

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 67/10
5277113

BETWEEN STEPHEN PHILIP CASE
 Applicant

A N D B J DAKINS & COMPANY
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Applicant in person
 Robert Thompson, Advocate for Respondent

Investigation Meeting: 12 December 2009 at Christchurch

Submissions Received: 25 January 2010 from the Applicant
 26 January 2010 from the Respondent

Determination: 16 March 2010

DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Case, was employed as a driver/operator for the respondent beginning his employment on 12 January 2006. He claims to have been constructively dismissed from his employment following an adjourned disciplinary meeting relating to alleged frequent misuse of paid time and breaches of his employment agreement. Mr Case seeks remedies of compensation and expenses.

[2] The respondent denies it constructively or actively dismissed Mr Case. It says it called him to an investigation meeting on 13 May 2009 looking for explanations for over 12 incidents when the GPS system in his truck located him at his home address during working hours. In the course of that meeting, the applicant's representative, Ms Burness, asked for an adjournment until 15 May to allow the applicant to respond to the company's concerns. This was agreed to and the applicant was granted paid leave.

[3] The respondent says Mr Case arrived at the office on 15 May and tendered his verbal resignation to Mr Russell. After consulting his adviser, Mr Russell, the general manager, accepted Mr Case's resignation.

[4] The respondent says the applicant was not dismissed and hence declines to offer any remedies. The parties attended mediation but were unable to resolve their differences.

Essential facts

[5] While there had been an occasional issue over matters during the course of the employment, the issue at the heart of this case was the convening of the investigation into the applicant's apparent use of company time during working hours when the GPS system identified his location to be his home address. The respondent was concerned and called a formal meeting with Mr Case in a letter of 7 May 2009. That letter outlined the incidents it wanted Mr Case to explain and advised him of his rights to have a representative attend the meeting with him.

[6] The applicant attended with his representative, Ms Georgina Burness. Mr Russell and Mr Thompson were present on behalf of the company.

[7] The applicant's evidence before the Authority in the investigation meeting was that he had not resigned. This was contrary to the basis of his claim set out in his statement of problem where he says the problem he wishes the Authority to resolve is *constructed dismissal/unfair dismissal*.

[8] In specifying the other steps he had taken, Mr Case wrote in his statement of problem *took lady to first meeting but told to leave or be fired. Not much mediation there*.

The issues

[9] To resolve this matter, the Authority needs to make findings on the following issues:

- Did the applicant resign; and
- If so, did the resignation amount to unjustifiable dismissal; and

- If he did not resign, was he dismissed unjustifiably; and
- If so, to what, if any, remedies is the applicant entitled?

The test

[10] As set out in s.103A of the Employment Relations Act 2000, the Authority is required to determine justification on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

Investigation meeting

[11] At the Authority's investigation meeting, evidence was heard from Mr Case in person. For the respondent, Mr Russell and Mr Ian Thompson presented evidence for the respondent.

[12] It is fair to remark Mr Case's presentation of his case was at times confusing due to his references to issues beyond those at hand and because he shifted his evidence from the dismissal being constructive to actually having been sent away from his employment.

[13] Somewhat fatally, Mr Case revealed in the course of questioning that he had secured alternative employment with a company in competition with the respondent prior to the events of 15 May 2009. That is the date both Mr Russell and Mr Thompson confirmed in evidence was the date Mr Case tendered his resignation, verbally, to Mr Russell.

[14] The Authority expresses its thanks to all who assisted at the investigation meeting and for the submissions received from each party.

Analysis and discussion

[15] On the evidence before the Authority, it is clear there were wider operational and environmental issues between Mr Case and the company. I think it fair to say he was a considerable irritant to the respondent with regard to those issues. Nonetheless, the Authority is satisfied Mr Case resigned his employment in the course of a two day adjournment of the company's investigation into his apparent misuse of company

time, and thus before the respondent had come to any definite view on the applicant's response to its allegations.

[16] The next issue is whether the resignation was given in circumstances which would give rise to a successful claim of constructive dismissal. No evidence supporting his initial contention that he was offered the opportunity of resigning or being dismissed was put before the Authority, let alone an identification of an alleged breach by his employer which might entitle him to repudiate the agreement given an open investigation was under way into his own conduct at work.

[17] Mr Case is not a man afraid to break into print when he has things to say. Given that proclivity, it is surprising he failed to resign in writing on 15 May 2009. Given that he had already found alternative work, I think it highly unlikely his resignation was a spur of the moment decision.

[18] On the balance of probabilities, I have come to the view Mr Case became aware his employment could be terminated if the respondent's investigation was resumed, found alternative employment so promptly that no wage loss was claimed, and then resigned. Thereafter, he saw the prospect of compensation should he allege constructive dismissal.

Determination

[19] Returning to the issues set out above in this determination, I find:

- The applicant resigned his employment in circumstances which do not amount to constructive dismissal.
- The applicant was not dismissed.
- The applicant does not have a personal grievance and the Authority is unable to assist him further.

[20] The application is dismissed.

Costs

[21] Mr Thompson has asked that costs be reserved. I have considered that submission but take the view costs can be fixed without delay and without incurring further cost.

[22] The investigation meeting took a little over two hours and two moderately brief statements of evidence were prepared for the respondent. The statement in reply and closing submissions need to be taken into account as does the advocate's time in dealing with a welter of emailed material from Mr Case.

[23] Following the principled approach set out in *PBO Ltd (formerly Rush Security) v. Da Cruz* [2005] 1 ERNZ 808, I find a contribution to the respondent's reasonably incurred expenses is \$1,500.

[24] Mr Case is to pay the respondent the sum of \$1,500.

Paul Montgomery
Member of the Employment Relations Authority