

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 74  
5370051

BETWEEN JAMES MURRAY GRIFFITHS  
Applicant

A N D A1 BOBCATS & CONCRETE  
LIMITED  
Respondent

Member of Authority: K J Anderson  
Representatives: A Singh, Counsel for Applicant  
S McKenna, Counsel for Respondent  
Investigation Meeting: 31 August 2012 at Hamilton  
Submissions Received: 21 September 2012 from Applicant  
22 September 2012 from Respondent  
Date of Determination: 4 March 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] The applicant, Mr James Griffiths, claims that he was unjustifiably dismissed on or about 4 October 2011. Mr Griffiths asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of lost wages and compensation; pursuant to s.123 of the Employment Relations Act 2000.

[2] Conversely, the respondent, A1 Bobcats & Concrete Limited, says that Mr Griffiths was not dismissed, rather he abandoned his employment.

**Background**

[3] A1 Bobcats & Concrete Limited (the company), is owned and operated by Mr Shaun Dromgool and Mrs Kellie Dromgool. They are also the sole directors. The

company is largely involved with laying concrete in a variety of situations. Mr Dromgool runs the day-to-day operations of the business.

[4] Mr Griffiths commenced his employment with the company as a concrete labourer on 30 May 2011. He was given an employment agreement that has been signed by Mr Dromgool but Mr Griffiths did not sign it. Notwithstanding this, it appears that it is commonly accepted that at least some of the terms of the agreement applied to the employment relationship. Relevant to the dispute before the Authority is clause 12.0 of the agreement:

Abandonment

- 12.1 Where the employee absents himself or herself from work for a continuous period exceeding three (3) days without notifying or without the consent of the employer, he or she shall be deemed to have terminated his or her employment.
- 12.2 If the employee is unable to notify the employer of any absence due to unforeseen hospitalisation or similar circumstances, the employee shall be given the opportunity of an explanation and reinstatement.

[5] The company has its base in Cambridge but carries out work within the wider Waikato region. The evidence of Mr Dromgool is that employees usually report to the yard each morning and are then sent to the various work sites that exist at any given time. Mr Dromgool attests that the employees have to be at the yard at 6.30a.m. each day. However, if the work is in Hamilton, then Mr Dromgool sends a text to the employees residing in Hamilton (as Mr Griffiths does), notifying of the location of the work site where attendance is expected.

**Conflict arises – 29 September 2011**

[6] The details of the communications between Mr Griffiths and Mr Dromgool on 29 September 2011 are inconclusive, but it appears that the nature of an exchange of text messages between the two men was fairly robust. The Authority understands that Mr Griffiths was working on a job in Hamilton. His evidence is that it was bigger than expected and some of where the concrete was to be poured was in the shade. Mr Griffiths says that he sent a text message to Mr Dromgool “advising him” to put some hardener (accelerant) in the concrete; apparently for the purpose of promoting quicker hardening of the concrete.

[7] The evidence of Mr Dromgool is that he sent a return text to Mr Griffiths informing that accelerator would not be used due to concrete cracking at a previous job (Hautapu School). But according to Mr Griffiths, the language used by Mr Dromgool was much stronger than Mr Dromgool alludes to. He says that he was accused of “fucking up” the job at the Hautapu School. Mr Dromgool denies using this language and maintained that position during cross-examination. However, it is established that Mr Griffiths took strong exception to the response from Mr Dromgool regarding the use of accelerant, and it seems that an acrimonious exchange of text messages took place.

[8] On Friday, 30 September 2011, Mr Griffiths did not go to work. His evidence about why he did not attend work on this day is contradictory. First, Mr Griffiths attests that:

I told the boys [work colleagues] I would like an apology from Shaun [Mr Dromgool] before I came back to work but they just laughed.

[9] The further evidence of Mr Griffiths is that at approximately 4.30a.m. on 30 September 2011, he sent a text message to Mr Dromgool informing that he would not be at work that day, but did not provide any details in regard to the reason for his absence. Mr Dromgool responded by text message, asking why Mr Griffiths would not be at work. It is commonly accepted that Mr Griffiths did not respond to the question.

[10] The evidence of Mr Griffiths is that he had to take his partner, Ms Aimee-Lee Emery, to the hospital due to a problem relating to her pregnancy. Mr Griffiths says that he did not respond to Mr Dromgool’s text inquiry as he was “focused on Aimee” and did not check his phone until later that night. Mr Griffiths attests that Mr Dromgool would have known there was a problem as Ms Emery had “many scares in the past few weeks”. Just how Mr Dromgool was supposed to know of the circumstances related to by Mr Griffiths has not been explained and the evidence of Mr Dromgool is that he had no knowledge of the situation pertaining to Ms Emery. There is no documented evidence of a visit to the hospital and Ms Emery does not refer to it in her evidence.

### **The absence of Mr Griffiths**

[11] Mr Griffiths did not attend work on Monday, 3 October 2011 nor did he make any contact with Mr Dromgool. On Tuesday, 4 October 2011, Mr Griffiths sent a text to Mr Dromgool asking to be paid any wages owing to him. As Mr Griffiths had been paid recently, there was only one day's wages owing – for 29 September 2011. However, apart from making the request for his wages to be paid, Mr Griffiths did not give any explanation regarding his absence from work, nor did he make any enquiry if work was available. The evidence of Mr Dromgool is that Mr Griffiths was paid the one day of wages owing to him and his accrued holiday pay.

[12] When he was asked at the investigation meeting why he paid Mr Griffiths, what was effectively, his final pay, Mr Dromgool told the Authority that because Mr Griffiths had not come to work on Friday, 30 September, Monday, 3 October and Tuesday, 4 October 2011, he thought "that was it". Mr Dromgool also said that it was clear that Mr Griffiths was "pretty shitty with me", an apparent reference to the exchange of texts between the two men on Thursday, 29 September 2011.

[13] In regard to why he did not go to work on the three days mentioned, the explanation from Mr Griffiths is firstly, that he was with his partner at the hospital on 30 September. Then he says he was not advised on Sunday, 2 October 2011 by text that there was work for him on Monday, or any other day. And then on Tuesday, 4 October, because he was "broke", he asked for his pay. It seems he did not expect to be paid his holiday pay and upon checking his bank account and noting the extra money that had been paid to him, Mr Griffiths sent a text to Mr Dromgool on Wednesday, 5 October 2011 as follows (with spelling as sent):

*Hey shaun thankr for the muny didn't think I had work that i gues u not gana saz u wrong bot that job crank. I dindnt want to own it, i still keen towrk. Up to u.*

Mr Dromgool did not respond.

[14] On 13 October 2011, Mr Griffiths enquired via a text to Mr Dromgool if the extra money he received earlier was his holiday pay. Upon this being confirmed by Mr Dromgool, Mr Griffiths says he realised that "perhaps" his employment had been terminated.

[15] The evidence is that on 25 October 2011, Mr Dromgool contacted Mr Griffiths by a text and asked him if he wanted to work the next day. Mr Dromgool says that Mr Griffiths did not respond to him but he was told by another employee (with whom Mr Griffiths was friendly) that he did not want the work.

[16] The final text message from Mr Griffiths to Mr Dromgool was on 10 November 2011 as follows (and as sent):

*Shaun I feel coz I stood up to you after being accused of fuckn a job.  
An with baby on the way. You fired me an payed me out my holiday  
pay with my pay. I like to know why I got the boot. Thanks. James.*

Mr Dromgool did not respond.

### **Offer of reinstatement**

[17] Via his lawyer, Mr Griffiths raised a personal grievance on 5 December 2011 alleging unjustifiable dismissal. The lawyer for the company responded on 12 December 2011, advocating the company's belief that Mr Griffiths had abandoned his employment. However, Mr Griffiths was informed that:

To resolve this dispute the company is prepared to reinstate James, should he wish to return to work.

[18] The offer of reinstatement was rejected by Mr Griffiths on 16 December 2011 citing "some further developments in relation to Mr Dromgool's conduct" (without any explanation) and a loss of trust and confidence.

### **Did Mr Griffiths abandon his employment?**

[19] The abandonment clause in the employment agreement provides that the employee shall be deemed to have terminated his employment if he absents himself from work for: ["...a continuous period exceeding three (3) days without notifying or without the consent of the employer ...". It is accepted by the company that the absence of Mr Griffiths (without notification) began on Monday, 3 October 2011. Therefore, to activate the abandonment clause, Mr Griffiths would have had to have been absent, without notification, for a period exceeding three days – being some time on Thursday, 6 October 2011.

[20] But Mr Griffiths contacted Mr Dromgool via a text on Wednesday, 5 October 2011, indicating that he was still keen to work and that it was "up to" Mr Dromgool.

Unfortunately, Mr Dromgool chose not to respond to this clear indication from Mr Griffiths that he was available for work.

[21] Given that Mr Griffiths indicated that he was available for work on Wednesday, 5 October 2011, the obvious conclusion must be that the abandonment clause of the employment agreement was not activated. Hence the argument for the company that Mr Griffiths abandoned his employment is not sustainable. Indeed, Mr Dromgool had an obligation to contact Mr Griffiths to ascertain his intentions in regard to returning to work. The Court of Appeal has stated that:

[... clearly 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.<sup>1</sup>

### **Was Mr Griffiths dismissed?**

[22] I conclude that Mr Griffiths was dismissed on or about Tuesday, 4 October 2011 when he was paid his final pay. Perhaps Mr Dromgool may have been acting under the understanding that Mr Griffiths had abandoned his employment; or in more basic terms, he was just not coming back to work due to the dispute on 29 September 2011. But as set out above, Mr Dromgool was not entitled to form that view without further inquiry as to the intentions of Mr Griffiths. Given that I have found that Mr Griffiths was dismissed, the following statement from the Court of Appeal has clear application. The Court held that:

It is now well settled that before dismissing or requiring the resignation of an employee an employer has in general an obligation to inquire fairly into the circumstances and to afford the employee an opportunity of stating his case. This obligation is but one facet of the wider relationship of confidence and trust that is implied as a normal incident of the contract of employment.<sup>2</sup>

[23] The parties also have obligations to each other under the good faith provisions of s.4 of the Employment Relations Act 2000 (the Act). Particularly relevant to the facts of this matter is s.4 [(1A):

The duty of good faith in subsection (1) –

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a

<sup>1</sup> *E N Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97 (CA) at [26].

<sup>2</sup> *Pitolua v Auckland CC Abattoir* [1992] 1 ERNZ 693.

- productive employment relationship in which the parties are,  
among other things, responsive and communicative;
- (c) ...

[24] Unfortunately, Mr Dromgool failed to observe the good faith provisions of the Act. But of course, so did Mr Griffiths; a matter I will return to in due course.

[25] Given the failure on the part of the company to observe the fundamental requirements of the common law and s.4 of the Act, the dismissal of Mr Griffiths was not what a fair and reasonable employer could do in the circumstances.<sup>3</sup> It follows that I must find that the dismissal was unjustifiable; hence Mr Griffiths has a personal grievance.

### **Remedies**

[26] Having found that Mr Griffiths has a personal grievance, pursuant to s.123(1) of the Act:

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the following remedies ...

[27] Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then, at s.128(2) of the Act, if the Authority determines that an employee has a personal grievance and there has been lost remuneration because of the grievance, the Authority:

... must, whether or not it provides for any of the other remedies provided for in s.123 order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

(a) *Reimbursement of lost wages*

[28] Mr Griffiths seeks reimbursement of lost wages from 5 October 2011 to 31 August 2012 (the date of the hearing). But I conclude that this is not appropriate. Mr Griffiths was given two opportunities to resume his employment with the company. The first of these was when he was offered work by Mr Dromgool on 25 October 2011 but made no direct response. The second opportunity to resume his employment was made on 12 December 2011. This second offer of reinstatement followed from the raising of a personal grievance by Mr Griffiths on 5 December

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<sup>3</sup> Section 103A of the Act.

2011 whereby, among the remedies sought, was: [“... reinstatement to Mr Griffiths’ position at the company”. When responding on 12 December 2011, to the raising of the grievance, the company stated it was prepared to reinstate Mr Griffiths. This offer of reinstatement was refused by Mr Griffiths on very tenuous grounds indeed.

[29] There is an onus on Mr Griffiths to mitigate his losses<sup>4</sup>. But given the rather casual manner in which the offer of employment was made by Mr Dromgool to Mr Griffiths on 25 October 2011, it is doubtful if Mr Dromgool was particularly committed to the offer at all. One would have thought that a meaningful offer of employment would have been made by a direct phone call, at the very least, particularly given the circumstances pertaining to the breakdown in the relationship between the two men. But I conclude that Mr Griffiths had no good reason for refusing the offer of reinstatement made on 12 December 2011. Mr Griffiths was seeking as a remedy, reinstatement to his previous position. The company agreed to this and I conclude that at this point the chain of causation in relation to the loss of wages was broken. Therefore any entitlement to reimbursement can only go to this date: a total of 9 weeks.

[30] The wage and time records provided by Mr Griffiths (via the statement of problem) are difficult to interpret with any real certainty without further assistance from the parties. Therefore, they are requested to use their best efforts to arrive at an agreed fair average weekly rate of gross earnings for the period that Mr Griffiths was employed. Note should also be taken of the finding in regard to contribution at para [34] of this determination. Leave is reserved for the parties to return to the Authority for a further determination in the event that agreement on the appropriate reimbursement of wages cannot be arrived at; subject, of course, to appropriate evidence and calculations being provided to the Authority.

(b) *Compensation*

[31] Mr Griffiths seeks the sum of \$10,000 pursuant to s.123(1)(c)(i) of the Act. However, apart from the fact that there was little evidence of the affects that Mr Griffiths claims compensation for, I conclude that any such distress or humiliation that may have existed was largely due to Mr Griffiths’ own actions, including a complete failure to be responsive and communicative towards his employer as

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<sup>4</sup> *Allen v. Trans Pacific Industries Group Ltd (t/a “Medismart Ltd”)* [2009] 6 NZELR 530 (EmpC)

required by s.4 [(1A) of the Act. It seems to me that all Mr Griffiths had to do was what any reasonable person would have done. That is, he should have informed Mr Dromgool of why he was not at work on each of the days that he was absent without notification. Therefore, I decline to award any compensation.

(c) *Contribution*

[32] Pursuant to s.124 of the Act, the Authority is required to consider the extent to which the actions of Mr Griffiths contributed towards the situation that gave rise to the personal grievance. I conclude that Mr Griffiths did contribute towards the situation by his failure to be responsive and communicative towards his employer as required by the Act. I have to say that both Mr Griffiths and Mr Dromgool relied far too much on obscure text messages; a matter that appears far too often in cases before the Authority these days. Indeed, it sometimes seems that some people have lost the ability, or inclination, to actually speak to each other at all. And while the use of text messages is clearly useful in many circumstances, when it comes down to critical matters such as whether the employment relationship still exists, as in this case, surely one could reasonably expect the parties to speak to each other on the telephone; or perhaps even take the trouble to actually meet face-to-face.

[33] Mr Griffiths had a partner and new baby to support. One would have expected that he could have made an effort to speak to Mr Dromgool, about the reasons for his absence on the days in question, and show some real interest in retaining his employment; particularly given that it is obvious that he had no other employment options open to him.

[34] On the other hand, Mr Dromgool's actions in failing to adequately communicate with Mr Griffiths have also been noted above. Both men were equally at fault. Therefore, I conclude that the reimbursement of wages, when the amount is decided, should be reduced by 50% as a reflection of Mr Griffiths' contribution to the circumstances.

**Costs**

[35] Costs are reserved. The parties are invited to resolve this issue if they can, taking into account the overall outcome.

In the event that a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions. The respondent has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**