IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 81/10
5157341

BETWEEN	BRENDAN NEIL GRAY Applicant
AND	BEST REMOVALS OTAGO LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Anne-Marie McInally, Counsel for the Applicant Diana Hudson, Counsel for the Respondent
Investigation Meeting:	23 February 2010 at Dunedin
Submissions Received:	23 February 2010 and 11 March 2010 from the Applicant 4 March 2010 from the Respondent
Determination:	30 March 2010

DETERMINATION OF THE AUTHORITY

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[1] Brendan Gray worked for Best Removals Otago Limited from December 2007 until his employment terminated in January 2009. Mr Gray says that he was unjustifiably constructively dismissed. It seems that Mr Gray first sought advice after the employment terminated because Best Removals did not pay him his holiday pay on account of damage to company vehicles caused by Mr Gray. That matter remains unresolved so there is also a claim for holiday pay of $1,600.00 to be investigated.

[2] Best Removals says that Mr Gray resigned of his own volition in the face of a disciplinary investigation into his continual lateness and that he was not constructively dismissed. The company also says that Mr Gray agreed he owed debts because of the

vehicle damage and that the written employment agreement allowed it to deduct debts from Mr Gray's final pay.

[3] To resolve these problems I will make findings about what happened concerning the termination of Mr Gray's employment before applying the law about constructive dismissals and justification. Next I will set out more fully what happened concerning two unrelated incidents that led Best Removals to make deductions from Mr Gray's holiday pay.

The termination of Mr Gray's employment

[4] Tina Harris is the company's Dunedin branch manager. There was a disciplinary meeting with Mr Gray, following which Ms Harris wrote a letter dated 29 December 2008 to Mr Gray about his persistent lateness for work. The last paragraph reads:

> *This is now your third warning regarding lateness, and we require you to be aware that you are now at risk of having your employment terminated if you are late again.*

[5] Mr Gray was late for work on 6 January 2009. Simon Holliday is the company's Dunedin branch operations manager. Mr Gray phoned Mr Holliday to say that he had slept in. He was told that a replacement had been arranged so he was no longer required that day but should report for work the next day as usual. On 7 January Mr Holliday told Mr Gray that it was the last time that they would accept his lateness.

[6] Mr Gray was late again on 8 January. Mr Holliday sent him hone when he eventually arrived as he had already arranged agency labour. He told him that he would be in touch later to arrange a meeting. Mr Holliday did phone later and a meeting was arranged for that afternoon. At the meeting Mr Gray asked if he was fired. There is a dispute about Mr Holliday's response. Mr Gray then said that he wanted to resign. Mr Holliday said it would end the matter if he chose to resign but he (Mr Holliday) would first need to check with Mr Harris, the company owner. Mr Holliday did so, got Mr Harris's approval to accept a resignation and then contacted Mr Gray. Mr Holliday told Mr Gray that if he wished to resign, his resignation would be accepted. Mr Gray then confirmed his resignation. Some days later Mr Gray returned his shirt and received a refund. There was no complaint about the

termination of his employment at that point. At some point during this sequence of events Mr Gray signed a typed letter of resignation.

[7] When he did not receive his holiday pay Mr Gray sought advice from his union and the union organiser (Juanita Willems) sent an email dated 26 January 2009 to Mr Harris asking for a suitable time to discuss the holiday pay issue. Mr Harris responded setting out some background about Mr Gray's resignation and the vehicle damage. By way of explanation the email says *…I'm not prepared to trust Brendan to front up when the completed [vehicle] costs are known and pay….* Further communications between Mrs Willems and Mr Harris did not resolve the problem about holiday pay. These proceedings were eventually initiated.

Unjustified dismissal?

[8] In *Auckland etc Shop Employees' etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. These are not closed categories but the present situation is closest to the first category.

[9] In *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965 the Arbitration Court took an opportunity to speak generally about the principle of constructive dismissal. The Court considered that, in identifying cases of constructive dismissal, there is a useful insight to be gained from considering the real or true source of the initiative for the termination of the employment.

[10] Mr Gray's unjustified dismissal claim is advanced on the basis that he asked Mr Holliday if he was going to be dismissed, Mr Holliday said *Yes* so Mr Gray resigned. That is characterised as a dismissal in reality. There was more to Mr Gray's evidence on the point. He said in response to a question *My first reaction was to say to Simon I'm sacked, aren't I? It was my assumption that was confirmed.* He also said in evidence that the main reason he resigned was that he did not want it on his work record that he had been dismissed. Mr Holliday's evidence differs on his response to the question. He says that Mr Gray asked if he was fired to which he said *No, but you're in the shit*. It is not disputed that there was mention of the need for Mr

Holliday to speak to the company owner (David Harris) before accepting the resignation. Nor is it disputed that Mr Gray put his resignation in writing after Mr Holliday reported back on his conversation with Mr Harris.

[11] I should say a little about the context of the exchange between the two men. On whatever view is taken Mr Gray had often been late for work, he had received a blunt warning about what might happen if he was late again, then he was late on 6 and 8 January. Neither man needed to be clairvoyant to see that Mr Gray was *in the shit* and Mr Holliday was simply being honest in confirming that, as I find he did. That falls a long way short of establishing that the employer was the real or true source of the initiative for the termination of the employment. That question is answered by Mr Gray's evidence that he did not want a dismissal on his record. Mr Gray initiated the termination. It is confirmed by Mr Holliday's caution in not accepting the verbal resignation without first checking with Mr Harris.

[12] I should mention that Mr Gray was engaged on a casual basis for a brief period after the resignation. That too points to the initiative for the termination not being with the employer. The casual work did not last long but there is no grievance claim raised about that.

[13] There being no basis for treating Mr Gray's resignation as a dismissal his personal grievance claim fails.

Arrears

[14] There are two parts to the arrears claim. First, I am referred to the employment agreement that provides that the employee will work 30 minimum hours per week. The claim is to recover payment for any weeks where the pay records show payment for less than 30 hours.

[15] If there was any breach of this term of the employment agreement it was on Mr Gray's part. There is no evidence that Best Removals defaulted on its obligations to provide 30 hours work but there is ample evidence that Mr Gray often was late or declined available work. This part of the arrears claim is rejected.

[16] The second part of the claim concerns deductions from Mr Gray's final pay made by Best Removals to recover debts it says Mr Gray owed to the company. I am referred to provisions in the employment agreement authorising such deductions.

Clause 6.3 has the employee agreeing to pay the employer any loss incurred by the employer not covered by the insurer where a vehicle under the employee's control sustains damage through the employee's actions. Clause 4.4 records the employee's agreement for the employer to make deductions from wages and holiday pay for debts owed to the employer or as agreed in the employment agreement. There is further reference to the insurance aspect of vehicle damage in the *In-House Rules* which is a schedule to the employment agreement.

[17] Mr Gray's evidence, which I accept, is that he spoke to Tina Harris several times following the termination of his employment about his holiday pay and was told that it was being calculated. Eventually he went in to see Ms Harris. She gave him a piece of paper with the following list:

> *105.00 Light lens*
> *641.25 Panelbeating*
> *216.00 Wrong Fuel*
> *300.00 Labour fix van: re fitting lens*

[18] The same day he received this list Mr Gray went to see Mrs Willems who then contacted Mr Harris. Mr Harris replied by email dated 26 January 2009 saying:

> *Brendon was responsible for damage to two of our vehicles Transit van Mitz Canter apparently he reversed the transit into the front of the canter. Some of the Panel work was fixed by Mark costing $300.00 …But neither of the vehicles have been completed so I'm not prepared to trust Brendan to front up when the completed costs are known and pay so have decided to have them costed professionally so the company is not going to be left out of pocket at the end of the day. Had this been arranged initially the costs to Brendon would have been $1000.00 for the excess to both vehicles. Added to this was a light lens @ $105.00. …And the incident relating to the fuel which was never resolved to our satisfaction last year which we reserved our final decision on to charge the person responsible for the initial mistake as it was a costly and stupid mistake to make*

[19] I will deal separately with the two incidents giving rise to the deductions.

Vehicle Damage in the yard

[20] Mr Gray caused some damage to both vehicles when he backed the Transit Van into the Mitsubishi Canter. This incident apparently occurred in September 2008 in the company yard. At the time Mr Gray had only a learner's licence. He says that Ms Harris knew about that but nonetheless permitted him to move vehicles in the yard. There is no evidence from Ms Harris to refute that.

[21] Following the accident, another employee (Mark Willems) did some work on the vehicles to lessen the cost to Mr Gray of repairs. There is a dispute about these

costs. Mr Harris says that he was told by Mr Holliday and Ms Harris that Mr Gray had been spoken to and he and Mr Willems had come to an agreement for Mr Willems to do the repairs to lower the cost. Mr Harris then spoke to Mr Willems who said he would do the work as time became available. Mr Harris says that the arrangement between him and Mr Willems was that the work would not be done on company paid time. Mr Harris's evidence is that he did not speak to Mr Gray about these arrangements. Mr Gray's evidence is that Mr Willems did some repair work but not at Mr Gray's request. The $300.00 in Ms Harris's list and Mr Harris's email is apparently the labour cost for Mr Willems to make the Transit Van useable.

[22] Some time later the Transit Van was involved in an unrelated accident and was written off by the insurers who paid out of the company's claim. The claim was reduced by $641.25 being a panelbeater's estimate dated 19 January 2009 of the cost of repair of the damage caused by Mr Gray. Following the email from Mrs Willems dated 26 January 2009 the company obtaining a panelbeater's estimate of repair costs for the Canter of $1,665.00. There was no mention of any repair costs for the Canter in Ms Harris's list.

[23] The starting point is s.4 of the Wages Protection Act 1983 which declares that *Subject to sections 5(1) …of this Act, an employer shall, when wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.* Mr Gray's employment ended by his resignation. Although the written resignation is expressed to be effective 13 January 2009, it appears to have been agreed on 8 January between Mr Gray and Mr Holliday that Mr Gray would finish up immediately and would not be subject to forfeiture of pay in the absence of proper notice. Under the employment agreement wages were payable weekly. That all leads me to conclude that Mr Gray's final wages including holiday pay became payable on the regular payday during the week commencing 12 January 2009 at the latest. The law required the company to pay the whole of those wages at that time unless s.5(1) of the Wages Protection Act 1983 applied.

[24] Pursuant to s.5(1) an employer may, for any lawful purpose, with the written consent of a worker, make deductions from the wages payable to that worker. The argument for the company is that clause 4.4 and clause 6.3 of the employment agreement met the requirements of s.5(1) – the latter clause as to the creation of a debt due to the company and the former clause as to the authority to deduct it. Those clauses say:

> *The Employee agrees that the Employer may make deductions from pay, holiday pay …for the following things: …debts owed to the Employer …[and] as agreed in this agreement or otherwise.*
>
> *The Employee agrees to pay to the Employer any loss the Employer incurs where a vehicle under the Employee's control has sustained or caused damage through the action or inaction of the Employee and such loss is not recoverable from the Employer's insurer or a third party.*

[25] The lawfulness of the deductions needs to be considered as at the date the company should have paid Mr Gray.

[26] I find that there was no arrangement between Best Removals and Mr Gray that Mr Gray would be liable for the cost of Mr Willems' labour. I also accept the submission of counsel for Mr Gray that Best Removals must prove that any loss was not recoverable from its insurer before it could look to Mr Gray by way of a debt pursuant to clause 6.3 of the employment agreement. The evidence is that Best Removals elected not to make any claim against its insurer, having told its broker that Mr Gray did not have a driver's licence and being told that a claim would not be accepted. I find that Best Removals has not established that any loss was not recoverable from the insurer.

[27] It is clear from Mr Harris's email dated 26 January 2006 that Best Removals did precisely what the Supreme Court and the Employment Court found the previous legislation and the Wages Protection Act 1983 respectively were intended to prevent – it exercised a remedy by way of self help to avoid the inconvenience to it of Mr Gray being part of determining what debts he owed to Best Removals and how to repay them: see *McClenaghan v BNZ* [1978] 2 NZLR 528 and *Amaltal Fishing Company Ltd v Morunga* [2002] 1 ERNZ 692. In doing that, Best Removals breached the Wags Protection Act 1983.

Fuelling Incident

[28] In response to questions during the investigation meeting Mr Harris said that no deduction was made on account of the fuelling mistake. That evidence is wrong. It is clear from Ms Harris's list and Mr Harris's email that the fuelling mistake was one of the reasons for the company withholding Mr Gray's holiday pay. I will determine whether a deduction could lawfully have been made.

[29] Mr Harris said the fuelling mistake occurred sometime between September and November/December 2008. Mr Gray was a passenger with the driver and one

other employee in a company truck. The driver stopped the vehicle at a petrol station to get fuel and Mr Gray filled the tank with petrol instead of diesel. The vehicle then was driven a short distance before it stopped running. It had to be towed back to the yard. The fuel was drained, filters changed and lines cleaned to make it go again. Mr Harris's evidence is that he intended to make the three guys pay for the damage but the other two refused. Mr Gray apparently accepted responsibility and said he would pay but the company did nothing more about it.

[30] I do not accept that clause 6.3 of the employment agreement applies. The vehicle was not under Mr Gray's control at the time the damage was caused, it was under the control of the driver.

[31] At the time of the incident Mr Gray (I find) said that he would accept responsibility for the damage but no sum was then quantified and nothing was in writing. This falls short of the statutory requirement before an employer can lawfully make a deduction from wages In *McClenaghan* the Supreme Court said:

> *the Act deprives every employer of his ability to exercise an arbitrary power to make deductions from wages at a time that suits him best and for his convenience. …The scheme of the Act is to shift it to the worker to decide when it is convenient to him to have his wages diminished in the event that he is indebted to his employer.*

[32] Accordingly I find that there was no right for the company to make any deduction from Mr Gray's final pay in respect of this matter.

Additional matters

[33] As the case developed there is a claim for compensation for the effects suffered by Mr Gray caused by Best Removal's failure to pay him his holiday pay. Mr Gray apparently had to live in his car for a time because he had no money to pay for accommodation, nor money for food. That was no doubt distressing for him but I do not consider it should result in any award of compensation. The wrong done to Mr Gray was a breach of his statutory right to control when and how he spent his wages. The remedies available under the statute are a right to recover an unlawful deduction irrespective of the existence of a genuine debt and/or a penalty. There was no claim for a penalty. I do not accept that it can be said that Mr Gray's employment was disadvantageously affected by Best Removals' breach of statute after the end of the employment so as to entitle Mr Gray to grievance remedies.

[34] Mr Holliday's evidence, which I accept, is that a company shirt Mr Gray returned and for which he was given $50.00 was actually Mr Holliday's shirt. In other words, Mr Gray was not entitled to the $50.00. That $50.00 received by Mr Gray can be treated as holiday pay already received by Mr Gray.

Summary

[35] The failure to pay Mr Gray his holiday pay is a breach of the Wages Protection Act 1983. Best Removals must now pay him his holiday pay in full without delay. Leave is reserved in case of any doubt about quantum.

[36] I was not asked to order the payment of interest.

[37] Costs are reserved. Each side has had some success. If either party wishes to make any claim for costs they may do so by lodging and serving within 28 days a memorandum which the other party may reply to within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority