May, Mr Smith agreed to increase Mr Harvey's pay to $14.35 per hour. Unfortunately the issues over taxation created a real tension in the parties' employment arrangements. Mr Smith accused Mr Harvey of breaching the confidentiality provisions in his employment agreement for having raised his concerns directly with IRD. He was told that he would have to work in future on the carpet run and that he would no longer be given any weekend work. Mr Harvey gave evidence, which I accept, for the reasons given above, that these changes were made to punish him for having raised his concerns with the IRD. Mr Harvey had four concerns about this. The first was that he was aware that Toll would not allow drivers to shift from one run to the other because of their experience with driver theft. The second was that

he knew nothing about the carpet run and was not going to be trained properly on that run. The third was that he would lose money as a result of missing out on weekend work. His fourth concern was that he believed he was being unfairly punished. He therefore decided to resign and did so by way of letter soon thereafter. He did agree, however, to work out the notice period of one month required by his employment agreement. During Mr Harvey's notice period matters did not improve at all. In particular, there were ill-tempered letters by both sides and Mr Smith and Ms Nola declined to attend mediation to help sort out the issues between the parties.

13. Mr Harvey did not receive any weekend work for the last three weeks of his employment. Mr Smith and Ms Nola then deducted a week's pay from Mr Harvey's final pay for the time that he had been in the High Court, despite having previously paid it to him. No holiday pay was paid to him. Mr Harvey later discovered that no PAYE tax had been paid by his employer to Inland Revenue at the beginning of his employment, but that is a matter between the parties and Inland Revenue.

14. I accept that Mr Harvey was greatly distressed by his dismissal. He went into his shell, as Mrs Harvey's evidence clearly showed, and they had difficulties meeting their bills, particularly for the four weeks until Mr Harvey got another job. That job was only for 40 hours per week, at $12 per hour, which was significantly less than $789.25 gross he was used to earning on the general run. Subsequent to the employment ending, matters were made worse for Mr Harvey by text messages sent by the respondent calling Mr Harvey and his wife "losers", amongst other things, and making fun at their lack of progress in their claim against them.

15. I find that this was clearly a constructive dismissal. Workers are entitled to take up issues concerning them, particularly over the appropriate level of their take home pay. Instead of assisting this process, Mr Smith and Ms Nola punished Mr Harvey by changing the job he did to one for which he was not trained, and reducing his hours. This was clearly a breach of duty of sufficient seriousness to make it reasonably foreseeable by Mr Smith and Ms Nola that Mr Harvey would not be prepared to work under the conditions prevailing. Thus a substantial risk of resignation was reasonably foreseeable having regard to how serious the breach by Mr Smith and Ms Nola was

(*Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IOUW Inc* [1994] 1 ERNZ 168 (CA) applied).

16. Mr Harvey is therefore entitled to claim compensation and lost remuneration. I accept that the way he has been treated upset him greatly, as shown above. Furthermore, the gratuitous text messages could only have been designed to aggravate Mr Harvey's upset. I therefore determine that compensation in the sum of $8,000, as claimed, is appropriate. This also takes into account any claim for disadvantage Mr Harvey may have had. I find that the claims for disadvantage are inextricably intertwined with his claim for unjustified dismissal, and thus I issue one global award in relation to both claims.

17. Mr Harvey is also entitled to three months' lost remuneration. That sum is $5,940.25 gross. I would have extended compensation to beyond three months, as sought by Mr Harvey, had his employment been for a much longer duration than three months and had he not been working significantly reduced hours at his new employment (presumably at his own election, as he could have sought secondary employment).

18. Mr Harvey is also entitled to claim back the week's pay that was deducted from his final pay in these circumstances, constituting $560 gross. He is also entitled to claim for the loss of weekend hours for the last few weeks of employment, constituting $401.80. I also accept that Mr Harvey is entitled to $336.80 gross in unpaid holiday pay.

19. Mr Harvey claims costs in the sum of $4,000, plus expenses. I accept that there was some extra work involved in this matter because of the non co-operation of Mr Smith and Ms Nola. On the other hand, the matter was expeditiously dealt with in around 2 hours and much of the early manoeuvrings over this case were the fault of Mr Harvey in not properly identifying his employer. I therefore consider that an award of costs of $1,500 is appropriate, plus disbursements as claimed of $223.

20. I therefore order the respondents, Darryl Smith and Majti Nola, trading as DM Transport, to pay, on the basis of joint and several liability, the following sums to the applicant, Ronald Harvey:

- $8,000 in compensation;
- $5,940.25 gross in lost remuneration;
- $961.80 gross for wages unpaid over the period of employment;
- $336.80 gross in unpaid holiday pay;
- Costs of $1,500; and
- Disbursements of $223.

21. Interest on these sums is to be paid at the rate of 6% per annum, calculated on a simple interest basis, until the sums are paid.

G J Wood
Member of Employment Relations Authority