Determination Number: WA 187/05
File Number: WEA 70/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Michael Green (Applicant)
AND	Big Red Storage Company Limited (Respondent)
REPRESENTATIVES	G Tasker for the Applicant M Cromarty for the Respondent
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	1 November 2005
FURTHER SUBMISSIONS	2 December
DATE OF DETERMINATION	5 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The applicant, Mr Green, was dismissed by the respondent (Big Red Storage) after the parties could not reach agreement on the terms of an individual employment agreement. Mr Green claims that the dismissal was unjustified and that he was subjected to unfair bargaining by Big Red Storage, which it denies.

The Facts

2. Big Red Storage is a trading company whose sole director is Mr Mark Cromarty. The main shareholders are Mr Cromarty and his sister Ms Leanne Syme, according to the New Zealand Companies Office Register. Mr Cromarty stated that Big Red Storage was owned by a family trust associated with him, but that is not reflected in the company register. Both Mr Cromarty and Ms Syme work in the business. According to Mr Cromarty, the assets in Big Red Storage, such as its warehouse and the machinery used in its operation, are owned separately by a family trust.

3. Mr Green's association with Mr Cromarty went back to an earlier time when he worked for Radiata Haulage Limited as a driver. Mr Cromarty was the sole director of Radiata Haulage. During a period while Mr Green was off on ACC, the staff, including Mr Green, were told that they would lose their jobs with Radiata Haulage as it was going into liquidation. The workers were all told, however, that they could have jobs with Big Red Storage, which was moving into the trucking business, on the same terms and conditions. The sole proviso mentioned was that this would only be for a trial period until it was clear whether or not Big Red Storage would retain the main contract that Radiata Haulage had. This was confirmed by the time Mr Green returned for work from ACC on 7 November.

4. All this is clear from the evidence of Mr Green and Ms Syme. I do not accept Mr Cromarty's evidence that employment was subject to signing an employment agreement to be negotiated later. It was, however, implicitly rather than explicitly agreed that Mr Green would stay on the same pay and conditions. This is also more consistent with Mr Cromarty's letter of 18 January 2005 to Mr Green's then representative, which indicated that the trial period was on the basis of seeing if the company could pick up more work. The fact that this work was in fact obtained is clear from the above. This is further borne out by the fact that from 7 November Mr Green was employed by Big Red Storage and paid on the same basis as he had been by Radiata Haulage. Thus in effect Mr Green and Mr Cromarty had agreed that his employment would continue on the same terms as those that existed when Mr Green worked for Radiata Haulage.

5. Mr Cromarty was aware, however, that Big Red Storage ought to have written employment agreements with its staff. Accordingly he had prepared, with professional assistance, employment agreements for Mr Green and the other staff. During the time it took for this to be prepared, Mr Green had had concerns over his hours of work and had given notice of his resignation. During the period of notice, however, he changed his mind and Mr Cromarty accepted that he could stay on.

6. On 13 December, Ms Syme provided Mr Green with a copy of the intended agreement. Mr Green then took advice on the intended agreement and was told not to sign it without significant amendments. Mr Green's concerns were that the hours he

believed he was expected to work were too long in terms of the Transport Act's requirements, that the salary was too low, that he wanted the occasional Friday and Sunday off, and that he wanted a clause covering redundancy compensation. Mr Green raised these matters with Ms Syme and then later with Mr Cromarty in a telephone call on 16 December.

7. The hours of work clause provided that:

> *"…The shift arrangement applies to the employee in the following manner: 3pm Sunday to 6am Monday, 6pm starts - 9am finishes Monday - Friday, finishing 9am Saturday."*

8. Mr Green believed that those hours were not only one hour more than he had previously been expected to work each day, but also were unlawful under the Transport Act. Mr Cromarty accepted that there was one hour extra per day. He believed, however, that as the nature of the job was on-call it did not breach the provisions of the Transport Act because Mr Green was seldom if ever required to work, and therefore drive, more than 40 hours per week. Unfortunately, the clause does not state that the work was on call, although I accept that that was in fact the case.

9. Mr Cromarty therefore did not accept Mr Green's claim that in effect he was being asked to work for $5 per hour. He also concluded that Big Red Storage could not afford to pay redundancy compensation and that having Sundays off clashed with his own commitments.

10. While all these matters were discussed that day, no agreement was reached and it was determined that the matter would be further discussed in a meeting the next day.

11. At the meeting on 17 December, the matters were all canvassed again. No progress was made as neither side would agree to any significant change in their position. At that point I accept Mr Green's evidence that Mr Cromarty asked Ms Syme for "*the letter*". The letter was one of dismissal. It stated:

> *"This letter follows our discussion on the telephone last night. If you feel you are unable to sign the contract I presented to you earlier this week, you leave me no option but to terminate your employment. Therefore I will give you one week's notice effective from today."*

12. I accept that there can be no certainty of what occurred at that time. When assessed by the Authority some months later, the Authority can only go on what was more likely to have happened than not. In preferring Mr Green's evidence over that of Mr Cromarty and Ms Syme I have taken particular account of the wording of the letter. The letter indicates that it was pre-prepared, as opposed to being prepared on the spot in the standard dismissal format, as alleged by Mr Cromarty and Ms Syme. There was nothing about this letter which lends itself to being prepared in a standard format. It does not refer to the discussions that took place on 17 December, but rather those of the night before, and therefore it is more likely than not that it was pre-prepared. It also does not refer to a second (amended) contract which Mr Cromarty and Mr Syme claim was tabled at the meeting but Mr Green refused to pick up. Given these facts, it is more likely than not that the letter was pre-prepared and that no amended contract was tabled that day and I so find.

13. Mr Green then worked out his week's notice, registered on the unemployment benefit and remained there until he got a new job on 5 February 2005.

14. I accept that Mr Green was paid $480 gross per week on average and thus lost $2,880 gross in lost wages while he was unemployed and a further $1,120 (being $3,360 less $2,240 earned) for the balance of the three month period.

15. As the parties have attempted mediation but were unfortunately unable to resolve the matters between them, it falls to the Authority to make a determination.

Determination

16. The proper time to have provided Mr Green with an intended employment agreement was before he commenced work for Big Red Storage on 7 November 2004. That did not occur. It was clear, however, that his terms and conditions of employment were to stay the same as those in Radiata. That was how he was paid. Mr Green therefore had a binding employment agreement with Big Red Storage. What Big Red Storage attempted to do with its new written individual employment agreement, not provided until December, was to negotiate changed employment terms with Mr Green. The important change was the extra hour that Big Red Storage required Mr Green to be available each day. Big Red Storage had no justification whatsoever to attempt to

impose this change unilaterally on Mr Green. The parties could simply have remained working under the prevailing conditions without the need for dismissal.

17. Mr Green was therefore unjustifiably dismissed, even although he had no right either to insist, as opposed to negotiate, on changes such as a redundancy clause, greater pay, or different hours, leaving aside the fact that the parties obviously could not agree to hours that were unlawful under the Land Transport Act

18. That error on Mr Green's part does not mean, however, that he is at all at fault in this situation. It was Mr Cromarty who decided that he had had enough of Mr Green and the difficulties he was raising. As Mr Cromarty told the Authority, people either operate under his terms and conditions or they do not work for him. When it was pointed out to him that, as the proposed contract provided for mediation assistance, it should have been pursued first, he said that he did not have time for those sorts of things. These points underscore his attitude in what was a 'take it or leave it' situation resulting in an unjustifiable dismissal.

19. Given that there is no contributory fault by Mr Green, he is entitled to the loss of remuneration referred to above. He is also entitled to compensation for the way he was treated and the loss of his job. In setting this figure I must take into account the financial position of Big Red Storage, said to be very poor. Its trading position does appear to be poor. Any inability to meet any significant payment must be taken into account: *Northern Clerical etc Union v. Beachlands Engineering Ltd* [1991] 3 ERNZ 1023. Because of this Big Red Storage was given until 23 November to provide information from its accountant on its overall financial position. It failed to do so despite the deadline being extended until 2 December. I cannot therefore conclude that Big Red Storage is unable to meet any payments ordered by the Authority.

20. In all the circumstances of this case, I consider that compensation is appropriately set at $5,000.

21. Given that the dismissal has been found to be unjustified, there is no need to address the issue of unfair bargaining as any remedy, if applicable, will be covered by the compensatory award for unjustifiable dismissal.

22. I therefore order the respondent, Big Red Storage Company Limited, to pay to the applicant, Michael Charles Green, the sums of $5,000 in compensation and $4,000 gross in lost remuneration.

Costs

23. Costs are reserved.

G J Wood
Member of Employment Relations Authority