

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 37/08
File Number: 5106464

BETWEEN HOERA (JOE) NATHAN
Applicant

AND 123 METALS LIMITED, FORMERLY
CASH FOR SCRAP LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Joe Nathan on his own behalf
No attendance by or for Respondent

Investigation Meeting: 3 April 2008 at Napier

Determination: 4 April 2008

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter has had a troubled history. The statement of problem originally filed by the applicant, Mr Nathan, was with “Cash for Scrap”. This statement of problem was served on the Auckland office of Cash for Scrap Limited and signed for by an “A Venkap”.

[2] When contacted by a support officer, because the statement in reply was overdue, a “Phil” from Cash for Scrap informed her that the statement of problem had been received but that he was too busy to deal with it. The support officer informed “Phil” that Cash for Scrap could respond only with leave and that a directions conference would be organised in due course.

[3] On 17 December 2007 Cash for Scrap Limited changed its name to 123 Metals Limited. That does not affect the matters before the Authority, as it is simply a change

of name and 123 Metals Limited inherited the assets and liabilities of Cash for Scrap Limited accordingly.

[4] After several calls, the support officer was told on 28 January 2008 that Mr Bill Conway would be dealing with the matter. The next day she spoke to Mr Conway. He said he was unaware of the issues and that he was going away until May or June, but to send any papers to PO Box 25748, St Heliers, Auckland, which is what occurred.

[5] When she phoned again on 31 January, the support officer was told that Mr Conway was not available. By fax that day, Cash for Scrap was informed that a directions conference would be held on 11 February. A follow up letter was signed for by a Marissa Dunbar on 1 February 2008.

[6] At the directions conference on 11 February there was no attendance by or for Cash for Scrap. At that conference call Mr Nathan confirmed that Cash for Scrap Limited was his employer. As a result Cash for Scrap Limited was served, on 18 February 2008, with the statement of problem, the directions notice set out below and a notice of investigation meeting, which were again signed for by Marissa Dunbar.

[7] The notice of directions states:

The respondent has been formally identified as Cash for Scrap Limited. Consistent with its failure to file a statement in reply, the respondent did not attend on the conference call, despite knowledge of it. I formally draw its attention to sections 181 and 182 of the Act, concerning its responsibility to facilitate the Authority's investigation and the consequences of not doing so.

[8] As at 9.10am this morning, 3 April 2008, there was no attendance by the respondent, which in law is 123 Metals Limited. I have used the name Cash for Scrap Limited or Cash for Scrap interchangeably in this determination, but in law the company for responsible for answering Mr Nathan's claims is 123 Metals Limited.

[9] Because there was no attendance by or for 123 Metals Limited the support officer rang its offices in Auckland. The person answering the phone told the support officer that Mr Conway was not in the office and so she asked for Ms Dunbar, who in fact was the person who answered the phone. Ms Dunbar said she knew nothing about the matter but did not deny, when reminded, that she had previously signed for the documents in relation to this matter.

[10] Ms Dunbar then transferred the support officer to Mr Conway, who clearly was therefore able to be contacted. Mr Conway said that he was just a contractor, that Cash for Scrap did not exist any more and then hung up.

[11] Clearly, the respondent, 123 Metals Limited/Cash for Scrap Limited, has failed to attend or be represented at the investigation meeting. No good cause for this absence has been shown. It is consistent with its attitude throughout, despite having been warned of the consequences of not addressing the employment relationship problem. I therefore determined to act as fully in the matter before me as if 123 Metals Limited had attended or been represented, pursuant to clause 12 of Schedule 2 of the Act.

The Facts

[12] At the investigation meeting evidence was given by Mr Nathan and his wife. I have accepted the evidence of Mr Nathan because I had no reason not to and when questioned closely he answered clearly and directly. He appeared forthright and honest. My findings follow accordingly.

[13] The applicant, Mr Hoera (Joe) Nathan, was employed as a driver based in the Hastings office of Cash for Scrap Limited, now 123 Metals Limited, but covering the Napier area, from 2 June 2007.

[14] During the last few weeks of his 11 weeks of employment with Cash for Scrap, issues occurred over jobs piling up. Customers were concerned about delays, but Mr Nathan could only do one job at a time. Matters came to a head on 19 August while the local manager was on annual leave. When Mr Nathan returned to the office in his truck, the office worker took the keys from his truck while he was unloading some scrap. She would not return the keys to him or give any reason why she would not do so. Given that Mr Nathan had no truck to drive, he went home.

[15] He then rang head office in Auckland to find out what was happening. He rang Cash for Scrap up to a dozen times before anyone in authority would speak with him, and that was not until some four days later, on 23 October. He spoke to Mr Bill Conway, who he described as the *big boss*. He was told that he was suspended, but that he needed to speak to the transport manager to get Cash for Scrap's reasons. That manager, known only to Mr Nathan as "Glen", said that he had been suspended for taking too long on jobs. Mr Nathan pointed out that a lot of the jobs took between one

and two hours to complete. Glen replied that he had had years of experience and that Mr Nathan's throughput was *not good enough*.

[16] When asked about his pay, Mr Nathan was told it had been stopped from that day. Given that Mr Nathan lived from week to week and was worried about income, he asked for his holiday pay. He was referred to the office. His details were taken over the phone by someone in the office in Auckland, but no money was forthcoming (or reasons for the lack thereof), despite a further number of calls by Mr Nathan.

[17] Understandably, as a result of all this, Mr Nathan believed that he had been dismissed and went to the Community Law Centre for advice. When asked if he wanted to return to his job, he said no. His lawyer at the time took that as evidence of a resignation and wrote accordingly to Cash for Scrap seeking copies of his written employment agreement and payslips (none of which had never been provided to him) and payment of his holiday pay. No response was made to this letter or the subsequent follow up letter.

[18] On 15 October Mr Nathan raised a personal grievance over the situation. Again, there was no reply to his letter. He subsequently filed a personal grievance with the Authority on 12 November. Mr Nathan sought to be paid his holiday pay, lost remuneration and compensation for the way he had been treated.

[19] The rest of the history of this matter is set out above.

Determination

[20] I conclude that Mr Nathan was dismissed with effect from 23 August 2007, at the latest. He had been suspended without pay. He had had no positive response to his questions about his future and I conclude that he was correct in assuming at that time that his job was no longer available to him.

[21] At best for Cash for Scrap it could be said that it had some performance concerns about Mr Nathan's throughput of work. However, it never raised these concerns (if they did indeed exist) through any performance management or disciplinary proceedings. It simply moved to take his truck keys off him and suspend him without pay. No fair and reasonable employer would suspend a worker in these circumstances, let alone do so without pay. Equally, no fair and reasonable employer

would effectively dismiss a worker without reasons or prior warning in circumstances such as this.

[22] Thus it is clear that no fair and reasonable employer would have acted in this manner and dismissed Mr Nathan in these circumstances. His dismissal was unjustified.

[23] I turn now to address remedies. Mr Nathan was paid \$600 after tax per week. For his 11 weeks of employment he is due \$528 net in holiday pay.

[24] I accept that Mr Nathan faithfully looked for a new job from the time it was clear that he did not have a job at Cash for Scrap. He needed a job and the money that went with it. He had to go on the unemployment benefit until 9 weeks later, when he got a better paying position. He is owed \$5,400 after tax for that period of time.

[25] Mr Nathan's dismissal has had a great impact on him. This is the first time in 40 years of employment that he had been dismissed. He got behind in hire purchase and other regular payments he was required to make. He even found it difficult to pay for food for himself and his wife. He was very much "down in the dumps" until he got his new position. He was also concerned that the pressures he was under as a result of losing his job would precipitate another heart attack, and he had only just recovered from one. This clearly exacerbated the situation. Mr Nathan's wife gave evidence of his irritability with her and especially with the grandchildren, which had never happened before.

[26] Mr Nathan seeks \$9,000 compensation and I concur that this is an appropriate sum to award in all the circumstances. The evidence has disclosed no contributory behaviour by Mr Nathan and therefore no reduction in remedies is required.

[27] Mr Nathan's only expense in pursuing this matter is the \$70 filing fee, for which he should be reimbursed by Cash for Scrap.

[28] I therefore order the respondent, 123 Metals Limited, formerly Cash for Scrap Limited, to pay to the applicant, Mr Hoera (Joe) Nathan the following sums:

- \$9,000.00 compensation under s.123(1)(c)(i) of the Act.
- \$5,400.00 after tax in lost remuneration
- \$528.00 after tax in unpaid holiday pay
- \$70.00 in expenses.

G J Wood
Member of the Employment Relations Authority