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Maikuku v S.T.L. Linehaul Limited WA145/10 (Wellington) [2010] NZERA 762 (10 September 2010)

Last Updated: 16 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 145/10 5291528

BETWEEN GEORGE MAIKUKU

Applicant

AND S.T.L. LINEHAUL LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

G J Wood

Linda Nolan, for the Applicant No appearance by or for the Respondent

26 August 2010

10 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr George Maikuku, was employed by S.T.L. Linehaul (STL), for around 11 years. Mr Maikuku left STL and rejoined it several times during that period. Mr Maikuku claims that he was unjustifiably summarily dismissed when STL's Auckland manager and major shareholder, Mr Robert Pearson, told him over the telephone that he was *finished* for using the company truck as a taxi service, and that he was redundant. STL now appears to argue that the real reason for Mr Maikuku's dismissal was redundancy.

[2] STL did not attend and was not represented at the investigation meeting. When contacted, STL's sole director, Mr Shane Pearson, claimed that he had intended to attend but he was not well. He asked the Authority to be informed that the company had had *a real bad time and had to make Mr Maikuku redundant*. Apart from providing a letter setting out STL's position that Mr Maikuku was made redundant, this was the only contact the Authority had with STL, which did not provide a statement in reply or attend on the case management conference held on 14 May 2010.

[3] STL was also directed to provide statements in preparation for the investigation meeting and had the provisions of ss.181 and 182 referred to it. Despite this, no contact was made until, as noted above, an Authority support officer contacted Mr Shane Pearson at the time of the investigation meeting.

[4] I was satisfied that no good cause for STL's failure to attend or be represented had been shown. Mr Shane Pearson's claim of illness was not supported by any medical certificate, for instance. Pursuant to clause 12 of Schedule 2 of the Act, I therefore proceeded to act as fully in the matter as if it had been represented.

The Facts

[5] I have determined the facts set out below on the basis of my acceptance of the evidence of the applicant, Mr Maikuku, and his wife, Ms Linda Nolan, the only witnesses in the matter. Having questioned them on their written statements of evidence, and as against STL's claim that this was a genuine redundancy, I have no reason to disbelieve their evidence. Both appeared to answer my questions fully and frankly and I have therefore accepted their evidence in full.

[6] STL is, as its full name implies, a long haul trucking company. Mr Maikuku was closely associated with Mr Robert Pearson, the Auckland branch manager and major shareholder of STL, in both a business and personal capacity for over 11 years. There had been some problems in the relationship before, such that on some occasions Mr Maikuku had been dismissed, only to be contacted by Mr Robert Pearson a few days later to tell him to come back to work, which Mr Maikuku did.

[7] On 12 October 2009, Mr Maikuku had the day off in order to attend a doctor's appointment. However, he was informed by STL's sales manager, while he was at the doctor's, that he was needed at work that day. Mr Maikuku's depot was in Palmerston North, but he lived in Otaki. He attended the Palmerston North office from Otaki as directed, and prepared to work the rest of the day there, as he had been told. However, he was then told that he had to drive to Auckland, even though he informed STL that he had no spare clothes and did not have his medication for diabetes, which he needed with him.

[8] Once in Auckland, Mr Maikuku was required to drive back to Napier and then, the day after that, to Palmerston North. He arrived in the Palmerston North office around 5pm that night and unloaded the trailer from his truck. He told the Palmerston North manager that he was going to go home to Otaki in order to get his clothes and medication, which the manager would have known involved him taking the company truck. The manager told him that he was needed back early the next morning, but made no comment about him taking the company truck home to Otaki with him. I accept that Mr Maikuku felt that this trip was accordingly condoned by the Palmerston North manager, at least implicitly if not explicitly, and that there was nothing wrong in doing this, given that he had not been home for three days and needed to collect his food, medication and clothing that would be required for his trip starting the next morning. Such trips could often last a week before he returned home again, depending on the runs given to him.

[9] Having an early start the next morning, Mr Maikuku was in bed by 8pm. At 9.30pm he was rung by Mr Robert Pearson, who asked him where he was and what was he doing. Mr Maikuku told him that he was at home having his break. Mr Pearson then told him he was not to use the company truck as a taxi service. Mr Maikuku replied that he had to come home and get his clothes, food and medicine, to which Mr Pearson responded (using swear words) that he was not to use STL as a taxi service, that he had to get his stuff out of his truck, that the truck would be picked up and that he was finished. He stated *you're not fired George you're redundant*. Before Mr Maikuku could protest any further, Mr Pearson hung up.

[10] Ms Nolan wrote to STL immediately, asking for a written statement containing the reasons for Mr Maikuku's dismissal, a copy of his wage and time records and a copy of his personal file. In response, she received a letter dated 14 October stating:

It is with regret that effective today we have to terminate your employment contract by way of redundancy.

Due to the economic climate we need to streamline our operation.

[11] After receiving the redundancy letter, Mr Maikuku asked for the reasons for the disestablishment of his position, noting in particular that a new driver had been employed at the Palmerston North yard only a day previously.

[12] In response, Mr Robert Pearson wrote on 16 October 2009, stating that he could not contact Mr Maikuku about an over-dimensional load and that when he found out that he was in Otaki instead of Palmerston North, this was not acceptable. He finished by stating:

Threatening me with Court action etc has left me with no option but to lay a complaint with the Palmerston North Police for theft as a servant.

[13] The Police declined to take that complaint further, or even interview Mr Maikuku, when the Palmerston North manager, who was required to lay the complaint, explained the circumstances to the Police.

[14] Mr Maikuku was able to find part time work within a couple of weeks and then full time work a couple of weeks after that, but has not been earning the same income in his new permanent position that he was earning at STL.

[15] Mediation was not directed in this matter because of the failure of STL to respond to Mr Maikuku and the Authority, and the matter therefore falls to the Authority to make a determination.

Determination

[16] In the absence from any direct evidence from STL to support its claim that this was a genuine redundancy, it has failed to persuade me of such a claim. For instance, such claims are normally supported by financial records or other accounting information which show the pressures a company is under, or alternatively evidence of some form of restructuring that has occurred. None of that was, of course, provided in this case. Furthermore, the fact that another staff member was employed in the same office within a week of Mr Maikuku's alleged redundancy is also evidence that negates STL's claim.

[17] I also note that STL's telling Mr Maikuku of his alleged redundancy out of the blue and over the phone, even if a genuine decision, is quite inconsistent with the lawful requirements over redundancy, which almost always requires consultation with an affected employee. Furthermore, a later email from Mr Pearson raises another potential issue of concern to STL that has nothing to do with redundancy. It is also unusual to lay a complaint with the Police for theft as a servant in relation to a genuine redundancy, or even in relation to a worker taking a truck home for the night, which is exactly what STL subsequently did.

[18] I conclude that Mr Maikuku was summarily dismissed because he had allegedly taken the company truck home without permission. I accept that in circumstances where it is made clear to an employee that they are not allowed to take a company vehicle home and they do so, then that may justify dismissal. In this case, however, Mr Maikuku clearly had at least the implicit approval of the Palmerston North manager to take the truck home. Furthermore, in the particular circumstances of this case, no fair and reasonable employer would criticise an employee for taking the truck home in order to collect vital medication and necessary clothing and other provisions. After all, he had been required, on his day off, to come to work and was then required (without notice) to do three days' work out of town, before being expected to return within a few hours for another week's work out of town.

[19] Mr Maikuku's explanation is quite clearly believable and would, I conclude, have been accepted by any fair and reasonable employer, had Mr Maikuku been given the opportunity to answer the concerns of STL.

[20] A fair and reasonable employer would also have set out clearly the allegations against Mr Maikuku and given him a full opportunity to explain, in the context of a disciplinary meeting whereby he knew the allegations he was facing. None of this occurred.

[21] Furthermore, for the reasons given above, there was no justifiable cause for the dismissal of Mr Maikuku, who had acted properly throughout. In fact, Mr Maikuku would have been well within his rights to have declined to have even started work on his day off, which is what led to the later issue over him returning home to Otaki.

[22] I therefore conclude that what STL did and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. Therefore Mr Maikuku's dismissal was unjustified.

Remedies

[23] Mr Maikuku provided evidence of the wages he has lost since he was dismissed. I accept the evidence that although he has done everything to mitigate his loss of employment, he has lost remuneration in the sum of \$11,690 net to date, taking into account all his earnings and making allowance for the 1% weeks' extra pay made by STL.

[24] Mr Maikuku has also suffered greatly as a result of his dismissal. Although he obtained further employment quite quickly, it was not at the same level as he had been earning before, and he worried about being able to provide properly for his family. He is committed to the trucking industry and, as Ms Nolan described it, it was his first love. He has been very embarrassed about news of his dismissal being spread about the trucking community and the fact that he has lost a number of friendships since his dismissal over comments he attributes to the Pearsons.

[25] Mr Maikuku was also very embarrassed about finding out that a complaint had been laid about him with the Police as a thief, which he justifiably considered to be a very humiliating complaint to be made, and which others in the industry were told about.

[26] Ms Nolan's evidence was very clear that Mr Maikuku was *shattered* as a result of the dismissal, that he closed down, that he got down on himself, that he had very high highs and very low lows as a result, and that he is just not that happy any more.

[27] I conclude that this dismissal has had a very serious impact on Mr Maikuku and that compensation of \$10,000 under s.123(1)(c)(i) is therefore appropriate.

[28] For reasons given above, neither of these remedies should be reduced in any way for contribution. Mr Maikuku was dismissed for taking his truck home when he was given at least implicit approval to do so. In the circumstances it was quite an understandable action for him to take, given that he had been required to work for three days straight out of town after he had been required to come back from leave early without notice. In particular, Mr Maikuku needed his diabetes medication and therefore had to get home somehow.

Costs

[29] Mr Maikuku's only direct expense that can be claimed through the Authority is the \$70 filing fee.

Conclusion

[30] Mr Maikuku was unjustifiably summarily dismissed by S.T.L. Linehaul Limited. I therefore order the respondent, S.T.L. Linehaul Limited, to pay to the applicant, Mr George Maikuku, the following sums:

- \$11,690 net in lost remuneration;
- \$10,000 net in compensation under s.123(1)(c)(i); and
- \$70 net in expenses.

G J Wood
Member of the Employment Relations Authority

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