

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 413/08
5120278

BETWEEN MURRAY STOCKMAN
 Applicant

AND GARRETT AUTOMOTIVE
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Murray Stockman in person
 Amy Henrich for Respondent

Investigation Meeting: 16 October 2008 at Hamilton

Determination: 5 December 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Murray Stockman was employed by Garrett Automotive Ltd (“Garrett Automotive”) on a full-time basis on or about 9 July 2006.

[2] Despite many requests for a written employment agreement none was forthcoming. Mr Stockman claims he has suffered a personal grievance for unjustified actions which has led to him being disadvantaged in his employment,

[3] Mr Stockman says he was disadvantaged when he did not receive NZQA credits as a result of the work he carried out for Garrett Automotive and that he did not receive any pay increments as a result of his increased qualifications when he passed unit standards. Mr Stockman also claims that his resignation amounts to a constructive dismissal and that dismissal is unjustified. Garrett Automotive, denies the claims.

[4] This issues for this determination are:

- What were Mr Stockman's agreed terms and conditions of employment?
- Was Mr Stockman disadvantaged in his employment; if so what, if any, remedies should be awarded?
- Was Mr Stockman constructively dismissed and if so, what, if any, remedies should be awarded?

What were the agreed terms and conditions of employment?

[5] Mr Stockman undertook a pre-apprenticeship training course at WINTEC in early 2006. He approached Mr Graham Garrett, sole shareholder and director of Garrett Automotive and was successful in obtaining work experience one day per week for the duration of his pre-apprenticeship training. This was a requirement of the training course. In common with such arrangements, Mr Stockman received no remuneration for his contribution during his work experience.

[6] Following the completion of his pre-apprenticeship training course Mr Stockman approached Mr Garrett and asked for permanent work and an apprenticeship. Mr Stockman says that by agreement he was employed as an apprentice from July 2006.

[7] Mr Garrett denies this and says Mr Stockman was employed full time, but it was agreed they would wait until Mr Stockman could demonstrate skills equivalent to level 3 of his trade before Mr Garrett would enter into an apprenticeship agreement with him.

[8] There is no dispute that Mr Stockman did not reach level 3 during his employment at Garrett Automotive. There is also no dispute that Mr Stockman never entered into a formal apprenticeship agreement with Garrett Automotive.

[9] I am satisfied Mr Stockman entered into an agreement with Garrett Automotive to work full time and to be paid the rate of \$15.00 per hour. On the balance of probabilities it is more likely than not that Mr Stockman was not employed as an apprentice mechanic at the commencement of his employment.

[10] In his oral evidence Mr Garrett says he offered Mr Stockman the opportunity to enter into an apprenticeship agreement only upon achieving the competencies equal

to a level 3. I have concluded that some form of assessment would be required before a formal agreement was drawn up and signed with MITO. It was common ground that Mr Stockman never reached level 3 although he was not far from achieving it, according to Mr Garrett.

[11] Further, from Mr Stockman's own evidence it is not uncommon for mechanics seeking an apprenticeship, to develop skills equivalent of level 3 before being offered a formal apprenticeship agreement from MITO. Mr Stockman is working in new employment and in his oral evidence he confirmed that after four months employment he has not yet entered into a formal apprenticeship agreement with his new employer, as they are waiting for him to reach level 3.

Was Mr Stockman disadvantaged in his employment?

[12] As Mr Stockman claims he has been unjustifiably disadvantaged, I am required to examine the actions of Garrett Automotive in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[13] The section requires me to scrutinise Garrett Automotive's actions and ascertain whether its actions have led to one or more conditions of Mr Stockman's employment being affected to his disadvantage. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[14] The basis of Mr Stockman's complaint is that he was disadvantaged when Mr Garrett failed to have Mr Stockman's work recognised on the NZQA framework and when Mr Garrett failed to pay incremental pay increases during his employment.

Is Mr Stockman due any credits with NZQA

[15] It is not disputed that Mr Stockman was never formally assessed during his employment at Garrett Automotive. I find that without a formal assessment to

confirm he has achieved the requisite skills and competencies associated with achieving credits on the NZQA framework, Mr Stockman has not met his obligation to prove that he was entitled to such credits. This aspect of Mr Stockman's claim fails.

Was Mr Stockman entitled to pay increments during his employment?

[16] Mr Stockman claims he should have received increased pay by way of increments during his employment to recognise his increased knowledge. Rates of pay, and pay rises are a matter for negotiation and agreement between an employer and employee.

[17] I am not satisfied Mr Stockman and Mr Garrett entered into any agreements that Mr Stockman would receive any pay increments during his employment. His claim in this regard fails.

I find that Mr Stockman did not suffer a disadvantage during his employment.

Was Mr Stockman unjustifiably, constructively dismissed?

[18] Mr Stockman says he had no option but to leave his employment, given that he had no employment agreement, Mr Garrett was refusing to enter into a formal apprenticeship agreement with him, he had received no pay increases during his employment, and because no unit standards had been accredited to him.

[19] In coming to my conclusions under this heading I must determine the following issues:

- Was the resignation caused by a breach of duty on the part of the Garrett Automotive? and
- If there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Stockman would resign?

(Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc [1994] 1 ERNZ 168)

Was the resignation caused by a breach of duty on the part of Garrett Automotive?

[20] The basis for Mr Stockman's claim for constructive dismissal is that he left as a result of a breach or breaches of duty on the part of the employer, which is the third of the three non-exhaustive categories of constructive dismissal referred to by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 1 NZLR 372.

[21] The conduct amounting to a breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. (*Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 2 All ER 1 (CA)).

[22] The Authority must also scrutinise Garrett Automotive's actions and separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances of this matter.

[23] On 28 February 2008 Mr Stockman resigned from his employment. In his letter of resignation he cites the following reasons:

- Failure by Garrett Automotive to provide an employment agreement;
- Failure by Garrett Automotive to provide a pay rise during his employment; and
- Failure by Garrett Automotive to accredit Mr Stockman with NZQA credits recognising the work he had completed.

[24] In addition to the reasons set out in his letter of resignation, at the investigation meeting Mr Stockman raised stress as a factor in his decision to resign.

[25] I have already found Mr Stockman's claims with respect to the pay increments and NZQA credits have not been established to my satisfaction. Therefore there has been no breach by Garrett Automotive with respect of these two points.

[26] I have, however, concluded that by the time Mr Stockman resigned from his employment, he had raised with Mr Garrett several times, his concerns over not having either an employment agreement or a formal apprenticeship agreement. Mr

Stockman met with the MITO representative to discuss entering into an apprenticeship agreement but was told he was unable to do so, until such time as he had a written employment agreement with his employer.

[27] The failure to provide a written employment agreement is a clear breach of the Employment Relations Act 2000 which has, for the past 8 years, required all employers to provide a copy of the proposed employment agreement to all employees. Garrett Automotive has breached its statutory duty to Mr Stockman.

[28] With regard to the issue of stress, Mr Stockman's witness statement was the first indication that he had left his job for reasons associated with stress. In his oral evidence Mr Stockman said he raised the issue of his stress about five or six months before he resigned. He told me he had raised his stress issues in relation to hassles he was having at home, and his partners' children. Mr Stockman went on to tell me that the stress from the job was never the issue, it was the stress of continually trying to get a contract.

[29] I am satisfied the major reason Mr Stockman left his employment was due to his frustration at not achieving an apprenticeship agreement and the lack of a written employment agreement. Without the benefit of a written employment agreement, Mr Stockman could not achieve his goal of entering into an apprenticeship agreement.

Was the breach sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Stockman would resign?

[30] I find that the lack of an employment agreement impinged on the employment relationship to a significant extent. Had Mr Garrett taken the time to commit the terms and conditions of Mr Stockman's employment to writing, it would have been clear, that a formal apprenticeship agreement would not be offered until such time as Mr Stockman had satisfied Mr Garrett that he was equivalent to level 3.

[31] Mr Stockman had left long term employment to undertake a career change into an industry he was passionate about. He was working on a lesser hourly rate, but was prepared to do that, in order to secure himself an apprenticeship as a mechanic. He entered into the employment agreement with Garrett Automotive on the basis that at some stage he would become an apprentice. After about 18 months and when the

apprenticeship never eventuated Mr Stockman chose to leave the employment situation and try to secure an apprenticeship elsewhere.

[32] Mr Garrett was fully aware of Mr Stockman's desire to enter into a formal apprenticeship agreement. Mr Stockman only came to work for Mr Garrett as a result of the promise that he would be entering into such an agreement. I find it was therefore foreseeable that in the absence of a written employment agreement incorporating a formal apprenticeship agreement Mr Stockman would leave his employment to secure an apprenticeship elsewhere. Mr Garrett knew Mr Stockman wanted both agreements and why, but refused to accommodate him despite their agreement.

[33] A fair and reasonable employer in Mr Garrett's position would have ensured a written employment agreement was developed and negotiated between the parties, if not prior to the commencement of the employment relationship, then certainly at least three months into the employment relationship when it became apparent that Mr Stockman was concerned about the absence of a written document.

[34] In all the circumstances of this case I find that the failure to provide a written employment agreement amounted to a breach serious enough to warrant Mr Stockman treating his employment as repudiated and that Mr Stockman was unjustifiably constructively dismissed.

Remedies

[35] I have found Mr Stockman was not disadvantaged, but was constructively dismissed from his employment with Garret Automotive. I have also found that dismissal to be unjustified. Mr Stockman is therefore entitled to remedies for his constructive dismissal.

[36] I have noted that Mr Stockman's submissions include claims for remedies which are not set out in his statement of problem and are not remedies available under section 123 of the Act. I have therefore not commented on those remedies.

[37] The only remedy sought by Mr Stockman for his unjustified dismissal, pursuant to section 123 of the Act, is for lost wages for the period of ten weeks from the time he left Garrett Automotive and he commenced his new employment. I have received a copy of a pay slip from his employment with Garrett Automotive which shows that Mr Stockman worked 40 hours per week at the rate of \$15.00 per hour.

[38] I am satisfied Mr Stockman took appropriate steps to mitigate his loss and have therefore awarded him lost wages to cover his loss of ten weeks wages.

Garrett Automotive Limited is ordered to pay lost wages to Mr Stockman in the amount of \$6,000 gross pursuant to section 123(1)(b) within 28 days of the date of this determination.

Penalty

[39] Employers have had very clear statutory obligations for eight years to provide written employment agreements for all employees. I find Garrett Automotive Limited has breached section 64 of the Employment Relations Act and that breach has been ongoing.

[40] The statement of problem did not seek a penalty with regard to the failure to provide an employment agreement, however, in his submissions Mr Stockman seeks the payment of a penalty. Submissions are not the place to introduce new causes of action.

[41] In any event, a claim for a penalty must be commenced within 12 months of the date the cause of action first became, or ought to have become known, to the person bringing the action (s.135(5)). Mr Stockman's evidence is that he was aware soon after he commenced employment that he did not have a written agreement and he raised this on a number of occasions throughout his employment starting at least three months into the employment relationship. I am satisfied that Mr Stockman was aware of the cause of action by at least October 2006 which means the 12 months expired in October 2007. The remedy of a Penalty is therefore time barred by the provisions of the Employment Relations Act 2000.

Costs

[42] Costs are reserved. The parties are encouraged to resolve that question between them, however, if they fail to reach agreement the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority