

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 151
5400214

BETWEEN JAMES CAMERON STUART
Applicant

AND M & L MANAGEMENT
LIMITED (FORMERLY
DIRECT FREIGHT
MANAGEMENT LIMITED)
Respondent

Member of Authority: P R Stapp

Representatives: Russell Ward, Counsel for the Applicant
Rangi Watling for the Respondent

Investigation Meeting: 16 October 2013 and 19 November 2013 at Palmerston
North

Determination: 25 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem is primarily about Mr Stuart's claim that he was unjustifiably dismissed. He has made a number of other claims; the first is an unjustifiable disadvantage in employment claim over a number of separate matters that he says happened during his employment. He relies on his representative's letter dated 6 September 2012 for raising the personal grievance. He has also made claims relating to his employer breaching good faith, failing to take all practical steps to provide a safe working environment, failing to provide him with a written employment agreement and payslips and/or proof that PAYE was being deducted; and that the respondent failed to provide for KiwiSaver. He is seeking global remedies of lost wages and compensation. He also seeks costs.

[2] In a statement in reply filed in the Authority on 23 January 2013, the respondent claims that Mr Stuart abandoned his employment by not returning after he went on sick leave. It denies that there was any dismissal and denies all the claims.

The issues

[3] Was Mr Stuart dismissed?

[4] Is there a basis for any unjustified disadvantage in employment claim?

[5] Does Mr Stuart have any claims for penalties for the alleged breaches of good faith and the employer failing to provide a safe place of work?

[6] What is the standing of the claims relating to the employer failing to provide an employment agreement, pay slips and allegedly failing to provide for Kiwisaver?

The facts

[7] M & L Management Limited (MLM) is a trucking company. Its main office is in Christchurch. Previously MLM was called Direct Freight Management Limited. Mr Stuart was employed on 20 March 2012 as a line haul/delivery driver for three months under a letter of employment offer (dated 20 March 2012). The letter guaranteed him a minimum of 40 hours per week at \$18 per hour, but required him to be available 7 days a week and to work when and as required. After he started the pay arrangements changed and he received more pay for his work than the minimum above. He says he never received a copy of an employment agreement and was never given payslips. He dealt with Mary Lindstrom, MLM's director who is also known as Bing Liu. He says his place of work was located at Palmerston North and he was required to travel, including across the Cook Strait with the truck.

[8] He says that he often worked a minimum of 14 hours per day, including crossing the Cook Strait. It is common ground that the time on the ferries would be rest time, but Mr Stuart claims he had more time on the ferries and was not paid as he should have for the time. He produced bank statements to support his claim for wages and worked out that his average wage over his employment was \$723.52 per week in the hand.

[9] Mr Stuart says Ms Lindstrom laid him off work when she failed to provide him with work and did not respond. He says that he raised a number of concerns with Ms Lindstrom during his employment and he believes that underlying his employment ceasing were other matters including not being given his employment agreement, not being given pay slips and not being informed of the amounts of tax and Kiwisaver paid. He has also complained about being threatened when Ms Lindstrom/Bing Liu told him that she was a lawyer. He says that her partner wanted him to break the law by not taking breaks and to “doctor” the driver’s log book and called him an “idiot”. He accepted that the latter occurred when he did not properly fuel up a vehicle. The matters came to a head when he had to take time off for some dental surgery for toothache, on 2 August 2012. He sent Ms Lindstrom a copy of a medical letter from the dentist to confirm that he had attended the dentist on 3 and 7 August 2012, for time off until 9 August, and that this appeared to be the reason for her not giving him any more work. He says that subsequently she required him to move to Wellington (SOE and SIR) to work on the wharf and/or move to Hamilton (SOP), which he would not do. He says that he would not have taken the job in the first place if he knew that there was a requirement to relocate later. He says he felt misled by her.

[10] Mr Stuart says that on 3 August he finished a run to Wellington from Auckland at 6am. He says he went to the dentist at 11.30 in Palmerston North, because of the pain that his tooth was causing him. The dentist could not help him until the swelling in his mouth had gone down and he was given another appointment for 7 August 2012 (corrected SOE). He had a follow up appointment on 16 August 2012. I accept he got his dates mixed up. The dates are confirmed from the medical certificate from the dentist. He says he confirmed his dental situation with his employer. He was not expecting to be paid sick leave because he had only been employed for five months. He attempted to return to work by telephoning over two-three weeks and in this time had the various demands on him to move his place of work and return his employer’s property. There was no more work provided for him.

[11] On 10 August when Mr Stuart was able to return to work he says no work was made available, and no work was given to him when he rang looking for work over the next two-three weeks. No reasons were provided.

[12] Bing Liu (aka Mary Lindstrom) has not been constructive in assisting the Authority's investigation. She failed to attend the investigation meeting and failed to produce documents requested by the Authority that are crucial in any investigation of the employment relationship problem. It was more than reasonable to expect Bing Liu/Ms Lindstrom to attend the Authority's investigation meeting because of her direct involvement in the matter and in the business. Instead Mr Rangi Watling, MLM's transport manager, attended the next investigation meeting. Indeed the first investigation meeting date was put off to enable Bing Liu/Ms Lindstrom to attend a rescheduled investigation meeting later. She was directed by the Authority to produce wage and time records, telephone accounts and relevant documents. She failed to do so. Also, it would have been reasonable for her to produce the employer's copy of the driver's log book in regard to the latter category of documents, for the hours worked and to assist a reconciliation of the pay, since the arrangements had changed from the letter of offer and there are no wage and time records. Also Mr Stuart had asked for the log book that he left behind, and it has not been returned to him.

[13] Mr Watling attended the Authority's rescheduled investigation meeting ostensibly as an observer, but also as a representative and he did give evidence on the background of the industry and rest time on the ferries which applied to him. He had no knowledge of Mr Stuart's terms and conditions of employment and arrangements. He had no knowledge of any payments made to Mr Stuart, including any holiday pay. He was not involved in Mr Stuart's employment and the events around Mr Stuart's toothache. The only thing in common is that they were both employed as drivers. Mr Watling has bought the business and that occurs on 1 December 2013.

Determination

[14] Mr Stuart's employer was M and L Management Limited (formerly Direct Management Limited). There was no written employment agreement provided. The letter of employment offer purports to be a fixed three month term. However the letter does not meet the requirements of s 66 of the Employment Relations Act, and without the employment agreement, I hold Mr Stuart's employment was indefinite. Indeed he worked past the three months in the letter and therefore had a reasonable expectation of continuing work.

[15] I accept Mr Stuart's evidence that his employment did not continue past 10 August 2012 when no work was provided to him by Bing Liu/Ms Lindstrom. The

employer has provided no reasons and has not supported the claim in the statement in reply that Mr Stuart had abandoned his job. He was available to work from 10 August and tried to return, I hold. I hold that he has been unjustifiably dismissed without any reason, inquiry and fair process. A fair and reasonable employer could not have acted the way M and L Management Limited did by not providing Mr Stuart with work after his toothache, given the medical certificate at the time that was not challenged. The jobs offered by Bing Liu/Ms Lindstrom came after the event of Mr Stuart's illness and were only attempts by the employer to change Mr Stuart's terms and conditions and it was open to him to reject any such proposal, particularly as he felt that he had been misled. Mr Stuart was unjustifiably dismissed at the initiative of the employer when the decision was made not to offer him any more work, and no work was provided after 10 August 2012 in his role. There was no investigation carried out, even if there was any problem about the toothache and/or any other matter in Mr Stuart's employment. No concerns were put to Mr Stuart and he had no opportunity to comment. It follows that the employer could not meet the requirement to genuinely consider an explanation from Mr Stuart before not offering him any more work.

[16] Mr Stuart has claimed unjustified disadvantage in his employment. The letter dated 5 September 2012 raised a personal grievance claim that his log book was not returned and this has caused him disadvantage in the labour market, particularly finding alternative work. There is insufficient evidence about this to establish an unjustified disadvantage personal grievance, other than to support the background to the dismissal. I hold that he was not able to get work for some time which may explain why he holds this view, but he did obtain work much later. In any event as I understand the situation the driver is responsible for the driver's log book, and any pressure from an employer to "doctor" the log book must be the responsibility of the driver to resist. He also complained about being called an "idiot". It seems this occurred when he did not properly fuel up a vehicle. I hold it is more likely than not that such a comment was not malicious and purposely disparaging given Mr Watling's description of behaviour in the workplace and the industry. Further, Mr Stuart says that he was told that Bing Liu/Ms Lindstrom was a lawyer and he says this was done to threaten him. There cannot be a problem with Mr Stuart being told that Bing Liu/Ms Lindstrom is a lawyer when he had his own rights and opportunity to get representation. There was no more evidence about the claims and the context of them

for me to take them any further. There cannot be an unjustified disadvantage action for the claims, I hold.

[17] Mr Stuart has claimed a breach of good faith on three matters. First the employer failed in its duty under the Employment Relations Act (the Act) to provide an employment agreement. Second the employer failed to provide pay slips. Third it has failed to provide proof of PAYE deductions and Kiwisaver.

[18] The employer has breached the Act by not providing a copy of an employment agreement. There is a separate penalty provision for this breach that has not been claimed (s 63A (3) of the Employment Relations Act). Mr Stuart had the basic terms that were made in the letter of employment offer. He understood his hours of work and his base rate of pay. He clearly understood the arrangements about the pay that applied to him after starting work. There is no evidence that he took these matters up with his employer at the time and that he asked for an agreement (no dates given) at any time until he raised a personal grievance, which he was entitled to do. I hold that in any case there was a change in the payment arrangements given the pay Mr Stuart averaged over his time working for M and L Management Limited. I hold that the employer's failure to provide an employment agreement is a particular breach of the Act with its own remedy for a penalty. Also, I am not prepared to award a penalty for a breach of good faith on this for the employer not being responsive and communicative and award it to Mr Stuart when he has brought a personal grievance and there are separate remedies for that, when in reality all the matters are background in the employment relationship.

[19] A good employer would provide pay slips and details of wages paid and have a holiday record to be responsive and communicative. There are a number of things that Mr Stuart could have done in the absence of the employer's attention to this, and to assist and find out his tax, such as asking the IRD. He confirmed that he did not do this. He could also have produced a Kiwisaver report for proof of membership any payments and failure of the employer to make deductions. He did not do so. The responsibility for Kiwisaver exists elsewhere, and as such there are no terms of employment and any details around that arrangement for compensation for the loss of a benefit. Mr Stuart had no information and/or any details or even that any Kiwisaver deductions had been made for him that he needed to make an effort to get more

information about. Furthermore Mr Stuart has not particularised his claim for a remedy on these matters in his personal grievance.

[20] Further I am not satisfied that beyond the claim for unjustified dismissal that Mr Stuart's other claims, such as the ferry time, reach a threshold for liability because of an absence of detail and they have evolved differently from the letter raising a personal grievance, the statement of problem and Mr Stuart's written statement of evidence.

[21] Indeed the last claim he has made is that the employer did not provide a safe place of work. It is significant that there has been an absence of sufficient detail to prove his claims prior to the statement of problem being filed in the Authority. In any event the Employment Relations Authority does not have the power to impose penalties under the Health and Safety in Employment Act. There is no satisfactory list of complaints in Mr Stuart's personal grievance to take the matter any further.

[22] Mr Stuart's claims for penalties are dismissed, but he does have an unjustified dismissal.

[23] I turn to the remedies for unjustified dismissal. The only claims he has made are for lost wages and compensation. Other than the letter of employment offer he has produced his bank statements to identify the amounts of wages he was paid. I hold that he tried to mitigate his loss sufficiently to cover the claim. I hold that Mr Stuart is entitled to 3 months lost wages. His entitlement to 13 weeks (a quarter of a year) is based on the average earnings given the arrangements that applied and using his bank statements. Therefore the amount owing is \$9,405.76 net (the employer is responsible for tax).

[24] He has claimed compensation under s 123 (1) (c) (i) of the Act. I accept that the employer's actions had an impact on Mr Stuart. He suffered financially and emotionally and informed me of the difficulties he had with his income ceasing and his relationship with his partner and family. He is entitled to \$5,000 net under s 123 (1) (c) (i) of the Act.

[25] There is no deduction on the sums because I hold that Mr Stuart did not contribute to his personal grievance. He is not at fault.

Summary of orders

[26] M and L Management Limited is required to pay James Cameron Stuart the sums of:

- (i) \$9,405.76 net (the employer is responsible for tax) lost wages; and
- (ii) \$5,000 compensation under s123 (1) (c) (i) of the Act.

[27] Mr Stuart is entitled to costs based on the notional daily tariff of \$3,500 for a one day investigation meeting. He attempted to settle with an offer to settle and save the expense of an investigation meeting. This is a factor to be taken in to account, I hold. He has been put to the cost of the preparation for his case at the investigation meeting and the attendance of a representative for the scheduled meeting that lasted a half day. The employer is responsible for any extra costs and time by its failure to provide relevant documents and the proper attendance of relevant witnesses. He has been put to the expense and cost by MLM by needing to have an investigation meeting to get his employment relationship problem resolved and to try and get MLM to engage in the matter.

[28] I award Mr Stuart slightly more than the equivalent of a half day in the sum of \$2,000 costs and \$71.56 filing fee. In addition to the sums above in [26] (i) and (ii) M and L Management Limited is to pay James Stuart \$2,000 costs and \$71.56 filing fee.

P R Stapp
Member of the Employment Relations Authority