New Zealand Employment Relations Authority Decisions

Gray v B A Chilton Logging Limited (Wellington) [2017] NZERA 2135; [2017] NZERA Wellington 135 (21 December 2017)

Last Updated: 15 January 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 135
3019089

BETWEEN ARONA GRAY Applicant

A N D B A CHILTON LOGGING LIMITED

Respondent

Member of Authority: James Crichton

Representatives: Alex Kersjes, Advocate for Applicant

Philip Ross, Counsel for Respondent

Investigation Meeting: 19 December 2017 at Napier

Indication of preliminary views

19 December 2017

Date of Determination: 21 December 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant (Mr Gray) alleges that he was unjustifiably dismissed from his employment by the respondent on or about 8 February 2017 and unjustifiably disadvantaged. The respondent (Chilton Logging) resists those claims.

[2] The parties attempted mediation unsuccessfully and the matter was dealt with by me using the fast track process which the Authority is now experimenting with.

[3] By my direction, no briefs of evidence were filed nor any other documents save for those that were attached to the original statement of problem and statement in reply. The only submissions that the parties made were oral ones.

[4] Mr Gray was employed as a gang foreman by Chilton Logging on or from

16 January 2017. He had replied to an advertisement which was run in Facebook and

TradeMe and met with Mr Blair Chilton the previous Friday (13 January 2017).

[5] It is common ground that on 13 January, the two men went out to one of the work sites and the conversation concluded with Mr Chilton offering Mr Gray the position.

[6] There is some dispute about what else was discussed between the two protagonists on 13 January 2017 but I am satisfied on the evidence before me that the following Monday, 16 January 2017, Mr Gray commenced employment and was given an

induction pack which comprised what amounts to a formal application form, together with two copies of an employment agreement, material relating to KiwiSaver, and an IR330 form for tax purposes.

[7] I note immediately that Mr Gray denied receiving any of these documents and even when counsel for Chilton Logging produced the copy of the application form duly completed by Mr Gray's partner, Mr Gray still chose to deny that he received the other material.

[8] As it happens, I am satisfied that nothing turns on whether he received the other material or not; the short point is that there was no signed agreement between the parties and on that basis, I am satisfied the terms of that agreement cannot be relied upon against Mr Gray.

[9] On or around Wednesday 18 January 2017, Mr Gray was provided with a company vehicle to enable him to pick up the crew that he supervised and take them out to the work site. He was also issued with other safety equipment and the like belonging to the employer.

[10] One of Mr Gray's minor complaints was the failure by the employer to provide him with payslips. The employer customarily obtained the private email addresses of each employee and forwarded payslips to the email address electronically. Mr Gray said that he had a private email address but was never asked for it.

[11] This is puzzling because it would seem self-evident that if Mr Gray did not have his own email address, that would explain why he did not receive payslips. Put

another way, given he had his own email address it is hard to understand why he would not have provided that address if he had been asked for it and therefore got payslips especially when for context, I am satisfied that other employees did receive payslips electronically.

[12] In any event, the payslips issue was not of great moment and nothing turns on whether Mr Gray received the payslips or not. As a matter of fact, he has received them all now in anticipation of these proceedings.

[13] For our purposes, the employment relationship was uncontroversial until

8 February 2017 when the issue which led to the end of the employment took place. Mr Chilton's evidence was that as the gang foreman, Mr Gray had a variety of pretty obvious responsibilities supervising the other workers. For our purposes, ensuring that there was sufficient fuel to run the chainsaws that the gang needed to cut and trim trees was a key responsibility.

[14] On the day in question, the fuel ran out. Mr Gray's evidence was that he had delegated this issue to a gang member, Jeremy Robinson. He says that when fuel was required Mr Robinson would contact Mr Chilton and get more fuel organised. He further says that on this particular day (8 February 2017) for whatever reason, those arrangements did not work and his crew ran out of fuel about 10.30 in the morning.

[15] That is not the whole story because it is clear on the evidence that I heard that Mr Chilton himself had established that the fuel was running low and as a consequence, he made it clear to Mr Robinson that he would be back to the work site by noon with fuel for the chainsaws.

[16] Notwithstanding those arrangements, and assuming that Mr Robinson told Mr Gray that that was what was happening, a point I come back to shortly, it is difficult to understand why Mr Gray terminated work on the site when the fuel for the chainsaws ran out (at about 10.30 am) and took the men off home around 11 am that same morning.

[17] If Mr Gray knew that the fuel was on its way, one would expect that he would keep the men on site until the fuel arrived. I was unable to speak to Mr Robinson who could have confirmed if he had spoken to Mr Gray or not. While it is hearsay, Mr Chilton was adamant that all of the gang knew that he would be back at midday with the fuel.

[18] During his oral evidence before me, Mr Gray alleged that the reason he had taken the men off site on Wednesday 8 February 2017 was because it was raining that day, they had nothing to do, were sitting in a vehicle in wet clothes and that was a health and safety issue.

[19] Mr Gray agreed that this explanation was not tendered in his statement of problem nor indeed anywhere else.

[20] In any event, as he was leaving the site, Mr Gray texted Mr Chilton to tell him that they had run out of fuel and he was leaving the site with the gang. Mr Chilton who was driving when he received the text responded with the following message:

Fucking useless. Make this your last week fucking wasting my time.

[21] Mr Gray took this as notice of his dismissal, relying no doubt on the first clause in the second sentence which reads:

Make this your last week...

[22] Mr Gray's evidence is that he thought he was to finish that week.

[23] Conversely, Mr Chilton said that his intention was absolutely not to dismiss Mr Gray; he was simply exasperated by Mr Gray's behaviour over fuel and wanted to give him a tune up. First, he pointed out that Mr Gray was responsible for ensuring that there was adequate fuel on the site and second, he was critical of Mr Gray's decision to leave the site when he knew, or ought to have known, that Mr Chilton would be back at noon with more fuel.

[24] Moreover, Mr Chilton was absolutely clear that his point in sending the text was to be critical of Mr Gray's behaviour in the sort of language that was habitually used in the forestry industry but in no way was he expecting that his text would be taken as a dismissal.

[25] In result, Mr Gray, while claiming to have seen that text as a dismissal attended at work as normal the following day. His evidence was that he had tried to contact Mr Chilton overnight but had not been successful. There is no evidence before the Authority that Mr Gray did in fact try to contact Mr Chilton, save for Mr Gray's testimony to that effect. He did not produce telephone records or any other evidence

to corroborate his claims. Mr Chilton knew nothing of any attempt that Mr Gray made to contact him on the evening of 8 February 2017.

[26] In any event, as I mentioned, Mr Gray attended the work site again with the gang , and on this occasion he only worked a half day with his gang as well, this time because his tracked machinery threw one of its tracks. He said that he spent an hour-and-a-half trying to put the track back on, was unsuccessful and then decided to pull the plug for the day.

[27] He did not tell Mr Chilton that he had had this difficulty and Mr Chilton found out subsequently from Mr Robinson.

[28] It is difficult to understand why Mr Gray would have attended the workplace again the following day if he believed he had been dismissed. He said that it was because he wanted to see Mr Chilton, but that does not ring true because Mr Chilton satisfied me that Mr Gray would have seen Mr Chilton on the side of the road coming away from the work site and he could have stopped and talked to Mr Chilton then.

[29] In any event, at the end of this second day when there were problems, Mr Gray handed over the keys to the firm vehicle and all the other property that belonged to the employer to Mr Robinson and he told Mr Robinson "*I have had enough – I'm not coming tomorrow".*

[30] Mr Chilton told me in his evidence that Mr Robinson told him about this conversation so he knew that Mr Gray was finishing up.

[31] There was no further discussion between the two men until various attempts made by their representatives to resolve the employment relationship dispute.

The issues

[32] The Authority will need to decide how the employment ended. It is apparent that there was an employment relationship and that it came to an end, but there is disagreement about the circumstances that brought it to an end.

[33] I will also need to decide what if anything the employer can rely upon in respect to the employment agreement and thirdly and finally what obligations the principal protagonists had to each other in terms of good faith and whether those obligations were discharged, or not.

[34] I have not been persuaded that Mr Gray was dismissed. I think any reasonable person reading the text message that he received would have concluded that the sender was exasperated but no more than that. I do not accept that any reasonable construction of the text message, taken as a whole, constituted a "sending away" in the way that phrase has been interpreted by the judges over many years.

[35] If Mr Gray were in any doubt about the meaning of the message, he should have persevered with his initial intention of engaging with Mr Chilton. It is plain on the facts that Mr Gray first tried to find Mr Chilton and talk to him. He seems to have persevered with that strategy for no more than 24 hours and then given up.

[36] Mr Gray says that Mr Chilton was trying to avoid him, but I do not accept that evidence. Mr Chilton's evidence was very clear that he was simply busy; he had just started another larger gang on a bigger block and he was, to use a colloquialism, "flat out".

[37] Moreover, despite Mr Gray's evidence that he tried to catch up with Mr Chilton, there is nothing before the Authority to confirm that; no text messages, no telephone records, or any other corroborative evidence. Mr Chilton's evidence is that he had no idea that Mr Gray was trying to contact him.

[38] Moreover, Mr Chilton points out that if Mr Gray had wanted to engage with him, he (Mr Chilton) was on-site the day after

the text message and that Mr Gray passed Mr Chilton driving the company vehicle when Mr Chilton was sitting in his vehicle making a telephone call. Mr Chilton assured me that Mr Gray knew what his vehicle looked like and that evidence seems to be true on its face.

[39] Mr Gray's interpretation of the text message places reliance on the first clause in the second sentence. It will be remembered that the text message was in the following terms:

Fucking useless. Make this your last week fucking wasting my time.

[40] Mr Gray says that the words *make this your last week* were interpreted by him as a dismissal for the end of that working week. But if that interpretation were correct, it is difficult to understand why Mr Gray did not attend at the workplace on Friday 10 February 2017, which would have been the last day of that working week.

He did not. What he did was having left the site early on Thursday, and again, according to Mr Chilton, without proper authority, Mr Gray deposited his gang home early and then handed over the company property to Mr Jeremy Robinson, saying to him, and this is Mr Gray's own evidence:

I've had enough – I'm not coming tomorrow.

[41] It seems to me then that Mr Gray's conduct and behaviour is inconsistent with his claim that the first clause of the second sentence of the text message from Mr Chilton was a dismissal timed to take effect at the end of that week. If he had believed that, it would be appropriate for him to work that week in full but he did not.

[42] Moreover, if he had had any doubt about the meaning of the text message, he ought to have contacted Mr Chilton. While he says that he tried to do that, there is no evidence to support that, save his oral testimony, and I am satisfied that Mr Chilton was completely unaware that Mr Gray was seeking to talk to him.

[43] Moreover, the suggestion by Mr Gray that he was seeking to talk to Mr Chilton is inconsistent with Mr Chilton's evidence that Mr Gray passed Mr Chilton driving the company vehicle, with his gang inside the vehicle, on the day after the text message. Mr Gray says that he did not see Mr Chilton. I find that difficult to accept. Mr Chilton saw Mr Gray and Mr Gray had a cab full of co- workers all of whom would be familiar with Mr Chilton's vehicle.

[44] In all the circumstances then, my considered view having reflected on the evidence is that Mr Gray's behaviour is more consistent with a decision by him to conclude the employment rather than an acceptance by him that he had been dismissed by Mr Chilton. That considered view of mine is, I fancy, supported by Mr Gray's unchallenged evidence that it was very easy to get work in the forestry sector at present if you had the requisite skill-set and were drug free.

[45] In that general connection, Mr Gray gave evidence that he obtained work almost immediately in the forestry sector after his employment with Chilton Logging came to an end and in the period since then, he appears to have had a number of roles in the forestry sector and moved easily between these various jobs.

[46] I am satisfied that the employment ended by way of an abandonment of employment. Mr Chilton's able counsel suggested to me in closing submissions that Mr Gray had simply resigned his employment. I am not attracted to that submission because it seems to me that the law requires that a resignation be contemporaneously conveyed to the employer and as will be apparent from the factual summary earlier in this determination, during the events which led to the termination of the employment there was no contact at all between Mr Chilton and Mr Gray.

[47] If it is to be postulated that Mr Gray resigned his employment then it would be necessary to contend that such a resignation was given by Mr Gray not to the employer, not even to a senior person employed by the employer but rather to a junior employee, a member of Mr Gray's gang. This is because the resignation, if that is what it was, was given by Mr Gray to Mr Jeremy Robinson when he handed over the keys to the company vehicle, handed over all of the company property in the vehicle and told Mr Robinson that he had had enough and that he was not coming back tomorrow. In the result, not surprisingly, Mr Robinson contacted Mr Chilton (and interestingly enough had no difficulty getting hold of Mr Chilton) and told Mr Chilton what Mr Gray had said.

[48] Mr Chilton's evidence is that the communication from Mr Robinson was his only source of information about what Mr Gray was up to as he had had no contact from Mr Gray and he satisfied me that he had no idea Mr Gray was trying to get hold of him (if indeed Mr Gray was trying to get hold of him).

[49] I prefer to analyse the termination of the relationship as an abandonment rather than a resignation. In my preliminary indication of views to the parties at the end of the hearing, I read them two paragraphs from the decision of Judge Inglis (as she then was) in her decision *Cross v Onerahi Hotel Limited* 1where Her Honour summarised the law relating to abandonment. Put shortly, the law is that an employee may be deemed to have abandoned their employment if they fail to attend to their duties for a consecutive period of days without good cause or communication to the employer but

that an employer ought to take proper measures to inquire into the employee's

intentions and both parties have obligations of good faith in terms of s.4 of the

Employment Relations Act 2000 ("the Act").

[50] Dealing first with the question of what Mr Chilton would have known, I have already referred to the intelligence that he would have gathered from Mr Jeremy Robinson who apparently left him in no doubt that Mr Gray had finished up and was not coming back. Given Mr Gray's decision to communicate his intentions to one of his subordinates together with his behaviour in handing over the keys to the company vehicle and all the property that belonged to the company that was in the vehicle it would have been difficult for Mr Chilton to conclude anything other than the obvious conclusion, that Mr Gray had brought the employment to an end.

[51] Mr Chilton also received one text message from Mr Gray on 10 February 2017 which simply reads as follows:

I must have holiday pay owing as well.

[52] Mr Gray invited me to conclude that the text message, the only evidence that he had any contact with Mr Chilton, after the events leading to the end of the employment, was evidence of his view that he had been dismissed.

[53] I do not accept that view. It is equally plausible to regard that text message as evidence that the employment had come to an end by other means and Mr Gray was seeking his holiday pay, which of course he is absolutely entitled to.

[54] In any event, Mr Chilton's receipt of that text message was, I conclude, further evidence for him that what Mr Jeremy Robinson had told him about Mr Gray's intentions was made out by Mr Gray himself via this text message.

[55] Perhaps more importantly than all of that though is the point that if Mr Gray had wanted to advance any other proposition, for instance to question whether he should take the text message as a dismissal, or indeed make any reference at all to the fact of the purported dismissal, this would have been the opportunity to do that but he did not.

[56] Mr Chilton's evidence was that he did not respond to the request for holiday pay because in his view, Mr Gray had cost him money by pulling the gang out of the work site on two successive days for no good reason.

[57] On the evidence I heard, I am satisfied that Mr Chilton could reasonably have concluded that Mr Gray had abandoned his employment and I am not persuaded that he needs to have done anything else to inquire into Mr Gray's intentions.

[58] It follows from that conclusion that I am satisfied Mr Gray abandoned his employment and was therefore not dismissed let alone unjustifiably dismissed.

Could the Employer have relied on the employment agreement?

[59] In the original statement in reply, Chilton Logging maintained that there was an operative 90 day trial in place and as a consequence, Mr Gray could not raise a personal grievance. In my indication of preliminary views at the investigation meeting, I made it clear that I did not accept that proposition.

[60] This is because the employment agreement was never signed by the parties or, if it was, no signed agreement was provided to me. In the absence of evidence of a signed agreement which was entered into before the employment commenced there can be no basis on which the 90 day trial provision is operative.

[61] This is for the obvious reason that if the law is to operate to remove from a party a basic right (such as the right to bring a personal grievance) then the requirements of the provision which take away that right must be strictly complied with.

[62] That means that in effect the provision is an example of black letter law and everything that is required by the statute must be strictly complied with in order to make the provision operative.

[63] In this case, there was no written employment agreement and, as the advocate for Mr Gray pointed out, even if there had been a completed employment agreement, on the facts as they came out in the investigation meeting, it was inevitable that Mr Gray could not have signed the agreement until after he commenced work and that is fatal to the operation of the provision.

[64] I take a similar view of Chilton Logging's attempt to rely on the notice provision in the employment agreement; Chilton Logging's claim was that they were entitled to claim the value of the notice which Mr Gray ought to have given but did not.

[65] Of course, that provision as to notice is also in the written employment agreement and in the absence of a signed copy of that agreement between the parties binding them to those provisions, I do not consider it can be implied as a term of the unwritten employment agreement that would have applied in the absence of the document being signed.

What about good faith?

[66] Neither party distinguish themselves by their ability to be open and communicative in terms of s.4 of the Act.

[67] Mr Gray made (he says) desultory attempts to contact Mr Chilton to discuss the text message which Mr Gray claimed was a dismissal but in the result no contact was ever made. This was despite the fact that I am satisfied on the evidence before me that Mr Gray must have driven straight passed Mr Chilton when he left the site on Thursday 9 February 2017.

[68] Mr Chilton made no attempt whatever to contact Mr Gray. He heard nothing from Mr Gray save for the two text messages that I have referred to. The first told him that Mr Gray was pulling his crew out of the work site because Mr Gray had not ensured that there was sufficient fuel for the chainsaws and despite the fact that Mr Gray knew or ought to have known that there was fuel on the way with Mr Chilton. The second text simply sought his holiday pay.

[69] The only other communication Mr Chilton received in respect of Mr Gray's intentions was the message through a third party, Mr Jeremy Robinson, to the effect that Mr Gray was not returning to the work place.

[70] In the circumstances, it is difficult to be too critical of Mr Chilton for not initiating contact; he was I think entitled to regard the dye as cast by the sum total of the messages from and about Mr Gray and while no doubt he could have initiated a discussion with Mr Gray to satisfy himself of the position, I am not persuaded that, in the particular circumstances of this case, he had a legal duty to do so.

[71] The position would have been otherwise if Mr Gray had diligently pursued Mr Chilton, sought to engage with the other man, and created an environment where discussion between the two protagonists became a necessity.

Determination

[72] For reasons that I have made clear in this determination, I am not persuaded that Mr Gray has any personal grievance and I am satisfied on the evidence I heard that Mr Gray abandoned his employment with Chilton Logging thus bringing the employment to an end himself, in circumstances where no right to personal grievance could lie.

[73] However, Mr Gray is entitled to his holiday pay and the retention of that holiday pay by Chilton Logging is quite improper. There is no right for an employer to set off wages owed to an employee against putative claims the employer seeks to prove against the employee.

[74] Accordingly, I direct that B A Chilton Logging Limited is to pay to Mr Gray the holiday pay owed by B A Chilton Logging Limited to Mr Gray for the period of work that Mr Gray performed for B A Chilton Logging Limited and in addition because the refusal to pay at the end of the employment was improper, B A Chilton Logging Limited are to pay to Mr Gray interest on the overdue holiday pay at the rate of 5% per annum calculated from the date the holiday pay should have been paid at the end of the employment (for ease of calculation the next pay period after the employment ended) down to the date that the holiday pay is finally paid over.

Costs

[75] Costs are reserved. The parties are urged to try to resolve costs on their own terms. I observe, without making a decision on the point, that both parties have had a measure of success in this matter and in the circumstances, this may be a case where costs should lie where they fall.

[76] If the parties are unable to resolve costs on their own terms, one party is to initiate a request for the Authority to fix costs by filing a memorandum to that effect in the Authority and serving a copy on the other party, and the other party will then have fourteen days thereafter to respond.

[77] I will then deal with the application to fix costs on the papers.

James Crichton

Chief of the Employment Relations Authority
