New Zealand Employment Relations Authority Decisions

Westerhof v Customised Deliveries (2013) limited (Auckland) [2016] NZERA 597; [2016] NZERA Auckland 410 (15 December 2016)

Last Updated: 12 January 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 410
5593772

BETWEEN PETER WESTERHOF Applicant

AND CUSTOMISED DELIVERIES (2013) LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Carole Sandford, Advocate for the Applicant

Tim Le Cren, Advocate for the Respondent

Investigation Meeting: 13 December 2016

Determination: 15 December 2016

DETERMINATION OF THE AUTHORITY

A. **Customised Deliveries (2013) Limited (CDL) was not entitled to**

   withhold two weeks' wages from Peter Westerhof after he left

   CDL's employment on 3 November 2015.

B. **Within 14 days of the date of this determination CDL must pay Mr Westerhof the sum of $2130 (less any applicable PAYE income tax deduction) and $118.17 as interest on that sum.**

C. **Under s 114(4) of the Employment Relations Act 2000 is granted leave to proceed with a personal grievance raised after the expiration of the 90-day period. The parties are directed to use mediation to seek to mutually resolve the grievance. Mediation is to be held by no later than 10 February 2017.**

D. **CDL must also pay Mr Westerhof the further sum of $1200 as a contribution to his costs of representation.**

Employment Relationship Problem

[1] Peter Westerhof worked as a delivery driver for Customised Deliveries (2013) Limited (CDL) from December 2014 to 3 November 2015. In an application to the Authority Mr Westerhof said he resigned in November 2015 because of worries about safety issues at work. In reply CDL denied he resigned. It said Mr Westerhof abandoned his employment in the middle of the working day.

[2] Mr Westerhof's application alleged he was not paid at least the statutory minimum wage throughout his employment. He withdrew that claim at the beginning of the investigation meeting. Information from his bank account and CDL pay slips showed he was paid above the minimum wage rates applicable during his employment.

[3] Two issues remained for investigation.

[4] Firstly, Mr Westerhof claimed CDL had unlawfully withheld his last two weeks' wages because he had not given two weeks' notice. He said he was not provided with a written employment agreement and because there was no agreed notice period, CDL was not entitled to keep those wages.

[5] Secondly, Mr Westerhof sought leave to pursue a personal grievance over the circumstances of how he came to resign from his job with CDL, which he said had really amounted to a constructive dismissal. He said leave should be allowed because he had no written employment agreement and was therefore unaware of the statutory requirement to have raised his grievance within 90 days.

[6] CDL, in its statement in reply, said Mr Westerhof was given a written employment agreement. It had relied on a term in that agreement to deduct an amount equivalent to pay for a two week notice period because "he abandoned his role in the middle of a work day without the required notice period". It opposed Mr Westerhof being given leave to pursue his personal grievance. CDL also considered Mr Westerhof owed it $2162 to cover the insurance excess on damage to a work vehicle and $116 for costs associated with an error he made in putting the wrong fuel in a vehicle.

The Authority's investigation

[7] At a case management conference held by telephone on 20 October 2016 arrangements were made for written witness statements to be lodged by Mr Westerhof, CDL's general manager Tim Le Cren and Stacey Le Cren, who was responsible for CDL administration and human resource documentation. Mr Westerhof lodged a witness statement but none were received from Mr Le Cren and Mrs Le Cren. All three attended the investigation meeting and, under oath, answered questions. The parties' representatives also had an opportunity to ask additional questions and providing a closing summary.

[8] This determination has confirmed an oral indication of preliminary findings given at the end of the investigation meeting.1 As permitted by 174E of the Employment Relations Act 2000 (the Act) it has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made. It has not recorded all evidence and submissions received.

Did Mr Westerhof have an applicable individual employment agreement?

[9] Mr Westerhof said he did not get a written employment agreement. CDL said he was given an intended agreement. CDL provided a copy of an intended agreement, dated as coming into force from 23 February 2015, which Mrs Le Cren said was prepared after Mr Westerhof had been working for a few months on a casual basis. Mr Le Cren said he had asked Mrs Le Cren to prepare the agreement after talking to Mr Westerhof about working on a permanent basis. The document produced to the Authority had a handwritten note reading "copy TBF" (meaning 'to be filed') on its first page. Its ten pages set out 27 clauses of the type typical to a standard form employment agreement, including notice. The names of Mr Westerhof and Mr Le Cren were printed on the last page but the space for signatures of both was blank.

[10] Mrs Le Cren also provided an "employment checklist" form bearing Mr Westerhof's name. On a line reading "contract" was a handwritten note with the letter Y (meaning yes) and the word "taken". Mrs Le Cren thought she had given the agreement intended for Mr Westerhof to a supervisor to give to him when he was next

on shift. She believed the note indicated the supervisor had given the document to Mr

1 Employment Relations Act 2000, s 174B.

Westerhof but accepted that established only that the supervisor had made a note, not that the document had been given to Mr Westerhof.

[11] The next two lines on the form, labelled "Signature #1" and "Signature #2" were blank. Mr Le Cren accepted he would have known if Mr Westerhof had or had not returned a signed employment agreement. CDL's procedure for such documents was that once returned by the worker, Mr Le Cren would sign it. A copy would then be given to the worker and a copy put on CDL's files. In Mr Westerhof's case this had not been done in the time between February 2015, when Mr Le Cren and Mrs Le Cren said they thought the intended agreement had been given to Mr Westerhof by a supervisor, and November 2015 when he left the job. Mr Le Cren said it was unusual not to have a signed agreement and was an oversight on his part. Mrs Le Cren described it as a situation where CDL had "dropped the ball".

[12] Mr Westerhof denied having seen the intended agreement at any time while he was an employee of CDL.

[13] On the basis of the evidence of the three witnesses, it was possible that Mr Westerhof was not correct and his supervisor had given him the intended agreement. Mr Westerhof described himself as not having a good memory. However it could not be established as more likely than not (that is to the civil standard of the balance of probabilities) that he was given it and simply had not returned it. Even if Mr Westerhof was given it, there was then a failure by CDL to follow up on the documentation which, because he was the person who signed on the company's behalf, Mr Le Cren would have known had not been done.

[14] The onus to establish the existence of an employment agreement fell on CDL

because of the following provisions of the Act:

64 Employer must retain copy of individual employment agreement or individual terms and conditions of employment

(1) When section 63A applies, the employer must retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment (as the case may be).

(2) If an employer has provided an employee with an intended agreement under section 63A(2)(a), the employer must retain a copy of that intended agreement even if the employee has not—

(a) signed the intended agreement; or

(b) agreed to any of the terms and conditions specified in the intended agreement.

(3) If requested by the employee, the employer must, as soon as is reasonably practicable, provide the employee with a copy of the employee's—

(a) individual employment agreement or current terms and conditions of employment retained under subsection (1); or

(b) intended agreement retained under subsection (2).

(4) An employer who fails to comply with subsection (1), (2), or (3) is liable, in an action brought by a Labour Inspector or the employee concerned, to a penalty imposed by the Authority.

(5) ...

(6) To avoid doubt, an intended agreement must not be treated as the

employee's employment agreement if the employee has not—

(a) signed the intended agreement; or

(b) agreed to any of the terms and conditions specified in the intended agreement.

[15] This was a situation where s 63A applied because Mr Westerhof was being employed on an individual basis, not under the provisions of a collective agreement.

[16] Even if it were accepted that CDL was correct that Mr Westerhof was given the intended agreement, s 64(6) applied to limit any application it could have. The intended agreement "must not be treated" as his employment agreement if it was not signed or he had not agreed to any terms or conditions specified in that document. The document was not signed. No evidence established, as more likely than not, that he had, nevertheless, agreed to all its particular terms and conditions, including those relevant in this case about giving notice and what deductions the employer could make from an employee's wages.

[17] The only terms that could be said to have been established as agreed, by conduct, were that Mr Westerhof agreed to work at the hours required and CDL agreed to pay him for the hours he worked. Certain other terms implied in any employment relationship also applied,2 even without a written agreement, but there were no express terms about matters such as notice, abandonment of employment or

deduction of wages in the event of abandoning the job or leaving at short notice.

2 *Walden v Barrance* [1996] NZEmpC 224; [1996] 2 ERNZ 598 at 615.

[18] In the absence of a written term, there was a term implied in common law that each party would provide 'reasonable' notice. Such 'reasonable' notice often takes the pay period as a guide. CDL paid employees fortnightly. However there was no basis for suggesting that an implied term of reasonable notice also amounted to agreement that Mr Westerhof would forfeit any outstanding wages to an equivalent value of what he would have been paid if he had worked such a notice period. Such a term would require express agreement.

Was CDL entitled to withhold Mr Westerhof's wages due to inadequate notice?

[19] Mr Le Cren suggested Mr Westerhof's outstanding wages may have been paid if he had responded to efforts to contact him after he left work on 3 November. Mr Le Cren said there were repeated attempts to phone Mr Westerhof and a letter was sent to

him dated 9 November 2015. CDL provided the Authority with a copy of the letter it said was sent. At the investigation meeting Mr Westerhof confirmed the address on the letter was his but denied getting it. He also denied getting any calls on his mobile phone from Mr Le Cren.

[20] However, even if Mr Westerhof had received the letter, its contents confirmed Mr Westerhof was unlikely to have been paid his last two weeks' wages. The letter said he had abandoned his employment. It cited a clause from the supposed employment agreement that entitled CDL to deduct wages if notice was not given.

[21] There was no contractual or statutory provision under which CDL could have lawfully kept Mr Westerhof's last two weeks' wages.

[22] As already established, there was no signed employment agreement authorising such a deduction.

[23] The Wages Protection Act 1983 (the WPA), as it was in November 2015, included the following relevant provisions:

4 No deductions from wages except in accordance with Act

Subject to sections 5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

5 Deductions with worker's consent

(1) An employer may, for any lawful purpose,—

(a) with the written consent of a worker; or

(b) on the written request of a worker—

make deductions from wages payable to that worker.

[24] WPA s 6(2) had no application to this particular matter. The deduction made by CDL, for a notice period, was not permitted under the WPA without the "written consent" referred to in s 5(1). CDL's intended agreement included the following clause:

17.1 Either party may terminate this agreement by giving two weeks written notice to the other party. ...

17.2 If you do not give the notice in accordance with 17.1, the employer reserves the right to deduct an amount equivalent to payment for the notice period from payments due to you. This may include deduction of any monies that have accrued due for any period of leave.

[25] Putting aside the question of whether 'reserving the right' to make a deduction amounted to written consent of the type required by s5(1) of the WPA, CDL had not established Mr Westerhof had ever consented to such an arrangement. The contents of the intended agreement, even if given to him, could not apply because s 64(6) of the Act prohibited that document being treated as his employment agreement as it was not signed and there was no other evidence of his agreement to such terms.

[26] As a result Mr Westerhof was entitled to an order for the amount of wages withheld to be paid to him without delay. Because the money was withheld without statutory or contractual authority to do so, it was appropriate he be paid interest on that amount from 4 November to the date of this determination. The applicable interest rate was five per cent.3 The amount of wages claimed for that period was

$2130, for 142 hours at $15 an hour. There was no challenge to the amount. It must

be paid to Mr Westerhof, less any applicable deduction of PAYE income tax, within

14 days of the date of this determination. Interest of $118.17 must be paid on that amount for the period of 405 days (1 year and 40 days).

Should Mr Westerhof be given leave to pursue a personal grievance?

[27] Mr Westerhof sought leave to raise a personal grievance outside the required

90 day period. He had sought mediation assistance soon after his employment ended. Mediation records, checked after the investigation meeting, showed he had first

3 Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), clause 4.

contacted the Ministry of Business about mediation on 17 November 2015. Attempts to arrange mediation continued through February and March 2016 but, due to problems with availability, the parties did not meet in mediation until 24 May 2016.

[28] After mediation failed to resolve matters Mr Westerhof sought help from an employment advocate. His statement of problem then lodged in the Authority on 11

August 2016 applied for leave to raise a grievance out of time because Mr Westerhof did not have a written employment

agreement setting out the statutory dispute resolution process (including the rule on raising a grievance within 90 days of the relevant event).

[29] Under s 114(4) of the Act the Authority has the power to grant leave to pursue a grievance outside the 90-day period if satisfied that the delay in raising the grievance was "occasioned by exceptional circumstances" and the Authority considers it just to grant the leave. One category of exceptional circumstance, stated at s 115(c) of the Act, is where the employee's employment agreement does not contain an explanation of the statutory provisions for resolving employment relationship problems. The explanation must include reference to the 90 day period within which

to raise a grievance.4

[30] The intended agreement included a clause referring to the 90 day period but, for reasons already given, it could not be established to the necessary evidential standard that Mr Westerhof was given that document. Even if he had, s 64(6) prohibited treating it as his "employment agreement" so, for the purposes of s 115(c) of the Act, he could not be said to have an agreement containing the relevant information about the 90-day period. The question about leave, therefore, was: Did not having that information 'occasion' or cause the delay in Mr Westerhof raising his grievance?

[31] Mr Westerhof said he did not know about the 90-day period for raising grievances. He had previously worked as a self-employed taxi driver, so did not have an employment agreement for that job. Prior to that work he had been a bus driver in a job where he was a union member and likely covered by a collective agreement rather than an individual employment agreement. He said his request for mediation

assistance soon after ending his work at CDL was made at the suggestion of a friend.

4 Employment Relations Act 2000, s 65(2)(a)(vi).

There was no evidence he was aware of the procedure or requirements for raising a personal grievance directly with his employer.

[32] Because CDL had not complied with its statutory obligation to complete a signed and written employment agreement with Mr Westerhof that included advice about the 90-day period, no presumption could be made he knew how to raise his employment issues "in the correct manner and within the correct time frame".5 The lack of an established explanation of his rights had to be accepted as occasioning his delay in raising a personal grievance.

[33] The remaining question before granting leave was whether it was "just" to let Mr Westerhof pursue his grievance now. There was no evidence CDL would be prejudiced by having to respond to his grievance outside the 90-day period. Neither did the limited information available, at this stage, suggest his claim was so devoid of merit that it would not be just to allow the leave. Whether his grievance had any prospect of success would depend on the detailed evidence about what had happened at the relevant time, if the leave to pursue the grievance was granted. On those grounds it was just to grant the leave.

[34] Where such leave is granted, the Authority must first direct the employer and the employee to use mediation to seek to mutually resolve the grievance.6 The direction has been made at the head of this determination. Because of delays in holding earlier mediation, a further direction has been made that this mediation be held no later than Friday, 10 February 2017. If the matter is not resolved in mediation, Mr Westerhof should advise the Authority whether or not he then wishes

the Authority to proceed with an investigation of his grievance.

Costs

[35] As Mr Westerhof was successful in establishing that wages were unlawfully withheld from him and that he should also have leave to pursue his personal grievance, he was entitled to an assessment of whether CDL should be required to contribute to his costs of representation. Costs are assessed from the starting point of

a daily tariff, currently $4500 for a matter such as this commenced after 1 August

5 *Bryson v Three Foot Six Limited* [2006] NZEmpC 88; [2006] ERNZ 781 at [51].

6 Employment Relations Act 2000, s 114(5).

2016, and adjusted upwards or downwards for relevant factors.7 A small downward adjustment was appropriate as he had made an allegation about minimum wages that was abandoned at the start of the investigation meeting. A small upward adjustment was appropriate because CDL had made the investigation meeting slightly longer than it might otherwise have been by not providing written witness statements from Mr Le Cren and Mrs Le Cren that were expected under the Authority's timetable directions. Those two factors balanced one another out. The outcome of the assessment of costs on that basis, for an investigation meeting lasting less than two hours, was $1200. CDL must pay that amount to Mr Westerhof as a contribution to his costs of representation.

Robin Arthur

Member of the Employment Relations Authority

7 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].
