IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2013] NZERA Wellington 15
5373659

	BETWEEN	MICHAEL STRUTHERS Applicant
	AND	NRG HOME ELECTRICAL LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	John Wayne Howell for the Applicant Ramendra Narayan for the Respondent
Investigation Meeting:	30 October 2012 at Wellington
Submissions Received:	By 22 November 2012
Determination:	31 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Michael Struthers, claims that his summary dismissal by the respondent, NRG Home Electrical Ltd (NRG), for falsifying his time sheets, was unjustified. He also claims that he was not paid travel time he was due (a dispute that led to the differences over Mr Struthers' timesheets), was not properly remunerated for overtime worked, and unjustifiably disadvantaged during a meeting with his manager. NRG denies all of his claims.

Factual discussion

[2] NRG has as its principal responsibility the installation of HRV ventilation systems. It also undertakes other general electrical work. It provided services to HRV franchises in the Wellington region and in 2011 and 2012 had bases in Mt Cook and Upper Hutt.

[3] Mr Struthers is a registered electrician. In July 2011 he was looking for work as there was insufficient work for him in the contracting business run by his father, Mr John Struthers.

[4] Michael Struthers was interviewed for a position as an HRV ventilation system electrician, installing HRV ventilation systems, on 21 July 2011. He was interviewed by Mr Mark Weir, the Wellington Area Manager for NRG.

[5] On the balance of probabilities, i.e. what is more likely than not, I prefer Mr Weir's evidence, that at the interview Mr Struthers was told that NRG operated as a regional company and that employees could be required to work from either the Mt Cook, Wellington City, or Upper Hutt base. From that base employees would collect such tools and equipment as they required and then travel to wherever the work was. I also accept that at the meeting there was no discussion of pay rates for overtime.

[6] I do so because I consider that Mr Struthers does not have a particularly good memory, as evidenced by his failure to remember that he had been instructed to leave the company vehicles at the yard at Christmas. Similarly, he later forgot that he had agreed that he would change the way he filled out his time sheets. Mr Struthers has also forgotten that at the end of his disciplinary meeting he agreed to attend a further meeting the next day, as was clear from the disciplinary notes prepared by one of NRG's staff in attendance. It was clear that Mr Struthers knew of this meeting, because he attended it at a different base to which he would normally have worked from, namely Mt Cook. I do, however, accept Mr Struthers' evidence as being genuine, and that he was not attempting in any way to mislead the Authority.

[7] Mr Struthers was offered the job the same day by way of letter of offer of employment. That letter makes it clear that if he agreed to the proposed terms he was to sign the proposed employment agreement by 25 July, and that if he did not respond then the offer could lapse. The written offer of employment makes clear that the company's policies and procedures formed part of his contract of employment. It also deals with the place of work. The contract first offered to him stated:

> *5.1 Fixed place of work*
>
> *(i) The parties agree that the employee shall perform the duties at 20 Goodshed Rd, Upper Hutt, Wellington.*
>
> *(ii) The employee agrees that there is a possibility of one (1) overnight occurrence per week within the region*

> *to coincide with NRG Home Electrical Limited "out of town policy".*

[8] Clause 6 deals with hours of work:

> ***6.1 Full time hours with an obligation to perform overtime as necessary.***
> *The employee's normal hours of work shall not exceed 40 hours per week, between the hours of 6.30am and 6pm on weekdays. The employee may also be required to perform such overtime as may be reasonably required by the employer. If permanent changes to start times are required the employer will give the employee one week's notice.*

[9] The proposed employment agreement also provided, as required by law, a clause on resolving employment relationship problems. Once a problem has been raised and discussed one of the options, in the event of the problem not being able to be resolved, was mediation.

[10] The proposed employment agreement was provided to Mr Struthers on his first day of work, 25 July. He noticed that the fixed place of work was Upper Hutt and asked for it to be rectified. However, despite following it up, Mr Struthers did not receive a revised employment agreement until 24 October.

[11] From the time he started Mr Struthers was paid overtime at time and a half for working more than 40 hours in any week. NRG later claimed that Mr Struthers had no right to any particular rate of pay for overtime and that this could be changed by a change of company policy. Thus on 21 October Mr Steve Eagles, NRG's Operations Manager, provided a notice to staff about overtime. This notice was also discussed at a staff meeting that Mr Struthers may not have attended.

[12] It was NRG's concern that there were different practices within the company and it did not wish to pay time and half for overtime for people working between 40 and 45 hours per week. In the staff notice on overtime Mr Eagles stated that there was no contractual obligation for additional payment beyond the normal hourly rate of pay and that no overtime payment would be made unless approved and in writing by an area manager in advance. Weekend work would also be paid at time and a half, but only after four hours work.

[13] This Overtime Policy was contained in a new clause 6.2 in the revised individual employment agreement provided to Mr Struthers on 24 October.

Previously this had not been in his employment agreement, as NRG should have been well aware. From that time on Mr Struthers regularly missed out on overtime payments for which he would previously have been paid.

[14] By December NRG had some concerns about Mr Struthers' employment. Mr Struthers had been transferred from HRV installations into smart metering work quite soon into his employment. That work involved a lot of work in the Hutt Valley. Mr Struthers was therefore required to report to work at the Upper Hutt base, from which he would then go out to his daily work. Mr Weir was concerned about Mr Struthers' attitude and that he was effectively claiming travel time to work, which Mr Weir considered a breach of his obligations to NRG. He was also under instructions from Mr Eagles to get Mr Struthers to sign NRG's most recently proffered version of an employment agreement. Mr Struthers considered that he was engaged to work from Mt Cook and hence reported his time of starting work as the time he passed the Mt Cook depot, in the vehicle supplied to him by NRG.

[15] Mr Weir called a meeting, ostensibly about the timesheet issue, by way of text message sent on 12 December, for 13 December. The meeting did not go well and appeared to be a classic case of difficulties that an older manager sometimes faces with a younger worker over matters such as flexibility, reliability and motivation. At one point Mr Weir essentially threatened Mr Struthers that if he insisted on seeking an employment agreement different to NRG's other employees then the parties may have to *agree to part* their ways.

[16] About three quarters of the way through the hour long meeting Mr Weir made it clear (a point clearly reinforced during the meeting) that Mr Struthers was to arrive at the Upper Hutt base at 7.30am and finish at 4pm, and not to charge for any travel time. Mr Struthers was asked if he was prepared to work with that at the moment, and Mr Struthers response was *at the moment, well I suppose while you sort it out.* Mr Weir agreed to take Mr Struthers' concerns back to management. It is more likely that not that Mr Struthers forgot that he agreed to not claim for travel time in the interim, because he continued to do so on the very next weekly time sheet.

[17] Mr Weir must have reported the results of his meeting to Mr Eagles because the same day, 13 December, Mr Eagles wrote to Mr Struthers, noting his refusal to sign the employment agreement and recording that despite this *the employment terms*

such as wages, leave and hours of work are pursuant to the terms of the employment agreement provided to you at the commencement of your employment.

[18] Mr Struthers responded on 20 December stating that NRG's view was incorrect, because of the issues of overtime and place of work. He noted that the result was that he would in effect be required to work an extra hour a day, and that he would never qualify for overtime. He believed also that he was guaranteed a 40 hour working week. His final comment was *unfortunately I believe your revised contract is not fair to both parties and I have been advised not to sign it accordingly at this stage*. Mr Struthers was so advised by his father.

[19] In response Mr Eagles wrote on 21 December, noting that the flexibility of base was agreed to at interview and that there was no contractual term to pay him time and half for overtime. He also stated:

> *It is regretful and unfortunate to state that you are the only employee in the company who has refused to sign an employment contract despite repeated attempts asking you to do so. I wish to bring to your attention a important term of the company's Code of Conduct which binds all employees of the company that a refusal to carry out a lawful and reasonable instruction by a manager amounts to insubordination and serious misconduct.*

[20] Mr Struthers was given until 22 December to return a signed copy of the agreement and that failure to do so would *necessitate consideration of the option the company may have.*

[21] It soon became clear to Mr Weir that Mr Struthers was not following what he believed had been agreed to at the meeting on 13 December about travel time, as the time sheets continued to be filled in by him in the same way. He sent Mr Struthers a note on 9 January 2012 stating:

> *…you have now submitted two time sheets with incorrect times reported. I have corrected these as per the Navman reported times you have actually worked and submitted correct time sheets for processing. …*
>
> *Making false claims on your time sheet is considered gross misconduct.*
>
> *To reclarify:*
> *As a minimum you are expected to begin work at 7.30am and work until 4pm with a break of half an hour for lunch. As pointed out to you several times now, including during your pre-employment*

> *interview, you may be required to work from either of Wellington bases depending on work load and the hours pertained to both bases.*
>
> *Please ensure you follow these guidelines for the future.*

[22] On 10 January 2012 Mr Struthers Senior became involved through discussions with Mr Eagles. His discussions were followed by correspondence between the two concerning travel time, the guarantees over 40 hours work and whether or not Mr Struthers was being threatened with charges of misconduct. A key point in this correspondence is that Mr Struthers expected to be paid for travelling time and that if NRG was going to continue not to pay it, or if he was pressured any more to sign NRG's employment agreement, or otherwise treated unfairly, Mr Struthers would *file proceedings with the Labour Department for personal grievance.*

[23] Mr Eagle's response was a useful one in that he stated *I have noted your intention to raise a personal grievance and advise that we will participate in mediation proceedings to have this long standing matter settled.*

[24] No arrangements were made to organise any mediation, however. Instead any attendance at mediation as discussed by Mr Eagle was stymied by Mr Weir's actions in calling Mr Struthers to a disciplinary meeting on 19 January, as informed to him on 17 January. The allegation was that he had failed to follow written and oral instructions and continued to record incorrect working times for 10 – 12 January 2012. This was said to amount to serious misconduct by a breach of the company's code of conduct. Mr Struthers was informed that if the allegations were substantiated serious disciplinary action and/or dismissal may result.

[25] Mr Struthers attended the meeting with his father. The meeting did not go well, largely because Mr Weir was not prepared to discuss Mr Struthers' view that he was entitled to travel time, but rather focussed on his prior agreement to not claim it, at least in the interim. Mr Struthers Senior made it clear that his son had continued to carry on writing down the hours under his instructions and as he believed was proper. Thus the facts were clear that Mr Struthers had continued to claim the hours he believed he was entitled to, namely travel time, in breach of the clear instructions not to.

[26] The meeting ended after about 20 minutes, with Mr Struthers questioning whether Mr Weir believed he had a bad memory and Mr Weir stating that he believed

Mr Struthers' actions were deliberate. Mr Weir asked whether there was anything else Mr Struthers wanted to say, and received a rude comment from Mr Struthers Senior, at which point Mr Weir required him to leave the meeting. Mr Struthers Junior had no further comments to make and it was agreed, although Mr Struthers Junior does not remember this, that the parties would meet the next day to make any final comments.

[27] They met the following day and Mr Struthers was asked if he had any further submissions to make. He did not. Mr Weir then informed him that he would be dismissed on notice with one week's wages in lieu of notice. Mr Struthers was dismissed for serious misconduct under NRG's code of conduct, for refusal to carry out a lawful and reasonable instruction or request from a company representative and for falsification of company records, including attendance records.

[28] There are other matters between the parties relating to health and safety issues that are not central to the claims between the parties here and can be dealt with by the Occupational Safety and Health Inspectors in the Ministry of Business Innovation and Employment if necessary. I therefore do not refer to them.

[29] Mr Struthers raised a personal grievance, and despite mediation and attempts during the course of the investigation by the parties to resolve matters, the problems remain unresolved. It therefore falls to the Authority to make a determination.

The law

1. In *Angus & McKean v Ports of Auckland* [2011] NZEmpC 160 the Full Court dealt with the application of s.103A in practise. It held at para [57]ff:

> *[57] The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.*
>
> *[58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any*

other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections 3, 4 and 5 must be applied to this exercise.

[59] Finally, in determining justification under new s103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for that of a fair and reasonable employer in all the circumstances.

2. Those subsections (3), (4) and (5) referred to above state as follows:

(3) In applying the test in subsection (2) the Authority or the court must consider –

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the facts as described in section (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

(a) minor; and

(b) did not result in the employee being treated unfairly.

[30] In *Sky Network Television v. Duncan* [1998] 3 ERNZ 917 (CA) it was held that ultimately the test is not whether there was wilful disobedience to obey a lawful and reasonable instruction, but rather whether the conduct of the worker justified dismissal. This test remains of relevance to determinations made under s.103A, in

assessing what a fair and reasonable employer could do in all the circumstances It was held at pg.923:

> *Although Sky was right in its assessment of the contractual position and Mr Drummond was confronted with an employee who was both a nuisance to Sky and, it is now established, legally in the wrong, the Employment Tribunal found that Mr Duncan was merely defending, albeit doggedly, a sincerely held position concerning his contractual rights …*
>
> *The legal position was not clear-cut, as is evident from Travis J's provisional view. Mr Duncan was an employee of some three years standing who was being asked to make a significant alteration in his work patterns at the cost of some disruption to his family life. He was being advised by his union, as Sky knew, though it was undoubtedly unwise for the union to give such advice, and for him to place reliance on it in making this stand, when the union adviser had not seen the form of contract.*
>
> *In these circumstances the dispute cried out for an attempt at resolution either by resort to the disputes procedure referred to in the contract or, if that was considered too long winded, by a speedier means. Such an approach to the issue which had arisen between the parties may well have resolved it without matters reaching a point at which the mutual confidence or trust of the parties, often said to be an essential of the employment relationship, had been destroyed. If the employer had suggested to Mr Duncan that an independent person be asked to arbitrate or mediate between them, and that such a task be undertaken within a week or two, rather than both sides facing a wait of perhaps months for a solution through the disputes procedure, and if Sky had at the same time pointed out again the real difficulty it faced over scheduling of the suites to accommodate Mr Duncan's position pending resolution, Mr Duncan could hardly with much credibility have insisted that the longer route be taken and still maintain that he was being genuinely reasonable in his approach. If he had refused to co-operate in the employer's endeavour to resolve in an expeditious matter the situation which posed difficulties for both parties, his stated belief concerning his contractual rights might have seemed less than genuine. The obligation to act reasonably and in good faith in pursuing contractual rights rests upon the employee as well as the employer. The genuineness of the employee's behaviour, which is central to the character of the act of disobedience, is to be judged objectively in the light of all the circumstances, including the way in which the resolution of the dispute is approached.*
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> *But, as it happened, Sky elected to dismiss him summarily without broaching the topic of dispute resolution. It was for Sky to show that its behaviour towards its employee was fair in the circumstances and it failed to satisfy the Tribunal and the Judge that it had done so.*

Determination

[31] The parties did not have agreed written terms of employment. Two written agreements were prepared, but Mr Struthers would not agree to the first because it set

his place of work as Upper Hutt. He would not agree to the second, which referred to his place of work as Wellington, because of the issues of overtime and travel time.

[32] Despite the absence of a written employment agreement the parties still had an employment agreement, which must be determined on the basis of what in fact happened between the parties by way of oral agreements and understandings, and how the employment was conducted.

[33] Mr Struthers essentially had three major issues with NRG about what the terms of his employment were. First, it is clear that the parties had not agreed on a guarantee of 40 hours minimum a week. Rather the employment was a full time one, with an obligation to perform overtime as necessary, as is clearly set out in the hours of work clause and was not contradicted by any agreed arrangement between the parties. It was clear that the *normal hours of work shall not exceed 40 hours per week.* There was, however, no guarantee of 40 hours a week work to Mr Struthers, and I note that he did not complain about this at the commencement of his employment when he complained about the place of work being wrong. It follows that Mr Struthers' claim for lost remuneration for the balance of 40 hours of work per week, if he did not work that long in any particular week, must be dismissed.

[34] Second, NRG and Mr Struthers disagree when overtime should be paid. It is clear from the employment agreement proffered to Mr Struthers that overtime constituted work done in excess of 40 hours per week. This is clearly implied by the employment agreement at clause 6.1, which states that any hours in excess of 40 hours per week constitute overtime. The issue outstanding therefore is whether or not overtime is paid at ordinary rates or at 1.5 times ordinary rates. While there was no written guarantee that overtime would be paid at time and a half over 40 hours, that in fact was the practice that existed from the commencement of Mr Struthers' employment, until it was withdrawn unilaterally by NRG by way of a reported change of policy. NRG backed this change to its policies with an attempt, in the new employment agreement provided by it at essentially the same time, with a written term to that effect in the agreement. It is clear, however, that Mr Struthers had been paid overtime for working in excess of 40 hours regularly at time and a half. I conclude that it had become a term of Mr Struthers' employment, having already occurred for around three months, that he would be paid overtime rates for any time over 40 hours per week. NRG's attempt to unilaterally vary that term of agreement

was ineffective at least as far as Mr Struthers was concerned, because he never agreed to any such change and he is therefore entitled to be paid the sum said to be owing, namely $646.26 gross, that being an unchallenged amount.

[35] Third, there is the travel time issue based on a fixed place of work, which is a more difficult issue to determine. In this regard I accept that at interview Mr Struthers agreed that he could be required to work from either of the Wellington bases, namely Mt Cook or Upper Hutt. This is consistent with NRG's reason for giving Mr Struthers a work vehicle, namely to assist him to get to either of those places of work, and was consistent with him not being paid for travel time, at least consciously by NRG, by contrast with its deliberate decision to pay him overtime rates after 40 hours. I also do not accept that NRG ever gave Mr Struthers specific permission to claim travel time. In particular, I do not accept his belated evidence in reply that a manager in Auckland had approved this practice. This person wrote to the Authority stating that he did not approve the practice – but that if he had approved Mr Struthers' timesheet on one or two occasions then that was out of ignorance rather than out of any appropriate interpretation of NRG's policy relating to travel time.

[36] On the other hand, if NRG was so fixed on having flexible locations for employees to commence work from then it should have been covered that point clearly off in its proposed employment agreement. This issue is therefore a problem of NRG's own creation. However, the written terms proffered were never agreed to by Mr Struthers, and in any event did not specifically address the issue of travel time. I conclude, on the balance of probabilities, based on the agreement at interview, that there was no term or condition in Mr Struthers' employment that allowed him to claim travel time from one set work base. I therefore dismiss Mr Struthers' other claims for underpayment of wages. Notwithstanding this, it was clear that Mr Struthers' approach was a genuine one and, as analysed above, genuinely arguable. The fact that Mr Struthers was acting in good faith was further highlighted by the fact that he knew, as did NRG, that his timesheets were always checked by the company using its GPS systems, which immediately alerted Mr Weir to the travel time issue. Furthermore, Mr Struthers' interpretation was backed by others who had worked in the industry, such as his father. However, times have changed and even trades people do not necessarily receive the same non-salary emoluments that have existed in the past.

[37] I turn to consider the claim for unjustifiable action. I conclude that the 13 December meeting was not a disciplinary meeting. Mr Struthers' employment was not put in jeopardy in reality, although Mr Weir's comments that there might have to be an agreed parting of the ways indicated his attitude at the meeting. That however did not constitute a warning or an unjustified disadvantage to Mr Struthers' employment at that time. I therefore dismiss his claim for disadvantage. It is, however, relevant information in terms of how Mr Struthers' dismissal came about, and to any remedies to be awarded to him.

[38] Finally, I consider the claim for unjustified dismissal. The parties had addressed the issue of mediation over the travel time issue, but instead Mr Weir determined to take matters down a disciplinary route, and dismissed Mr Struthers, in essence for refusing to follow a company direction to fill in his time sheet in the way NRG expected him to. As was clear from the disciplinary interview he was not interested in Mr Struthers' reasons for continuing to claim travel time, which were based on issues of contractual interpretation and application.

[39] NRG made no allowance for Mr Struthers' genuineness, or the alternative of mediation, in assessing that Mr Struthers was guilty of serious misconduct and should be dismissed. Given the history and complexity of the issue, the legal difficulties associated with it, the genuineness of Mr Struthers' position and the availability of mediation as an alternative way of resolving the matter, no fair and reasonable employer could have concluded that Mr Struthers was guilty of serious misconduct in the sense of his conduct being a derogation from duty, or for being knowingly improper (*Duncan* applied). Fairness and reasonableness called out for an alternative way of resolving this impasse instead of by disciplinary action. It therefore follows that no fair and reasonable employer could have dismissed Mr Struthers at the time and in all of the circumstances. This is particularly so on analysis of the parallels with *Duncan*, as is envisaged in s.103A(4). It therefore follows that Mr Struthers dismissal was unjustified.

[40] Mr Struthers gave ample evidence, supported by family members, of the distress that he has suffered as a result of the loss of his job. He has not been able to find another job to date and gave cogent evidence of the impact his period of unemployment has had on him. In all the circumstances I consider that an award of $8,000 compensation is appropriate.

[41] Mr Struthers claims a minimum of three months loss of wages. I consider that three months is an appropriate sum to be awarded in lost remuneration, given that Mr Struthers did look for work but has unfortunately been unsuccessful. However there is no certainty, given the difficulties faced over the travel time and overtime issues, and considering that Mr Struthers' employment only lasted around six months in total, that his employment would likely have continued beyond three more months. This sum is $12,220.00 gross, calculated at $23.50 per hour for forty hours of work x 13 weeks (13 weeks being one quarter of a year of 52 weeks, and thus equating to one quarter of a year, namely three months).

[42] I need to consider to what extent Mr Struthers has contributed towards the situation that gave rise to his personal grievance. There is no doubt that Mr Struthers has been unbending on an issue upon which ultimately he was found to be in the wrong. He could even have been said to have been defiant in the face of the requirements of NRG. However, Mr Struthers was in effect raising a dispute with his employer, which he suggested should be dealt with in mediation. This suggestion (seemingly approved by NRG), was the appropriate way to deal with the issues between the parties. However, NRG elected to pursue its own disciplinary path on its own initiative. During that disciplinary process Mr Struthers attempted to make his issues clear but was not allowed to do so.

[43] In all the circumstances I conclude that Mr Struthers' behaviour, while unbending, was not blameworthy because it was NRG that took the matter down the wrong path. In these circumstances I make no reduction for contribution.

[44] I therefore order the respondent, NRG Home Electrical Limited, to pay the applicant, Mr Michael Struthers, the following sums:

- $8,000 in compensation under s.123(1)(c)(i);
- $12,220 gross in lost remuneration;
- $646.26 gross in unpaid wages.

Costs

[45] Costs are reserved.

G J Wood
Member of the Employment Relations Authority