

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 37
5420845

BETWEEN ALLEN-ROBERT SMITH
Applicant

AND STRATFORD FURNITURE
MANUFACTURING COMPANY
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Julian Hannam and Greg Kirk, for the Applicant
Megan Gundersen, for the Respondent

Investigation Meeting: 10 December 2013 at New Plymouth

Determination: 17 April 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Allen-Robert Smith claims he was unjustifiably disadvantaged by Stratford Furniture Manufacturing Co Limited by being sent away from his employment on 18 April 2013. He also claims to have been unjustifiably dismissed. Mr Smith says he was underpaid his annual holidays entitlement on the termination of his employment.

[2] Mr Smith asked the Authority to award penalties against his former employer for breaches of s. 65 of the Employment Relations Act 2000 (the Act) and for breaching s. 75 of the Holidays Act 2003. Those claims were not pursued when it was brought to his attention that such penalty actions could be taken only by a Labour Inspector.

[3] Stratford Furniture Manufacturing Company Limited (Stratford Furniture) specialises in commercial fit outs throughout the North Island. It employs between 25 and 30 people at any one time, comprising tradesmen, apprentices, labourers, truck drivers and office staff. The company's sole director is Neil Cameron.

[4] The company denies that it disadvantaged or dismissed Mr Smith. It says the termination of his employment was brought about by his own actions which amounted to a resignation. Stratford Furniture denies underpaying Mr Smith his annual leave entitlement on termination of his employment.

Background

[5] Mr Smith commenced employment with Stratford Furniture on 27 March 2012. The previous day he had called into the company regarding employment opportunities and Mr Cameron had offered him a position loading trucks for the company. He was given an employment agreement to take away and read which he signed and returned on his first day of work. The duties of the position were described in the employment agreement as *despatch and general work as required*. He commenced on \$16 per hour with an understanding that he would be working between 40 and 50 hours per week.

[6] After approximately three months Mr Smith's hourly rate was increased to \$17. Two months later it was increased to \$18. Mr Smith was paid a flat hourly rate for all hours worked.

[7] In September 2012 Mr Smith commenced a seven month period of home detention. Under the terms of his sentence he was permitted to work only 40 hours per week. Mr Cameron agreed to maintain Mr Smith's remuneration at the level it was before he commenced home detention.

[8] At that time Mr Smith's pay was \$900 gross per week, representing 50 hours of work at \$18 per hour. The arrangement for the period of his home detention meant that Mr Smith would be paid for 50 hours work per week, when in fact he worked only 40 hours per week for the seven month period. His payslips showed an increased hourly rate of \$22.50 for 40 hours. The arrangement was recorded in a letter from Mr Cameron to Mr Smith dated 21 September 2012.

[9] Mr Cameron said he agreed to maintain Mr Smith's pay at its former rate during this period because he was a good worker whom he hoped would remain with the company for the long term. He said he viewed it as an investment in the employment relationship and that it cost the company \$5,400 over the seven month period of Mr Smith's home detention.

[10] Mr Smith did not complete his full 40 hours of work for many of the weeks of his home detention, although there was always work always available for him according to Mr Cameron. He came to an additional arrangement with Mr Smith whereby the employee was permitted to use his annual leave or, at times, his sick leave to top up his hours to 40 per week so he could maintain the same pay level in the weeks he worked shorter hours. Mr Smith had said that was important to him because of his outgoings.

[11] The relationship between Mr Smith and Mr Cameron, to whom he reported, was for the most part friendly and cordial with only one incident of any note between them before 18 April 2013. That incident related to Mr Cameron's annoyance at finding that the confidential arrangement he had agreed with Mr Smith for the period of his home detention had been disclosed to other staff members. They were upset about the enhanced pay Mr Smith was receiving. There was a verbal altercation between Mr Smith and Mr Cameron following which both parties appeared to put the matter behind them.

[12] Mr Smith's home detention order expired on 9 April 2013. Some of Mr Smith's co-workers and Mr Cameron gave evidence of a change in Mr Smith's demeanour in the weeks leading up to the end of his home detention. His mood and attitude towards his co-workers changed. He was less friendly, approachable and communicative than previously. During this time Mr Smith talked to the Payroll Officer, Michelle Burrows, on many occasions about his hourly rate and the hours he had worked. He asked for a copy of the agreement over his pay for his home detention period. Mr Smith acknowledged there was a change in his behaviour at this time. He said he was dreading going back to working longer hours as he would have less time to spend with his children and his partner.

[13] On Wednesday 17 April 2013, shortly after he had completed his home detention and reverted to 50 hours of work per week, Mr Smith asked Mrs Burrows if he could use his annual leave to top up the 43.5 hours he had in worked in the past

week to 50 hours. Mrs Burrows relayed that request to Mr Cameron on Thursday 18 April 2013. Mr Cameron, who saw that arrangement as having ended with the home detention, sought out Mr Smith in the despatch area of the factory to discuss this issue. He took with him a handwritten note of the hours Mr Smith had worked in the last week and a copy of the letter of 21 September 2012 regarding the special arrangement put in place for Mr Smith's home detention.

[14] A verbal altercation quickly started between Mr Smith and Mr Cameron. Each accuses the other of instigating the incident. An attempt by Mr Cameron to diffuse the situation by putting his hands on Mr Smith's upper arms and telling him he loved his work further inflamed it. Mr Smith said in his oral evidence that he thought Mr Cameron was making a pass at him which disgusted him so he brushed Mr Cameron's arms away. Mr Cameron says Mr Smith "*smashed*" both his arms away.

[15] Both men agree about the language they used to each other, which could euphemistically be described as robust. Mr Cameron walked away firing a last verbal salvo. His words, which were more colourful and succinct than mine, made clear his annoyance at what he saw as ingratitude on Mr Smith's part over the favourable remuneration arrangements he had made for him during his home detention. Mr Smith says a direction to "*F... off*" was included in the salvo: Mr Cameron denies this.

[16] Mr Smith walked out of the factory, taking some items from his locker as he departed. He returned later with his partner to clear out his locker and hand in his keys and overalls. Both Mr Cameron and Mr Smith communicated with Sharlene Stokes, Mr Smith's Probation Officer.

[17] Neither Mr Cameron nor Mr Smith contacted the other in the ensuing days. Mr Cameron had Mr Smith's final pay made up on Wednesday 24 April 2013.

Issues

[18] The issues for the Authority to determine are:

- (a) Whether Mr Smith was sent away from his employment on 18 April 2013; and, if so
- (b) Whether that was an unjustifiable action by his employer that disadvantaged him;

- (c) Whether Mr Smith was dismissed from his employment; and, if so,
- (d) Whether his dismissal was unjustifiable;
- (e) Whether he received all the moneys due to him at the termination of his employment.

Did Stratford Furniture send Mr Smith away from his employment on 18 April 2013?

[19] Mr Smith and Mr Cameron agree they exchanged angry words on 18 April 2013. Each claims to have been calm at the outset of the discussion and to have reacted to the verbal belligerence of the other. It is clear from their evidence that the discussion took on an aggressive tone very quickly and that both men were verbally abusive to each other. Where their evidence conflicts, I have preferred that of Mr Cameron. Both in his written and oral evidence he impressed me as the more truthful and less self-serving witness.

[20] I accept Mr Cameron's account that he realised matters had got out of hand and attempted to retrieve the situation by putting his hands on Mr Smith's shoulders, telling him that he loved his work. I find Mr Smith's claim that he believed his employer was "*making a pass*" at him to be a fanciful attempt to justify his subsequent violent reaction.

[21] By Mr Smith's account, he "*flicked off*" Mr Cameron's arms. I find Mr Cameron's account of his arms being "*smashed*" away by Mr Smith the more credible of the two versions of the event. Mr Smith's written evidence portrayed himself as being calm and in control of the situation at this point while his employer was enraged. I find that implausible given the barrage of abuse Mr Smith then described himself as directing to Mr Cameron.

[22] Mr Cameron then walked away from Mr Smith expressing in colourful language his annoyance at his employee's ingratitude. I reject Mr Smith's evidence that Mr Cameron told him to go away and find another job. Mr Smith left the workplace after collecting some of his belongings.

[23] I find that he was not sent away by Mr Cameron but left of his own volition, in a "*mad, angry mood*" as he described his state in his written evidence. Having found

that he was not sent away, I do not have to consider further his claim to have been disadvantaged by his employer's action.

Was Mr Smith dismissed by Stratford Furniture?

[24] Mr Smith acknowledged being in an emotional state leading up to the ending of his home detention. Mr Smith described himself and Mr Cameron as being "*ticking*" before their encounter on 18 April 2013. I find that expression, with its implication of imminent explosion, apt to describe Mr Smith's state. Mr Cameron's evidence was that he was feeling apprehensive about raising with Mr Smith his request to use his annual leave to make up his hours from the 43.5 he had worked to the 50 hours for which he expected payment.

[25] It was apparent from Mr Smith's oral evidence that he was upset about coming off home detention because it signalled the end of his shorter hours for the same pay arrangement. He told the Authority he knew he would be "*thrashed and abused*" and that he "*wouldn't have a life*". I understood him to mean that the resumption of his former longer hours would result in him spending less time with his partner and their children. Mr Smith's evidence made it clear that he resented this and believed himself to be worth more than the \$18 per hour he was paid.

[26] It is not necessary for me to describe the encounter between Mr Smith and Mr Cameron again. I accept that the workplace environment was one in which robust language was normal. I note, however, that Mr Smith's written evidence of how he acted throughout the encounter reveals an attitude of disrespect bordering on contempt for his employer.

[27] In my view he took out on Mr Cameron his frustration and resentment at having to revert to his former hours for the same remuneration after completing home detention. That was the main cause of the explosive encounter with Mr Cameron on 18 April 2013, at the conclusion of which Mr Smith left the premises in a heightened emotional state.

[28] When cross examined as to why he had emptied his locker when he came back later the same day to return his keys to the factory, Mr Smith asserted that it was his right to do so. Other than that, he provided no explanation for his action. He said his partner had suggested he return his keys to the premises so he would not receive the blame if anything happened to the factory over the weekend. He confirmed he had

not known until after he had returned the keys that Mr Cameron had asked Ms Stokes (his Probation Officer) that he do so. Mr Cameron said he made that request in the knowledge that people sometimes do “*silly things*” and he was concerned for the safety of the factory.

[29] Payroll Officer, Mrs Burrows, gave evidence that when Mr Smith returned to the workplace with his partner to clear his locker he asked her for a copy of his employment agreement. She gave him a copy immediately. Mrs Burrows said Mr Smith handed in his keys to the factory and his overalls. She told him it was her understanding from Mr Cameron that he had not been dismissed. Mr Smith’s evidence confirmed that conversation with Mrs Burrows.

[30] Mr Smith also acknowledged that his Probation Officer had told him on 18 April that Mr Cameron had confirmed to her that Mr Smith had not been dismissed. Mr Smith says he did not contact Mr Cameron in the days following 18 April because Ms Stokes had told him not to telephone or text the factory. She had said Mr Cameron would telephone her after the weekend to let her know how he was going to deal with Mr Smith.

[31] Ms Stokes gave evidence of the three telephone discussions she had with Mr Cameron at his initiation after Mr Smith had left the workplace on 18 April. She had relayed the information from Mr Cameron to Mr Smith, including the information that he had not been dismissed. Her recollection was that Mr Cameron had said he would contact her after the weekend when he had thought the matter through. He did not want to deal with Mr Smith or have him on the property until he had done that.

[32] Ms Stokes said she relayed this information to Mr Smith and told him that he was not to contact the factory by telephone or text. When questioned, Ms Stokes acknowledged that was her interpretation of what Mr Cameron meant, and that he had not specifically referred to wanting no contact from Mr Smith by telephone or text.

[33] Mr Smith says he started to look for other work when he met Ms Stokes six days after the incident and she told him that Mr Cameron had not contacted her. He received a final payslip from Stratford Furniture on 24 April 2013. Mr Smith began new employment on 7 May 2013 on an hourly pay rate of \$17.

[34] Mr Cameron’s evidence is that he was in a state of disbelief over the incident with Mr Smith on the morning of 18 April 2013. He had contacted Ms Stokes shortly

after it had occurred and had spoken with her two or three times that day. He did not recall telling her he would contact her after the weekend and did not make further contact with her after that day.

[35] I find that Mr Cameron did not dismiss Mr Smith on 18 April 2013. Mr Smith stated in his written evidence that he “*felt that (he) had been fired*” by Mr Cameron on 18 April 2013. Under questioning in the investigation meeting, however, he acknowledged he did not think he had been dismissed when he left the factory on 18 April 2013. There was no further interaction between the two men. Mr Smith agreed he had walked out of the premises that day and there was no dispute that he had returned later to clear his locker.

[36] The question then becomes whether Mr Cameron subsequently dismissed Mr Smith when he arranged for a final pay to be made up for him on 24 April 2013. Mr Cameron had not contacted Mr Smith in the meantime. His evidence was that he had difficulty coming to terms with what had happened on 18 April and took some time to sort out his thoughts.

[37] As he reflected in the days following the incident Mr Cameron says he came to the view that Mr Smith “*threw his job in*” or effectively resigned. He had walked off the job after the argument, and then later come back and emptied out his locker before walking out again.

[38] I find that was a legitimate view for Mr Cameron to take. Mr Smith acknowledged that he did not believe he had been dismissed when he walked off the premises on 18 April. I accept that Mr Smith’s initial action of walking off the job was carried out in the heat of the moment and did not indicate that he had decided to terminate his employment. According to Mr Smith, after first walking off the premises he visited Major Ashton at the Salvation Army. At that stage he was “*crying, swearing and in a mad, angry mood*”.

[39] He then spoke to his step-father by telephone and was advised to seek legal advice. He spoke to his Probation Officer. On her advice he went home where he started to write an account of the events of the morning. At his partner’s suggestion they drove to Stratford Furniture where he obtained a copy of his employment agreement, handed in his keys and overalls and cleaned out his locker.

[40] The encounter with Mr Cameron had taken place, by Mr Smith's account, just before 10 a.m. It was approximately midday, by Mrs Burrows' uncontested evidence, when Mr Smith returned with his partner to clean out his locker. This was a deliberate action and not one taken while in the throes of intense anger or emotional disturbance. I find Mr Cameron was justified in concluding, once he had the time to reflect on the events, that Mr Smith had decided to walk out and not come back.

[41] The question arises whether Mr Cameron should have attempted to make contact with Mr Smith in the days following their fiery encounter before coming to the conclusion that the employee had decided to leave his employment. In *E N Ramsbottom Ltd v Chambers*¹ the Court of Appeal noted that:

"...clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment"

[42] I find Mr Smith did clearly evince his intention to end his employment by his action of returning to the workplace to clear out his locker almost two hours after he had first walked off the job. There was accordingly no requirement for Mr Cameron to contact Mr Smith to make inquiries of his intentions.

[43] In the circumstances, Mr Cameron's decision to arrange for Mr Smith's final pay to be made up did not constitute a dismissal. It was an acknowledgement that Mr Smith had terminated the employment relationship.

Did Mr Smith receive all moneys owing to him on the termination of his employment?

[44] Mr Smith claims that his employer breached the Holidays Act 2003 by paying him annual leave during his employment when he did not take time off work. In his written evidence to the Authority he claimed to have taken only one day off work in the whole time he was employed by Stratford Furniture. When questioned in the investigation meeting he acknowledged this was incorrect and said he had also taken a day's leave the day before he started his home detention. In submissions, counsel for Mr Smith referred to three days leave that he had taken.

¹ [2000] 2 ERNZ 97

[45] Mr Smith also acknowledged that, while he was on home detention, he had asked his employer if he could use his annual leave to top up his hours in weeks in which he did not work his full 40 hours. Mr Cameron had agreed to this. It was Mr Smith's request to be allowed to continue taking annual leave to top up his hours after his home detention had finished that led to the incident of 18 April 2013 immediately before he walked out of his employment.

[46] I find it difficult to reconcile Mr Smith's actions in asking to use his annual leave in this manner and then claiming that his employer has breached the Holidays Act in complying with his requests. I also find his claim to have only taken one day off work throughout his employment (amended orally during the investigation meeting to two days, then in submissions to three days as noted above) to be inconsistent with his requests to his employer to use his annual leave to top up his hours. The "top up" hours were hours that Mr Smith was not working. He asked to be paid for those hours from his annual leave entitlement. In my view that means he was on annual leave during those hours.

[47] Mr Smith was on home detention from 10 September 2012 to 9 April 2013. Pay slips submitted for that period reveal that in 19 of the 30 pay periods between those dates Mr Smith used annual leave to bolster the hours he worked. The average number of hours he used as annual leave in those 19 weeks was 5 per week. Cumulatively, the annual leave totalled 95 hours, which represented just over two weeks' leave.

[48] The Holidays Act 2003 provides that:

18 Taking of annual holidays

- (1) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.
- (2) If an employee elects to do so, the employer must allow the employee to take at least 2 weeks of his or her annual holidays entitlement in a continuous period.
- (3) When annual holidays are to be taken by the employee is to be agreed between the employer and employee.
- (4) An employer must not unreasonably withhold consent to an employee's request to take annual holidays.

[49] Although it may be unorthodox to allow an employee to take their annual holidays in the manner requested by Mr Smith, I find it is not prohibited by the Holidays Act. The alternative for Mr Smith was to receive reduced pay in those weeks in which he chose not to work the full 40 hours. He was fortunate that his

employer acceded to his requests thus allowing him to retain the level of remuneration he had said he found necessary to live.

[50] There was no evidence put before me to support Mr Smith's claim to have been underpaid his annual holidays entitlement.

Determination

[51] Mr Smith does not have a personal grievance for unjustifiable disadvantage or unjustifiable dismissal.

[52] Stratford Furniture has paid all holiday entitlements due to Mr Smith.

Costs

[53] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority