Determination Number: CA 95/06
File Number: CEA 321/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Harry Solo Solouata (Applicant)
AND	New Zealand Van Lines Ltd (Respondent)
REPRESENTATIVES	Rob Davidson, Counsel for Applicant Jeffrey J McCall, Counsel for Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	16 May 2006
DATE OF DETERMINATION	28 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Solouata), alleges that he was constructively dismissed from his employment with New Zealand Van Lines Limited (Van Lines) on 17 June 2005.

[2] It is common ground that Mr Solouata was an experienced furniture removal person and had worked in the industry for many years. He had been employed by Van Lines since 2001. Mr Solouata was employed pursuant to a collective employment agreement.

[3] In 2003, Van Lines established a separate line haul section and Mr Solouata was offered a position in that section at a higher hourly rate and on different terms and conditions from the ones that he had had previously. Under the new arrangements, Mr Solouata reported to Van Lines' national line haul manager, Mr Stuart Tutt who was based in Van Lines' Wellington office.

[4] The documented arrangements for this new position are contained in a memorandum dated 24 April 2003 from the managing director of Van Lines to Mr Solouata and a subsequent letter of offer dated 8 May 2003, also from the managing director.

[5] Mr Solouata remembers receiving the memorandum but has no recollection of receiving the offer of employment. Be that as it may, he signed his acceptance of it and so it can be assumed that he did receive it. The letter of offer purports to vary the terms of the collective employment agreement which is a much larger and more comprehensive document. The letter of offer simply recites the nature of the obligations in effect peculiar to the line haul driving section and seeks agreement on those terms and conditions of employment.

[6] The memorandum, however, contains a more relevant provision for our purposes. In the final paragraph of the first page of the memorandum, the following sentence appears: *I need to stress that these wage rates only apply to Line Haul Division drivers and if you come off regular line haul your wage rate will be reassessed within our grading system, which will inevitably lead to a reduction in pay rate*.

[7] Then, to emphasise the point, the paragraph concludes with the following phrase: … *the rate you are about to be paid is because of the particular job you do now*. Here, the managing director is emphasising the fact that the line haul drivers get a significant premium in wage rate over the ordinary drivers and the rate applies to the job rather than to any notions of seniority or skill.

[8] The collective employment agreement provides generic terms and conditions of employment but throughout the document emphasises that those terms and conditions of employment need to be read subject to letters of offer of the particular positions. The significance of these observations will become clear shortly.

[9] In the early part of 2005, there were a number of complaints from Van Lines' clients about Mr Solouata. Van Lines called a meeting with Mr Solouata on 4 May 2005. Mr Clive McCall, a director of Van Lines, took the meeting for the employer. He sought an explanation. According to Mr McCall's evidence which I accept on this point, Mr Solouata simply said that the clients were lying in what they said about his deficiencies. Given that Mr McCall had spoken to the clients who were in three different cities and completely unconnected and each complained about the same kind of deficiency, not surprisingly Mr McCall was unmoved by Mr Solouata's protestations.

[10] Mr McCall wrote Mr Solouata a letter the following day, 5 May 2005, which is not a warning letter and contains no disciplinary sanction at all. Mr McCall in his evidence acknowledged that he was being lenient but he simply wanted to get Mr Solouata to *pull his socks up*. He said in effect that Mr Solouata was a very experienced line haul driver and knew what to do but simply refused to do it.

[11] Immediately before this meeting between Mr McCall and Mr Solouata, there had been a national line haul meeting in Wellington at which line haul drivers had been briefed on the company's progress in a number of respects. Amongst other things, drivers were reminded of the importance of the Coca Cola contract to Van Lines. The minutes of that meeting were produced to me and clearly make the reference referred to.

[12] Within a matter of weeks of that meeting, Mr Solouata had been responsible for freighting Coca Cola machines south and, without consulting his superior Mr Tutt (as he was required to do), he offloaded some of the machines in order to accommodate another part-load. In making this decision, he had consulted with another person about what he was intending to do, but the company's position was that that person had no authority to advise him. In the result, Mr Solouata's actions put the contract at risk and cost Van Lines significant money in putting right the consequences of Mr Solouata's actions.

[13] There was another meeting between Mr McCall and Mr Solouata on 8 June 2005. Van Lines says that Mr Solouata knew there was a problem and effectively delayed the meeting by carrying out avoidance behaviours.

[14] At the meeting, Mr McCall again sought an explanation from Mr Solouata. In Mr McCall's terms, the explanation was again *implausible* and again Van Lines decided not to institute traditional disciplinary procedures against Mr Solouata.

[15] What they did was they demoted Mr Solouata from line haul work to *local* work. This resulted in an hourly rate reduction of $1.50 per hour and no doubt the loss of other privileges and benefits applying to line haul drivers. Mr Solouata's evidence was that the demotion would cost him $200 a week.

[16] In documenting the demotion and recording the company's displeasure at the latest incident, Mr McCall gave Mr Solouata a letter ostensibly under the signature of the managing director but signed by Mr McCall which was dated the day before the meeting.

[17] Mr McCall frankly acknowledged that the letter had been prepared by the managing director and emailed to Mr McCall's office in anticipation of the meeting and of course it had originally been believed that the meeting would have taken place on the previous day, 7 June. Mr McCall told me that in the event Mr Solouata had offered a plausible explanation for what had happened in relation to the Coca Cola machines, he would not have proceeded with the handing over of the letter and the implementation of the demotion.

[18] Mr Solouata did not read the letter immediately but subsequently read it at home. He was not at work for the balance of the day of the meeting and the following day, but worked the next four days without incident doing local work.

[19] There is some suggestion (although the evidence is equivocal) that Mr Solouata telephoned the then operations manager at the Christchurch branch and purported to resign. The operations manager was not available to give evidence so could not be questioned on this issue but certainly Mr McCall confirmed his understanding that a resignation had been offered. Mr McCall was clear about that because he gave evidence that he had asked Mr Solouata to withdraw his resignation which Mr Solouata did. I accept that evidence as truthful.

[20] On 17 June 2005, Mr Solouata reported for duty as usual and he was apparently given local work by the then operations manager. Mr Solouata confirms that he said to the then operations manager on that day *stick your job up your arse*. Mr Solouata told me that while he remembers saying those words, he did not intend that that be seen as a resignation.

[21] The company, however, did see it as a resignation and wrote to Mr Solouata via Mr McCall that day accepting his resignation and making the point that this was the second time in a week that Mr Solouata had in fact resigned.

Issues

[22] The issues for determination are, first whether Van Lines is able to demote Mr Solouata and, secondly, whether there has been a dismissal or a resignation.

[23] It is useful to analyse the issues under the following headings:

(a) The demotion;

(b) Constructive dismissal?

The demotion

[24] Van Lines relies on the paragraph in the 24 April 2003 memorandum as authority for its demotion of Mr Solouata. It seems accepted that there was no other basis for the demotion.

[25] Indeed, Van Lines' submissions almost proceed on the footing that there was no basis at all for the demotion when, for instance, it says that the demotion was *not a substantial breach of the employment terms and conditions …"*.

[26] However, the position must be that either the sanction is permitted or not. Mr McCall's view, when I asked him about it at the investigation meeting, was that there was too much emphasis being placed on what he called a *demarcation* between line haul work and the rest of the business. Mr McCall said: *When our drivers are on line haul they have added responsibility and they are paid more because they have no supervision. Our staff move in and out of line haul. We can't have people telling us what they will and will not do.*

[27] Certainly it is true that the offer of employment contained in the letter of 8 May 2003 contains a list of duties which may be included in the role but the relevant provision makes clear that those duties are not an exclusive list. In any event, that list includes duties which, on the face of it, would appear to be "local" rather than "linehaul" work.

[28] Further, there is ample evidence from Van Lines' witnesses that line haul drivers continued to do local work.

[29] The difficulty with Mr McCall's argument in my opinion is the fact that what he is talking about and what the evidence from Van Lines's other witnesses confirm, is a situation where a line haul driver, while continuing to be a line haul driver and continuing to be paid as a line haul driver, will perform local work.

[30] What Van Lines did with Mr Solouata was to decree that for a period of two months from two days before the meeting with Mr Solouata, Mr Solouata was to be not only demoted to doing **only** local work, but also to have his rate of pay reduced by $1.50 per hour.

[31] There is clearly no basis for that unilateral change in the employment agreement between the parties and the only possible assistance to Van Lines is derived from the memorandum of 24 April 2003.

[32] Mr Solouata's submissions argue that that provision in the memorandum cannot be used as a basis for a disciplinary performance-based response. I agree with that view. In my opinion, there would need to be far more specific wording in the documentation of the agreement between the parties to justify a unilateral demotion, albeit only for two months, for what effectively is a punishment for misbehaviour.

[33] I might also say in passing that I think Van Lines now accepts that its meetings with Mr Solouata were unsatisfactory. Mr McCall, who impressed me as an honourable and decent man, was quick to concede that the meetings that he held with Mr Solouata did not comply with Van Lines' disciplinary code. His explanation for that was that they were not disciplinary meetings and he pointed out that there were no disciplinary consequences.

[34] That may be true of the first meeting, but as to the second meeting, while the disciplinary consequence may not have been one contemplated by the employment agreement and the disciplinary code, the demotion of a worker in response to alleged bad behaviour is clearly disciplinary, even if there is no proper legal basis for it.

[35] For reasons I have just advanced, I consider that at the very least Mr Solouata has a personal grievance by reason of Van Lines' taking an unjustifiable action or actions (the second disciplinary meeting not following due process and the unilateral demotion without legal authority) to Mr Solouata's disadvantage.

Was there a dismissal?

[36] Mr Solouata alleges that he was constructively dismissed from his employment when Van Lines demoted him without legal authority, thus breaching a fundamental term of his employment agreement. In particular, Mr Solouata refers to the significant reduction in pay as evidence for this alleged breach of a fundamental term.

[37] Mr Solouata says that he *repeatedly* sought rectification of the breach and in the absence of any commitment so to do from Van Lines, he had no alternative but to accept the repudiation of the employment agreement and leave the employment.

[38] Mr Solouata's contention that he regularly protested the demotion is not accepted by Van Lines. Its evidence, via Mr McCall, is that, after Mr Solouata resigned the first time, Mr McCall asked Mr Solouata to visit him and they discussed the resignation and Mr McCall persuaded Mr Solouata to withdraw.

[39] Mr McCall says that what happened next was that he urged Mr Solouata to *keep his nose clean* for the two month period and abide by the company's rules and he would get back to line haul driving. Mr McCall then goes on to say: *We discussed the reasons for the demotion and he accepted that it was fair, that the company had been very good to him in the past ….*

[40] Mr Solouata agrees that he told Mr McCall that the company had been very good to him, but denies that it was during this conversation. He thinks it was earlier, before the week of the resignations.

[41] Mr McCall's evidence is that Mr Solouata did complain about the pay cut but only on 17 June, the day on which the employment finally ended. Van Lines also makes the point in its submissions that after the demotion, Mr Solouata continued to work at the lower rate of pay and doing the local work, albeit with bad grace and for a very limited period of time.

[42] On balance, I prefer Mr McCall's recollection of these events to Mr Solouata's, though I think it unlikely that Mr Solouata protested about the demotion more than once. I also accept Mr McCall's recollection that in the earlier conversation, Mr Solouata had actually accepted the demotion.

[43] Given that I have found that the matter of the demotion was only raised by Mr Solouata once, and then literally on the day that the employment ended, I hardly think it available to him to say through his counsel in his closing submissions that he *repeatedly* complained about the demotion. Even his own evidence says that he raised it just once, and that was on the day that his employment ended in a conversation that he had with Mr McCall which Mr McCall also gave evidence about.

[44] In my view, Mr Solouata's claim to have been constructively dismissed can only succeed if he can show that he had no choice but to tender his resignation. I have now established that there was only one occasion on which Mr Solouata raised his objection to the demotion with his employer. The evidence is also clear that Mr Solouata had established contact with the relevant Union official but at no stage, it seems, did he ask that Union official to protest the demotion and seek to negotiate on the matter.

[45] None of the evidence supports the conclusion that the employer required a resignation of Mr Solouata or it would dismiss him. Nor, in my opinion, is there evidence to support a view that Van Lines adopted a course of conduct designed to remove Mr Solouata from the workplace.

[46] Indeed, quite the reverse would seem to be the case. A succession of serious complaints against Mr Solouata was investigated by Van Lines and resulted in it pursuing responses which fell well short of the responses available to it in its own employment agreement. This reflected the practical reality of the difficulty in recruiting line haul drivers which Mr McCall frankly conceded, but also in my view gives the lie to any suggestion of a *course of conduct* kind of constructive dismissal.

[47] The only possible constructive dismissal that could lie in this case is a breach of duty by the employer. This would have to rely on the employer's failures in procedural terms, which I have found, and the fundamental failure in respect of the unilateral demotion.

[48] I accept without reservation that those breaches have been made and, as I have already said, I accept that they ground a disadvantage personal grievance. However, I do not think that the weight of evidence supports a constructive dismissal around the employer's breach of duty.

[49] All the evidence suggests to me that Mr Solouata had other options available to him in terms of pleading his case and that he simply lost patience within a week of the imposition of the improper demotion. In my opinion, Mr Solouata chose to resign his position.

[50] Accordingly, I do not accept Mr Solouata's claim that he has been constructively dismissed.

Determination

[51] I have found that Mr Solouata has suffered an unjustifiable action by Van Lines to his disadvantage and for that he is entitled to compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[52] Before making an award, I need to consider the question of contribution and in that regard I think the evidence supports the view that Mr Solouata has indeed contributed to the events of which he complains. Clearly there is a measure of respect, even affection, between Mr McCall and Mr Solouata. If Mr Solouata had adopted a collaborative approach to the complaints about him by Van Lines' customers rather than the confrontational approach that he adopted, Van Lines might well have taken an entirely different view of matters and the unilateral demotion without authority might never have happened.

[53] For those reasons, I am inclined to think that each of the protagonists are equally to blame and accordingly I assess Mr Solouata's contribution at 50%.

[54] I would have awarded compensation for the disadvantage at $5,000 but with the 50% contribution I award compensation at the figure of $2,500.

[55] Mr Solouata also claims lost wages and I assess that loss at $2,300 gross comprising one month's lost wages between positions, a shortfall of $200 per week between the Van Lines position and the new position, and a shortfall of $200 on the final week of employment at Van Lines.

[56] That amount is, of course, abated by the 50% contribution and so the amount payable by Van Lines to Mr Solouata is $1,190 gross.

Summary

[57] I make the following orders:

(a) for compensation in the sum of $2,500.00 under section 123 (1)(c)(i); and
(b) for lost wages in the sum of $1,190.00 gross.

Costs

[58] Costs are reserved.

James Crichton
Member of Employment Relations Authority