

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 81
5550112

BETWEEN

REECE MacGREGOR
Applicant

A N D

CORBOY FOREST
MANAGEMENT LIMITED
Respondent

Member of Authority: James Crichton
Representatives: James McGirr, Counsel for Applicant
No appearance for Respondent
Investigation Meeting: 7 March 2016 at Hamilton
Oral Determination: 7 March 2016
Written Record Issued: 11 March 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination records an oral determination I gave at the conclusion of my investigation meeting into the employment relationship problem between these parties.

[2] Mr MacGregor was employed as a truck driver by the respondent (Corboy). There is a written employment agreement which was signed on 3 February 2015 but which records the commencement date as 19 January 2015.

[3] Although the employment agreement contains a trial period that is not referred to by either party, I observe that the commencement of the employment predated the execution of the agreement which would preclude Corboy relying on it in any event.

[4] The issue that caused the employment relationship to break down was an application for annual leave made by Mr MacGregor on 9 March 2015. It is common cause that on that date, Mr MacGregor spoke to the office manager for Corboy (Ms Diane Cox) and Mr MacGregor says that Ms Cox told him he should regard the application for leave as having been lodged as a consequence.

[5] Notwithstanding that, it is nonetheless a fact that the employment agreement specifically requires applications for leave to be submitted in writing on a "*Leave Request Form*": clause 10.12 of the operative individual employment agreement.

[6] Mr MacGregor now accepts that he should have completed that form in order to apply for the leave in question although his evidence is that he did not know of that requirement at the time he made the leave request and that he had previously successfully asked for leave on the informal basis that he followed on 9 March 2015.

[7] On Friday, 27 March 2015, the date before the leave day that Mr MacGregor applied for, Mr MacGregor engaged with Mr Pevreal, his direct supervisor, to remind Mr Pevreal that he was taking a leave day the following day (Saturday, 28 March 2015) in order to attend a friend's wedding.

[8] Mr MacGregor's evidence is that Mr Pevreal did not respond to him immediately but later the same day, he received a text message from Mr Pevreal, the effect of which was to purport to cancel the requested leave.

[9] The actual exchange is as follows:

Mr Pevreal: You need to be at Ricks job at 4am.

Mr MacGregor: As I told you I'm going to a wedding tomorrow and I'll see you Monday.

Mr Pevreal: That is not good enough Reece [Mr MacGregor] as I explained today. If you are not at work tomorrow there will be no work on Monday as I will be driving the truck.

[10] The statement in reply filed by Corboy maintains that if Mr MacGregor was not going to work on Saturday, then Mr Pevreal would himself work on Saturday and it is contended that Mr Pevreal would, as a consequence, need to retain possession of the truck and fulfil the duties that Mr MacGregor would otherwise have performed on

the following Monday as well. For the avoidance of doubt, Mr MacGregor does not accept that proposition.

[11] Mr MacGregor says there is no reason for Mr Pevreal to retain possession of the truck as Mr Pevreal lived next door to the depot and could readily simply relinquish it for Monday work by Mr MacGregor.

[12] In any event, the text exchange between the two principal protagonists continued with Mr MacGregor asking: *“on what terms are you dismissing me?”* and Mr Pevreal stating: *“I’m not dismissing you. I’m saying if I have to drive it tomorrow I will still be driving it on Monday”*.

[13] Mr MacGregor responded: *“so when will there be work for me again?”* and Mr Pevreal responded *“as I said your start time is at 4am at Ricks (on the Saturday) end of conversation”*. Mr MacGregor attended his friend’s wedding on 28 March 2015 and the following day (Sunday, 29 March 2015), he engaged with Mr Pevreal again by text message and was told there was no work tomorrow (that would be Monday, 30 March 2015) and that Mr Pevreal *“will text tomorrow night regarding Tuesday”*.

[14] Mr MacGregor tried engaging with Mr Pevreal again on Monday, 30 March 2015 and sent three text messages before he got a reply from Mr Pevreal indicating that there would be no work the following day (Tuesday, 31 March 2015) because the truck was in the workshop.

[15] On Tuesday, 31 March 2015, Mr MacGregor attended at the workplace but Mr Pevreal was not physically present. Mr MacGregor’s evidence is that Mr Pevreal was at his home next door but he refused to engage with Mr MacGregor. Mr MacGregor’s evidence is that Mr Pevreal would have been in no doubt that he (Mr MacGregor) was at the workplace during that visit.

[16] Equally important was the evidence from Mr MacGregor that the truck that he was told would be in the workshop was actually in the yard. Moreover, Mr MacGregor gave hearsay evidence that a former workmate had indicated that the truck was being used on Monday as well and accordingly it is suggested that I should treat the contention that the truck was in the workshop on Monday and Tuesday, with some suspicion.

[17] In any event, having called at the workplace and been unable to speak to Mr Pevreal, Mr MacGregor explained to Ms Cox that he was in financial difficulty as a consequence of not working, needed clarity around his employment status and would be happy to be placed on paid leave if there was no work. Ms Cox provided him with a letter for Work & Income New Zealand (WINZ) which advised that there was no full time work, that Corboy was not prepared to pay Mr MacGregor annual leave and that Corboy could not determine when work would be available again.

[18] Mr MacGregor decided that there was too much uncertainty around his continuity of employment with Corboy and accordingly sought alternative employment. A personal grievance was raised on 1 April 2015.

The respondent's engagement

[19] On receipt of the personal grievance, Corboy refused to attend mediation maintaining that Mr MacGregor had no valid personal grievance. Mr MacGregor then filed his statement of problem in the Authority and the parties subsequently attended mediation unsuccessfully. Corboy maintains that Mr MacGregor knew there was work available because on the evening of 31 March 2015 a supervisor from Corboy contacted Mr MacGregor to indicate work that was available the following day. Because Mr MacGregor had already commenced looking for an alternative role, it is alleged by Corboy that Mr MacGregor had effectively abandoned his employment.

[20] A statement in reply was filed in the Authority which sets out fully Corboy's position.

[21] Up to 3 February 2016, Corboy was represented by counsel but on that date counsel for Corboy indicated they no longer had current instructions and from that date forward, my Authority officer has been endeavouring to engage with Corboy directly, but entirely without success.

[22] For the avoidance of doubt, I am absolutely satisfied that Corboy was aware of the Authority's attempts to engage with it and that it simply chose not to respond in any way.

[23] Originally, the matter was set down for an investigation meeting on 14 June 2016 but because of a reallocation of files within the Authority's Auckland office, this matter came onto my list and I was able to deal with it more quickly. It was in the

context of endeavouring to get a commitment to a fresh, and earlier date, that it became apparent that counsel for Corboy was withdrawing.

[24] Notwithstanding that withdrawal, as I have already noted, I am satisfied that Corboy knows about the salient details; there are electronic read receipts on my file indicating messages have been received and the notice of hearing for the earlier fixture was formally served on the registered office for Corboy.

[25] When I convened a telephone conference to engage with the parties in respect of my requirements for an investigation meeting, the directions conference taking place on 9 February 2016, my Authority officer telephoned the number for Corboy and heard a voice message to the effect that Corboy had ceased trading on 25 January 2016.

[26] Accordingly, when the telephone conference proceeded with just counsel for Mr MacGregor present, I was at pains to explore with counsel whether Mr MacGregor wanted to proceed or not given that intimation that Corboy had ceased trading.

[27] At the investigation meeting, Mr MacGregor gave the clearest evidence that Corboy had not ceased trading at all but that it might well have some significant indebtedness. I was advised that there are other companies within the Corboy group and one of those, Corboy Earthmovers Limited, may have ceased trading but that Corboy Forest Management Limited (the employer of Mr MacGregor), has certainly not ceased to trade.

[28] Having satisfied myself that Corboy was aware of the Authority's process, aware of the changes to the date of the investigation meeting, and therefore was able to engage with the Authority at any time, I determined that it was available to me to proceed to conduct my investigation notwithstanding the fact that Corboy was not present. I determined that its failure to engage with the Authority was deliberate and not inadvertent and that it was well aware that the matter was proceeding.

[29] It is always disappointing for the Authority when a party simply does not attend especially where they have gone to the trouble to make their position clear in earlier engagements with the Authority.

[30] It is self-evident that a failure of a party to attend an investigation meeting makes it more rather than less likely that that party's position will not be as well

represented in the Authority's eventual decision as the position of the other party. This is for the self-evident reason that this process is an evidenced-based one and in the absence of evidence, it is more rather than less likely that the Authority will reach conclusions adverse to the party that has not bothered to engage.

[31] However, I should make the point that because of the full and clear statement in reply that was filed in this matter before Corboy stopped engaging in the Authority's process, I was able to challenge Mr MacGregor's recollection of significant events and put to him the contentions advanced by Corboy. That said, I reiterate that Corboy's position would have been greatly enhanced if it had engaged in my process and been prepared to provide me with evidence of its position.

Determination

[32] I have concluded on the material before me that Mr MacGregor was either dismissed by Mr Pevreal via text message in the exchange the two men had on 27 and 29 March 2015 or Mr MacGregor was constructively dismissed by the same process when, despite Mr MacGregor's obvious desire to get a clear statement about when he would have gainful employment again, Corboy persisted with a failure to appropriately engage.

[33] The first element that is relevant is the application for annual leave. Mr MacGregor told me (and in the absence of any other evidence I have no reason to doubt him) that he had previously applied for annual leave on exactly the same informal basis (notwithstanding the provision in his employment agreement) and there had not been any problem with the earlier application for leave.

[34] Accordingly, despite the clear provision in his employment agreement which he ought to have followed, I am satisfied that because he had no reason to think about that provision, given it had not been drawn to his attention previously, his application for leave was, in his mind, a proper one.

[35] Moreover, Mr MacGregor's evidence was that Ms Cox not only did not draw his attention to the requirement that he file a written application but also told him that his application made on 9 March 2015 was "*lodged*".

[36] Clearly Mr MacGregor ought to have filed a written application but given that he had not done that in the past without any challenge from the employer, it is

difficult to see why the employer can suddenly rely on that contractual provision now. Moreover, Ms Cox, as the employer's representative for these purposes, ought to have warned Mr MacGregor if there was an issue in this regard, that he needed to file a written application.

[37] It follows that I am satisfied the application for annual leave was properly made notwithstanding the contractual provision, although I accept that the employer may well be able to contend that it did not know about the application for leave, which seems to be the burden of what the employer was saying in the statement in reply.

[38] If that is true, then it is plain on the evidence that Mr Pevreal found out about the leave application the day before when Mr MacGregor reminded him of it in a telephone call from his truck to Mr Pevreal's office. It was this call which provoked the text exchange between the two men that I have already dwelt on.

[39] And more than that, even if Mr MacGregor's absence on the Saturday was inconvenient (as perhaps it was), Mr MacGregor put in a letter to the employer that same day in which he carefully and temperately set out his willingness to try to resolve the dispute between the parties.

[40] Mr MacGregor sets out the process that he had followed to apply for the leave, notes that he had applied for leave previously (and successfully) using exactly the same process, indicates that he thought that was the process, refers to Mr Pevreal threatening to sack him if he did not work the Saturday and indicates that he wished he could change his plans to resolve matters but had already incurred costs which he could not get out of, to attend his friend's wedding. He then concludes with the following sentence:

I hope we can resolve this amicably and I am happy to talk things over when I return to work next week.

[41] Having received that communication, it is difficult to see why Mr Pevreal would not have looked at that and thought that here was a young man trying to do the right thing in circumstances where the parties had managed to get at crossed purposes.

[42] Then on the day after the disputed leave day, Mr MacGregor made a further series of efforts by text messages and after two attempts got a response from Mr Pevreal to say that there was no work the following day, Monday.

[43] No doubt that response from Mr Pevreal is consistent with his earlier intimation that if Mr MacGregor did not drive on the Saturday, then Mr MacGregor would not be driving on Monday either because Mr Pevreal would be still driving the truck.

[44] Again, on the evidence that I heard, there is no logical basis for Mr Pevreal to require Mr MacGregor to stand aside on the Monday unless of course, as Mr MacGregor maintains, Mr Pevreal was simply trying to punish Mr MacGregor for inconveniencing him over the disputed annual leave day. This is because Mr Pevreal lived next door to the yard and he could easily have relinquished the work on Monday in favour of Mr MacGregor if he had chosen to.

[45] Then on Monday, 30 March 2015, Mr MacGregor sent three text messages asking about work the following day and eventually got a response from Mr Pevreal 2½ hours after the last of those three messages, indicating that the truck was in the workshop and therefore there was no work on Tuesday, 31 March 2015 either. As I have already indicated, I doubt that the truck was indeed in the workshop as that is inconsistent with Mr MacGregor's evidence that it was sitting in the yard when he visited the following day, 31 March 2015, a day where according to the statement in reply from Corboy, the truck was in the workshop still.

[46] Again, Mr MacGregor's appearance at the workplace on 31 March 2015 is also illustrative of his enthusiasm to try to engage with the employer and yet despite the fact that Mr MacGregor's evidence is that the employer was at his home and therefore presumably available to engage with him simply by coming next door to the depot, Mr Pevreal would not deal with him and it would have been evident to Ms Cox, the office manager, that Mr MacGregor was anxious about his financial position because of his request to her to have a letter that he could take to WINZ, the terms of which I have already referred to.

[47] Accordingly, my considered view is that either Mr Pevreal dismissed Mr MacGregor looking at the totality of the text message exchanges or in the alternative that his behaviour in ensuring that Mr MacGregor was deprived of work was calculated to provoke a severance of the employment relationship by the employee and it was reasonably foreseeable that such a severance of the employment relationship would result, in the particular circumstances of the case.

[48] It ought to have been absolutely apparent to Corboy that Mr MacGregor was concerned about money and his various attempts over the handful of days in question all show his enthusiasm to engage with the employer and try and resolve the matter in a practical way. Despite Mr MacGregor's efforts, there was no corresponding effort from Corboy at all and indeed looking at the evidence in its totality, I am satisfied that Corboy set out to make things as difficult as it could for Mr MacGregor.

[49] Having concluded that this is an unjustified dismissal and that Mr MacGregor therefore has a personal grievance, my next task is to consider whether Mr MacGregor has contributed in any way to the circumstances giving rise to his personal grievance. I conclude that he has not; if he had not given the evidence that he had been successful in obtaining annual leave previously on the informal basis which got him into trouble on this occasion, I should have reached a different conclusion. But the short point is that given Mr MacGregor had successfully applied for and been granted annual leave on a previous occasion using the same informal system, it is difficult to see why he should be penalised now.

[50] I turn now to the question of compensation. As I indicated at the investigation meeting, it was pleasing to see an applicant party turn up to an investigation meeting and be prepared to provide clear and explicit evidence of the non-economic loss that the dismissal occasioned. I heard evidence especially from Mr MacGregor's partner, Ms Chloe Bryce, who told me that she and Mr MacGregor had been together for seven years that the dismissal resulted in him not sleeping, and that there was a breakdown in their relationship to the extent that she went home to her mother for a period because of Mr MacGregor's depressed mood.

[51] She said that Mr MacGregor stopped speaking to her and before she left to stay with her mother for a time, she would regularly find Mr MacGregor out of bed and awake in the middle of the night.

[52] Ms Bryce told me that she eventually got Mr MacGregor to see a doctor but that the only thing that improved his mood was when he found a replacement job, albeit at significantly reduced hours.

[53] In all the circumstances of the present case, I am satisfied that an award of \$7,000 is an appropriate amount of compensation to remedy the non-economic loss that Mr MacGregor has suffered and I direct that that sum is to be paid by Corboy to

Mr MacGregor pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[54] Mr MacGregor was unemployed for just 12 days after the unjustified dismissal but his new role, although paid at the same hourly rate, did not offer him as many hours.

[55] Accordingly there is a loss of wages entirely for the 12 days of unemployment together with the difference between the hours worked in the new role and the hours that would otherwise have been worked in the role Mr MacGregor was dismissed from. I am satisfied that a gross payment of \$5,548.80 ought to be made by Corboy to Mr MacGregor representing the sum of the lost 12 days of employment and the difference between the hours that he worked in his new role set against the hours he would have continued to work in the role he was dismissed from and I have exercised my discretion in terms of s.128(3) of the Act to allow a greater period than the three months period that automatically applies by the effect of s.128(2) of the Act.

[56] Costs are sought and in the circumstances I do not propose to reserve them but to deal with them now. I am advised that Mr MacGregor has incurred legal costs of about \$7,250 inclusive of GST. Given the nature of this matter, I am satisfied that that is a reasonable fee in all the circumstances.

[57] The starting point must be the daily tariff which is currently set at \$3,500. This matter was dealt with in half a hearing day but in the particular circumstances of this case where I am satisfied that the way in which Corboy conducted its case has materially added to Mr MacGregor's costs, an uplift is appropriate. I direct that Corboy is to pay to Mr MacGregor the sum of \$4,000 as a contribution to his legal costs. That figure represents an uplift of \$2250 on the effect of the daily tariff for a half day hearing.

[58] Interest is sought but I have indicated I am not willing to allow a claim for interest.

[59] A Certificate of Determination is to be provided to Mr MacGregor.

James Crichton
Chief of the Employment Relations Authority