

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Tom Page (applicant)
<b>AND</b>	Masta Maintenance Services (NZ) Limited (respondent)
<b>REPRESENTATIVES</b>	Stephen Frawley for the applicant No appearance by or for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION MEETING</b>	Wellington, 17 May 2005
<b>DATE OF DETERMINATION</b>	19 May 2005

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. Tom Page says he is owed unpaid wages and damages by the Company and that it actually or constructively dismissed him – statement of problem received on 2 December 2004 and as developed in the Authority’s investigation on 17 May 2005. He seeks reimbursement for lost wages, damages, compensation for humiliation, etc of \$10,500 and costs.

2. The Company has never filed a statement in reply.
3. The parties underwent mediation in respect of this employment relationship problem but it remained unresolved.
4. In a telephone conference on 10 February 2005, agreement was reached by the parties on a one-day investigation in Wellington on 17 May. The respondent also agreed to file its statement in reply by 3 March and its witness statements along with an agreed bundle of documents by 24 March: the Company then failed to meet those commitments. Despite agreeing to another conference call, the Company also failed to participate in it, at the agreed time. No explanation has ever been received from the Company for its failures.

#### **Failure to Attend and Lack of Good Faith**

5. Despite its agreement to the date of the investigation, no representative appeared for the respondent at the commencement time of 10.00 a.m. A support officer telephoned the Company to advise of its commitment and to ask if it would be participating in the Authority's investigation. The officer spoke to Mr Gavin Stowers: Mr Stowers was the Company's representative in the conference call of 10 February. The officer advised that Mr Stowers first attempted to deny ever receiving notice of the investigation. When reminded of his agreement in the 10 February conference call Mr Stowers then gave a variety of explanations as to why the Company would not be participating in the investigation. They included his having been overseas, a new management structure and poor communication by the Company.
6. After considering the support officer's report of her conversation, and for the following reasons, I elected to proceed with the investigation: the Company had originally agreed to the investigation date. It had made no effort to communicate that it would not participate in the investigation on the agreed date, or to seek an adjournment. It had failed to meet its other undertakings to provide a statement in reply, witness statements and an agreed bundle of documents. Despite its earlier agreement to do so, the Company also failed to participate in another conference call convened for 5 May so as to address those failures. That failure caused the Authority, on the same day, and by both email and letter, to advise the Company that – amongst other

matters – the investigation set for 17 May would proceed, if necessary in its absence. Until Mr Stowers' account, the Company has never attempted to account for its failures. Mr Stowers did not request the Authority to adjourn its investigation.

7. For the reasons set out above I am satisfied it was appropriate to apply Clause 12 of Schedule 2 of the Act and proceed to investigate the problem notwithstanding the Company's absence.

### **Background and Mr Page's Claim**

8. Mr Page says he started work with the Company on 3 January 2002. He said the Company contracted to various bodies, including the Wellington and Hutt City Councils, the Corrections Department and NZ Rail, to provide maintenance services and the like. Mr Page said his duties included sand and water blasting, painting, scrub-cutting, cleaning and building maintenance.
9. His terms and conditions were not set out in a written employment agreement.
10. The applicant's claim, as set out in his statement of problem and as developed in the during the investigation, is for the following:

#### **Work Vehicle**

- a. Mr Page says that, three weeks after starting his employment with the Company, he reached an agreement with one of its directors, Mr Wayne Hemi, that he would use his vehicle as a work vehicle and, in return, the applicant would be provided with a fuel card and be paid \$50 per week for that use.
- b. Mr Page says those monies have never been paid to him. He therefore claims \$1,450, for the 29 weeks from the commencement of this arrangement to the 6<sup>th</sup> of August when he advises he returned his fuel card to his employer with the advice that his vehicle would no longer be available to it.

**Unpaid Travelling Time**

- c. Mr Page says he worked additional but unpaid hours, arising out of the Company requiring him to drive from Wellington to Bulls on 5 March 2002, leaving at 6.30 am and staying overnight; doing the same on 24 April, leaving at 4.30 a.m. and returning at 9.00 p.m.; again on 25 April, leaving at 5.00 a.m. and returning at 8.30 p.m.; and, finally, the same again on 1 May, leaving at 4.30 a.m. and returning at 9.15 p.m. In support of his claim Mr Page produced his diary for those days, which recorded these commencement and finishing times. He says the Company has never complied with his requests that it provide him with a record of his wages and the hours and days he worked for it. The applicant said his normal start and finish times were 7.30 a.m. and 5.00 p.m. He therefore calculates his additional and unpaid hours as totalling \$270.00 gross.

**Unpaid Sick Leave**

- d. Mr Page says he was eligible for sick leave from 3 July, i.e. 6-months after his commencement date, that he was off work because of illness on 3, 4, 5 & 8 July 2002 and was not paid for those days. He claims four days sick pay, i.e. 8 hours X four days @ \$13.50 = \$432 gross.

**Unpaid Safety Training**

- e. Mr Page says he has not been paid for 1 and 11 July when he spent some or all of the day undergoing safety training: he therefore claims 8 hours X two days @ \$13.50 per hour = \$216.00 gross.

**Stood Down – First Occasion**

- f. Mr Page says that, following a complaint about him from the Wellington City Council, he was stood down by the Company on 24 July. Despite being available for further work on the two days following, i.e. 25 & 26 July, and while his colleagues did work on those two days, Mr Page was not provided with work for during that 3-day period. Mr Page says he asked for, but was never given, a copy of the complaint. He provided an explanation to the Company about the

complaint, but was not paid for those days. He therefore claims 8 hours X three days @ \$13.50 = \$324.00 gross.

#### **Stood Down – Second Occasion**

- g. On the 6<sup>th</sup> of August Mr Page says he returned to the depot where a confrontation occurred between himself and Mr Hemi's mother (who, the applicant understood, operated in the capacity of an office manager). At issue was his use of the fuel card. Mr Page believes this incident led to the termination of his employment. Mr Page says that, in front of others, he was accused of improperly using the fuel card, by picking up his partner after he finished work. Mr Page says he responded by handing in the card with the advice his vehicle would no longer be available for work purposes. On the following day, at 7.15 a.m., Mr Page says Mr Hemi called him "a wanker", also in front of his co-workers. Mr Page says he was stood down on 8 August "until further notice". No work was provided to Mr Page on 8, 9, 12, 13 & 14 August while employment was provided to his co-workers. He is therefore claiming 8 hours X five days @ \$13.50 = \$540.00 gross.

#### **Actual or Constructive Dismissal**

- h. On the 14<sup>th</sup> of August Mr Page was told to attend a meeting in the Company's office on the following day, at 10.00 a.m. He says he was not told its purpose, whether it was serious or if he could attend with a representative. Mr Page says that, at the meeting, Mr Hemi said that, because of the complaint, the applicant could no longer work at the Wellington City Council, or at Arohata Women's Prison, because of his convictions, or at the Reserve Bank, because of Mr Page's problem with heights, and thus the only work available for the applicant was in Bulls. Mr Page says he told Mr Hemi he had previously advised him of the problem in working at Arohata, that he had no difficulty with heights, that Mr Hemi knew he did not want to work at Bulls and that he should instead swap with co-workers doing work for the Lower Hutt City Council. Mr Page says he took from Mr Hemi's comments, and because no work was being offered to him, that his employment was being terminated. He expressed the view to Mr Hemi that he was expecting him to resign. In response, Mr Hemi then said something like, 'So, you want to resign'. Mr Hemi immediately broke off the discussion and went and

had Mr Stowers prepare a letter of resignation dated 15 August 2002 (copy provided at the investigation). Mr Page said he signed the letter of resignation because Mr Hemi:

*“... gave me no choice. He said sign it. I was dumbfounded. I didn’t know what was involved in the process of resigning. If I’d known his intentions I wouldn’t have signed it. I said, “you give me no choice but to resign”. It was done so hard my head was spinning.”*

- i. Mr Page says he was thereby actually or constructively dismissed, as it was his wish to continue working for the Company. He was unable to find fresh employment until December of that year. He therefore seeks fourteen weeks’ lost wages totalling \$7,560 gross.
- j. As evidence of his ability to work with height Mr Page says he was engaged by his new employer to sandblast Parliament’s ‘Beehive’, working off a cherry-picker at the top of that building.

#### **Ladder - Damages**

- k. Mr Page seeks to recover a ladder belonging to his father that he says has been used by the Company from the time of his employment, on 3 January 2002, until the present. Despite his repeated requests, Mr Page says it has not been returned to him. He also seeks to recover damages for the loss of the use of that equipment. Mr Page believes the ladder could be hired out at \$25 per week: he claims \$25 from 18 October to the present day, or \$3,375.00.

#### **Humiliation, etc**

- l. Mr Page seeks compensation for humiliation, etc of \$10,500 arising out of the circumstances of his unjustified termination. He says the circumstances leading up to his termination, including public comments by Mr Hemi and his mother, were particularly painful. His partner was not happy when she discovered he was no longer employed. It was a stressful time particularly as Mr Page’s partner supported him (in preference to the applicant seeking a benefit, on the ground that he would lose motivation). They were *“at each other’s throats”*, said Mr Page. His

partner had mortgage, insurance, hire purchase and other commitments. The strain on her was such that she had a breakdown and – because of the aggravation to an existing medical condition – was obliged to leave her work and go onto ACC. The applicant's representative, Mr Stephen Frawley, confirmed that Mr Page's partner no longer worked for her previous employer. Mr Page said his father is dying of cancer and is particularly distressed by the failure of the Company to return his ladder.

### **Costs**

m. Mr Page seeks to recover legal costs of \$1,920 plus GST, or 12 hours at \$160.00 per hour. This figure results from his representative's costs to date, including two pre-investigation telephone conferences, additional preparation resulting from the respondent's failure to provide a statement in reply, etc, and attending the investigation itself. Mr Page also seeks to recover disbursements of \$85 (which includes the filing fee).

### **Discussion and Findings**

11. I find in favour of the applicant's claims for the following reasons:
12. The only evidence of the respondent's position available to the Authority is set out in three letters from the Company's then-representative, Employers Assistance Limited, and attached to the applicant's statement of problem. The first letter is dated 20 September, the second is undated and the third is dated 5 November 2002. Amongst other matters they assure Mr Page that information requested by him would be provided: it has not.
13. Mr Page disputes their substantive content. I have no reason, after reading those unsupported letters and hearing direct evidence from Mr Page, to doubt his version of events, in particular that he was given no choice but to sign a letter of resignation when in reality the Company had made it clear it no longer intended offering work to the applicant.

**Determination**

14. For the reasons set out above, but for one exception, I find in favour of the applicant, Mr Tom Page's, claims against the respondent, Masta Maintenance Services (NZ) Limited. The respondent is therefore directed as follows:

**Work Vehicle**

14. I accept Mr Page's evidence that there was an agreement between himself and the company that it would pay him for the use of his private vehicle and that the respondent is in breach of that agreement. The respondent is directed to pay to Mr Page the sum of \$1,450.00 gross.

**Unpaid Travelling Time**

15. I accept Mr Page's evidence that he is owed \$270.00 gross for unpaid travelling time and direct the respondent to pay that sum to the applicant.

**Unpaid Sick Leave**

16. I accept Mr Page's evidence that he is owed \$432 gross for unpaid sick leave and direct the respondent to pay that sum to the applicant.

**Unpaid Safety Training**

17. I accept Mr Page's evidence that he is owed \$216.00 gross for unpaid safety training and direct the respondent to pay that sum to the applicant.

**Stood Down – First Occasion**

18. I accept Mr Page's evidence that he is owed \$324.00 gross for having been unfairly stood down when he was available to undertake work for which he otherwise would have been paid and direct the respondent to pay that sum to the applicant.

**Stood Down – Second Occasion**

19. I accept Mr Page's evidence that he is owed \$540.00 gross for having been unfairly stood down when he was available to undertake work for which he otherwise would have been paid and direct the respondent to pay that sum to the applicant.

**Actual or Constructive Dismissal**

20. I accept Mr Page's evidence that he is owed \$7,560.00 gross arising from wages lost to him as a consequence of having been unjustifiably actually or constructively dismissed and direct the respondent to pay that sum to the applicant. I reach this finding as I accept Mr Page was given no option or choice by the respondent other than to resign.

**Ladder - Damages**

21. I do not accept Mr Page's evidence that he is entitled to recover \$.3,375.00 gross arising out of the Company's failure to return to him a ladder owned by the applicant's father, that it has had the benefit of since Mr Page's termination on 15 August 2002. The ladder does not belong to the applicant even though he may well enjoy unrestricted use of it. The situation is no different from workers being required, at the end of their employment, to return tools, uniforms and any other items belonging to their employer. I accept, therefore, that Mr Page is entitled to recover this item of equipment and order the respondent to immediately return the ladder to Mr Page.

**Humiliation, etc**

22. Taking all of the evidence adduced by Mr Page in support of his claim, I accept as fully made out Mr Page's claim for \$10,500 compensation for humiliation, etc arising out of his unjustified termination and direct the respondent to pay that sum to the applicant.

**Costs**

23. I also accept as entirely fair and reasonable the modest costs claimed by Mr Page, but note that GST is not recoverable: *Davidson v Christchurch City Council* [1995] 1 ERNZ 523, 528, etc. The Company is to pay to the applicant the total costs sum of \$2,005.00.

**Denis Asher**

**Member of Employment Relations Authority**