

**ORDER PROHIBITING PUBLICATION OF NAME
OR IDENTIFYING DETAILS**

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 131
EMPC 148/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SURPLUS BROKERS LIMITED Plaintiff
AND	JOHN NEIL ARMSTRONG Defendant

Hearing: 10 December and 24-25 June 2020
(Heard at Auckland)

Appearances: S-J Neville, counsel for plaintiff
L Anderson, advocate for defendant

Judgment: 24 August 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] Surplus Brokers Limited (Surplus Brokers) has challenged a determination of the Employment Relations Authority which found that the company unjustifiably dismissed Mr Armstrong during a period of employment on a casual basis.¹ The challenge was pursued on a non-de novo basis, focussing on a number of alleged errors of law and fact made by the Authority Member. In essence, the alleged errors relate to the finding that Mr Armstrong was an employee at the time of termination; that he had been unjustifiably dismissed; and that there had been deficiencies in the procedure leading up to his dismissal. It was agreed that, given the nature and scope of the

¹ *Armstrong v Surplus Brokers Ltd* [2019] NZERA 235 (Member Arthur).

challenge, the evidence relevant to the particular matters at issue would be heard afresh.

[2] While I have heard the evidence afresh, and had the benefit of extensive submissions advanced by both parties, I have reached broadly the same conclusions as Member Arthur, for substantially the same reasons.

Background

[3] The company sells caravans and camper trailers. Mr Armstrong worked as one of its salespeople for around six months. There is no dispute that he was employed on a casual basis. Mr Caspersen, the company's road, chief product and sales manager, would contact Mr Armstrong in advance of events asking if he was free and, if so, the number of hours that he would be needed for. The circumstances which led to his departure from the company took place at a car show in Hamilton in April 2018.

[4] Prior to the show Mr Caspersen had emailed Mr Armstrong (on 21 March 2018) advising that Mr Armstrong would be involved in set-up work from Thursday 5 April 2018 and work at the show on Friday, Saturday and Sunday. The email went on to say that Mr Armstrong would also be involved in packing up the trailers and returning them to the company's premises in Auckland on the night of Sunday 8 April 2018. A subsequent discussion then took place between Mr Caspersen and Mr Armstrong and, as a result of those discussions, Mr Armstrong agreed to be available to work on Monday 9 April 2018, in order to bring a vehicle back from Hamilton if required.

[5] All of this is relevant because of what unfolded over the weekend of the show. Mr Caspersen had arranged for Mr Armstrong to share a motel room with another salesperson who worked for the company (referred to as Mr R). An altercation broke out between the two men, prompted (it appears) by objections to Mr Armstrong's snoring. As a result, Mr Armstrong left the motel room, made a complaint to the Police, and spent the night in the company car. Mr Armstrong sent Mr Caspersen a text message early the next morning:

Armstrong: [Mr R] threatened to kill me last night if I snored and I had to call the police at 2.30 they couldn't wake him up. I have slept in the car all night. I am having nothing more to do with him. I can't work today and neither am I picking him up. He is crazy.

Caspersen: where is he

Armstrong: Last I knew he was in motel but police didn't get an answer when they knocked.

[6] Mr Armstrong and Mr R travelled to the show and spoke to Mr Caspersen once he got there. Mr Caspersen indicated that Mr Armstrong should rest in the car while he (Mr Caspersen) and Mr R worked on the company's stands. Mr Caspersen advised Mr Armstrong that if he was leaving the car he was to make sure it was locked and that the keys were returned to him. Mr Caspersen later returned to the car and asked Mr Armstrong to give him the keys. Mr Armstrong remained in the car for some time but was tired, uncomfortable and unsettled by events the previous night. He did not feel able to work. The original plan had been for Mr Armstrong to travel back to Auckland in the company car with Mr R. Mr Armstrong decided to return to Auckland on his own. He locked the car and set off for the bus depot.

[7] It appears that Mr Caspersen rang Mr Armstrong at 11.01 am while Mr Armstrong was waiting for his bus. Telephone records indicate that the call lasted 84 seconds. Mr Armstrong said that during the call Mr Caspersen expressed no concern about his situation, made no attempt to stop him from leaving and made no offer to make arrangements for a safe return to Auckland. Rather, Mr Armstrong says that Mr Caspersen issued him with a verbal instruction to return his work shirts. Mr Caspersen gave evidence that he had no recollection of the call.

[8] At 12.59 pm Mr Caspersen sent Mr Armstrong a text advising that a complaint had been received from the motel about a broken mirror in the motel room. The text went on:

Do you know about broken mirror?

I am really upset at what has occurred and you have let me down badly. Please leave your company shirts at Otahuhu hq.

I will decide Tomorrow what [I am] going to do from this point.

[9] Mr Armstrong responded with his view of events in three text messages later that day.

[10] On Monday 9 April 2018 the following text message exchange occurred:

Armstrong: Hi [Mr Caspersen] do you need me if so whats the plan?

Caspersen: No plan, pick your Car up drop off shirts

Armstrong: Ok I thought you still wanted me to go to hamilton in afternoon.
No worries

Armstrong: Ive put shirts on front wheel of your ute didnt want to bump into him

Caspersen: I just got back from show, what Ute did you put shirts? And where was it

[11] There followed further text messages and an email about events at the motel, including in relation to the broken mirror. At 7.40 am on 10 April 2018 Mr Caspersen sent an email to Mr Armstrong emphasising a number of concerns in relation to what had occurred, and advising that: "I am now letting you know I will not be continuing our job role offers with you." At 10 am Mr Caspersen sent a further email, reinforcing that he was not taking sides, that he had been presented with two conflicting versions of events which he did not intend to resolve, and that: "I have made the decision to discontinue the part time opportunity as a direct result of the problem that occurred, it is very much unacceptable for me and my company."

[12] Mr Armstrong successfully pursued a claim of unjustified dismissal. The company's case on its challenge incorporated a number of threads. First, the instruction to return the work shirts contained in the text message of 8 April 2018 did not amount to a dismissal. Second, by the time the instruction to return the work shirts had been issued, Mr Armstrong had abandoned his employment (by departing from the show). Third, while there was an offer of work, it was conditional on the company needing assistance on 9 April 2018. The company did not need assistance and so anything that occurred on or after that date fell outside the timeframe within which the parties owed mutual obligations to one another.

[13] The company falls at the first hurdle. It is true, as the plaintiff company points out, that no express statement was made to Mr Armstrong that he had been dismissed. An express statement is not, however, necessary. Nor is any particular form of words or actions. Whether something amounts to a dismissal must be considered objectively, in light of the particular circumstances that applied at the relevant time.²

[14] I accept counsel for the company's submission that Mr Caspersen's communication in respect of the return of the work shirts must be viewed in context. I do not, however, accept that viewing it through this lens supports the conclusion that the communication did not amount to notification of a dismissal. The relevant context was that Mr Armstrong was part-way through a period of casual employment when he received the communication. Even accepting that Mr Caspersen did not make a request for return of the work shirts during the 84-second telephone call on 8 April 2018, he plainly made the request in writing shortly afterwards. Mr Armstrong was required to wear a work shirt while attending assignments for the company. The clear implication of the direction that the work shirts be returned to the company's headquarters was that Mr Armstrong would not be needing them because he would not be completing the Hamilton show assignment. Also, by this stage, Mr Caspersen had retrieved the car keys from Mr Armstrong.

[15] While, as Ms Neville points out, the text message concluded with the words: "I will decide tomorrow what [I am] going to do from this point," I do not agree that these words objectively reflect that Mr Caspersen had yet to decide whether Mr Armstrong was an employee for the purposes of the Hamilton assignment. Rather, it was directed at the likelihood of future assignments, consistently with Mr Caspersen's subsequent email, recording that he had made the decision to "discontinue the part time opportunity". Nor do I accept that Mr Armstrong's text message inquiry on 9 April 2018 as to whether he was needed for work on Monday reflected the fact that he did not consider that he had been dismissed. He said (and I accept) that it was simply seeking confirmation of what he understood the position to be. And later that day he

² *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 at 102–103; *Cornish Truck & Van Ltd v Gildenhuys* [2019] NZEmpC 6 at [45].

wrote: “the fact you have taken the shirts back off me suggests I have lost the job as well.”

[16] The written direction to return the work shirts also occurred against a backdrop of Mr Armstrong leaving the Hamilton show after telling Mr Caspersen that a co-worker had threatened to kill him the night before, the Police had been involved and he had slept in the car. In addition, it arose against the backdrop of Mr Caspersen receiving a complaint from the motel about the broken mirror which he was clearly irritated by, as his communication at the time reflects. What also emerges from the contemporaneous documentation is a distinct lack of concern about Mr Armstrong, despite the nature of the concerns that he had raised and the fact that the Police had been involved.

[17] The company’s alternative submission that Mr Armstrong abandoned his employment cannot fly having regard to the context surrounding Mr Armstrong’s departure from the show. An inference of abandonment is one that an employer should draw carefully and only after making inquiries of the employee to ensure that abandonment was their intention.³ No such inquiries were made by Surplus Brokers, and later correspondence by Mr Armstrong made clear that he was interested in accepting further work from the company in the future.

[18] It will be apparent that I do not accept that the Authority Member erred in concluding that the direction to return the work shirts amounted to a dismissal in the circumstances, and I agree with the Authority Member’s analysis leading to that conclusion, namely that:⁴

[40] In this case Mr Caspersen’s direction to return the work shirts was, objectively assessed, a clear statement that Mr Armstrong’s employment was being terminated at the initiative of the employer. The message was simple. Mr Armstrong had to give back the work shirts because Mr Caspersen had decided Mr Armstrong was not working for the company anymore and did not need the shirts. Mr Armstrong was being sent away. This direction was given twice – once on 8 April and once on 9 April. ... those days were within the period of the assignment. This meant Mr Armstrong was dismissed while employed by [the company].

³ *Lwin v A Honest International Co Ltd* [2002] 1 ERNZ 387 (EmpC) at [33]. See also *E N Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97 (EmpC) at [26].

⁴ Footnotes omitted.

[41] Mr Caspersen's subsequent inquiries, and his emails of 10 April, provided and confirmed his rationale for the decision he had already reached and communicated by his directions about the shirts on the previous two days. Having occurred during a period of employment that decision was required to have been reached on the standard of what a fair and reasonable employer had could have done. Mr Caspersen's actions failed to meet that standard because he had not sufficiently investigated his concerns or given Mr Armstrong a reasonable opportunity to respond to them before making a decision. He had not given Mr Armstrong the opportunity to comment on whatever Mr R had told him. And, because he declined to reach any view on what had happened at the motel, Mr Caspersen could not have fairly have reached the conclusion that Mr Armstrong's decision to return to Auckland on the Sunday was really misconduct. Neither was Mr Armstrong given the opportunity to comment on the prospect that he was to be dismissed for his conduct.

[42] Those failures of fairness were defects in the process Mr Caspersen followed. Those defects were more than minor. They resulted in Mr Armstrong being treated unfairly. As a result Mr Caspersen's actions, on [the company's] behalf, amounted to an unjustified dismissal.

[19] The instruction to return the work shirts on 8 April 2018 amounted to a dismissal. A finding that the dismissal was procedurally unjustified is inevitable, having regard to the factual context. The deficiencies in the approach adopted on behalf of the plaintiff are well set out in the above passages of the Authority's determination and do not need to be repeated.

[20] For completeness I deal with the company's residual argument that if dismissal occurred on 9 April 2018 (which I do not accept), it fell outside the period of casual employment. Mr Armstrong was offered and accepted work at the Hamilton show, spanning set-up work on Thursday 5 April 2018 through to packing up and bringing back equipment on the evening of Sunday 8 April 2018. All of this is made clear in Mr Caspersen's email of 21 March 2018. There were then further discussions between Mr Caspersen and Mr Armstrong about the possibility of work on Monday 9 April 2018, returning a vehicle to the depot in Otahuhu. The evidence established that Mr Armstrong was asked to be available for such work and he agreed to make himself available. I agree with the Authority Member that events that occurred on both 8 and 9 April 2018 occurred during a period when mutual obligations of employment existed between the parties.⁵ Mr Armstrong was entitled during that period to all that

⁵ See *Rush Security Services Ltd, (T/A Darien Rush Security) v Samoa* [2011] NZEmpC 76, [2011] ERNZ 529 at [32].

employees are usually entitled to, including not to be dismissed without substantive and procedural justification. The company breached those obligations.

[21] The company's non de novo challenge was focussed on the findings of unjustifiable dismissal. No issue was taken with the remedies ordered by the Authority in the defendant's favour.

Conclusion

[22] The challenge is dismissed. The defendant is entitled to a contribution to his costs on the challenge. If these cannot otherwise be agreed, I will receive memoranda, with the defendant filing and serving any application together with any supporting material within 15 working days; the plaintiff within a further 10 working days; and anything strictly in reply with a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 2.45 pm on 24 August 2020