

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 269  
3080452

BETWEEN	PETER SUNBEAM Applicant
A N D	RITCHIES TRANSPORT HOLDINGS LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Mary-Jane Thomas, counsel for the Applicant Maria Green, counsel for the Respondent
Investigation Meeting:	14 December 2020 in Queenstown
Submissions and further information received:	Up until 26 April 2021 from the Applicant Up until 12 May 2021 from the Respondent
Date of Determination:	22 June 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Peter Sunbeam worked as a bus driver for Ritchies Transport Holdings Limited, driving buses in Queenstown. Mr Sunbeam was employed from 15 April 2018 until 25 July 2019 when he resigned.

[2] Mr Sunbeam says that a term of his employment was that Ritchies Transport would provide him with free accommodation, and he enjoyed that benefit for over 12 months before Ritchies Transport unilaterally decided that he, and other drivers, would have to pay \$175.00 per week for this accommodation. Mr Sunbeam says Ritchies' decision to change to drivers

paying for accommodation and the way it dealt with him over the change, including removing his belongings from the accommodation without his permission, was a unilateral variation of his employment terms and conditions and/or a breach of duty. He says the breaches caused him to resign and this amounts to an unjustified dismissal by Ritchies Transport and/or unjustifiable actions by Ritchies Transport that have caused a disadvantage to his employment.

[3] Ritchies Transport says that the provision of free accommodation to Mr Sunbeam was not a term of his employment and as a result there were no breaches of duty that would support the unjustified dismissal claim or the unjustifiable action causing disadvantage claims.

[4] I have investigated Mr Sunbeam's claims for unjustified dismissal and unjustifiable action causing disadvantage and this determination resolves them.

#### **Issues for unjustified dismissal**

[5] The issues for the unjustified dismissal grievance are:

(a) Was Mr Sunbeam dismissed; and

(a) If so, was the dismissal justified assessing justification on the basis of section 103A of the Employment Relations Act 2000 (the Act) and section 4 of the Act.

#### **Unjustifiable action causing disadvantage**

[6] Section 103(1)(b) of the Act sets out that an employee may have a personal grievance against their employer where that employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[7] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

(a) What does the employee say the employer did and did the employer act as alleged?

(b) If so, did these actions cause any disadvantage to the employee's employment or a condition of employment?

(c) If so, were the employer's actions justifiable?

### **Events giving rise to Mr Sunbeam's claim**

[8] Before I analyse the issues arising in Mr Sunbeam's claims I will set out the facts I have established from my investigation meeting.

#### *Mr Sunbeam and Ritchies Transport negotiate and agree terms of employment*

[9] In 2018 Mr Sunbeam lived in Invercargill and was working as a bus driver. He became aware that Ritchies Transport were looking for bus drivers in Queenstown and that some drivers had been given free accommodation in Queenstown.

[10] Mr Sunbeam contacted Ritchies Transport to discuss employment in Queenstown. Around March 2018 Mr Sunbeam had a meeting with Stuart Adams, the Operations Manager for Ritchies Transport in Queenstown. Mr Sunbeam says they discussed free accommodation and he understood it was for bus drivers employed by Ritchies Transport in Queenstown to assist them but he was not told how long it would last for and he conceded that he was told he may have to pay for the accommodation at some later time but any payment would be minimal – he says he remembers being told about \$10.00 per night.

[11] Lindsay Collins, part of the management team at Ritchies Transport, was tasked with dealing with processing applicants after they had spoken to Mr Adams and Ritchies Transport wanted to offer employment to them. As part of this process he spoke to these approved applicants and discussed the role and then sent them written offers of employment with an employment agreement for them to consider and sign if they wished to accept the role being offered to them. He did not remember dealing with Mr Sunbeam specifically but insists that he told all applicants he dealt with the same thing about the provision of accommodation – it was accommodation for new drivers but the free accommodation was not a permanent thing and Ritchies Transport might start charging drivers a minimal rate of \$10.00 per night.

[12] Mr Collins was also very clear in his evidence that the free accommodation was not a term of employment; it was not recorded in writing in the offer letter nor was it set out as a term of the employment agreement.

[13] After speaking to Mr Sunbeam, Mr Collins emailed him an offer letter and an employment agreement on 21 March 2018. In line with Mr Collin's evidence, neither the offer letter nor the employment agreement referred to free accommodation for drivers.

[14] Mr Sunbeam responded by email on 22 March 2018 and asked if the accommodation would form part of the contract and would it be available when he started.

[15] Then on 23 March 2018 before he had received a response to his two questions, Mr Sunbeam signed the employment agreement and emailed it back to Mr Collins confirming he would start on 9 April 2018 if this was suitable for Ritchies Transport.

[16] Later on 23 March 2018 Mr Collins responded to Mr Sunbeam's email confirming the start date of 9 April 2018 and he stated:

Re your query about accommodation, for those who are resident elsewhere and travelling up here to do minimum of 40 hour stints, we do offer shared accommodation (this means a separate room in one of our houses or flats). At this point in time there is no cost for this service, there may be a minimal cost to this in the future (e.g. \$10 a night), due to the expense involved at our end, but for now it is free.

*Ritchies Transport provides free accommodation to bus drivers whilst they are working in Queenstown*

[17] Mr Sunbeam then commenced work with Ritchies Transport in Queenstown; when he was working he used the free accommodation provided.

[18] In late 2018 the Queenstown Branch Manager, at that time, spoke to the bus drivers using the free accommodation advising them that Ritchies Transport would soon start charging for the accommodation they were using. So, by the end of 2018 many of the drivers were aware of a possible change to the accommodation, in particular that Ritchies Transport was going to start charging for it, but none of them knew when that might happen or how much any charge would be.

[19] Through the early part of 2019 bus drivers working for Ritchies Transport in Queenstown continued to use this free accommodation. This included Mr Sunbeam.

*Ritchies Transport withdraws the free accommodation and requires employees to pay for accommodation provided*

[20] Around April 2019, the Queenstown Branch Manager met with each of the bus drivers who were using the free accommodation and advised them that they would have to start paying for accommodation. The manager provided the drivers with a staff accommodation agreement which provided for payment at the rate of \$200.00 per week plus a bond. The drivers were told they needed to sign the agreements by the end of April 2019 with the charge being payable from 1 June 2019.

[21] There was some discussion between the bus drivers and the Queenstown Branch Manager around the timing and cost of the charge. Ritchies Transport agreed to reduce the amount charged to \$175.00 per week and that it would delay implementing the charge in order for drivers to be able to pay a bond of \$150.00. A second accommodation agreement was provided to the drivers reflecting this change.

*Mr Sunbeam does not agree to pay for accommodation and Ritchies Transport removes his belongings*

[22] By May 2019 all of the bus drivers who used Ritchies Transport accommodation in Queenstown had signed the second accommodation agreement except for Mr Sunbeam.

[23] Mr Sunbeam had met the Queenstown Branch Manager to discuss the change to the accommodation provided by Ritchies Transport. He did not sign the accommodation agreement at that time and then he was away from work on pre-approved leave.

[24] When Mr Sunbeam returned to work on 9 June 2019 despite having not signed the accommodation agreement he continued to use the accommodation provided by Ritchies Transport, without paying.

[25] In June 2019 a new Branch Manager started in Queenstown, Cesar Costa. Mr Costa had not been involved in dealing with bus drivers over the change to the accommodation provided to them but he was aware of the steps the previous Branch Manager had taken.

When he commenced work in the Branch Manager role, Mr Costa believed he just had to follow up with Mr Sunbeam to get the accommodation agreement signed.

[26] In the week of 9 June 2019 there were various exchanges between Mr Sunbeam and other staff at Ritchies Transport over the accommodation agreement and Mr Sunbeam signing it. In terms of those interactions Mr Sunbeam says Mr Costa was aggressive and pressured him over signing it. Ritchies Transport staff say Mr Sunbeam was evasive, avoiding meeting with them or discussing the agreement; Mr Costa says it was so difficult to get Mr Sunbeam to engage with him that he resorted to not approving Mr Sunbeam's time sheet in order to get Mr Sunbeam to meet him. Ritchies Transport staff then say when they did speak to him, Mr Sunbeam was angry, confrontational and refused to sign the accommodation agreement.

[27] On 14 June 2019 Mr Sunbeam's lawyer wrote to Ritchies Transport advising that Mr Sunbeam would not sign the accommodation agreement as he was employed on the basis of Ritchies Transport providing him free accommodation during his employment; he would not now consent to be charged \$175.00 for that accommodation.

[28] What followed was an exchange of correspondence, firstly from Ritchies Transport directly and then its lawyer. The parties respective positions set out in the correspondence was:

- (a) Mr Sunbeam asserting that free accommodation was a term of his employment and as he did not agree to it being removed and replaced with accommodation he had to pay for, he would not sign the accommodation agreement.
- (b) Ritchies Transport denying that the provision of free accommodation was a contractual term rather it was a discretionary benefit which it had the right to change and had changed for all bus drivers using its accommodation. So Mr Sunbeam was required to pay for the accommodation provided by Ritchies Transport if he chose to use it and his continued refusal to pay was causing problems with the other drivers who had signed the accommodation agreement and were paying.

[29] The disagreement between Mr Sunbeam and Ritchies Transport was not resolved and it came to a head on 25 July 2019 when Mr Sunbeam attended at work to fulfil a rostered

shift. Ritchies Transport did not have accommodation for Mr Sunbeam – which arose partly because of the change in accommodation being used and because Mr Sunbeam had not signed the accommodation agreement and the issue of payment for accommodation had not been resolved. Mr Sunbeam’s belongings were in a room another bus driver was using so Ritchies Transport removed his belongings and took them back to the Queenstown depot for safe keeping and collection by Mr Sunbeam.

[30] The issue with there being no accommodation for Mr Sunbeam on 25 July 2019 and Ritchies Transport removing his belongings was communicated to Mr Sunbeam’s lawyer by Ritchies Transport’s lawyer.

[31] In response to these events, Mr Sunbeam resigned and raised a personal grievance for constructive dismissal and unjustifiable disadvantage on 25 July 2019.

### **Constructive Dismissal**

[32] Mr Sunbeam alleges that his resignation is an unjustified dismissal because he resigned in response to a breach of duty by Ritchies Transport; that is, a constructive dismissal.

[33] The relevant case law shows that in order to determine if Mr Sunbeam was constructively dismissed I must consider:<sup>1</sup>

- (a) Was there a breach of duty by Ritchies Transport;
- (b) Was that breach of duty sufficiently serious, that is repudiatory or dismissive, to warrant Mr Sunbeam’s resignation;
- (c) Was it reasonably foreseeable that Mr Sunbeam might resign in response to that breach; and
- (d) Did Mr Sunbeam resign in response to that breach of duty?

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<sup>1</sup> *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

*Was there a breach of duty by Ritchies Transport?*

[34] Counsel for Mr Sunbeam says there were four acts which support Mr Sunbeam's claim that there was a breach of duty :

- (a) Ritchies Transport unilaterally varying a term of Mr Sunbeam's employment that he would be provided with free accommodation.
- (b) Ritchies Transport not consulting Mr Sunbeam over charging him for accommodation, at a non-negotiated amount, thereby reducing his remuneration.
- (c) Ritchies Transport threatening to stop paying Mr Sunbeam's wages unless he signed an accommodation agreement thereby agreeing to pay for accommodation provided by Ritchies Transport.
- (d) Ritchies Transport moving Mr Sunbeam's belongings out of the Ritchies Transport accommodation without informing him and leaving him stranded without accommodation.

[35] I will consider if each amounts to a breach of duty.

*Unilateral variation of a term of Mr Sunbeam's employment*

[36] The first point is that Ritchies Transport did make a unilateral decision to remove the free accommodation provided to bus drivers in Queenstown. All drivers accepted this except Mr Sunbeam. By its actions on 25 July 2019 Ritchies Transport confirmed there was no longer free accommodation for Mr Sunbeam when he worked in Queenstown; it offered him accommodation when he worked at the rate of \$175.00 per week. So Ritchies Transport imposed its decision on Mr Sunbeam i.e. it was a unilateral variation.

[37] The next question is to determine if the provision of free accommodation to Mr Sunbeam by Ritchies Transport was a term of his employment i.e. was the unilateral variation to a term of Mr Sunbeam's employment.

[38] I am not satisfied that the provision of free accommodation by Ritchies Transport was a term of Mr Sunbeam's employment. I believe the circumstances here are analogous to those

in *The ANZ National Bank Limited v Doidge*.<sup>2</sup> In *Doidge* the Employment Court decided a mileage allowance paid for evening/night work was not a term of employment but rather a condition of employment. This was on the basis that the allowance was not expressly incorporated into the employment agreement and it could not be implied into the employment agreement.

[39] The analysis in *Doidge* applies here, the provision of free accommodation:

- (a) Was not an express term of Mr Sunbeam's employment agreement and in fact it was specifically excluded on the basis that Ritchies Transport did not consider it a term of employment and did not offer it as such. And Mr Sunbeam accepted this by signing the employment agreement offered.
- (b) Was not a term that can be implied into Mr Sunbeam's employment under common law; it is not reasonable or equitable to imply the term in this case nor is it necessary to give business efficacy to the employment agreement.<sup>3</sup>
- (c) Was not a term that can be implied by custom and practice because Ritchies Transport provided the free accommodation for over one year; in the circumstances the evidence does not show a custom or practice which can be said to be certain, reasonable, universal and notorious and it cannot be said the parties intended it to be part of the employment agreement.<sup>4</sup>

[40] So, there is no legal basis to find that Ritchies Transport breached a term of Mr Sunbeam's employment by the unilateral variation it made by requiring him to pay for the accommodation it previously provided for free. So there is no breach of a term of Mr Sunbeam's employment that would inform a constructive dismissal claim.

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<sup>2</sup> *The ANZ National Bank Limited v Doidge* (2005) 2 NZELR 558.

<sup>3</sup> *Attorney-General v New Zealand Post Primary Teachers Association* (1992) 1 ERNZ 1163 (CA).

<sup>4</sup> *Edminston v Sanford Ltd* [2017] NZEmpC 70; and *Everist v McEvedy* [1996] 3 NZLR 348.

*Was there a breach of an implied duty by unilaterally imposing a requirement for Mr Sunbeam to pay for accommodation?*

[41] It also follows from *Doidge* that the provision of free accommodation was a condition of Mr Sunbeam's employment.<sup>5</sup>

[42] In *Doidge* the Court went on to conclude that a lawful alteration of a condition of employment cannot be relied on to found a claim of unjustified dismissal.<sup>6</sup> The Court also stated that counsel for Mrs Doidge conceded that if the allowance was not a contractual term its discontinuation cannot support a constructive dismissal claim.<sup>7</sup>

[43] The question is, do these findings mean the unilateral withdrawal of a condition by an employer could not support a claim to constructive dismissal?

[44] This issue was addressed in *Ramsay v Commissioner of Police*, where the Employment Court stated that constructive dismissal arises where an employee establishes that their resignation was caused by a breach of an express or implied employment duty by the employer which is sufficiently dismissive or repudiatory to justify the resignation. And the Court said, in the absence of a breach of an express term of the employment agreement, a breach of the duty of good faith could be established to reach the threshold of repudiatory conduct.<sup>8</sup>

[45] Putting all of this together what this means for Mr Sunbeam's constructive dismissal claim is that he cannot rely on the removal of the condition of his employment that Ritchies Transport would provide free accommodation, even if that action was unjustifiable. Mr Sunbeam needs to show something more; that the actions amount to a breach of an implied duty. If Mr Sunbeam establishes that there has been a breach of an implied duty he will then need to show the breach was sufficiently serious i.e. dismissive or repudiatory, to warrant his resignation in response.

[46] The question therefore is, what implied duty arises for Ritchies in respect of the withdrawal of a condition of employment?

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<sup>5</sup> *Doidge*, above n 2 at [66].

<sup>6</sup> *Doidge*, above n 2 at [67].

<sup>7</sup> *Doidge*, above n 2 at [57].

<sup>8</sup> *Ramsay v Commissioner of Police* [2009] ERNZ 81 at [8] – [10]; see also *Creedy v Commissioner of Police* (2006) 3 NZELR 293 at [124].

[47] Counsel for Mr Sunbeam refers to a mutual obligation on both the employer and the employee to treat each other fairly and with respect. Counsel also refers to the unilateral removal of the free accommodation as being unreasonable.

[48] Counsel for Ritchies Transport submits that the relevant implied duty in the circumstances would be the duty of trust and confidence, now found in the statutory duty of good faith.<sup>9</sup> And Counsel submits that Ritchies Transport did not conduct itself in a manner that breached either duty or if it did that any such breach was sufficiently serious to form a basis for constructive dismissal.

[49] In the circumstances I am not satisfied that Ritchies Transport breached the duty of good faith or trust and confidence it owed to Mr Sunbeam.

[50] First, there was no obligation on Ritchies Transport to consult and agree over the change. This is because:

- (a) The provision of free accommodation was a discretionary condition that Ritchies Transport had reserved the right to change by requiring bus drivers to pay for accommodation; and
- (b) The duty of good faith does not require consultation and agreement over the removal of a condition; the obligation is not the same as the test for justification set out in section 103A of the Act.

[51] In the circumstances, Ritchies Transport needed to inform the bus drivers and explain the change. It also had to respond to concerns raised by bus drivers but no more was required in terms of reaching agreement or making changes in response to bus drivers' concerns; Ritchies Transport could unilaterally impose a change.

[52] Second, the test for breach of good faith and/or trust and confidence as it relates to constructive dismissal requires serious and sustained actions that damage the fundamentals of the relationship.

[53] So, in the context of removing a condition, which Ritchies Transport had always reserved the right to change by adding a charge for accommodation provided, Ritchies

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<sup>9</sup> *Hamon v Coromandel Independent Living Trust* [2013] NZEmpC 54; and *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 34.

Transport did not breach any implied duties in the way it acted toward Mr Sunbeam. Its actions may have been direct and even a little harsh at times but given that Mr Sunbeam was evasive and not cooperative around signing the accommodation agreement and then he made it clear he was not going to pay for accommodation provided by Ritchies Transport, Ritchies Transport responded appropriately.

[54] So, I conclude there was no breach of an implied duty by Ritchies Transport that would support a constructive dismissal claim.

*Breach of duty by threatening to stop wages*

[55] I am not persuaded that Ritchies Transport threatened to stop Mr Sunbeam's wages if he did not sign the second accommodation agreement. So there is no factual basis to support this allegation and therefore no basis for the allegation to support a constructive dismissal claim.

*Breach of duty by removing Mr Sunbeam's personal items from the accommodation provided*

[56] Ritchies Transport did remove Mr Sunbeam's personal items from the accommodation it provided to bus drivers, but it did not breach any implied duties it owed to Mr Sunbeam in doing so. Ritchies Transport had a right to remove Mr Sunbeam's belongings as he was not entitled to use the accommodation. Then in doing so it advised him of what was occurring, through its lawyer and then kept the belongings safe for Mr Sunbeam to collect.

*Conclusion*

[57] Ritchies Transport did not breach a term of Mr Sunbeam's employment agreement nor did it breach any implied duty it owed to him, therefore Mr Sunbeam's resignation does not amount to a constructive dismissal; there is no basis for Mr Sunbeam's unjustified dismissal claim and it is dismissed.

**Unjustifiable action causing disadvantage**

[58] Mr Sunbeam's claim for unjustifiable action causing disadvantage to his employment relates to three actions by Ritchies Transport in removing the provision of free accommodation for bus drivers in Queenstown and replacing it with paid accommodation:

- (a) A unilateral variation to a term of Mr Sunbeam's employment.
- (b) Using intimidatory tactics and bullying behaviour to exert pressure on Mr Sunbeam to sign the accommodation agreement.
- (c) Removing Mr Sunbeam's belongings from the accommodation it provided to bus drivers.

[59] For each of these actions I must consider if the action occurred, then if it did whether it caused a disadvantage to Mr Sunbeam's employment and then if it did whether Ritchies Transport was justified in acting as it did.

*Unilateral variation to term*

[60] I have already determined that the removal of the free accommodation for bus drivers was not a unilateral variation of a term of employment. So this action did not occur and it cannot support the unjustifiable action claim.

*Pressuring Mr Sunbeam to agree to change*

[61] I am not satisfied that Ritchies Transport's actions in discussing the change to the accommodation with Mr Sunbeam and its efforts to get him to sign the accommodation agreement amount to intimidatory tactics or bullying behaviour. So these actions did not occur and they cannot support the unjustifiable action claim.

*Removing property*

[62] As I have already established, Ritchies Transport did remove Mr Sunbeam's belongings from the accommodation it provided to bus drivers. However this did not cause a disadvantage to Mr Sunbeam's employment as, at the time, it was not a condition of his employment; the provision of free accommodation to bus drivers had been removed and Mr Sunbeam had not taken up the offer of accommodation provided on the basis that he paid \$175.00 per week. So this action cannot support the unjustifiable action claim.

*Conclusion*

[63] There are no actions by Ritchies Transport that support Mr Sunbeam's unjustifiable action causing disadvantage claim.

## **Outcome**

[64] Mr Sunbeam's claims are dismissed.

## **Costs**

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[66] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority