

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Brett Samson (Applicant)  
**AND** K & T Renata Transport Limited (Respondent)  
**REPRESENTATIVES** Michael McFadden, for Applicant  
Rodney Renata, for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 14 November 2006  
**DATE OF DETERMINATION** 13 December 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Brett Samson was employed by K & T Renata Transport Limited as a truck driver from November 2005 until 8 May 2006 when he says he was constructively dismissed. He seeks reimbursement of wages lost as a consequence of his dismissal, compensation for hurt and humiliation, recovery of wages and holiday pay, including the recovery of unlawfully deducted wages, and that a penalty is awarded against Renata Transport for unlawful deductions from his wages.

[2] Renata Transport runs a trucking business from a depot in Penrose. It operates three trucks and employs four drivers. Renata Transport says Mr Samson's employment was justifiably terminated on 28 April 2006 because he persistently failed to perform his duties despite these performance concerns being drawn to his attention. Renata Transport says lawful deductions were made from Mr Samson's wages to repay private calls made by Mr Samson on the company mobile telephone.

[3] I received evidence from Mr Samson and Mr Ratana and closing submissions were presented by the representatives at the conclusion of the investigation meeting.

[4] The calculation of Mr Samson's holiday pay has been referred to the Labour Inspectorate. At the date of issuing this determination I have not received the Labour Inspector's report regarding Mr Samson's holiday pay. The determination of Mr Samson's holiday pay claim is suspended pending further information being provided to the Authority.

[5] I record that the parties have attended mediation in an attempt to resolve this issue themselves.

**Was Mr Samson unjustifiably dismissed?**

[6] Kelly Renata, a director of Renata Transport, contacted Mr Samson on 20 April 2006 and asked him to attend a meeting on 21 April 2006 to discuss his hourly rate. Mr Renata told me he wanted to meet with Mr Samson and another driver, Mike Randell, to put a proposal to them that they move from salary to hourly rate. Mr Renata also asked Mr Samson to bring in

a medical certificate to support the three days sick leave he had taken that week.

[7] Mr Samson agreed to bring in the requested medical certificate and asked for his payslips to be at the meeting. Mr Samson told me he wanted to discuss deductions which had been made from his pay. He said he did not tell Mr Renata that this was why he wanted the payslips. Mr Samson said he had agreed with Mr Renata that he would pay for private telephone calls made on the company mobile phone but he did not know if the amounts deducted were correct.

[8] The meeting proceeded at 7pm on 21 April in the smoko room of the Toll transport depot, from where Renata Transport's trucks operate. Mr Samson provided the requested medical certificate. Mr Renata did not bring the pay slips to the meeting. He said he was driving the truck that day and could not return to the office to print off Mr Samson's pay details. Renata Transport provided a print out of Mr Samson's salary payments at the investigation meeting. These documents are not wage and time records<sup>1</sup>.

[9] Present at the meeting were Mr Samson, Mr Renata, Mr Randell and Stewart Renata. Stewart Renata is Mr Renata's father. He works part-time for the company driving trucks. Mr Renata put the hourly rate proposal to Mr Samson and Mr Randell. They did not accept this proposal and the discussion went no further. An issue regarding Mr Randell's weekend work was then discussed and agreement reached. Mr Randell then left the meeting.

[10] Mr Samson says he then tried to raise the issue of the deductions from his pay and was shouted down by Mr Renata and Mr Renata snr. He says Mr Renata snr became very hostile, grabbed him by the collar and pushed his fist into his chin and that when Mr Samson left the smoko room to return to his car, Mr Renata snr stood in the door of his car and shouted abuse at him. Mr Samson said he dropped his car keys during the assault and had to return to the smoko room to retrieve them. Mr Samson filed a complaint of common assault with the police on 23 April. He told me the police have advised him that they will not prosecute the matter because there is no evidence upon which to proceed. Mr Samson says the exchange ended when Mr Renata asked him if he would be in on Monday and Mr Samson replied that he would let him know.

[11] Mr Renata denies that either he or his father were hostile towards Mr Samson. He says the pay issues were discussed, Mr Samson and Mr Randell did not accept the hourly rate proposal and the meeting ended with his inquiry as to Mr Samson's attendance at work the following Monday. Mr Renata said he made this request because Mr Samson had been on sick leave, Wednesday, Thursday and Friday of that week and he needed notice if it was necessary to organise another driver for Monday. Mr Renata said he asked Mr Samson to return his work mobile telephone, that Mr Samson objected and Mr Renata told him he needed it for the driver working the weekend. He said Mr Samson then threw it at him them saying "*...have the f\*\*\*ing thing then...*" and Mr Renata snr said something like you should have more respect for other people's property. Mr Renata snr did not attend the investigation meeting. Mr Samson denied he threw the mobile telephone at Mr Renata.

[12] I am satisfied that some form of altercation occurred between Mr Samson and Mr Renata snr and that the most likely scenario is that following a heated exchange about the deductions, Mr Samson went to leave the meeting, Mr Renata asked for the mobile telephone, Mr Samson tossed it at him and Mr Renata snr then assaulted Mr Samson. I am satisfied Mr Samson returned the work mobile then because he showed me the text message exchange between the parties which occurred that weekend on his personal mobile.

[13] Renata Transport submits that it was not responsible for the actions of Mr Renata snr because he was not an employee. This argument cannot stand. Mr Renata was an employee of Renata Transport at the time (Mr Renata told me Mr Renata snr drove part-time for the company) and to any objective observer of his role in the meeting he was there representing Renata Transport. For Mr Renata to allow Mr Renata snr to assault Mr Samson amounts to a

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<sup>1</sup> Section 130 Employment Relations Act 2000

serious failure of Renata Transport to maintain its obligations towards an employee to provide a safe work place.

[14] Mr Samson says when he returned home after the meeting he was stressed and upset. On Sunday 23 April he sent Mr Renata a text message advising he would not be in on Monday and filed his complaint with the police. On Monday 24 April Mr Samson took sick leave, faxing a medical certificate dated Tuesday 25 April to Renata Transport advising that he would not be fit to attend work until 8 May 2006. He went to his doctor who, he says, placed him on stress leave. The medical certificate does not specify what illness he was suffering.

[15] Mr Renata says he did not receive the faxed medical certificate and was unaware Mr Samson was on sick leave. He said the fax number Mr Samson sent the document to is not a number allocated to Renata Transport.

[16] Mr Samson has provided the fax transmission report which shows he successfully faxed a document on 25 April 2006. The number it was sent to is the same number which appears at the top of each page of Renata Transport's statement of reply, along with the header "*Stuart Renata Transport*". The statement of reply was faxed to the Authority on 5 May 2006. It is my general understanding that the fax number which appears at the top of a faxed document is the number from which it was faxed and this information is provided to identify where the fax has been sent from. Mr Samson said he got this fax number from documents received from his employer. I accept this.

[17] I find Mr Samson made reasonable efforts to send the medical certificate to his employer using a fax number provided by the employer.

[18] On 26 April Mr Samson sought advice about his employment issues.

[19] On 27 April Mr Samson's representative sent a letter to Renata Transport raising:

- (i) an alleged breach of the Wages Protection Act 1983 for making deductions from Mr Samson's pay without written authorisation;
- (ii) an alleged unjustified constructive dismissal arising from breaches of the Wages protection Act and a hostile work environment; and
- (iii) a request for the parties to attend mediation.

[20] On 17 May Mr Samson received a letter from Mr Renata advising he was dismissed:

"You are hereby notified that your services are no longer required and that you are dismissed from the position of driver operator with this company. And that your employment with K & T Ratana Transport Ltd is terminated as of 6.00am on the 28<sup>th</sup> day of April 2006 at which time you did not attend your place of work at the Toll Tranzlink yard at Penrose, as was required of you under the terms of your employment with this Company."

[21] The letter goes on to detail alleged performance failings of Mr Samson's through his employment with Renata Transport.

[22] Mr Renata told me he sent the dismissal letter because:

- (i) he had not heard from Mr Samson;
- (ii) he had not received a medical certificate; and
- (iii) he had received the letter of 27 April raising a personal grievance and alleging unauthorised deductions on behalf of Mr Samson.

[23] Was Mr Samson unjustifiably dismissed? I have found Mr Samson was assaulted at work by a representative of Renata Transport and that Renata Transport seriously failed to take reasonable steps to provide a safe work place. It is reasonable that Mr Samson, having sustained an assault at work from a representative of the company, passively observed by Mr Renata, formed the view his employer would not abide by the terms of the employment agreement. Mr Samson was constructively dismissed.

[24] If I am wrong on these events do not amount to a constructive dismissal, then the actual dismissal communicated by the company by letter dated 17 May 2006, effective 28 April amounts to an unjustified dismissal. The purported reason for the dismissal is that Mr Samson did not attend work on 28 April but there is no evidence that Mr Renata required or expected Mr Samson to attend work on that day. Mr Renata accepted that he had received a letter from Mr Samson's representative raising a personal grievance on his behalf for unjustified constructive dismissal on 27 April. Mr Renata also accepted that he and Mr Samson had exchanged texts over the preceding weekend and that Mr Samson had advised he would not be in on Monday and I have found that Mr Samson took reasonable steps to send his medical certificate to the company on 25 April. Mr Renata said he took no steps to contact Mr Samson between then and when he decided to dismiss him. Mr Renata had no reasonable basis upon which to believe Mr Samson would attend work the following day. There was no reasonable basis for the dismissal.

[25] Regarding the performance issues raised in the dismissal letter; there was no evidence that Mr Samson was notified of or given a fair opportunity to respond to Renata Transport's concerns prior to the decision to dismiss being made and communicated to him. The company says it had raised these concerns with Mr Samson before. This discussion occurred four weeks before the effective date of dismissal and Mr Samson had not had a chance to comment on any fresh issues; it does not provide a justifiable reason for dismissal.

### **Remedies**

[26] Mr Samson has established he has a personal grievance and he is entitled to a consideration of the remedies he seeks.

[27] Mr Samson gave evidence of his efforts to find a new position after his dismissal. I am satisfied that these efforts were reasonable and that he is entitled to the period of claim he seeks. Mr Samson says his actual lost wages amount to \$3634.80 nett; his new employment started four weeks and three days after his dismissal on 21 April 2006, he received pay of \$780 nett per week. By my calculation Mr Samson's claim totals \$3588, being 23 days at \$156 nett per day.

**[28] K & T Renata Transport Limited is ordered to pay Brett Samson \$3588 (nett) pursuant to section 123(1)(b) of the Employment Relations Act 2000.**

[29] Mr Samson says he was stressed and humiliated by the circumstances of his dismissal. He was a new parent at the time and his dismissal added to an already stressful period in his life. Mr Samson said he was very worried about his financial situation as he is the only income earner in his family.

**[30] K & T Renata Transport Limited is order to pay Brett Samson \$4000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[31] I have found that Mr Samson tossed his mobile telephone at Mr Renata and this triggered Mr Renata snr's reaction. Though this was an unwise action, Mr Renata snr's reaction was not proportionate. Mr Samson's action in tossing the mobile telephone cannot be considered blameworthy conduct which contributed to the situation which gave rise to his dismissal<sup>2</sup>.

### **Deductions from wages**

[32] Mr Samson says the deductions of \$200 from his wages, which first occurred on 22 March 2006, were unauthorised and that his attempts to vary the amount of the deductions was ignored by Renata Transport. He seeks that a penalty be awarded against Renata Transport for breach of section 5 Wages Protection Act 1983. Mr Samson accepts he owed the amounts deducted to Renata Transport.

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<sup>2</sup> Section 124 Employment Relations Act 2000

[33] The following text message was presented at the investigation meeting. It was sent by Mr Samson to Mr Renata 27 March 2006 at 10.39am:

"Hey Whanau, any chance cld miss this wk of deduc pay of \$200 and just take \$100 this week. Thanks, whānau"

[34] Mr Samson did not challenge this text. It is evidence that Mr Samson had agreed, in some form, to deductions of \$200 per week from his wages and that he sought to vary that agreement to \$100 for that week. Mr Renata said he was unable to comply with the request to vary the deduction amount because an automatic payment had already been set up with his bank.

[35] Section 5 Wages Protection Act 1983 provides:

**5 Deductions with worker's consent**

- (1) An employer may, for any lawful purpose, -
  - (a) With the written consent of a worker; or
  - (b) On the written request of a worker - make deductions from wages payable to that worker.
- (2) A worker may vary or withdraw a consent given or request made by that worker for the making of deductions from that worker's wages, by giving the employer written notice to that effect; and in that case, that employer shall -
  - (a) Within 2 weeks of receiving that notice, if practicable; and
  - (b) As soon as is practicable, in every other case, -
  - (c) Cease making or vary, as the case requires, the deductions concerned.

[36] There is no evidence that Mr Samson provided written consent for the 22 March 2006 deduction of \$200 from his wages or that of the following pay period. By way of explanation Renata Transport accepts that it failed to get a written authorisation for the deduction but relies on the verbal agreement entered with Mr Samson. The details of that agreement have not been provided and Renata Transport relies on the 27 March text message.

[37] Based on the evidence received I am satisfied, in relation to the \$200 deduction on 22 March 2006 and the deduction made at the following pay period, that Renata Transport failed to comply with the mandatory requirements of section 5 Wages Protection Act 1983 to make deductions only with the written consent of the worker. I accept that Mr Samson verbally agreed to the deduction, that is implicit in the text message, but such a consent falls short of the section 5 requirements. The deductions were unlawful and the explanation provided is not satisfactory.

**[38] A penalty is appropriate and I set it at \$200 to be paid to the Crown pursuant to section 136 Employment Relations Act 2000.**

**Costs**

[39] Costs are reserved.

Marija Urlich  
Member of Employment Relations Authority