

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 113/10
5284775

BETWEEN DARREN GOLDFINCH
Applicant

AND JE & IM LOCKLEY
Respondents

Member of Authority: R A Monaghan

Representatives: D Goldfinch in person
JE and IM Lockley in person

Investigation meeting: 22 February 2010

Additional information
provided: 25, 26, and 27 February 2010
7 and 10 March 2010

Determination: 11 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Darren Goldfinch says his former employers, JE and IM Lockley, owe him payment in lieu of notice of the termination of his employment, meal money, payment in respect of work done on a statutory holiday, and the reimbursement of monies deducted from his pay.

[2] Mr Goldfinch was employed as a truck driver, commencing in October 2008. He usually drove night runs on various routes between Auckland, New Plymouth, Wellington, and Palmerston North.

[3] There was no written employment agreement.

[4] Mr and Mrs Lockley are counterclaiming in the sum of \$500,000 in respect of a contract they say their business lost because of Mr Goldfinch's actions.

Payment in lieu of notice of termination of employment

1. The reason for termination

[5] Mr and Mrs Lockley said they often received complaints from customers about late deliveries of freight. They said the driver at fault when these complaints were received was Mr Goldfinch. They believed that Mr Goldfinch devoted considerable time to other activities out of work, particularly to animals he raised on farm land he leased and to an agricultural contracting business, to the detriment of his work. These activities meant that he did not receive enough sleep. Deliveries were late because he would stop the truck and sleep at the side of the road.

[6] Mr Lockley said that twice he saw Mr Goldfinch asleep in his truck just outside Taupo. Although he said he warned Mr Goldfinch, the warnings amounted to little more than drawing a concern to Mr Goldfinch's attention. There were no disciplinary warnings.

[7] Mr Goldfinch denied that he devoted such time to his other activities that he needed to sleep when he should have been driving.

[8] Matters came to a head when, at 6 am on or about 11 August 2009. Mrs Lockley received a query from a customer regarding the whereabouts of a delivery due at 3.30 am. Mr Goldfinch's driver logbook showed he was in New Plymouth between 3.30 and 5.30 am. A proforma outturn report document subsequently provided to the Authority indicated there was some handling of the delivery at 4.20 am.

[9] The effect of the lateness was compounded later that morning, when freight was also late to Palmerston North. There was a further complaint. At the same time it was common ground that Mr Goldfinch had a problem with the truck that day, and Mr Goldfinch said that problem contributed to any lateness.

[10] Mrs Lockley said that, as a result and also the same morning, the customer concerned advised her that its contract with the Lockleys was being terminated. The late delivery was the last in a number of late deliveries the customer was no longer prepared to tolerate. This loss of contract is the subject of the counterclaim.

[11] Mr and Mrs Lockley decided to terminate Mr Goldfinch's employment by way of redundancy following the loss of the contract. Mr Goldfinch, rather than any of the other drivers employed by the Lockleys, was the employee chosen for dismissal because he was blamed for the loss of the contract. Mr Lockley informed Mr Goldfinch on 12 August that he was being laid off because of the loss.

2. Entitlement to payment in lieu of notice

[12] Mr Goldfinch seeks only payment in lieu of notice in respect of the termination of his employment. If the termination amounted to a justified dismissal without notice, Mr Goldfinch would not be entitled to this payment.

[13] However on the basis of what was put to me there was no justification for such a dismissal. The Lockleys blamed Mr Goldfinch for the loss of the contract because of the complaints associated with late deliveries, culminating on 11 August. However they did not provide any details of any earlier complaints, let alone evidence that Mr Goldfinch was the driver or that he was at fault on any of the relevant occasions, they did not investigate the circumstances of the last late delivery on 11 August, and until required to do so during the investigation meeting they provided no documentation in support of the events of 10-11 August.

[14] The lack of detailed information regarding the late deliveries, the failure to investigate Mr Goldfinch's role in the loss of the contract, and the failure to consult with Mr Goldfinch about the termination of his employment mean I am not persuaded for present purposes that it was fair to blame him for the loss of the contract or that the dismissal on the ground of redundancy was justified.

[15] I therefore conclude that Mr Goldfinch is entitled to the payment in lieu of notice he seeks. In the absence of a written employment agreement, I must infer a

reasonable notice period. A reasonable period for a driver would be one week, and I find accordingly.

[16] Mr and Mrs Lockley are therefore ordered to pay Mr Goldfinch one week's pay in lieu of notice. The amount is \$923.10 (gross).

Meal money

[17] It was common ground that drivers passing through Turangi received paid-for meals if they stopped for them. Otherwise they received a \$20 meal allowance.

[18] Mr Goldfinch seeks payments of \$20 for meals not taken in Turangi. After discussion during the investigation meeting the parties agreed there were 8 occasions on which Mr Goldfinch was entitled to a meal payment.

[19] Payment is ordered accordingly, in the sum of $8 \times \$20 = \160 .

Holiday pay

[20] Mr Goldfinch seeks a payment of annual leave in respect of time he said he worked. It was apparent from his logbook that, while on a period of leave from his employment with Mr and Mrs Lockley, he had worked for someone else. That was the work in respect of which he sought the payment in for leave not taken.

[21] Mr Goldfinch received payment of annual leave from the Lockleys and the claim is declined.

[22] There was also a claim for payment in respect of work done on the Queens Birthday holiday. Mr Goldfinch had not been paid at the rate applicable to a statutory holiday because drivers were told they could start work at midnight that night rather than at their earlier start time.

[23] Mr Goldfinch said he was unaware of the offer of a late start, so started work that day at 4.30 pm. He did not receive payment at the rate of T1½, and did not

receive an alternative paid holiday. In effect he is entitled to an additional payment for that day at the rate of $T\frac{1}{2} + T1$, or \$276.93.

[24] A review of pay records during the investigation meeting revealed that a clerical error had led to an overpayment of holiday pay to Mr Goldfinch in the sum of \$864.

[25] The result is that Mr and Mrs Lockley are ordered to pay Mr Goldfinch \$276.93 for unpaid statutory holiday pay, while Mr Goldfinch is ordered to pay to Mr and Mrs Lockley \$864 as overpaid holiday pay.

Phone calls

[26] It was common ground that employees who used a work phone had payments for personal calls deducted from their wages.

[27] Although Mr Goldfinch questioned these deductions, they were in very small amounts and he conceded it was likely they reflected his actual use. Accordingly this claim was withdrawn.

Deduction in respect of straps taken

[28] A deduction of \$246.94 was made from Mr Goldfinch's pay in respect of 10 straps belonging to the business, which Mr Lockley believed Mr Goldfinch had taken without authority. He said he based his belief on the word of another employee.

[29] There was no written authority for the deduction. It was unlawful, and in breach of the Wages Protection Act 1983.

[30] Mr Goldfinch said he took two straps. Mr Lockley's assertion was not sufficient to persuade me Mr Goldfinch took any more, and mere reliance without more on the word of the other employee is not in any event sufficient to establish that Mr Goldfinch took anything.

[31] On the basis of Mr Goldfinch's acknowledgement, Mr and Mrs Lockley are ordered to repay to Mr Goldfinch a sum equivalent to 8 straps.

[32] I calculate the amount owed as $[\$246.94/10] \times 8 = \197.55 .

The counterclaim

[33] Mr and Mrs Lockley's counterclaim in respect of the loss of the contract required detailed evidence as to breach of obligation, causation of loss and quantification of loss, as well as legal argument as to liability and why the remedy should be ordered. None of that was provided.

[34] In particular, no evidence beyond Mr and Mrs Lockley's broad assertion was provided in support. An unsigned letter apparently from a director of Streamline, provided after the completion of the investigation meeting in response to my requirement that further information be provided, did not amount to evidence and in any event the content was far from adequate.

[35] In conclusion, the minimal evidence provided in support of the counterclaim fell far below the standard necessary to establish any factual basis for it. The claim is dismissed.

Summary of orders

[36] JE and IM Lockley are ordered to pay to Mr Goldfinch:

- a. \$923.10 (gross) as wages in lieu of notice;

- b. \$160 as meal money;
- c. \$276.93 (gross) as statutory holiday pay; and
- d. \$197.55 as reimbursement of monies deducted from wages.

[37] Mr Goldfinch is ordered to pay to JE and IM Lockley:

- (a) \$864 (nett) as repayment of overpaid holiday pay.

[38] Interest is payable on the above amounts, calculated as 4.8% from 12 August 2009 to the date of payment.

Costs

[39] Costs are reserved.

[40] Any party seeking an order for costs from the Authority shall have 28 days from the date of this determination in which to set out in writing, and send to the Authority and the other party, what is sought and why. The other party shall have a further 14 days in which to send a written reply to the Authority and the party seeking the order.

R A Monaghan

Member of the Employment Relations Authority