

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 53/07
5049928**

BETWEEN GLEN JAMES PERRY
 Applicant

AND TOM RYAN CARTAGE
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Ralph Webster, advocate for the applicant
 Dylan Marriott, advocate for the respondent

Investigation Meeting: Tuesday, 13 March 2007
 Wednesday 21 March 2007

Submissions received: 29 March 2007 from Applicant
 11 April 2007 from Respondent

Determination: 15 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Perry) claims he was unjustifiably dismissed as a consequence of a flawed re-structuring proposal while the respondent Tom Ryan Cartage Limited (Tom Ryan) deny that claim and contend that Mr Perry was lawfully dismissed as a consequence of abandoning his employment

[2] Mr Perry was employed by Tom Ryan on an individual employment agreement commencing work on 1 June 2005. He was a driver working shifts shuttling particular product from one site to another.

[3] There was never an employment agreement signed. Tom Ryan proposed a form of employment agreement to Mr Perry who sought to make some amendments to it; at the time that the re-structure which led to the termination of Mr Perry's employment, the terms of the employment agreement were not settled.

[4] By May 2006, there was concern about the financial viability of the operation which Mr Perry was engaged to work on. In essence, two drivers were employed on a contract that Tom Ryan had with Mainland Products Limited. Tom Ryan had reached the conclusion that the operation of this particular contract was financially unsustainable.

[5] There were a series of meetings involving Tom Ryan's operational people which began in May 2006 and extended through into June 2006. One such meeting was on 22 June 2006 at which Mr Perry and the other driver employed by Tom Ryan on the Mainland contract met with two of the operational people of Tom Ryan to discuss the contract and its future viability.

[6] Tom Ryan's operational people discussed with the two drivers the difficulties that Tom Ryan were experiencing with the contract, told them that there might be some restructuring and sought ideas from the drivers to improve the present arrangements. Mr Perry took up the option of advancing some proposals which Tom Ryan evaluated as creating further cost rather than reducing it.

[7] As a consequence of the 22 June meeting Tom Ryan decided that there needed to be a shedding of one driver position and the decision was taken that it should be Mr Perry's position that was disestablished. Married to that seemed to be a conviction that Mr Perry might be redeployed elsewhere in the business.

[8] On 28 June 2006 Mr Perry was summoned to a meeting with Mr Wayne Jones from Tom Ryan. Mr Jones is the fleet manager of Tom Ryan based in Auckland.

[9] The two men met in a utility vehicle belonging to Tom Ryan which was usually driven by Mr Graeme Smith. There is considerable dispute about what happened at this meeting in the utility vehicle.

[10] Mr Perry's evidence is that Mr Jones said that the company had made some bad decisions and that contracts had been lost which should not have been lost. Mr Perry says that Mr Jones made him redundant, gave him a weeks notice and told him that he would finish up *next Wednesday 5 July*. Mr Perry then told a number of people in the immediate vicinity that he had been made redundant.

[11] Mr Jones, however, has a quite different recollection of that meeting in the utility vehicle. He denied telling Mr Perry that he was redundant and claimed that the purpose of the meeting was to continue the discussions that had started on 22 June and that the purpose of those discussions was, far from creating a redundancy situation, to seek alternatives.

[12] That perspective on the meeting in the utility vehicle is supported by a letter which Mr Jones sent to Mr Perry dated 30 June 2006 (two days after the meeting) which thanks Mr Perry for his contributions in relation to the proposed restructure and invites him to another meeting to discuss the matter further.

[13] Mr Graeme Smith, whose work vehicle the utility was, also gave evidence to the Authority. His evidence supports Mr Perry's version of what happened at the meeting in the utility vehicle. Mr Smith conveyed Mr Jones to the yard site where the meeting between Mr Jones and Mr Perry took place. In the course of the journey, Mr Smith's evidence is that Mr Jones told Mr Smith that Mr Perry was to be made redundant. Mr Smith also says that he was standing six feet away from the cab of his utility when Mr Jones was talking to Mr Perry and he overheard Mr Jones tell Mr Perry that Mr Perry was to be made redundant. Mr Jones is equally certain that Mr Smith was nowhere within earshot when he had the conversation with Mr Perry.

[14] Mr Smith also said that when he conveyed Mr Jones to the airport to fly back to Auckland that night Mr Jones *knew he had done it all wrong* referring to the termination of Mr Perry by redundancy earlier in the afternoon.

[15] Believing that he had already been made redundant, Mr Perry may have taken a rather jaundiced view of the proposed meeting between himself and Tom Ryan which had been stipulated in Mr Jones' letter of 30 June 2006. Mr Perry sought to postpone the meeting so that he could obtain advice.

[16] There were follow up letters from Tom Ryan to Mr Perry on 3 July and 4 July, both seeking to confirm details of a suitable meeting date and it is clear that Mr Perry received these communications.

[17] There were other letters dated 13 July and 26 July which I am satisfied on the evidence Tom Ryan sent, but I am equally satisfied Mr Perry did not receive. These letters again were attempts to resolve the question of a meeting time and the last of them simply confirms that given there has been an abandonment of employment, Mr Perry was terminated from his employment.

Issues

[18] The Authority needs to determine whether Mr Perry was in fact dismissed by reason of redundancy at the meeting in the utility on 28 June 2006 and then decide what happened when Tom Ryan took Mr Perry off the payroll some four weeks later.

The 28 June 2006 meeting

[19] The difference between the parties in relation to the 28 June meeting is stark. Mr Perry says that he was dismissed at that meeting and his subsequent behaviour seems to confirm that that was what he understood the position was. As well as telling people that he had been dismissed immediately after the 28 June meeting he also dealt with his employer's request for a further meeting with him in a way which suggested that he believed he had already lost his position.

[20] On the other hand, Tom Ryan clearly understood that the redundancy discussions with Mr Perry were ongoing and Mr Jones, who had the conversation with Mr Perry, is adamant that he did not say anything to Mr Perry which would have led him to believe that he was in fact redundant. Mr Jones' letter of 30 June is consistent with Mr Jones' recollection of the 28 June meeting.

[21] Then there is the evidence of Mr Smith who not only says that he overheard the conversation between Mr Jones and Mr Perry, but also says that Mr Jones told him before the meeting that Mr Perry was to be made redundant and then confirmed after the meeting to Mr Smith that he (Mr Jones) had made a mess of the discussion with Mr Perry.

[22] I have reached the conclusion, on the balance of probabilities, that it is more rather than less likely that Mr Perry was told something at the meeting on 28 June which left him with the reasonable belief that he had lost his position. I am equally certain that such an outcome was not Tom Ryan's intention, because their behaviour is inconsistent with that consequence. However, Mr Perry's behaviour is simply inexplicable on any other basis. Mr Smith's evidence seems to support this conclusion. Mr Smith was very clear in what he heard both before the fateful meeting, during the meeting and indeed afterward.

[23] Mr Smith's evidence in particular, suggests that whatever Tom Ryan's stated position was on the possible redundancy of Mr Perry, Mr Jones either had a different agenda or, at the very least, lost his way in keeping to the agenda.

After the 28 June 2006 meeting

[24] Four letters were written by Tom Ryan to Mr Perry; only two of those letters were received by Mr Perry, namely the first two. I accept the submission made by Tom Ryan to the effect that the second two letters dated respectively 13 and 26 July 2006 may be taken as evidence that Tom Ryan was seeking to continue and progress the employment relationship between the parties. The difficulty though with that submission is that, given the finding I have already made that Mr Perry believed on reasonable grounds that he had been made redundant at the meeting on 28 June, the fact that the employer was still trying to develop a credible relationship which is some four weeks later is really neither here nor there. The damage had already been done.

[25] Tom Ryan also quite properly makes the point that in the four weeks after the meeting in the utility vehicle, Mr Perry continued on the payroll and continued to cheerfully receive pay from Tom Ryan, notwithstanding that he was not providing work.

[26] Tom Ryan seeks to advance its position by accusing Mr Perry of being unhelpful in his failure to allow the confirmation of a date for a meeting between the parties. While that may be fair comment, as far as it goes, it must have been difficult for Mr Perry to have been anything other than disinclined to engage with Tom Ryan in circumstances where he believed he had been made redundant on 28 June.

[27] The two letters which I have found as a fact Tom Ryan sent to Mr Perry but which I find Mr Perry did not receive, dated respectively 13 July 2006 and 26 July 2006, both refer to a further attempt by Tom Ryan to have Mr Perry attend a meeting, the proposed date for which was 18 July 2006. The first of the two letters in question refers to the meeting, notes there has been no response from Mr Perry to earlier correspondence and suggests that a failure to attend may be a failure to obey a lawful and reasonable instruction.

[28] The second letter, dated 26 July 2006, noted that Mr Perry had not either responded to the earlier letter or attended the proposed meeting and recorded in consequence Tom Ryan's assumption that Mr Perry had abandoned his employment.

[29] Given that I have found as a fact that neither of these letters were received by Mr Perry, although I have also accepted that they were sent by Tom Ryan, the reason for Mr Perry's non-response is self-evident.

[30] No doubt Mr Perry can be criticised for continuing to accept payment from Tom Ryan in circumstances where he considered his employment relationship was at an end. In answer to a question to that effect at the investigation meeting, Mr Perry simply said that he thought it was payment for his notice period. But that cannot be because, on his own evidence, his notice period was to expire a week after the dismissal, that is on 5 July 2006. I shall need to consider this issue again when I turn to review contribution.

Determination

[31] It is clear to me on the evidence that Mr Perry was dismissed from his employment as a consequence of the interview in the utility vehicle on 28 June 2006 but that because of genuine and honest confusion by Tom Ryan after the dismissal, they persisted in trying to arrange meetings with Mr Perry and indeed to retain him on the payroll. I accept that Tom Ryan did not intend to dismiss Mr Perry on 28 June, but I find as a fact that it was reasonable for Mr Perry to reach the conclusion after that meeting that he had in fact been dismissed on that occasion.

[32] Given that the dismissal was completely devoid of any appropriate process, I find that the dismissal was unsafe and accordingly Mr Perry has succeeded in his claim that he has been unjustifiably dismissed on that date.

[33] Having made that finding, I need to consider the question of contribution. It might be said that Mr Perry, by continuing to receive payment well after, on his own evidence, his notice period would have expired, ought to have been on notice that there was some confusion or mistake in operation.

[34] That view might well have been encouraged by the correspondence that Mr Perry did receive from Tom Ryan which sought to have him attend a meeting, even after he understood he had been dismissed.

[35] For those reasons then I determine that, while Mr Perry plainly did not contribute to the fact of his dismissal, he certainly contributed to the confusion which followed it, and in that respect he failed to mitigate the loss that he suffered in consequence of the dismissal.

[36] However, I do not consider that the contribution that Mr Perry made to his own misfortunes is a significant one and accordingly I evaluate his contribution at 20%.

[37] Mr Perry is entitled to compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 for the hurt, humiliation and injury to his feelings occasioned by the unjustified dismissal. The evidence of that hurt is clear. Mr Perry has an ill wife. The dismissal exacerbated her condition and undoubtedly contributed further to Mr Perry's own distress. Notwithstanding the restructuring proposals which were clearly on foot at the time of the dismissal, the dismissal was plainly a terrible shock to Mr Perry.

[38] I award Mr Perry the sum of \$4,800 as compensation, that figure reflecting the 20% contribution.

[39] Mr Perry is also entitled to recover lost wages. I accept the calculation submitted by Mr Perry that he is owed a total of \$5,236.88 gross and I direct that that amount is to be paid to Mr Perry by Tom Ryan.

[40] Finally, it seems to be accepted that Mr Perry is owed holiday pay. I directed during the course of the investigation meeting that Tom Ryan was to pay that holiday

pay. Mr Perry's closing submissions record that, as at the date that those submissions were filed, that matter has still not been dealt with as I instructed. The amount outstanding is \$1,697.84 gross. In the circumstances, I accept Mr Perry's submission that that amount ought to be subject to the payment of interest and I direct that interest at the rate of 7% per annum is to run from the date that that amount ought to have been paid (25 July 2006) down to the date of this determination.

Costs

[41] Normally in a matter such as this, I would simply reserve the question of costs on the footing that the parties' representatives can be left to resolve the matter between them and in the unlikely event that that proved unsuccessful, the parties can revert to the Authority for a determination on costs.

[42] In this particular case, the parties' representatives have had difficulty dealing with each other and the difficulties in that relationship have made this particular matter more difficult to deal with for the Authority than it ought to have been.

[43] Both parties have, in their closing submissions, sought a direction from me as to costs. To make the matter free from doubt, I direct that the representatives are to file with the Authority and serve on each other a memorandum as to costs within 14 days of the date of this determination. I will then issue a further determination on costs.

James Crichton
Member of Employment Relations Authority