IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 1/09
5133638

	BETWEEN	ROBERT HOUGHTON Applicant
	AND	THE PERFECT FOOD COMPANY LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Andrew Riches, Counsel for Applicant John Shingleton, Counsel for Respondent
Investigation Meeting	17 December 2008 at Christchurch
Determination:	6 January 2009

DETERMINATION OF THE AUTHORITY

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[1] Robert Houghton worked for The Perfect Food Company Limited from May until August 2008. His employment ended in August when he was presented with but refused to sign a written employment agreement. At the same time, The Perfect Food Company withheld pay and holiday pay due to Mr Houghton on account of money lent to him by the company shortly before the problem arose. Mr Houghton says that his wages were unjustly withheld in breach of the Wages Protection Act 1983 and that he was constructively dismissed. He seeks compensation for distress and reimbursement of lost wages.

[2] The Perfect Food Company says that Mr Houghton was employed as a casual, that he was offered a written agreement for his consideration but did not agree to it, that it ceased providing work to Mr Houghton as a casual employee there being no obligation to continue to offer him work, and that it is prepared to continue employing Mr Houghton on a casual basis. The company also says that Mr Houghton still owes it $1,700.00.

[3] To resolve this problem I must determine the basis of Mr Houghton's employment before explaining the circumstances surrounding the cessation of Mr Houghton's work.

Mr Houghton's employment

[4] Mr Houghton worked for the company for part of 2007. There is a disagreement about the circumstances of the termination of that relationship but it is not relevant for present purposes. The only point to note is that there was a written employment agreement for this earlier employment entered into prior to its commencement. It is not suggested that the terms of the 2007 contract formed the basis for the 2008 employment.

[5] Peter Braid is the principal of The Perfect Food Company. Sometime in or before May 2008 he and Mr Houghton ran into one another at the working men's club and had a discussion about new employment. In evidence both men persisted with their own version of the discussion and adamantly rejected the other's version. I doubt that either man has any reliable recall now about the precise terms of employment that were discussed during the brief exchange. Most likely there was a discussion in general terms about whether Mr Braid had any work for Mr Houghton and whether Mr Houghton was available for work. I do not accept that Mr Braid specified that only casual employment was available nor that Mr Houghton offered to work on a part-time basis. After this initial discussion there was a further exchange between the two men by phone. Arrangements were made for Mr Houghton to start work on 21 May 2008.

[6] What can be established is that Mr Houghton was to work Monday to Friday principally as a driver usually to start at 7.00am for up to five hours. At the time Mr Houghton was working night shift at the freezing works so he was not available for fulltime work nor did the company want a fulltime employee. However there was the prospect that more work could be offered to Mr Houghton once the freezing works season finished. The time and wage records show that is what happened through to August 2008.

[7] The evidence indicates that the company normally provides a written employment agreement and an opportunity for an employee to get independent advice

prior to starting. That did not happen here. Mr Braid acknowledged this was an oversight on his part.

[8] The absence of a written agreement means that there is a measure of uncertainty about the terms of the employment. However, I do not accept that the employment was ever casual in the sense that there was no ongoing obligation for the company to offer work or for Mr Houghton to perform it. The history of the relationship shows that the arrangement was for regular on-going employment.

[9] On 1 August 2008 the company lent Mr Houghton $1,900.00 to help him with his bills. It was verbally agreed that the advance would be repaid at the rate of $100.00 per week from Mr Houghton's wages. This arrangement supports the conclusion that the agreement was for ongoing not casual work.

The termination of the employment

[10] Mr Braid was away overseas for part of June and part of July. Mr Braid says that when he returned he got reports from his factory manager that Mr Houghton had been unwilling to perform factory work and work at directed times in Mr Braid's absence. Mr Braid never raised that with Mr Houghton but it did partly prompt Mr Braid to take steps to formulate a written employment agreement for Mr Houghton.

[11] Mr Braid arranged for an agreement to be drafted. He gave it to Mr Houghton on or about 13 August 2008. Mr Braid's evidence is that what he gave Mr Houghton was an *exact updated replica* of the previous year's agreement. That evidence is wrong. The proposed agreement provided for a 2 month trial period ending 11 October 2008 but the 2007 agreement was not for a trial period. Mr Braid told me that the trial period was included because Mr Houghton had indicated interest in a supervisor position. However, the proposed agreement related to Mr Houghton's existing employment as a driver. Mr Braid then told me that, but for his oversight, there would have been a trial period originally. I am left with no satisfactory explanation for the proposed 2 month trial period even though Mr Houghton had been working there for nearly three months when he was presented with the proposed agreement. Mr Braid gave the signed document to Mr Houghton and asked him to review and sign it.

[12] Mr Houghton read the proposed agreement later. He had several problems with it but did not approach Mr Braid about that or return the document. When Mr

Houghton came to work on 18 August 2008 Mr Braid asked him about the agreement. Mr Houghton told him it was at home. Mr Braid sent him home to get the agreement. After Mr Houghton returned there was an exchange in the office involving the two men. No-one else was present. There was discussion about Mr Houghton's objections. He pointed out that his start date was 21 May not 11 August 2008 as recorded in the proposed agreement. He objected to the trial period since he had been working there since May. He also said he could not agree to the hours of work provision setting the days at *Monday to Sunday inclusive* and reserving to the employer the right *to roster on employees in shifts through the 24 hour day*. The discussion between Mr Houghton and Mr Braid got heated. Mr Houghton told Mr Braid that he would not sign the *fucking contract*. Mr Braid's evidence is that he got a little bit angry and told Mr Houghton to go home and have a think about it. Mr Houghton's evidence is that he was told he was suspended and that Mr Braid said *No contract, No Job!* It is common ground that Mr Houghton left the premises.

[13] Mr Houghton rang Mr Braid later in the afternoon to have another discussion about the situation. During the investigation meeting it emerged that Mr Houghton had secretly tape recorded some of this phone call. I should mention that directions were made for the exchange of relevant documents prior to the investigation meeting. Although counsel for Mr Houghton was aware of the existence of this tape recording prior to the investigation meeting, it was not disclosed. That is a breach of the Authority's direction. I can only think that the tape was withheld to avoid the negative light cast by Mr Houghton's actions in secretly taping a phone conversation. The tape records Mr Braid saying *I can't employ you, simple as that …until it's resolved.* Mr Houghton said *So you're saying don't bother coming in until we've resolved it?* Mr Braid replied *That's Right*.

[14] After this call Mr Braid decided to write to Mr Houghton. There is a letter dated 18 August 2008. It records Mr Braid's *disappointment* that Mr Houghton had refused to sign the proposed agreement. It then says

> *You may or may not be aware that it is unlawful to employ staff without having an Employment Contract, …signed by both parties. Because you do not want to sign it, for whatever reason, the absence of signing the Agreement leaves me with no option but to suspend your job for that reason.*

[15] The tape recording and the letter have Mr Braid conveying the same message and it is likely that he said something similar earlier on in the exchange with Mr Houghton in the office.

[16] The letter also included a demand for repayment *without delay* of monies advanced and goes on to say *All proceeds owing to you will be held from you until you come to a satisfactory arrangement with the company.*

[17] Having received the letter Mr Houghton got legal advice and his solicitor wrote a letter dated 20 August 2008 to Mr Braid. This letter refers to the Wages Protection Act 1983 and requests payment of all wages and holiday pay owed to Mr Houghton and payment for the suspension. A personal grievance is threatened if payment is not forthcoming. The letter also asserts a constructive dismissal personal grievance based on the company suspending Mr Houghton unless he agrees to new terms of employment.

[18] Mr Houghton eventually received cheques for $1098.00 on 28 September 2008 and $178.55 later. I take it that all wages and holiday pay owed to Mr Houghton has now been paid.

Constructive Dismissal?

[19] In *Auckland etc Shop Employees' etc IUOW v. Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. The third category is in issue here. Not every breach of duty is sufficiently serious to give rise to a personal grievance of constructive dismissal. In *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168, the Court of Appeal said:

> *In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in*

> *the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach*

[20] I find that Mr Houghton resigned because of breaches of duty on the part of his employer. The Perfect Food Company breached the Wages Protection Act 1983 and the contractual obligation to pay wages by withholding Mr Houghton's wages pending a satisfactory arrangement over repayment of the loan. The Perfect Food Company also breached the implied obligation of trust and confidence by suspending Mr Houghton unless he signed a contract that included terms significantly different from those verbally agreed. To put it another way, The Perfect Food Company made it clear that it was no longer prepared to be bound by the existing verbally agreed terms of the employment.

[21] These breaches were sufficiently serious to make it reasonably foreseeable that Mr Houghton would not be prepared to work under the prevailing conditions. Indeed Mr Houghton said he would not work under the proposed written agreement and Mr Braid said he was suspended unless he signed the new agreement. So Mr Braid knew that Mr Houghton could not continue working. It follows that Mr Houghton was constructively dismissed by The Perfect Food Company Limited.

[22] The dismissal was unjustified. In his 18 August 2008 letter Mr Braid says *it is unlawful to employ staff without having an Employment Contract, either collective or individual signed by both parties. Because you do not want to sign it, for whatever reason, the absence of signing the agreement leaves me with no option but to suspend your job for that reason.* That statement is both a pretext and wrong. The individual employment agreement of an employee not covered by a collective agreement (as here) must be in writing: see s.65 of the Employment Relations Act 2000. Properly, that is achieved by compliance with the bargaining obligation to provide a copy of an intended agreement, tell the employee they are entitled to get independent advice and give that opportunity prior to the commencement of the employment. However failure to comply with this requirement does not affect the validity of an employment agreement: see s.63A(4) of the Employment Relations Act 2000. All that The Perfect

Food Company needed to do was to put in writing the verbally agreed terms of the employment but Mr Houghton's work should have continued regardless.

[23] Mr Braid was not actually trying to remedy the company's breach of the law in any event. He was trying to impose on Mr Houghton a trial period, a clear contractual obligation to perform factory work and an obligation to work at any time of the day as determined by the company.

[24] There was an attempt by Mr Braid in evidence to explain his actions by saying that business requirements had changed so that they needed a permanent employee rather than a casual employee. My earlier finding that Mr Houghton was never a casual employee discounts this explanation.

[25] For the foregoing reasons I find that The Perfect Food Company's actions and how it acted at the time were not what a fair and reasonable employer would have done in the circumstances. Mr Houghton has established a personal grievance of unjustified dismissal.

[26] There is also a second grievance referred to in the statement of problem arising from The Perfect Food Company withholding wages owed to Mr Houghton. As noted the wages and holiday pay was eventually paid to Mr Houghton. The company's unjustified action in withholding payment forms part of the dismissal grievance so it is not appropriate to deal with it as a separate grievance.

Remedies

[27] Mr Houghton did not contribute in a blameworthy way to the situation giving rise to the grievance. Mr Braid formed a fixed view that Mr Houghton had to sign the proffered agreement and that he would not permit him to continue working unless he did so. Nothing said or done by Mr Houghton during the exchange between the two men on 18 August 2008 contributed to that position.

[28] I accept the submission by counsel for the company that there was no direct evidence offered in support of the claim for compensation for humiliation, injured feelings or lost dignity. I am left to infer that Mr Houghton was angry about the situation from Mr Braid's evidence about their exchange on 18 August 2008 and the restrained hostility apparent between the two men during the investigation meeting.

These circumstances call for a minimal award of compensation only which I assess at $1,000.00.

[29] The evidence is support of the claim for compensation for lost remuneration was more detailed. Shortly after the employment ended Mr Houghton obtained part-time work and he re-commenced seasonal work at the freezing works on 29 October 2008. In the four weeks before the dismissal Mr Houghton averaged 32 hours per week or $640.00 (gross). He probably would have continued that pattern of work until he restarted at the freezing works. That is a period of just over 10 weeks. There after Mr Houghton probably would have reverted to working shorter hours at The Perfect Food Company. I will take the average of his hours actually worked in the four weeks up to 19 July 2008, about 22 hours or $440.00 (gross). There is a further 7 weeks from 29 October 2008 up to the date of the investigation meeting. These two periods of loss give a total of $9,480.00. From that must be deducted the earnings of $4,758.33 (gross) from the post employment part-time work. That leaves $4,721.67 (gross) as the assessed lost wages which I will round down to $4,000.00 since I do not have complete data for Mr Houghton's alternative earnings from the part-time employment to the date of the investigation meeting. The Perfect Food Company is to reimburse Mr Houghton $4,000.00 (gross) for lost remuneration. That will reimburse Mr Houghton for the whole of his lost earnings to the date of the investigation meeting, there being no reason to limit recovery to the first 3 months following the dismissal.

Summary of orders

[30] Mr Houghton was unjustifiably dismissed by The Perfect Food Company Limited.

[31] The Perfect Food Company Limited is to pay Mr Houghton compensation of $1,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[32] The Perfect Food Company Limited is to pay Mr Houghton reimbursement of $4,000.00 (gross) pursuant to s.123(1)(b) and s.128(3) of the Employment Relations Act 2000.

[33] Costs are reserved. Any application must be made within 28 days by lodging and serving a memorandum. Any reply must be lodged and served within a further 14 days.

The outstanding loan

[34] As I understand it separate proceedings have been commenced in another jurisdiction regarding the loan. However, I am asked by counsel for the company to deal with the outstanding loan by way of set-off or counterclaim. The issue of the loan is outside of and separate from the employment relationship so falls outside the Authority's jurisdiction.

Philip Cheyne
Member of the Employment Relations Authority