



driver with ESL. It is common evidence that the interview took place with Ms Linda Bishop, the office manager for the company.

[4] The evidence of Ms Bishop is that the WINZ job broker had forwarded to ESL information regarding Mr Lye's relevant qualifications for the position. That is, he was a Class 2 driver with a dangerous goods (DG) endorsement.

[5] Ms Bishop says that during the interview, Mr Lye informed that he believed that the DG endorsement on his driver's licence may have lapsed and he would need to undertake a refresher course. As the DG endorsement is a statutory requirement for the driving position, Ms Bishop informed Mr Lye that ESL would be agreeable to assist with the cost of the refresher course; but the costs contribution would not apply if a full training course was required. Ms Bishop says that this is because the company has in the past, paid for a full course for drivers, but they have then left their employment at ESL. Ms Bishop states that Mr Lye accepted her explanation.

[6] On 29 April 2013, Mr Lye undertook a trial work day driving an ESL truck, accompanied by Mr Mike Madden, the company's senior driver, who subsequently, became Mr Lye's supervisor.

[7] After completion of the trial day of employment and following some discussion with Mr Madden and Mr Richard Gerritsen, the Managing Director of ESL, Ms Bishop offered Mr Lye employment with the company on 3 May 2013. The evidence of Ms Bishop is that there would be a 30 days trial period and this would subsequently be deducted from the 90 days trial period term that would be duly included in an employment agreement for Mr Lye (notwithstanding that such action is not legally permitted).

[8] On 6 May 2013, as requested by Ms Bishop, Mr Lye attended the ESL office. The evidence of Mr Lye is that he expected to sign an employment agreement, in addition to receiving his company uniform. Ms Bishop says that she informed Mr Lye that because the company was going through a restructure process, his employment agreement would not be available until the restructure was completed. It subsequently transpired that Mr Lye never received an employment agreement.<sup>1</sup>

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<sup>1</sup> This may be because the employment was of a very short duration.

[9] On 6 May 2013, there was some discussion about the hours of work, commencing at 7:00a.m. each day. Ms Bishop says that she informed Mr Lye that if he was unable to attend work, for any reason, he was to contact Mr Madden before 7:00a.m, to allow him to make alternative arrangements to cover the work for the day. Relevant to later events, this instruction is confirmed in the information contained in the *WELCOME TO EFFLUENT SERVICES* document that Mr Lye received, whereby there is a requirement to “phone” Mr Madden if absence due to sickness arises.

[10] Mr Lye commenced his employment with ESL on 13 May 2013.

### **The Dangerous Goods course**

[11] On 18 May, Mr Lye was informed that he and Mr Madden had been booked to attend a DG refresher course to take place on 25 May 2013. The AMS Group would conduct the course.

[12] Mr Lye contacted the AMS Group on 23 May 2013, two days before the course was to take place. His evidence is that he contacted the AMS Group because he was concerned that his DG endorsement may have expired. It was confirmed that the endorsement had expired, hence Mr Lye would be required to complete a full training course, rather than just a refresher course.

[13] Upon receiving this information, Mr Lye says that he immediately informed Ms Bishop. He was advised to book for the next full course, taking place on 31 May 2013.

[14] The evidence of Ms Bishop is that she reminded Mr Lye that it had been accepted at the job interview on 22 April 2013 that ESL would only pay for the refresher course, hence Mr Lye would have to pay for the difference in the cost between the refresher course and the full course. Ms Bishop says that Mr Lye was unhappy about this, even after she offered some assistance, whereby ESL would pay for the full course and then Mr Lye could reimburse the company by instalments deducted from his wages. Ms Bishop attests that she also offered the option of the company paying for half of the course, but Mr Lye refused this and stated that: “If I have to pay for this course, then maybe this isn’t the job for me”.

[15] Ms Bishop says that she was surprised by this statement given that Mr Lye had previously agreed that he would pay for the full course (if required) as he wanted the

job with ESL. Following a suggestion by Ms Bishop that Mr Lye should contact WINZ, to see if they would assist with payment for the course, Mr Lye took up that suggestion. He took a day off work to meet with WINZ but he was not paid for this day. WINZ agreed to give financial assistance for the DG course.

[16] On 25 May 2013, Mr Madden attended the DG refresher course, but because Mr Lye did not have the necessary DG endorsement, he was not able to work unsupervised. Nonetheless, he was paid for this day.

[17] On 27 May 2013, Mr Madden was sick and because Mr Lye could not work unsupervised, he was unable to work this day but was paid.

[18] The evidence of Ms Bishop is that around late May she had a discussion with Mr Madden for the purpose of obtaining an assessment of Mr Lye's work. Mr Madden informed that Mr Lye had expressed displeasure about the finishing times for the job. Mr Madden also informed that Mr Lye would need to improve his fitness levels as the nature of the job requires moderate to heavy manual labour at times, and Mr Lye appeared to be out of breath and could not keep up with the workload.

[19] Finally, Mr Madden informed that Mr Lye was unhappy about getting dirty. Ms Bishop says that Mr Lye was aware (following the trial day) of the type of work involved, i.e. working with effluent in its various forms. Ms Bishop says that she was going to discuss Mr Madden's concerns with Mr Lye at a suitable time and also discuss any other concerns that Mr Lye may have had.

### **The departure of Mr Lye**

[20] On Thursday, 30 May 2013, Mr Lye contacted Mr Madden by text message, informing he was sick and would not be at work that day. Mr Lye says that he was suffering from stomach cramps, diarrhoea, and vomiting.

[21] The evidence of Mr Lye is that on Friday, 31 May, he was still "quite ill" but took some medication that helped to reduce the diarrhoea, and the vomiting "lessened". Mr Lye then attended and passed the DG course and returned home to his bed.

[22] The weekend came to pass and Monday, 3 June 2013, was a public holiday (Queens Birthday). Mr Lye says that he remained sick for the three days of the long

weekend and was still unwell on Tuesday, 4 June 2013. He notified Mr Madden via a text that he would be absent from work.

[23] Upon the evidence of Mr Lye and Ms Bishop it is established that Ms Bishop telephoned Mr Lye about his absence, but there is substantial conflict in the evidence in regard to the discussion that took place.

### **The evidence of Mr Lye**

[24] In his written brief of evidence Mr Lye says that Ms Bishop telephoned him at home on the morning of 4 June 2013 and told him that: "... the job isn't working out and we will be leaving it at that".

[25] Mr Lye says that Ms Bishop told him that: "... alarm bells went off" in regard to his attitude and the way in which he had handled the DG licence endorsement issue. Mr Lye attests that Ms Bishop: "... quoted something about a 90 day trial period in my IEA". Mr Lye says that when he informed Ms Bishop he didn't have an employment agreement, her response was that: "... employment law allows us to let you go".

[26] Mr Lye says that he became "very upset" and told Ms Bishop that: "...this is a huge fuck around". He then hung up the phone.

[27] In his oral evidence at the investigation meeting Mr Lye referred to some further discussion with Ms Bishop on 4 June 2013. Mr Lye says that he told Ms Bishop that he was going to see his doctor regarding his illness and that her response was that he "didn't need to bother" going to a doctor as the job wasn't working out and that there was "no need" for him to come back to work.

### **The evidence of Ms Bishop**

[28] In her witness statement Ms Bishop refers to the telephone conversation with Mr Lye taking place on 5 June 2013, and that this followed a text sent to Mr Madden by Mr Lye notifying that he would not be at work that day. But I conclude that Ms Bishop is mistaken about this and on the weight of the overall evidence, it is established that the telephone conversation between her and Mr Lye took place on Tuesday, 4 June 2013.

[29] The evidence of Ms Bishop is that she inquired from Mr Lye as to what was happening with him as he had not been at work since the previous Wednesday (29 May 2013), although he had been fit enough to attend the DG course.<sup>2</sup> Ms Bishop attests that Mr Lye informed that he had been violently ill for the whole period with vomiting and diarrhoea. Ms Bishop asked Mr Lye if he had attended a doctor for treatment and to obtain a “note” as to when he would be returning to work. Mr Lye informed that he had not attended a doctor.

[30] The evidence of Ms Bishop is that she began to raise the points that Mr Madden had reported to her some days earlier. Ms Bishop says that at this point in the discussion Mr Lye began to get angry. And when she stated that she was concerned about his attitude towards his job and that he had refused the offer of help regarding the DG course, he became abusive “using expletives” and making her feel “extremely uncomfortable”. Ms Bishop’s oral evidence to the Authority is that Mr Lye was upset and swearing and he “used the f word quite a few times”. Ms Bishop says that when she reminded Mr Lye he was on a trial and that his attitude was unacceptable, his response was: “... this is absolutely a fuck around” and he was “not fucking happy”.

[31] Ms Bishop’s oral evidence is that she thinks that after Mr Lye became upset her “exact words” were: “I think we will leave it at that for now”. However, her written statement is that when she reminded Mr Lye that he was still on trial, and his attitude was unacceptable: “... before I could say anything further Mr Lye hung up the phone”. And then further into her witness statement, Ms Bishop says that: “...what I did say to Mr Lye was that during the trial period we were allowed to terminate his employment for any reason”.

[32] Ms Bishop told the Authority that she was quite “shaken up” at Mr Lye’s reaction. Following her discussion with Mr Lye, Ms Bishop rang Mr Andrew Thompson, the WINZ job broker. Ms Bishop says that she wanted to “clarify procedure” as WINZ had recommended Mr Lye.

[33] Mr Thompson made a file note at 2.45pm on 4 June 2013. This records:

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<sup>2</sup> Mr Gerritsen submitted to the Authority that he contacted the AMS Group and was informed that Mr Lye seemed to be in good health when he undertook the DG course.

Had a call from Marc's employer Effluent Services in Cambridge. They have had to give him notice to end his employment with them due to his unwilling attitude. No details on dates/last pay available yet. Calling employer to see when last date of work.

### **Post - 4 June 2013**

[34] Mr Lye did not return to work after the conversation between him and Ms Bishop on 4 June 2013. Ms Bishop says that Mr Lye did not return the company uniform and she was unsure if he had decided to "quit" or if he was coming back at all. When questioned by counsel for Mr Lye regarding whether she made any subsequent attempt to contact Mr Lye, Ms Bishop responded that because of the "abuse" she received from Mr Lye, she was not willing to contact him again. Ms Bishop says she assumed that Mr Lye would come in and get his wages on the Wednesday. I note that the wage and time records for Mr Lye have the following entries:

4/06/2013	Tuesday	Sick?
5/06/2013	Wednesday	Sick?
6/06/2013	Thursday	Did not turn up
7/06/2013	Friday	Did not turn up again

[35] The evidence of Mr Gerritsen is that it was his decision not to contact Mr Lye and he thought it would be better to "let him settle down" and Mr Gerritsen says that he was prepared to wait for Mr Lye to come back to work.

[36] The evidence of Mr Madden is that when Mr Lye did not turn up for work, he was under some pressure with the workload but was informed that the company would not be employing anyone else as Mr Lye might return. But after a few weeks working on his own, Mr Gerritsen made arrangements for his son to help Mr Madden for a while.

### **Analysis and conclusions**

[37] Given the obvious conflict in the evidence, it goes without saying that the primary question for determination by the Authority is: Was Mr Lye dismissed?

[38] In deciding this question I turn firstly to the evidence of Mr Lye as compared with that of Ms Bishop pertaining to the telephone conversation on 4 June 2013. My first observation is that there is considerably more evidence from Ms Bishop than there is from Mr Lye. Secondly, the evidence of Ms Bishop is contextually more credible compared with that of Mr Lye. For instance, Ms Bishop's evidence is that she opened the conversation by inquiring what was happening and why wasn't Mr Lye at work. This seems an entirely logical approach given that Mr Lye had been absent from work at that point for three working days, including the day of the DG course. On the other hand, the evidence of Mr Lye is that Ms Bishop immediately informed him that the job wasn't working out "and we will be leaving it at that".

[39] Generally speaking, I found the evidence of Ms Bishop to be consistent and credible, albeit it is clear that she was taken aback by Mr Lye's aggressive response to her and it is now acknowledged that it probably would have been prudent not to have made the comment about the trial period allowing ESL to terminate Mr Lye's employment for any reason, particularly given that this was not correct.

[40] Nonetheless, that does not excuse the reaction by Mr Lye and the language used by him. And it is established that it was Mr Lye who abruptly ended the conversation by hanging up the phone.

[41] A closer examination of the overall evidence reveals that in some regards, there is similarity between the recollection of Mr Lye and Ms Bishop. It is reasonably clear that some valid concerns were expressed by Ms Bishop in regard to what had been occurring during Mr Lye's short period of employment. But it must be said that Mr Lye's reaction was inexplicable and unacceptable.

[42] In the round, I conclude that Ms Bishop certainly made it quite clear to Mr Lye that the company had some serious concerns about his overall behaviour to date, and that some possible action was being contemplated given that ESL believed there was a valid trial period in existence.<sup>3</sup>

[43] However, I find that there is nothing in the language used by Ms Bishop that could reasonably be interpreted by Mr Lye that he been dismissed by her on 4 June 2013. Furthermore, it is Ms Bishop's evidence that she does not have the authority to dismiss any employee: only Mr Gerritsen does, as corroborated by him. And while Ms

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<sup>3</sup> The company now acknowledges that there was not a legally binding trial period in existence.

Bishop clearly played a prominent part in employing Mr Lye, the overall evidence is that the approval of Mr Gerritsen was required before an offer of employment was made.

[44] Having found that there is not sufficient evidence relating to the discussion with Ms Bishop, to support Mr Lye's assertion that he was dismissed by her on 4 June 2013, I now turn to ascertain if there is any other evidence that may support Mr Lye's contention that he was dismissed.

[45] To support his argument that he was dismissed, Mr Lye has referred the Authority to the file note compiled by Mr Thompson, the WINZ job broker, on 4 June 2013 (at para. 33). The evidence is inconclusive regarding when ESL became aware of the evidence of this file note. But it was obviously sometime after 4 July 2013, as evidenced by a letter from WINZ to Mr Lye enclosing a copy of the note. The evidence of Ms Bishop is that upon becoming aware of the content of the file note, whereby reference is made to ESL giving "notice" to Mr Lye, Ms Bishop concluded that this was not an accurate version of the discussion that she had with Mr Thompson on 4 June 2013. Therefore Ms Bishop sought to have the record corrected to reflect more accurately the content of the conversation, as evidenced by an email to Mr Thompson dated 28 August 2013. Mr Thompson replied via an email dated 3 October 2013 stating (among other things) that: "*The notes that were incorrect have been removed from his [Mr Lye's] file completely.*"

[46] Following the investigation meeting on 8 April 2014, counsel for Mr Lye provided an email trail regarding some contact between Mr Lye and WINZ in relation to his personal file. Apart from the fact that it appears that both parties may have attempted to influence various WINZ's officers, none of whom have given evidence to the Authority, I conclude that I should not place any weight on either the file note made by Mr Thompson on 4 June 2013, or the subsequent communications emanating from WINZ's offices. This is because all of this evidence is fraught to such an extent that it has no probative value.

[47] Having found that it is probable that Mr Lye was not dismissed, a further question arises: Did Mr Lye abandon his employment?

[48] As ESL appears to have come to the conclusion that Mr Lye did abandon his employment, I have given some thought to whether the company may have had an obligation to contact Mr Lye, to ascertain his intentions in regard to returning to work, before any conclusions could be reached about the continuation of the employment relationship. The Court of Appeal has stated that:

... clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment.<sup>4</sup>

But similar to the eventual finding of the Court of Appeal in *Ramsbottom*, the matter of whether Mr Lye abandoned his employment does not arise for determination by the Authority. This is because via a letter dated 21 June 2013,<sup>5</sup> Mr Lye raised a personal grievance claiming that he had been unjustifiably dismissed on 4 June 2013. He did not ask for reinstatement as a remedy and only sought monetary relief.

[49] Nonetheless, Mr Lye and ESL had obligations to each other under the good faith provisions of s.4 of the Employment Relations Act 2000 (the Act). Particularly relevant to the facts of this matter is s.4(1A):

The duty of good faith in sub-section (1) –

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;
- (c) ...

[50] It is clear that following the telephone discussion on 4 June 2013, Mr Lye failed to be responsive and communicative towards his employer in regard to his intentions. Equally, given the outcome of the telephone conversation, ESL failed to be responsive and communicative towards Mr Lye in regard to taking steps to ascertain his intentions. However, given the content of the grievance letter dated 21 June 2013,

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<sup>4</sup> *E.N. Ramsbottom Limited v. Chambers* 2000 2 ERNZ 97 (CA) at [26]

<sup>5</sup> This was 13 working days after 4 June 2013, coincidentally, exactly the same as the situation in *Ramsbottom*.

Mr Lye removed any doubt that may have existed, notwithstanding that I have concluded that he was not dismissed at all.

[51] But even if I was to find that Mr Lye had been unjustifiably dismissed, due to a failure on the part of ESL to contact Mr Lye shortly after 4 June 2013, under s.124 of the Act, I conclude that the actions of Mr Lye were so substantially blameworthy that it would not be appropriate to award any remedy. This is because he failed to be responsive and communicative as required by s.4 of the Act. Indeed, there is some evidence that he had no intention of returning to his employment at ESL.

[52] For example, there is the evidence of Mr Madden, who I found to be a forthright and credible witness. He gave evidence of Mr Lye informing that he was going to undertake an interview for another job. Mr Madden said that this surprised him given that Mr Lye had only been in his employment with ESL for a very short period of time. There is also the view expressed by Mr Madden that Mr Lye was not particularly happy about the work environment. I have also given consideration to the fact that Mr Lye has said that he was very ill suffering from stomach cramps, diarrhoea and vomiting from early in the morning of 30 May 2013, and even as of 4 June 2013 his condition, apparently, had not improved. Nonetheless Mr Lye never took any steps to attend a doctor even though, on his account, he had been very ill for six days. While I cannot be entirely sure, it seems to me that Mr Lye may have made up his mind that he was not going to return to his employment at ESL, and his actions in regard to claiming that he was dismissed on 4 June 2013, give the distinct impression that he wished to create a scenario whereby he could claim that he was dismissed and hence return to being paid a WINZ benefit; which I note was reinstated very shortly after 4 June 2013.

### **Determination**

[53] For the reasons set out above, I find that Mr Lye was not dismissed from his employment at ESL, rather, for reasons only known to him, he made a decision not to return to work there. It follows that the claim of unjustifiable dismissal fails and is dismissed.

[54] In regard to Mr Lye's claim for arrears of wages and holiday pay, it is accepted by ESL that the sum of \$285.00 is owing to Mr Lye. This consists of \$270 in

regard to wage arrears and holiday pay, and a further \$15 for reimbursement of a laboratory fee incurred by Mr Lye whilst taking a pre-employment blood test.

[55] The Authority indicated to ESL, that given that there was no dispute that this money is owing, as evidenced via a letter dated 9 July 2013 from Mr Gerritsen, inviting Mr Lye to pick up the sum of \$285 from the ESL office, then payment should be made to Mr Lye immediately following the investigation meeting. The Authority has no information as to whether this has occurred, but if it has not, then Effluent Services Limited is ordered to pay to Mr Lye the sum of \$285.00.

### **Costs**

[56] Given the outcome of this matter it is appropriate that costs should lie where they fall. It is so ordered.

**K J Anderson**  
**Member of the Employment Relations Authority**