IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 204
5343237

	BETWEEN	ALLAN WALLACE Applicant
	AND	BROADWAY GENERAL CARRIERS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Jeff Goldstein, Counsel for Applicant Keith Church, Director of the Respondent
Investigation Meeting:	7 December 2011 at Christchurch
Submissions Received	At the investigation meeting
Determination:	16 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant alleges that he was unjustifiably dismissed on 14 February 2011, that he was unjustifiably disadvantaged in his employment, that the respondent failed to provide an employment agreement, and that the respondent failed to provide time and wages records.

[2] The applicant seeks:

a. the sum of $7,595.51 in lost wages,

b. compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $10,000;

c. penalties for the failure to provide an employment agreement and failure to provide a time and wages record; and

d. costs.

The facts

[3] The applicant commenced working for the respondent in around April 2009 as a long distance truck driver. The respondent's solicitors had initially lodged a statement in reply denying that the applicant had been employed by the respondent, claiming instead that the applicant had been employed by Freight Lines Limited. This was subsequently amended orally by Mr Church on behalf of the respondent during a directions conference in which Mr Church, the director of the respondent, agreed that the respondent had been the employer of the applicant throughout the applicant's employment.

[4] However, all of the driving and other work carried out by the applicant while he was employed by the respondent had been done for the benefit of Freight Lines Limited, which was the respondent's major customer.

[5] The statement in reply had also denied that the respondent had dismissed the applicant, which Mr Church maintained was the case.

[6] On Saturday 5 February 2011, the applicant had been driving a truck in Kaikoura when, upon driving around what he described as a blind bend, he crashed into another truck which had stopped a little way up the road. This collision had caused the truck which had been hit by the applicant to be shunted into a third truck, which had also stopped on the road.

[7] The Police attended the accident and established that the fault of the accident had been some tourists who had been parked on the wrong side of the road, watching seals, causing the front most truck to stop.

[8] The applicant telephoned Mr Church shortly after the accident to advise him what had happened and Mr Church admits that he had been angry with the applicant. Mr Church's evidence was that he had said that, if the applicant was at fault, he would not be likely to have a job afterwards because Mr Church knew how Freight Lines would react. The applicant's evidence was that Mr Church dismissed him during that telephone conversation, which was denied by Mr Church. The applicant became upset following the telephone conversation by what he understood had been his dismissal.

[9] The evidence differs as to whether Mr Church telephoned the applicant later that same day to tell him that he had spoken to the police officer who had attended the accident, and had established that the police were satisfied that the accident had not been the fault of the applicant. The applicant denies that that conversation took place.

[10] In any event, on Monday, 7 February 2011, the applicant received a call from the respondent's depot manager in Christchurch, who told him that he had not been dismissed but that Freight Lines required the applicant to take a drug test, as was their usual procedure when an accident had occurred. The applicant took the drug test, which was negative, and on the same day, the applicant consulted with his GP and was signed off as unwell.

[11] The depot manager had also told the applicant during the telephone conversation on 7 February that he wanted the applicant to attend a meeting to discuss the accident, which was arranged for Thursday, 10 February. This meeting was later cancelled and the depot manager told the applicant to call Mr Church instead. The applicant called Mr Church on 10 February and, during that conversation, it was arranged that they would meet when the applicant had been certified as fit to work by his GP. At that point, the applicant did not know when he would be fit for work. During this conversation, Mr Church confirmed to the applicant that he had not been dismissed on 5 February.

[12] Unbeknown to Mr Church, the applicant had recorded the telephone conversation. The transcript of the recording, prepared by the Applicant's wife, suggests that Mr Church wished to meet with the applicant to discuss the accident and its implications for the applicant's employment.

[13] The applicant later consulted with his doctor who told him that he was not yet fit to work. The applicant advised the depot manager that this was the case. On 11 February, the applicant was rushed to hospital with a suspected heart attack but was discharged later that night.

[14] On Monday, 14 February, the applicant was still unwell, but his wife telephoned Mr Church in order to arrange the meeting that had been discussed on 10 February. Again, unbeknown to Mr Church, this telephone conversation was also recorded. The transcript of the recording, which Mr Church confirmed was accurate, shows that Mr Church stated at one point:

ah … it doesn't matter now Vicki … he doesn't have a job with us any more and I've got a … he was meant to ring me Friday and he didn't and … I've got a letter on my table which Freight Lines gave me last week saying that they didn't want him to … cart their product any more. … so I've had no choice to, so he's got no job, so.

[15] The letter referred to by Mr Church in his conversation with the applicant's wife was a letter dated 10 February 2011 from Freight Lines Limited addressed to Mr Church. It referred to the accident on the Kaikoura coast and went on to state, inter alia:

> *We are satisfied that this accident occurred as a direct result of Allan not correctly observing the following distances required.*
>
> *We note that on several occasions Allan has had verbal warnings from our Christchurch area manager, Lionel Smith, regarding concerns over his driving habits specifically concerning both speeding and tailgating. …*
>
> *We consider this accident to be serious misconduct and advise that with immediate effect Allan Wallace will no longer be an approved driver for Freight Lines and/or its customers and as such will be banned from all FLL and customer sites. Our staff will be instructed to not load any unit under the control of Allan.*

[16] The respondent appears to rely on this letter to argue that it did not dismiss the applicant but that, in effect, the dismissal was effected by Freight Lines Limited.

[17] No meeting took place between the applicant and the respondent regarding the concerns of Freight Lines, and I am satisfied that the applicant did not even know that Freight Lines were contemplating banning the applicant.

Findings

[18] I am satisfied, from the evidence, that Mr Church dismissed the applicant by way of his words quoted above during the telephone conversation with Mrs Wallace on Monday, 14 February 2011.

[19] The respondent has asserted that the surreptitious recording of his telephone conversations amounted to an illegal act. Whether this is the case or not, the Authority is able to rely on the recording, the transcript of which Mr Church concedes was accurate, pursuant to s.60(2) of the Employment Relations Act 2000 which states that:

> *The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.*

[20] Having established that there was a dismissal, the legal burden shifts to the employer to show that it was justified. Mr Wallace's dismissal took place on 14 February 2011, prior to the legislative amendments enacted by the government earlier in the year. The correct test to apply in assessing whether or not the dismissal was justifiable is that in s.103A of the Act as it stood on 14 February 2011, namely:

> *For the purposes of s.103(1)(a) and (b), the question of whether 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.*

[21] I am satisfied that, had the respondent been legally represented, it would have relied on the letter of 10 February 2011 from Freight Lines Limited barring the applicant from any work carried out for it to justify the dismissal. The problem that the respondent has in satisfying the s.103A test, however, is that Mr Church communicated the dismissal to the applicant via Mrs Wallace without having first attempted to discuss the matter with the applicant. Mr Church gave evidence that he had met with Freight Lines Limited on two occasions to discuss the applicant's position and had tried to persuade it that he could not dismiss the applicant because no police charges had been laid. This did not, however, persuade Freight Lines Limited, which relied on warnings that it said had been given to the applicant previously about poor driving. (The applicant denies that he had ever been given warnings, although conceded that discussions had taken place with him about allegations of poor driving in the past.)

[22] The Employment Court case of *G & H Trade Training Ltd v. Crewther* [2002] 1 ERNZ 513 concerned the dismissal of a carpentry tutor from a trade training establishment based upon allegations from WINZ that Mr Crewther had asked trainees to "*score drugs for him*". The dismissal was found to be unjustified because of inadequate attempts to get the employee's side of the story. At para.[42] of the judgment, Goddard CJ states the following:

> *The allegations that Mr Goodchild accepted without any specific input from the respondent might have been open to him if he had canvassed the matter with the respondent and followed up any lines of inquiry that the respondent's answers might have suggested. ..…*

> *[The appellant's] only defence is that he had no choice, or the choice was so unpalatable that it could not bring itself to make it. The Tribunal was right not to allow itself to be persuaded by such an argument. There is almost always a choice. The third party can be made to understand that employees have statutory rights and employers have liabilities to employees and cannot simply bow to demands.*

[23] In the Employment Relations Authority case of *Charles v. Waitakerere City Council & North Shore City Council* [2007] AA 362/07, the Authority held, at para.[63] as follows:

> *It is also the issue at the heart of the so-called "triangular employment" cases that recognise the difficult position of employers when a third party – often the principal to a service contract with the employer – requires a worker to be removed from the principal's workplace. Those cases establish however that an employer in such situations still remains bound to full and fair procedures and consult with the workers on alternative work prospects. And they also confirm an employer's responsibility to properly investigate complaints before complying with a principal's demand for removal of a worker.*

[24] No steps were taken by the respondent to get the applicant's side of the story before accepting Freight Line's edict contained in their letter of 10 February.

[25] Mr Church gave evidence that he did have another job available for the applicant but had been waiting for him to confirm that he was fit to work. The problem that the respondent has with that position is that it did not make that clear to the applicant prior to dismissal, nor did it contact the applicant after dismissal to advise him of that fact. Mr Church blames the applicant for not advising him when he was fit to work; however, the applicant can hardly be blamed for not having had any further contact directly with Mr Church after having been dismissed in the manner that he was, without any prior meeting or warning. If anything, Mr Church's conversation with the applicant on 10 February, in which Mr Church said that he could not sack the applicant because he had not been *ticketed*, only served to cause the applicant to believe that his job was safe.

[26] Furthermore, on the day following the dismissal the applicant consulted Mr Goldstein, his counsel, who wrote a letter to Mr Church setting out the applicant's grievance, to which Mr Church did not reply. The only communication eventually received was a statement in reply lodged in response to the statement of problem by the respondent's then solicitors denying that the respondent ever employed the

applicant. It is unsurprising, in these circumstances, that the applicant failed to advise Mr Church when he was well enough to work again, especially as Mr Church failed to advise the applicant that another job was available.

Claims for arrears of salary and unpaid holiday pay

[27] At the Investigation Meeting the Applicant's representative raised two further problems which had not been raised in the Statement of Problem, as follows:

(a) A claim for one week's holiday pay for the year April 2009 to April 2010, and four weeks' holiday pay for the final year of employment;

(b) The loss of four days' pay when the date of payment of the applicant's weekly salary was moved from a Monday to a Friday. The applicant produced bank statements which showed that he had received the same net sum ($869.88) 11 days after his last receipt of that same sum, which should have been received seven days after.

[28] Mr Church had asserted at the Investigation Meeting that the applicant had been paid the 4 days' pay claimed. However, the applicant's bank statements seemed to disprove this and, as this and the holiday pay claims were newly raised, I gave the respondent an opportunity urgently to provide wages and time records to establish whether or not there was liability towards the applicant in respect of the further claims.

[29] Mr Church reverted by email 2 days after the Investigation Meeting with a statement stating, effectively, that all holiday pay had been paid to the applicant. He did not, however, produce the time and wage records as requested.

[30] S 132 of the Act provides that, where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that:

a. the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and

b. that failure prejudiced the employee's ability to bring an accurate claim under section 131.

[31] Subsection 132 (2) provides that, where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of:

a. the wages actually paid to the employee; and

b. the hours, days, and time worked by the employee.

[32] S 83 of the Holidays Act contains a similar provision in respect of holiday and leave records in respect to the recovery of holiday pay.

[33] In the absence of the time and wage records requested, I accept the claims made by the applicant, and award him 4 days pay, together with 5 weeks' holiday pay.

Penalties

[34] Section 63A of the Act applies when bargaining for terms and conditions of employment in relation to, inter alia, terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee (63A (1) (e)). This was the case when the applicant commenced working for the respondent.

[35] S 63A(2) of the Act as it stood in April 2009 when the Applicant commenced work for the respondent provided that the employer had to do at least the following things:

> (a) provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and
> (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement or any part of the intended agreement; and
> (c) give the employee a reasonable opportunity to seek that advice; and
> (d) consider any issues that the employee raises and respond to them.

[36] S 63A (3) provides that every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

[37] The applicant seeks a penalty in respect of a failure to provide him with an employment agreement in breach of s 63A of the Act. Mr Church admitted that no employment agreement had been given to the applicant, and his only explanation was that the applicant had *"slipped through the net"*.

[38] However, s 135 (5) of the Act provides that an action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of—

> (a) the date when the cause of action first became known to the person bringing the action; or
>
> (b) the date when the cause of action should reasonably have become known to the person bringing the action.

[39] The Applicant commenced work for the respondent in April 2009 and so, pursuant to s 135 (5) (a) the application for a penalty for the breach of s 63A should have been commenced no later than the April 2010. Whilst the Applicant may be excused for not knowing his rights in respect of s 63A, that is not, in my view, sufficient reason for the Authority to determine that the cause of action did not become known to him until he engaged Mr Goldstein following his dismissal. The applicant knew he had not been given an employment agreement when he first commenced working for the respondent. Ignorance of the provisions of the Act should not, in itself, amount to a reason to determine that he has satisfied s 135(5). If it were, it may excuse any act in contravention of the Act due to ignorance. I therefore find that the award of a penalty for breach of s 63A is not appropriate.

[40] Section 130 of the Act requires every employer at all times to keep a record showing certain details which comprise a wages and time record and s.130(2) requires every employer, *upon request by an employee or a person authorised under section 236 to represent an employee, to provide that employee or the person immediately with access to or a copy of or an extract from any part or all of the wages and time record relating to the employment of the employee by the employer at any time in the preceding six years at which the employer was obliged to keep such a record*. Section 130(4) provides that every employer who fails to comply with any requirement of s.130 is liable to a penalty imposed by the Authority.

[41] By way of Mr Goldstein's letter to Mr Church dated 15 February 2011, a request was made for the production of the applicant's wage and time records for the whole of his employment with the respondent. The respondent failed to provide those records and Mr Church said in evidence that he had failed to do so because he was feeling *"negative"* about the applicant and Mr Goldstein.

[42] At the Investigation Meeting on 7 December 2011 I gave Mr Church a further opportunity to produce the records. He had previously advised the Authority that he was leaving New Zealand to live in Australia on 14 December 2011. Mr Church has not produced the wage and time records before his departure, and in the absence of an explanation, I determine that he has failed to comply with Mr Goldstein's request, as well as the Authority's request.

[43] I find that the respondent did fail to comply with a requirement set out in s.130(2) and that the imposition of a penalty is therefore appropriate in this case.

[44] I fix that penalty at $3,000 to be paid 50% to the Crown and 50% to the applicant.

Remedies

[45] I award the applicant 4 days' arrears of wages, in the gross sum of $593.41.

[46] I award the applicant 5 weeks' holiday pay in the gross sum of $5,192.35.

[47] I have found that the applicant was unjustifiably dismissed and, accordingly, he is entitled to payment of wages lost as a result of the unjustifiable dismissal, together with a payment of compensation pursuant to s.123(1)(c)(i) of the Act.

[48] Where S 128(1) of the Act applies, subsection (2) requires the Authority to order the employer to pay to the employee the lesser of a sum equal to his or her lost remuneration or to 3 months' ordinary time remuneration. I find that the applicant sustained a loss of wages for the period between 10 February 2011 and 21 March 2011 in the gross sum of $6,230.82 and a further loss of $1,364.69 for the period of 21 March 2011 to 3 April 2011 (the day before the applicant found new employment at a higher wage), taking into account casual earnings made between those two dates. Accordingly, I find that the applicant has sustained a total loss of remuneration arising out of his unjustified dismissal in the gross sum of $7,595.51.

[49] With respect to the award of compensation pursuant to s.123(1)(c)(i) of the Act, I heard evidence from the applicant and his wife of the effects of the dismissal. Whilst there was no doubt that the applicant suffered stress and anxiety, as well as humiliation in having been dismissed, I find that an element, although not an equal element, of that reaction was due to the accident on the Kaikoura coast and not wholly

to the dismissal. However, I accept that an award of compensation in the mid range is appropriate, which I fix at $7,500.

[50] Section 124 of the Act requires me to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. The only area for consideration of contribution in this case arises from the accident.

[51] The applicant's evidence was that he was not in any way to blame for the accident. The only material evidence I heard from Mr Church that may suggest that the applicant had been in any way responsible for the accident which led to his dismissal was Mr Church's statement that he had heard that skid marks had been left by the applicant's truck indicating that he may have been travelling too fast when he collided with the stationary truck on the bend. However, Mr Church admitted that the evidence of the skid marks came to him third hand. Whilst Mr Church stated that the applicant had been given warnings in the past for speeding and tailgating, no documentary evidence of that had been produced, and the applicant had denied that he had been given warnings, which I accept. As the applicant's evidence was the only eye witness evidence that I heard about the accident, I accept that. Accordingly, there was no blameworthy conduct by the applicant that was causally connected to the grievance and which justifies any reduction in the remedies awarded.

[52] Therefore, I find that it is not appropriate to reduce the remedies in this case.

Summary

[53] The respondent is ordered to pay to the applicant the following sums:

a. Lost wages in the gross sum of $7,595.51;

b. Compensation pursuant to s.123(1)(c)(i) of the Act in the sum of $7,500;

c. Holiday pay in the sum of $5,192.35;

d. Arrears of wages in the sum of $593.41;

e. A penalty in the sum of $1,500 (a further $1,500 payable to the Crown);

Costs

[54] The applicant's counsel gave an indication of the costs that had been incurred by the applicant. However, in view of the fact that the respondent had not been represented at the hearing and so had not been in a position to question the submission made by Mr Goldstein in that respect, I reserve costs, and if the parties are unable to resolve the question of costs between themselves, the Authority will determine costs after hearing from the parties by way of written representation.

[55] If that is necessary, the applicant is to lodge and serve an application for costs within 28 days of the date of this determination and the respondent may reply within 14 days of that application being lodged in the Authority.

David Appleton
Member of the Employment Relations Authority