New Zealand Employment Relations Authority Decisions

Anderson v The Salmon Farm Limited (Christchurch) [2010] NZERA 944 (15 December 2010)

Last Updated: 11 January 2011

IN THE EMPLOYMENT CHRISTCHURCH

RELATIONS AUTHORITY

CA 231/10 5285277

BETWEEN PETER ANDERSON

Applicant

A N D THE SALMON FARM

LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting:

James Crichton

Gordon Strang, Counsel for Applicant Jim Eddy, Counsel for Respondent

27 August 2010 at Blenheim
16 September 2010 at Christchurch

Date of Determination:

15 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Anderson) claims to have been unjustifiably constructively dismissed from his employment and to have suffered disadvantage as a consequence of unjustified actions of his employer, The Salmon Farm Limited (the employer).

[2] The employer denies dismissing Mr Anderson either constructively or otherwise and denies unjustified actions causing Mr Anderson disadvantage.

[3] Mr Anderson worked for the employer as a truck driver operating the employer's vehicle on a regular basis from Picton to Christchurch and return. It was a line haul operation such that Mr Anderson was responsible for picking up trailers off the Cook Strait ferry, discharging and reloading as necessary at Blenheim and then proceeding south to Christchurch where he would arrive around 9.30 at night on a typical run. He would then unload at the Christchurch depot and return north to Picton. Mr Anderson was one of two drivers performing this service for the employer; Mr Anderson typically drove four nights a week for the employer commencing in Picton at around 3pm and returning home to Picton about 4.30am the following morning.

[4] Mr Anderson had worked for the previous owner of the run for a number of years. The present employer took over ownership on 5 January 2009 and the essence of the continuing operation was that the employer had a contract to pick up freight for Fastway, a freight forwarder, at Picton, convey that south as far as Christchurch, then reload at Christchurch and

convey freight north again to Picton.

[5] There was little contact between Mr Anderson and the employer save occasionally when Mr Anderson would meet the employer's representative, Mr Smith, at the Christchurch depot. Mr Smith lived in Christchurch.

[6] There was an uneventful employment relationship between the parties for some months after the employer took over the business. However, in July 2009 there was a significant issue. The employer was required to transport roses for The Warehouse. The employer says that goods for transporting were always presented in modular form and simply slotted into the truck in the appropriate position. Mr Anderson said in his evidence that the roses for The Warehouse were *packed in loose containers* and he was concerned *... that it was impossible to ensure that those containers were secure within the truck on the basis of the loading that was proposed .* to him.

[7] There was an altercation between Mr Anderson and the loader, effectively the agent of Fastway, with Mr Anderson insisting that the proposed loading regime was unsafe. Mr Anderson emphasised to me in his evidence that he was responsible for safety.

[8] The parties on site at the time of this altercation were unable to resolve matters and in the result Mr Anderson locked up the truck, and of course in effect all of the product on the truck worth apparently many hundreds of thousands of dollars, and simply walked away. Mr Smith for the employer was not physically present and was not advised by Mr Anderson of the difficulty, despite providing Mr Anderson with a cellphone for use in just such a situation. Mr Smith was telephoned by Fastway's head office at around 11 o'clock that night to describe what had happened, and the effect of Mr Anderson's actions apparently were to place the whole contract in jeopardy.

[9] Mr Smith gave evidence to me that he was obliged to go out of his way to satisfy Fastway that the problems would not occur again, and amongst other things, he had to get Mr Anderson to apologise to all parties for what had happened. Mr Smith also had to get Fastway to accept Mr Anderson continuing to effectively drive its contracted route and the only way he was able to obtain that agreement was by agreeing himself to travel with Mr Anderson on a number of runs, to in effect smooth the waters.

[10] That issue effectively resolved itself but matters came to a head again when Mr Smith wrote Mr Anderson a letter on 13 October 2009 which proposed to reduce the payment to Mr Anderson from a per trip payment of $230 for the return journey to a per trip payment of $216 and to change Mr Anderson's status from that of a permanent employee to that of a casual employee. Mr Anderson found the letter in the cab of the truck after the run on the previous day had been done by the other driver.

[11] Mr Anderson promptly got hold of Mr Smith, immediately that he read this letter, which by then was a day later, 14 October 2009, and Mr Anderson told Mr Smith that he was very upset by the contents of the letter and not sure that he would be able to drive that night.

[12] The issue about Mr Anderson being upset and stressed by the receipt of the letter and the consideration of its contents, is important. Mr Anderson says he told Mr Smith that he was stressed by the letter and although Mr Smith does not remember being told that, he agrees he may have been told that. What Mr Smith is adamant about is that he had no knowledge that Mr Anderson was a Type 2 diabetic. He says Mr Anderson did not disclose this to him at engagement (or more accurately when he took over the ownership of the business) and that it was a relevant medical condition in terms of having a long distance truck driver in charge of a large vehicle usually at night with the possibility of the chronic medical condition influencing the ability of the driver to manage the vehicle, particularly in stressful situations.

[13] Mr Anderson, for his part, is adamant that Mr Smith knew that he was a Type 2 diabetic and he claims that Mr Smith would have seen him injecting himself while they were travelling together after the July 2009 incident.

[14] Mr Smith acknowledges that he wrote the letter to Mr Anderson with a view to trying to trim costs to better reflect the margin that he was getting from Fastway. He said when he took over the business he had anticipated that Fastway would increase the contract price, based on what it told him, but that increase never eventuated. In the result, Mr Smith decided that he had to address costs and that was why he wrote the letter to Mr Anderson.

[15] With Mr Anderson indicating he was stressed by the letter and its contents, he declined to continue work in that state, and immediately sought medical advice. Two medical certificates were eventually obtained by Mr Anderson and provided to Mr Smith, giving a total of two weeks' sick leave away from work from 13 October down to 27 October 2009. While he was away from the workplace, Mr Anderson also sought legal advice and during that two week interregnum, his counsel wrote to the Mediation Service of the Department of Labour seeking its assistance in resolving the employment relationship problem.

[16] Mr Anderson's evidence is that once he recovered his health and from the period commencing on 27 October down to 2 December 2009, he made 11 separate attempts to contact the employer to advise that he was ready, willing and able to commence work again. The predominant means by which Mr Anderson endeavoured to communicate with the employer was by text message, although there were also some phone messages which he left as well and on his evidence at least one

fax. Mr Smith told me that he did not know how to text or indeed how to receive texts and that Mr Anderson would know that his phone was not set up for sending or receiving texts. He also says that he made a number of straightforward requests to Mr Anderson to return to work during this period and that Mr Anderson is being *disingenuous* in his evidence on this point.

[17] The employment relationship problem went to mediation in the usual way which did not resolve the problem and the matter is now before the Authority for determination.

Issues

[18] Mr Anderson says that he was unjustifiably constructively dismissed from his employment whereas Mr Smith maintains that Mr Anderson simply refused to return to work after a period of ill health. It follows that the first matter for the Authority to consider and make a finding about is whether Mr Anderson was dismissed or not.

[19] Then, there are issues around reimbursement of moneys and payment of allegedly agreed sums. That matter will also need to be the subject of inquiry by the Authority. This aspect is not assisted by the failure of the parties to enter into a written employment agreement. Associated with these matters is Mr Anderson's claim to have suffered disadvantage by unjustified actions of the employer.

Was Mr Anderson unjustifiably dismissed?

[20] There is a clear factual difference between the parties on what happened after Mr Anderson's period of sick leave. Mr Anderson's evidence is that he made 11 attempts to contact Mr Smith and seek instructions about a return to work while Mr Smith contends that he told Mr Anderson that he was free to return to work at any time. From the Authority's standpoint, the difficulty in balancing these competing accounts is that Mr Smith's evidence is that his principal attempts to get Mr Anderson back on the job were in the context of mediation discussions and thus conducted in a protected environment. What is clear is that Mr Anderson can point to a succession of diary notes referring to various attempts to contact Mr Smith. Most of the diary notes refer to text messages as the form of communication. Mr Smith gave evidence to the Authority that he did not *do* text messaging and that Mr Anderson would have known that. If that evidence is to be accepted, it follows that Mr Smith would simply not have received the majority of Mr Anderson's messages.

[21] However, in addition to the text messaging, Mr Anderson claims to have left phone messages on four occasions and to have faxed Mr Smith on two occasions. I note that in Mr Anderson's own evidence at para.10(f), he refers to a fax he received from Mr Smith dated 30 November 2009 in which Mr Smith said that *he often does not receive texts for days as he does not hear the small text ring.* That observation, from Mr Anderson's own evidence, gives some verisimilitude to Mr Smith's evidence. As to the faxes supposedly sent by Mr Anderson, only one seems to have survived. This is dated 25 November 2009 and is in itself a response to a fax from Mr Smith of even date.

[22] The fax from Mr Anderson is notable for three aspects. The first is Mr Anderson's statement that he had been *trying ... to sort out our misunderstandings and continue to work.* On the face of it, that suggests that as late as 25 November 2009, Mr Anderson was telling Mr Smith that he wanted to continue working. However, also important is the next statement in the fax which claims that Mr Smith's fax of the same date ... *and statements on the phone seem to be an attempt to dismiss me.* That commentary suggests to me that the parties were in fact engaged in a continuing dialogue, albeit an unsatisfactory one, and that some doubt must be expressed at Mr Anderson's evidence that he tried to communicate his availability to the employer but was not successful. In fact, it seems more likely (and more consistent with Mr Anderson's own facsimile), that he was engaging with the employer on a continuing basis.

[23] Looking at this exchange from the other perspective, Mr Smith's fax to Mr Anderson, which basically proposes a way of concluding the employment relationship, also evidences a significant degree of frustration. Because it appears to suggest that the employment relationship should come to an end, Mr Anderson's response in his fax of even date (and the third significant aspect of Mr Anderson's fax), is the claim that the employer is trying to dismiss Mr Anderson, that that is unfair and that action will be taken. Certainly, I consider that Mr Smith's fax cannot possibly be read as evidence of dismissal; it is a proposal to sever the relationship and nothing more. This facsimile exchange took place the day after the parties had first attempted to mediate the issue.

[24] Of more interest, in terms of the determination of the issues, is the fact that the parties spoke by telephone shortly after the mediation, probably on 30 November. That is a day when, according to Mr Anderson's diary, there was a phone discussion and Mr Smith acknowledges a discussion after mediation as well. I am inclined to think this was the date the discussion I am about to refer to took place, because the following day (1 December) was the day that the employer disconnected the cellphone previously allocated to Mr Anderson. Mr Smith says this was the phone call in which Mr Anderson made it clear to him that he was wasting his breath making offers for Mr Anderson to recommence his duties and that Mr Smith could *get fucked. I'll see you in court. You're nothing but a mongrel.*

[25] My considered view is that neither of the two protagonists have done a great job in retaining any sort of paper trail to assist the Authority now in deciphering what happened. There is little or no documentary evidence about the exchanges

between the parties. Mr Anderson wants to create the impression that he tried without success to get Mr Smith to engage with him, but yet his own evidence suggests that after his period of sick leave, there were continuing exchanges, albeit by telephone. Even on Mr Anderson's evidence, he says that *if I was able to get through to Kevin Smith he would tell me that he was prepared to let me drive but Andrew Lane* [the manager of the employer's client] *was causing the problem.* Mr Smith accepts the first part of that statement as being absolutely accurate, but rests there. He denies absolutely the qualification relating to Mr Lane and puts into evidence an email from Mr Lane dated December 14 2009 in which Mr Lane emphasised that the issue of concern to the employer's client was dealt with in July 2009 by an apology by Mr Anderson and in effect that, provided Mr Anderson did not commit a similar indiscretion again, the matter was closed.

[26] It seems inconceivable that Mr Smith would have gone to the trouble of obtaining such an email statement from Mr Lane, which is absolutely consistent with the facts relating to the July 2009 incident (about which more later), but then adopted the stance of using Mr Lane as a stick to beat Mr Anderson with.

[27] On the basis of the evidence before me, I conclude that at the end of Mr Anderson's period of sick leave, which is uncontroversial, he proceeded to engage with Mr Smith with a view to returning to duty and, despite Mr Anderson's wish to categorise the evidence in a one-sided fashion, I am satisfied that there is sufficient evidence (including in particular from Mr Anderson himself) for me to conclude that there was a genuine two-way exchange between the parties about Mr Anderson returning to work. I do not think the evidence supports Mr Anderson's position that Mr Smith put qualifications in the way of Mr Anderson returning to driving.

[28] However, I do think the matter was complicated by the uncertainty around the future. In particular, the reason that Mr Anderson had gone off work sick in the first place was his receipt of a letter from Mr Smith seeking to change the basis of his employment. There were also issues around agreements allegedly made between the principal protagonists on remuneration, or more accurately reimbursement. All of those doubts, I think remained in play.

[29] Whatever the position in relation to those payments, the fact remains that this is a claim essentially of constructive dismissal. Mr Anderson resigned his position effective 16 December 2009 to take an alternative position. While it is clear that there were missed communications between the parties, it is not clear to the Authority on the evidence that Mr Anderson was left with no alternative but to resign his position. Nor am I satisfied on the facts that Mr Anderson's resignation was reasonably foreseeable. There is no evidence that satisfies me that the employer behaved with the dominant purpose of removing Mr Anderson from employment, nor am I satisfied that the employer committed breaches of duty sufficient to entitle Mr Anderson to repudiate the employment relationship. There were breaches of obligations by each party to the other, principally around communication, but I am simply not persuaded that the employer's behaviour can be categorised as activated by a dominant purpose of having the employment relationship brought to an end or by breaches of the employer's duties of such seriousness as to entitle repudiation.

[30] I am satisfied on the evidence that both parties probably wanted the relationship to continue, but that the communication strategies adopted by each of them were simply not good enough to bring the matter to a satisfactory resolution. I think the evidence supports the view that Mr Smith thought he was being clear that the job remained open and the fact that the employer's truck was parked outside Mr Anderson's home must resonate as a factor encouraging the view that Mr Smith was not wilfully determined to conclude the employment. While Mr Smith's facsimile of 25 November 2009 suggests a degree of frustration with the whole process, by the same token, so does Mr Anderson's abuse of Mr Smith in the telephone message which I think most likely was sent on 30 November 2009.

[31] The threshold in a constructive dismissal case is, of course, a reasonably high one for an applicant to achieve and in the absence of plain evidence of conduct sufficient to justify repudiation or justify a conclusion that resignation is reasonably foreseeable, the claim for constructive dismissal must fail. A particular basis on which this conclusion seems to be supported is the way in which the employer dealt with the very serious incident created by Mr Anderson's behaviour in July of 2009. I am satisfied that Mr Anderson overreacted to a situation, cost his employer a significant amount of money as a consequence, but that rather than go down the disciplinary trail, the employer took all reasonable steps to resolve the issue to its client's satisfaction such that the employment relationship between these parties could continue. That is the behaviour of a fair and reasonable employer and is completely inconsistent with Mr Anderson's subsequent allegations that he was driven out of his employment by the employer's behaviour. I do accept, and have accepted, that there were communication deficits on the part of both parties and that matters were not assisted by the confusion about whether money was owed by the employer to Mr Anderson and/or whether Mr Anderson was facing a pay cut, or not. None of that can have helped the parties engage with each other, but it does not constitute a basis for constructive dismissal in my view.

Is anything owed to Mr Anderson by the employer?

[32] As I am satisfied there was no constructive dismissal, Mr Anderson is not entitled to compensation for the alleged personal grievance nor to any contribution to wages allegedly lost because of the dismissal. However, as I have already noted, there are arguments around whether Mr Anderson was short paid various amounts to which he would otherwise be entitled.

[33] One of the reasons that these issues became problematic was the continued agreement of the parties to make verbal arrangements with regard to matters such as the payment of holiday pay. A contributing factor is the absence of a signed employment agreement. I decline to make findings against the employer in this regard; he says he made a number of attempts to agree an employment agreement but that Mr Anderson "was extremely obstructive". That is consistent with my primary factual findings that both parties are to blame for the failure to agree matters.

[34] Mr Anderson's contention that he has suffered disadvantage by unjustified actions of the employer, needs to be considered. Mr Anderson relies on a number of matters to ground this claim. He alleges the employer was "oblivious" of his Type 2 diabetes but that may be because the employer did not know about it; certainly that is the employer's evidence. He accuses the employer of referring to the incident with the roses for The Warehouse for "tactical" reasons but the employer is entitled to rely on that incident as evidence of his general approach to Mr Anderson. Mr Anderson complains about the way the employer dealt with the matter once counsel became involved; I agree communication was not satisfactory but that cuts both ways. Looked at in the round, I am not satisfied that Mr Anderson suffered disadvantage from these matters nor am I persuaded that the employer's actions were unjustified. It follows that claim fails.

[35] Mr Strang, counsel for Mr Anderson, referred to the short payments in a carefully written email dated 8 July 2010 to Mr Eddy, counsel for the employer. That email is marked *without prejudice* but was specifically provided to the Authority during the course of the investigation meeting on an unrestricted and open basis. I have reviewed the evidence on the payments covered and referred to in Mr Strang's email of that date and I am satisfied that Mr Strang's calculations can be relied upon and where there is difference between Mr Anderson's evidence on the one hand and the employer's on the other, on this issue anyway Mr Anderson's evidence is to be preferred. It follows that Mr Anderson is owed the sum of $2,024 gross in respect of short paid holiday pay and statutory holiday pay over the period of the employment.

[36] A variety of other sundry claims were made by Mr Anderson for payments he said were due and owing to him. Payment of all these sums was rejected by the employer, as not agreed to. Mr Anderson has been unable to satisfy me that he is owed these sums.

Determination

[37] I am not satisfied that Mr Anderson has met the tests required in the law to prove a constructive dismissal and therefore his claim for personal grievance is unsuccessful. His unjustified disadvantage claim is also unsuccessful.

[38] However, I am satisfied that Mr Anderson is owed unpaid holiday pay and unpaid statutory holiday pay totalling $2,024 gross. The Salmon Farm is directed to pay that amount directly to Mr Anderson.

Costs

[39] Costs are reserved.

James Crichton

Member of the Employment Relations Authority
