

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 287/07
5078918

BETWEEN HENRY MAXWELL
 Applicant

AND TREVOR THOMAS
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: No appearance for Mr Maxwell
 Mr Thomas in person

Investigation Meeting: 14 September 2007

Determination: 17 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Maxwell lodged this problem in the Authority in February 2007. He claims that he was unjustifiably dismissed on 1 December 2006. Mr Thomas denies dismissing Mr Maxwell at all.

[2] This matter has been set down for an investigation meeting without the parties having been to mediation. Mr Maxwell failed to comply with a direction to mediation dated 26 March (attached.) My Minute of 24 May (also attached) sets out that background.

[3] Unfortunately, Mr Maxwell did not attend the investigation meeting either. When he failed to arrive at the start time of 10.00am the Authority support officer telephoned him and (over the course of two separate calls) established from him that he had been served with notice of the meeting but had overlooked it. He advised her that he made another commitment but provided no details of this. He requested that the investigation meeting be rescheduled. On my instructions she advised that the start time could be delayed in order to enable him to travel in however the meeting would

proceed today. He responded that he would not be attending. I proceed therefore to determine the matter without having heard from him, on the basis of evidence taken at the meeting of 14 September 2007.

[4] The first issue for determination was whether Mr Maxwell was dismissed.

Was Mr Maxwell dismissed?

[5] Mr Maxwell and Mr Thomas live next door to each other and had already known each other for some time when Mr Thomas hired Mr Maxwell as a driver in February 2006. The agreement between them was initially expressed to be casual in nature but by late 2006 Mr Maxwell was working long hours every week and I am satisfied that the employment relationship had effectively become permanent.

[6] On Friday December 1 Mr Thomas's "2IC" told him that Mr Maxwell had telephoned the office and said that he needed to go to Australia urgently. After work that day Mr Thomas and Mr Maxwell spoke at home. Mr Maxwell confirmed that he was going to Australia as soon as possible as his father was ill. He said that he was not sure exactly how long he would be away, but probably three or four days. Mr Thomas understood that Mr Maxwell left the next day.

[7] Mrs Thomas, who was good friends with Mr Maxwell's partner, heard part of the conversation and gained the impression that Mr Maxwell might be planning to resign. Over the weekend (2 and 3 December) she mentioned this to Mr Maxwell's partner. Mr Maxwell telephoned Mrs Thomas a day or two later and confirmed that he did not plan to resign. He rang again in a further day or two and told her he was still not sure when he would be back, but he thought in the next week. Mrs Thomas asked him for a contact number but he did not provide her with one. In the second conversation she told him that since he would obviously need money to manage on, she could pay his holiday pay. She told me he seemed happy with this suggestion. She also told me there was no pressure on him to return in a hurry since Mr Thomas had engaged a relief driving service to cover the period while Mr Maxwell was away.

[8] Mrs Thomas did go ahead and arrange for all Mr Maxwell's holiday pay (which amounted to between one and two weeks pay) to be paid in to his account on 6 December.

[9] Mr and Mrs Thomas say that they neither saw nor heard from Mr Maxwell again until Mr Thomas glimpsed him in the grounds of the next door property on about 18 December. Mr Thomas told me at that stage he was expecting Mr Maxwell to let him know when he would be back at work and planned to talk to him about putting him on night shift.

[10] However, he says he did not hear from Mr Maxwell at all. Mrs Thomas and Mr Maxwell spoke on one occasion on 23 December but the conversation was entirely unrelated to employment matters.

[11] Then, in a letter dated 13 January, Mr Maxwell asked Mr Thomas for wage slips, an IR12, a copy of his employment contract and "*A written statement as to why my employment was terminated.*"

[12] Mr Thomas replied in writing on 19 January, saying:

"regarding the ceasing of your employment.

Your employment with my company has not been terminated so I am confused as to why you have requested a statement regarding this...

Due to the indefinite nature of your trip I paid out your holiday entitlements owing and the wages from the week before. I am aware that you have now returned home (only because we are neighbours) but to this date you have not had any conversations with me regarding your employment, nor have you advised me that you are now available to work."

[13] Mr Thomas told me he would have been very glad to have Mr Maxwell back, even at this stage. He said he was short of drivers and the relief driving service which covered Mr Maxwell's absence was very expensive.

Determination

[14] From what Mr Maxwell has said in his statement of problem it would appear that he construed the payment of his holiday pay and the fact that a relief driver was covering his run, as indicating that his job was gone. However because I have been unable to hear his evidence I cannot be sure. I was told that the parties were once good friends as well as neighbours. In these circumstances it is particularly unfortunate that Mr Maxwell did not attend and take up an opportunity to clarify what may have been a simple misunderstanding.

[15] On the basis of what I have heard, I have concluded that Mr Maxwell jumped to conclusions prematurely. I accept that he was paid his holiday pay because he was on leave, and that a relief driver was engaged temporarily to cover him because it was the busiest time of the year. I conclude that he was not dismissed. I can do nothing more to assist with this employment relationship problem.

Yvonne Oldfield

Member of the Employment Relations Authority