

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 324
5413711**

BETWEEN RONEEL SINGH
Applicant

AND KIWI HIRE AND SALES
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
James Worker, Advocate/ for Respondent

Investigation Meeting: 23 July 2013 at Auckland

Determination: 29 July 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Roneel Singh, claims he was unjustifiably dismissed by the Respondent, Kiwi Hire and Sales Limited (Kiwi Hire), on 7 January 2013.

[2] Kiwi Hire denies that Mr Singh was dismissed and claims that Mr Singh resigned from his employment during a meeting on 7 January 2013.

Issues

[3] The issues for determination are whether or not Mr Singh was unjustifiably dismissed by Kiwi Hire.

Background Facts

[4] Kiwi Hire is a business providing small and/or heavy equipment for hire or sales, including earth moving and access equipment, excavators and trucks. Kiwi Hire has two directors, Mr James Worker (Mr Worker) who manages the sales part of the business, and Mr

Geoff Worker, his father. There is also a workshop foreman in addition to sub-contract labour as and when required.

[5] Mr Singh said that he and Mr Worker had had a professional relationship prior to his commencing employment with Kiwi Hire as Mr Worker regularly approached him for advice due to his knowledge of the hire business.

[6] Mr Singh said that Mr Worker had approached him on a number of occasions to ask him to join Kiwi Hire and during December 2012 they had discussions which resulted in his accepting an oral offer of employment. The employment offered to, and accepted by, Mr Singh had been as General Manager of the hire operation on terms and conditions which included payment of \$22.50 per hour for a 45 hour working week, a work vehicle and a Galaxy 3 mobile telephone.

[7] Mr Singh said that pending the supply of a Ute, which was the vehicle type agreed at his meeting with Mr Worker, he had been allocated a work vehicle, a truck, on 21 December 2012, however this had been in a dangerous condition due to both the warrant of fitness and registration having expired.

[8] Mr Singh said he had pointed out the dangerous condition of the truck to both Mr Worker and Mr Geoff Worker; however he had used the truck due to there being no alternative transport available.

[9] Mr Worker accepted that the truck had been in a dangerous condition and agreed that at their meeting he had offered Mr Singh the use of a Ute, and said that it had been his intention to have a Ute available for Mr Singh to use in the New Year.

[10] Mr Singh said he had commenced employment on 22 December and he had also worked on 24 December 2012 when he had started to analyse the Kiwi Hire processes and procedures.

[11] On 27 and 28 December 2012 Mr Singh said that he had been unable to attend for work as expected due to a neck sprain sustained over the Christmas break, and he had contacted Mr Worker by text message to inform him of his non-attendance.

[12] Mr Worker said that over the next couple of days he had made numerous attempts to contact Mr Singh by text messages and mobile telephone calls to the Galaxy 3 mobile telephone with which Mr Singh had been provided by Kiwi Hire; however he had had no response.

[13] On 30 December 2012 Mr Worker texted Mr Singh with the message: “*Mate call me now, dads about to report truck stolen*” to which Mr Singh had responded with the text message: “*Just bit tied up mate. Can’t call atm.*”.

[14] When asked during the Investigation Meeting why he had not called Mr Worker as requested, Mr Singh had explained that he had been on leave with effect from 29 December 2012 and he had been busy with his family.

[15] Mr Worker said that Mr Geoff Worker had been concerned at both the lack of contact from Mr Singh, and his retention of the truck which was required for business purposes as it was the main transporter vehicle in the business.

[16] Following a further exchange of text messages between Mr Worker and Mr Singh it had been arranged that the truck would be collected on 31 December 2012.

[17] On 7 January 2013 Mr Singh said he had texted Mr Worker to request a lift to work as he had no transport himself, and he had been collected by Mr Worker at approximately mid-day.

[18] Mr Singh said that upon arrival at Kiwi Hire he and Mr Worker had a meeting during the course of which Mr Worker had told him that Mr Geoff Worker was taking over the role of General Manager of the hire operation, and that there was no longer a position for him.

[19] Mr Singh also confirmed that it had been agreed at the meeting that he would be wages for the time he had worked, fuel monies owed for the petrol he had purchased for the truck, and that he would be allowed to keep the Galaxy 3 mobile telephone.

[20] Mr Singh said he had been furious and considered that Mr Worker had breached the trust between them.

[21] Mr Worker said he had not dismissed Mr Singh, but that he had informed him that he was to work as Assistant Manager under the supervision of Mr Geoff Worker as General Manager of the hire operation.

[22] Mr Worker said that Mr Singh had told him that he did not wish to accept the position of Assistant Manager which had been offered, however they had agreed the terms of the termination of his employment and he had believed Mr Singh to have accepted the situation amicably.

[23] Mr Worker said it had been agreed that Mr Singh would retain the Galaxy 3 mobile telephone as payment for the 1.5 days he had worked, and that he would be reimbursed for the

fuel he had purchased for the truck. It had also been agreed that Mr Singh would send him his bank account details in order that the agreed payment could be made.

[24] Mr Worker said that Mr Singh had informed him during the meeting that he knew of someone suitable for the Assistant Manager position.

[25] Mr Worker provided text messages in evidence which showed that Mr Singh had texted him on :

- 7 January 2013 with his bank account details;
- 8 January 2013 with some details of the person he had thought might be suitable for the Assistant Manager position; and
- 9 January 2013 with details of a customer whom he knew who required hire equipment and asking for a quotation of Kiwi Hire prices.

[26] Mr Worker said that the agreed payment to Mr Singh had not taken place due to it having been overlooked

[27] On 15 March 2013 Mr Singh had filed a Statement of Problem with the Authority. The parties had attended mediation but this had not resolved the matter.

Determination

[28] Mr Worker said that he had not dismissed Mr Singh, but that Mr Singh had resigned after he had told him that he would no longer be employed as General Manager but would be demoted to the position of Assistant Manager working under the supervision of Mr Geoff Worker who would be taking over the position of General Manager.

[29] On the basis of the supporting text message evidence, I accept Mr Worker's evidence that Mr Singh did not accept the Assistant Manager position and therefore resigned from his employment at Kiwi Hire and that the meeting had concluded on a reasonably amicable basis. However I now proceed to consider whether Mr Singh's resignation constituted a constructive dismissal by Kiwi Hire.

[30] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[31] In the Court of Appeal case *Auckland Shop Employees Union v Woolworths (NZ) Ltd*¹ Cooke J listed three situations in which a constructive dismissal might occur, although noted that these were not exhaustive. The three situations were:

1. Where the employees is given a choice of resignation or dismissal;
2. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
3. Where a breach of duty leads a worker to resign.

[32] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*² the Court of Appeal said regarding the correct approach to constructive dismissal:³

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[33] Therefore in examining whether a constructive dismissal has occurred the two relevant questions are:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation, and
- ii. secondly if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

¹ [1985] 2 NZLR 372

² [1994] 1 ERNZ 168

³ Ibid At p 172

[34] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁴ observed in describing this type of constructive dismissal:⁵

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

Was there a breach of the duty owed to Mr Singh by Kiwi Hire?

[35] Kiwi Hire was under a duty to deal with Mr Singh in good faith. Accordingly if Kiwi Hire had concern about Mr Singh's performance it owed him a duty to conduct a fair and reasonable disciplinary process to address the matter.

[36] A process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable. There are three major principles applicable to the disciplinary process: a duty to inform the employee of the allegations, an informed opportunity for the employee to respond, and a decision that is free from bias and pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have a representation at a meeting of a disciplinary nature.

[37] Mr Singh had no advance warning of the nature of the meeting which took place on 7 January 2013, he had received no notification of the specific concerns Kiwi Hire had about his performance, and he had no informed opportunity to respond to these concerns. Mr Singh had not been advised for his right to have a representative present at the meeting. Further I find the decision to remove Mr Singh from his position as General Manager for the hire operation to have been a predetermined decision.

[38] I find that Kiwi Hire had breached the duty of good faith which it owed to Mr Singh.

Reasonable foreseeability

[39] Given the circumstances I consider that Kiwi Hire's conduct in demoting Mr Singh without due process crossed the border separating inconsiderate conduct from dismissive or repudiatory conduct.

[40] I find that there had been a breach of the duty owed to Mr Singh by Kiwi Hire such as to render it reasonably foreseeable by Kiwi Hire that there would be a substantial risk of resignation by Mr Singh.

⁴ [1983] ACJ 965

⁵ at [975]

[41] I determine that Mr Singh was unjustifiably constructively dismissed by Kiwi Hire.

Remedies

[42] Mr Singh has been unjustifiably dismissed and is entitled to remedies.

Reimbursement for Lost Wages

[43] Mr Singh provided satisfactory evidence that he attempted to mitigate his loss following the termination of his employment with Kiwi Hire, however he has been unable to find alternative employment.

[44] Mr Singh is to be reimbursed for lost wages from the date of his dismissal on 7 January 2013 for a period of 13 weeks pursuant to s 128 (2) of the Act.

[45] I order that Kiwi Hire pay Mr Singh the sum of \$13,162.50 calculated as \$22.50 per hour x 45 hours x 13 weeks.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[46] Mr Singh is also entitled to compensation in respect of hurt and humiliation and injury to feelings. Mr Singh said he had felt shocked by the termination of his employment, had suffered humiliation and lost trust and confidence in people as a result of his experience at Kiwi Hire.

[47] I find that Mr Singh suffered hurt and distress and I order Kiwi Hire to pay Mr Singh the sum of \$2,500.00, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[48] Mr Singh had been unable to attend work due to a neck injury on 27 and 28 December 2012. During that period from 27 December until 30 December 2012 Mr Worker had made many efforts to contact Mr Singh, however Mr Singh had not returned his calls on the basis that he had been on annual leave and too busy with personal matters.

[49] Mr Singh who had been employed for a few days only, had been unresponsive to the attempts of his employer to contact him, and had additionally been in possession of the Kiwi Hire truck, which was required for business purposes.

[50] I find that this situation resulted in Mr Geoff Worker becoming very concerned about Mr Singh's reliability, which had in turn influenced the decision to ensure Mr Singh would be supervised during at least the initial period of his employment at Kiwi Hire.

[51] I observe that employees are also under a duty of good faith in the employment relationship and I find that Mr Singh breached that duty of good faith by failing to be "*responsive and communicative*"⁶ to the repeated attempts to contact him made by Mr Worker, despite the fact that he could have done so at no cost to himself by using the mobile phone supplied to him by Kiwi Hire

[52] I find contributory fault on the part of Mr Singh and reduce the sums due to him by 50 %.

Costs

[53] Costs are reserved. I note that although Mr Singh had been not been legally represented at the Investigation Meeting, he referred to having obtained legal advice during the investigation process and he may be able to make a claim in respect of that amount.

[54] Accordingly the parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority

⁶ Section 4(1A)(b) of the Act