

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 105
5399035

BETWEEN DARYL TIPLADY-PRASAD
Applicant

AND KENNETH JAMES BROAD
Respondent

Member of Authority: David Appleton

Representatives: Georgina Burness, for Applicant
Respondent not represented

Investigation Meeting: 5 June 2013 at Christchurch

Submissions received: 5 June 2013 from Applicant
None received from Respondent

Determination: 10 June 2013

DETERMINATION OF THE AUTHORITY

- A. The Applicant was unjustifiably dismissed and is owed arrears of wages.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Tiplady-Prasad claims that he was unjustifiably dismissed on or about 1 March 2012. He also claims that he is owed the gross sum of \$1,800 by way of arrears of wages. The respondent has never lodged a statement in reply and did not make an appearance at the investigation meeting.

Non-appearance of the respondent

[2] The Authority has evidence that the statement of problem was signed for by Mr Broad on Wednesday, 24 October 2012. The Authority wrote to Mr Broad on

7 December 2012 advising him that the statement in reply was overdue and asking him to lodge it with the Authority without any further delay. The Authority wrote again to Mr Broad on 18 December 2012 advising him that a case management teleconference would be set down for 15 January 2013.

[3] The Authority managed to make contact with Mr Broad on 15 January 2013 and a case management teleconference was held during which the parties were directed to mediation by agreement. The Authority's records show that mediation was arranged by the Labour Group of the Ministry of Business, Innovation and Employment for Monday, 18 February 2013 but that Mr Broad did not show up despite indicating to the Mediator on the telephone that he was on his way. The mediation therefore had to be abandoned.

[4] A further case management teleconference took place on 20 March 2013 and, again, Mr Broad took part. The parties were advised that an investigation meeting would be held on 21 May 2013 and a notice of investigation meeting confirming this was sent out by email and by post to both parties. The respondent was invited to lodge and serve a written statement of evidence prior to this investigation meeting but he failed to do so.

[5] At the investigation meeting on 21 May 2013, neither Mr Tiplady-Prasad nor Mr Broad turned up, although Mr Tiplady-Prasad's advocate turned up. The investigation meeting was therefore abandoned. Enquiries revealed that Mr Tiplady-Prasad had been prevented from attending the investigation meeting by his new employer. This was confirmed by his new employer in writing. No explanation was forthcoming from Mr Broad for his absence, however. Accordingly, a new investigation meeting was set down for 5 June 2013, which both parties were advised of. On this occasion, Mr Tiplady-Prasad did appear with Ms Burness (and he apologised profusely for his absence on the previous occasion) but, again, Mr Broad did not turn up.

[6] Given the pattern of non-participation demonstrated by Mr Broad throughout the Authority's process, I decided to proceed with the investigation meeting in his absence. He had been warned of the possible consequences of his non-attendance and it is my view that Mr Broad has not conducted himself in good faith in respect of the Authority's proceedings.

[7] In the absence of Mr Broad, and any explanation in any form from him in response to the allegations of Mr Tiplady-Prasad, as I did not find any lack of credibility in anything that Mr Tiplady-Prasad told me, I accept all of Mr Tiplady-Prasad's evidence. The account of the events below is based upon his evidence.

Brief account of the events leading to the dismissal

[8] Mr Tiplady-Prasad was employed as a bread delivery driver, delivering bread baked by South Island Bakeries, which is based in Sydenham, Christchurch. Mr Tiplady-Prasad saw an advertisement on TradeMe and was interviewed by Mr Broad at Mr Broad's home. He was given a trial of one week, which commenced on 1 February 2012 and, after that trial, was advised that he had the job.

[9] Mr Tiplady-Prasad stated that he had been given a draft individual employment agreement to sign but that many of the fields in the document were blank and so he gave it back to Mr Broad saying he would sign it once they had been filled in. He said that, although he asked Mr Broad for the completed agreement subsequently, Mr Broad never gave it to him. Consequently, there was no written employment agreement in place between Mr Tiplady-Prasad and Mr Broad.

[10] Mr Tiplady-Prasad said that he worked an alternating pattern of six days on, one day off for one week, and five days on, two days off for the following week. He would work between 9 to 11 hours each day and started at 10pm each evening. His job was to deliver bread to various businesses in Christchurch, including schools, cafés, dairies, and supermarkets. The job entailed four runs, and he used a van which he understood belonged to South Island Bakeries but which Mr Broad was buying off that business.

[11] Mr Tiplady-Prasad stated that, initially, he believed that he was being employed directly by South Island Bakeries, but that he was subsequently told by the Manager of the bakery that Mr Broad was a contractor and that Mr Tiplady-Prasad was actually employed by Mr Broad.

[12] Mr Tiplady-Prasad's problems started to occur when he found that there was not enough fuel in the van one evening to complete the runs. He said that, in order to complete the runs, he needed three-quarters of a tank of fuel each night. On the first occasion when he found that he was about to run out of fuel, he contacted Mr Broad

who asked him to go to the service station from which he usually bought fuel, and to see if they would give him fuel on credit. Mr Tiplady-Prasad said that they did so reluctantly because Mr Broad already owed the petrol station money for fuel previously purchased.

[13] Mr Tiplady-Prasad said that the second time he was close to running out of fuel he tried to ring Mr Broad who did not answer the phone. Instead, he rang the Manager of the South Island Bakeries who also asked him to go to the petrol station and ask for fuel on credit. Mr Tiplady-Prasad did so and, again, they agreed reluctantly. Mr Tiplady-Prasad said that after this second occasion, he told Mr Broad that he would not beg for fuel a third time and that if he was unable to complete the runs, because of a lack of fuel, he would park the van up. Mr Tiplady-Prasad said that, whilst he could have paid for fuel himself and then asked Mr Broad to refund it, as Mr Broad was often late in paying his wages, he did not trust Mr Broad to reimburse him.

[14] Mr Tiplady-Prasad said that shortly after he had this conversation with Mr Broad, Mr Broad accompanied him on a run to check that he really was using three-quarters of a tank of fuel each night. Mr Tiplady-Prasad said that Mr Broad agreed that he was indeed using that much fuel and, again, promised to ensure that there would be enough fuel in the tank going forward. However, around two nights later, Mr Tiplady-Prasad arrived at work to find that the van only had half a tank of fuel. He therefore did three of the four runs, and as the tank was on empty, made two deliveries on the fourth run and then drove back to Sydenham, parked the truck and took the product back to the bakery. He said that he left a message with Mr Broad, who did not respond, and he left a letter for the Manager of the bakery explaining what had happened. He said that he expected that the Manager would have been quite angry when he had arrived the following morning to find that the bread had not been delivered as most businesses required the bread before 8am.

[15] Mr Tiplady-Prasad said that, on 1 March 2012, the next working day after he had left the van with no fuel, he was presented with a trespass notice signed by Mr Broad requiring him to stay off the premises of South Island Bakeries. When Mr Tiplady-Prasad asked Mr Broad why he was being trespassed off the premises of the bakery, Mr Broad replied that it was because Mr Tiplady-Prasad had raised his voice at the Manager of the bakery three days before. Mr Tiplady-Prasad said that

Mr Broad explained that, being trespassed off the premises of the bakery meant that he was no longer able to do his job. When Mr Tiplady-Prasad pointed out that he had not been paid for two weeks, Mr Broad promised to sort that out.

[16] However, the following day Mr Tiplady-Prasad found that no money had been put into his account and so he went to the residence of Mr Broad where he had had his initial interview. A relative of Mr Broad was present who presented him with another trespass notice requiring him to stay away from that address. He did not manage to speak to Mr Broad. Mr Tiplady-Prasad says that he never received his wages from the two last weeks of his employment and that he was owed the sum of \$1,800 gross.

[17] With respect to the allegation that he had shouted at the Manager of the bakery, thereby causing the trespass notice to be issued, Mr Tiplady-Prasad said that he had spoken to the Manager when he had run out of fuel on the second occasion in order to say that he would park the van up if it happened a third time. He says that the Manager had said that it was nothing to do with him and did not want to know. Mr Tiplady-Prasad says that he did raise his voice when speaking to the Manager but did this only to get across his point that, if he ran out of fuel again, he would not be able to complete the deliveries and that would have an impact on the business of the bakery.

Issues

[18] I must consider the following issues:

- i. Was Mr Tiplady-Prasad an employee or an independent contractor?
- ii. If an employee, was Mr Tiplady-Prasad employed by Mr Broad or by South Island Bakeries?
- iii. Was Mr Tiplady-Prasad unjustifiably dismissed?
- iv. Is Mr Tiplady-Prasad owed the sum of \$1,800?

Was Mr Tiplady-Prasad an employee or an independent contractor?

[19] Although it has never been raised as a defence by Mr Broad, I must satisfy myself that Mr Tiplady-Prasad was an employee so that the Authority has the jurisdiction to consider the personal grievance raised by him. Having questioned

Mr Tiplady-Prasad about the arrangements in place between him and Mr Broad, I am satisfied that the nature of the arrangement was one of employment rather than a contract for services. There appears to have been mutuality of obligation; a van was supplied to Mr Tiplady-Prasad; he was required to do as he was told; his work was regular, and the hours were predictable. This latter point also disposes with any doubt as to whether his employment was permanent or a casual arrangement.

[20] In summary, I am satisfied that Mr Tiplady-Prasad was permanently employed rather than operating as an independent contractor with respect to the delivery of the product from South Island Bakeries.

Was Mr Tiplady-Prasad employed by Mr Broad or by South Island Bakeries?

[21] I found Mr Tiplady-Prasad to be a candid and credible witness and I accept his evidence that he was told by the bakery that Mr Broad was a contractor in respect of the delivery of their product and that Mr Broad was subcontracting that delivery to Mr Tiplady-Prasad. From an enforcement point of view, Mr Tiplady-Prasad would be more likely to be able to enforce any orders of the Authority from the bakery than from Mr Broad but, notwithstanding that, Mr Tiplady-Prasad's evidence is that he was employed by Mr Broad. In the absence of any evidence to the contrary, I accept that assertion.

Was Mr Tiplady-Prasad unjustifiably dismissed?

[22] A valid personal grievance was raised on behalf of Mr Tiplady-Prasad in respect of the effective termination of his employment, by way of a letter from Mr Tiplady-Prasad's advocate dated 18 May 2012. The Authority therefore has jurisdiction to consider the personal grievance.

[23] The requirements of the Employment Relations Act 2000 in respect of assessing whether a dismissal of an employee by an employer is justified is set out in section 103A of that Act. Pursuant to section 103A(2) the Authority must assess whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[24] Section 103A(3) sets out the factors that the Authority must consider in respect of the process to be followed by an employer prior to dismissal. These include the following:

- 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 before dismissing or taking action against the employee.

[25] It is quite clear that none of these steps were taken by Mr Broad before serving on Mr Tiplady-Prasad the trespass notice requiring him to stay away from the premises of South Island Bakeries. Whilst Mr Tiplady-Prasad was told that he was being trespassed from those premises because he had raised his voice with the Manager of the bakery, it is interesting to note that it is Mr Broad that signed and served the trespass notice and not anybody from the bakery. Therefore, when assessing the evidence, on balance, I am satisfied that it was Mr Broad that initiated the decision to trespass Mr Tiplady-Prasad from the premises of the bakery which had the immediate effect of preventing him from carrying out his duties.

[26] Even if Mr Broad had been acting at the behest of the bakery, as Mr Tiplady-Prasad's employer, he was still obliged to follow the process set out in section 103A(3) of the Act. Mr Broad manifestly failed to do so and I have no hesitation in concluding that Mr Broad's dismissal of Mr Tiplady-Prasad was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[27] I must therefore find that the effective dismissal was unjustified in accordance with the Act.

Is Mr Tiplady-Prasad owed arrears of wages?

[28] I was shown a copy of a timesheet which, Mr Tiplady-Prasad states, recorded his hours in respect of the weeks when he was not paid. This showed a total of 88 hours worked. Mr Tiplady-Prasad stated that he was paid \$15 per hour and this amounts to a total of \$1,320 gross. However, I understand from Mr Tiplady-Prasad's evidence that he was also owed wages in respect of three days in the preceding week and that, together, the total owed amounts to \$1,800 gross. In the absence of any time or wages records from the employer, or any explanation whatsoever in respect of the statement of problem, I accept this evidence of Mr Tiplady-Prasad and accept that he is owed the sum of \$1,800 gross from Mr Broad.

Remedies

[29] Having established that Mr Tiplady-Prasad was unjustifiably dismissed, I must now decide what remedies are due to him. Mr Tiplady-Prasad gave evidence that he tried to find work after his dismissal but that it took him several months to do so. He eventually ended up working for another bakery company. Mr Tiplady-Prasad's evidence was that he took nearly six months to find new employment.

[30] Section 123(1) of the Act states that, where the Authority determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the remedies set out in subsections 123(1)(a) to (c). Mr Tiplady-Prasad does not seek reinstatement but does seek reimbursement of a sum equal to the whole or any part of the wages or other monies lost by him as a result of the grievance (section 123(1)(b)).

[31] Section 128 of the Act states that, where the Authority determines that an employee has a personal grievance and has lost remuneration as a result of it, then, subject to section 128(3) and section 124, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

[32] Section 128(3) states that the Authority may, in its discretion, order an employer to pay by way of compensation for remuneration lost to that employee, a

sum greater than that to which an order under that subsection may relate. However, as Mr Broad was not present to make any submissions in respect of the remedies, even though he had the opportunity to do so, I do not think that it would be just to award more than the sum calculated in accordance with the principles set out in section 128(2).

[33] Three months from the effective termination of Mr Tiplady-Prasad's employment expired on 30 May 2012. Taking into account Mr Tiplady-Prasad's evidence that he worked alternatively five days and six days, and assuming that, averaged out, he worked 10 hours per day, I calculate that Mr Tiplady-Prasad would have worked 7 weeks of 5 days on, and 6 weeks of 6 days on until 30 May 2012. For each week that Mr Tiplady-Prasad would have worked for 5 days, at an average of 10 hours per day and \$15 per hour, he would have earned a gross of \$750. For each week in which he would have worked for 6 days, he would have earned a gross of \$900 per week. Totalled over 13 weeks, this makes \$10,650 gross earnings that Mr Tiplady-Prasad missed out on as a result of his unjustified dismissal.

[34] Mr Tiplady-Prasad is also entitled to be considered for compensation pursuant to section 123(1)(c)(i) of the Act, which relates to payment of compensation for humiliation, loss of dignity and injury to the feelings of the employee. Mr Tiplady-Prasad's evidence was that he was discouraged by what had happened because he felt that he had given his all for Mr Broad only to have it *thrown in his face*. He said that he was forced to move from his residence because he fell into debt and that it took him a long time to catch up on his lost wages. He said that he also actually went a week without having any food because of his financial situation.

[35] I accept Mr Tiplady-Prasad's evidence that he suffered humiliation, loss of dignity and injury to his feelings as a result of the way in which he was dismissed and that he is therefore entitled to compensation pursuant to the Act. He asked for the sum of \$4,000 in compensation and I consider that that is a fair and reasonable sum.

[36] Finally, I must consider, pursuant to section 124 of the Act, the extent to which Mr Tiplady-Prasad's actions contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[37] I have not had the benefit of any representations from Mr Broad on this matter. However, thinking about the evidence that I have heard from Mr Tiplady-Prasad, which I accept, the actions that appear to have contributed towards the situation giving rise to the personal grievance are Mr Tiplady-Prasad telling Mr Broad that he would not beg for fuel again if there was insufficient fuel in the van for him to complete the deliveries and him raising his voice to the Manager of the bakery when he was repeating the same message.

[38] In order to justify the reduction of remedies, any contributing action must be blameworthy. In a situation where an employee is employed to deliver product, and there is insufficient fuel in the vehicle that is provided to that employee, and where the employee is not given any funds or a fuel card with which to purchase fuel, I do not believe that it is unreasonable for that employee to draw a line in the sand and say that he would no longer ask a petrol station for credit in circumstances where that petrol station was clearly very reluctant to give it.

[39] In respect of the interaction with the Manager of South Island Bakeries, Mr Tiplady-Prasad's evidence is that he did not shout but simply raised his voice to get across the message that the Bakery would suffer if he did not have the fuel to put in the van so he could deliver the product. Again, this seems like a normal situation where an employee, who was clearly frustrated, was trying to convey that either his employer or the company for which he delivered the bread, took some responsibility for the situation.

[40] All in all, I do not consider that it would be just to make any reduction to the remedies that I have calculated are due to Mr Tiplady-Prasad.

Orders

[41] I order that Mr Broad pay to Mr Tiplady-Prasad the following sums:

- i. The sum of \$1,800 gross in respect of arrears of wages owed to Mr Tiplady-Prasad;
- ii. Lost wages in the gross sum of \$10,650, pursuant to section 123(1)(b) of the Act;
- iii. The sum of \$4,000 pursuant to section 123(1)(c)(i) of the Act.

Costs

[42] Normally, I would reserve costs and give the losing party the opportunity to make representations in respect of costs sought by the winning party. However, in this matter, Mr Broad has shown no inclination whatsoever to take part in any substantive way in the proceedings and I therefore believe it would be a waste of time giving him yet another opportunity to do so.

[43] Furthermore, Ms Burness' fee for advising Mr Tiplady-Prasad amounts to a total of \$1,500. In all the circumstances, where Ms Burness has represented Mr Tiplady-Prasad at two directions conferences, has prepared the documentation to assist the Authority in its investigation meeting and taken part in two investigation meetings (albeit that one was abandoned), I believe that the sum of \$1,500 is a reasonable sum which should be paid by Mr Broad in accordance with the usual principles of *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] ERNZ 808.

[44] Accordingly, I also order that Mr Broad pays to Mr Tiplady-Prasad the sum of \$1,500 in respect of costs incurred by him in bringing his personal grievance to the Authority. I also order Mr Broad to pay Mr Tiplady-Prasad the sum of \$71.56 in respect of the Authority's lodgement fee.

David Appleton

Member of the Employment Relations Authority