Employment Court of New Zealand

Smith and Nola v Harvey WC 10B/07 [2007] NZEmpC 164 (18 December 2007)

Last Updated: 22 December 2007

IN THE EMPLOYMENT COURT

WELLINGTONWC 10B/07WRC 32/06

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN DARRYL JAMES SMITH
MAJTI ELIS NOLA
Plaintiffs

AND RONALD HARVEY
Defendant

Hearing: 24 September 2007

(Heard at Wellington)

Appearances: Michael Gould, Counsel for Plaintiffs
Gail Irwin, Advocate for Defendant

Judgment: 18 December 2007

JUDGMENT OF JUDGE A A COUCH

[1] Mr Harvey was employed by the plaintiffs as a driver. There were a series of difficulties in the relationship. After 2 months, Mr Harvey gave notice of his resignation which took effect 1 month later. Mr Harvey claimed this was a constructive dismissal and pursued a personal grievance to that effect. He also raised a second personal grievance alleging disadvantage in his employment and made a claim for arrears of wages.
[2] The Employment Relations Authority determined all of these matters in favour of Mr Harvey. It awarded him remedies and costs totalling more than $17,000. The plaintiffs challenged the determination as a whole. Mr Harvey pursued a cross-challenge seeking increased remedies.

Nature of the hearing

[3] The proceedings have had a difficult and lengthy history. Details of this are set out in the Authority's determination dated 9 October 2006 (WA 132/06) and in the two interlocutory decisions of Judge Shaw dated 7 March 2007 (WC 10/07) and 7 August 2007 (WC 10A/07).
[4] In essence, the plaintiffs took no part in the Authority's investigation other than to file a statement in reply. As a result, when the plaintiffs challenged the Authority's determination, a good faith report was called for pursuant to

s181 of the Employment Relations Act 2000. After considering that report and the submissions of the parties in relation to it, Judge Shaw gave the following directions as to the nature of the hearing of the challenge (judgment 7 August 2007, WC 10A/07):

[21] The plaintiffs' challenge will not be heard by way of a de novo hearing. No further evidence, other than that adduced before the Authority including the plaintiffs' statement in reply and associated documents and briefs of evidence and documents filed for the defendant may be relied on in the hearing of the challenge.

[22] The challenge will be heard by way of submissions as to law and fact based on those documents.

[5] I was provided by the parties with an agreed bundle of documentation. This included the written statements of Mr Harvey and his wife which were confirmed on oath before the Authority. It appears that the Authority tested this evidence in the course of its investigation. In recording that it accepted it, The Authority noted that it "*was satisfied, in particular, with Mr Harvey's answers to searching questions.*"
[6] The bundle also contained a large number of what were said to be contemporary documents. This included an employment agreement and other documents establishing the terms of Mr Harvey's employment, together with timesheets and wage slips. It also included a series of increasingly bitter correspondence exchanged between Mrs Harvey and Ms Nola following Mr Harvey's resignation.
[7] Mr Gould and Mrs Irwin very helpfully provided me with detailed written submissions addressing the issues on the basis of these documents. Having these submissions in writing and in advance was of considerable assistance and enabled the hearing to be brief and focussed.

Principles

[8] Mr Gould submitted at the outset that, as the hearing was not a de novo one, the principles set out in *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] NZEmpC 79; [2001] ERNZ 157 applied. The plaintiffs had the onus of persuading the Court of the existence of an error of law and/or fact by the Authority in its determination but, to the extent that the plaintiffs did so, the Court could then make its own decision. I agree and have adopted that approach in this decision.
[9] An issue I raised with both representatives at an early stage of the hearing was the relative weight to be given to the differing types of document contained in the bundle. Both representatives accepted the following approach which I now adopt. Sworn evidence accepted by the Authority should be regarded as the best evidence with respect to issues of fact. To the extent there is any conflict between that evidence and other documents, the sworn evidence should be preferred. On any issue not dealt with in sworn evidence, contemporary documents may assist but I treat with caution the exchange of correspondence I have referred to which contained a good deal of emotive and self-serving material. I have also had regard to the statement in reply. This consisted of an eight-page letter from Ms Nola to the Senior Support Officer of the Authority. I treat this with similar caution. While it purports to set out the plaintiffs' view of events, it is an unsworn, untested statement containing a good deal of rhetoric and argument in addition to assertions of fact.
[10] As to the law applicable to a claim of constructive dismissal, it was common ground that the principles to be applied are those set out by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] NZCA 250; [1994] 1 ERNZ 168. They may be summarised in the form of three questions:

Was there a breach of duty by the employer to the employee?
If so, was that breach of duty sufficiently serious to make it reasonably foreseeable by the employer that the employee might resign?
If so, was that breach of duty the actual reason for the employee's resignation?

Sequence of events

[11] Giving the evidence as a whole the relative weight discussed above, I find that it discloses the following sequence of events.
[12] Mr Harvey was an experienced truck driver. Mr Smith and Ms Nola operated a small road transport business under the name "*DM Transport*". In or about March 2005, Mr Smith offered on behalf of the plaintiffs to employ Mr Harvey. Mr Harvey accepted the offer and began work on 2 April 2005.
[13] The plaintiffs' business was in two distinct parts. One was the delivery of carpet. The other was the delivery of general goods including motorcycles. When Mr Harvey was employed, it was agreed that he would do the general deliveries and that Mr Smith would do the carpet deliveries.
[14] On 3 April 2005, the parties entered into a brief written employment agreement. Three provisions of that agreement are noted:

Starting rate is $10.90 per hour cash in hand, thereafter, an hourly rate of $14.00 per hour Gross will apply.

Confidentiality is vital. All business matters discussed shall not be disclosed at anytime to third parties, with the exception of the

spouse.

Any problems can be addressed by Majti or Darryl, either of us will be willing to help in any way we can.

[15] The reference to Mr Harvey initially being paid "*cash in hand*" was included in the employment agreement because Mr Smith said that the plaintiffs had not previously had employees and that it would take them a few weeks to establish a payroll system. This did not happen as quickly as promised and the plaintiffs continued to pay Mr Harvey in cash well into May 2005.

[16] On 7 April 2005, Mr Harvey received a letter from the police telling him that he was required to be a witness in the High Court in Hamilton in a trial commencing on 16 May 2005. When told of this, Mr Smith agreed to continue paying Mr Harvey's wages during the period he was required to attend Court.

[17] In early May 2005, Mr Smith told Mr Harvey that his wages had been increased to $14.35 per hour. This was confirmed by Ms Nola in a letter dated 10 May 2005 addressed "*To Whom It May Concern*" and headed "*Confirmation of Earnings for Ronald Harvey*".

[18] On or about 24 May 2005, the plaintiffs completed their payroll system. On 1 June 2005, Mr Harvey received his first payment using that system. This included a wage slip showing how the amount he received had been calculated.

[19] Mr and Mrs Harvey both thought that the net amount of wages paid to Mr Harvey on 1 June 2005 was significantly less than it ought to have been. They sought advice about this from three sources. Mr Harvey called the Inland Revenue information line. Mrs Harvey spoke to an acquaintance whose work included preparing tax returns and to a relative who was also knowledgeable about such matters. The advice received from all three sources was that the amount of PAYE tax deducted from Mr Harvey's gross earnings was excessive and that the plaintiffs had incorrectly deducted ACC levies.

[20] After receiving this advice, Mr Harvey telephoned the plaintiffs to raise his concerns. He initially spoke to Ms Nola who insisted that the calculations were correct and became angry. Later, Mr Harvey spoke with Mr Smith. Both he and Ms Nola were very angry and accused Mr and Mrs Harvey of having breached the confidentiality provision in his employment agreement.

[21] Mrs Harvey was also involved in these telephone conversations. In particular, she spoke with Ms Nola. Mrs Harvey explained the sources of the advice that she and her husband had received about the deductions from his wages. Ms Nola replied that all the people Mrs Harvey had spoken to were liars and that they did not know what they were talking about. Ms Nola said that she would continue to make the same deductions from Mr Harvey's wages each week in future and suggested to Mrs Harvey that she get her facts straight.

[22] The following day, 2 June 2005, Mr Smith required Mr Harvey to do the carpet deliveries rather than the general deliveries it had been agreed he would do. Mr Harvey's evidence about this was "*From the way Darryl Smith behaved and what he said, I believed that this change was intended to be his punishment to me because I had challenged his incorrect wage deductions.*"

[23] During the day on 2 June 2005, Mr Harvey decided to tender his resignation. He said that his reason for doing so was the plaintiffs' reaction to his questioning the calculation of his wages. Mr Harvey asked his wife to type a letter of resignation which she did and brought with her to the workplace that evening when she came to collect Mr Harvey. Mr Harvey left the letter for the plaintiffs when he finished work on 2 June 2005.

[24] Mr Harvey's resignation letter was very brief. The text was "*I am giving you 1month notice of my resignation. Starting today 2 June 05. My last day of work will be the 1 July 05.*" Curiously the letter was dated "*1 June 2005*" but it was common ground that it was prepared and signed on 2 June 2005.

[25] Mr Harvey had difficulty doing the carpet deliveries. He asked Mr Smith to either give him training in the work or to return him to general deliveries. Mr Smith refused to do either. He swore at Mr Harvey and told him that he would regret having complained about his wages. Mr Smith also refused to discuss further with Mr Harvey the calculation of his wages.

[26] Some time after this, Mr Smith reduced Mr Harvey's hours of work by withdrawing the Saturday work he had previously done. Mr Harvey protested and asked to have his Saturday work restored but Mr Smith refused to do so. Mr Smith told Mr Harvey that this was his punishment for having phoned Inland Revenue about the calculation of his wages.

[27] These two events effectively confirmed the impression Mr Harvey formed on 2 June 2005 and which prompted his resignation.

[28] Mr Harvey did not say explicitly in his evidence when this withdrawal of Saturday work took place. The timesheets show that Mr Harvey did not work on Saturday 4 June 2005 or Saturday 11 June 2005 and the issue was specifically referred to in a letter from Mrs Harvey to the plaintiffs dated 16 June 2005. It is clear from that letter, and from the context of Mr Harvey's brief of evidence as a whole, that the withdrawal of Saturday work occurred after Mr Harvey had tendered his resignation. I infer from this that the conversation between Mr Harvey and Mr Smith about the withdrawal of Saturday work occurred on Friday 3 June 2005.

[29] Another issue raised by Mrs Harvey in her letter of 16 June 2005 was that the plaintiffs had deducted 7.5 hours from the amount of work for which Mr Harvey was paid on 15 June 2005. Mr Harvey was told that this was being taken as partial repayment of the wages Mr Harvey received while attending Court in Hamilton on 16 to 18 May

2005. The plaintiffs said they were entitled to recover 20 hours' wages and would continue to make deductions from his remaining two payments of wages to make up this amount.

[30] In response to Mrs Harvey's letter of 16 June 2005, Ms Nola wrote a lengthy letter to Mrs Harvey the following day. In that letter, Ms Nola attempted to justify the actions that she and Mr Smith had taken. She did much of this in pejorative language which undoubtedly soured the relationship between the plaintiffs and Mr and Mrs Harvey yet further.

[31] On 29 June 2005, Mr Harvey suffered an accident in the course of his work. On 1 July 2005, Mr Harvey took time off work to see his doctor about the injury that he had suffered. He left work at 9.30am but apparently did not come back for the rest of the day. The plaintiffs did not pay Mr Harvey for any of this time.

[32] 1 July 2005 was Mr Harvey's last day of work. When he received his final pay, which should have included holiday pay, he found that it was much less than he expected. The Authority found that no holiday pay was paid to him.

[33] Following the termination of his employment, Mr Harvey was without work for a month and was then only able to obtain work at a significantly reduced rate of pay. Both Mr and Mrs Harvey gave evidence of the distress experienced by Mr Harvey from 1 June 2005 onwards as a result of the plaintiffs' actions.

Case for the plaintiffs

[34] For the plaintiffs, Mr Gould presented a concise and well constructed argument that the Authority had erred in both fact and law in reaching its conclusion that Mr Harvey had been constructively dismissed.

[35] It is apparent from paragraph 12 of the determination that the Authority found as a fact that Mr Harvey resigned because of three actions by the plaintiffs. The first was their refusal to discuss his concerns about the calculations of his wages and their angry response to his raising the matter. The second was Mr Smith's direction that Mr Harvey do the carpet deliveries rather than the general deliveries which he had previously done. The third was the plaintiffs' withdrawal of Saturday work from Mr Harvey.

[36] I accept Mr Gould's submission that the Authority was wrong in finding that Mr Harvey's resignation was motivated in part by the withdrawal of the Saturday work. For the reasons I have set out above, I have concluded that the withdrawal of Saturday work occurred after Mr Harvey tendered his resignation and most likely on Friday 3 June 2005.

[37] The circumstances which can be taken into account in deciding whether a resignation ought to be regarded as a constructive dismissal are limited to those which occur prior to the decision to resign being made. In this case, therefore, the Authority was wrong to take the withdrawal of Saturday work into account in reaching its conclusion that Mr Harvey had been constructively dismissed.

[38] The second limb of Mr Gould's argument was that the actions of the plaintiffs on 1 and 2 June 2005 with respect to the calculation of Mr Harvey's wages and the change in his work were not breaches of duty or, in the alternative, were not sufficiently serious to make it reasonably foreseeable that Mr Harvey would resign.

[39] With respect to the calculation of wages, Mr Gould has submitted that there was a genuine dispute between the plaintiffs and Mr Harvey and that, where such a dispute exists, it cannot be grounds for a claim of constructive dismissal. In support of this submission, Mr Gould referred me to the decision of the former Chief Judge in *New Zealand Institute of Fashion Technology v Aitken* [2004] NZEmpC 128; [2004] 2 ERNZ 340 where, at paragraph [66], he said:

... Where there is a genuine dispute between the parties as to their rights, especially if it is based on reasonable grounds, neither party can use the other party's stance in the dispute as a ground for either dismissal or resignation intended to be treated as a dismissal. ...

[40] If Mr Harvey's concern about this aspect of the matter was simply that the plaintiffs did not agree with him, there might well be force in this submission. But that is not the case. The evidence on which I must decide this matter was that the plaintiffs responded to Mr and Mrs Harvey's concern with anger and rebuke. They would not entertain the possibility that a mistake had been made. The following day, Mr Harvey reasonably concluded from Mr Smith's actions and demeanour that he was being punished for having raised the issue. These actions by the plaintiffs were clearly in breach of their duty of good faith pursuant to s4 of the Employment Relations Act 2000 and, in particular, in breach of subsection 1A(b) which declares that the duty of good faith:

requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative...

[41] I find that the plaintiffs' actions in this regard were also in breach of the term of the employment agreement which, when problems were addressed to them, required the plaintiffs to "*be willing to help in any way*" they could.

[42] The change to Mr Harvey's work was imposed unilaterally on him by Mr Smith on 2 June 2005. Mr Gould submitted that this was no more than an exercise of the plaintiffs' prerogative to manage their business. What that submission overlooks is that, on the evidence of Mr Harvey, there was an express agreement at the beginning of the employment relationship that he would do the general deliveries and Mr Smith would do the carpet deliveries.

Requiring Mr Harvey to swap duties without his agreement, therefore, constituted a breach of a term of the employment agreement.

[43] In its determination, the Authority placed emphasis not only on the unilateral nature of the change in Mr Harvey's duties but also on the fact that he was required to do work for which he was not trained. Mr Gould submitted that the Authority was wrong to take this into account because "*Even if the Defendant did anticipate he would not be trained properly, that is anticipation of a future event which does not entitle him to treat himself as constructively dismissed.*" In support of this submission, Mr Gould referred me to the decision of the Court of Appeal in *Business Distributors Ltd v Patel* [2001] NZCA 301; [2001] ERNZ 124.

[44] The facts of this case are not directly comparable with those in the *Business Distributors* case and I do not accept that the statement of principle made by the Court of Appeal in that case assists the plaintiffs in this case. One of the grounds on which Mr Patel sought to have his resignation treated as a constructive dismissal was a general concern that he might be treated unfairly in the course of a review due to take place 6 months later. In that context, the Court of Appeal made the observation relied on by Mr Gould:

[24]... However he was not entitled to treat himself as constructively dismissed in anticipation of something which lay well in the future and may well never have occurred. He cannot point to the employer's possible future conduct as causative of the resignation.

[45] In this case, when Mr Harvey raised the issue of training with Mr Smith on 2 June 2005, Mr Smith explicitly told Mr Harvey that he would not receive any help. Unlike Mr Patel, therefore, Mr Harvey was dealing with a situation which was immediate and certain. I find that Mr Harvey was properly entitled to take Mr Smith's refusal to provide training into account in deciding to tender his resignation and to rely on it in his claim of constructive dismissal.

[46] Mr Gould's final submission was that, even if the plaintiffs had breached their duty to Mr Harvey, the breaches were not of sufficient seriousness that it was reasonably foreseeable that he might resign as a result. I do not accept that submission. The test of reasonable foreseeability is an objective one. The plaintiffs' actions were in breach of both their statutory duty and their contractual duty to Mr Harvey. What an employee is paid will always be of fundamental importance. By angrily rejecting his concern about his wages and then punishing him for raising that concern, the plaintiffs seriously undermined the foundation of the employment relationship. To an objective observer in the plaintiffs' position it would have been entirely foreseeable that Mr Harvey might not be prepared to put up with that.

[47] I confirm the Authority's conclusion that Mr Harvey was constructively dismissed.

[48] In his submissions, Mr Gould also addressed the significance of the plaintiffs' allegation that Mr Harvey had breached the confidentiality provision of the employment agreement by discussing the calculation of his wages with people other than his wife. I need not address that issue in any detail because it does not seem from my reading of its determination that the Authority took this factor into account in its conclusion that Mr Harvey was constructively dismissed. I record simply that I do not accept the submission that the confidentiality provision in the employment agreement prevented Mr Harvey from seeking advice about the amount of tax which ought properly be deducted from his wages. In my view, the provision in question was intended to restrain Mr Harvey from discussing commercial aspects of the plaintiffs' business with potential competitors rather than seeking advice about his own situation.

[49] The final aspect of the plaintiffs' case was that the deductions from Mr Harvey's wages made from 15 June 2005 onwards were made by agreement. In support of this proposition, Mr Gould referred me to a passage in Ms Nola's letter to Mrs Harvey dated 17 June 2005. Noting that Mr and Mrs Harvey's evidence was silent on this point, he urged me to accept what Ms Nola had said in her letter as accurate.

[50] I need not make a finding of fact on this issue. There was nothing to suggest that the agreement Ms Nola referred to in her letter was recorded in writing by Mr Harvey. Section 5 of the Wages Protection Act 1983 makes it lawful for an employer to make deductions from an employee's wages with the written consent of the employee or on the written request of the employee but s4 of the same statute requires an employer to otherwise pay the entire amount of the wages without deduction. When these provisions were drawn to Mr Gould's attention, he properly conceded that the deductions had been improperly made.

[51] Although the challenge was originally expressed to be to the Authority's determination as a whole, Mr Gould did not address me on the disadvantage grievance or on the Authority's orders regarding holiday pay, costs and disbursements. On the evidence, it seems to me that those aspects of the matter were also correctly determined and I confirm the Authority's orders in relation to them.

The cross-challenge

[52] In the statement of defence, Mr Harvey challenged three aspects of the Authority's determination.

[53] The first aspect of Mr Harvey's challenge was to the award of compensation made by the Authority. Mrs Irwin submitted that the Authority was wrong to have regarded Mr Harvey's two personal grievances as *"intertwined"* and to have made a global award in respect of them both. She noted that the unjustified disadvantage grievance was based on events that occurred after Mr Harvey had resigned and submitted that this meant they could not be

seen to cross over the events relied on for the claim of unjustified dismissal. What this submission overlooks is that a dismissal occurs when the employment comes to an end. This has been found to be so even in cases of constructive dismissal. As I read the Authority's determination, this was the approach to the matter it took and, in that sense, it was correct to say that the events relating to the two grievances overlapped. In any event, the Authority was not bound to make distinct awards in respect of compensation for each of the grievances. It was open to it to make a global award in respect of them both and, in my view, this was an appropriate case in which to do so.

[54] Mrs Irwin also submitted in a general sense that the quantum of compensation awarded was too little. Having had regard to all the material before me, I am not persuaded that the amount of $8,000 awarded was wrong and I confirm it.

[55] The second aspect of the cross-challenge was a claim that the Authority ought to have awarded reimbursement of lost income for a greater period than 3 months. Mrs Irwin's submissions on this point tended to mix this issue with the issue of compensation for distress but, separating out the factors which supported this aspect of the matter, I am not persuaded that the Authority was wrong. Mr Harvey obtained alternative employment a month after his employment by the plaintiffs ended. That was at a significantly lower rate of pay but there was no evidence that Mr Harvey made any attempt to obtain a better paying job or to seek secondary employment. These were factors the Authority correctly took into account in exercising its discretion to limit reimbursement to the 3-month period provided for in s128(2) of the Employment Relations Act 2000. There was evidence suggesting that the plaintiffs had attempted to make it difficult for Mr Harvey to find employment but there was no evidence that this had been successful. This evidence therefore went, at best, to the issue of compensation. I confirm the Authority's decision to order the payment of 3 months' lost remuneration.

[56] The third aspect of the cross-challenge related to the award of costs and disbursements made by the Authority. Mr Harvey's actual costs associated with the proceedings before the Authority were $4,000. The Authority awarded him $1,500. In the circumstances, this award is unexceptional and consistent with the principles enunciated in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808. I am not persuaded that the Authority was wrong in this regard. I confirm the award of costs.

[57] As to disbursements, Mrs Irwin submitted that this Court should order the plaintiffs to reimburse expenses incurred by Mr Harvey in seeking to enforce the orders of the Authority. Any such expenses were incurred in the District Court and any order for costs or disbursements associated with that process can only be made by the District Court.

[58] The fourth claim made in the cross-challenge was for penalties to be imposed on the plaintiffs for breach of the Employment Relations Act 2000 and of the Wages Protection Act 1983. I decline to do so for the reasons discussed in *Xu v McIntosh* [2004] NZEmpC 125; [2004] 2 ERNZ 448. Mr Harvey has sought and been granted other remedies in respect of the matters relied on as breaches of statute. To impose penalties as well would be a double penalty and would be unjust.

[59] In the course of submissions, Mrs Irwin also raised a claim for return of an A-frame Mr Harvey said he owned and which had been retained by the plaintiffs. This Court has no jurisdiction to entertain that claim. If agreement cannot be reached for its return, Mr Harvey may have recourse through the Disputes Tribunal or the District Court.

[60] Another claim raised in submissions was for an order that the plaintiffs account to Inland Revenue or to Mr Harvey for the PAYE tax apparently not remitted to Inland Revenue. I agree with the Authority that this is a matter to be resolved in the first instance by Inland Revenue. To the extent that it may assist in that process, however, I record the following findings of fact. Mr Harvey was employed by the plaintiffs from 2 April 2005 until 1 July 2005. The provision in the employment agreement between the parties dated 3 April 2005 that Mr Harvey was to be paid *"$10.90 per hour cash in hand"* was intended to mean that this was to be his rate of pay after deduction of PAYE tax.

Conclusions

[61] In summary, my judgment is:

The challenge is unsuccessful.
The cross-challenge is unsuccessful.
All orders made by the Authority are confirmed.

[62] The sum of money currently on deposit through the Registrar should now be paid out to Mr Harvey together with the interest on it which has accrued while on deposit.

Comment

[63] The plaintiffs may disagree with the findings of fact which form the basis for this judgment and feel that their point of view has not been properly taken into account. If so, they must understand that this is the result of the very limited scope of challenge they were permitted to pursue which, in turn, is the direct result of their failure to

participate constructively in the Authority's investigation.

Costs

[64] All parties in this matter have been unsuccessful in their challenges. Overall, however, my preliminary view is that the plaintiffs' challenge comprised the large majority of the matter which was before the Court and that, having successfully resisted that challenge, the defendant is entitled to a modest contribution to his costs. The parties are encouraged to agree costs but, if they are unable to do so, Mrs Irwin is to file and serve a memorandum by 1 February 2008. Mr Gould is then to file and serve any memorandum in reply by 15 February 2008.

A A Couch
Judge

Judgment signed at 4.45 pm on 18 December 2007
