

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Hirine Te Kani Lardelli (Applicant)
AND Pars Transport Limited (Respondent)
REPRESENTATIVES Graeme Gowland for the Applicant
Paul Pa'u for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Palmerston North (3 February 2005 – vacated)
Palmerston North 14 April 2005
(Mr. Pa'u and Respondent by Telephone)
SUBMISSIONS 19 May and 2 June 2005 from Graeme Gowland
25 May 2005 from Paul Pa'u
DATE OF DETERMINATION 10 June 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. Mr Hirine Te Kani Lardelli says that he commenced employment with Pars Transport Limited (“Pars”) on 1 March 2004.
2. He says Rasul Adjani, the company’s director, agreed to pay him \$750 in the hand per week and meal expenses per day. He was provided with a truck.
3. Mr Lardelli’s wages were paid weekly directly into the bank (ANZ). Payments of \$750 were made at first but, Mr Lardelli says, the payments fell into arrears on 14 May, 2 & 25 June and 2, 12, 16 & 23 July. He says he is owed wages in arrears. Mr. Adjani says he gave Mr. Lardelli payments in cash on occasions. Mr. Lardelli denies this.
4. Mr Lardelli says the truck was old and required regular oil and maintenance. He says it required a Certificate of Fitness (CoF) and the last time he drove it was when he took it into the garage for the CoF. He told the Authority that, from 14 May, when the truck went into the garage for repairs and the CoF, he was told to stay at home and wait. This is different to Mr.

Lardelli's earlier evidence, which was that he stayed at home to wait when he went home sick on 6 July until 13 July 2004. There is an unexplained discrepancy in the evidence on this point. I will comment further later.

5. Mr Lardelli was able to use a Fuel Card for the purchase of fuel and oil. He says that with Mr Adjani's agreement, he was able to obtain cash on the Fuel Card to pay for his meal allowance by using "miscellaneous items". Mr. Lardelli says that Mr. Adjani agreed to the arrangement after they could not get agreement on the timing and method of payment for the meal allowance. Mr. Lardelli arranged for some people he knew at different petrol stations to do this. He admitted that the card should not have been used in this way but explained that he considered it customary in the industry. Mr. Adjani denied he agreed to such an arrangement and says that he warned Mr. Lardelli about using the card in such a way. Mr. Lardelli denied receiving a warning. He says the card was subsequently replaced with an "All Purchase Card" for him to use and pay for meals.
6. Mr Lardelli says that he developed influenza in June 2004. He says he told Mr Adjani that he would drive the truck to Auckland, unload and get another driver to stand in for him, and go back to Otaki, to see his doctor. At the Authority's investigation, he said that he obtained a car from Mr Adjani to go home. It is common ground that Mr Lardelli purchased the car and paid a bank cheque dated 21 June 2004 for \$10,000, but Mr Adjani says the purchase price was \$12,000, and that the balance would be paid by deduction from Mr Lardelli's wages. Mr. Lardelli denies such an arrangement being agreed to.
7. Mr Lardelli says he took some sick leave early in his employment and five days between 6 and 13 July 2004. He says in the latter period he frequently telephoned Mr. Adjani and included the following examples.
8. On 4 July he telephoned to tell Mr Adjani he was sick and had a medical certificate. Mr Adjani denies this. A medical certificate was produced by Mr. Lardelli dated 7 July when he saw his doctor. He was unable to attend work from 6 to 13 July. Mr. Lardelli accepted that he had also taken some sick leave earlier in his employment that Mr. Adjani did not seem to know about.
9. On 11 July he telephoned Mr. Adjani to inform him that he was able to return to work on Tuesday. Mr Lardelli says he followed this up on 12 July with the company's line haul coordinator, to find out where his truck was, and to get the relieving driver to deliver it to him.

10. On 13 July he telephoned Mr. Adjani and was told to stay at home until another truck could be found. In the meantime Mr. Lardelli says that he learnt that some of his personal gear was at Mr. Adjani's place. He says that the relieving truck driver delivered the rest of his gear to him at home.
11. Mr Lardelli says that on 26 July he telephoned Mr Adjani, and Nicole Adjani answered, and told him that he was no longer required to work. She told me during the investigation meeting that she could not have answered the telephone because she was in Australia. She was asked to prove that she was in Australia at the time. Mr Lardelli says that he made another call later that day and Mr Adjani told him he was not needed any more.
12. Mr Lardelli then arranged for his representative to raise a grievance on 30 July and requested detailed records (letter produced).

The issues

13. The primary issues are:
 - Was Mr Lardelli an employee or owner/driver?
 - If he was an employee, what were the employment arrangements in regard to his wages, the meal allowance, hours of work and whether or not the position was casual or a fulltime permanent position?
 - Was Mr Lardelli dismissed?
 - If he was dismissed, was the dismissal justified and was it procedurally fair?
14. Also there are some factual issues, including the following:
 - Did Mr Lardelli have Mr Adjani's agreement to use the Fuel Card for fuel and oil and to obtain cash for the meal allowance by arranging to use the miscellaneous items?
 - Did Mr. Adjani warn Mr. Lardelli about improper use of the Fuel Card?
 - Was the work arrangement to include a deduction from Mr Lardelli's pay where he:
 - ❖ Would stay at home waiting for work (the employer would have it from early May and where Mr. Lardelli gave contradictory evidence of the timing)?
 - ❖ Would pay the balance for the purchase of the motor vehicle with his pay?

- Was Mr. Lardelli paid in cash?
- How much was the purchase price of the motor vehicle?
- If there are arrears, what sums are owed?
- When did Mr. Lardelli start staying at home to wait for work?
- Did Mr. Lardelli have a medical certificate on 4 July?
- What were Mr Lardelli's telephone calls about on 4, 11, 12, 13 and 26 July?
- Did Nicole Adjani and Rasul Adjani tell Mr Lardelli he was dismissed?

Was Mr Lardelli an employee or owner/driver?

15. I conclude Mr Lardelli was an employee. His employer was Pars Transport Limited. My reasons are as follows:

- There was no written employment agreement or contract of any arrangements between the parties.
- Mr Lardelli has been regularly paid by Pars Transport Limited.
- Mr Lardelli was provided with a truck to work in and he kept it at home.
- Mr Lardelli took sick leave during the period of his employment.
- Mr Lardelli was not in business on his own account. He did not carry out any other work in the period of his employment with Pars: from 1 March 2004 until 26 July 2004.
- Mr Lardelli completed a tax form consistent with an employee.
- Furthermore, it is more than likely Mr Lardelli gave up a fulltime job before working for better terms and conditions with Pars. This supports his claims and makes it likely he took on full time permanent work with Pars.
- It is not unusual for drivers in the industry to be employed as employees as well as independent contractors. Prior to his engagement at Pars he was an employee. On other occasions he had been a contractor.

What were the employment arrangements?

16. Mr Lardelli was paid \$750 on 5, 12, 18 & 26 March and 2, 8, 15 April 2004 and \$400 on 23 April and \$350 on 26 April 2004 (bank statements produced) (a total sum of \$6,000).
17. I hold that it was agreed he would be paid \$750 per week. There was no written authorisation for any deductions and in the absence of an employment agreement. There were no wages and time records produced despite request for them. Mr. Adjani denied that the wages were \$750 and says Mr. Lardelli was paid \$700. There is not one deposit in the bank statements for such a sum or any other record.
18. Mr Lardelli was permitted to have a meal allowance.
19. The bank statements also support the following wages being paid:
- | | |
|---------|---------|
| 14 May | \$500 |
| 2 June | \$600 |
| 4 June | \$800 |
| 18 June | \$1,500 |
| 25 June | \$600 |
| 2 July | \$600 |
| 12 July | \$500 |
| 16 July | \$500 |
| 23 July | \$500 |
20. The total payments received amount to \$12,100. Mr. Lardelli has been underpaid in the sum of \$2,100 over the time of his employment for 19 weeks (not including sick leave) that should have totalled \$14,250. Mr. Lardelli was not entitled to get paid for sick leave. This involves the medical certificate for time off work between 6 and 13 July and an estimate of 5 days in the earlier period of his employment and accounts for the 21 weeks period of his employment.
21. The evidence indicates a discrepancy on whether or not Mr. Lardelli had a medical certificate on 4 July when he says he telephoned Mr. Adjani and told him he was unwell. He certainly had a certificate by 7 July (produced).
22. It is unlikely that Mr. Lardelli was paid any make up wages in cash as Mr. Adjani says. It was never raised as a defence earlier. It is inconsistent with the respondent's thrust of other evidence and defences in this matter.

23. Mr Adjani told the Authority he has receipts for the payment of \$500 amounts on 14 and 30 April and 31 May that support his claim that Mr Lardelli owed money to pay on the motor vehicle. No receipts were produced. There are no written arrangements between the parties other than the existence of the bank cheque paid. Nothing further turns on how much the purchase price of the car was. I conclude it was not part of the employment arrangements, especially considering there was no employment agreement, which was the responsibility of the employer.
24. I further hold that the earlier payments of \$750 are consistent with the existence of a permanent fulltime position being offered to Mr Lardelli. This is supported by the use of a truck provided and that it was kept in Otaki. If the truck was given to a relieving driver it was reasonable for Mr. Lardelli to expect other arrangements to be made for him to return to work after his sick leave.
25. In the absence of any wage and time record being produced I accept Mr. Lardelli's evidence since he has been prejudiced by the absence of such a record and his claims have not been proved as incorrect.

Deductions without proper authorisation and or under payments in wages

26. I hold that if the sums not paid were deductions then they were made without proper written authority (as required under the Wages Protection Act). Otherwise in the alternative the wages properly due have been under paid. Mr Lardelli is owed \$2,150 for the arrears on his wages when they were deducted and or underpaid. I have derived this sum from the difference owing from what was paid and what should have been paid on the basis of \$750 per week for 19 weeks as claimed.

Was Mr Lardelli dismissed?

27. Mr Lardelli went on sick leave. Mr Lardelli did not have a truck at the time of the sick leave between 6 and 13 July 2004 as he left it in Auckland. It had been unavailable during a period of four weeks before his sickness to enable a CoF to be issued and repairs to the truck. Maybe the vehicle was back on the road and a relief driver using it by 13 July. Mr. Lardelli's evidence was not clear when he left the truck in Auckland. It is common ground there was a period when the truck needed repairs and had been left in Auckland and a relief driver engaged.

28. I conclude it is probable that Mr Lardelli was waiting at home from 13 July for arrangements to be made for him to work and a truck to be provided.
29. I can only conclude that Mr. Lardelli reasonably concluded that there would be no more work for him on 26 July. I accept his evidence that he was told that he was not required and not needed anymore by Nicole Adjani and Mr. Adjani. My reasons for accepting Mr. Lardelli's evidence is that the defences put up by Mr. Adjani have not been credible. Furthermore Ms. Adjani's evidence about being in Australia during the timing of the telephone calls involving Mr. Lardelli's dismissal was wrong. She was unable to recall that this was a fact a year earlier.
30. I have balanced the evidence from Mr. Lardelli and Mr. Adjani on whether Mr. Lardelli had a medical certificate on 4 July and whether he told Mr. Adjani he was unwell. Given that Mr. Adjani did not provide dates in his evidence about the different events that occurred I prefer Mr. Lardelli's evidence. There has been a discrepancy and mistakes in Mr. Lardelli's evidence but they are not enough to say his evidence is otherwise unreliable.
31. Finally a credibility issue emerged on whether Mr Lardelli and Mr Adjani had an agreement to use the Fuel Card for fuel and oil and to obtain cash for the meal allowance by arranging to use the miscellaneous items and whether Mr. Adjani warned Mr. Lardelli about the improper use of the Fuel Card? This remains disputed. Both Mr. Lardelli and Mr. Adjani added to their evidence during the investigation meeting about this matter. It would have been reasonable for them both to have included their explanations in their written statements. Thus, I conclude on this point that their evidence was wanting. The evidence does not affect my conclusion.

There is a personal grievance and there are remedies to resolve the problem

32. I conclude Mr Lardelli was dismissed without cause. Alternatively the employer's failure to provide Mr. Lardelli with work and make arrangements for the use of a truck by him was unjustified and affected Mr. Lardelli's employment to his disadvantage. Whichever way he has a personal grievance.
33. He is entitled to have his employment relationship problem resolved with remedies for a personal grievance. Fortunately he obtained new work quickly. In the absence of any employment agreement there was no notice arrangements. Mr. Lardelli would have been entitled to be paid from the time he was available for work, and in regard to his personal grievance, wages from 26 July until he obtained new employment on 9 August 2004. Given

that a claim for only 2 weeks notice was made it is fair to assess the amount as approximately two weeks wages in the sum of \$1,500. There was no contribution to off set. I am mindful that the employer has made claims that Mr. Lardelli deliberately caused damage to the truck. This is an entirely separate matter and does not impact on this problem.

34. He is entitled to claim compensation. I award him \$4,000 under section 123 (c) (i) of the Act for the impact of the matter on him. I have also been mindful that Mr. Lardelli was able to get work quickly and this matter did not set him back in that regard. He had been sick and waiting on Mr. Adjani to provide him with work from 13 July. There was not much evidence given by Mr. Lardelli about the impact of the employer's actions on him and consequently I have restricted the amount awarded to the lower end of the scale in such circumstances.

Breaches and Penalties

35. Pars Transport has been wholly responsible for the failure to provide Mr. Lardelli with an employment agreement when he started work. This is in breach of the Act. The action has been brought within twelve months of the breach (18 October 2004 SoP). Indeed, with the requirement to provide a written agreement, if the company really wanted Mr. Lardelli to be a contractor, it could reasonably have entered into clear written terms to avoid any conflict. It did not do so, and since the findings are unequivocal about Mr. Lardelli being an employee, the company's failure to provide such an employment agreement was deliberate, I hold. This attracts a penalty under the Act. Therefore Pars Transport Limited is to pay to the Crown as a matter of public policy a penalty of \$1,500.
36. Requests were made for wage and time records. There were no documents. This is in breach of section 130 of the Act. The action has been brought within twelve months of the breach. There has been no answer for the breach. I do not accept the defence that Mr. Lardelli was a contractor because it was not credible on the findings. This is a matter for a penalty of \$500.

Costs

37. Mr. Lardelli is also entitled to a contribution towards his costs. I assess the contribution at \$3,500 since he was represented by a lawyer, and preparation was involved as was travel and written submissions. I accept there have been disbursements in the region of \$250. Costs are to follow the event.

Conclusion

38. In conclusion Pars Transport Limited is to pay the sums of:

- \$2,100 to Hirine Te Kane Lardelli for the arrears on his wages when they were deducted and or underpaid without his authorisation. In addition interest of 7% per annum from the date of this determination until the payment is made is to be paid also.
- \$1,500 to Hirine Te Kane Lardelli for reimbursement of wages.
- \$4,000 to Hirine Te Kane Lardelli under section 123 (c) (i) of the Act for compensation.
- A penalty of \$1,500 to the Crown for the breach of the Act in failing to provide an employment agreement.
- A penalty of \$500 to the Crown for the breach of the Act for not keeping a wage and time record.
- \$3,500 costs and \$250 disbursements to Hirine Te Kane Lardelli.

P R Stapp
Member of Employment Relations Authority