

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 617
3262340

BETWEEN NAVDEEP DHINDSA
Applicant

AND VEER TRANSPORT
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Benjamin Hinchcliff, counsel for the Applicant
Arunjeev Singh, counsel for the Respondent

Investigation Meeting: 11 June 2024

Further information and submissions received: 20 June and 15 July 2024, from the Applicant
9 July 2024, from the Respondent

Determination: 15 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Navdeep Dhindsa was employed by Veer Transport Limited (VTL) as a truck driver from January 2023 until his dismissal on 6 June 2023. He brings claims before the Authority for unjustified disadvantage relating to VTL's alleged lack of required due diligence in respect of an ACC claim he made and unjustified dismissal. He seeks remedies to compensate wages and injury to feelings. He also seeks a contribution to costs.

[2] VTL says it did not dismiss Mr Dhindsa. It seeks a contribution to costs.

The Authority's investigation

[3] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Dhindsa and from Jarnail Singh, who was a director of VTL at the relevant time and was authorised to give evidence on its behalf.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues identified for investigation and determination are:

- i. Was Mr Dhindsa unjustifiably disadvantaged in his employment and/or unjustifiably dismissed?
- ii. If so, is Mr Dhindsa entitled to a consideration of remedies sought including:
 - a. Reimbursement for lost income under s 123(1)(b) of the Employment Relations Act 2000 (the Act;
 - b. Compensation under s 123(1)(c)(i) of the Act.
- iii. If Mr Dhindsa is awarded lost wages should holiday pay be ordered?
- iv. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Dhindsa which contributed to the circumstances which gave rise to her grievance?
- v. Is either party entitled to an award of costs?

Relevant law

The test for justification

[6] When the Authority considers justification for the actions of DKL including the dismissal decision it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances.

It is required to consider on an objective basis whether the actions of DKL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[7] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations set out in s 4 of the Act. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law”.¹

The parties’ employment agreement

[8] The parties’ signed an individual employment agreement on 20 January 2023. Mr Dhindsa was a permanent employee with minimum guaranteed hours of 30 per week with hours and days set in advance by a mutually agreed roster.² The employment agreement provided from time-to-time Mr Dhindsa may be offered additional hours and consistent with this he said he usually worked about 50 hours per week. His hourly rate of pay was \$36 per hour.

[9] Clause 26 of the employment agreement deals with termination and clause 26.4 deals with abandonment of employment:

26. TERMINATION OF EMPLOYMENT

...

26.4 In the event you are absent form work for three consecutive working days without any notification to the Employer, this Agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

Background

[10] Mr Dhindsa was employed by VTL for about four and a half months prior to his employment ending. This was his second period of employment with VTL. Mr Singh said Mr Dhindsa was a good truck driver who he was happy to reemploy and that they were friends.

[11] Issues concerning Mr Dhindsa’s attendance at work started not long after he rejoined the business. VTL drew these issues to his attention in late May and by email

¹ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

² Refer the parties’ employment agreement, clause 10 hours of work.

dated 7 June, under the name of the general manager, recorded it was a second warning regarding absenteeism.³ Mr Dhindsa replied to the general manager by return acknowledging there was an issue with his attendance:

Hi Raoul

I apologise to you and JD. About not coming to work regularly. And I totally agree how things get bad when driver not show up because I also dispatched for [name of another business]. But I'm going through something very personal which I can't explain. I think the best for both of (sic) as is I can give resign. Because I don't put dispatcher in pressure when I don't show up.

If not then please give me some time till next month because I can't come to work till 3 July.

Kind regards

[12] There was a further exchange of emails with agreement reached that Mr Dhindsa would take time some off work and return on Monday 26 June.

[13] On 15 June the general manager emailed Mr Dhindsa asking if he would extend his leave by a further week due to a downturn in the business. The email referred to possible redundancies and offered to discuss the matter further. Mr Dhindsa replied he could not afford more time off work. The general manager referred by reply to a redundancy programme starting and asked Mr Dhindsa to come in for a discussion. The following day Mr Dhindsa emailed offering to come in the following day, Saturday 17 June. He did not attend the workplace on 17 June.

[14] Mr Singh's evidence is Mr Dhindsa rang him on 16 June and asked for some financial assistance and they reached agreement VTL would pay him his outstanding holiday pay entitlement which was \$2,781.77 (gross). A net holiday entitlement payment of \$1489.46 was made to Mr Dhindsa on 21 June 2023. The payslip describes the payments as final pay:

Annual leave this pay (final pay)
Holiday Pay 8.00% (final pay)

[15] Also on 21 June Mr Dhindsa emailed the general manager offering to take a further week off work if the business was still quiet. There was then an exchange of

³ Mr Dhindsa does not challenge the justifiability of the warning.

emails where VTL appears to have agreed to a further extension by a week of Mr Dhindsa's leave, asked him to come in "before you come back to work. I need to work out a plan for you" to which Mr Dhindsa offered to attend the workplace on the "coming Monday" that is, the 26 June. By this stage VTL and Mr Dhindsa had agreed he would be off work until Monday 31 June. It is more likely than not Mr Dhindsa made the request for payment of his holiday pay as Mr Singh describes. If he had not, he would likely have raised a query about the payment.

[16] Notwithstanding, the payment of the holiday pay was I have found made at Mr Dhindsa's initiation, it is not compliant with the requirements of s 28A of the Holidays Act 2003 which provides an employee may request a portion of annual holiday pay be paid out to a maximum of one week within an entitlement year and that such a request must be made in writing. Mr Dhindsa makes no arrears claim is made in respect of this payment.

[17] On 28 June Mr Dhindsa emailed the general manager that he had had an accident on 26 June attaching a medical certificate which declared he was unfit for work from 27 June until 10 July 2023. The medical certificate was in an ACC 18 form, indicating Mr Dhindsa had made a claim for ACC coverage.

[18] On 30 June ACC wrote to VTL asking for information about Mr Dhindsa to be completed in an attached ACC040 "Termination of Pay Information request" form. On 3 July ACC repeated the request to VTL. The general manager replied that day to ACC:

Sorry I don't understand the request, Navdeep has not been terminated yet, he has been on extended unpaid leave.

[19] This accurately reflects Mr Dhindsa's employment status at this stage.

[20] ACC replied to VTL that day seeking clarification on the following matters:

- (i) information from Inland Revenue stated Mr Dhindsa ceased employment with VTL on 18 June;
- (ii) if that was not the case, why did he receive a payment of gross earnings higher than usual for the period 12 June to 18 June 2023 and what was the payment for;

- (iii) if Mr Dhindsa had been on unpaid sick leave or other leave and the dates between 19 December 2022 and 18 June 2023; and
- (iv) if Mr Dhindsa was a permanent or non-permanent employee.

[21] The information from Inland Revenue ACC refers to described Mr Dhindsa's employment as having ended with VTL because the payment he received on 21 June described it as a final payment. The reference to 18 June is the end date of the pay period.

[22] The general manager replied to ACC that day including "Payroll has paid out any outstanding balance, including any leave entitlements, as he has been off for a significant period, we are under the assumption that he has abandoned his employment, however he has not been terminated at this stage, and I am waiting to see if he will come to a meeting after the 10th". Again, VTL communicated to ACC that Mr Dhindsa's employment had not ended and provided an explanation for his absence and the payments.

[23] On 11 July ACC decided Mr Dhindsa was not an earner at date of accident based on the date of the last payment he had received from VTL. The consequence of this decision was his application for weekly compensation was declined, as communicated to him on 28 July. Mr Dhindsa lodged a review of the decline decision which was successful. It is not clear why ACC did not accept VTL's representations that Mr Dhindsa remained an employee.

[24] On 13 July VTL wrote to ACC:

As per the discussion between Navdeep and management it has been decided that he will join "Veer Enterprise" back post his recovery and will be on books as our employee from then."

[25] Mr Singh said this email was written under his instruction following a WhatsApp call received from Mr Dhindsa who asked him to write to ACC advising he was still employed. Mr Dhindsa accepted he had made the call but denied making the request as Mr Singh describes. I prefer Mr Singh's account because there would be no other reason for him to direct such the communication to ACC. While the 13 July email is ambiguous and suggests Mr Dhindsa would be reemployed after he was fit to return to work, I am satisfied there was no communication from VTL to Mr Dhindsa that it

considered his employment had ended. Further, the 13 July communication was not relevant to ACC's decline decision because that decision had already been made.

[26] On 15 August ACC contacted VTL and asked for someone to contact them to discuss matters relating to Mr Dhindsa's review. VTL does not appear to have replied.

[27] On 7 September an ACC review specialist emailed VTL "I need to confirm if Mr Dhindsa is still employed by yourselves. If Mr Dhindsa is no longer employed by Veer Enterprise Ltd, can you confirm his final workday". A member of VTL's payroll team replied that day including "No, he is not working with the veer enterprise anymore and his last working day was 6/6/2023, Tuesday".⁴ Mr Singh's evidence is the message from payroll was incorrect because VTL still considered Mr Dhindsa employed at that date.

[28] Also on 7 September Mr Dhindsa called Mr Singh. Mr Singh says Mr Dhindsa said he must write to ACC saying he was employed by VTL or he would raise a personal grievance. Mr Dhindsa said he rang Mr Singh and asked him to fix things with ACC. It is more likely Mr Dhindsa contacted Mr Singh to request VTL communicate clearly with ACC that he remained an employee, which was the case. Unfortunately, Mr Singh appears to have understood the situation differently and did not review the 7 September communication to ACC from VTL's payroll to correct the error. What if any difference it would have made is unclear given ACC had declined Mr Dhindsa's claim, for which a review was lodged.

[29] By letter dated 8 September Mr Dhindsa raised personal grievances with VTL for unjustified disadvantage and unjustifiable dismissal when it ended his employment without notice on 6 June. Remedies were sought and mediation proposed.

[30] VTL, under the name of the general manager, replied to the personal grievance raising letter that day including VTL had not terminated Mr Dhindsa's employment, and he had abandoned his employment by:

Navdeep ceased his engagement with our company without prior notice or communication. His absence from work, lack of contact, and failure to return

⁴ It is accepted nothing turns on the references to Veer Enterprise Limited, a related entity to Veer Transport Limited.

to his duties have led us to conclude that he has effectively abandoned his place of work, which is in direct breach of the terms outlined in his employment contract.

[31] This was a communication to Mr Dhindsa that VTL considered his employment was terminated by way of abandonment. Mr Dhindsa's employment with VTL ended on 8 September 2023.

[32] On 17 October ACC accepted Mr Dhindsa's application for weekly compensation.

[33] On 18 October Mr Dhindsa travelled to India to live with family because he was unable to afford to continue living in New Zealand. He did not receive accident-related compensation after this date because he could not provide the necessary medical certification to ACC.

[34] On 27 October ACC approved backdated weekly compensation of \$21,593 (gross) for the period 3 July 2023 to 15 October 2023.

Discussion

Did Mr Dhindsa abandon his employment?

[35] The parties' employment agreement contains a termination for abandonment clause. The Court of Appeal has found an employee abandons their employment when there is clear evidence they intend to end their employment.⁵ In that judgment, noting it was decided before enactment of the statutory good faith obligations, the Court held an employer should be cautious in drawing the inference that an employee had abandoned their employment:⁶

...the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment.

[36] VTL consented to Mr Dhindsa taking leave without pay which then overlapped with a period where he was certified unfit to work. This then overlapped with extended

⁵ *E N Ramsbottom Ltd v Chambers* (2000) 2 ERNZ 97 (CA).

⁶ Above at [26].

communications with ACC regarding Mr Dhindsa's employment which VTL expressly represented to ACC as ongoing up to 13 July and, on its evidence, erroneously communicated to ACC on 7 September that he was no longer employed by VTL. VTL did not write to Mr Dhindsa to inquire where he was. On the evidence this is more likely than not to be because it knew he was unable to work. Further Mr Dhindsa contacted Mr Singh at least twice to ensure his employment was ongoing. Mr Dhindsa did not give a clear indication to VTL that he intended his employment to end. Mr Dhindsa did not abandon his employment.

Was Mr Dhindsa unjustifiably dismissed?

[37] Mr Dhindsa wrote to VTL on 8 September that it had ended his employment on 6 June 2023 and that this amounted to an unjustified dismissal. The factual basis for this claim is VTL's email to ACC on 7 September and the 21 June pay slip which describes the annual leave and holiday payment as 'final pay'. As can be seen from the background narration this is only part of the story. Mr Dhindsa's employment did not end on 6 June, even on his own account - he had reached an agreement with VTL that he would return to work on 31 June after a period of unpaid leave.

[38] Mr Dhindsa suggests in submissions, in the alternative, that he may have been dismissed on 13 July based on the wording of VTL's email to ACC of that date. Again, given the ambiguity of and context of this communication including Mr Dhindsa's request to Mr Singh to advise ACC he was still employed, and that this communication was not addressed to Mr Dhindsa, the 13 July email is not a sending away and does not amount to a dismissal.

[39] VTL's 8 September response to the personal grievance letter asserts unambiguously that the employment had ended by way of abandonment. As stated above VTL had no reasonable basis to form this view. This communication amounts to a dismissal.

[40] VTL is unable to demonstrate its actions were justified that is, that they were those a fair and reasonable employer could have taken in all the circumstances.⁷ There is no or little evidence VTL investigated its apparent concerns, as described in the 8

⁷ Employment Relations Act 2000, s 103A.

September correspondence, into Mr Dhindsa's absence from work. Any concerns about his absence were not put to him in a way which he could fairly respond to, and he was not given a reasonable opportunity to comment on whether dismissal was fair and reasonable. These were not minor deficiencies and they have resulted in Mr Dhindsa's being treated unfairly – he was not provided a fair opportunity to understand VTL's concerns or provide comment.

[41] Mr Singh told the Authority VTL employs 60 staff. As a trucking business it operates in a highly regulated environment. It has access to or could reasonably be expected to access support to deal in a fair and reasonable way with the employment issue with Mr Dhindsa. This could reasonably include communicating to him clearly about the matters concerning his ACC claim, his attendance at work and actively seeking to clarify any ambiguity. This did not occur and has contributed to the difficult and uncertain situation Mr Dhindsa faced. The flaws in how VTL dealt with Mr Dhindsa's employment coming to an end were not technical or minor. Mr Dhindsa was unjustifiably dismissed.

[42] His personal grievance for unjustified disadvantage relating to VTL's engagement with ACC is unsuccessful. The claim is understood to be VLT failed in its obligation to engage with ACC accurately and sufficiently in respect of Mr Dhindsa's claim. If such a claim could be said to engage good faith obligations, in the circumstances of this matter it could not succeed on the facts. Prior to ACC's decline decision VTL repeatedly provided information to the agency that Mr Dhindsa's employment was ongoing. Following ACC's decline determination VTL continued to engage with ACC and Mr Dhindsa's review was ultimately successful.

Remedies

Lost wages from end of employment

[43] Mr Dhindsa seeks reimbursement of earnings lost as a result of his dismissal pursuant to section 123(1)(b) and section 128 of the Act. He seeks:

- (i) 20% top up payment for the 5 weeks and 2 days from 8 September 2023 until 15 October 2023 when his ACC weekly compensation ended;

- (ii) \$28,080.00 (gross) for 26 weeks from 16 October 2023 to 15 April until he started working; and
- (iii) holiday pay calculated from the date of his last pay slip (18 June 2023) until 20 May 2024.

[44] The usual position is that ACC and similar payments are taken into account when assessing lost remuneration, because reimbursement for lost earnings is for an established loss. Where that loss has been mitigated or reduced by other earnings, it is not open to the Authority to award more than the actual loss.⁸ While Mr Dhindsa received accident-related compensation, albeit back paid, his financial position was not negatively impacted less the 20% more he would have earned had he been able to work. Mitigation is a relevant factor to consider in assessing an award of lost wages.⁹

[45] The evidence of loss as a result of the grievance has been reviewed as has Mr Dhindsa's attempts to mitigate that loss. This evidence includes Mr Dhindsa's decision to leave New Zealand on 18 October which has prevented his ability to establish his incapacity and therefore ongoing entitlement to accident-related compensation and reduced the period for which loss resulting from the grievance can be established. The Authority is satisfied Mr Dhindsa is entitled to an award of lost wages calculated for the period 8 September 2023 to 15 October 2023 of the difference between the amount he received in accident-related compensation payments and what he would have earned if he had remained employed by VTL working his contracted 30 hours per week at \$36 per hour. He is not entitled to compensation for lost earnings beyond that date given the particular circumstances of this matter.

Compensation for humiliation, loss of dignity and injury to feelings

[46] In evidence Mr Dhindsa said as a result of losing his employment with VTL he faced financial uncertainty as well as stress and he had to return to India live with family.

[47] It is accepted the impact of his personal grievance has had a negative impact on Mr Dhindsa. The Authority is satisfied he experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter Mr

⁸ *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57 at [162]–[163].

⁹ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [103].

Dhindsa is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings he has suffered consequent to his established personal grievance of \$8,000.00.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Dhindsa that contributed to the situation giving rise to his grievance?

[48] No deduction from the remedies awarded is to be made under s 124 of the Act. While Mr Dhindsa's communication with VTL over the subject period fell short I am not satisfied it contributed in a blameworthy way to the situation giving rise to his personal grievance.

Holiday pay arrears

[49] Mr Dhindsa claims arrears of holiday pay calculated from 19 June to 8 September. While he has established, he was employed over this period, he did not earn anything. His gross earnings were nil, and the calculation of holiday pay would accordingly be zero rated.¹⁰

Summary of orders

[50] Within 21 days of the date of determination Veer Transport Limited is to make the following payment to Mr Dhindsa:

- a) \$8,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
- b) lost remuneration pursuant to section 123(1)(b) of the Employment Relations Act 2000 less accident-related earnings in the relevant period; and
- c) holiday pay calculated on the lost remuneration award pursuant to s 123(1)(b) of the Employment Relations Act 2000.

Costs

[51] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Dhindsa may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date

¹⁰ Holidays Act 2003, s 23.

of service of that memorandum Veer Transport Limited will then have 14 days to lodge any reply memorandum.

[52] On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment.

Marija Urlich
Member of the Employment Relations Authority