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King v Waste Tyre Solutions Limited (Auckland) [2011] NZERA 569; [2011] NZERA Auckland 369 (23 August 2011)

Last Updated: 31 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 369 5335470

BETWEEN KEITH DAVID KING

Applicant

AND WASTE TYRE SOLUTIONS

LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Rachel Larmer

No appearance by James Parlane, Advocate for Applicant
Kate Sullivan and Damian Quinn, Counsel for Respondent

19 August 2011 at Tauranga

23 August 2011

DETERMINATION OF THE AUTHORITY

A Mr Keith King's claims against Waste Tyre Solutions Limited ("WTS") are all dismissed.

B Costs are reserved.

Employment relationship problem

[1] Mr King alleged that he had been unjustifiably dismissed by WTS. He also claimed he was owed wage arrears. The arrears claim was based on allegations he had not been paid:

- a. All of the hours he had worked;
- b. Annual holidays;
- c. Statutory holidays;
- d. Meal allowances;
- e. Staying away from home allowance; and
- f. Bonuses.

[2] Mr King also alleged WTS had made unlawful deductions from his wages for a truck ashtray which he had broken.

[3] WTS denied all of these allegations. It said that Mr King resigned on the morning of 7 February 2011. It said that it has paid him everything he was owed.

Telephone conference

[4] From the first two statements of problems filed it appeared Mr King wanted the Authority to investigate;

- a. An allegation he had been unjustifiably dismissed;
- b. A claim for wage arrears.

[5] A lengthy telephone conference was held on 12 May 2011. This took far more time than is usually required for a telephone conference because considerable time was required in order to ascertain the nature of Mr King's claims because he had made a number of wide ranging various other allegations that did not appear to relate to either of the above claims.

[6] The nature of the various other allegations suggested they may have been relevant to a constructive dismissal claim, which would also have been consistent with WTS's claim that Mr King had resigned. However, Mr Parlane was adamant Mr King was not alleging he had been constructively dismissed. He made it clear a number of times Mr King's position was that he had actually been dismissed, he had not resigned. That was also confirmed in writing after the telephone conference.

[7] I suggested to Mr Parlane that, based on what he had said about there being no allegation of constructive dismissal, the various other allegations which did not relate to either the dismissal grievance or the wage arrears claims therefore did not appear to be relevant. When Mr Parlane was asked to explain why he believed they were relevant to the Authority's investigation, he said they supported Mr King's claim for hurt and humiliation.

[8] I explained to Mr Parlane that distress compensation could only be awarded to compensate an employee for the actual non economic effects their personal grievance had on them, it could not be used to punish or signal disapproval of an employer's conduct. Mr Parlane point blank refused to accept that.

Timetable directions

[9] By consent, an investigation meeting was set down for 21 June 2011. A timetable for the disclosure of information between the parties, the preparation of a joint bundle, and the exchange of written statements was set by agreement.

[10] This required Mr King to provide WTS with the documents he wanted included in a joint bundle of documents (which WTS was to prepare) by 19 May 2011. Mr King failed to provide any documents, despite a reminder from WTS of his obligation to do so.

[11] Mr King was directed to return the WTS log books which he had retained upon termination. That did not occur. He was again directed to provide WTS with the log books on 24 May 2011.

[12] Mr King was directed to provide a witness statement by 26 May 2011, but did not do so. He did not seek the Authority's leave to vary the agreed timetable.

[13] On 24 May 2011 the Authority had advised the parties that it expected them to comply with the agreed timetable. During the first telephone conference Mr Parlane expressed annoyance that WTS had been given leave to file its statement in reply out of time and he asked the Authority to prevent WTS from defending Mr King's claim if it breached the agreed timetable on the grounds Mr King would be complying with it.

[14] It was therefore surprising in light of Mr Parlane's request that Mr King then did not comply with the agreed timetable.

[15] On 24 May 2011 the Authority warned the parties that if the timetable was not complied with the investigation meeting scheduled for 21 June 2011 may need to be adjourned. The parties were also reminded of the Authority's new jurisdiction to impose a penalty on a person (which may include a representative) for obstructing or delaying an investigation.^[1]

[16] Mr King filed a witness statement on 30 May 2011. This basically just repeated the allegations that had already been made and it looked as if it was Mr Parlane's words, rather than Mr King's evidence. It did not explain what evidence Mr King's allegations had been based on.

Opportunity for Mr King to provide additional evidence

[17] On 31 May 2011 the Authority adjourned the investigation meeting and advised the parties it considered Mr King's statement was inadequate because it did not identify what evidence he intended to rely on in support of his claims. The Authority set out the matters it required him to provide evidence about in respect of each of the allegations he had made.

[18] Mr King was given until 30 June 2011 to file a supplementary witness statement. Instead of doing so, Mr Parlane filed a third statement of problem on 5 July 2011. This appeared to just be a repeat of the previous amended statement of problem so Mr Parlane was asked to identify what (if any) new claims had been raised. He did not respond.

[19] No supplementary statement was ever received from Mr King.

[20] The Authority issued further directions to Mr King on 5 July 2011. It explained that he had been required to provide a supplementary witness statement so that WTS and the Authority were fully informed in advance of the investigation meeting

of the evidence he intended to rely on. This was particularly important because of the question mark over why certain allegations had been raised and how these were relevant (if at all) to the Authority's investigation.

[21] Mr King was reminded that the Authority had identified the evidence he needed to cover in his supplementary statement and that failure to provide this information could fundamentally compromise his claims. He was told he would not be permitted to introduce new evidence for the first time during the investigation meeting, so it was important for him to prepare a supplementary statement which set out his evidence.

[22] The Authority advised Mr King that because of the serious prejudice he was likely to face if he did not comply with the direction on 31 May 2011 to provide evidence in support of his claims, he would be given another opportunity to do so. The timetable for him to file a supplementary statement was extended to 30 July 2011 and he was warned that failure to do so could be reflected in a future costs award.

[23] Mr Parlane was again asked to advise what (if any) new claims he had raised in the third statement of problem, because it did not look like there were any.

[24] No supplementary statement was provided and Mr Parlane did not respond to the Authority's query about the content of the third statement of problem.

Investigation process

[25] Once it became clear that Mr King was unlikely to provide any supplementary evidence in support of his claims, the Authority decided to undertake a two stage investigation whereby it would hear from Mr King and his witnesses during the first investigation meeting and then from WTS during a second investigation meeting, held two weeks later.

[26] The purpose of this was to give WTS an opportunity to hear Mr King's evidence before it prepared its evidence so it had some advance notice of what it was required to respond to.

[27] On 5 August 2011 the Authority advised the parties that its investigation had to be completed by 30 September 2011 because WTS's key witness, Mr Richard Linthwaite, would be overseas from 1 October 2011 for the rest of the year.

[28] The Authority advised the parties of its proposal to undertake a two stage investigation and it proposed investigation dates of 19 August 2011 and 2 September 2011. The parties were invited to provide feedback on the proposed investigation process and dates before a final decision was made to set the matter down (again) for hearing.

[29] WTS agreed with the two stage investigation and the proposed dates, and asked that Mr King specifically confirm he would be attending in light of his failures to comply with previous directions.

[30] The Authority responded to this by advising the parties it had the power to investigate the matter in the absence of a party so Mr King's non attendance would not stop the investigation meeting proceeding.^[2] It stated that if Mr King could not attend on the proposed dates he had to explain why and identify what other dates he was available. Mr Parlane responded to that by an email which said "*we will attend on that day, please advise the venue.*"

Notice of Hearing

[31] A notice of hearing for the first investigation meeting in Tauranga on 19 August 2011 was emailed to the parties on 8 August 2011. Mr Parlane received this email because he subsequently responded to it with a question about the Authority's process.

[32] A further notice of hearing for the investigation meeting on 2 September 2011 was emailed to the parties on 9 August 2011.

No appearance

[33] The Authority hearing on 19 August 2011 was scheduled to start at 9.30am, however when neither Mr King nor Mr Parlane appeared the start time was delayed to 10am in case they had been delayed in traffic on the way to the investigation.

[34] Inquiries were also made with the Support Officer to ascertain whether either Mr King or Mr Parlane had contacted the Authority to explain their non attendance. They had not done so. No explanation has been received for their non attendance at the hearing.

[35] The notes section of the notice of hearing stated "*if the Applicant does not attend the investigation meeting, the matter may be dismissed and costs may be awarded against the Applicant..*"

Investigation meeting

Onus of proof

[36] WTS denied that Mr King was dismissed or that it had failed to pay him correctly. He therefore bore the onus of proving his claims on the balance of probabilities.

Evidence

[37] Mr King produced no evidence in support of his claims. Mr King produced 38 pages of documents prior to the hearing, but there was no explanation as to how these related to his claims (if at all).

[38] WTS had two witnesses, Mr Richard Linthwaite, former owner and director of WTS and Mr Anthony Harwood, Foreman WTS. Mr Linthwaite gave evidence in person under affirmation. Mr Harwood provided an affidavit in advance of the hearing, which had been disclosed to Mr King. Mr Harwood did not attend in person, but he was questioned under affirmation by telephone during the investigation on 19

August 2011.

[39] WTS produced a bundle of documents consisting of 168 pages, which was disclosed to Mr King in advance of the hearing. Mr Linthwaite gave evidence regarding the relevance of the documents to the matters Mr King had raised.

[40] WTS's bundle of documents included;

- a. Mr King's employment agreement;
- b. Mr King's disciplinary history which included two warnings for inaccurate timesheet recording;
- c. Mr King's most recent performance review which referred to prior discussions about the need for his timesheets to be accurate which was reiterated again during the review on 28 May 2010. It recorded "*Timesheets MUST be accurate and completed at the end of each day*" and that "*when a break is shown [in the log book] it must be taken*";
- d. Letter from Mr Linthwaite to Mr King dated 7 February 2011 which recorded he had verbally resigned that morning;
- e. Timesheets;
- f. GPS reports for his work truck;
 - g. A GPS map which showed he had claimed in a timesheet he had been working whilst the truck had been parked at his house at the end of the

day;

h. Selection of driving log books;

i. Payslips;

j. Correspondence which showed the only deduction WTS had made from Mr King's pay was for 33% of the cost of a class 2 truck licence which he had signed his agreement to, and which was deducted at \$10 per week;

k. Schedule of wages paid to Mr King; l. Mr King's holiday and pay record;

m. WTS's bank history which showed dates of and amounts of the wages paid to Mr King over the course of his employment;

n. Communications from NZLTA which contradicted allegations made by Mr King about WTS's vehicles.

Unjustified dismissal claim

[41] Mr Linthwaite and Mr Harwood both said that Mr King attended work between 7am - 7.30am on Monday 7 February 2011 and asked for his final pay and holiday pay to be made up and paid out immediately. He asked if he had to work out his notice and was told he did not.

[42] Mr Harwood and Mr Linthwaite said Mr King gave his resignation to Mr Linthwaite verbally whilst Mr Harwood was standing close enough to hear their conversation. Mr King had told Mr Harwood over the weekend that he had obtained employment driving grain trucks at night for a company which was based in Waihi.

[43] Mr Harwood and Mr Linthwaite both gave detailed evidence about the discussion with Mr King, and I am satisfied from their evidence that Mr King resigned of his own free will.

[44] Mr King's personal grievance claim for unjustified dismissal is dismissed. **Wage arrears**

Short pay for hours worked

[45] Mr King claimed that he had not been paid for the hours he recorded on his timesheets. Mr Linthwaite's evidence satisfied me that Mr King was in the habit of recording hours on his time sheets that he did not actually work.

[46] For example, Mr King would record he had worked through lunch, when it had been made clear to him he had to take all of his breaks. Mr King also recorded he had worked through lunch when Mr Linthwaite had seen him taking his lunch break.

[47] WTS had an ongoing problem with Mr King recording hours he had not worked on his timesheets. This problem was regularly raised with him. Mr King had received two written warnings for inaccurate timesheets and he had been reminded during his last performance review to complete accurate timesheets at the end of each day.

[48] Mr King was the only employee with whom WTS had issues about inaccurate timesheets. Mr King's timesheets would often be inconsistent with the times recorded by the truck GPS. On one occasion Mr King claimed an hour of work time when the GPS showed the truck was parked outside his home for the evening.

[49] After reviewing Mr King's timesheets, I accept Mr Linthwaite's evidence that Mr King recorded hours and days he did not work, and had also on occasion incorrectly added up the hours he said he had worked. I accept Mr Linthwaite's evidence that it was a small business and he worked closely with his staff so he knew where they were, what they were doing, and what time they started and finished work because he allocated their work to them and the trucks were also all fitted with GPS.

Annual holidays

[50] There was no evidence in support of Mr King's allegation he had not been paid his full annual holidays entitlement.

[51] WTS used an independent payroll provider to process its payroll which included the payment of holiday pay and other leave entitlements. WTS provided Mr King's full holiday and leave record for the duration of his employment. I am satisfied his claim for annual holiday arrears is without merit.

Statutory holidays

[52] Mr King did not provide evidence in support of this allegation. WTS did not know what statutory holidays Mr King believed he had not been paid for, but it said it had fully complied with the [Holidays Act 2003](#) requirements by engaging an external professional payroll provider company to process its statutory holiday entitlements.

Meal allowances

[53] Mr King provided no evidence in support of his claim he had not been paid meal allowances which he alleged he was entitled to.

[54] Mr Linthwaite stated that Mr King was not entitled to a meal allowance. He was however entitled to a meal reimbursement if he was required to stay away for work, which only happened "once in a blue moon". Mr Linthwaite's evidence was that on those rare occasions Mr King was either given cash in advance of his trip to buy a meal on the understanding he would subsequently provide the receipts to WTS (which he did not do) or he was told to purchase a meal and then produce the receipt in order to be reimbursed.

[55] I accept Mr Linthwaite's evidence that Mr King had not produced any meal receipts to WTS which had not been reimbursed.

Staying away from home allowance

[56] Mr King provided no evidence in support of this claim.

[57] I accept Mr Linthwaite's evidence that Mr King was never entitled to a staying away from home allowance.

Bonus

[58] Mr King provided no evidence in support of his claim he had not been paid bonuses to which he was entitled.

[59] Mr King was entitled to a bonus which was paid to motivate him to meet behaviour expectations WTS required from him but with which there had been ongoing problems.

[60] The bonus consisted of a small increase to Mr King's normal hourly rate (initially \$1 extra per hour but which later increased to \$2 extra an hour) which was to be paid at Mr Linthwaite's sole discretion, if he considered Mr King had met the following criteria during the week:

- a. He had kept his speed under control;
- b. He had attended work on time; and
- c. He had completed his timesheets and day sheets accurately each day.

[61] I accept Mr Linthwaite's evidence that on the occasions when he exercised his discretion to pay Mr King a bonus, it was paid correctly.

Unlawful deductions from wages

[62] Mr King provided no evidence in support of his claim that WTS had made unlawful deductions from his wages. WTS denied it had deducted the damage Mr King had caused to a truck ashtray when he had hit it in anger. It said the ashtray had not been fixed because it was too old, so they could not find a replacement ashtray because they were not being made any more.

[63] WTS provided Mr King's pay records. The only deductions evident were the \$10 per week Mr King had agreed to in writing which was to reimburse 33% of his class 2 truck licence. I accept Mr Linthwaite's evidence that no unlawful deductions were made from Mr King's wages.

Outcome

[64] Although Mr King alleged he had been short paid, there was no evidence in support of that claim. I accept Mr Linthwaite's evidence that Mr King was paid for all of the hours he actually worked and for his statutory and contractual entitlements.

[65] Mr King's wage arrears claim is dismissed.

Various other allegations

[66] In his three statements of problem and statement of evidence Mr King made a number of other various allegations. There was no evidence from Mr King in support of any of those allegations and it was unclear what (if any) claims they allegedly gave rise to.

[67] However, for the sake of thoroughness, I nevertheless questioned Mr Linthwaite about those matters to determine whether the any of the various other allegations had any substance. I am satisfied they are all without merit.

Costs

[68] The respondent has been wholly successful and is therefore entitled to a contribution towards its costs. The parties are invited to provide submissions on whether Mr King's conduct put WTS to unnecessary additional costs.

[69] WTS has 14 days in which to file a costs application, Mr King has 14 days within which to respond, WTS then has a further 7 days to respond. This timetable will be strictly enforced and may only be departed from with the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority

[1] S.134A ERA 2000

[2] Clause 12, Schedule 2 ERA 2000

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