IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 175/10
5154505

	BETWEEN	DEREK SLEMINT Applicant
	A N D	NORTH OTAGO TRANSPORT LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Christy Corlett, Counsel for Applicant Tony Tweed, Counsel for Respondent with Jannah Stringer
Investigation Meeting:	4 August 2010 at Oamaru
Determination:	2 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Slemint) alleges that he was unjustifiably dismissed from his employment by the respondent (North Otago Transport). North Otago Transport resists that claim and says the dismissal was justified in all the circumstances.

[2] Mr Slemint was employed as a truck driver by North Otago Transport from 6 March 2006 down to 16 October 2007.

[3] On 16 October 2007, Mr Slemint was summarily dismissed from his employment as a consequence of a threat allegedly made by Mr Slemint to North Otago Transport that he would report the company for log book offences to the Land Transport Safety Authority.

[4] A personal grievance was raised by Mr Slemint by letter dated 27 October 2007. Amongst other things, the letter indicates that, in the absence of a reply from

North Otago Transport (which was not forthcoming), Mr Slemint would progress the matter with either his lawyer or the Labour Department.

[5] In the result, Mr Slemint was offered work in Australia and departed almost immediately to take up that opportunity. Mr Slemint was away from the jurisdiction from 14 November 2007 (barely a month after the dismissal) down to late 2008.

[6] On his return from Australia, Mr Slemint again began the active prosecution of his grievance and after two unsuccessful attempts to convene a mediation between the parties, an unsuccessful mediation finally took place.

Issues

[7] A preliminary issue in this matter is the nature of the employment agreement between the parties. Mr Slemint has filed with the Authority an employment agreement which appears to emanate from North Otago Transport and which has been signed and dated by him but has not been signed and dated by North Otago Transport. North Otago Transport maintains that that agreement does not represent the bargain between the parties, although it acknowledges it is a form of employment agreement which has been used in its business in the past, although it was not in current use at the time that Mr Slemint was appointed to his position.

[8] However, the fundamental issue remains whether or not Mr Slemint was unjustifiably dismissed from his employment.

What was the relevant employment agreement?

[9] As I indicated above, Mr Slemint has filed with the Authority a copy of an individual employment agreement styled *North Otago Transport employment contract*. Mr Slemint's evidence is that this document was handed to him by Barry Sadler, the Managing Director of North Otago Transport, at the Waimate depot of an associated company in March 2006, that is, about the time that Mr Slemint commenced his employment. Mr Sadler has no recollection whatever of handing such an agreement over to Mr Slemint and notes that North Otago Transport has no copy of the agreement on its file. Mr Sadler said it would be implausible for him to have handed over one copy only but he was unable to offer any other explanation for how Mr Slemint obtained this copy of the agreement if it had not been provided by North Otago Transport.

[10] The particular difficulty with this agreement from North Otago Transport's perspective is that on the execution page (the final page of the document) under the heading *wages* there appears the following paragraph:

> *A meal allowance of $8.50 shall be paid whenever the employee exceeds 11 hours work on any one day. All necessary expenses will be paid by the company during any stay away from home.*

[11] Mr Slemint seeks to rely on that clause and is claiming payment of that meal allowance over the whole period of the employment.

[12] Mr Sadler for North Otago Transport told me that that particular provision (the one relating to the meal allowance payment) had been crossed out of the employment agreements for the other employees of North Otago Transport and more importantly, in respect of Mr Slemint and his co-workers, Mr Sadler had had individual discussions with each and had secured their agreement that the meal allowance payment would not apply. Mr Sadler was clear in his evidence that there was such a verbal agreement between North Otago Transport and Mr Slemint.

[13] The nature of this document bears examination. First, there is no signature on behalf of North Otago Transport. It says in consequence it is not bound by its terms or, at the very least, is not bound by the meal allowance provision because it has been subject to a subsequent variation. It is true that the only writing on the agreement is Mr Slemint's. He has completed the declaration in respect of the employee by filling in his own name, by putting in his licence number, noting the categories of licence that he holds and then signing and dating the document under the general heading *DECLARATION*. The portion for the signature of North Otago Transport is blank, that is, unsigned.

[14] Then, on the same final page of the document, under the heading *WAGES*, there are four discrete paragraphs, one of which relates to the meal allowance which I have quoted in full above, and one of which relates to the hourly rate of the employee and the overtime rate of the employee. Neither of those rates have been completed. The whole section on *WAGES* concludes with another place for North Otago Transport and the employee to sign. **Neither** party has signed this portion at all.

[15] I am satisfied that a proper construction of this document and the place that it has in determining the nature of the employment relationship between the parties is that it must be no more than a guide to the elements of the employment agreement

between the parties and that insofar as the general provisions in the bulk of the document are concerned, it may be taken that the parties have, by their actions, confirmed their agreement to those terms. However, I am not satisfied that the parties had ever agreed to the provisions on the final page under the heading of *WAGES*. I conclude this because, first, the quantum of ordinary time wages and overtime wages has not been completed, and second, that part of the document which is specifically required to be signed off by the parties has also not been completed.

[16] It seems to me to follow that neither party can be said to have turned their mind to committing to the provisions under the heading of *WAGES* and that it must follow that Mr Slemint cannot rely on the meal allowance provision in that document when even he has not signed that portion of the agreement. I am reinforced in that conclusion by the fact that both parties (Mr Slemint included) acknowledge that there was discussion between them early in the employment about meal allowances and confirmation from North Otago Transport that meal allowances were no longer payable. Mr Sadler for North Otago Transport told me that there was agreement with Mr Slemint on the point at the time and that his claim now is effectively a reneging on that agreement and, while that might put it a little strongly, I am satisfied that both parties knew there were no meal moneys payable.

[17] It follows that Mr Slemint's claim for meal allowances is struck-out.

Was Mr Slemint unjustifiably dismissed?

[18] The context in which the dismissal occurred needs to be briefly sketched. For about a month prior to the dismissal, Mr Sadler had been increasingly concerned about the apparent *loading* of Mr Slemint's overtime claims. Mr Sadler's evidence was that Mr Slemint's overtime claims were excessive being greater than the company's own expectations, greater than the other workers the company employed doing the same work, and sufficiently notorious to attract complaints from work mates that Mr Slemint was effectively over-claiming for overtime.

[19] Mr Sadler readily acknowledged that he had not picked up the discrepancy (if there were any) earlier in the relationship but he pointed out that he ran three different trucking companies at three different locations and his personal relationship with Mr Slemint was not extensive. However, his evidence was that once the issue came to his attention, he endeavoured to deal with it.

[20] While Mr Slemint has no recollection of this, I am satisfied from Mr Sadler's evidence that he spoke to Mr Slemint about overtime claims and Mr Sadler's concern about Mr Slemint's claims being out of step with everybody else's. I am satisfied also that Mr Sadler would have pointed out to Mr Slemint that the company knew how long each job should take and that the fact that Mr Slemint was taking longer than the company's estimate for each job was a cause for concern.

[21] Both parties agree that Mr Sadler gave Mr Slemint a handwritten note in which he set out the requirements the company had for dealing with claims for overtime. Mr Slemint cites this note as evidence for the view that Mr Sadler knew he was working overtime hours. There is no dispute that Mr Sadler knew that; the issue is whether those overtime hours were legitimately incurred or not. What the note says is as follows:

> *All extra hours to be rung through to me on pay day. If possible extra hours will be paid out as meal moneys – one extra hour equals two times meal moneys (tax free)* …

[22] Both parties agree that Mr Slemint did not ever ring through to Mr Sadler after receipt of that note to ask for extra hours (that is, to obtain permission to work overtime). Mr Slemint was unable to explain to me why he should be allowed to claim for overtime when he readily acknowledged that he had not complied with the employer's directive about how to get overtime approved.

[23] Clearly, North Otago Transport cannot refuse payment of overtime in respect of work performed prior to that note issuing (at least in reliance on its terms), but once that note issued, North Otago Transport can rely on that instruction as a basis for refusing payment of overtime.

[24] On 11 October 2007, Mr Sadler asked to see Mr Slemint's diary entries to justify the hours of overtime that Mr Slemint was claiming. Mr Slemint's evidence is that he refused to hand his diary over, apparently regarding that as his personal property but undertook to obtain photocopies of the relevant entries. The following day, 12 October 2007, North Otago Transport's yard manager gave Mr Slemint a list of dates for which he was to produce diary entries. That schedule (or more accurately a copy of it) has been filed in the Authority. It identifies a succession of dates commencing with 15 April and concluding with 26 August. Beside each date identified is the hours claimed for that day. The document concludes with the

following statement: *Can you please provide your diary to explain how these hours were accounted for*. It is then signed *Baz* which is Mr Sadler's nickname.

[25] When Mr Slemint was given the schedule of dates just referred to, he responded to this request for information with a remark in his own words along the lines of *that if he wants to play this game, I should report the company to the Land Transport Safety Authority for logbook offences*. I heard evidence from Robert McIntosh, another truck driver at North Otago Transport, who telephoned Mr Sadler to advise him about this comment made by Mr Slemint to the yard manager.

[26] Mr Slemint was rung again by North Otago Transport on Monday, 15 October 2007 and asked where the diary entries were as the company wanted to progress the issue promptly. Mr Slemint promised to have the material to the employer the following morning.

[27] On Tuesday, 16 October 2007, Mr Slemint arrived at work with the photocopies of the diary entries sought by Mr Sadler. Mr Slemint says that Mr Sadler barely scanned the material he presented or attempted to discuss them with him, simply told him that he was *a threat to the company* and that he was dismissed.

[28] Mr Sadler's evidence is different. He is clear that when he was presented with the diary entries he indicated to Mr Slemint that the diary entries did not justify the hours claimed because many of them were blank. He says there was no response from Mr Slemint to this observation. Then, Mr Sadler says that he asked Mr Slemint about the Land Transport Safety Authority threat made to the yard manager the previous week and he says that Mr Slemint denied making a threat. He says Mr Slemint became agitated and began to point at Mr Sadler's chest, referring to his diary claiming all the evidence was in there and saying *you're in the gun for all of this*.

[29] Mr Sadler said in his evidence that he regarded this observation as effectively a repeat of the threat which had been made to the yard manager the previous week. Further, he considered that Mr Slemint could not prove that he was entitled to be paid for all the overtime he was claiming and therefore he was seeking to force the company to pay him his overtime by threatening to report the company to the Land Transport Safety Authority if it did not. Mr Sadler regarded that stance as *blackmail*.

[30] These two versions of this critical discussion are materially different. Both parties accept that there was an original threat made to the yard manager. Mr Slemint, while acknowledging that he made the threat and even referring to it as a threat in his own evidence, sought to rather make light of it. I do not accept it is the sort of remark that can be made light of. It seems to me to fall into precisely the same context as persons foolish enough to make jokes about bombs on aeroplanes when they are in the process of being checked in. It is difficult to see how a threat to report one's employer to the Land Transport Safety Authority can be seen as anything other than a straightforward threat.

[31] The real difference between the parties though is the question of what happened in the discussion between Mr Sadler and Mr Slemint on 16 October 2007. Mr Slemint says that he presented his diary entries and was fired without any further engagement. Mr Sadler says that there was further discussion and that Mr Slemint repeated the threat in different words. I prefer Mr Sadler's recollection of events. It seems to me highly unlikely that Mr Sadler would have not taken the opportunity of raising the original threat (the one made to the yard manager) with Mr Slemint when he met with him. This was the first occasion the two men had spoken face-to-face after the initial threat had been made and it seems to me highly unlikely that Mr Sadler would not have raised the issue. Mr Sadler says that in the context of raising the first threat, Mr Slemint responded aggressively and repeated the threat with the remark *you're in the gun for all of this*. Mr Sadler gave vivid evidence of his recollection of the interview with Mr Slemint and I found his recollection of events believable and to be preferred over the recollection of events provided by Mr Slemint. It seems to me more rather than less likely that there was some further discussion between the two men about the nature of the diary entries that had been provided, and about the earlier threat which led on to a repeated threat from Mr Slemint.

[32] So far as the diary entries were concerned, Mr Sadler's view was that they did not justify the overtime hours for which payment was sought. Many of them (but by no means all) were blank pages or near enough to blank pages from Mr Slemint's diary and despite Mr Slemint's explanation that he was effectively saving up overtime hours where he worked in excess of the legal requirement one week and transferred them to a quiet subsequent week, nothing on the blank diary pages explained that, identified the detail of where the claimed hours had been incurred, or anything that would enable the employer to justify making the payment. It seems to me highly

unlikely that Mr Sadler would not even have looked at the entries (as Mr Slemint claimed in his evidence), given that he had been trying for several days to get Mr Slemint to produce them. Having finally been given them, it seems most unlikely that Mr Sadler would not at least have looked at them and, if he had looked at them, he would have seen that many of them were blank. I find it inconceivable that he would not have engaged with Mr Slemint to, at the very least, suggest to him that the blank diary pages did not justify anything.

[33] Of course, this exchange on 16 October 2007 ended in Mr Slemint's dismissal. Mr Sadler told me that the effect of Mr Slemint's conduct was, in effect, to place Mr Slemint *beyond my control in the company*. Mr Sadler was saying that Mr Slemint's actions were designed to guarantee payment of whatever overtime claims he submitted now and into the future, whatever their justification. Mr Sadler felt he had no option but to dismiss Mr Slemint. He told me that he regarded the drivers he employed as operating in *a high trust environment that was effectively a sole charge position*. This was because once the driver left the yard, the employer had no real control over the driver and the hours that the driver worked and the way he recorded those hours were essentially taken on trust by the employer.

[34] Of course, Mr Slemint saw matters differently. He thought at the very least he was entitled to have the opportunity of giving an explanation and that he was not given such an opportunity. Mr Sadler says that the circumstances of the dismissal were such that he had nothing further to inquire into. The reason for the dismissal was the continuing threat made by Mr Slemint against the company. Even on Mr Slemint's evidence, that threat was made once and I have already decided that it is unreasonable to expect that that threat would be taken lightly by its recipient. On Mr Sadler's view, there was no further explanation that could be sought. On his evidence, which I prefer, he had sought explanation from Mr Slemint but only got the threat repeated.

[35] I conclude this is the kind of situation where an employer is left with little choice but to summarily dismiss. This is, I think, a situation, as counsel for North Otago Transport suggests, that is analogous to the factual matrix in *W&H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448 where a single act of the employee completely overwhelmed the subsisting trust and confidence that must exist between employer and employee. In short, I think the dismissal was, in all the circumstances, justified.

Determination

[36] I am satisfied, on the evidence before the Authority, that Mr Slemint has no personal grievance because his dismissal was, in the particular circumstances of this case, justified.

[37] It follows that Mr Slemint is not entitled to remedies in respect of the unsuccessful prosecution of his personal grievance, but there are issues relating to wages which I desire to comment on.

[38] I am satisfied that Mr Slemint has been short paid wages for the period from 8 October 2007 to the date of dismissal and has been short paid holiday pay. As to the first, Mr Slemint is entitled to receive payment for 7.75 hours at the overtime rate of $22.50 per hour making the total due and owing $174.38 gross. I am satisfied on the evidence before the Authority that those hours were actually worked and therefore payment is due for them.

[39] As to the holiday pay issue, I am satisfied that Mr Slemint has been short paid holiday pay and a further $595.88 gross is required to be paid to him by North Otago Transport.

Costs

[40] Costs are reserved.

James Crichton
Member of the Employment Relations Authority