

Determination Number: WA 50/06

File Number: WEA 272/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Trent Nuku (applicant)
AND	Awa Mira Freightline Limited (first respondent)
AND	Bryan Shackleton (second respondent)
REPRESENTATIVES	Mike Andrews for the applicant No appearance by or for the respondents
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North, 27 March 2006
DATE OF DETERMINATION	28 March 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

Mr Nuku says that the respondents either breached his employment agreement or unjustifiably dismissed him – statement of problem (SOP) received on 18 July 2005. He is seeking lost wages, compensation for humiliation, etc of \$10,000, costs and any other order the Authority deems just.

The respondents deny the allegations and say, amongst other things, that Mr Nuku's performance was unsatisfactory and that he quit his employment – statement in reply (SIR) received on 4 August.

Mediation did not settle this employment relationship problem.

Investigation

This employment relationship problem was originally scheduled to be investigated in Palmerston North on 18 January 2006. In December 2005 advice was received from the respondents' recently appointed counsel, Ms Marrian Leca, that she was acting on their behalf. Because of leave commitments, Ms Leca sought an adjournment in respect of the 18 January fixture. Counsel for the applicant, Mr Mike Andrews objected. Because Ms Leca was an experienced counsel and known to the Authority, I formed the view that her involvement would be constructive: I granted the request.

Unfortunately, despite Ms Leca's efforts to obtain to facilitate a settlement, she advised by email dated 22 February 2006 that she had not heard back from her clients and now regarded herself as not having instructions to take the (offer) matter further.

I next directed this employment relationship problem to be set down for an investigation in Palmerston North on Monday 27 March 2006. A letter dated 28 February enclosing a notice of investigation meeting was forwarded to the parties. The Authority's track & trace system records the copy to the respondents as being delivered on 1 March when it was signed for by "*Shackleton*".

By telephone advice received on 16 March Ms Leca advised she could no longer represent the respondents because of, unfortunately, her ill-health.

Consistent with the original record of preliminary conference dated 21 October 2005, the applicant usefully provided witness statements in advance of the investigation. No statements were received from the respondents, despite a written reminder by an Authority support officer dated 9 December.

Because of the respondents' longstanding awareness of, and participation in, these proceedings, their instruction to counsel to represent them in the same and on the basis of the notice of investigation having been signed off as received on 1 March, I was satisfied it was appropriate for me to proceed – in the absence of the respondents or any explanation for their absence – to investigate this problem on 27 March 2006: s. 160 of the Act applied.

Background

I am satisfied from the SOP & SIR and the applicant's written statement that the following is an accurate summary of relevant background material.

Mr Nuku signed off an individual employment agreement with "*Awa Mira **Freight Ltd***" on 30 March 2005 (emphasis added, attachment to SOP) as a driver delivery person. The agreement is not signed off in the space provided for the employer.

Mr Nuku started working for the respondents from around 3 April 2005. At that time he had direct contact with the second respondent, Mr Bryan Shackleton.

Awa Mira Freightline Limited was incorporated on 18 May 2004. It has one director, Mr Bryan Keith Shackleton. A NZ Companies Office search as recent as 27 March 2006 indicates that it is still trading: the last document registered was an online annual return dated 16 May 2005.

Mr Nuku says that, on 14 April, he was not contacted by Mr Shackleton as previously arranged in respect of the arrival time of the (supply) truck from Huntly. Thinking something was wrong Mr Nuku went to the depot to find the delivery trucks were already being loaded. Concerned about what was happening, Mr Nuku telephoned Mr Shackleton: the latter advised the applicant he was suspended.

Shortly afterward Mrs Nuku telephoned Mr Shackleton to ask if her husband was dismissed: she says Mr Shackleton advised her that the applicant was "*suspended indefinitely*" (par 7, SOP). Mrs Nuku asked for that advice in writing: no written advice was ever received.

Following further telephone contact on 16 April, and by letter dated 26 April, Mr Nuku raised a personal grievance with the respondents (attachment to SOP).

In a statement attached to the SIR and signed off by “*Bryan & Dorothy Shackleton C/- Awa Mira **Freight Ltd***” (emphasis added) the respondents advance their version of relevant events. They confirm that it was Mr Shackleton who employed the applicant. Amongst other matters, the Shackletons were critical of the applicant’s performance but also say that Mr Nuku advised of his intention to quit (page 4 of the statement attached to the SIR). However, the same narrative also records Mr Shackleton telling the applicant that, because of his inappropriate behaviour, lack of experience, because he lied at the interview, etc his services were no longer required. That advice was, Mr Shackleton says, repeated by him shortly afterward when the applicant later reported for work. Mr Shackleton says he posted a letter to Mr Nuku’s address on 15 April confirming his “*suspension*” (page 5, above). The letter is described as being attached to the SIR: however, there is no such attachment to the Authority’s copy and the applicant denies ever receiving or seeing a copy.

The statement attached to the SIR also advances Mr Shackleton’s argument that it was pointless Mr Nuku bringing a claim as the applicant “*hadn’t returned his signed contract to me for countersigning, regardless of my numerous requests for him to do so*” (page 5, above). No legal argument has been advanced by the respondents in support of this novel claim.

Discussion and Findings

Who is/are the employer/s?

Despite the individual employment agreement referring to “*Awa Mira Freight Ltd*” – which is not a legal entity – I am satisfied that the present respondents are correctly identified, jointly and severally, as the applicant’s employer. This is because of the doctrine of undisclosed principal (see *Cuttance v Purkis* [1994] 2 ERNZ 321, etc): Mr Shackleton never made clear the true identity of the employer to Mr Nuku at the outset of the latter’s employment.

It is also because the Shackletons and their counsel have never disputed Mr Nuku's claims against Awa Mira Freightline Limited and its director.

Mr Shackleton is the sole director of that Company and his role in employing (and, I find, unjustifiably terminating) the applicant is clearly set out in the respondents' SIR.

Unjustified Dismissal?

35. I am also satisfied that Mr Nuku was unjustifiably dismissed by the respondents for the following reasons.
36. I have no reason to doubt the evidence provided by Mr Nuku and his wife uncontested as it was at the Palmerston North investigation on 27 March.
37. My finding that Mr Nuku was unjustifiably dismissed is also supported by the respondents' contradictory account of the termination of his employment. While Mr Shackleton claims Mr Nuku quit his employment it is clear from the former's narrative that he had already formed the view the applicant should go and that, when the applicant later reported for work, he was sent away with the advice that "*his services were no longer required*" (page 4 of the attachment to the SIR). In other words, Mr Shackleton did not rely on the applicant's purported resignation to not continue his employment.
38. It is equally apparent from reading the SIR that Mr Shackleton had quickly formed a negative view of the applicant's work performance. However, I find that these matters were never put to Mr Nuku as performance issues such that, within a reasonable period, he might correct. The applicant was terminated arbitrarily, without warning and without specificity as to the claimed shortcomings in his performance.
39. Finally, I find the applicant a more credible witness as to relevant events. I reach this conclusion for the following reasons: Mr Shackleton deliberately blurred the circumstances of the applicant's termination by referring to it as a "*suspension*" (page 5 of the attachment to the SIR) when in fact he had clearly dismissed Mr Nuku. Mr Shackleton also failed from the outset to co-operate with the Authority's efforts to progress this employment relationship problem: in particular he did not make himself

available at the agreed time for the telephone conference call, employed obscene language in a subsequent telephone conversation with the Authority, said he was selling the business while failing subsequently to provide any evidence of the same, said he would call the Authority back by telephone later but failed to do so, failed to provide witness statements as required by the record of preliminary conference and – via his counsel – failed to enter into genuine effort to settle this matter having instructed Ms Leca to initiate the same.

40. I am also satisfied that the latter amounts to a deliberate and obstructive slowing down of the Authority's investigation process by the respondents when they clearly never genuinely intended to attempt to settle this matter. The respondents have acted with bad faith throughout these proceedings.

Remedies

41. Mr Nuku seeks compensation of lost wages totalling \$12,560 gross (annual wages of \$32,656 divided by 52 weeks X 20 weeks' unemployment). He also claims compensation of \$10,000 for humiliation, etc. Mr Nuku gave compelling evidence of both his unsuccessful attempts to find fresh employment until 5-months after his dismissal, and of the impact his dismissal had on him and his family.
42. In all the circumstances I am satisfied that both claims are reasonable and should succeed: ss 123 (1) (c) (i) & 128 (3) of the Act applied.

Contributory Fault

43. There is no evidence of Mr Nuku's actions contributing to the situation that gave rise to his personal grievance: s. 124 of the Act applied.

Costs

41. At the investigation Mr Nuku claimed costs of \$2,000, excluding the costs of his unsuccessful mediation. Additional costs resulted, I find, from the respondents' late appointment of counsel and instruction – and abandonment of the same – to Ms Leca

to pursue a settlement. I am therefore satisfied that the sum of \$2,000 amounts to a fair and reasonable contribution to Mr Nuku's legitimate legal costs.

Determination

42. For the reasons set out above I find in favour of the applicant, Trent Nuku's, claim that he was unjustifiably dismissed by the first and second respondents, respectively Awa Mira Freightline Limited and Bryan Keith Shackleton.
43. The respondents are therefore, jointly and severally, to pay to Mr Nuku the following remedies:
 - a. Lost wages – the sum of \$12,560 gross (twelve thousand and five hundred and sixty dollars gross), i.e. annual wages of \$32,656 divided by 52 weeks X 20 weeks' unemployment;
 - b. Compensation for humiliation, etc – the sum of \$10,000 (ten thousand dollars);
and
 - c. Legal costs of \$2,000 (two thousand dollars).

Denis Asher

Member of Employment Relations Authority