

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Peter Roman Solomon (Applicant)
AND Vertical Roofing Limited (Respondent)
REPRESENTATIVES Peter Roman Solomon In person
Victor Bracken, Advocate for Respondent
MEMBER OF AUTHORITY James Crichton
INTERVIEWS 1 May 2006 with Mr Solomon
22 May 2006 with Mr Bracken
DATE OF DETERMINATION 28 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Solomon) alleges that he was unjustifiably dismissed, suffered unfair pay deductions and was verbally abused and subjected to physical intimidation whilst employed by the respondent, Vertical Roofing Limited (Vertical).

[2] Vertical resists that claim and contends that Mr Solomon was dismissed for a breach of the company's safety policy, that there were no unfair pay deductions although there is an acknowledgment that there were a number of robust verbal exchanges. Physical intimidation of Mr Solomon is absolutely denied.

[3] The relationship between the parties was so tense that I made the decision not to bring them together and I conducted my investigation meeting effectively in two stages, first with Mr Solomon and then with Vertical.

[4] In January 2006, Mr Solomon responded to an advertisement from Vertical in the *New Zealand Herald*. This involved Mr Solomon speaking by telephone with Victor Bracken who was the manager of Vertical.

[5] Vertical had a subcontract to roof the new Otago Prison complex and Mr Solomon told me that he was a roofer by trade. Mr Bracken's view was rather different. He says that Mr Solomon was a roofing labourer because, by Mr Solomon's own admission, he was not able to do roof flashings. Mr Bracken said that flashings were a significant part of the roofing trade and Mr Solomon's inability to do flashings meant that he could not call himself a roofer and was just a labourer.

[6] Be all that as it may, Mr Bracken hired Mr Solomon and the employment relationship started in mid-January 2006.

[7] Mr Bracken says that he was *a hard task master* but that he was fair. He says that he will have told Mr Solomon what he told all his new staff, namely that there was to be no drugs, no drink, no women, no language and no advances of wages. Because the employment relationship required the workforce to be away from home, Vertical paid for motel accommodation with all meals being provided.

[8] Because Vertical paid for the meals and the accommodation, the menus were selected and approved by Mr Bracken and the accommodation was organised by Mr Bracken so that if men were required to share the same motel unit, that was directed by Vertical and was not a matter on which the workforce could necessarily have their own way.

[9] Despite the reservations that Mr Bracken had about Mr Solomon's technical competence, Mr Bracken says that he employed Mr Solomon on a roofer's wage although the work that he arranged for Mr Solomon to perform was effectively only that of a labourer. Clearly Mr Bracken felt some kinship with Mr Solomon because both were Maori and the rest of Mr Bracken's gang of workers was not. Mr Bracken said to me that he *wanted to look after him* [Mr Solomon] *because he was a Maori*.

[10] Mr Bracken's evidence was that when Mr Solomon arrived in Dunedin from Auckland to commence his new job, Mr Bracken collected him from Dunedin Airport and drove him to the motel where the gang was all staying and during this drive from Dunedin Airport to Mosgiel, Mr Bracken reiterated the rules of employment, indicated that an employment agreement would need to be signed and amongst other things emphasised that no personal cellphones were allowed on the job.

[11] This was because the nature of a roofer's calling was that responding to a cellphone while working high up on a roof was inherently dangerous. Mr Bracken said that he was concerned to fulfil his obligations to OSH and he always emphasised this to his workforce.

[12] As a means of communication with his gang, Mr Bracken held what he called *tool box meetings* every work day at the commencement of work. In these meetings, he identified the work that needed to be accomplished that day and then concentrated on safety matters. He emphasised the need for the crew to wear high visibility clothing and hard hats (which were supplied) and his evidence was that from time to time he would emphasise the ban on personal mobile phones.

[13] Mr Bracken said in his evidence that Mr Solomon was *the only guy who defied my ruling on phones*. Mr Solomon's evidence was that a number of his colleagues had phones including phones provided to them by Vertical.

[14] When I put this to Mr Bracken he agreed that he drew a distinction between personal mobile phones and phones held by foremen and leading hands which were issued by Vertical on the basis of a strict protocol about use. Mr Bracken explained the difference by saying that the site Vertical was working on was large with a number of big buildings and the only way that he could manage his gang was by being able to communicate from time to time and on an agreed basis with his foremen and leading hands. He said that of the gang of 25 there were seven men who were allowed to have mobile phones and had them provided by the employer. Mr Bracken maintained his evidence that Mr Solomon was the only worker who defied him on the use of personal mobile phones and I accept his evidence on this point as truthful.

[15] Mr Bracken says that Mr Solomon had been spoken to on two occasions previous to his final day about using the cellphone on the job and I accept that evidence as truthful. For his part, Mr Solomon said that he was never told that he was not allowed a cellphone on site. As I have already mentioned, not only were there two incidents when Mr Bracken had to speak to Mr Solomon about his personal cellphone use on site, but he had also told him about the rule about cellphones at the beginning of the employment relationship and spoke about it occasionally but on a regular basis during his tool box meetings. I accept Mr Bracken's evidence on this point.

[16] The relationship between the parties was never particularly satisfactory. In Mr Bracken's view, Mr Solomon kept pushing the envelope. Despite the prohibition on drinking, Mr Bracken says that Mr Solomon was regularly the worse for drink. Mr Solomon says that he was an insomniac and the only way that he could get to sleep was by drinking a six pack of beer every night. It seems that there were constant arguments about Mr Solomon's alcohol intake.

[17] Then there was an argument about whether Mr Solomon had a bank account to direct credit wages to. Mr Bracken's evidence was that Mr Solomon had no bank account and that Mr Solomon was *running away from the law*. Mr Solomon denies that any of that is true and says that he had a bank account but that his bank did not have a branch in the town nearest where they were working (Milton) but only in Mosgiel which was some way from the job site.

[18] Mr Bracken lent Mr Solomon the company vehicle to drive into Mosgiel to arrange automatic payments at his bank and he returned to his employer with a receipt for \$20 worth of fuel that he had put in the vehicle. He sought reimbursement and was refused. Mr Bracken, not surprisingly, took the view that the loan of the company's vehicle was a large enough contribution and that the fuel could be paid by Mr Solomon.

[19] Mr Solomon, it seems, lost his temper and told Mr Bracken that he could stick his job and walked off.

[20] The next day, Mr Bracken received a text message on his mobile phone from Mr Solomon in the following terms: *Hi bro. Can I have my job back. I got mad over f all and I am sorry it won't happen again. I got nowhere to go can't ring you got no money left.*

[21] Mr Bracken says that he felt sorry for Mr Solomon and took him back.

[22] The employment relationship then continued but it seems there were continuing difficulties. There were disputes between Mr Solomon and Vertical about the quality and choice of the food being provided at the motel, and there were issues between Mr Solomon and his work mates. Mr Solomon told me that he got on *really well with everyone* but that is not the evidence of Vertical. The great weight of evidence suggested that Mr Solomon was not regarded well by his work mates and particularly towards the end of the short period of employment, they preferred not to have anything to do with him. There were exceptions to that rule and one work mate in particular seems to have thought well enough of Mr Solomon but the majority was not kindly disposed towards him.

[23] On the day the employment relationship ended, Mr Solomon was observed by Mr Bracken standing behind a crane using his mobile phone. Mr Bracken's evidence is that he watched Mr Solomon using the phone for 15 minutes.

[24] Mr Solomon agrees that he was talking on his cellphone that morning when he was spotted by Mr Bracken but he says the call was only seven to eight minutes in duration. He says the call was from his new partner in Norway and that he told her that she could not ring him during normal work time and that she should ring back at 10am (morning smoko). Mr Solomon says that Mr Bracken came over to see him just as the call was finishing.

[25] Mr Bracken says that he approached Mr Solomon and asked him to deposit his cellphone in his office and to leave it there. Mr Bracken recalls Mr Solomon saying that he would just turn the cellphone off and Mr Bracken said in response that that would not do as Mr Solomon could not be trusted.

[26] Mr Bracken's evidence is that he then said to Mr Solomon that if Mr Solomon was not prepared to leave his cellphone in his (Mr Bracken's) office or leave it at the motel when he came to work, then there was no work for him.

[27] Mr Bracken reports that Mr Solomon looked at him defiantly for a time and then said words to the effect *I'm not giving you my f..... phone*. Mr Bracken says that he repeated his request that Mr Solomon leave the phone in his office until the end of the working day.

[28] Mr Bracken says that Mr Solomon then said something to the effect *f..... you I'm finished*. Mr Bracken's evidence then is that he said to Mr Solomon that if Mr Solomon could not comply with the rules about cellphones then he was not welcome on the job. Mr Bracken says he walked away at that point and left Mr Solomon to it. Mr Solomon subsequently left the workplace.

[29] That, however, was not the end of the matter because there was a verbal altercation between the two men that night at the motel.

[30] Mr Solomon accuses Mr Bracken of verbal and physical abuse.

[31] After departing the workplace, the evidence is that Mr Solomon went to the principal contractors on the site to seek work with them. Mr Bracken's take on this conversation is that Mr Solomon told the principal contractors *a sob story* so that his accommodation for that night at the motel would still be paid.

[32] Mr Solomon's evidence was that he had gone to the principal contractors to seek another job and that, while sympathetic, they were disinclined to employ him because he had fallen out with Vertical who were the principal subcontractors.

[33] That night in the motel, the evidence is clear that Mr Bracken confronted Mr Solomon in the latter's motel room. There was at least a verbal altercation with Mr Bracken acknowledging to me that he called Mr Solomon *scum of the earth*. Mr Solomon also alleges that Mr Bracken poked his finger into Mr Solomon's chest. Mr Bracken told me that he had said to Mr Solomon that Mr Solomon could *have a go at him* if he wanted to.

Issues

[34] Given that the termination of Mr Solomon's employment revolved around workplace policy in respect to private cellphones, I need to examine that aspect, and then consider whether there was in fact a dismissal, or for instance an abandonment of employment, and if there was a dismissal what the basis of it was.

[35] It follows that the issues are:

- (a) What was the cellphone policy and did Mr Solomon know about the policy?
- (b) Was there a dismissal?
- (c) Are there any obligations flowing from that?

- (d) Other issues.

Cellphone policy

[36] Mr Solomon said in his evidence at no time did anybody make it clear to him that there were to be no private cellphones on site. He noted that some other workers appeared to have cellphones and so he felt that he was being singled out for special treatment.

[37] Mr Bracken's evidence is quite different. He says he made it clear when he engaged Mr Solomon that there were no private cellphones allowed on site for reasons of safety. He says he reiterated that fact when he picked Mr Solomon up from Dunedin airport at the commencement of Mr Solomon's employment and that he regularly referred to it (not every day but certainly from time to time) at his morning tool box meetings. He also says that he had occasion to quarrel with Mr Solomon on two occasions prior to the day that Mr Solomon's employment ended in relation to his cellphone use on the job.

[38] I prefer Mr Bracken's recollection of events relating to this matter to that of Mr Solomon. Tangible support for Mr Bracken's recollection of events is contained in a handwritten rough minute of a tool box meeting held on 9 January 2006 at which Mr Solomon is marked present and the following note is included relating to cellphones:

No cellphones at work. Please don't bring them to work... my cellphone is avail (sic) in the event of emergencies. Anybody found with cellphones will be docked time and asked to hand this over.

[39] This written evidence, clearly in Mr Bracken's handwriting, is absolutely consistent with the evidence that he gave me orally.

[40] It follows that I am satisfied that there was a clearly enunciated policy on cellphones on site and that that policy was promulgated to staff including, in particular, Mr Solomon.

Was there a dismissal?

[41] The events immediately prior to the termination of Mr Solomon's employment with Vertical are not much in dispute. Mr Solomon was using a cellphone during work time, was observed doing so by Mr Bracken, was spoken to by Mr Bracken, told to hand over the cellphone, and refused to do so.

[42] Mr Bracken says that what happened next was that Mr Solomon said words to the effect *f...you I'm finished* and that Mr Bracken then reiterated that if Mr Solomon would not give up the cellphone, he was not welcome on the job and Mr Bracken then left.

[43] Mr Solomon says that he was *dismissed on the basis of receiving a phone call at work* and that Mr Bracken was *not willing to listen to any reason and demanded that I give (up) my phone. I do not consider the fact that I was not willing to give (up) my personal property a suitable reason for dismissal.*

[44] I think on the balance of probabilities, it is more likely than not that Mr Solomon's recollection of events is the more accurate and that the impetus for terminating the relationship was indeed from Mr Bracken rather than from Mr Solomon.

[45] It follows that I hold that there was in fact a dismissal rather than an abandonment of employment or a resignation as Mr Bracken's recollection of events seems to favour.

Consequences

[46] Having decided that Vertical had a policy on cellphone use which it had clearly promulgated around its workforce and having further decided that Mr Bracken dismissed Mr Solomon, the next issue is to decide whether that dismissal was justified or not.

[47] Mr Solomon has contended throughout that he was unaware of the employer's policy in respect to cellphones. I have made it clear I do not accept that evidence and I prefer the evidence of the employer on that point.

[48] However, on the question of whether there has been a dismissal or an abandonment of employment or resignation, I prefer Mr Solomon's evidence and consider that there has been a dismissal.

[49] The question is whether there has been an unjustified dismissal. I have reached the conclusion, having applied the new test for justification, that a fair and reasonable employer in Vertical's position, having made clear to an employee its safety based policy in respect to cellphone use and having had a number of occasions prior to dismissal to remind the employee of that policy, would have dismissed in those circumstances.

[50] I see the matter as a straightforward issue where the employee has been given another opportunity to follow the employer's policy and has chosen again not to do that. In those circumstances, I do not think an employer can be punished for failing to continue to offer work.

[51] Quite clearly, on the facts presented by both parties, had Mr Solomon handed over his cellphone to Mr Bracken for safekeeping, he would continue to be in employment, or at least have that opportunity. His failure to comply with a fair and reasonable instruction of his employer, motivated as it was by a concern for health and safety issues, brought about his own downfall.

Other issues

[52] In his statement of problem, Mr Solomon claimed he had suffered unfair pay deductions. Each of these instances was considered during my investigation. Amongst other things, Mr Solomon thought he was having tax deducted at source at the wrong rate but he accepted that that fear was misplaced. Mr Solomon also thought a deduction from his final pay was improper but it transpires this was to cover the motel costs after the dismissal.

[53] I accept Mr Solomon's evidence, in part confirmed by Mr Bracken, that there was a robust exchange between the two men in Mr Solomon's motel room on Mr Solomon's final day on the job. This exchange, I find, involved Mr Bracken calling Mr Solomon *scum of the earth* and poking Mr Solomon in the chest with a finger. However, by reason of the fact this exchange took place after the dismissal I do not think it relevant to the employment relationship problem.

Determination

[54] I have found that the employer had a policy on cellphones which it had made known to Mr Solomon. I have found also that Mr Solomon was dismissed for failure to comply with that policy after being given a reasonable opportunity to comply and that because Mr Solomon was

given an opportunity to comply with the policy and chose not to, the dismissal could not be held to be unjustifiable.

[55] It follows that Mr Solomon's claim fails in its entirety and there is nothing further that I can do to assist him in his employment relationship problem with Vertical Roofing Limited.

Costs

[56] Costs are to lie where they fall.

James Crichton
Member of Employment Relations Authority