

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 194
5395407

BETWEEN ROY SEABROOK
 Applicant

A N D TIN MEN LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: Roy Seabrook, In person
 William Mulholland, Advocate for Respondent

Investigation Meeting: 7 February 2013 at Auckland

Further information
received: 15 April 2013

Date of Determination: 15 May 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] Mr Seabrook was dismissed on 29 June 2012. He claims that the dismissal was unjustifiable and asks the Authority to find that he has a personal grievance and award him various remedies. Conversely, Tin Men Limited says that the dismissal of Mr Seabrook was justifiable because he pushed (or assaulted) the Managing Director of the company, Mr William Mulholland.

[2] Mr Seabrook also claims wage arrears of \$360 which he alleges is owed to him because he was underpaid by one hour each day on most days that he worked. Also claimed is the sum of \$504 as annual holiday pay. Additionally, Mr Seabrook seeks payment in the sum of \$45 pertaining to a public holiday (Queens Birthday 2012). Finally, Mr Seabrook asks the Authority to award a penalty in the sum of \$20,000 for the failure of Tin Men Limited to provide an employment agreement.

[3] Tin Men Limited (TML) rebuts the monetary claims for various reasons, as set out further into this determination.

Background

[4] Mr Seabrook commenced his employment with TML on 30 April 2012. There is a contest in regard to the evidence as to whether an employment agreement was provided but given the rather loose nature of the employment arrangements overall, it remains doubtful if Mr Seabrook was given an employment agreement to peruse. Mr Seabrook was engaged by Mr Carlton Brown, the Yard Foreman for TML. It was agreed that Mr Seabrook would be paid \$15 per hour, in cash, for each hour that he worked. There is a dispute about the employment status of Mr Seabrook. He says that it was permanent employment on a full time basis. TML says that it was casual employment, and relative to Mr Seabrook's claims, the hourly rate of \$15 included annual holiday pay.

[5] Both parties have provided their respective records of the hours that Mr Seabrook purportedly worked. The records produced by TML inform that the start date for Mr Seabrook was 24 May 2012. But I conclude that it is most probably wrong and I accept that the records kept by Mr Seabrook are more probably an accurate record of the hours that he actually worked, particularly given that the company is unable to produce reliable records. This is probably because of the method that was used to pay Mr Seabrook. The evidence of Mr Brown (and Mr Seabrook) is that Mr Seabrook would start work at 7:00a.m. each day and he would be paid in cash for the hours worked for that day. Mr Brown says that he used to tell the administration person for the company (Tina) how much money had been paid to Mr Seabrook so that Tina could "balance the cash books," whatever that is to be taken to mean.

[6] The further evidence of Mr Brown is that while Mr Seabrook was usually paid cash at the end of each day for the hours that he had worked, if there was not enough cash available, Mr Seabrook would be given a "receipt" for what he was owed in wages for that day, and then he would be paid the next day when there was enough cash available. An example of a receipt (for 7 June 2012) has been provided by Mr Seabrook.

What was the nature of Mr Seabrook's employment?

[7] Based on the record of the working hours kept by Mr Seabrook, which the Managing Director of TML, Mr Mulholland, has not reliably disputed, I conclude that the nature of Mr Seabrook's employment was of a permanent nature. This is particularly evident in that his weekly hours of work were between 35.5 and 54 hours, apart from the short week due to the Queens Birthday holiday and the week ending Friday, 22 June 2012, when Mr Seabrook did not work on the Thursday of that week, for reasons unknown. It could be arguable as to whether the job was part-time depending on the work available, but on the evidence before the Authority relating to the short period that Mr Seabrook worked for TML, the hours of work were consistent.

Is Mr Seabrook entitled to annual holiday pay?

[8] There are two particular issues that fall for consideration in regard to this matter. Firstly, TML has produced an individual employment agreement. The evidence of Mr Mulholland is that Mr Seabrook was engaged as a "Part Time Casual" labourer and truck driver. Mr Mulholland says that Mr Seabrook was given a copy of an employment agreement (the Agreement) to take home and consider and then sign and return it; but Mr Seabrook did not return the Agreement. Mr Seabrook "categorically" denies ever receiving any employment agreement and I found his evidence about this to be credible.

[9] The employment agreement that has been produced by TML does not have any employee name present. It also provides for a probation period of 90 days but there has been no mention of this applying to Mr Seabrook. Clause 8.1 of the Agreement provides:

As a part time casual employee the holiday rate is included daily of 8% of gross pay. This is in accordance [sic] the Holidays Act 2002.

[10] The Holidays Act 2003, at s.28, provides for circumstances whereby "*an employer may regularly pay annual holiday pay with the employee's pay*", or in other words, payment of an hourly rate that includes a holiday pay component. This is permitted if the employee is employed in accordance with s.66 of the Employment Relations Act 2000 on a fixed term agreement to work less than 12 months. Or, the employee works for the employer on a basis that is so intermittent or irregular that it

is impracticable for the employer to provide the employee with four weeks annual holidays, as required by s.16 of the Holidays Act.

[11] The evidence shows that the employment of Mr Seabrook did not fit within either of the above criteria and hence TML was in breach of the Holidays Act and Mr Seabrook is entitled to be paid the net sum of \$504 as annual holiday pay, calculated on the total payments he received for the full period of his employment, as presented by him at the investigation meeting.

The payment of wage arrears

[12] Mr Seabrook alleges that he was underpaid by one hour each day on 24 occasions and he has provided what appears to be a credible record accordingly. TML have not provided any evidence or any form of record that counteracts that which Mr Seabrook has provided. Mr Seabrook also acknowledges in his calculations that there were some days when he was overpaid by half an hour and up to one and a half hours on other days and his calculations allow for a set-off accordingly; hence the net outstanding amount is \$360. It is proven to my satisfaction that Mr Seabrook is entitled to be paid this amount.

Payment for the Queen's Birthday public holiday - 2012

[13] Mr Seabrook acknowledges that he has received a part payment (\$75) for this holiday and he now seeks payment of the remainder of the daily rate (\$120 – \$15 x 8) being the sum of \$45. TML says that Mr Seabrook was not entitled to be paid for a public holiday as he was a casual employee and was not required to work on the day in question. Apart from my earlier finding that Mr Seabrook was not a casual employee, it appears that Mr Brown acknowledged that some entitlement was due and hence the reduced amount claimed by Mr Seabrook.

[14] I find that Mr Seabrook is entitled to be paid the sum of \$45 as claimed.

The dismissal of Mr Seabrook

[15] On 29 June 2012, Mr Mulholland was driving through the town of Orewa and saw one of the TML trucks parked on Moana Avenue. Upon inspection, he noted that there was copper and other scrap metal on the deck of the truck but the driver was not present. Upon making contact with the TML office in Silverdale, Mr Mulholland was

informed that the driver of the truck was Mr Seabrook and he had been despatched to Helensville to pick up scrap metal. Mr Mulholland waited at the truck for 10-15 minutes until Mr Seabrook appeared. Mr Mulholland approached Mr Seabrook and asked him why he was in Orewa as there was no apparent or valid reason for him to be there, as he should have been returning from Helensville to the yard at Silverdale; and Orewa is well off the route that would normally be driven.

[16] The evidence of Mr Mulholland is that in response to his inquiry, Mr Seabrook said he had taken a wrong turn on his way back from Helensville. Mr Mulholland says that because of where the truck had ended up in Orewa he told Mr Seabrook this was not consistent with genuinely finding his way back to the yard and that he was: “... *lying to him, and this was not the first occasion that this had happened*”.

[17] Mr Mulholland attests that he told Mr Seabrook that Mr Brown would: “*probably sack you*” when Mr Seabrook got back to the TML yard. It is the evidence of Mr Mulholland that Mr Seabrook became “*very aggressive*” and because of this he asked Mr Seabrook if he was “*going to be okay*” to take the truck back to the yard. Mr Mulholland says that Mr Seabrook’s response was: “*Do you think I am going to wreck it?*”

[18] The evidence of Mr Mulholland becomes somewhat inconsistent at this point. In his written statement of evidence he says:

I told him [Mr Seabrook] he was dismissed there and then but when I went to get the key from the truck, he blocked me from the door and said I could not sack him and I was not getting the truck. I repeated that he was sacked and what he was doing could lead to an assault charge. At that point I rang the local Police Station but no one was available to help.

[19] Mr Mulholland further records that:

I then called the yard and arranged for someone to come down and pick up the truck. There was a period of bad language and threats but eventually I got the keys and locked the truck.

[20] But the oral evidence that Mr Mulholland gave to the Authority is:

I remember saying to him you are not going to take the truck back to the yard. I reached to get the keys – he physically stopped me. Roy shoved me back out of the way. I said you can’t do that, you’re fired.

[21] Mr Mulholland told the Authority that he subsequently went around to the door on the other side of the truck and grabbed the keys and locked the truck. It seems that at some point, Mr Seabrook was told to get his personal gear out of the truck.

[22] And then we have the evidence of Mr Seabrook. He more or less agrees with the initial discussion that took place in regard to the inquiry as to why Mr Seabrook was in Orewa. Mr Seabrook also accepts that Mr Mulholland asked him if he was okay to take the truck back to the yard and when he responded: *“Do you think I am going to wreck it,”* Mr Mulholland’s: *“... immediate reply was you’re fired right there on the spot”*. Mr Seabrook also confirms that Mr Mulholland accused him of lying in regard to his reason for being in Orewa.

[23] The further evidence of Mr Seabrook is that when Mr Mulholland told him he was “fired” he responded: *“We don’t have a contract – you can’t do that – that’s not the correct procedure”*. Mr Seabrook accepts that he blocked Mr Mulholland’s access to the driver’s door of the truck when Mr Mulholland was attempting to get the keys. Mr Seabrook says that Mr Mulholland told him to get out of the way and said: *“I have punched bigger and uglier men than you”*. Mr Mulholland appeared incredulous upon hearing this from Mr Seabrook at the investigation meeting, and while there is always a possibility he may have been disguising his physical prowess, I have to say that Mr Mulholland did not give me the impression that he has pugilist tendencies.

[24] Mr Seabrook told the Authority that he responded to Mr Mulholland: *“You touch me and I will call the Police”* to which Mr Mulholland said: *“That’s a good idea”* and he then proceeded to call the local Police Station but was informed that a patrol car was not available.

[25] Mr Seabrook’s further evidence to the Authority is that he and Mr Mulholland were: *“Standing face to face at the truck door. After about a minute I relented and moved aside. Mr Mulholland opened the door and I got my gear”*.

[26] Given that there is some consistency between Mr Mulholland’s written evidence and Mr Seabrook’s oral evidence, I conclude that Mr Mulholland has most probably exaggerated the circumstances in regard to the physical scenario that existed between two men, when he gave his oral evidence. I do not accept that Mr Seabrook “shoved” Mr Mulholland. Rather I conclude that it is more probable, and consistent with the evidence of both men, that Mr Seabrook was dismissed by Mr Mulholland

following the question from Mr Seabrook as to whether Mr Mulholland thought that he might “wreck” the truck when taking it back to the yard. It is apparent that what followed then was a stand-off between the two men, when Mr Mulholland attempted to get the keys out of the truck; but this was not why Mr Seabrook was dismissed, as by that point, he had already been told that he was “fired”.

[27] After locking the truck and leaving Mr Seabrook to find his own way to wherever he wanted to go, Mr Mulholland drove off; having arranged for the truck to be picked up by other staff from the Silverdale yard. The evidence from Mr Mulholland is that after driving away he then doubled back to the truck and found Mr Seabrook getting back into the truck¹. It seems that while the truck was locked, there was no back window in the vehicle and Mr Seabrook climbed through the space where a window should be. Mr Seabrook attests that he was sitting in the driver’s seat when Mr Mulholland came back. Mr Seabrook says that in anticipation of someone coming to get the truck, whereby he could get a ride back to the yard, he decided to climb into the truck and wait, rather than sit by the roadside.

[28] When Mr Mulholland saw Mr Seabrook in the truck he rang the Police, alleging that Mr Seabrook had broken into the vehicle. The Police duly arrived and interviewed the two men but the matter was left there. The Authority has listened to a recording of Mr Mulholland’s telephone call to the Orewa Police, as provided by Mr Seabrook, apparently via an Official Information Act request. However the general content of the CD is not really relevant to the matters the Authority must determine, albeit I will return to one particular aspect of that recording.

Analysis and conclusions

[29] The justification (or otherwise) for the dismissal of an employee must be determined by the Authority on an objective basis by applying this test: Whether the employer’s actions and how the employer acted, were what a fair and reasonable employer could have done at the time the dismissal occurred.² When applying the above test the Authority must consider:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the

¹ It is more probable that Mr Seabrook was already inside the cab of the truck at that point

² Section 103A(1) and (2)

- allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
 - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.³

[30] Taking the partially consistent evidence of Mr Seabrook and Mr Mulholland into account, it is transparently clear that Mr Mulholland failed completely to apply any of the above criteria. It is also established that the dismissal of Mr Seabrook was an entirely spontaneous reaction by Mr Mulholland in the heat of the moment. While Mr Mulholland has attempted to portray to the Authority that he dismissed Mr Seabrook because he was physically assaulted by him; as referred to earlier, the reality of the situation is that the dismissal of Mr Seabrook had already been actioned before he barred Mr Mulholland from rightfully accessing his truck. Ironically, perhaps, had Mr Mulholland not dismissed Mr Seabrook earlier and upon warning him of the consequences of continuing to block his access to the truck, and upon Mr Seabrook persisting with such action, Mr Mulholland would have been on much sounder ground if he had then dismissed Mr Seabrook. But of course, that is not what happened and I am left to conclude that the manner in which Mr Mulholland dismissed Mr Seabrook is not what a fair and reasonable employer could do in the circumstances. It follows that I find that the dismissal of Mr Seabrook was unjustifiable and he has a personal grievance.

Remedies

[31] Having found that the dismissal of Mr Seabrook was unjustified and he has a personal grievance, pursuant to s.123(1) of the Employment Relations Act 2000, the Authority *may* in settling the grievance, provide for various remedies, including reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to the feelings of the employee.

³ Section 103A(3)

(a) *Reimbursement of lost wages*

[32] Mr Seabrook seeks the sum of \$6,720, being three months loss of wages. There is a legal onus on Mr Seabrook to mitigate his losses and he has to reasonably establish this in evidence. The obligations of a dismissed employee, in relation to loss of earnings was explained by Chief Judge Colgan in *Allen v. Trans Pacific Industries Group Ltd (trading as 'Medismart Limited')*⁴ as follows:

[78]

- Dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained details of this will also need to be retained for the hearing, including dates of employment, amounts paid and reasons for ceasing employment.

[33] The *Allen* judgment was referred to by Judge Ford in *Radius Residential Care v. McLeay*⁵: His Honour stated that:

It is up to the employee in an unjustified dismissal case to produce the evidence to prove any loss of income.

The same applies in relation to the obligation to mitigate loss. The Court [Authority] should not be left to speculate or guess. The paucity of evidence produced by the defendant on these topics has not persuaded me that she did take adequate steps to mitigate her loss. She has failed to produce any of the evidence identified by Chief Judge Colgan required to substantiate a loss of earnings claim.

[34] And so it is with the circumstances pertaining to Mr Seabrook. Unfortunately, there has been no evidence at all produced by him that would satisfy the requirements of *Allen* and in fact, Mr Seabrook did not refer to any attempt to obtain alternative employment; hence I am left to decline to make any award of reimbursement under this head.

⁴ [2009] 6 NZELR 530 (EmpC)

⁵ [2010] NZEmpC 149 at para.[51]

(b) *Compensation*

[35] Mr Seabrook seeks an award of compensation in the sum of \$5,000 (originally \$20,000). But he has not provided even a sliver of evidence as to why compensation should be awarded. There is no evidence whatsoever in regard to how the sudden loss of his employment affected him. Regrettably, my observations of Mr Seabrook are that he is, most probably, immune to being humiliated, or suffering a loss of dignity, or injury to his feelings in such circumstances. This impression is confirmed upon listening to the CD recording of Mr Mulholland's second call to the Police; whereby one can hear Mr Seabrook's language in the background. But even if I were to find it was otherwise, it is clear that pursuant to s.124 of the Act, if I had been of a mind to award Mr Seabrook any remedy, his contribution to the circumstances that gave rise to the grievance, and his actions overall, were of such a nature that any remedies that may have been awarded would be nullified by the reduction to them.

[36] Having said that, one should not be taken to have only formed an unenthusiastic impression of Mr Seabrook. It is also clear to me that the attitude of Mr Mulholland, and the way that he handled the general circumstances pertaining to this matter, was far from satisfactory. He would be well advised to obtain professional assistance in regard to keeping accurate wage and time records, ensuring that proper employment agreements are in place that reflect the true nature of the employment; and ensuring that he obtains some advice about appropriate disciplinary methods, and how to apply them, should circumstances arise in the future where disciplinary action is necessary.

Determination

[37] For the reasons set out above, the various claims presented by Mr Seabrook have been determined as follows:

- (a) The dismissal of Mr Seabrook was unjustifiable but due to a failure on his part to provide any perceptible evidence as to his entitlement to remedies, the Authority has exercised its statutory discretion, pursuant to s.123 of the Act, not to award the remedies of reimbursement of wages or compensation;

- (b) Tin Men Limited is ordered to pay the following sums to Mr Seabrook within 28 days of the date of this determination:
- (i) Annual holiday pay of the net sum of \$504.00;
 - (ii) Wage arrears in the net sum of \$360.00;
 - (iii) Outstanding arrears of \$45.00 for the Queens Birthday 2012 public holiday.
- (c) It may be arguable as to whether or not Mr Seabrook received an employment agreement, as legally required under the Employment Relations Act. But in any event, given the overall circumstances it is not appropriate for the Authority to award a penalty as sought by the applicant.

Costs

[38] Mr Seabrook seeks an award of costs of the sum \$750.00 but he has not provided any evidence in regard to why this sum is being sought. And given the outcome of this matter, it is appropriate that costs should lie where they fall: it is so ordered.

K J Anderson
Member of the Employment Relations Authority