

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 142
5394486

BETWEEN PAUL BRIGGS
 Applicant

A N D GOS CUT CONCRETE
 CUTTER LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Ceara Rooney, Advocate for Applicant
 Graeme Gosney, Advocate for Respondent

Investigation Meeting: 4 July 2013 at Christchurch

Submissions Received: On the day from Applicant
 Although scheduled none received from Respondent

Date of Determination: 10 July 2013

DETERMINATION OF THE AUTHORITY

- A The applicant was unjustifiably dismissed from his employment.**
- B I have ordered the respondent pay to the applicant lost wages in the sum of \$1800 net.**
- C I have ordered the respondent pay to the applicant compensation in the sum of \$1500.**
- C I have found that \$600 was deducted from Mr Briggs final pay in breach of s 4 of the Wages Protection Act 1983 and ordered that the sum of \$600 be repaid to him.**
- D I have reserved the issue of costs and timetabled for an exchange of submissions.**

Employment relationship problem

[1] Paul Briggs commenced employment with Goscut Concrete Cutter Limited on 21 September 2011. Goscut Concrete Cutter Limited (Goscut Concrete) is a duly incorporated company that specialises in concrete cutting and related services. The sole director and owner of Goscut Concrete is Graeme Gosney.

[2] The first few months of Mr Briggs employment were without incident however Mr Briggs became unhappy in or about early February 2012 with what he described as Mr Gosney's attitude towards him including how Mr Gosney spoke to him. Mr Briggs said that in February 2012 after Mr Gosney had yelled at him about some tools he telephoned and advised the Administrator/Office Manager at Goscut Concrete Kirsty Bailey, that he had had enough of how he was being talked to and intended to unload his gear from the van and drop it back at the yard and thereafter would not be back. Sensibly Mr Gosney contacted Mr Briggs and matters were sorted out with Mr Briggs returning and continuing to work.

[3] There were a few uneventful weeks but Mr Briggs again became unhappy in his work at Goscut Concrete. Mr Gosney in turn became dissatisfied about Mr Briggs' performance and his attitude.

[4] Matters came to a head on 1 June 2012. Mr Gosney asked Mr Briggs what he intended to do about a job that was performed unsatisfactorily. Mr Briggs made it clear that he was not intending to take steps to remedy the job. He said in evidence that he didn't consider he had the skills required to fix the job.

[5] Mr Briggs said that he felt Mr Gosney was blaming him for things that were outside of his control making his life difficult. He said in his evidence that he approached Mr Gosney and advised him that he was *almost done*. Mr Gosney replied with the words *what with?* Mr Briggs said he then responded *the job*. Mr Briggs said that he wanted Mr Gosney to hear him out as to why he was not happy in his role and that was the purpose of his approach. He said that instead Mr Gosney *lost it*, using profanities and saying amongst other matters, *you f***d my gear, you f***d my van, you're a useless loser, f** off*. Mr Briggs said Mr Gosney told him that he wanted his boots and gear and then to leave. Mr Briggs said that he did not say anything during the exchange, took off his work clothes and boots and left.

[6] Mr Gosney does not accept that was the nature of the exchange. He said in his evidence that Mr Briggs told him that he was *over the job* and *sick of it* and he was *moving on*. Mr Gosney said that he thought Mr Briggs was *quitting the role* and Mr Gosney said *fine* and told him to take *his boots* and *work gear off*. He denied that he used any profanities.

[7] The Authority also heard from another employee at Goscut Concrete, Daniel van de Langenberg who had overheard the exchange. Mr Langenberg said in his evidence that he recalled Mr Briggs saying he *had had enough* and/or *was done* and was *sick of it*. He said that Mr Gosney asked Mr Briggs whether that meant *you quit* and Mr Briggs responded affirmatively. Mr Langenberg said that there was no swearing by Mr Gosney. He said that Mr Gosney asked Mr Briggs to take his boots off.

[8] Mr Briggs says that he was dismissed during the exchange and Mr Gosney says that Mr Briggs either resigned or abandoned his employment.

[9] Mr Briggs seeks the following remedies:

- (a) Reimbursement of three weeks lost wages in the net sum of \$600 per week;
- (b) Compensation in the sum of \$5,000.
- (c) Recovery of money in the sum of \$600 deducted by the respondent from Mr Briggs' final pay to cover the excess payment insurance claim when a van was damaged;

Issues

[10] The issues for the Authority to determine in this case are:

- (a) Did the employment relationship end by dismissal, resignation or abandonment?
- (b) If Mr Briggs was dismissed, then was his dismissal unjustified?

(c) If Mr Briggs was unjustifiably dismissed, then what is he entitled to for remedies and are there issues of contribution and mitigation?

(d) Is Mr Briggs entitled to reimbursement of the sum of \$600 deducted from his final pay?

How did the employment relationship end?

[11] I have carefully considered the evidence of Mr Briggs, Mr Gosney and Mr van de Langenberg about the exchange that took place on 1 June 2012. Mr van de Langenberg was the only person present during the exchange who said that Mr Gosney clarified whether Mr Briggs was resigning by questioning if that meant he *quit*. Mr Gosney had stated in his written evidence that Mr Briggs told him *I quit* but that was not a word he used when he gave his oral evidence about the exchange. I find it less likely that there was clarification about resignation and more likely the clarification was about what Mr Briggs had had enough of.

[12] Was Mr Gosney entitled to conclude that Mr Briggs was giving notice of his resignation? In the absence of a clear and unambiguous resignation an employer is not entitled to seize on words, not intended or capable of amounting to a resignation – *Monteith v Hakansson* EmpC Wellington WC5/08.

[13] Mr Briggs did not clearly say that he was intending to resign that day. His opening statement I accept was unclear and somewhat unhelpful. Objectively assessed Mr Briggs was focussed on his feelings about *the job* rather than specifically about his intention to resign that day. I am not satisfied that there was a clear and unambiguous resignation proffered by Mr Briggs to be effective that same day.

[14] There was also reason for Mr Gosney to be upset with Mr Briggs that day which, in my view meant he was more likely to seize on the words used by Mr Briggs as a resignation rather than question more carefully about exactly what Mr Briggs was trying to say. Mr Gosney believed that Mr Briggs had deliberately cut the flashing incorrectly on the job that he had that day asked him to fix although Mr Briggs denied in his evidence that there was any deliberateness involved. I find in those circumstances it is likely that Mr Gosney did in addition to the request to remove boots and work gear, utter some profanities.

[15] Mr Briggs accepted that he was contemplating the possibility of leaving Goscut Concrete if he was not satisfactorily advised about matters involving provision of adequate tools for future jobs. He did not, however, wish to leave his employment without having obtained firstly other employment. Any further discussion about Mr Briggs's intention was stopped by Mr Gosney's insistence that Mr Briggs remove his boots and other work gear.

[16] I do not find Mr Briggs clearly and unequivocally gave notice of his resignation before Mr Gosney demanded the return of boots and work gear. I find in those circumstances that Mr Briggs neither resigned nor abandoned his employment but was dismissed.

Was the dismissal unjustified?

[17] Although Mr Gosney had a number of concerns about Mr Briggs' attitude and performance, he accepted that he had not raised those matters in any formal way with Mr Briggs as they arose and I do not find that they can therefore justify in accordance with the test in s 103A of the Employment Relations Act 2000 the dismissal on 1 June 2012. I find that Mr Briggs has a personal grievance that he was unjustifiably dismissed from his employment with Goscut Concrete. He is entitled to remedies.

Remedies

Lost Wages

[18] Mr Briggs seeks three weeks' lost wages in the sum of \$600 net per week. I am satisfied that Mr Briggs attempted to obtain further employment as soon as he could and was able to secure a position after three weeks without employment. Mr Briggs is entitled to the sum of \$1,800 being three weeks' lost wages.

Compensation

[19] The evidence from Mr Briggs about hurt and humiliation he suffered was limited. I accept however that there would have been a degree of humiliation in the way that Mr Briggs was asked to leave his employment. In all likelihood his employment relationship was not going to continue for a significant period. Although \$5000 is claimed in all the circumstances I am satisfied that an appropriate and fair award of compensation is the sum of \$1500 compensation.

Contribution

[20] Mr Briggs did not clearly articulate his intentions to Mr Gosney but I do not find in this matter a causal connection between that and Mr Gosney's reaction. In those circumstances, I do not find any blameworthy conduct and make the following orders:

(a) I order Goscut Concrete Cutter Limited to pay to Paul Briggs the sum of \$1800 net being lost wages.

(b) I order Goscut Concrete Cutter Limited to pay to Pau Briggs the sum of \$1500 without deduction being compensation.

.Reimbursement of \$600

[21] Mr Briggs had an accident in the work van whilst employed. Mr Gosney explained that Mr Briggs agreed to pay the insurance excess because he was at fault in the accident. There was some lack of clarity about what the excess amount actually was. In any event for present purposes the sum of \$600 was deducted from Mr Briggs final pay. As there was no final pay slip available to the Authority no-one could advise whether it was deducted from holiday pay or wages or a combination of the two.

[22] It was intended Mr Briggs be provided with a written employment agreement but I am satisfied that he never received one and/or never signed one. The employment agreement that Mr Gosney did show the Authority provided that the company may exercise its discretion to require the employee to pay the excess paid to the employer's insurance company in the event of an accident deemed to be the employee's fault. I am not required to reach any conclusions about whether that money could be deducted under the deduction clause 8 because the employment agreement was never signed.

[23] Section 5 of the Wages Protection Act 1983 provides that deductions can only be made from wages payable to a worker by way of written consent or written request. Section 4 of the Wages Protection Act 1983 provides that the employer *shall* pay wages without deduction subject only to ss 5 and 6 that do not apply in this case.

[24] The Employment Court judgment in *Amaltal Fishing Co ltd v Morunga* [2002] 1 ERNZ 692 involved a deduction from wages of employees of the costs of making good damage done to a hotel by them. Chief Judge Goddard held that the employer had breached the Wages Protection Act and said at [35]

..Wages have to be paid in money and not partly in money and partly by discharging debts which seem valid to the employer but the existence or amount of which the employee may wish to dispute or at least to control the timing of their payments having regard to other commitments and needs.

[25] Mr Briggs is entitled to payment of his final pay including salary and holiday pay without deduction. \$600 has been deducted in breach of s 4 of the Wages Protection Act 1983 and is to be reimbursed.

[26] I order Goscut Concrete Cutter Limited to pay to Paul Briggs the sum of \$600 being money deducted from his final pay without authorisation.

Costs

[27] I reserve the issue of costs. The usual daily tariff is \$3,500. However as the investigation meeting was able to be conducted within about two hours, it would be likely that any costs would be assessed on half of that usual tariff. Ms Rooney has until 24 July to lodge and serve submission as to costs and Mr Gosney has until 7 August to lodge and serve submissions in response.

Helen Doyle
Member of the Employment Relations Authority