

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 49
5347796

BETWEEN	STEPHEN CALLENDER Applicant	JOHN
A N D	TRANSPORT LIMITED Respondent	(WAIMATE)

Member of Authority: M B Loftus

Representatives: David Jackson, Counsel for Applicant
Tony Tweed, Counsel for Respondent

Investigation Meeting: 7 March 2012 at Oamaru

Submissions Received: At the investigation meeting

Date of Determination: 23 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Stephen Callender, claims to have been unjustifiably dismissed by the respondent, Transport (Waimate) Limited, on 3 February 2011.

[2] Transport (Waimate) denies it dismissed Mr Callender and asserts that the employment ceased as the result of a decision of Mr Callender's to depart and never return. The label they apply is abandonment.

Background

[3] Mr Callender commenced with Transport (Waimate) in October 2010 as a driver primarily engaged in the spreading of fertiliser.

[4] Mr Callender was given one copy his individual employment agreement and told to read it, sign it and bring it back. He says he took it home and signed on 4 November but accepts that he did not return it. He explains the non return by saying both (a) he was never asked for it and (b) it was *stupidity on my part*. Irrespective, it was not returned and that became an issue that was to play a part in the events that led to his cessation.

[5] The employment progressed with, from Transport (Waimate's) perspective, difficulties. In the words of Mr Barry Sadler, a director of Transport (Waimate) *There were various issues concerning Steve's performance as a driver which required attention, and these had been brought to his attention and we were working through them.*

[6] Mr Phillip Chamberlain, the Operations Manager, goes further. He says there were regular discussions but complains that Mr Callender was reluctant to accept advice, training or that there was even an issue. Mr Chamberlain also comments that there were concerns about Mr Callender's attendance record.

[7] Mr Callender has differing views. He contents that the issues were minor and there was nothing like the level of deficiency portrayed by Transport (Waimate). He also states that his absences, such as they were, were all legitimate and frequently supported by medical certification.

[8] The chain of events that brought the relationship to an end commenced with Mr Callender's absence on Monday 31 January 2011. He says *I was experiencing severe pain in my leg. I went to the Doctor who told me that I must take that day off and rest. The Doctor gave me a medical certificate*

[9] He goes on to say:

9. *My wife at the time, Jane, took the Doctors certificate into the offices ...*
10. *Jane later informed me that Mr Sadler swore at her, banged the counter, pointed at her face and said this was not good enough and that I would need to be sorted out.*
11. *Jane told me that she was so shocked by the incident that she sat in the car for some time outside the respondent's premises as she tried to recover sufficiently to come home. She subsequently spoke to the Waimate Police about this incident.*
12. *When I found out about this incident I was extremely upset and angry that Mr Sadler had spoken to my wife in this way. If he had*

any issues regarding my performance or my having sick leave I felt that he ought to raise those with me and certainly not in such an abusive way towards my wife in the presence of others.

[10] Mr Sadler's recollection of the discussion is that he and Mrs Callender first discussed the absence and his (Mr Sadler's) view that Mr Callender's repeated absences were making it very difficult for Transport (Waimate). He says that he then raised the fact that Transport (Waimate) was disappointed with Mr Callender's performance and reports that he had been uttering obscenities about the company to clients. Mr Sadler says he did this as Mrs Callender was a friend and he hoped she would be able to influence Mr Callender's behaviour given the company's failure in that respect. Mr Sadler denies threatening Mrs Callender but accepts that she was upset. He attributes this to her realisation that the situation was such that Mr Callender's ongoing employment was potentially in jeopardy.

[11] It would be fair to say that Mrs Callender perceived Mr Sadler's approach as overbearing and that led to the complaint to the Police. That said, and irrespective of how the discussion may have been portrayed to Mr Callender at the time, she essentially accepts that Mr Sadler's comments were about her husband's performance and not an attack directed at her.

[12] She adds that when she told her husband, he was upset and wanted to confront Mr Sadler but notwithstanding her visit to the Police, she counselled him to calm down and simply get on with his work.

[13] That Mr Callender apparently did. He returned on 1 February and said nothing about the incident.

[14] Mr Callender claims that late in the morning of 3 February he was summonsed by radio and told to return to Mr Sadler's office immediately. Again the company's view differs. They say that work was no longer possible due to high winds and, as a result, Mr Callender was asked to return to the depot. The request that he speak to Mr Sadler was not made until after he returned.

[15] Irrespective of who is correct about how the meeting was called, it is clear that it occurred. The discussion occurred in Mr Sadler's office but both Mr Chamberlain and another employee, Ms Bernadette Blackgrove, were in an adjacent workspace.

[16] About the discussion Mr Callender says:

I went into the office and Mr Sadler demanded that I give him a copy of my employment contract. I refused and told him that I wanted an apology for my wife as he had abused her and brought her to tears. I said that I wanted the apology before I would give him my employment contract.

[17] Mr Callender states that Mr Sadler rejected his request in abusive terms:

19. *[... telling] me that he was sick of me getting my truck stuck and that I was not sufficiently committed to the company.*
20. *He also told me that I had taken too many days off and that I had not completed a full weeks work for the company.*
21. *Mr Sadler's last words to me that day were that I had two weeks to put my contract on his desk or I could f... off.*
22. *I told him that he would be waiting a long two weeks as he was not getting the contract until he apologised to my wife Jane.*
23. *He then told me that I might as well f... off now, get off his property, and that if I did not leave he would have me arrested for trespass.*
24. *I turned and walked out and as I left the office I called back to him that he was 'a f...ing idiot'.*
25. *I then cleared my possessions from my truck and went home.*

[18] Mr Sadler states that the unsigned contract was not the reason for the meeting being called but that he was responding to a request from Mr Chamberlain that he talk to Mr Callender about the ongoing performance concerns.

[19] Mr Sadler goes on to say that he informed Mr Callender of the performance concerns and that they required resolution but that Mr Callender refused to accept any wrongdoing or deficiency. Mr Sadler goes on to say:

13. *I was concerned at Steve's failure to accept responsibility for his actions or any commitment to make improvements and it was this concern that drove my insistence that he sign and return the Employment Contract.*
14. *I required formal acceptance of the terms and an acknowledgement of what was expected and required.*
- ...
17. *Steve told me that he was not going to give us a signed copy of his contract until I apologise to his wife for upsetting her. I replied that Jane got upset but it was because I told her about the concerns we had about your attitude to work and what I told her was the*

truth and that she was upset because of the possibility of you losing your job.

18. *Steve then repeated that he was not going to sign the contract. I told Steve that he must provide a signed copy of the contract to the Company within two weeks.*
19. *He then replied 'that's what I wanted to hear, I've recorded all this you know' and waved his cell phone at me. I replied 'good'.*
20. *Steve opened the door and I told him again that I wanted the Contract signed and returned within two weeks. He then stormed out of the office yelling abuse at me and stating that he was not going to sign any f... ing contract.*

[20] Mr Sadler states that it was his expectation that Mr Callender would eventually calm down and return to work. As events transpired that did not occur. He did not report the following day, a Friday, but this was not pursued by Transport (Waimate) as Mr Sadler was also absent that day.

[21] On his arrival on the Monday Mr Sadler found a letter from an employment advocate acting on Mr Callender's behalf. It opens with advice that *I write on behalf of our above client to formally notify you of a personal grievance for unjustified dismissal and to ask if you are prepared to attend mediation.* The letter then goes on to detail Mr Callender's view of the facts giving rise to his purported grievance.

[22] Mr Sadler states that he telephoned the advocate, advised that he had received the letter and asked that the advocate return his call. He says that his call was not returned but accepts that he did not follow the matter up as the following Monday he received another letter, this time from a solicitor representing Mr Callender. That letter again reiterates Mr Callender's view that he had been dismissed and that he was raising a personal grievance.

[23] Mr Sadler states that he responded to this by immediately ringing the solicitor, whom he knew, but was advised that he was not present. Mr Sadler states that he left a message with the solicitor's secretary advising that he had not dismissed Mr Callender and suggesting that the solicitor listen to the recording (see 19 above) that Mr Callender had made of the discussion which in his (Mr Sadler's) view would confirm his assertion.

[24] Here it should be noted that while Mr Callender accepts that he did tell Mr Sadler that he recorded the conversation this was a bluff and no recording exists. It should also be noted that Mr Callender claims that a considerable period of time

passed before he received advice of Mr Sadler's claim that he had not been dismissed and by that time he (Mr Callender) had no intention of returning to the employ of Transport (Waimate).

Issues for determination

[25] There are, possibly, two issues that require determination. They are:

- i. Was Mr Callender dismissed or did he, as Transport (Waimate) contend, leave of his own volition; and
- ii. If a dismissal occurred, can Transport (Waimate) justify it?

Determination

[26] The dismissal is alleged to have occurred during the meeting of 3 February and while there are considerable similarities between Messrs Callender and Sadler's recollection of the crucial discussion, there are also significant differences. The most important of these is Mr Callender's assertion that Mr Sadler responded to his refusal to sign the employment agreement by advising he could leave now and that any return would be considered a trespass (or words to that effect).

[27] A dismissal is a sending away and in my view the alleged comment would, if made, constitute a sending away – ie: there would have been a dismissal. The question is whether or not the comment was made. The onus of establishing, on the balance of probability, that it was lies with Mr Callender.

[28] I will not rely on a credibility finding to decide whether or not Mr Callender has discharged the onus as while accounts vary, I do not consider either Mr Callender or Mr Sadler is trying to mislead or deceive – they just have differing views about what was said. Instead I rely upon the fact that there were two others in an adjoining workspace who witnessed part of the interaction (see 15 above).

[29] Ms Blackgrove commented that she was aware that Mr Sadler wanted to speak to Mr Callender about *ongoing concerns* before saying that she did not hear raised voices or the content of the conversation until the door opened between five and ten minutes after Mr Callender had entered. Here it should be noted that this is relevant as the evidence suggests that while Mr Sadler's office had a door, it did not close

properly and, as a result, sound could travel though a conversation's content would only be discernable when voices were raised.

[30] Having commented on the door opening Ms Blackgrove goes on to say:

... Steve was standing there and I heard Barry tell Steve that he had two weeks to provide the signed contract. Steve then stormed out loudly stating "I'm not signing any f...ing contract" ... I did not hear anyone before or after the meeting talk of a dismissal or sacking.

[31] When answering questions her evidence only differed to the extent that she added that Mr Callender's refusal to sign was conditional – he would sign once Mr Sadler apologised to his wife. She is adamant that she never heard the comments Mr Callender attributes to Mr Sadler in paragraph 23 of his brief (17 above).

[32] I put a lot of weight on this evidence. I do so for the following reason:

- a. Ms Blackgrove is no longer employed by Transport (Waimate) and no longer beholden to the company in any way;
- b. She has a friendly relationship with all concerned and displays no particular bias; and
- c. Her evidence was corroborated by that of Mr Chamberlain and that is, in my view, significant given that the parties had agreed to witness exclusion and he did not hear Ms Blackgrove's oral evidence.

[33] Ms Blackgrove's evidence leads me to conclude that Mr Callender is unable to convince me that, on the balance of probability, he was dismissed. It is Mr Callender's evidence that the words that may be construed as a sending away (ie; a dismissal) occurred after his last advice that he was not going to sign the contract until Mrs Callender has received an apology. Ms Blackgrove heard that refusal but did not hear the subsequently uttered words that amounted to a dismissal. Mr Chamberlain's evidence is similar.

[34] I also note that Mr Sadler's oral evidence remained consistent with his written brief. That said, it must be said that Mr Callender's oral evidence remained consistent with his brief, though one or two answers did indicate some uncertainty as to events and the order thereof. For example Mr Callender was asked whether or not Mr Sadler

had raised the allegation of badmouthing the company as he had not referred to it in his brief. He agreed Mr Sadler had, but was uncertain as to when in the conversation this occurred.

[35] He also states that from his perspective he was going to use the opportunity to speak to Mr Sadler to pursue the *most important thing to resolve* and that was the attainment of an apology for his wife. By focusing on that as he accepts he did, he may well have misheard or misunderstood what else was being said.

[36] My conclusion that Mr Callender was not dismissed does not, however, end the matter. The question of how the cessation occurred remains. There are two possibilities. The first is that, as Transport (Waimate) contend, Mr Callender abandoned his employment. The second is that he resigned.

[37] With respect to the first possibility I note Mr Jackson's submission that this can not be an abandonment given the content of the relevant provision in the employment agreement. I put aside the fact the agreement was never signed as there is no suggestion that it not apply.

[38] Essentially the argument is that abandonment requires an absence of more than four days and its applicability is therefore nullified by the fact Transport (Waimate) was aware of the claim of dismissal within that period.

[39] I agree with that approach and given my conclusion that Mr Callender was not dismissed, I can only conclude that his actions amounted to a resignation, albeit one tendered in heated circumstances.

[40] That conclusion raises yet another issue. It is well established that it is fraught to accept a resignation tendered in heated circumstances and a cooling period is required (see *Boobyer v Good Health Wanganui*, EMC Wellington, WEC3/94, 24 February 1994 and *Kostic v Dodd*, EMC Christchurch, CC14/07, 11 July 2007).

[41] Mr Sadler was made aware that Mr Callender considered he had been dismissed in relatively short time. The uncontested evidence is that he did not simply accept the situation but reacted immediately. He made an attempt to contact the first advocate and explain the situation. He then left express advice with the second representative's office that he had not dismissed Mr Callender and that there was evidence (namely the tape) to support that contention.

[42] He had no response and here it must be noted that Mr Callender's uncontested evidence is that he was unaware of the first approach and the second was only brought to his attention some time after the event. That uncontested evidence is accepted.

[43] I can not conclude that this is a resignation inappropriately accepted in haste. Mr Sadler reacted and made an attempt to address the situation. I can not criticise Mr Sadler for not pursuing the second representative's non-response. He has a duty to allow a cooling period and a considered response. He allowed that. He is not required to beg that the employee reconsider and return. Nor can I conclude that he is required to pursue a representative's non-response. His duty was to make the situation clear and that he did but, in any event, I note Mr Callender's evidence that it would have made no difference – he would not have contemplated a return.

Conclusion

[44] It is my conclusion that Mr Callender was not dismissed but, by his actions, resigned. It is also my conclusion that despite the situation, Transport (Waimate) can not be considered culpable by virtue of inappropriately accepting a resignation tendered in heat.

[45] Those conclusions mean that Mr Callender has failed to establish, prima-facie, a dismissal that requires justification. His application must, therefore, be dismissed.

Costs

[46] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that Transport (Waimate) wishes to seek a contribution toward its costs, it is required to file its application within 28 days of this determination. A copy shall be served on Mr Callender who is to file any response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority