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Tohu v Scrap Metal Exporters Limited [2011] NZERA 176; [2011] NZERA Wellington 48 (28 March 2011)

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Tohu v Scrap Metal Exporters Limited [2011] NZERA 176 (28 March 2011); [2011] NZERA Wellington 48

Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 48 5299136

BETWEEN PETER TOHU

Applicant

AND SCRAP METAL EXPORTERS

LTD

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

P R Stapp

Kyle Macneil, Counsel for the Applicant
Jason and Beverley Churchill for the Respondent
15 March 2011 at New Plymouth
28 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Peter Tohu was a truck driver employed by Scrap Metal Exporters Ltd (SME). He was paid \$17 per hour to drive SME's truck which included driving between New Plymouth and Auckland return.

[2] Mr Tohu was dismissed for failing to contact his employer and provide sufficient reasons for staying overnight in Auckland and being delayed on his return to New Plymouth next day. Mr Tohu has raised a personal grievance that he was unjustifiably dismissed.

[3] In addition to personal grievance remedies Mr Tohu has sought penalties against the respondent. The respondent has denied all the claims.

The Issues

[4]

The issues in this matter are:

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Would a fair and reasonable employer have dismissed Mr Tohu in all the circumstances?

Did Mr Tohu have a reasonable explanation for his stay in Auckland and delay on the road home next day?

Was Mr Tohu listened to by the yard manager?

What were the reasons for the dismissal?

If there is a personal grievance what remedies apply and how much?

Is this a matter for penalties?

How much in costs should be awarded to the successful party?

The facts

[5] Mr Tohu commenced his driving duties with SME on or about 8 August 2009. There was no written employment agreement. Mr Tohu was not challenged that he was required to work up to 50 hours per week.

[6] On 19 August 2009 Mr Tohu drove from New Plymouth to Auckland. Upon his arrival in Auckland he was required to unload his vehicle at two places (Warrens and Metalman). At the first place (Warrens) his son in law advised him that an auntie had had a stroke and had been hospitalised. At the second place (Metalman) he unloaded and by arrangement left his truck there while he was taken to the hospital and subsequently to his auntie's home to visit her.

[7] Mr Tohu says that he made an attempt to contact his employer about his circumstances (not challenged). He did not have a work phone and says that he did not have his employer's telephone details. Such details would usually be obtained from a card located in the cab. However, on this occasion Mr Tohu says there was no card in the cab. Consequently he contacted his wife in New Plymouth, and asked her to try and contact the employer. Because she did not have cell phone coverage where

she was she could not make any contact with the employer.

[8] That same night the yard manager running the business for his father (who had become ill) decided to telephone the Police because he had not heard from Mr Tohu and had a concern both for the truck and Mr Tohu's safety in the event that something had happened. The Police were able to make contact with Mr Tohu and were able to confirm at least *everything was fine*.

[9] Mr Tohu in the course of the trip says he took his truck from the Metalman yard and made arrangements for it to be secured at Mainfreight (the respondent was not in a position to challenge this information).

[10] Mr Tohu drove back to New Plymouth the next day. He was delayed for a short time because of an accident involving another person hitting some stock on the road.

[11] When he got back to the depot Mr Tohu says that the yard manager wanted to know where he had been and what he had been doing to explain the stay-over in Auckland and delay to get home. Mr Tohu was adamant that the yard manager talked over him and informed him that he had been fired.

[12] Mr Tohu and the yard manager met the next day after the yard manager had over the previous night thought about what he was going to do. It eventuated that the yard manager confirmed that he did not want Mr Tohu driving the company's truck. Mr Tohu was dismissed.

[13] On 13 November 2009 Mr Tohu's lawyer raised a personal grievance with a claim for lost wages, compensation and costs. When the matter was not able to be resolved, including the use of mediation, the applicant filed a statement of problem in the Authority confirming his claim related to unjustified dismissal and seeking lost wages until 15 October 2010, compensation for humiliation, loss of dignity and injury to feelings, costs and penalties.

The conduct of the employer

[14] SME has one sole director. It was established during the Authority's investigation meeting that she was a passive director. She had no knowledge of the events at the yard that occurred on 19, 20 and 21 August 2009. She had no knowledge of any employment agreements with employees. She had no knowledge of any wage and time and holiday records. She had no knowledge of SME's lawyer's correspondence in regard to the events in this matter and the issues that had developed. She accepted that the yard manager took over and was involved. She had no knowledge of any arrangements in regard to the yard manager's role in the business. The yard manager stepped into the business and ran it when his father had a stroke. In doing so the yard manager accepted that Mr Tohu did not have an employment agreement. He accepted that Mr Tohu was paid \$17 per hour and he did not challenge Mr Tohu's hours. No wage and time record was produced. The yard manager never responded to the statement of problem filed in the Authority.

[15] Because of difficulties in contacting and serving the respondent the applicant's lawyer arranged for personal service and this was achieved with the use of a personal server. I am satisfied that the respondent was served with all the papers in this matter. Indeed I saw that the yard manager had them in his possession during the Authority's investigation meeting to refer to.

[16] I find it entirely unreasonable and the explanations unsatisfactory for SME not responding to the statement of problem. This is especially so given that the yard manager asked for more time and then failed to be responsive and communicative with the Authority's office. In that respect the only document outlining some reason to justify the dismissal was SME's lawyer's letter dated 2 December 2009 that stated:

Mr Tohu ... could not be contacted on his work cell phone when repeatedly and anxiously telephoned by [the yard manager] of Scrap Metal Exporters Ltd.

[17] SME's sole director and the yard manager attended the Authority's investigation at which I allowed them to respond in reply. Their explanation for failing to properly reply and respond with a statement in reply was because the yard manager had become ill in the meantime. I accept that may have been the case but does not adequately explain their delays and failure to reply given the time available and the lack of any other supporting evidence of any illness and or incapacity throughout the whole of that time.

Determination

[18] There was no employment agreement. That was in breach of the Employment Relations Act. However, it is not a matter that I can impose a penalty because the claim does not satisfy the requirement under s.134 (5) of the Act.

[19] No wage and time records have been produced. It was established during the Authority's investigation meeting that there had been no request for a wage and time and holiday record to be produced at any time by the applicant and or representative. Consequently since no request was made there can be no penalty as claimed.

[20] The respondent was given time by the applicant's representative to reply with the request for written reasons for the dismissal. SME failed even to reply in the extra time. The correspondence on 2 December 2009 was out of time (given 14 days to reply). However the claim for a penalty was not brought within twelve months as required under s.134 (5) of the Act. Consequently it is not possible to impose a penalty on that claim.

[21] It emerged that the yard manager has a different version of events in regard to what happened on 20 and 21 August 2009 when Mr Tohu says that he was dismissed without an opportunity to provide an explanation, gather information and without the knowledge of what the employer was relying on.

[22] I accept Mr Tohu's evidence. The reason for this is because:

- (i) Mr Tohu's outline of his facts of the events and the nature of his personal grievance and the circumstances were provided on 13 November 2009 very close to the dates of the events that have come into question. SME has relied on only one written document and that is the letter from its lawyer dated 2 December 2009. The letter never covered sufficient detail and was incorrect about Mr Tohu having a work cell phone.
- (ii) Mr Tohu was emphatic about his recollection of the events.
- (iii) Mr Tohu was consistent in providing his evidence and answers to questions put by me during the investigation meeting. Indeed two points were clarified: one involving when Mr Tohu learned that his auntie had had a stroke (at the point of his first unloading in Auckland); and two, he secured his truck (first at Metalman and then took it to the Mainfreight depot). There was nothing produced by the respondent to challenge the latter.
- (iv) The yard manager was not able to contradict and/or challenge Mr Tohu's evidence that he secured that truck at Mainfreight. Indeed the yard manager never carried out any inquiry and did not make any contact with Mainfreight over this at the time.
- (v) The yard manager accepted that the person he spoke to at Metalman may not have seen the truck when Mr Tohu says he arranged to leave it there.
- (vi) The yard manager was never responsive and not adequately communicative of any problems including any health issues. He never made any voluntary attempt to keep in touch with the Authority once the proceedings were filed.

[23] The yard manager says that Mr Tohu never provided any supporting detail about his auntie's hospitalisation and stroke. He was never asked, I hold because Mr Tohu never referred to being asked and SME never replied with any issue about any such information being requested when it had a reasonable opportunity to do so at the time and before the Authority's investigation meeting. Moreover Mr Tohu's description of the meeting on 21 October was consistent with it being more likely than not that the yard manager did not ask for such information at any time.

[24] A fair and reasonable employer would not have dismissed in all of the circumstances. I refer to the circumstances as follows:

- (a) Mr Tohu tried to contact the employer (proof supported by the Police involvement). Although Mr Tohu could not contact his employer directly he tried to do it indirectly. I accept his evidence. It was most unfortunate that Mr Tohu's wife was not in cell phone coverage. In any event the yard manager did contact the Police and at the very least the Police established that everything was fine. The yard manager accepted this. That information from the Police should have been reassuring about the truck's and Mr Tohu's safety. Whether or not Mr Tohu was behaving appropriately was an entirely different matter, I hold, and should have been subject to the employer's proper investigation. That did not happen I hold.
- (b) Mr Tohu visited his auntie in Auckland who had a stroke. He visited her at the hospital first, and when he found out she had gone home, he visited her at her home. Even although he did not provide any documentary evidence to support this I accept his evidence.

Mr Tohu stayed overnight in Auckland. He says that he would have had to rest at some point during his trip home to meet

legal driving requirements. I accept this evidence too.

(d)

Mr Tohu secured his truck. He has to be given the benefit of the doubt here because there were no inquiries made by the employer of Mainfreight. Furthermore the yard manager could not say with any certainty from the information he says he received from someone at Metalman that the truck had been there, but that the person at Metalman contacted by the yard manager later did not see it at the time. In other words the truck could have been there and that person never saw it.

(e) There was a further delay in Mr Tohu getting home because of another person hitting stock. This has not been challenged.

(f) Mr Tohu says he tried to explain his circumstances when he got back to New Plymouth but the yard manager would not listen.

(g) There was no employer inquiry and/or investigation carried out. A fair and reasonable employer would not just have left it overnight to think about things but would have carried out a more detailed inquiry that may have taken more time than just overnight consideration of things.

(h) No opportunity was given to Mr Tohu to get representation and/or assistance.

(i) Mr Tohu was not advised of the possibility that he would not be able to drive for SME, and was not informed of the possibility of being dismissed until he was advised of the decision.

(j) Mr Tohu was not advised of any allegation being considered and deliberated on by SME and was not told of any grounds the employer was considering that might lead to the possibility of Mr Tohu losing his job. For instance, whether the allegation of not contacting his employer amounted to misconduct or serious misconduct. The employer had no code of practice, no disciplinary procedures in writing and no employment agreement.

(k) Mr Tohu reasonably concluded that his employer was not going to listen.

(l) There was no work cell phone provided to Mr Tohu, despite the employer's lawyer's letter referring to Mr Tohu not using the work cell phone. That was clearly wrong because the yard manager admitted to me that Mr Tohu had no work cell phone.

[25] In all the circumstances this leads me to conclude that Mr Tohu has a personal grievance for unjustified dismissal. A fair and reasonable employer would not have dismissed in all the circumstances.

[26] I now turn to remedies. Mr Tohu is seeking lost wages of \$51,000 from his dismissal until the week ending 15 October 2010. His hourly rate of pay was \$17 per hour. He has contributed to the situation giving rise to his personal grievance. Despite any anguish or stress caused because of being informed that his aunt had had a stroke Mr Tohu should have been able to make some attempt to contact his employer directly, instead of relying on an indirect communication through his wife. This was particularly so when his wife found out that she was not in cell phone coverage and where the employer concerned about safety had to call the Police.

[27] I am satisfied that Mr Tohu has attempted to mitigate his loss by looking for work and using Work and Income (WINZ), cold calling on job prospects and during the course of the period claimed he did find alternative employment after 15 October 2010.

[28] In the first instance having regard to the issues involved, the mitigation and Mr Tohu's length of driving for SME there would have been no guarantee that he would have worked for the period that he has claimed.

[29] I am prepared to award him the three months that he initially sought in his personal grievance on 13 November 2009. I discount this by 10% for his contribution. I will make an award shortly.

[30] Mr Tohu has claimed compensation for hurt and humiliation in the sum of \$15,000. I accept that there has been an impact on him in regard to the dismissal. His evidence was corroborated by his wife who witnessed stressed and upset. Mr Tohu explained that his dismissal was in front of other people who he had to walk past when he left the depot. I accept that he felt degraded and hurt. I also accept that there has been a financial impact on him with the loss of his income and that has affected his feelings. I award Mr Tohu the sum of \$8,000 compensation under s.123 (1) (c) (i) of the Act, but to be reduced by 10% for contribution.

[31] The claims for penalties are all dismissed.

[32] I award Mr Tohu \$140.00 for the fees for the professional server. I award Mr Tohu the \$71.56 filing fee. In addition I award Mr Tohu \$2,800 as a contribution towards his legal costs that excludes mediation.

Orders of the Authority

[33] Scrap Metal Exporters Ltd is ordered to pay Peter Tohu:

- \$9,945 lost wages;
- \$7,200 compensation for hurt and humiliation;
- \$2,800 costs plus \$140 service fees and \$71.56 filing fee. [34] The penalty claims are dismissed.

P R Stapp

Member of the Employment Relations Authority

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