

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 166/09
5133646

BETWEEN ROBBIE HOOKER
 Applicant

AND STREET SMART LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Melanie Swarbrick for Applicant
 Gretchen Stone for Respondent

Investigation Meeting: 9 February 2009 at Hamilton

Submissions Received: 20 March 2009

Determination: 25 May 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Robbie Hooker was employed by Street Smart Limited (“Street Smart”) in August 2006. He was based at the Whitianga Refuse Station. Street Smart contracted to the Thames Coromandel District Council for the operations of Council’s solid waste collection services. This involves the collection of refuse and recycling, and operating seven transfer stations throughout the Thames Coromandel district.

[2] Mr Hooker had worked at the Whitianga refuse under the previous contracting company Onyx. On the sale of the business to Street Smart it was agreed that the terms and conditions of employment would be no less favourable than the terms of employment Mr Hooker had with Onyx.

[3] While Mr Hooker had been subject to a written employment agreement with Onyx it was common ground that there was no written employment agreement between Mr Hooker and Street Smart. Mr Hooker worked five days per week,

Monday to Friday inclusive starting at 9.30am and finishing at 5.00pm each day except when required to perform overtime.

[4] On 22 June 2007 employees of Street Smart were advised that the company was undertaking a review of its operations in the Coromandel. Street Smart was proposing that the current RTS Operator positions would become new Recovery Operator positions with a larger focus on reuse, recycling and other waste stream diversion.

[5] Street Smart undertook a Mystery Shopper campaign in July 2007 to identify issues relating to staff practices at each Refuse Station. As a result of the report from the Mystery Shopper Mr Hooker was requested to attend a disciplinary meeting to discuss an allegation that he had accepted a bottle of whiskey rather than a cash payment for dumping of refuse.

[6] Mr Hooker never attended the disciplinary meeting and on 19 July 2007 Mr Hooker advised Street Smart, through his lawyer that he considered his employment had been terminated. Mr Hooker says the termination of his employment was unjustifiable. Street Smart denies Mr Hooker was dismissed but says he resigned through his lawyer on 19 July rather than face a disciplinary process.

[7] By way of counter-claim Street Smart seeks recovery of money it says was received by Mr Hooker as a result of the unauthorised sale of scrap metal.

[8] The issues for this determination are:

- Was Mr Hooker dismissed as a result of the restructuring?
- If he was, was that dismissal unjustified? and
- If Mr Hooker was unjustifiably dismissed what, if any remedies should be awarded?
- Was the selling of scrap metal for “beer money” authorised?
- If not, what, if any, amounts are recoverable?

Credibility

[9] Before coming to any conclusions or determination on the issues, I need to say something about the credibility of the parties. I found Mr Hooker's evidence to be less reliable than the evidence for Street Smart in a number of key areas. For example in his written evidence Mr Hooker says that at the meeting on 25 June at which the restructuring proposal was discussed, Mr Grennell was asked to expand on what was going to happen at the Refuse Station but he just "...beat around the bush." This evidence is contrary to the evidence of both his brother Mr Graeme Hooker and Mr Grennell, whose evidence was largely confirmed by Mr Graeme Hooker.

[10] I found the respondent's witnesses to have been the more credible overall. As a result of my findings on credibility, where there are disputes between the parties that impact on my findings in this matter, it is the evidence of the respondent's witnesses that I prefer.

Was Mr Hooker dismissed?

[11] Mr Hooker was advised by letter on 22 June 2007 that Street Smart was undertaking a review of its operations. He was advised that Street Smart was looking to implement new recovery operator positions which would have a far greater focus on reuse, recycling and other waste stream diversion as opposed to compacting and sending to landfill. Another area of review was the way in which operators would be rostered and the use of temporary employees on weekends.

[12] Mr Hooker was advised that if the restructuring proceeded, all current RTS positions would be disestablished and the new positions would be advertised and a selection process entered into. Mr Hooker was advised that a meeting would be held the following Monday on 25 June at 9.00am to discuss the proposal and to seek feedback. Mr Hooker was invited to seek advice or involve a representative or support person at the meeting.

[13] The meeting on 25 June went ahead and Mr Hooker, together with his brother Graeme and another worker from the Whitianga Refuse Station attended. I am satisfied Mr Grennell discussed the rationale for the restructure and invited comments.

I am also satisfied that those present at the meeting participated in the meeting and expressed their opinions about the proposal.

[14] Mr Hooker claims the period between receiving the notice of the meeting to discuss the proposals and actually meeting with Mr Grennell was not long enough to allow them to seek advice. I accept that the period was very short. They received the letter on the Friday afternoon and the meeting took place first thing on Monday morning.

[15] However, Mr Hooker was invited to make telephone contact with Mr Grennell to seek further information if they felt it was necessary. As events transpired either Mr Hooker or his brother Graeme Hooker made contact with Mr Grennell on that Friday during which time it was agreed they would meet collectively on the Monday rather than separately. During that conversation there was no issue taken with the timing of the receipt of the invitation and the planned meeting time.

[16] I am satisfied that even with the short notice of the meeting Mr Hooker was able to and did discuss the proposed timetables and rosters and raised questions about overtime etc. He participated fully in the consultation meeting.

[17] On 3 July 2007 Street Smart notified all staff that it had decided to implement its proposed new structure. Mr Hooker was advised on the timeframe going forward and that advertisements would be placed in the Hauraki Herald on 6 and 10 July, with a closing date of 22 July. Interviews would be held from 23 – 27 July with final decisions being notified in the week 13-17 August 2007. Mr Hooker was advised that if he wished to be considered for the new Resource Recovery Operator position he simply needed to send a letter indicating his interest. He was also invited to seek advice and involve a representative or support person at future meetings if he required that assistance.

[18] On that same day a mystery shopper visited the Whitianga site. Mr Hooker, who was in charge of the site at the time, permitted the dumping of materials without charging the person and accepted a bottle of whiskey by way of payment which he kept. This information was included in a report provided to Street Smart from the mystery shopper.

[19] On 7 July 2007 Mr Grahame Christian, Managing Director of Street Smart, wrote to all staff and advised them what the Mystery Shopper had reported to him. Mr Christian noted the following areas as being cause for concern:

- Staff have no real interest in the role
- Customer interface is poor
- Theft and bribery are rife
- Charging is either not being made or is being undercharged
- Many visitors on sites
- Secondary industries for personal benefit going on

[20] All employees were advised that affected staff would be required to attend a meeting to discuss the concerns and any action which may be taken by Street Smart.

[21] By letter dated 11 July Mr Hooker was requested to attend a disciplinary meeting on 19 July 2007. Mr Grennell was aware Mr Hooker had left to travel overseas on annual leave on 10 July and would not be returning until 19 July. In his letter to Mr Hooker he advised that the purpose of the meeting was to get Mr Hooker's initial responses to an allegation that he had permitted a customer to dump materials without charging him and instead accepted a bottle of whiskey as payment plus Mr Hooker's possible suspension which was also to be discussed.

[22] Mr Hooker was advised that Street Smart would not be making any final decisions at the initial meeting, and that further enquiries may be required. Mr Hooker was told the issues were considered serious and that dismissal was a possibility. Finally, Mr Hooker was invited to seek advice and have a support person or representative with him at the meeting.

[23] Even though Mr Hooker was overseas on 17 July 2007, his lawyer (not Ms Swarbrick) contacted Street Smart to advise that 19 July was not a suitable date for the meeting.

[24] On receipt of that advice Street Smart notified Mr Hooker through his representative that although a date had not been able to be agreed, the disciplinary

meeting would proceed on 24 July. Street Smart also advised that it had decided to suspend Mr Hooker without pay.

[25] The employment agreement between Mr Hooker and Onyx provided for suspension with or without pay. It was this provision of the agreement that Street Smart relied on when it suspended Mr Hooker without pay. It was common ground that when Street Smart took over the business in August 2006, the terms specified in the employment agreement between Onyx and Mr Hooker had continued to apply. However, the agreement required Street Smart to discuss the possibility of suspension before making any decision. That action was not taken by Street Smart.

[26] In response to Street Smarts letter, Mr Hooker advised in writing through his representative that he did not believe Street Smart would provide a fair assessment of the disciplinary matter and in any event, he regarded the letter of 3 July as notice of termination of his employment. He declined to meet on 24 July.

[27] Street Smart accepted this letter as a letter of resignation and paid Mr Hooker up to and including 20 July 2007. At the investigation meeting Mr Hooker confirmed to me that he had instructed his representative to resign on his behalf.

[28] I find that Mr Hooker was not dismissed but chose to resign his employment rather than face the consequences of a disciplinary meeting. Further I am satisfied that the letter advising staff that the restructuring would proceed, did not amount to a letter of termination. Certainly Mr Hooker doesn't appear to be considered his employment to have ended prior to 10 July as he continued to work after 3 July and then proceeded on paid leave on 10 July 2007.

Unjustifiable disadvantage

[29] Pursuant to s.160(3) of the Act the Authority has jurisdiction to consider whether Mr Hooker has been disadvantaged in his employment in relation to the suspension. The appropriate test can be found in s.103A of the Act.

[30] As already set out in this determination, by letter dated 11 July Mr Hooker was requested to attend a disciplinary meeting on 19 July 2007. Mr Grennell was aware

Mr Hooker had left to travel overseas on annual leave on 10 July and would not be returning until 19 July. Even though Mr Hooker was overseas, on 17 July 2007 his lawyer (not Ms Swarbrick) contacted Street Smart to advise that 19 July was not a suitable date for the meeting. This was not an unreasonable response given that Mr Hooker was only just due to return from a period of annual leave on that date.

[31] Street Smart then notified Mr Hooker on 18 July 2007, through his lawyer, that although a date had not been able to be agreed, the disciplinary meeting would proceed on 24 July and that it had decided to suspend Mr Hooker without pay. The Authority notes that although there is a letter on its file addressed to Mr Hooker dated 10 July suspending him, that date does not accord with the dates on which the correspondence between Mr Grennell and Mr Hooker's lawyer took place with regard to setting a meeting time and is actually before the initial letter of 11 July was sent requesting Mr Hooker's attendance at a disciplinary meeting.

[32] While the written employment agreement between Mr Hooker and Onyx (the terms of which applied following Street Smart taking over Mr Hooker's employment) provided for suspension with or without pay, the agreement required Street Smart to discuss the possibility of suspension before making any decision on that matter. That action was not taken by Street Smart and in fact quite the reverse. After being advised that the 19th was not a suitable date, no further opportunities were provided to Mr Hooker to enter into any discussions about a possible suspension. Indeed when the decision was made to suspend Mr Hooker, he was still absent on leave and overseas.

[33] Street Smart has failed to discharge the burden of showing that the actions it took in suspending Mr Hooker were what a fair and reasonable employer would have done in all the circumstances at the time it occurred. Street Smart's actions were both procedurally unfair and substantively unjustified. It follows that Mr Hooker was unjustifiably suspended.

Remedies

[34] Mr Hooker did not lose any wages as a result of the unjustified suspension. Through his own evidence Mr Hooker says that in reliance on the advice he received,

with regard to the 3 July letter Mr Hooker resigned from his employment without notice on 19 July 2007. Until this date he had been on paid annual leave.

[35] The evidence of hurt and humiliation was compelling but related in the main to the misapprehension that Mr Hooker had been dismissed. I have found that was not the case and Mr Hooker resigned after receiving legal advice. Therefore I consider an appropriate award for the disadvantage grievance is the sum of \$1,000.

Counter-claim

[36] Street Smart's income was derived from an annual contract payment from TCDC and through the sale of recyclables. As part of its contract with TCDC, Street Smart is entitled to recover from the rubbish and sell recyclables such as glass, paper, metal and plastics and to retain the income from these sales. The income received through gate fees while collected by Street Smart, was paid directly to TCDC. Shortfalls between the cost of the contract amount paid by TCDC and the gate fees collected were met by the rate payers.

[37] When Street Smart took on the contract in 2006, TCDC had made it clear to Street Smart that it held concerns about the way the transfer stations were being operated; in particular there were reports of under charging at the gate.

[38] In June 2007, while on a visit to the Whitianga Refuse Station, Mr Christian noticed a pile of scrap metal stacked up beside the gate. He made enquiries of Mr Hooker and his brother Graeme Hooker as to the reason for the metal being there. Mr Hooker and his brother advised Mr Christian that they sold the metal themselves. On questioning how much they received for the scrap metal the Hooker brothers told Mr Christian it was just "beer money". It was common ground that the Hooker brothers were told they could not sell metal for which Street Smart had a market.

[39] Following an investigation into the sale of scrap metal from the Whitianga Refuse Station to SJ Metals, the amounts staggered Mr Christian who concluded that the Hooker brothers were effectively operating a sideline business in the gathering and sale of scrap metal.

[40] Mr Hooker says he had the authority of his manager to take recycle from mainstream rubbish as TCDC didn't want heavy metals compacted with household rubbish. This evidence was, in part, confirmed by Mr Gary Jager and Mr Peter Smets who was Mr Hooker's manager at the time. Mr Smets told me that it was a grey area and that they certainly allowed the practice when staff were employed by Onyx.

[41] Both Mr Jager and Mr Smets were clear in their evidence that while the practice was condoned by Onyx, once Street Smart took over it should not have been continuing. Mr Jager also told me at the investigation meeting that he was not concerned about or aware of how much money was being made out of the sale of the scrap metal. Mr Jager also confirmed that by the time Mr Smets had instructed staff not to sell scrap metal, he had little to do with the management of the refuse stations.

[42] I am satisfied on the balance of probability that it is more likely than not that Mr Hooker was aware he was not to sell scrap metal at least two months after his employment with Onyx ended and his employment with Street Smart had begun. Mr Smets was clear in his oral evidence that he had instructed staff a month or two after Street Smart took over the management of the refuse stations that the practice of recycling and selling the scrap metal was to stop.

[43] The company have provided copies of invoices from SJ Metals for the period of June 2006 to July 2007. Of course the only period relevant to this employment relationship problem is from October 2006 to July 2007. The invoices show that during the latter period scrap metal to the value of \$15,036.00 was sold to MJ Metals from the Refuse Station.

[44] At the investigation meeting there were questions about whether all the invoices were for sales directly from the Whitianga station, however, I am satisfied that Mr Hooker and his brother were the only individuals selling scrap metal to SJ Metals.

[45] Also at the investigation meeting both Mr Hooker and his brother addressed the invoices but did not question the quantum and only disputed whether they were entitled to sell the items listed.

[46] Mr Graeme Hooker told me he and his brother would share the cash from the sales, which puts Mr Hooker's share at \$7,518.00. The money from the sale of the metals belonged to Street Smart and therefore it is recoverable.

Summary of orders

- **Street Smart Limited is ordered to pay to Mr Hooker compensation in the sum of \$1,000 pursuant to s.123(1)(c)(i) of the Act within 28 days of the date of this determination.**
- **Mr Hooker is ordered to reimburse Street Smart Limited the sum of \$7,518 being the total of the proceeds which he wrongly kept from the sale of metal belonging to Street Smart.**

Costs

[47] Costs are reserved. Given that both parties achieved some success in this matter I am of a mind to let costs lie where they fall. However, I encourage the parties to resolve the matter of costs between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority