

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 46
5336513

BETWEEN BRENDAN KELLERMAN
 Applicant

A N D TRADE STAFF GROUP
 LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Brendan Kellerman, Representing himself
 Phil Butler, Representing the Respondent

Investigation Meeting: 19 September 2011 at Wellington

Submissions Received: By 21 November 2011

Date of Determination: 20 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Brendan Kellerman was employed by Trade Staff Group Limited (Trade Staff). He was employed under an employment agreement that made provision for work on assignment and temporary employment (called “casual”). This was on an as needed and required basis. The agreement was supplemented by a “confirmation of assignment” document, which included the length of the assignment and a rate of pay, amongst other details when assignments were uplifted. Mr Kellerman was assigned to a Trade Staff client (called “the client”) for a role that required a forklift licence to cover a person on leave. This ostensibly was on a day by day basis, but lasted until 18 February 2011, to cover the absence of one of the client’s permanent employees. When Mr Kellerman started the assignment he knew his forklift licence had expired and he says that he had told Trade Staff about this previously, but that has been totally denied by Trade Staff.

[2] Although Mr Kellerman says he offered the client his licence at the time he started, the client did not scrutinise it because the employment responsibility was with Trade Staff and it had to take responsibility for meeting any licensing requirements (including having a forklift licence for the work).

[3] During the assignment Mr Kellerman had his photograph taken by a Trades Staff employee which he has taken exception to and claims that Trade Staff had no right to use his image for its purposes.

[4] In the last days of the assignment Trade Staff became aware that Mr Kellerman did not have his forklift licence. This was reported to the client. The client made arrangements for Mr Kellerman to carry on working for the last day of the assignment, but not to undertake forklift duties. The assignment ended for genuine reasons.

[5] Mr Kellerman has taken issue with Trade Staff over its handling of his licence and the arrangements with renewing the licence. There is a dispute between Mr Kellerman and Trade Staff about whether or not Mr Kellerman told them he would not work for Trade Staff again.

[6] On 21 February 2011 Mr Kellerman wrote a number of complaints, including an issue about his photo image being used, documents and people, and a claim that he had been constructively dismissed. It is common ground he did not resign.

Issues

[7] The primary issue in this matter is Mr Kellerman's complaint about the handling of his licence and any arrangements between him and Trade Staff about renewing the licence. Does Mr Kellerman have a claim for a personal grievance based on constructive dismissal? Does Mr Kellerman have a claim in regard to any alternative personal grievance based on the same facts?

The Facts

[8] Mr Kellerman and Trade Staff signed off the employment agreement and there is common ground that the provisions of the agreement and confirmation of assignment applied.

[9] During Mr Kellerman's employment he took exception to being photographed at work. Andy Poole, who was the team leader at the time, and Andy McCormick, Southern Operations Manger, denied that Mr Kellerman never consented to the use of his photo image. They believed genuinely that he had given consent. Mr Poole relied on a signed consent form from Mr Kellerman, but accepted that it was not completed until some time after the photos had been taken. Mr Kellerman has alleged that the signed form was a forgery, but has not proved that despite his own analysis of the signature. His image was apparently used once, and the company is now aware that care needs to be taken where approval for the use of images is required, to avoid this situation from arising. The allegation of a forgery remains unexplained but I do not have to take that any further. Indeed no personal grievance was raised at the time.

[10] Mr Kellerman started corresponding with Trade Staff on 21 February 2011 (complaints about the licence renewal, making allegations about the completion and accuracy of documents including a contract and that he had been constructively dismissed); letter dated 1 March 2011 (complaint about no reply to the first letter, complaint about not working since 18 February, request for holiday pay and remedies for costs, time of work, unfair treatment and constructive dismissal, and noting the use of the photograph image without permission); and letter dated 3 March 2011 (notice of continuing claims). Following the filing of the statement of problem (11 March 2011) Mr Kellerman wrote more letters dated 1 April 2011 and 13 and 16 May, with various complaints to various people alleging various matters about different people and the use of documents.

[11] The parties attended mediation with the department of Labour, but it falls on the Authority to make a determination.

Determination

[12] This is not a constructive dismissal. I hold that Mr Kellerman did not resign. There is no evidence of him ever resigning. Furthermore I hold that there was no serious enough breach by the employer that made it foreseeable Mr Kellerman's employment would end. Thus he is not able to bring a constructive dismissal personal grievance claim.

[13] I hold that Mr Kellerman's opinion of being constructively dismissed is entirely wrong. He raised a personal grievance, and for completeness I have

scrutinised the relevant matters that brought the employment to an end to consider if the nature of the personal grievance is different to what has been claimed as to any unjustified action disadvantage in relying on s122 of the Employment Relations Act (“the Act”). Section 122 reads as follows:

122. Nature of personal grievance may be found to be of different type from that alleged

“Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.”

[14] Mr Kellerman’s assignment with Trade Staff’s client ended for genuine reasons, I hold. The assignment was to cover a permanent employee’s absence from work. The assignment ended on 18 February 2011. Mr Kellerman has not established that the end of the assignment was not genuine and/or was based on improper motives/reasons.

[15] It is common ground that Mr Kellerman’s forklift licence had expired at the time that he commenced with the client. There is no provision in the employment agreement or assignment document for the employer to pay for licence renewals, plus there was no obligation on Trade Staff to pay for the renewal.

[16] Whether or not Mr Kellerman raised the expiry of his licence with Trade Staff much earlier, he had to take responsibility for renewing his licence and ensuring arrangements were made to renew it. He did not do this in a satisfactory manner I hold. He had every opportunity to do it during the course of the assignment and/or before the assignment commenced. He did not take that opportunity and Trade Staff cannot be held responsible for the situation that he found himself in.

[17] I hold that once Trade Staff became aware of the situation it attempted to make arrangements for relicensing and to help Mr Kellerman financially. Mr Kellerman worked unlicensed with Trade Staff’s client, which he said was because he needed the money at the time. Thus he did not tell the client his licence had expired, and even if as he says he did tell someone, nothing came of it. Trade Staff cannot be held responsible for that situation.

[18] I hold that even if Mr Kellerman had informed Trade Staff earlier that his licence had expired, any inaction by Trade Staff was not unjustified. This is because of the fact that Mr Kellerman did not have a current licence and was not the reason why the assignment ended. He was able to continue to work until the assignment

ended, albeit not on the forklift. The client completed the obligations at the very least to enable Mr Kellerman to complete his assignment and that was not interfered with by Trade Staff.

[19] I am satisfied that the assignment came to a proper end and that Mr Kellerman had no expectation of on-going employment with Trade Staff given the as required arrangements. The background on his licence had not been resolved, but I hold there was no unjustified action by Trade Staff on either party's position in regard to that.

[20] The matters to do with the complaint about the photo image and other complaints about documents and people have come about because of the employment relationship problem and escalated with the filing of the statement of problem and the statement in reply. The issues are indirect issues to Mr Kellerman's discontent about the assignment ending and his opinion on the renewal of his licence, albeit Mr Kellerman has very strong views about each of the matters. Each of the matters would have been relevant as background if there had been any substance to the claim of constructive dismissal. I hold that it is not necessary to make findings on each and everyone of them since the employment has ended and the passage of time. Indeed many of the issues can only serve as background, since they have been raised now and not in the context of any personal grievance properly raised at the time.

[21] In conclusion Mr Kellerman's claims are dismissed and costs are reserved.

P R Stapp
Member of the Employment Relations Authority