

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 411
5621332

BETWEEN DUNCAN MARTIN
 Applicant

A N D WAIHEKE MOVERS AND
 FREIGHT LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Joanne Paul, Director of Respondent

Investigation Meeting: 13 December 2016 at Auckland

Written Record: 15 December 2016

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Introduction

[1] Waiheke Movers and Freight Limited (Waiheke Movers) is a freight moving company based on Waiheke Island.

[2] The applicant, Mr Duncan Martin and his brother, Scott, had their own company and Ms Joanne Paul, the owner of Waiheke Movers, purchased a truck from their company.

[3] Following dissolution of the company, Mr Martin approached Ms Paul about a job with Waiheke Movers. He was subsequently employed for approximately seven weeks by Waiheke Movers as a driver from 4 January 2016 to 26 February 2016. Mr Martin says that during his short employment by Waiheke Movers he was constantly humiliated and reprimanded by the owner, Ms Paul, and that this led to his resignation on 22 February with effect from 26 February 2016. Mr Martin says he was

unjustifiably constructively dismissed and claims compensation under the Employment Relations Act 2000 (the Act). Mr Martin also claims arrears of wages and expenses he says remain owing to him by Waiheke Movers.

[4] Waiheke Movers dispute the claims and says it was not aware of the constructive dismissal claim. It also says Mr Martin failed to account to it for cash received for jobs undertaken by him while employed by it and property damaged by it. As a result, it says rather than Waiheke Movers owing Mr Martin money, he owes it money.

The employment relationship problem

[5] Mr Martin was employed pursuant to an individual employment agreement. The relevant provisions are as follows:

4. Times and hours of work

4.1 The Employee will complete time worked on job site/s in book provided.

6.2 Employees will be emailed details of their wage/salary calculations.

6.4 The Employer is entitled to make a rateable deduction from the Employee's pay for time lost through the Employee's own fault, for damage caused by the Employee's negligence or for any time the Employee is absent from work without good reason.

7. Expenses

7.1 The Employer shall reimburse the Employee for all reasonable travel, accommodation and other expenses that the Employee properly incurs in the exercise of duties.

11.1 **Public Holidays.** Where the Employee is required to work on any part of a public holiday the Employee is entitled to time and a half pay rate plus an alternative holiday ...

[6] Mr Martin was employed at a rate of \$30 gross per hour, and hours of work were to be at least 30 hours each week.

[7] Following employment Mr Martin had a day on 4 January 2016 working with Ms Paul to understand processes, administrative and other employment matters relating to the position. Mr Martin acknowledges that he was provided with a book in

which he was to write his hours of work and details with regard to each job on which he was working.

[8] Mr Martin says he did not understand the importance of the book to Ms Paul. Ms Paul says she repeatedly requested Mr Martin to fill in his hours and job details because she was not able to calculate his pay without this information, but he failed to do so for the first month of his employment. On 5 February Mr Martin sat down and filled in his time book for work from 5 January, so almost exactly a month's work. The book was provided to the Authority to consider.

[9] Ms Paul says she went through the book and where there seemed to be an inflation of time, she spoke to other workers on the particular job at the time. Ms Paul then paid Mr Martin for wages for the time she believed was owing.

[10] On 5 February, after Mr Martin had completed writing up his time book and Ms Paul had gone through it, she immediately arranged for payments to be made for the weeks of 8 and 15 January 2016. These were paid directly into Mr Martin's bank account, details of which were provided to the Authority. Subsequent wage payments were made to Mr Martin by direct credit to his bank account and these were also viewed by the Authority.

[11] Computer generated payslips were provided to the Authority from Waiheke Movers detailing Mr Martin's hours of work, rate of pay, and KiwiSaver payments. These payslips were emailed to Mr Martin each week. However, Mr Martin denies receiving the emails.

[12] There were various performance issues during the course of Mr Martin's employment and these were raised with him by Ms Paul. But on no occasion were written warnings or, I find, were any warnings at all issued.

Waiheke Movers' losses

[13] Ms Paul seeks to recover losses from Mr Martin which she says were caused by his negligence and carelessness. Ms Paul has not paid Mr Martin his final pay, holiday and last two weeks' wages because she says the losses suffered by Waiheke Movers as a result of Mr Martin's negligence far outweighs the moneys that Waiheke Movers owes to him.

Cash Jobs

[14] During the course of his employment, Mr Martin introduced Ms Paul to two websites which he thought would assist the business and help it to grow. The first was ‘Backload Moving’ and the second “Backload for You”.

[15] Ms Paul and Mr Martin discussed an arrangement whereby customers from each website would be contacted and offered Waiheke Movers’ services. Jobs totalling \$5,160 were obtained through those sites. On most occasions Mr Martin was paid cash for the jobs. A list of the jobs and the cash paid has been provided to the Authority. Mr Martin says he did not issue receipts for cash received by him , rather he wrote them out “received” next to each job in his own diary. The diary was provided to the Authority and it was extremely difficult to follow.

[16] From each cash amount, Mr Martin deducted related expenses and, he says, gave the balance to Ms Paul. Ms Paul says she refused to take cash from Mr Martin without a breakdown of jobs and agreed related expenses. Despite asking, she says this was not provided to her. Ms Paul says of the \$5,160 cash, she received \$900 and that Mr Martin did not account to her for the balance.

[17] It appears that there is a dispute as to how much cash Mr Martin received and whether the whole amount, after deduction of expenses, was in fact paid to Ms Paul. From the documentary evidence it is too difficult to establish what was received and paid. However, the issue for the purposes of this matter relates to the processes and I will return to that later.

Resignation

[18] It appears that on the weekend of 20 and 21 February, Mr Martin felt that he had had enough and took advice from a person he knew in human resources in a large company.

[19] On 22 February 2016, Mr Martin gave a letter of resignation to Ms Paul and sought wages, including wages at time and a half. This, Mr Martin says, was following advice received.

[20] In his letter of resignation, Mr Martin said:

Joanne,

I am disappointed that we have not been able to work out our differences ...

[21] Mr Martin remained in employment for the rest of the week and finished on 26 February 2016.

Unjustified constructive dismissal claim

[22] On the balance of probabilities, I do not consider this claim to be adequately made out.

[23] Mr Martin gave evidence of his anxiety and depression, but this was a condition he has suffered from prior to employment with Waiheke Movers.

[24] For there to be a constructive dismissal, the following three elements must be present¹:

- (a) The employee is given a choice of resignation or dismissal.
- (b) The employer has followed a course of conduct with the deliberate purpose of coercing an employee to resign.
- (c) A breach of duty forces the employee to resign.

[25] I find none of these elements to be present.

Arrears of wages claim

[26] Mr Martin provided the Authority with a schedule of hours he says he worked and calculated some at a daily rate and some at time and a half. This was not agreed.

[27] Time and a half was payable for work on public holidays only according to Mr Martin's employment agreement. Mr Martin accepted he had not sought time and a half during his employment, that it was only after he decided to resign that he claimed that amount.

¹ *Auckland Shop Employees Union v. Woolworth (NZ) Ltd [1985]2 NZLR 372*

[28] I accept Ms Paul's evidence that the only wages that remain due are amounts that she accepts are owing for the period 12 to 26 February 2016, together with holiday pay.

[29] Ms Paul says these sums were not paid because, amongst other things, Mr Martin damaged vehicles, property and caused her loss during his short period of employment. Further, Ms Paul says Mr Martin paid himself for cash jobs for which he did not account to the company and made deductions which were not consented to in respect of the cash jobs.

[30] Waiheke Movers is liable under the employment agreement to pay reasonable expenses that an employee properly incurs in the exercise of their duties.

[31] Mr Martin acknowledged that expenses for items such as alcohol and food were not reasonable and that he had not obtained consent before incurring such expenses. I find those expenses not properly incurred. However, I do find that a number of items which Mr Martin has provided details of as expenses that he incurred to be payable and these appear to me to relate directly to his employment. I do not intend citing all of them, but some, for example diesel mileage, driving log books, are items which were proper expenses.

[32] In that regard, after deduction of items which I do not consider to be reasonable items as referred to above, I consider expenses of \$2,773.91 to be payable as proper business expenses. The schedule the Authority was provided with by Mr Martin has a total of \$2,936.74 owing as expenses. However, in my view the items such as Alleycat café, Levin Sports Bar and Countdown Ferrymead, were not properly incurred and are not payable.

[33] With regard to the cash jobs, it was the responsibility, in my view, of Waiheke Movers to ensure a proper system was in place to monitor jobs coming in and payments being made. No proper process was undertaken by Waiheke Movers before making the unilateral decision to hold Mr Martin responsible for losses and accordingly to withhold wages and final pay.

[34] I am not prepared in this determination to make findings in relation to losses which Waiheke Movers say they incurred as a result of Mr Martin's actions. This is a matter that requires a process and it is clear that no process was undertaken before a

decision was made that Mr Martin was responsible for all losses which Ms Paul seeks to offset.

[35] On the balance of probabilities, Waiheke Movers owes Mr Martin wages totalling \$2,241.34 together with holiday pay of \$558.34. The total of these two sums amounts to \$2,799.68. I also order the expenses of \$2,773.91 to be paid to Mr Martin. The total of all amounts is \$5,573.59 which is to be paid by Waiheke Movers to Mr Martin within 21 days of today's date.

Costs

[36] Neither party was represented. Accordingly, no order of costs is made.

Anna Fitzgibbon
Member of the Employment Relations Authority