

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Patricia Cann (Applicant)  
**AND** Kiwi Carlton Cabs Whangarei Society Limited (Respondent)  
**REPRESENTATIVES** Andrew Holgate for Applicant  
Sally Leftley, Murray Broadbelt for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**INVESTIGATION MEETING** 8 June 2006, 9 June 2006  
**SUBMISSIONS RECEIVED** 15 June, 20 June 2006  
**DATE OF DETERMINATION** 04 July 2006

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

- [1] Mrs Cann was employed by Kiwi Carlton Cabs Ltd (Kiwi) to do dispatch and administration work from December 2004 until she resigned at the beginning of November 2005. She says her resignation amounted to a constructive dismissal brought about by stress which arose as a result of breaches of duty by the respondent relating to<sup>1</sup>:
- i. inadequate staffing levels;
  - ii. the way a disciplinary matter was handled;
  - iii. inadequate training.
- [2] Mrs Cann told me that she did not attempt to look for other work after she left her job at Kiwi because she did not feel that her health was up to it. I had evidence (doctor's certificates) confirming that her health was poor in October 2005 but nothing relating to what it was like after her employment ended. The parties have agreed that further evidence and submissions on the issue of mitigation of loss will be presented in the event that the constructive dismissal claim is successful. I deal here only with the merits of that claim.
- [3] I also advised the parties during the investigation meeting that in the event that I found the respondent's conduct did not give rise to a constructive dismissal I would consider whether it amounted to a disadvantage grievance. Both parties have taken the opportunity to provide submissions on the issue of disadvantage.

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<sup>1</sup>Further factors had been referred to in the statement of problem however only these three issues were relied on in closing submissions.

- [4] In her original statement of problem Mrs Cann also claimed unpaid sick leave, annual leave, statutory holiday payments, and overtime pay. During the course of the investigation meeting Mrs Cann accepted that statutory sick leave entitlements had been met and that any shortfall in her payment for annual holidays had been rectified. Regarding the statutory holiday pay the respondent acknowledged that it was not able to show that days in lieu had been given for statutory holiday worked. It remains in contention how much was owed as a result. Overtime pay also remains a hotly contested issue.
- [5] At the time Mrs Cann's employment relationship problem arose, her husband was driving a Kiwi cab and her son, Fraser, also worked for Kiwi providing administration and management services on contract. He was, in fact, Mrs Cann's manager. Father and son both had some involvement in Mrs Cann's employment relationship problem. Since that time Mrs Cann has lost her husband from a heart attack and she believes that his untimely passing was in part caused by the stress associated with her employment issues. This belief has added to the bitterness and distress she already felt in relation to her past employment with Kiwi Carlton Cabs Ltd.

### First Issue: was there a constructive dismissal?

#### *Hours of work*

- [6] As well as giving rise to a separate claim for arrears of wages, this issue is said by Mrs Cann to have been a significant contributor to her stress. Mrs Cann's solicitor argues that the respondent was under an obligation to provide a safe place of work which included maintaining adequate levels of staff so that Mrs Cann was not required to work unsafe levels of overtime. He says that this did not happen despite the issue being brought to the attention of the respondent.
- [7] Mrs Cann says that for three and a half months between late February 2004 and mid June 2005 she worked sixty hours a week, without overtime pay and to the detriment of her health. She says that these long hours were brought to the attention of the respondent in April (via a report by Mr Fraser to the respondent's Management Committee) and in June. During the second half of June her hours of work reduced to a forty hour week. Thereafter, until the end of her employment, she rarely worked more than 32 hours and a half per week.

#### *Handling of disciplinary matter*

- [8] On 1 July 2005 Mrs Cann "manually dispatched" a job to her husband's cab. To do so she had to override the automatic dispatch system. It would otherwise have allocated the job to the next cab in the queue which was not that of Mr Cann senior. A couple of weeks later the respondent's Chairperson, Arthur George, and another committee member, Mr Heremaia, were going through that day's records whilst investigating an unrelated complaint and saw what Mrs Cann had done. Although dispatchers did have some discretion to override the system (to accommodate priority cases or to avoid delays) it did not appear to them that there had been any such need on this occasion.
- [9] Because he was new to the role of Chairperson Mr George sought legal advice. On 19 July Kiwi's solicitors wrote to Mrs Cann requiring her to attend a meeting to discuss their concern that "*on 1 July 2005, a job was allocated by you to your husband rather than the next available driver.*" The letter provided some identifying details about the job in question and then continued:

*“The allocation of jobs is a serious matter and we consider wrongful allocation of jobs to be tantamount to theft.*

*You are invited to bring a support person to the meeting and we advise that should you [sic] explanation not be acceptable, termination may result.”*

[10] The meeting proceeded on 4 August (after being deferred to a time at which Mrs Cann’s representative could attend.) At the meeting she admitted the manual dispatch to her husband but said that it was justified. She said that the job was a priority one (a parcel from the hospital) and there were no cabs nearby except that of her husband. Mr George and the other committee member, Mr Heremaia were very sceptical about this as each thought they had seen that there was another cab in the right vicinity when they had looked at the records together. However they did not have this information with them. They told Mrs Cann that they would adjourn while they considered her explanation and checked what she said against the records.

[11] Unfortunately, it turned out that the records in question were automatically purged from the system after a certain period of time, which had now elapsed. Mr George spent some time trying to establish whether the records could be retrieved, even seeking help from the software provider in the UK. In the meantime, Mrs Cann waited anxiously to hear the outcome. On 19 August, when she had heard nothing at all from Mr George or anyone else representing Kiwi, she instructed her solicitor to write to her employer. The letter restated her explanation, rejected any allegation that there had been any wrongdoing by Mrs Cann, and ended:

*“Our client is entitled to an apology in writing. Furthermore we reserve the right on behalf of our client to exercise all legal remedies available to her without further notice.”*

[12] Ten days later Mrs Cann received a short note from Mr George which read:

*“I refer to our meeting of Thursday, 4 August 2005.*

*The committee has taken your explanation of job 406 on 1<sup>st</sup> July 2005, into consideration and decided that no further action will be taken.”*

[13] Mr George told me that after a fruitless search for the purged documents he had decided that Mrs Cann would be given the benefit of the doubt and the matter was left to lie where it was. He declined however to give her the apology she sought. He told me he felt that no apology was warranted because Kiwi was obliged to investigate the matter and did so in a proper and fair way.

[14] During the course of the inquiry into her conduct Mrs Cann heard of another instance of a dispatcher (Mr George himself) manually dispatching a car in circumstances which she felt were similar to her own case. She made a formal complaint and an investigation followed, after which it was concluded that there had been no wrongdoing. The results were posted on the lunchroom notice board. Mrs Cann told me that she felt further aggrieved that her own case had not been handled the same way as this other case.

[15] I asked Mrs Cann if she wanted some sort of public statement to be made informing the drivers and staff that matters against her would be proceeding no further. (This being a point of difference between the handling of the complaint against her and the handling of the complaint against Mr George.) However she told me that was not what she wanted.

### *Training*

[16] When Mrs Cann was employed by the respondent as administrator/dispatcher it was with the intention that she would eventually take over all management and administration from her son. (He was engaged on a contract for services that was never envisaged as permanent.) Mr Cann told me that he attempted to prepare his mother for these duties but had also identified a need for formal training for her. He says that he told the Committee of this but that appropriate training was never arranged for her. His contract came to an end in September 2005 after which many of his previous responsibilities fell to Mrs Cann. Mrs Cann says that the lack of training was a further cause of stress for her.

### **Determination**

[17] In relation to the issue of hours of work I accept that Mrs Cann was working a lot of overtime during the period late February to mid June. I will return to this point under the issue of the overtime claim. However, by Mrs Cann's own account, for the final four and a half months of her employment she worked less than full time: clearly not excessive hours of work. There can be no breach there. As for the earlier period, I conclude that it is too remote in time from the resignation (on 1 November) to have been the trigger for it.

[18] Turning to the disciplinary process, I accept that the respondent was entitled to conduct a disciplinary inquiry into the incident of 1 July, and did not owe Mrs Cann an apology for this. I also conclude that but for one aspect, the process itself was fair and reasonable. This one aspect is the matter of the time which elapsed before Mrs Cann knew of the outcome of the investigation. I consider it was appropriate for the respondent to try to find a way of retrieving the purged records however I consider that Mrs Cann should have been informed about what was happening and not left waiting and wondering for as long as she was.

[19] Finally I heard insufficient evidence to convince me that the respondent was under an obligation to provide any further training to Mrs Cann. She did not make it clear to me what her perceived needs were or how they related to duties she was required to pick up after her son left his role in the organisation. Since I cannot be confident that there was a real training need the fact that Kiwi did not provide more training does not amount to a breach.

[20] In summary, the evidence in relation to the hours of work, lack of training, and pursuit of disciplinary proceedings does not establish that there has been a breach by the respondent of sufficient seriousness to support a finding of constructive dismissal.

### **Second Issue: Was there a disadvantage grievance?**

### **Determination**

[21] I have identified one area of concern in relation to the way the disciplinary process was handled. The respondent kept Mrs Cann waiting from 4 August until 25 August for news of the outcome of its inquiry. During this time Mrs Cann continued to perform her duties and to cope, as best she could, with the uncertainty. She also had to cope with hearing gossip and rumour about the incident from drivers and others involved with Kiwi. Mr George has assured me that he did everything he could to keep the disciplinary matters confidential and I accept this. However I also accept that given the very close knit nature of

the respondent organisation it was unsurprising that there was gossip. Mr George should have recognised the need for speed and the need to keep Mrs Cann informed.

- [22] I do not consider that the delay and lack of information to Mrs Cann can be justified and I accept that it disadvantaged her by subjecting her to unnecessary additional distress and anxiety. I consider that this warrants an award of compensation for hurt and humiliation.

### Third issue: Wage Arrears Claim

- [23] Under “hours of work” Mrs Cann’s employment agreement provided:

*“Your hours of work will be Monday to Friday 8.30 to 17.00.*

*You are entitled to an unpaid hour lunch break and two paid tea breaks....*

#### *REMUNERATION*

*Your gross rate of pay will be \$38,000.00 per annum, payable weekly...”*

- [24] Mrs Cann’s claim is that she worked 12 hours a day from late February until mid June, without overtime pay. It was not in dispute that Mrs Cann and her son job shared all the administrative work in addition to the 12 hour daytime shift for dispatch, and that this was more than two normal full time jobs. Respondent witnesses also conceded that Mrs Cann was sometimes found to be in the office outside ‘normal’ hours. However, it was disputed that she worked 12 hour days or that there was enough work to occupy two people for 12 hours each. The respondent argued that any excess hours which were needed should have been taken up by Mr Cann pursuant to his contract for services.

- [25] The nightshift dispatcher of the relevant time gave evidence that Mrs Cann did not do both the morning and evening handover to her (instead, she would do one and her son the other) and was never in the office at both ends of the day. In response to this evidence Mrs Cann told me that she sometimes went early if she had not taken a lunch break. The respondent said that there was never be a need for Mrs Cann to work over lunch as this was the quietest time of day in a taxi dispatch office.

- [26] Mrs Cann told me that she understood that her son, as her immediate manager, had received the committee’s approval for her to work extra hours for the period in question on the basis that she would accrue time in lieu. The respondent denies agreeing to or authorising additional hours for Mrs Cann on any basis. Mr Cann told me that he had put the proposal to the committee at a formal meeting in late 2005. Both current and former committee members told me they had no recollection of discussing, let alone approving, any arrangement of the type described. Nor is there any record of such an agreement in the committee meeting minutes. Mr Cann himself was responsible for taking minutes and he and other witnesses agreed that it would have been likely that something of this sort would be minuted. (I also consider that this would be consistent with the content of the minutes generally.)

- [27] However, a newly elected Committee took over in April and there is evidence that it was at least advised of the issue. Mr Cann tabled documents at its first meeting which contained a reference to the fact that he and his mother were both working sixty hours per

week, and on 19 June Mrs Cann told Mr George that she was concerned about the long hours she was working.<sup>2</sup>

[28] Mrs Cann began taking her time in lieu by working less than full time hours (for her usual salary) from the time of this conversation. In August Mr George inquired as to why she was working reduced hours and was told that she was taking time in lieu. By this point at least he was aware of a possible claim for back pay/time in lieu. Mrs Cann told me that at the time her employment ended there was still a substantial balance owed to her, and it is this balance that she now claims as arrears of wages.

[29] The balance claimed is a total of 350.5 hours made up as follows:

- i. overtime claim of 298 hours, plus
- ii. 22 and a half hours being three days sick leave wrongly recorded in Mrs Cann's schedule as time taken in lieu, plus
- iii. 30 hours being four days in lieu of statutory holidays worked.<sup>3</sup>

### Determination

[30] Although I am not confident that the committee gave its approval to Mrs Cann's extended hours, I am satisfied that her son told her it had, and since he was her manager I consider she was entitled to rely on that information. In addition, I note that from April onwards the incoming committee was on notice that she claimed to be working extra hours. I conclude that wage arrears are payable for the overtime worked.

[31] The next question to determine is what quantum is owed. I am not prepared to accept that Mrs Cann worked 12 hours a day for 83 days as she claims. The night dispatcher disputes this evidence and it is not consistent with Mrs Cann's own admissions that she sometimes did take a lunch break and/or left early. Under Mrs Cann's agreement her lunch break was of course to be unpaid.

[32] I have decided to give Mrs Cann the benefit of the doubt over the rest of the hours she says she has worked, but not the lunch break. From the figure she claims to be owed (350.5 hours pay) I deduct an hour each day taken for lunch, that is, 83 hours, to leave a total of 267.5 hours pay owed to Mrs Cann. Mrs Cann's hourly rate has been correctly calculated at \$19.49 per hour. At this rate, her arrears of wages come to \$5,213.56 gross.

### Summary and Orders.

[33] Mrs Cann has been partially successful in the claims she has pursued. Her claim of constructive dismissal fails but her alternative claim of disadvantage succeeds. Her claim for arrears of wages has also been partially successful. I therefore make the following orders:

- i. In respect of the disadvantage grievance the respondent is ordered to pay to Mrs Cann the sum of \$750.00 pursuant to s.123 of the Employment Relations Act 2000 and,**

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<sup>2</sup> I do not accept however that she put this in writing. Mrs Cann showed me a copy of a document she claimed to have given Mr George but he said it was in a different form to what he had seen. In response Mrs Cann gave very confused and inconsistent evidence about the document's history. I was not satisfied that it was in the same form when Mr George saw it as it was when I saw it.

<sup>3</sup> The respondent agrees that four statutory holidays were worked without a day in lieu.

- ii. **In respect of the claim for arrears of wages and statutory holiday pay the respondent is ordered to pay to Mrs Cann the sum of \$5,213.56 gross.**

## Costs

[34] One matter remains outstanding and that is the issue of costs. I encourage the parties to attempt to resolve this issue between themselves however should that prove impossible, any request for costs should be made to the Authority within 28 days of the date of this determination.

Y S Oldfield  
Member of Employment Relations Authority