

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 5
5286006

BETWEEN

DENNIS SAUNDERS
Applicant

AND

PAUL JAMES CONTRACT
SERVICES LIMITED t/as PJs
CARTAGE
Respondent

Member of Authority: R A Monaghan

Representatives: A Taylor, advocate for applicant
T Kurta, advocate for respondent

Investigation Meeting: 20 December 2010

Determination: 10 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In his statement of problem Dennis Saunders says his former employer Paul James Contractors Limited t/as PJs Cartage (PJs Cartage) has:

- (a) dismissed him unjustifiably by reason of redundancy;
- (b) affected his employment to his disadvantage by unjustified action, namely changing his hours of work without consultation and failing to provide appropriate conditions relating to annual leave, sick leave and payment for statutory holidays; and
- (c) breached its obligation to provide him with a written employment agreement.

[2] Penalties for unspecified breaches of the Employment Relations Act 2000 were also sought.

[3] Claims for holiday pay were withdrawn on the basis that the matter was to be raised with a labour inspector, so I do not address them any further.

The issues investigated

[4] The matters listed in support of a disadvantage grievance(s) concerned a series of variations in the employment agreement from the commencement of the relationship in 2003. To the extent that they were capable of amounting to personal grievances, none were raised as grievances with the employer inside the 90-day period in s 114(1) of the Employment Relations Act 2000 and there was no application for a grant of leave to raise them out of time. They cannot proceed. Moreover several occurred outside the 3 year limit on the commencement of actions in respect of a personal grievance, set out in s 114(6) of the Act. There were no further applications in respect of those matters and they cannot proceed.

[5] For these reasons I do not address the disadvantage grievances any further.

[6] The allegation of unjustified dismissal was based on a letter dated 21 September 2009 regarding a change from permanent to casual employment status, and the surrounding circumstances. However Mr Saunders continued to work at PJs Cartage until there was a further incident on 6 November 2009. For its part PJs Cartage says there was an agreed change to casual status, and there was no dismissal.

[7] Accordingly I address whether:

- (a) there was a dismissal on 21 September 2009;
- (b) there was a dismissal on 6 November 2009; and
- (c) if there was a dismissal, whether the dismissal was justified on the ground of redundancy.

[8] The claim for a penalty was clarified to refer to a claim for a penalty for the failure to provide a written employment agreement.

Background

[9] PJs Cartage employed Mr Saunders as a '6 wheeler' truck driver, commencing in 2003. It was common ground that there was no written employment agreement.

[10] For approximately the first 5 years of Mr Saunders' employment payment was made at a minimum of 40 hours per week even if 40 hours were not worked. Often, however, Mr Saunders worked for more than 40 hours per week. When that occurred he was paid at the agreed hourly rate for each hour worked.

[11] By about mid-2008 some significant contracts had been lost and there was a downturn in the work available. Paul James, the company's owner and director, advised Mr Saunders that the company could no longer afford to pay him for 40 hours per week if 40 hours were not worked. The parties agreed that, in the weeks when Mr Saunders worked for less than 40 hours, he would still be paid for 40 hours but the difference between hours worked and hours paid for would be counted as annual leave.

[12] By 2009 the only two people working in the business on a permanent basis were Mr James and Mr Saunders. A casual employee carried out backup work when necessary. The nature of the work available at the time involved Mr James in driving a small digger and other earthmoving equipment on construction sites, thereby providing follow on removal or related work for Mr Saunders. Mr Saunders also carried out other pickup and delivery work when such work was available.

[13] Because of a heart condition Mr Saunders had never been able to assist with any associated lifting or shovelling for any more than very short periods of time. Indeed Mr James did not pursue contracts for certain types of work because Mr Saunders' condition meant the work would be too difficult for him. From time to time there were also discussions about Mr Saunders obtaining licences to operate other equipment, but Mr Saunders did not pursue these possibilities. He said he was not prepared to risk his safety. These factors limited the tasks he could perform.

[14] In or about early 2009 Mr James discussed the lack of incoming business with Mr Saunders, and Mr Saunders made preliminary approaches to other employers

regarding the possibility of employment with them. Mr Saunders accepted that on other occasions Mr James would say there was not much work, and Mr Saunders may want to 'look at other options'. Mr Saunders said he 'was looking [for other jobs] but there was not much out there'.

[15] In August or September 2009 Mr James was hoping to secure a new contract and suggested that Mr Saunders obtain an additional licence so the two could job share. The suggestion was not pursued, at least in part because Mr Saunders' condition made job sharing impracticable.

[16] Further, at or about the same time, Mr James advised Mr Saunders that his entitlement to annual leave was running out, and he could not continue to top up Mr Saunders' pay using that method. Indeed it was common ground that he advised Mr Saunders that the week when the discussion occurred was the last week on which he could pay Mr Saunders in that way. Mr James suggested that Mr Saunders become a casual or a self-employed worker.

[17] In response to the suggestion Mr Saunders told Mr James he would 'check things out' and 'get back' to him. He investigated the alternatives, including making an inquiry to the IRD. He concluded he could not afford to pursue either option, but did not advise Mr James of the conclusion

[18] Mr Saunders had not responded further to Mr James when Mr James decided to put his position in writing in a letter dated 21 September 2009. The letter read:

From this date forward we are unable to provide full employment due to current economic conditions. We are however prepared to offer work on a casual basis as the demand for work dictates. It is with regret that we have been forced to do this but we will continue to do our utmost to generate as much work as possible. ...

This letter now stands as an agreement between PJ's Cartage and Dennis Saunders that you are now employed as a casual employee.

[19] Mr Saunders said he did not open the envelope containing the letter at the time Mr James gave it to him, although he had a fair idea of what was in it. He took the letter out to his truck and read it there. His reaction was that he did not agree to it, although he did not say anything at the time and did not raise his disagreement directly with Mr James.

[20] Mr James was unaware of Mr Saunders' position until he received a letter from Mr Saunders' advocate, dated 28 September 2009 but received on 14 October 2009. The letter raised a personal grievance alleging that Mr Saunders had been dismissed and seeking mediation.

[21] The advocate for PJ Cartage replied in a letter dated 24 October 2009, advising of the view that Mr Saunders had become a casual employee by agreement and indicating a preparedness to attend mediation. The record indicates that an approach was made to the mediation service on 5 November, although by the time mediation went ahead the employment relationship had ended.

[22] In or about October or November Mr James secured the contract he had been seeking. He intended to work full time on the contract himself, without assistance. Since Mr Saunders was unable to do the digger work Mr James had been doing, Mr James engaged a contractor for the purpose. The work available was not full time – indeed Mr James described it as involving little jobs of a half day or so at a time. These changes affected the likely availability of work for Mr Saunders, and Mr James expected a significant drop.

[23] Meanwhile Mr Saunders was continuing to report for work. He was paid for the hours he worked, at an increased hourly rate loaded with a holiday pay component to reflect what Mr James considered to be Mr Saunders' new casual status.

[24] Work continued on this basis until in early November Mr Saunders raised a concern that he was not paid for the statutory holiday on Labour Day. The response was that as a casual worker he had not been offered work on that day and was not entitled to any payment. At or about the same time, but in any event on 6 November, Mr James advised Mr Saunders he was starting work on the new contract and would no longer be carrying out the work he had been doing. Mr James told Mr Saunders he was not fired, rather that Mr James did not know when he could use Mr Saunders again. The intended reference was to the availability of work in the light of the changes in the work available, and Mr Saunders' casual status.

[25] Mr Saunders said he was angry when he heard that. He believed he was fired, and said he would see Mr James in court. He said in evidence that his dismissal

occurred on 6 November 2009. It did not cross his mind on 21 September 2009 that he was fired.

[26] The parties' relationship ended on 6 November 2009.

Determination

1. The effect of the letter of 21 September

[27] Although the date of dismissal relied on in the letter of grievance and in the statement of problem was 21 September 2009, the evidence was that neither party considered their relationship as having ended on that date. The relationship continued until the disagreement on 6 November – 6 ½ weeks later.

[28] I am assisted in the approach to those circumstances by the judgment of the Labour Court in *NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holdings Ltd*¹. I refer in particular to the court's discussion of the law concerning employees' reactions to repudiatory conduct by an employer.

[29] The case concerned a foreman who was demoted, with a commensurate reduction in pay and the loss of other benefits. The employee continued to work under the new conditions for a period without apparent protest, and the employer believed the demotion was accepted. Some 4 weeks after the demotion the employee tendered notice of his resignation and later said he was constructively dismissed. Although he said he had visited his union at the time of the demotion, there was no immediate approach to the employer expressing dissatisfaction and no correspondence was initiated with the employer until several months later. The court found that the employee had continued to work without protest, and had failed to communicate his disagreement with the new conditions. If the employee accepted the repudiation, thus treating the relationship as ended, there was an obligation to communicate that acceptance.

[30] Here I find the notification of the change in Mr Saunders' terms of employment (from being a permanent to a casual employee) amounted to a unilateral

¹ [1991] 2 ERNZ 267

repudiation of the employment agreement. The question is whether Mr Saunders regarded the employment agreement as at an end as a result of the repudiation, or whether in the circumstances he agreed to continue despite the employer's action.

[31] Although Mr Saunders said in evidence he did not wish to become a casual employee because he believed he could not afford to, he continued to work in effect on a casual basis without conveying any protest for a reasonably significant period after 21 September. Plainly during the overall course of his employment he was able to, and on a number of occasions he did, raise any concerns in a robust manner. This time he did not take that approach. He accepted an enhanced rate of pay without comment. He even accepted payments of significantly less than 40 hours per week on some weeks, and did not question his payments until he noticed the absence of payment for the statutory holiday.

[32] There was a form of protest in the letter of grievance dated a week later and received some three weeks later. However, although the letter makes it clear the letter of 21 September was being relied on as a letter of dismissal, Mr Saunders continued to work under the new conditions. This continuation extended beyond the date of the employer's reply asserting that Mr Saunders was now a casual employee. Indeed Mr Saunders continued to work until he was told in effect that Mr James' commencement of the new contract had significant implications for the availability of further work. In continuing to work as he did he affirmed the new arrangement.

[33] For these reasons I do not consider that the grievance letter was sufficient to amount to an acceptance of the repudiation.

[34] I considered seeking the parties' comments on whether the letter of grievance could embody a disadvantage grievance in respect of the change to casual employment status. However because of the view I take of the justification for Mr James' actions I have not proceeded in that way.

2. The discussion of 6 November

[35] Mr Kurta submitted that Mr Saunders had become a casual worker and there was no dismissal on 6 November. The question was one of availability of work.

[36] In all of the circumstances I would accept that view.

[37] However if either or both of my conclusions regarding the existence of a dismissal are wrong I turn to the parties' more detailed argument regarding the justification for what Mr Saunders said was his dismissal.

3. Whether the dismissal, if it occurred, was justified

[38] The reality of the economic circumstances facing PJs Cartage was not in dispute. Mr Saunders said instead that he was unaware the circumstances were such that he may lose his job.

[39] If that was his view then I find it amounted to his setting his face against the obvious. There had been frequent communication between the parties about workloads, the availability of contracts and the way in which work would be allocated. Mr Saunders was aware of the difficulties his employer was facing in that respect, and had been encouraged to look for work elsewhere. He was aware enough to begin an attempt to obtain other employment. In the course of doing so he became aware of the limited employment opportunities anywhere else. He was also aware of the preparations for and entry into the contract Mr James commenced in November. Finally, he knew he had worked for less than 40 hours a week on a significant number of weeks for at least a year, and that Mr James could not afford to pay him for hours he did not work. Overall Mr Saunders could not reasonably have believed Mr James would be able to continue to employ him as a full time permanent employee in the face of those difficulties.

[40] There was also a broader submission that the dismissal was unjustified because of a lack of consultation. It is true that no formal process of consultation was entered into. However I refer to the above summary, and to the discussions about entry into a contractor or casual relationship as an alternative to continuing full time permanent employment. I find the cumulative effect of the discussions during the course of 2009 in particular was sufficient to meet the obligation to consult.

[41] Finally, Mr Saunders queried whether work that could have been made available to him was made available to others instead. I observe that Mr James did

not discount the possibility of casual work being available to Mr Saunders beyond 6 November, rather he expressed a view of the likelihood of that. Mr Saunders had indicated he would not continue on such a basis.

[42] Otherwise, in the context of an allegedly unjustified dismissal on the ground of redundancy, Mr Saunders was concerned because he had seen his 6 wheeler being driven by someone else. However Mr James' explanation was that the truck had been sold to a contractor. Mr James also acknowledged his engagement of a contractor to do the digger work, when the possibility of Mr Saunders carrying out such work had been considered but discarded for the reasons discussed. Further to that, during the investigation meeting Mr Saunders sought to suggest methods of creating work for him which were not practicable.

[43] For these reasons I would find a dismissal on the ground of redundancy was justified.

Penalty

[44] Section 135(5) of the Employment Relations Act provides:

An action for the recovery of a penalty under this Act must be commenced within 12 months of the earlier of –

- (a) the date when the cause of action first became known to the person bringing the action; or*
- (b) the date when the cause of action should reasonably have become known to the person bringing the action*

[45] The parties entered into their employment relationship in 2003. At that time s 64 of the Act was in force. Among other things, when there was no applicable collective employment agreement the provision obliged employers to provide prospective employees with a copy of the intended employment agreement before entering into the agreement. Failure to do so could attract a penalty. The section was repealed with effect from December 2004, and replaced with a similar but not identical requirement in a new s 63A. Again, failure to meet the requirement could attract a penalty.

[46] There was a failure to provide a written employment agreement prior to entry into the employment agreement in 2003. Without commenting on whether such

document was necessary I note that there has been no allegation of a failure to provide a written employment agreement in September 2009.

[47] On the fact of s 64, which applied at the relevant time, any breach occurred with the failure to provide a written employment agreement in 2003. An action for the recovery of a penalty should have been commenced within 12 months of that date, but was not.

[48] Mr Taylor asked me to treat the breach as a continuing one for the purpose of determining the parameters of the limitation period. I am not prepared to do so. Mr Saunders was aware from 2003 that he did not have a written employment agreement, but nothing was done about it until the matter was raised in the letter of grievance in September 2009. No action for recovery of a penalty was commenced until the employment relationship problem was filed in July 2010.

[49] There will be no order for a penalty.

Costs

[50] Costs are reserved.

[51] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority