New Zealand Employment Relations Authority Decisions

Smith v The Happy Hog Limited [2011] NZERA 372; [2011] NZERA Wellington 93 (31 May 2011)

Last Updated: 22 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 93 File Number: 5323522

BETWEEN

AARON SMITH Applicant

AND

THE HAPPY HOG LIMITED

Respondent

Member of Authority: Denis Asher

Representatives:

Russell Ward for Mr Smith Darren Mitchell for the Company

Investigation Meeting Palmerston North, 19 May 2011

Submissions Received By 30 May 2011

Determination:

31 May 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Smith bullied in his employment or by the respondent (the Company)? Is the applicant owed arrears of wages? Was Mr Smith given an individual employment agreement? Was Mr Smith unjustifiably constructively dismissed by the Company?

[2] If Mr Smith's allegations are correct, what remedies are appropriate?

[3] Did Mr Smith raise his personal grievance within the statutory 90-day period? The respondent does not consent to any grievance being brought outside of that period.

The Investigation

[4] During a telephone conference on 30 March 2011 the parties agreed to a one-day investigation in Palmerston North on 19 May 2011, as well as to time lines for providing an amended statement of problem and written witness statements.

Background

[5] The Company operates at least one piggery in Manawatu.

[6] Mr Smith was employed by the Company in early 2010. No employment agreement was provided to the applicant in

advance of his employment: Mr Smith says he never saw a written employment agreement, whereas the Company says two drafts were given to Mr Smith early on in his employment.

[7] The applicant says he was employed as an artificial inseminator technician but that the Company unilaterally changed his position to that of a labourer; the respondent says Mr Smith was always employed as a farm worker.

[8] Mr Smith's employment ended on 23 September 2010. He says he was bullied by co-workers and the Company's director, Mr Ross Barber, which caused him stress and fatigue and worsened a medical condition, and caused him to resign. Mr Smith says his counsel, Mr Russell Ward, notified the respondent on 30 September that he had been constructively dismissed.

[9] Mr Smith also says that his stress was increased when the Company's director, threatened his counsel with physical violence by telephone on 19 October 2010, and when he again abused his counsel before a mediator on 16 November, causing the part-heard mediation to be abandoned.

[10] Mr Smith says, because of the Company's failure to pay him his wages, his stress was further heightened when his guitar and amplifier were removed by a bailiff, thus depriving him of his only other source of income.

[11] The Company says that, during his employment, it was necessary to issue Mr Smith with a number of reprimands, verbal warnings and one written warning for various matters including verbally abusing other employees, vandalising the respondent's property, not following instructions, failing to clock in properly, lateness and walking off the job. It says the applicant was treated leniently in the hope his behaviour would improve.

[12] The Company also says that, during Mr Smith's employment, he did not raise any concerns regarding bullying or stress.

[13] The Company says Mr Smith provided his written notice of resignation on 23 September 2010: the notice did not specify any concerns the applicant might have had with his employment.

[14] The Company says it did not receive formal notice of a personal grievance within the statutory 90-day period and does not consent to a grievance being filed outside of that period.

[15] By email on 26 May 2011, and rather than providing a conventional submission as he was invited to do on behalf of his client, Mr Ward instead filed a *"Re-amended Statement of Problem"* (Authority record). The remedies sought now include (as amended during the Authority's investigation) a penalty for the failure to provide an individual employment agreement to be paid to the applicant. The respondent took no issue during the investigation with this late amendment to the remedies sought by Mr Smith but in submissions received on 26 May argue -amongst other things - that the applicant was not unduly prejudiced by this failure, and it was technical and slight.

[16] The applicant continues to seek remedies that, as advised to him and his counsel, the Authority has no statutory power to grant, including a certificate of service detailing the tasks undertaken by the applicant and indicating also that he was made redundant, and an apology.

[17] Attached to the re-amended statement of problem are two signed witness statements. The statements are from Mr Smith's partner and her father. They purport to give details in support of the applicant's various claims: I say 'purport' as the statements are not in affidavit form and have been produced after the opportunity for myself to ask questions of the signatories and for the respondent to cross-examine the witnesses in respect of their statements. They are accordingly objected to by the respondent as inadmissible; furthermore, Mr Ward had already advised both the respondent and the Authority that his client would be relying only on the amended statement of problem filed on 8 April.

[18] While oral evidence was provided at the Authority's investigation by Mr Smith's partner, her written statement provides greater detail. Her father did not appear as a witness at the investigation to give evidence under oath.

[19] The respondent says both statements should be disregarded by the Authority, and only Ms Smith's partner's oral evidence be considered.

[20] I note here that no application to resume the investigation so that this evidence might be formally provided has been sought.

Discussion and Findings Additional Evidence

[21] I accept the respondent's objections in respect of the two witness statements attached to the re-amended statement of problem received on 26 May from Mr Ward. Both are set aside other than where Mr Smith's partner's statement repeats her oral evidence.

[22] As already advised, the remedies sought of a certificate of service and an apology are not available under s. 123 of the Employment Relations Act 2000.

Was Mr Smith's Grievance Filed within 90-days?

[23] This part of Mr Smith's claim relies on an email he says was sent by his counsel to the respondent on 30 September 2010 (copy provided to the Authority on the day of the investigation): Mr Barber agrees that the email address is correctly addressed to him but denies ever having seen it. He otherwise does not take issue with the content or adequacy of the 30 September email.

[24] No other correspondence was sent by the applicant to the respondent, but the parties do agree that Mr Ward spoke to Mr Barber on 19 October last year, and that they attended mediation a short time later on 16 November.

[25] The email of 30 September plainly advises that Mr Smith believed he had been constructively dismissed, as a result of stress and fatigue arising out of bullying and an unnecessary written warning. The allegation of not having been given an individual employment agreement was also raised as was a claim of unilateral changes to his hours of work. Compensation was sought in the email, and an indication of the Company's willingness to attend mediation.

[26] The likelihood that notice was served within 90-days is reinforced by the telephone conversation both Mr Ward and Mr Barber agree they had on 19 October 2010 and the attempted mediation by the parties less than a month later: it is reasonable to conclude that by then, within the 90-day period, the respondent was fully on notice as to Mr Smith's grievance.

[27] By way of a balance of probabilities finding, I am satisfied proper notice of Mr Smith's grievance was filed on the respondent within the statutory 90-day period.

Bullying and Constructive Dismissal Claims

[28] Mr Smith relies on the detail of the allegations as set out in his amended statement of problem filed on 8 April 2011 (as is made clear above, I am giving no weight to the more detailed allegations set out in his re-amended statement of problem received on 26 may, after the Authority's investigation; both myself and the respondent have had no opportunity to question Mr Smith in respect of that detail).

[29] Mr Smith could not detail when and where and by whom he was bullied. No other evidence was produced on behalf of the applicant in support of these claims. Instead, his claims were generalised and included allegations his wages were not paid on time or at the correct rate, that his position description was unilaterally varied and that after saying an incident involving another employee would not be taken any further the respondent issued Mr Smith, unjustifiably as he explained it, with a final warning.

[30] As he explained during the Authority's investigation, Mr Smith *"assumed"* - in the absence of a written employment agreement - that he was employed on a full time basis and therefore could not understand when he did not work full time hours. However, during the investigation, Mr Smith accepted that when he was employed nothing had been agreed regarding hours to be worked.

[31] During the Authority's investigation, Mr Smith agreed he had never taken steps to raise his concerns with Mr Barber (including the claim his medical condition was being worsened by his treatment at work), or given notice of a grievance in respect of those concerns. He also agreed that, on one of the workplace walls, there was a poster setting out the steps to be taken in respect of employment relationship problems.

[32] As is plainly clear from reading the notice of resignation (copy attached to Mr Barber's witness statement), penned on or around 23 September 2010, and as agreed by Mr Smith, it makes no reference to the allegations he now raises in support of his claim he was unjustifiably constructively dismissed.

[33] During the Authority's investigation, Mr Smith conceded there were times he left the workplace early and that he sometimes was late to work and did not call in.

[34] There is no evidence to support the claims (even if they are correct) that threats of violence and abusive conduct by Mr Barber toward Mr Smith's counsel caused his client any stress.

[35] With the above in mind, I accept the respondent's submissions (pars 30 & 31, received on 26 May) that Mr Smith has failed to demonstrate any breach of duty by his employer resulting in his resignation, and that the applicant has not been able to demonstrate that the reason for his resignation was due to the (in)actions of his employer.

Arrears of Wages

[36] No evidence was brought by Mr Smith to support a claim he is owed arrears of wages. For example, he had no evidence of hours worked and not paid. There is no evidence of any agreed patterns of hours of work that was in conflict with the record of hours worked by Mr Smith that Mr Barber produced at my investigation. That record is clearly in breach of s. 130 of the Act (e.g. it did not include the applicant's address, the kind of work on which he was usually employed, or whether Mr Smith was employed under an individual or collective employment agreement). But, no penalty has been sought in respect of the wages and time record and I take the matter no further.

[37] Because of the absence of any credible particulars, Mr Smith's claim for unpaid wages arrears is dismissed.

Provision of Individual Employment Agreement

[38] At the time his employment commenced, and because of the evidence of its director (and as is conceded in the respondent's submissions received on 26 May), the Company had clearly not provided Mr Smith with an individual employment agreement per ss. 60 & 63A (2) of the Employment Relations Act 2000 (the Act). As Mr Barber stated in his oral evidence to the Authority, the draft employment agreement he provided to me during the investigation was given to the applicant *"early on"* in his employment. The Company is therefore in breach of the Act.

[39] While the statement of problem expressly identified one of the facts giving rise to the employment relationship problem as, *"no individual employment agreement"* (par 2), the remedies sought by Mr Smith did not include a penalty for failure to provide the agreement. As is made clear above, during the investigation, counsel for the applicant, Mr Russell Ward, confirmed his client's wish to seek a penalty for that failure; he also asked that it be paid to his client.

[40] Sub-section 134A (5) of the Act stipulates that:

An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of -

> *(a) the date when the cause of action first became known to the person bringing the action; or*
> *(b) the date when the cause of action should reasonably have become known to the person bringing the action.*

[41] What is clear from the evidence is that Mr Smith did not know of this cause of action until, acting on Mr Ward's advice and through him at the Authority's investigation, he confirmed he was seeking a penalty in respect of this breach. Should Mr Smith have reasonably known of the cause of action sooner, from before or shortly after he started his employment, by which time no employment agreement had been provided? I do not think so: that is because ss. 63A (2) of the Act is categorical, *"The employer **must do** at least the following things etc"* (emphasis added). The onus is on the employer, which it failed to meet. There is no reason to believe Mr Smith knew of the legal significance of this failure until after he took legal advice, in September last year. His representative has now raised the matter of a penalty late (during the investigation) but still within the statutory 12-month period.

[42] As the claim for a penalty was raised on 19 May 2011 I find that the claim was commenced within 12 months of the date when the cause of action should reasonably have become known to Mr Smith.

Penalty

[43] The requirement that employees provide intending employees with written employment agreements is now over 10 years old. Mr Barber had no explanation for the Company's failure to provide the document.

[44] Penalties for this breach are now well established (e.g. *The Wellesley Ltd* v *Adsett* unreported, Shaw J, 3 Dec 2007, WC 31/07).

[45] I therefore do not accept the respondent's submission that *"any breach of s. 65 of the ... Act ... is a technical and slight one on its part"* (par 44, above).

[46] In all the circumstances I am satisfied that a penalty of $2,000 is appropriate. In determining this amount I note that the breach preceded the 1 April 2011 amendment to Act which doubled fines for breaches of this type.

[47] As amply demonstrated by Mr Smith's evident confusion during the Authority's investigation as to his hours of work, tasks, designation and from whom he was expected to take directions - matters a written employment agreement typically address - I am satisfied that half of the penalty should be paid to the applicant: ss. 136 (2) of the Act applied.

Determination

[48] Other than a claim for a penalty in respect for failing to provide a written employment agreement, Mr Smith's claims do not succeed.

[49] The Company is to pay a penalty of $2,000 (two thousand dollars), half of which is to be paid to the applicant, the remainder to the Crown.

[50] As requested, costs are reserved.

Denis Asher

Member of the Employment Relations Authority