

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 19
5376360

BETWEEN LESLIE ASPLET
 Applicant

A N D BIRCHFIELD MINERALS
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Mr Asplet in person, with Ms Hodgson assisting
 David Carruthers, Counsel for Respondent

Investigation Meeting: 16 January 2013 at Greymouth

Submissions Received: 16 January 2013 from Applicant
 16 January 2013 from Respondent

Date of Determination: 24 January 2013

DETERMINATION OF THE AUTHORITY (NO 3)

- A. The Applicant’s claim for holiday pay and his claim under the Wages Protection Act 1983 succeed. His claim for notice pay fails. The respondent’s counterclaim partially succeeds.**
- B. Costs are reserved**

Employment relationship problem

[1] By way of a determination of the Authority dated 2 July 2012, the Authority found that Mr Asplet was an employee of the respondent. By way of a further determination of the Authority dated 4 December 2012, the Authority declined to accept Mr Asplet’s application for leave to raise a personal grievance for unjustified dismissal outside of the 90 day time limit. This determination addresses Mr Asplet’s

claim for arrears of wages and a claim for two weeks' notice pay together with a counterclaim by the respondent in relation to property allegedly unlawfully taken away or retained by Mr Asplet.

[2] Mr Asplet's claim for arrears of wages amounts to \$2,286 gross. His claim for two weeks' notice pay amounts to \$2,880 gross. The respondent's counterclaim when first lodged amounted to \$13,637.57 inclusive of GST.

[3] Right at the end of the investigation meeting, after the departure of Mr Birchfield and Mr Carruthers, Ms Hodgson raised the question of holiday pay, which she contends is owed to Mr Asplet after the finding of the Authority that he was an employee in law, and not a contractor.

Brief summary of the events giving rise to the claim and counterclaim

[4] Mr Asplet worked for the respondent between March 2009 and August 2009 in the capacity of an engineer, helping to maintain the 3,500 tonne gold dredge that operated on the Grey River near the town of Blackball.

[5] Mr Allan Birchfield, the owner of the respondent company, gave Mr Asplet a considerable amount of freedom in the work he carried out and also allowed him to order parts and consumables necessary for his work. Mr Birchfield's evidence is that, after a period, he and other staff noticed that equipment was going missing. His evidence was that two staff members also approached him saying that they were concerned about the large amount of unnecessary equipment that Mr Asplet was purchasing with his order book.

[6] Mr Birchfield's evidence is that he told Mr Asplet that he needed to get his permission before ordering any equipment. He also said that he did not believe that Mr Asplet was being honest in the way that he recorded his hours and, accordingly, reduced his hours to 40 per week. Mr Asplet's evidence is that the reduction in his hours to 40 per week meant that his work for Birchfield Minerals was not financially viable and he therefore started a second job which effectively meant he worked seven days per week.

[7] Mr Birchfield said that things came to a head when, in August 2009, Mr Asplet approached him for permission to buy some grinding discs. Mr Birchfield expected that it would cost about \$40 as that was all they would normally purchase, so

he agreed. However, a week later, he received an invoice for \$600 worth of grinding discs and cut off wheels. When he asked Mr Asplet about the order, Mr Asplet said that he had used some of his own discs. A few days later he and a staff member did an audit and found only half the order was there. Mr Asplet had split the \$600 order of grinding discs and cut off wheels in half and taken \$300 worth.

[8] Mr Birchfield said that it was at this point that he realised that *he had a thief on his site*. He said that he and a staff member checked around the workshop and found a lot of other equipment missing including air hoses, drills and welding leads, and single phase and three phase extension cords. He said that he then spoke to his onsite caretaker to ask if he had noticed any suspicious behaviour by Mr Asplet and that the caretaker told Mr Birchfield that he had seen Mr Asplet filling up one to three twenty litre containers with diesel from the site supply tank and taking them off site most Fridays. He said that the caretaker also told him that Mr Asplet would come into work before all the other staff and would not leave until all the staff had left.

[9] Mr Birchfield's evidence is that he then made a complaint to the Greymouth Police and summarily dismissed Mr Asplet. The police subsequently carried out a search of Mr Asplet's property, accompanied by Mr Birchfield, and certain items were identified by Mr Birchfield as belonging to him or the respondent. Some of these items were seized by the police whereas others were not as the police were not satisfied that Mr Birchfield could show that they did belong to him or the respondent. Charges were laid against Mr Asplet although all but one were subsequently dropped. Mr Asplet successfully defended a charge of using the respondent's order book to obtain a vacuum cleaner from the respondent company for his own use. The Authority was shown a press clipping that recorded that His Honour Judge Couch said that *he had a strong suspicion that Asplett [sic] had used the order book to illegally gain a pecuniary advantage but that did not amount to proof beyond reasonable doubt and he had to dismiss the charge*. Mr Asplet told the Authority that he had used the order book to buy a vacuum cleaner for himself, but had never got around to paying the respondent back.

[10] Mr Asplet also told the Authority that when he had been dismissed he had some of the respondent's equipment in his gang box (such as welding equipment) but that he had held onto it until he had been paid what he believed was due to him.

These items were seized by the police and returned to the respondent, and are not the subject of this investigation.

[11] On 25 November 2011 the District Court at Greymouth dealt with an application by the police under s.199 of the Summary Proceedings Act 1957 whereby the police sought orders as to what to do with property seized during the search of Mr Asplet's premises. His Honour Judge Neave directed that most of the items be returned to Mr Asplet. Some further items had already been returned to Mr Birchfield and to another of Mr Asplet's former employers.

[12] This investigation meeting was taken up by considering a number of further items which Mr Birchfield says were stolen by Mr Asplet from his company. Mr Birchfield asserts that he has not paid the arrears of wages and the two weeks' notice pay because Mr Asplet had breached the employment agreement in a fundamental way by stealing from him.

The issues

[13] The following are the issues which the Authority needs to determine in this matter:

- (a) Was the respondent entitled to withhold the arrears of wages claimed by Mr Asplet?
- (b) Is Mr Asplet owed a further two weeks pay in lieu of notice?
- (c) Is the respondent entitled to the value of property that it claims has been unlawfully retained by Mr Asplet?
- (d) Is Mr Asplet entitled to holiday pay.

Is the respondent entitled to withhold Mr Asplet's arrears of wages?

[14] It is not denied that Mr Asplet is owed remuneration in respect of having worked 63.5 hours, payable at \$36 per hour. Mr Birchfield asserts that he should not have to pay this though as Mr Asplet breached the agreement between the parties.

[15] Section 4 of the Wages Protection Act 1983 states that, subject to ss.5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to a worker without deduction.

[16] Section 5(1) of the Wages Protection Act allows an employer to withhold wages or make deductions from wages when it has the written consent of a worker or the worker has made a written request to that effect. Section 6(2) entitles an employer to withhold wages when it has made an overpayment to a worker.

[17] The agreement between the parties was recorded in a document signed by both Mr Birchfield and Mr Asplet on 25 February 2009. Nowhere in this document does it record an agreement by Mr Asplet that Birchfield Minerals Limited could make deductions from wages that fell due. Therefore, even if Mr Asplet had breached the agreement by unlawfully taking away and retaining equipment belonging to the respondent, the respondent has no lawful right to withhold the payment of the wages that has accrued. Accordingly, Mr Asplet is entitled to the sum of \$2,286 gross in respect of the 63.5 hours he worked in the two weeks immediately preceding the termination of his employment.

[18] I should just add that Mr Birchfield (as did Mr Asplet) originally believed that Mr Asplet was a contractor rather than an employee and so would not be protected by the Wages Protection Act. However, with the finding that Mr Asplet was an employee, that brings with it obligations which were not appreciated by Mr Birchfield at the time.

Is Mr Asplet entitled to two weeks payment in lieu of notice?

[19] This claim is a breach of contract claim, which the Authority has the jurisdiction to consider pursuant to s. 162 of the Employment Relations Act 2000 (the Act).

[20] Clause 18 of the agreement between the parties states as follows:

In the event of termination of your employment, the following conditions will apply:

(a) *Where notice is given by either of us it shall be for two weeks, or less by mutual agreement.*

[21] Mr Birchfield argues that, as Mr Asplet allegedly breached the agreement in a fundamental way by unlawfully taking away and retaining equipment and property belonging to the respondent, that breach of contract amounts to a repudiation which, in effect, disentitles Mr Asplet to his two weeks' payment in lieu of notice.

[22] I agree with the principle expounded in this argument and, accordingly, whether Mr Asplet is entitled to his two weeks' notice depends on whether he breached the contract himself by unlawfully taking away and retaining equipment and property belonging to the respondent or by some other action which repudiated the contract. Therefore, it is necessary to examine the counterclaim in order to determine Mr Asplet's rights in this respect. In the event I do find, for the reasons given below, that Mr Asplet did repudiate the contract by the way he acted in respect of the grinding discs, which form a part of the counterclaim.

The respondent's counterclaim

[23] Mr Birchfield asserts that Mr Asplet effectively stole from the respondent a number of items belonging to it. He therefore seeks their return or compensation in lieu thereof. It is necessary to emphasise that the Authority is not investigating whether Mr Asplet committed theft, or some other dishonesty crime as defined by the Crimes Act 1961 as the Authority operates in a civil jurisdiction. Accordingly, the standard of proof required is not the criminal standard (that the Court is satisfied beyond reasonable doubt that the crime was committed) but the civil standard (whether the acts complained of by the respondent occurred on a balance of probabilities). The counterclaims are claims for breach of contract, for which the Authority has jurisdiction in accordance with s.162 of the Act.

[24] I shall consider each item allegedly unlawfully taken and retained by Mr Asplet in turn.

Grinding discs to the value of \$300

[25] It was the issue of the grinding discs that led to Mr Birchfield concluding that Mr Asplet had been stealing property. Mr Asplet's evidence is that he had been using a number of his own grinding discs at the respondent's premises for the respondent's work. He had not wanted to use the order book, he said, because he knew that money was tight with the respondent. He says that he eventually asked Mr Birchfield if he (Mr Asplet) could order some more discs, and Mr Birchfield had agreed. Mr Birchfield's evidence was that, in agreeing, he had believed that around \$40 worth of discs would be ordered.

[26] In fact, Mr Asplet had ordered \$600 worth of discs. When Mr Birchfield saw the invoice, he approached Mr Asplet asking for an explanation. Mr Asplet says he

explained that he had split the order and taken half of the discs home to replace the ones that he says he had used. He says that Mr Birchfield did not answer him and had walked away. Mr Birchfield is adamant that Mr Asplet could not have used this many discs. It appears that Mr Birchfield did not answer Mr Asplet because he had at that point determined to tell the police about what he saw as attempted theft.

[27] In his evidence, Mr Asplet admitted that he had not told Mr Birchfield that he had been using his own discs and had also not told him that he intended to take some of the discs as replacements when he asked Mr Birchfield if he could order new ones. He had also not told Mr Birchfield that he was going to order around \$600 worth of discs. It was only when Mr Birchfield confronted him about the invoice that he told him what he had done. Finally, Mr Asplet admitted that he had not kept a record of how many of his own discs he had used, which he had wanted to replace. He had essentially estimated it. He agreed in evidence that he should have invoiced the respondent for the use of his own discs, but *had not been thinking, it is as simple as that*.

[28] Given all of this, I am not surprised that Mr Birchfield concluded that Mr Asplet had been stealing. On balance, I do not believe that Mr Asplet had intended to steal discs from the respondent, as the \$600 invoice would have given that intention away too easily. However, Mr Asplet failed fundamentally to treat the respondent with respect when he failed to tell Mr Birchfield what he was doing. In my view, the actions of Mr Asplet in this regard were sufficient to breach the duty of trust and confidence owed by him to the respondent.

[29] Applying this conclusion to the contractual relationship between the parties, it is my view that the way Mr Asplet dealt with the grinding discs issue amounted to a fundamental breach of the implied duty of trust and confidence between the parties, which entitled the respondent to treat the contract as at an end. Although Mr Birchfield ended the relationship on the grounds that he believed that Mr Asplet had been stealing from him, it was because of his discovery of the fact that Mr Asplet had taken \$300 of discs without telling him that was the catalyst for this belief.

[30] As the respondent was entitled to treat the contract as at an end, because of the repudiatory action of Mr Asplet, it was entitled to withhold the two weeks' notice that I believe would have otherwise been due to Mr Asplet.

[31] Turning to the counterclaim, whilst I accept that Mr Asplet would have used some of his own discs and was entitled to be reimbursed for those, I find it hard to believe that he would have used \$300 worth in a few weeks. As Mr Asplet himself did not keep a record of how many he used, I believe it would be just for Mr Asplet to reimburse the respondent for half of the discs that he took away. A fair approach, I believe, would be for Mr Asplet to pay the respondent \$150.

Argosshield gas bottle and contents

[32] Mr Asplet conceded during the Authority's investigation that he retained a gas bottle beyond his dismissal on 24 August 2009 until it was returned to BOC on 19 February 2011, and that the respondent had been paying the rental on the bottle during that time. Therefore, assuming this amounts to 18 months' payments, at \$13.71 per month, Mr Asplet owes the respondent the sum of \$246.78.

[33] Mr Asplet explained that he had used one of his own gas bottles at the respondent's premises for the respondent's work, and so had ordered a bottle using the respondent's BOC account to replace it and took this bottle home. When asked why he had not simply taken his own bottle home rather than the new one from BOC, all Mr Asplet could say was that he had made a *stupid, silly mistake*. The respondent had also counter claimed in respect of \$90 worth of gas used by Mr Asplet, but given that I accept on a balance of probabilities that Mr Asplet had used his own gas for the respondent's work, I shall assume that the value of the gas used cancels out the value of the gas claimed by the respondent.

Two axle stands valued at \$50

[34] In his evidence, Mr Birchfield says that, when he was in Mr Asplet's premises during the police search, he was unable to identify the axle stands that he believed had been taken from the respondent's workshop. Mr Asplet says that he had eight axle stands at his premises, four of which were home made and the other four purchased at auction. Mr Asplet had since sold the home made ones but showed the Authority the four he had purchased, which still bore the auction house's label.

[35] On the basis that Mr Birchfield had never seen the axle stands that he believed had been stolen in Mr Asplet's premises, on balance I am not satisfied that Mr Asplet was responsible for them having gone missing, and so I dismiss this counterclaim.

10 taper shank drills valued at \$10,000

[36] Half way through the investigation meeting, the respondent withdrew its claim against Mr Asplet in respect of these items as it accepted that it could not prove that the drill bits that Mr Asplet had in his own workshop were the same ones as the ones that went missing, and because it could not prove exactly which ones were missing.

Vernier callipers valued at \$179

[37] Mr Birchfield said that one of the respondent's two vernier callipers had gone missing during Mr Asplet's employment, but he had not seen the missing set when he had accompanied the police during the search. Mr Asplet said that he had never used the respondent's callipers during his employment because he preferred to use his own measuring equipment. He did not recall ever seeing the missing callipers.

[38] As Mr Birchfield did not see his missing callipers during the police search, on balance I accept that Mr Asplet had not taken them, and so I dismiss this counterclaim.

2 x 30 metre single phase leads valued at \$120

[39] It appears that, during the police search, the police had seized two sets of 50 metre single phase leads, instead of 30 metre leads. These were eventually returned to Mr Asplet under the Summary Proceedings Act 1957. Mr Birchfield said that he had not seen the 30 metre leads during the police search.

[40] Mr Asplet says that he had used his own leads during his employment at the respondent, and had not been responsible for the respondent's leads going missing. As Mr Birchfield was unable to identify the leads during the police search, on balance I accept Mr Asplet's evidence and dismiss this counter claim.

2 x 20 metre three phase leads valued at \$1,580

[41] Mr Birchfield says that these were one of the first things he noticed were missing, and that he saw them during the police search of Mr Asplet's premises, but that the police would not seize them as there were no identifying marks on them. He admitted that he could not prove that the ones he saw were his company's.

[42] Mr Asplet said that he had used one of the respondent's 20 metre three phase leads on the dredge and another one in the respondent's workshop. He remembers having taken a plug off a third lead to use it on a motor, on Mr Birchfield's instruction. He said that he had his own three phase lead, which was black, and that he remembered a staff member asking him about the whereabouts of a red three phase lead which he had never seen.

[43] On balance, given that Mr Birchfield could not prove that he had seen his lead at Mr Asplet's premises, I am not satisfied that Mr Asplet took the respondent's lead. Therefore, I dismiss this counterclaim.

800 litres of diesel valued at \$720

[44] This counterclaim stems from a statement made by the then caretaker of the dredge site, who stated to police that he had seen Mr Asplet taking away one to three 20 litre containers of diesel most Fridays. Mr Asplet vehemently denied this, saying that he had used a small amount of diesel to clean large bearings and to fuel two heaters in the large workshop. He said he had been careful about filling the containers because he had been wrongly accused of stealing diesel in a past employment.

[45] As Mr Searle, the caretaker, was not available to be questioned by the Authority, and had not sworn an affidavit (and had never given evidence at court on the matter in the criminal investigation) this allegation is hearsay only. Whilst the Authority can choose to accept hearsay evidence, in a matter of an allegation of theft or dishonesty, it would not be safe to do so. Therefore, I accept Mr Asplet's evidence that he did not steal any diesel, and dismiss this counterclaim.

An engineer's level valued at \$70

[46] Mr Birchfield said that he had not seen this during the police search of Mr Asplet's premises. Mr Asplet says he recalls the item but had never used it, as it was very *accurate* and not necessary for most jobs. He denies he took it. As Mr Birchfield had not seen this item during the police search, on balance, I do not accept that Mr Asplet took the item, so this counterclaim is dismissed.

4 x 30 millilitre x 1000 millilitre thread bars valued at \$200

[47] Mr Birchfield says that he did see these in the corner of Mr Asplet's container, and he had recognised them as they had plastic around them. He had bought a big lot at auction ten years ago. The police did not seize them because they had no identifying marks on them. Mr Asplet said that the thread bars that Mr Birchfield had seen during the police search were given to him when he had worked for another company in the North Island. He agreed that his thread bars had the plastic on them too.

[48] On balance, I believe that these bars are not the respondent's, and so I dismiss this counterclaim.

Paperweight valued at \$20

[49] This was in the shape of an anvil. Mr Birchfield says that he had not seen it during the search of Mr Asplet's premises. Mr Asplet denies he stole it, but says that he recalls talking to a plastic moulder about making a mould of it for him, although he had not given it to the moulder.

[50] As Mr Birchfield had not seen the paperweight during the police search, on balance I am not satisfied that Mr Asplet took it, and so this counterclaim is dismissed.

[51] It is worth saying at this point that some of the items subject to the counterclaim appear to have been included for no other reason than they have been noticed as missing. Mr Birchfield admitted that, prior to him and his staff doing a stock take after Mr Asplet's dismissal, he had not done one for years, and that he had had some of the items in the workshop for years. It is also the case, I believe, that the workshop contained a significant amount of equipment and parts. The respondent also employed around 18 staff.

[52] Whilst I can perhaps understand Mr Birchfield jumping to the conclusion that Mr Asplet was responsible for all the missing equipment, in light of what had happened with the vacuum cleaner and the grinding discs, it is more likely in my view that many of the missing items had disappeared over the years, either by accident or design, but that there is no evidence at all, other than circumstantial evidence of a flimsy nature, that Mr Asplet was responsible for these items going missing.

Conclusion

[53] Mr Asplet's claim for payment in lieu of two weeks' notice fails as the respondent was entitled to terminate the agreement between the parties following the repudiatory actions of Mr Asplet in keeping \$300 of grinding discs without having first explained to Mr Birchfield what his intentions were.

Holiday Pay

[54] Mr Asplet asks for his holiday pay at 8% of his gross earnings following his dismissal. Mr Carruthers, who was given the opportunity to comment on the late application for holiday pay, argues that no such payment should be made because the understanding was that Mr Asplet was a contractor and would be responsible for his own tax issues, thereby justifying a higher hourly rate.

[55] Whilst I accept that Mr Asplet and Mr Birchfield operated in good faith on the assumption that Mr Asplet was not an employee, having found in law that he was, I find that he must be entitled to be paid for untaken holidays which had accrued at the end of his employment, in accordance with s. 25 of the Holidays Act 2003. I have no option but to award holiday pay. Unfortunately, I do not have sufficient information about the gross earnings of Mr Asplet from his employment by the respondent, and so cannot calculate the exact figure owed.

[56] As for the complications in respect of the income tax and GST that arose following my determination that Mr Asplet was an employee, the parties will probably find that the Inland Revenue Department will be able to assist in untangling any complications. Mr Asplet's employment was for only five months, so the complications should not be significant.

Orders

[57] I order the respondent to pay to Mr Asplet the sum of \$2,286 in respect of unpaid wages.

[58] I order the respondent to pay to Mr Asplet 8% of his gross earnings from the employment from its commencement until its termination. The parties may apply to the Authority if they are unable to agree the sum owed.

[59] I order Mr Asplet to pay to the respondent the sum of \$246.78 in respect of the rental of the gas bottle and the further sum of \$150 in respect of the grinding discs.

Costs

[60] Costs are reserved, including in respect of the two preliminary matters. If the parties cannot agree how their respective costs are to be dealt with within 28 days of the date of this determination, each is to serve and lodge a memorandum setting out how they want their respective costs to be dealt with, and each party will have a further 14 days within which to serve and lodge any reply.

David Appleton
Member of the Employment Relations Authority