

was satisfied that Auckland was the appropriate venue for both mediation, and subsequently the investigation meeting (Minute to parties 9 July 2007 refers). The Applicant and another driver later referred to as a witness in this matter were employed by the Respondent to work out of an Auckland freight company depot. It was at that depot that the Applicant usually began and finished his working weeks and the location at which he allegedly resigned or was dismissed on 3 July 2006.

The investigation

[4] For the purposes of the Authority investigation I had statements of problem and reply from the parties; witness statements from the Applicant, Dr Greaney, his partner Cindy Morrison, freight depot supervisor Mike Swann, and an affidavit from another driver Haydon Kiriona. There was no objection to admitting Mr Kiriona's affidavit in evidence but it is of less weight than the evidence of the witnesses who attended and which could be tested by questions. All the other witnesses attended the investigation meeting and answered questions from the Authority and the parties' representatives. The representatives gave oral closing arguments.

[5] Shortly before the scheduled investigation meeting, newly-instructed counsel for the Respondent sought leave to lodge a revised statement in reply in order to formally raise a counter claim for alleged overpayment of wages. I refused that request as Dr Greaney had first raised that allegation in a letter to the Applicant dated 5 July 2006 and had not used ample opportunity to lodge a counter claim in the many months since the Applicant had lodged his claim in the Authority in August 2006. The issue of whether the Applicant was paid wages in advance was sufficiently well canvassed in background documents and witness statements already lodged.

Issues

[6] The following issues arise for determination:

- (i) Was there a resignation or dismissal during the course of the 3 July telephone conversation?
- (ii) If there was a genuine resignation, was the employer entitled to accept it in all the circumstances?
- (iii) If it were a dismissal, was it justified?

- (iv) If it were an unjustified dismissal and remedies were due:
- a) had the Applicant done enough to mitigate any loss of wages, and
 - b) was any reduction of remedies required for his contribution to any grievance found, and
 - c) was any offset required for monies said to be owed to the Respondent?

[7] The Authority's investigation is required to establish the facts and made a determination based on the balance of probabilities – that is, what is more likely than not to have happened – flexibly applied to the gravity of the circumstances of the matter.¹

[8] The evidence of the Applicant and Dr Greaney differs on a number of points. In establishing the facts required for this determination, I rely on the written and oral statements of the Applicant and Dr Greaney, and where it differs, as it does on a number of points, the evidence of Ms Morrison and Mr Swann. While both the latter two witnesses had personal or business connections with Dr Greaney, I found their evidence more measured and detached than either Dr Greaney or the Applicant, so that where necessary I rely on it. From that range of information, the following key facts are drawn.

Events of 3 July 2006

[9] The Applicant lives in Northland. He came to Auckland each time he needed to do a driving trip for the Respondent. These trips which would involve several days on the road, heading out from Auckland and to various destinations in the North and South Islands before returning to Auckland.

[10] On 3 July 2006 he arrived at the Freightline depot in Auckland in the early afternoon to prepare for a trip. He found his truck was undergoing repair. Around 5pm he spoke with Dr Greaney by telephone. Dr Greaney was annoyed because he believed the Applicant could and should have done more to get the truck repairs completed earlier in the day. He spoke brusquely about that in a manner which upset

¹ See *Whangarei College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at [20] (CA) and *Kostic v Dodd & Milligan* (unreported, EC, CC 14/07, 11 July 2007) at [79].

the Applicant, including the comment that he did not pay him to sit around and drink coffee.

[11] Following that phone call the Applicant told Mr Swann, who is a supervisor for the depot company not the respondent, that he was unhappy about the call from Dr Greaney. Mr Swan recalls the applicant saying he had been offered another job elsewhere which paid \$25 an hour, had had “*a guts full*” of the present job and was going to quit. He would find out the next day whether or not he would get that job.

[12] Mr Swann made this observation of the Applicant’s manner in that conversation: “*He was in an agitated state. He was worked up. He was telling me what he was going to tell Ken [Greaney]. I told him it’s no good telling me.*”

[13] The Applicant was also unhappy about the arrangements for the load being put on his truck, finding out that he was due to travel not only to Napier that evening but also on to Palmerston North. He was concerned about delays in getting his truck repaired and loaded in time to leave for the journey.

[14] The usual arrangement that once the truck was loaded and weighed, the Applicant would telephone the Respondent’s office and tell Dr Greaney or Ms Morrison the hubometer readings and vehicle weight so that the truck’s road user charges (“RUCs”) could be purchased by an internet transaction from the Land Transport Safety Authority.

[15] Loading of the Applicant’s truck that night was completed around 9.50pm. After weighing the truck on the weighbridge, the Applicant called Dr Greaney’s cellphone around 10.15pm. Dr Greaney was asleep but got up and went into his business office to use the computer needed to make the RUC transaction. Ms Morrison was also awake and heard Dr Greaney’s end of the conversation. She did not hear the Applicant’s words but could hear enough to know he was speaking loudly.

[16] The Applicant told Dr Greaney he was unhappy about the load on his truck and the length of the trip required that night. He also told him he wanted to have a face-to-face meeting to talk about other issues.

[17] Dr Greaney responded by insisting that the Applicant talk about his concerns then. Ms Morrison recalls hearing him say: *“You can tell me right now”*. She says he then listened further and said: *“Rex, please just do the job you are so handsomely paid to do”* and then: *“It’s not hard”* and then: *“Please just do your job”*.

[18] Dr Greaney says that the Applicant complained about a deduction from his wages but he reminded the Applicant that he had asked for the deduction to be made to cover a payment required for his fuel account with the Respondent. The Respondent had an arrangement for employees to purchase cheaper diesel through the company.

[19] He says that the Applicant then told him that he had a job offer from another company and said: *“It’s better than this shit”*. He describes the Applicant as *“wound up”* and shouting. He says that the Applicant then said he *“just felt like getting his things from the truck and going”*. Dr Greaney responded by saying that the Applicant would have to give him two weeks notice if he wanted to leave the job. He says the Applicant responded by saying: *“stick it”* and swearing at him.

[20] He says that he then asked the Applicant: *“Are you resigning?”* and the Applicant replied *“yes”*. Dr Greaney says that he then told the Applicant if that was what he wanted to do, then he could not stop him and the Applicant cut the call.

[21] Ms Morrison says she heard Dr Greaney say: *“Well, you don’t have to stay. I would never insist anyone stay in their position if they didn’t want to.”* He then asked: *“So you are resigning?”* and then: *“Get your stuff out of the truck and go then. I accept your resignation.”*

[22] The Applicant denies talking about a job offer because he did not have one to talk about at that stage. He also emphatically denies the evidence of Dr Greaney and Ms Morrison that he was asked if he was resigning or that he agreed he was. He accepts Mr Swann’s description of himself as being *“agitated”* by the earlier phone conversation with Dr Greaney and that he was talking loud, fast and emotionally during the later phone call.

[23] Mr Swann's evidence was that he could see the Applicant during some or all of his 10.15pm phone call, although he did not know until later that the Applicant was talking with Dr Greaney. The Applicant was standing in a foyer area at the depot and Mr Swann could see him through glass doors. Mr Swann walked into the foyer at heard the Applicant use the phrases: "*stick it*" and "*get f...ked*" before ending the call. He says the Applicant then told him that he had quit his job and was going to the truck to remove his gear. He described the Applicant's manner as "*pretty angry*".

[24] Mr Swann then got a phone call from Dr Greaney saying that another driver, Mr Kiriona, would come in shortly and drive the loaded truck.

[25] Mr Kiriona's evidence, by affidavit, was that the Applicant was still at the depot when he got there that night after a phone call from Dr Greaney. Mr Swann and the Applicant agree this was around twenty minutes to half-an-hour after the telephone call with Dr Greaney ended.

[26] The Applicant says that the first he knew of Mr Kiriona coming to take over the truck that evening was when he saw him arrive. Mr Kiriona says that the Applicant said:

that he'd had a 'guts full of this bullshit' and that he was 'sick of this shit'. I wasn't sure what he was talking about but figured he meant something to do with his job. [The Applicant] said something like that he was 'outta here'. He then got his gear from the truck I was about to drive and left. I saw [the Applicant] again a couple of times around the depot. A lot of companies work from there and he was just walking around. [The Applicant] never said anything to me about having been sacked or fired.

Disputed termination

[27] Dr Greaney says that the next day he sent a text message and spoke by telephone with the Applicant to make arrangements for return of a fuel card, cellphone and other company property. He says that the Applicant confirmed during that phone call that he had resigned. Later that day Dr Greaney had a call from the Applicant's wife who referred to her husband as being fired. He says he was surprised by the reference to being fired. He then wrote a letter to the Applicant and faxed it to him on 5 July. It includes a statement that the Repondent "*accepts your resignation which was tendered by yourself via phone on the 3rd July at approximately*

10.30pm". The letter asks for the Applicant to repay two weeks' wages paid in advance – amounting to \$2000 – and continues:

To address an issue that both you and your wife raised – you resigned, I did not terminate you. ...You said to me that you were sick of the job that I had for you and that you wanted to get your belongings from my truck and leave, to which I stated that if that is what you wanted to do, then I was not going to stop you.

[28] The next day the Applicant's representative, Mr McIntyre, spoke by telephone with Dr Greaney who reacted hostilely to the suggestion that the Applicant was dismissed rather than resigned. This included telling Mr McIntyre to "f..k off" and hanging up the phone. Dr Greaney says he reacted this way because Mr McIntyre rang at a time when he was busy with work requirements.

[29] Mr McIntyre raised a personal grievance on the Applicant's behalf by letter dated 10 July 2007.

Was there a resignation or a dismissal on 3 July?

[30] On the balance of probabilities I am satisfied that the Applicant used words and acted in a way on 3 July 2006 that were capable of being understood as a resignation from his job with the Respondent. This is consistent with dissatisfaction he expressed to Mr Swann following the earlier phone call that evening with Dr Greaney. It is a reasonable inference from the use of the phrase "*stick it*" when Dr Greaney referred to his expectation of two weeks notice if the Applicant wanted to leave. It is also consistent with his comments following that phone call to Mr Swann about getting his gear out of the truck and to Mr Kiriona about being "*outta here*".

[31] Accordingly I find that the Applicant resigned on 3 July 2006. However, for reasons explained below, that is not the end of the matter. It is not sufficiently clear that the Applicant entered the later telephone conversation with Dr Greaney with the intention of resigning, rather he was led to that course of action by Dr Greaney's apparent unwillingness to consider the Applicant's concerns and his comment that he would not insist on someone staying in their position if they did not want to. That is clear from Dr Greaney's own evidence that the Applicant presented the prospect of leaving the job as something he "*felt*" like doing, a comment made in the context of discussing his concerns that evening and following a refusal by Dr Greaney to meet

face-to-face to talk about those concerns. It appears that this ‘feeling’ was seized upon in the heat of the argument between the two men and rapidly escalated to words of resignation and acceptance.

Was the employer entitled to accept the resignation?

[32] However, the likelihood that the applicant did use words of resignation that night does not automatically resolve the matter in the respondent’s favour.

[33] Throughout the obligations of the Respondent – through the actions of Dr Greaney – are to be assessed against the standard of conduct required by s103A of the Employment Relations Act 2000 (“the Act”). The question to be answered is whether Dr Greaney’s actions, and how he acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

[34] An unequivocal resignation cannot be withdrawn without the consent of the employer: *Harris & Russell Ltd v Slingsby* [1973] 3 All ER 31, 32; applied in *NZ Labourers Union v Hodder & Tolley Ltd* [1989] 1 NZILR 430,439. However, in circumstances where a resignation is given during a heated discussion, an employer should act with caution and allow a “cooling off” period before taking reasonable steps to ensure a resignation is genuine: see cases cited in *Little Earth Ltd (t/a Kiwi Hilton Backpackers) v Luxmore* (unreported, EC Auckland, AC149/98, 8 December 1999, Travers J). In *Boobyer v Good Health Wanganui* (unreported, EC Wellington, W17/94, 24 February 1994, Goddard CJ) the Court states that an employer cannot safely insist on its interpretation of words of resignation that are “*an emotional reaction or amount to an outburst of frustration*” if it is obvious that on sober inquiry the words were not meant to be taken literally and that this would have been obvious if the employer made inquiry after the heat of the moment had passed taking with it any influence of anger or other passion that may impair the employee’s reasoning. As the Court in *Boobyer* noted:

Examples of a sudden flare up being treated as a resignation are scattered through the [law] books. Some feature either extreme actions by the employee including emphatic language and expressive conduct extending to actually walking out or using words of resignation, only to return to recant later. Each case turns on its own facts but it is at least clear that “[a]n apparent resignation can also amount, notwithstanding the words used, to a dismissal”.

[35] It is clear in the present case that Dr Greaney did not act the caution considered appropriate by the Court in *Boobyer*. He had a telephone conversation with the Applicant the next day but I am not satisfied that the evidence shows he made any real attempt to assess that the Applicant had made a decision unimpaired by emotions of anger or frustration. From the time that the Applicant's wife rang him the next day, the possibility of the Applicant having a completely different perception of the 3 July exchanges must have been apparent to Dr Greaney. Despite this he made no attempt to telephone the Applicant or suggest a follow-up conversation to check the situation with cool heads. Instead he sent a strident restatement of his views by letter on 5 July demanding the return of company property and threatening legal action to recover wages paid in advance.

[36] Dr Greaney's evidence was that he knew the Applicant and his wife had a baby about two months before 3 July and the Applicant had "repeatedly" talked about wanting to spend less time away from home. To that background, the delays in repairs, news that he was to drive further than anticipated that night, a perceived problem about a wage deduction, and being late getting out on the road must be added as factors combining to put the Applicant in an agitated emotional state. In turn Dr Greaney was awoken by a telephone call to deal with what he, most likely, anticipated would be a routine exchange about RUCs only to find he had an unhappy driver complaining about a range of matters. Neither man was in the best position for cool or rational discussion.

[37] A fair and reasonable employer would not have relied on the subsequent intemperate exchange that night. Such an employer would have arranged to discuss the Applicant's wage complaint – even if it were founded on a misconception or memory lapse – at a later stage. This notional employer would also have suggested a more suitable time to discuss the employee's feelings about wanting to leave. There is no evidence to suggest that the Applicant was demanding his concerns be discussed immediately or that he would not drive the truck unless they were discussed that night. A fair and reasonable employer would also have subsequently explored with the Applicant, as there was the opportunity to do so the next day, whether the resignation was genuine.

[38] Dr Greaney's evidence was that he had no reason to want the Applicant to resign and that he did not want to lose capable drivers such as the Applicant. He even accepted, in response to questions at the investigation meeting, that if the Applicant had called the next day and asked to come back that he would have continued to employ the Applicant. However his subsequent actions are not consistent with these comments. Rather they are consistent with an employer who has relied on an emotional reaction or amount to an outburst of frustration and not really considered making any sober inquiry about the employee's real intentions once the heat of the moment has passed. It was an intemperate approach which continued to be exhibited in Dr Greaney's comments to the earliest approach by the Applicant's representative, the Respondent's failure to comply with a direction to mediation, and in the manner of Dr Greaney's giving evidence at the investigation meeting.

[39] Accordingly I find that in all the circumstances at the time the Applicant's apparent acts of resignation amounted to a dismissal. Dr Greaney's actions in the surrounding events were unjustified and I find that the Applicant has a personal grievance which requires remedies.

Remedies

Lost wages

[40] The Applicant seeks lost wages for a 12 week period, from 3 July 2006, comprising seven weeks of no income and then a further five weeks where he seeks the difference between the wages he received in a new job and the higher amount he would have earned if still working for the Respondent.

[41] He says he had no income for the first seven weeks after the termination of his employment with the Respondent because he went "through a down period" before he started looking for work, and then needed time to find a job he was happy with.

[42] He subsequently found a job as a tyre fitter in Whangarei for five weeks before getting another truck driving job, again based from Whangarei.

[43] I am not satisfied that the Applicant did all he could reasonably be expected to do in order to mitigate his losses during this time. He did not, for example, seek any casual driving work, for which he was well qualified. He also appears to have limited his job search to the Whangarei area rather than seeking work further afield as he had done by working for the Respondent. That is a choice that he was entitled to make, for family or other reasons, but not one for which his former employer should necessarily foot the bill.

[44] His claim for twelve weeks lost wages also does not properly account for the fact that his wages were still two weeks in advance when he stopped working for the Respondent.

[45] Accordingly I consider it appropriate to limit the award of lost wages to a total of six weeks – comprising four weeks at his former full wages (of \$1000 a week) and a further two weeks at the difference between wages paid as a tyre fitter and what he would have received as a driver (being \$380 a week) – for a total sum of \$4760 (after tax).

[46] The Applicant also submitted that he was owed additional wages for paternity leave, a public holiday and one day's annual leave. I am not satisfied the evidence clearly shows the Applicant had such outstanding leave entitlements or that they were not met by the Respondent. I dismiss that part of his claim. Similarly I am satisfied that it was more likely than not that the Applicant had arranged for a wage deduction to cover part of his account for diesel purchases through the Respondent so the company was entitled to keep that. I accept he may still have owed the Respondent around \$160 more on his diesel account but I have not been able to establish this conclusively and take no further account of it in an overall assessment of remedies.

Compensation for hurt and humiliation

[47] The Applicant seeks an award of compensation for the hurt and humiliation of the circumstances of the termination of his employment with the Respondent.

[48] I accept that he found it humiliating returning to his Northland town and feeling unable to explain to people he knew why he was “back in town”. His distress continued until he got another job.

[49] Taking account of the generally modest level of awards made in cases of this type and the particular circumstances of this case, an award of \$3000 is appropriate compensation for the humiliation and injury to the feelings of the Applicant.

Contribution

[50] Section 124 of the Act requires the Authority to consider whether the actions of the employee contributed towards the situation giving rise to the personal grievance to an extent that requires reduction of the remedies that would otherwise be awarded.

[51] In all the circumstances of this case I consider a 50 per cent reduction of remedies is required to take account of the Applicant’s own actions in bringing about the end of his employment with the Respondent.

[52] It was not only Dr Greaney who demonstrated a bellicose attitude throughout the 3 July exchanges between the two men. From Mr Swann’s evidence it is apparent that the Applicant went into the later call on 3 July with an aggressive approach. The good faith obligations under s4(1A) of the Act to be active and constructive in maintaining a productive employment relationship apply to both employees and employers. Dr Greaney may have reacted badly to the range of concerns raised but the Applicant could have explained he needed to get on the road that night and would wait for a more convenient time to talk. Instead he resorted to intemperate language which went beyond what he meant to say. That is as may be, but the Applicant must take his share of the responsibility for the way that the conversation deteriorated. Similarly he could have done more on 4 and 5 July to clear up any misunderstanding about whether he had resigned.

Orders

[53] The Respondent is to pay to the Applicant the following sums in resolution of his personal grievance:

- (i) \$2380 (after tax) in reimbursement of wages lost as a result of the grievance, under s123(1)(b) and s128 of the Act; and
- (ii) \$1500 (without deduction) in compensation for humiliation, loss of dignity and injury to feelings, under s123(1)(c) of the Act.

Costs

[54] The Applicant is entitled to a reasonable contribution to his costs in bringing his personal grievance. The parties are encouraged to resolve any question of costs between themselves. If they are unable to do so, the Applicant may lodge within 28 days of the date of this determination an application for the Authority to determine the matter of costs. The Respondent may reply to any such application within 14 days of it being lodged. No application for costs will be considered outside this timeframe.

Robin Arthur
Member of the Employment Relations Authority