

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 263/08  
5106947

BETWEEN DANIEL CLARKE  
Applicant

AND ROADS SAFE LIMITED  
Respondent

Member of Authority: R A Monaghan  
Representatives: J Coyle, Advocate for Applicant  
L Fremaux, Advocate for Respondent  
Investigation Meeting: 3 July 2008  
Submissions received: 9 and 18 July 2008 from Applicant  
14 July 2008 from Respondent  
Determination: 21 July 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Roadsafe Limited (“Roadsafe”) employed Daniel Clarke as a Traffic Management Plan Draftsperson (“TMPD”).

[2] Mr Clarke says he was promised full personal use of a company motor vehicle as a term of his employment. He says he was not provided with a vehicle as promised, even after repeated requests. This was the principal reason for the resignation he says was an unjustified constructive dismissal.

[3] Further Mr Clarke seeks penalties against Roadsafe and his immediate manager for their joint and persistent refusal to accept agreed terms and conditions of employment (which I take as a reference to the provision of a vehicle); and for the cynical provision of an unroadworthy car and a consequent breach of health and

safety obligations. A penalty was also sought for the alleged failure to pay work related expenses, which I take as a reference to an alleged failure to reimburse Mr Clarke for work-related mileage using his own vehicle.

[4] Roadsafte denies that provision of a company motor vehicle was part of Mr Clarke's terms and conditions of employment. It also denies that Mr Clarke's resignation was a constructive dismissal, and denies liability to any penalty.

### **Mr Clarke's employment**

[5] The TMPD position involved using drafting software (known as autocad) to draw for the purposes of traffic management plans of areas of road on which work was to be carried out, including in the plans precise details such as the placement of items such as safety cones, and road signs of any kind. The position also required liaison with clients and colleagues in respect of the development, application and cost of relevant traffic management plans, and some site visits.

[6] The vacancy to which Mr Clarke was appointed was advertised on 27 November 2006. After Mr Clarke answered the advertisement, he had a first interview with Roadsafte's manager, Stephen Wilson. The conversation covered matters such as Mr Clarke's skills, employment background, and interests. Mr Clarke had a background in architectural drafting but little experience in the use of computerised drafting systems and none in traffic management planning. During the interview the incumbent TMPD, Jacques de Vries, gave a brief demonstration of the use of the drafting software.

[7] A second interview was conducted some 10 days later. It was common ground that the interview began with another demonstration of the use of the drafting software, and Mr Clarke attempted a simple activity. He then returned to the office to resume the conversation with Mr Wilson. It was common ground that there was a detailed discussion of the job description and the hours of work.

[8] Mr Wilson's evidence, as expanded upon during the investigation meeting, was that he told Mr Clarke that Mr de Vries' remuneration package included a salary

plus a vehicle (which at the time was a 10 year old Holden Vectra), a mobile phone and a fuel card. He told Mr Clarke there was to be a change in that the salary would be increased to \$50,000 pa, but there would be no vehicle or fuel card.

[9] Mr Clarke asked why. He was told Mr de Vries' vehicle was to be used as a pool vehicle, as the TMPD position did not warrant a vehicle. In particular Mr de Vries had the use of a vehicle because he carried out site visits which would now be the responsibility of Phil Broughton, the company's operations manager. Mr Wilson said Mr Clarke replied to all of these matters by nodding or saying 'yep'.

[10] In oral evidence Mr Clarke agreed he was told Mr de Vries had a company vehicle because he was required to be out of the office on site visits. The proportion of time spent in the office to time spent out of the office was 70:30. Mr Clarke said he understood that was what he would be doing too, because he was replacing Mr de Vries. He accepted he was told Mr Broughton would be taking over part of Mr de Vries' duties, but said that was only until Mr Clarke had grown more confident and was 'up to speed'. He also accepted he was told Mr de Vries' vehicle would be returned either to the company pool or to a leasing company.

[11] Mr Clarke did not accept that Mr Wilson told him there was to be a change in the salary package for the position. However he did accept that he was told the salary package being offered to him was \$50,000 not including a company vehicle.

[12] Mr Wilson's evidence was that the meeting ended with a consensus that Mr Clarke's speed on the autocad software was a concern, but Mr Clarke should be able to pick up the required skills. Mr Wilson then told Mr Clarke that, of the people he had interviewed, Mr Clark was the best candidate. He offered Mr Clark the job. Mr Clarke accepted then and there. A start date of 8 January 2007 was agreed.

[13] Mr Clarke agreed there was a consensus about his speed on autocad, but did not agree with the remainder of Mr Wilson's account. In his written statement he said that, when Mr Wilson offered him the job, his response was to say he had another offer which he needed to consider. At that point Mr Wilson asked if a company vehicle, in addition to the salary as offered, would make a difference. Mr Clarke said

it would, and accepted the offer of employment. In his oral evidence Mr Clarke added that he was told a vehicle would not be available immediately because the company's fleet was being changed. He accepted that arrangement.

[14] Mr Wilson denied such an exchange occurred.

[15] Otherwise there was no suggestion by either party that details of the vehicle Mr Clarke was to use were discussed, or that there was discussion about the issue to Mr Clarke of a company fuel card. Further, after the interview, Mr Wilson completed a document for internal use and headed 'contract for new employee'. The full written employment agreement was to be based on that document. Items relating to the provision of a vehicle and fuel card all had 'no' circled.

[16] I resolve the relevant conflicts in the evidence with reference to the following.

[17] First, Roadsafe's managing director, Simon Everett, gave evidence that Mr de Vries' appointment had originally been to a field position, but it became more office-based as the company's business grew. He and Mr Wilson took the opportunity to review the needs of the position in association with Mr de Vries' departure, and agreed that because of the changed nature of the position a vehicle was no longer necessary. He also said that he managed the company's fleet of vehicles, and he made the associated decisions. Mr Wilson could not act without his authority in matters such as the inclusion of a vehicle in a remuneration package. I accept Mr Everett's evidence.

[18] I find Mr Wilson's account of the second interview with Mr Clarke is both internally consistent and consistent with his discussion with Mr Everett.

[19] Moreover Mr Clarke's account was similar to that of Mr Wilson in several relevant respects, particularly when it came to discussing Mr de Vries' position and its evolution into a more office-based position. Mr Clarke even accepted that he was told the salary package of \$50,000 pa did not include a vehicle, and that he indicated 'yep' to that and the other matters Mr Wilson was raising with him.

[20] Thus the most critical point of conflict concerned the alleged exchange at the end of the interview, when Mr Clarke says Mr Wilson offered him a vehicle if that would tempt him to accept the offer of employment. However if Mr Wilson had made such an offer, he would have been acting without authority and ignoring the direction he had from Mr Everett. There was no evidence of any reason why he would act in that way. Even if the failure to offer a vehicle was an impediment in recruiting a suitable person, there was nothing to indicate why Mr Wilson would make the offer without first raising the matter with Mr Everett. For these reasons I consider Mr Clarke's account of that part of the conversation to be unlikely, and do not accept it.

[21] It was said that Mr Clarke was already employed in a position where he earned \$65,000 pa. Mr Wilson had no recollection of discussing Mr Clarke's existing salary during the interviews, Mr Clarke did not assert as much in his evidence in chief, and painstaking questioning of the parties regarding the content of the recruitment interviews showed the matter was not raised during the interviews. If Mr Clarke was receiving that level of remuneration it might explain the approach he has subsequently taken to having a company vehicle, but it does not change the content of the discussion and the agreement he reached with Roadsafe.

[22] A written employment agreement was sent to Mr Clarke with a covering letter dated 4 January 2007. The agreement referred to a motor vehicle as follows:

“8. Remuneration

The employee shall be paid remuneration of \$50,000 per annum.

...

A vehicle is not provided with this position, a company car will be made available when required to make site visits.”

[23] Mr Clarke signed and dated the agreement on or about 9 January 2007. He said in evidence that, when he returned to Roadsafe with the agreement, he pointed out the failure to include provision for a company vehicle. Mr Wilson told him “don't worry about it – it was just a typing omission – you'll definitely be getting a company car – my word is my bond.”

[24] Mr Wilson denied that conversation occurred. He said Mr Clarke brought the agreement in to be signed, and it was signed. There was, however, comment on the job description.

[25] In the light of my finding regarding the conversation at the end of the second interview, I cannot accept Mr Clarke's account. It is in any event unlikely. To accept it I would have to find that Mr Wilson was not only failing to take a proper approach to the contents of his employees' employment agreements, but was also embarking on a process of hiding the offer of a vehicle from Mr Everett or misleading Mr Clarke in order to entice him to accept the offer of employment. There was no evidence of any of this - only Mr Clarke's assertions about what was said to him.

[26] Mr Clarke said he raised with Mr Wilson his concern about the failure to provide a vehicle on a number of occasions during his employment. The first time was in or about mid-February 2007. The date coincided with the company's engagement of a business development manager, and the allocation of a vehicle to her. Mr Clarke said this action was the catalyst for his raising the matter, and he felt he could have been using the vehicle allocated to the business development manager. He said he asked Mr Wilson when he could expect a company vehicle. Mr Wilson told him to wait until the end of the financial year. Mr Clarke enquired again in or about mid-April, and was told a vehicle was coming.

[27] Mr Wilson denied these conversations occurred. He said Mr Clarke merely commented on two occasions that having a company vehicle would make his life easier. He regarded the comments as flippant and replied in kind.

[28] I accept Mr Clarke had come to believe he was entitled to a company vehicle, although I do not accept that this was a result of any express promise or agreement to that effect on Roadsafe's part. I also accept Mr Clarke sought to raise his concern with Mr Wilson. However Mr Clarke is not an assertive person and I find it very unlikely that he raised the concern with Mr Wilson as clearly as he said he did. I consider it likely that he raised it by way of comment of the kind referred to by Mr Wilson. That was not enough to indicate to Mr Wilson that Mr Clarke believed it was

a term of his employment agreement that his remuneration package included a company vehicle, and Mr Clarke required Mr Wilson to honour the agreement.

[29] Mr Clarke said he also raised his concern in a weekly management report he forwarded to Mr Wilson, dated 3 August 2007. Mr Clarke noted in the report: “Also can you give me an indication on when I can expect my company vehicle.” The overall purpose of the report was to summarise the work completed, current workload, and to add any other comments. The quoted comment appeared at the end of the report. Mr Wilson said he did not address the request because he did not take it seriously. He acknowledged, too, that he did not act quickly enough on the matter.

[30] Mr Clarke began considering alternative employment within a few months. Several emailed messages were found on his computer after his employment ended. One was dated 9 May 2007 and was addressed to a recruitment agent named Lee. It attached Mr Clarke’s CV and referred to the fact that Mr Clark was starting an autocad course later that month. A further cluster amounted to notifications of on-line vacancies dated from 26 – 29 July 2007. Although Mr Clarke said he routinely monitored vacant positions, his explanations of some of the material were unlikely and I consider it likely he was doing more than simply monitoring vacancies.

[31] On an unspecified date Mr Clarke saw an advertisement for a position with a firm of architects. He said he probably applied for the position early in August. He had probably accepted it by 17 September 2007. The firm eventually forwarded a written employment agreement for Mr Clarke’s signature on 1 October 2007.

[32] By emailed message to Mr Wilson, dated Monday 17 September 2007 and copied to Mr Everett, Mr Clarke forwarded a resignation worded as follows:

“I would like to take this opportunity to formally tender my resignation with Roadsafe Limited. I will be giving two weeks’ notice as of today, my last day of employment being Friday 28 September. I would like to thank you for giving me the opportunity of working for Roadsafe the last 9 months.”

[33] The employment agreement required 6 weeks’ written notice of termination.

[34] Mr Wilson called Mr Clarke into his office to ask why he was leaving. Mr Clarke told him the problem was with the lack of a company vehicle, and that he had a new job. Mr Wilson also raised with Mr Clarke the requirement that 6 weeks' notice be given, not two.

[35] Mr Clarke said Mr Wilson's response to the matter of the company vehicle was to say 'is that all? If it's only a company car, if a company car would keep you here, let's go and get one now.'

[36] However Mr Clarke's evidence overall was frequently inaccurate, and his accounts were often unlikely. Despite the quotation marks, I find the account in this part of his evidence was again inaccurate. I accept that Mr Wilson was prepared to consider ways of keeping Mr Clarke in his employment. However, after Mr Clarke raised the matter of the vehicle Mr Wilson consulted with Mr Everett about what could be done. I do not accept that Mr Wilson agreed immediately to provide a vehicle without consulting with Mr Everett. It was as a result of this consultation, and because Roadsafe wished to retain Mr Clarke's services, that Mr Everett agreed to provide a vehicle. Further, the decision about which vehicle was to be provided was his. The vehicle in question was a pool vehicle formerly used by Mr Broughton.

[37] It was Mr Broughton who advised Mr Clarke he would be getting a vehicle. Indeed Mr Broughton had the keys to the vehicle in question. It was he, not Mr Wilson, who accompanied Mr Clarke to collect the vehicle after work the next day.

[38] It appeared to be common ground that Mr Clarke was told the vehicle was being provided as a stop gap until other arrangements could be made.

[39] On the day after he collected the vehicle Mr Clarke had an opportunity to look over it properly. He found it was in a poor state of repair, and did not have a current warrant of fitness. It is unfortunate that was the case, but the provision of a vehicle in that state was not deliberate. Mr Clarke said that was the last straw, and he decided his resignation would stand.

[40] In a further emailed message to Mr Wilson, dated Friday 21 September 2007, Mr Clarke confirmed his resignation in the following terms:

“I would like to take this opportunity to formally tender my resignation with Roadsafe Limited. I have had a job offer in the last few days and have decided to accept this position. I would like to give 5 weeks’ notice as of today as my new employer needs me to start on a certain date. My last day of employment being Friday 26 October. I appreciate all the effort you and Simon have gone to in the last week, especially in providing me with a company vehicle. I would also like to thank Simon and the Everett family for giving me the opportunity of working at Roadsafe for the last nine and a half months.”

[41] Mr Clarke alleged that this message was amended on Mr Wilson’s dictation. In his evidence he did not identify how. I see nothing significant in the differences between the first resignation and the second. The reference in the second resignation to a job offer is an accurate statement of fact. The change to the notice period was required in order that Mr Clarke comply with the notice requirement in his employment agreement. If Mr Wilson required an amendment of that kind, he was entitled to do so. As for the reference to the provision of a company vehicle, it may be that the expression of appreciation was not genuine but nothing turns on that.

[42] On Thursday 27 September 2007 Mr Clarke went to his doctor. Later that day he advised Roadsafe he was unwell and had been diagnosed with stress. He attached a medical certificate saying he should be able to resume work on 8 October 2007.

[43] Since Roadsafe considered the vehicle Mr Clarke was using to be a pool vehicle, and Mr Clarke would not be using it because he was ill, Mr Wilson sought to retrieve the vehicle. Either Mr Broughton or another employee contacted Mr Clarke on or about Friday 28 September to advise that the vehicle was to be collected, and ask for Mr Clarke’s address. A Roadsafe employee in a marked truck arrived to collect the vehicle. Mr Clarke found this very embarrassing.

[44] On 30 September 2007 Mr Clarke sent Mr Everett a letter marked ‘without prejudice’. The letter was not produced to the Authority for that reason. However I was told the contents set out a number of Mr Clarke’s concerns, including the circumstances in which the vehicle had been collected.

[45] During a meeting on 2 October to discuss the concerns, Mr Everett explained the collection of the vehicle. Several other matters appeared to concern Mr Clarke's relationship with Mr Wilson. Mr Everett said it appeared Mr Clarke had interpreted certain matters without knowing all of the facts, which he then provided. There was also a discussion about why Mr Clarke was taking leave.

[46] Although Mr Clarke's stated reason for resigning had always been his view that Roadsafe failed to provide him with a company vehicle, he took the opportunity to raise other concerns in evidence. It is not clear how many of them were also raised with Mr Everett on 2 October, but workload was one. Regarding Mr Clarke's feeling that he was overworked, Mr Everett did not accept that Mr Clarke was working unreasonably long hours. He further pointed out that Mr Clarke had rejected an offer of help from Mr de Vries some 6 weeks earlier. As a result, when the company did need Mr de Vries' help, Mr de Vries was no longer available.

[47] Finally, Mr Everett told Mr Clarke he did not want Mr Clarke at work while he had a medical certificate and was grumpy because he did not wish to work with Mr Wilson. Mr Clarke did not cite difficulties with Mr Wilson as a primary or motivating reason for his resignation, although he made some generalised assertions about Mr Wilson's conduct when giving evidence. Several were gratuitous or unfounded. For those reasons, while I might accept Messrs Clarke and Wilson did not enjoy a smooth working relationship, I take the matter no further.

[48] There was also a discussion on 2 October about a negotiated settlement, but no settlement was reached.

[49] By letter dated 5 October 2007 Mr Clarke's advocate raised Mr Clarke's personal grievance on the ground of unjustified constructive dismissal. The letter alleged breach of contract in respect of the provision of a motor vehicle. It also referred to the circumstances in which the company vehicle Mr Clarke was using had been collected from Mr Clarke's home.

[50] Mr Clarke did not report for work again.

## Whether there was a dismissal

[51] A constructive dismissal may occur in the following circumstances:

- (a) an employer gives an employee a choice between resigning or being dismissed;
- (b) an employer follows a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; or
- (c) a breach of duty by the employer causes the employee to resign.<sup>1</sup>

[52] Mr Clarke relies on (c) above. The breach which caused him to resign was the failure to provide him with a motor vehicle. Although, as I have indicated, he raised other matters of concern in his evidence, he stated very clearly that the causative matter was his dissatisfaction over the failure to provide him with a motor vehicle.

[53] I have found as a fact that it was not a term of Mr Clarke's employment that he receive full personal use of a company motor vehicle. In addition, vehicles from the company pool were available for his use if required.

[54] As for the offer of a vehicle to Mr Clarke in an attempt to encourage him to reconsider his resignation, that matter was handled carelessly in the sense that a suitable vehicle was not identified at the outset. Even so Mr Clarke acknowledged that the vehicle he received was a stop gap, and he could have given Roadsafe an opportunity to obtain a more suitable vehicle before reacting as he did. Finally, the decision to resign had already been made, and I do not accept that decision was caused by a breach on the part of the employer. The unfortunate outcome of the offer to provide a vehicle after 17 September had the effect of reinforcing the decision, and failing to persuade Mr Clarke to change his mind.

[55] Accordingly I find that the action which caused Mr Clarke to resign was not a breach of duty on the employer's part. Mr Clarke was not constructively dismissed. He was not dismissed at all.

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<sup>1</sup> **Auckland etc Shop Employees IUOW v Woolworths NZ Limited** [1985] 2 NZLR 372; (1985) ERNZ Sel Cas.

## **The claims for penalties**

### 1. Persistent refusal to accept agreed terms and conditions of employment.

[56] This claim would have been better framed as a claim for penalty for breach of the obligation to provide a company vehicle as part of the remuneration package. In any event the claim is dealt with by my finding that Mr Clarke did not have an agreed entitlement to the full personal use of a company vehicle.

### 2. Cynical provision of unroadworthy vehicle

[57] I have taken this claim as a reference to the vehicle provided in response to Mr Clarke's notice of resignation on 17 September. I do not accept there was any cynicism involved in the unsatisfactory condition of the vehicle, although I accept that better care should have been taken to ensure a suitable vehicle was provided.

[58] I do not accept that these circumstances call for the imposition of a penalty.

### 3. Work related expenses

[59] I have taken this claim as a reference to the failure to pay for mileage Mr Clarke travelled in his own vehicle. The relevant provision in the employment agreement read:

“8. Remuneration

...

Work related expenses

...

Where the employee is authorised to use his/her own vehicle on company business, reimbursement will be made by the employer based on the vehicle reimbursement rate approved by the Inland Revenue Department.”

[60] While I accept that Mr Clarke used his own vehicle for company business on occasion, and may have been entitled to seek a reimbursing payment in respect of that

use, he did not seek such payment at the time. Having failed to seek it, there are no grounds on which he can now seek to penalise the employer for failing to pay it.

### **Costs**

[61] Costs are reserved.

[62] The parties are invited to reach agreement on the matter. Any party seeking an order from the Authority shall have 28 days from the date of this determination in which to file and exchange a statement setting out what is sought and why. The other party shall have a further 14 days in which to file and exchange a statement setting out any reply.

R A Monaghan

Member of the Employment Relations Authority