

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 293
5441206

BETWEEN

PETER ELSMORE
Applicant

A N D

MATERIAL PROCESSING
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Nicholas Koreneff, Counsel for the Applicant
Priscilla Kirk, Counsel for the Respondent

Investigation Meeting: 27 May 2014 at Rotorua

Date of Determination: 9 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Elsmore) alleges that he was unjustifiably dismissed by the respondent (MPL) on 23 August 2013. MPL denies that the dismissal occurred and maintains that Mr Elsmore resigned his employment on 26 August 2013. Nothing turns on the difference in the date; for the avoidance of doubt, I am satisfied that the date the employment came to an end was 26 August 2013, not 23 August 2013. That is consistent with the time sheets supplied by MPL.

[2] Mr Elsmore was employed on a casual individual employment agreement dated 9 February 2009. He worked as a recycler for MPL which has a contract with the Rotorua District Council to manage and run the city's recycling centre (the Centre).

[3] There are a small number of permanent staff who work a six days/two days off roster and four to five staff are required whenever the Centre is open.

[4] In order to fill the gaps in that roster arrangement, when permanent staff are rostered off, MPL has employed a number of casual staff and Mr Elsmore was one of that latter group.

[5] There was a particular issue which precipitated the events leading to the end of Mr Elsmore's employment relationship. One of the terms of the contract between the local authority and MPL was a requirement that all of the bays at the Centre be kept open irrespective of recycling demand. Notwithstanding that contractual obligation on MPL, there was a longstanding problem of staff unilaterally closing down bays when it was quiet. Staff did this because it made it easier for them to perform their duties. Conversely, the local authority's view was that closing some of the bays down made it less convenient for ratepayers to use the Centre.

[6] The evidence I heard was plain that MPL had taken all practicable steps to discourage staff from closing bays and made it clear that that was a contractual stipulation and that the logical corollary of staff persisting with closing down bays was that the local authority could allege a breach of contract and thus bring the contractual relationship to an end.

[7] Notwithstanding that context, on 26 August 2013, MPL's Regional Manager, Mr Sam Fredricsen, observed Mr Elsmore complaining to another staff member about the necessity for having all of the bays open. That discussion took place in the smoko room and Mr Fredricsen's office adjoined it.

[8] Mr Fredricsen's evidence is that he exited his office into the smoko room and remonstrated with Mr Elsmore, amongst other things making it clear that the requirement that all the bays be open was a contractual obligation which MPL could not vary.

[9] Critically, Mr Fredricsen also said, according to his own brief of evidence:

If you are not happy with that arrangement then you are free to leave at any time because the policy regarding the bays remaining open at all times is not negotiable.

[10] Again, relying on Mr Fredricsen's own brief of evidence, he goes on to say that he confirmed that because Mr Elsmore was employed on a casual employment contract, he was not under any obligation to give notice.

[11] Mr Fredricsen's evidence to me was that he was neither aggressive nor rude and that he did not intend to terminate Mr Elsmore's employment and that nothing that he said or did could be construed by a reasonable person as constituting an intention to dismiss. Mr Fredricsen said that he was simply stating the facts.

[12] Mr Elsmore's recollection of this significant event, not surprisingly, is different. He recalls Mr Fredricsen emerging from his office, remonstrating with him about the conversation and then telling him words to the effect "*go home and do not come back – goodbye*".

[13] Mr Fredricsen denies absolutely saying those words. He was adamant that all he did was say to Mr Elsmore that if Mr Elsmore was unhappy with the employer's requirements, which it derived from its contract with the local authority, then he need not continue working and that he was not required to give notice. Mr Fredricsen's evidence is that Mr Elsmore's response to those observations was to say something to the effect "*that's it I'm gone*" or "*fine I'll leave*".

[14] Both Mr Fredricsen and Mr Elsmore then left the smoko room but headed in slightly different directions. Mr Elsmore's evidence is that he went down to the bays area where the staff were working and told them that he was leaving. Then Mr Elsmore proceeded in the direction of the warehouse area where Mr Fredricsen was explaining to the Branch Manager, Mr Hammersley, what had happened.

[15] While Mr Hammersley and Mr Fredricsen were having their conversation, Mr Elsmore appeared, but some distance away, threw his arms out in the air and said something to the effect "*right that's it I'm leaving*". I note at this point that Mr Elsmore accepted in his oral evidence that he had said words to that effect in the warehouse area before leaving the workplace so there is some common ground on that second exchange.

[16] Mr Elsmore then endeavoured to engage privately with Mr Hammersley with whom he was friendly. It was Mr Hammersley who had originally hired Mr Elsmore and they drank together at the pub. Despite Mr Elsmore's attempts to get Mr Hammersley to address the issue, Mr Hammersley was resolute; his view was that it was between Mr Elsmore and Mr Fredricsen and he was not going to intervene.

[17] That being the case, Mr Elsmore then wrote a letter to the employer complaining about what had happened and he personally delivered that by putting it under the door of the employer's premises. There was no reply.

[18] Mr Elsmore then wrote a further letter, delivering it in the same way, and again there was no response.

[19] Finally, Mr Elsmore got an employment advocate to engage with MPL and the matter eventually came before the Authority for disposition.

Issues

[20] The first issue that I must determine is whether Mr Elsmore was genuinely a casual employee or not. He maintained in his evidence to the Authority that, although he acknowledged that he had signed a casual employment agreement he was, in truth, a permanent part time employee. Conversely, MPL maintained that Mr Elsmore was always a casual employee.

[21] The second question for the Authority to dispose of is whether Mr Elsmore resigned his employment, as MPL alleges, or was dismissed as he himself alleges.

[22] Accordingly, I will consider the following questions:

- (a) Was Mr Elsmore a casual employee; and
- (b) Was Mr Elsmore dismissed or did he resign?

Was Mr Elsmore a casual employee?

[23] I am satisfied on the evidence before the Authority that Mr Elsmore was a casual employee. It is common ground that Mr Elsmore signed a casual employment agreement in 2009 and that that agreement sets out the basis on which the employment is casual. Amongst other things, Mr Elsmore himself acknowledged in his evidence at my investigation meeting that holiday pay was included in each fortnight's pay.

[24] The evidence of MPL is important in the determination of this issue. Mr Hammersley in particular, as Branch Manager, gave evidence about how the rostering arrangements actually worked.

[25] Mr Hammersley's evidence was that it was his initiative to operate a pool of casual staff to augment the work of the permanent staff.

[26] He told me that he prepared a roster each week and that that was usually prepared on the Thursday prior to the week in question.

[27] The purpose of the casual staff, as I have already noted, was to relieve where there were staffing shortfalls particularly where full time staff were sick or on ACC or on holiday leave.

[28] Mr Hammersley said that he tried to keep the casual work spread around the casual staff so that everybody in the casual pool got about the same amount.

[29] Because Mr Hammersley was responsible for the recruitment of staff, he was able to tell me how the recruitment process was attended to. He had a standard process. He said that he invariably told casual staff that there was no guarantee of work, that they might be asked to work on any day of the week and that the hourly rate included holiday pay.

[30] Mr Elsmore has no particular recollection of the recruitment process although he remembers enough to be able to say in his brief evidence, as I have already noted, that holiday pay was included in each fortnightly pay. He also maintains that he did not receive a copy of the casual employment agreement although he told me in his oral evidence that he may have received a copy. What Mr Hammersley said was that he invariably gave a copy of the standard casual employment agreement to new staff when they were recruited and that he would have done the same with Mr Elsmore. I am satisfied that that is precisely what happened.

[31] Mr Elsmore also maintained that he worked a regular span of hours. He said that Saturday, Monday and Tuesday "*were my regular hours*" but he then went on to accept that he worked other hours on other days as well and that he also did not work every Saturday, Monday and Tuesday and that he was called in from time to time at short notice to do any hours.

[32] Mr Hammersley dealt with that aspect in his brief of evidence. He flatly denied that Mr Elsmore had three permanent days. He said that Mr Elsmore's hours and days of work varied and he referred me to the timesheets maintained by MPL for Mr Elsmore's work during calendar 2013.

[33] I have carefully looked at that material. It is true that Mr Elsmore worked many Saturdays, Mondays and Tuesdays (as he contended), but it is equally true that he worked a large number of Sundays as well. The short point is that on the evidence I heard, I am simply not persuaded that this arrangement is anything other than an absolutely legitimate use of a pool of casual labour. Mr Hammersley was a good witness; he was straightforward in the evidence he gave and dealt head on with Mr Elsmore's claim that the employment was not casual.

[34] The factors that impel me to that conclusion is the evidence of a pool of labour (not just Mr Elsmore), the evidence of a deliberate change to employ casual staff rather than recruiting temporary staff to fill in gaps, the fact that there was a roster, the fact that Mr Hammersley tried to keep access to casual work relatively even across the casual pool, and the clear evidence that Mr Elsmore worked a range of days and a range of hours.

[35] I am satisfied that Mr Elsmore was correctly employed as a casual employee and therefore that his entitlements to wages have been met by the employer.

Did Mr Elsmore resign or was he dismissed?

[36] I am satisfied that Mr Elsmore resigned his employment and was not dismissed from it. While I think the observations made by Mr Fredricsen may well have precipitated the resignation, I do not think on the evidence before me that Mr Fredricsen can be held to have constructively dismissed Mr Elsmore. That said, I think it only fair to observe that Mr Fredricsen may want to think a little more carefully about what he says to staff in future when he is providing them with information about the continuity of their employment. The observations that he made to Mr Elsmore went dangerously close to grounding a constructive dismissal and were therefore ill advised.

[37] I accept, however, without reservation that Mr Fredricsen was frustrated that staff kept raising the closing of bays issue notwithstanding MPL's attempts to convey to them the contractual realities of the situation. But no matter how frustrated a senior manager is, that does not entitle them to make observations to staff which could be misconstrued.

[38] The first reason that I conclude that Mr Elsmore resigned his employment is contextual. Everybody accepts that in the initial discussion in the smoko room,

Mr Elsmore was cross. I heard evidence from the staff member that Mr Elsmore was speaking to. He told me that Mr Elsmore was talking “*at*” him rather than talking with him. He said “*it was not a conversation*”. He referred to Mr Elsmore as “*arrogant*” and said that Mr Elsmore “*made me feel uncomfortable*”.

[39] Mr Elsmore himself admits that he “*wasn’t happy*” and that he was “*complaining and shouting*” although he denies trying to cause trouble.

[40] I also heard evidence from Ms Dawn Lee who had gone to the toilet nearby the smoko room at the relevant time. Ms Lee was then an employee of MPL also. Although Ms Lee could not hear all of the conversation, she did hear Mr Elsmore’s voice “*because it was rather loud*” and “*I assumed he was nutting off about the bays again*”.

[41] Ms Lee also heard Mr Fredricsen say something to the effect “*if you don’t like it you can go home*” but she clearly did not think that that constituted a dismissal because when Mr Elsmore came to say goodbye to her shortly thereafter (she was one of the staff working in the bays area when Mr Elsmore came to say farewell), Mr Elsmore told her that Mr Fredricsen had just fired him and her response, according to her evidence to me, was “*no that can’t be right. Go and talk to Neil [Mr Hammersley]*”.

[42] Based on Ms Lee’s evidence then, I think I am entitled to conclude that while she heard some of the heated discussion, and certainly heard Mr Elsmore getting excited and also heard some of the complained about observations of Mr Fredricsen, she did not think that Mr Fredricsen had dismissed Mr Elsmore, because if she had thought that, her subsequent advice to Mr Elsmore would make no sense.

[43] From all of this, I conclude that Mr Elsmore was himself cross, perhaps even more than cross, and that because he was in that state of mind, it is more likely than not that he might have behaved precipitately in respect of the continuation of his employment.

[44] The second reason that I conclude that Mr Elsmore resigned rather than was dismissed is that the evidence from the people who heard part or all of the discussion do not characterise Mr Fredricsen’s remarks as “*a sending away*”. That phrase is of course a term of art; in order for the Authority to be satisfied that an employer has

dismissed an employee, there must be evidence that the employer has sent the employee away.

[45] Put another way, the initiative for the termination of the employment relationship must emanate from the employer in order for there to be a dismissal and here my conviction is first that the evidence does not disclose a sending away, and second that in consequence, the initiative for the employment coming to an end was with Mr Elsmore rather than with the employer.

[46] The two witnesses who heard the exchange between Mr Elsmore and Mr Fredricsen, other than the protagonists, gave evidence. I have already referred to Ms Lee's evidence and noted that she did not regard Mr Fredricsen as attempting to send Mr Elsmore away.

[47] The other witness was, of course, the co-worker who Mr Elsmore spoke to, or more accurately spoke at, Mr Tokowaka Tiepa. Mr Tiepa, having heard the whole conversation, concluded that Mr Elsmore chose to resign. He referred to Mr Fredricsen being "*really calm*" and simply trying to convey the facts to Mr Elsmore about the contractual arrangements but he agrees that Mr Fredricsen said something like "*if you don't like it you can leave*" and then, on Mr Tiepa's recollection, Mr Elsmore said something like "*that's it, am I gone?*".

[48] I observe that that last phrase is capable of all sorts of reinterpretations and there was a discussion about this very point at the investigation meeting. Alternatives to that final phrase include "*that's it I'm gone*" and "*is that it, I'm gone?*".

[49] Quite clearly, there are a number of different recollections of the words actually used. I have already made clear my view that Mr Fredricsen went too far in explaining Mr Elsmore's options such that Mr Elsmore may not have been clear, as he should have been, about what the employer's position actually was.

[50] That said, neither of the independent witnesses formed the view that Mr Fredricsen was seeking to terminate the employment relationship. Mr Tiepa formed the view that Mr Elsmore simply got cross and resigned and Ms Lee, who certainly has no axe to grind and who now is a co-worker of Mr Elsmore in his current role, also formed the view that Mr Fredricsen had not brought the employment to an end.

[51] Moreover, Mr Elsmore repeated the intimation that he was leaving when Mr Fredricsen and Mr Hammersley were discussing the initial altercation in the warehouse at the Centre. As I have already noted, Mr Elsmore came into the view of both managers and flinging his arms wide said something to the effect “*I’m out of here, I’m gone*” or “*right. That’s it. I’m leaving*”.

[52] It is difficult to see how the resignation conclusion can be avoided when effectively Mr Elsmore has offered words of resignation not once but twice and the second time without any context that could be misconstrued. Moreover, by the time Mr Elsmore uttered the second set of words, he had met with his work colleague, Ms Lee, to say goodbye and it will be remembered that Ms Lee’s evidence to him when he told her that Mr Fredricsen had just fired him was to say “*no that can’t be right. Go and talk to Neil [Mr Hammersley]*”.

[53] So instead of doing precisely that, Mr Elsmore made the dramatic gesture I have just described and uttered the words indicated or something similar, and left the premises.

[54] I conclude then that this was not a dismissal at all but a resignation and that a fair and reasonable employer could conclude that an employee who behaved in the way just described, and particularly where there were two separate and consistent instances notifying his intention, was resigning his employment.

[55] If Mr Elsmore had taken prompt steps after the initial altercation to inquire into his position with the employer, then following *Kostic v. Dodd* NZEmpC CC14/07 (Judge Couch), I would reach a different conclusion.

[56] Plainly, if the employer is on notice that the purported resignation is in doubt, as was the case in *Kostic*, then that should raise a flag.

[57] But here, Mr Elsmore did not act promptly, did not follow Ms Lee’s advice and raise the matter immediately with Mr Hammersley, did not talk again to Mr Fredricsen and did not even identify the nature of his complaint in the subsequent written communications.

[58] But even those written communications do not seem to me to avail Mr Elsmore first because of their lack of specificity but more importantly because they come too far after the events complained of.

[59] Because Mr Elsmore was a casual employee, and because the terms and conditions of that employment made plain that no notice was required, any attempt by Mr Elsmore to resile from the impression I am satisfied he created in the first exchange, would have to have happened very quickly thereafter in order for the employer to be bound to consider it further.

Determination

[60] I am not satisfied that Mr Elsmore has any ground for complaint. I am satisfied Mr Elsmore was a casual employee of MPL, that as a consequence he was paid what he was entitled to under that contract, and that he resigned his employment and was not dismissed from it.

Costs

[61] Costs are reserved but the parties are urged to try and resolve matters on their own terms, assuming that MPL wishes to pursue costs.

[62] If MPL does wish to pursue costs, and is unable to resolve costs by agreement, MPL may file and serve a memorandum asking the Authority to fix costs and Mr Elsmore has 14 days from his receipt of that memorandum to file a memorandum in response.

James Crichton
Member of the Employment Relations Authority