

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Craig Darling (Applicant)  
**AND** Platinum Properties Limited (Respondent)  
**REPRESENTATIVES** Jenny Guthrie, Counsel for Applicant  
Simon Shreeve, Advocate for Respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**INVESTIGATION MEETING** 21 March 2006  
22 March 2006  
**DATE OF DETERMINATION** 29 May 2006

DETERMINATION OF THE AUTHORITY

***Introduction***

[1] Simon Shreeve and Anthea Baker-Shreeve are the principals of Platinum Properties Ltd and are based in Auckland. Platinum Properties Ltd operates a property management business based in Dunedin. It was established about January 2005 to provide property management services for properties owned by Mr Shreeve and Mrs Baker-Shreeve and also to provide that service to other landlords. Craig Darling was employed by Platinum Properties from about mid-January 2005 until he gave notice of resignation on 29 March 2005 to finish on 20 June 2005. As it transpired, Mr Darling did not work in the business after 6 May and was paid his final pay on 10 May for the period up to 9 May 2005. By lodging his statement of problem, Mr Darling seeks payment of his salary through to the end of his notice period. He also says that he has a personal grievance of unjustified disadvantage arising from the appointment of another employee and the removal from him of various duties and benefits.

[2] Mr Darling had no prior experience as a property manager but Mr Shreeve and Mrs Baker-Shreeve wanted someone with a fresh approach to property management. His initial tasks involved establishing the office in Dunedin and helping to get the business underway. Another employee, Hannah Camp, started work about the same time as Mr Darling. Nothing of significance for present purposes happened until 11 March 2005.

***Background to Mr Darling's resignation***

[3] On 11 March 2005 there was a meeting between Mr Darling and Mr Shreeve. In evidence each says they initiated it but it is not necessary to resolve that dispute. In this meeting Mr Shreeve referred to several issues that had caused him a developing sense of dissatisfaction with Mr Darling's work performance, while Mr Darling also spoke of several concerns. There is a document headed *Record of Meeting between Craig Darling and Simon Shreeve 11th March 2005*

which is Mr Shreeve's account of what was discussed. I accept it as substantially accurate. Mr Shreeve expressed dissatisfaction over Mr Darling's failure to call in sick the day before until about 4 pm. Mr Darling spoke of his dissatisfaction with his low salary and his intention to obtain secondary employment. It was agreed that Mr Darling's salary would increase to \$29,000 on 1 June, \$33,000 on 1 September and \$36,000 on 1 December but subject to satisfactory performance. Mr Darling said that he was looking to sell his car so Mr Shreeve said he would bring forward the purchase of a company pool vehicle. Mr Darling said that he felt vulnerable without a written employment agreement and Mr Shreeve explained that the draft agreement was ready but job descriptions had not been completed. There was also mention of the company's intention to offer an employee shareholding scheme and a bonus or incentive programme.

[4] At the meeting, Mr Shreeve also told Mr Darling that he had employed Barbara Anngow as the manager. Ms Anngow is an experienced property manager and there had been some contact between her and Mr Shreeve and Mrs Baker-Shreeve in the preceding months. Platinum Properties' decision to employ Ms Anngow was prompted by her decision to leave her previous employment as well as some dissatisfaction with Mr Darling's performance and the development of the business in Dunedin. I accept that Mr Darling was surprised by the announcement and disappointed as he saw himself in that manager's role. However, I do not accept that Platinum Properties' decision to appoint a local manager to whom Mr Darling would report constituted any breach of Platinum Properties' obligations to him.

[5] Ms Anngow started work on either Monday 28 March, or Tuesday 29 March 2005. By that time Mr Darling had decided to resign and go to work in Australia. His evidence is that he purchased his ticket on or about 13 March 2005 so the decision to resign must have been made by that time. On 29 March 2005 Mr Darling gave Ms Anngow his letter of resignation, but Ms Anngow told him to contact Mr Shreeve in Auckland. She rang Mr Shreeve to tell him of the resignation.

### ***Response to the resignation***

[6] After Mr Shreeve learnt of the resignation, there was a phone conversation between him and Mr Darling on 29 March. They agreed that Mr Darling would work until 29 April 2005 and would then receive two further weeks pay without any requirement to work for that time. Mr Shreeve drafted the agreement into writing and sent the document to Mr Darling for his signature. The proposed agreement included a number of other terms. On 30 March there was a further phone discussion between the two men during which Mr Darling said he would not sign the agreement.

[7] Mr Darling says that Ms Anngow told him that they (ie; Platinum Properties) would give him seven days and that if he did not leave in that time, they would be watching his performance and would get him out that way. Ms Anngow denies saying this. It is not necessary to resolve the dispute as it preceded the notice agreement with Mr Shreeve and the employment continued in any event.

[8] Mr Darling says that the company's cellphone, his office keys and company fuel card were taken off him by Ms Anngow. This happened on Friday, 1 April. Ms Anngow says that she did not take the cellphone off Mr Darling but offered to carry it over the weekend when Mr Darling indicated he would not deal with business calls. Ms Anngow says that she offered the phone back to Mr Darling, but he declined. Ms Anngow also says that she asked Mr Darling for the keys and company credit card as normal procedure for an employee who had resigned. However, at the time, Mr Shreeve and Ms Anngow thought that Mr Darling was going to work for a competitor because Mr Darling had been cagey about his plans when asked. Ms Anngow also became concerned about Mr Darling's activities because he had attended an appointment but had not told her about it during their morning meeting. Ms Anngow phoned Mr Shreeve about this. In those circumstances I find it

probable that Ms Anngow did take the cellphone, the credit card and the office keys off Mr Darling because she and Mr Shreeve thought they might be misused.

[9] The gist of Mr Darling's evidence is that he was sidelined and Ms Anngow tended to take over his work and responsibilities. I accept that to some extent it happened that way. However, Mr Darling had been used to managing his own work but with Ms Anngow's appointment his work was directed by her. She also needed to be involved in some of Mr Darling's work to help her become familiar with Platinum Properties' business. Mr Darling also became quite resentful about the closer scrutiny of his work.

[10] There was a meeting on 4 April 2005 involving Mr Darling, his solicitor (Jenny Guthrie), Mr Shreeve and Ms Anngow. Mr Darling's grievance complaint about having the cellphone, petrol card and office keys taken from him was discussed. Mr Shreeve agreed to return the cellphone but it was never actually returned to Mr Darling. Mention was also made of the failure of Platinum Properties to provide a written employment agreement for Mr Darling. Mr Shreeve was told that Mr Darling was going to work in Australia at the end of his notice period. There was also some discussion about Mr Darling's role needing to change as a result of the resignation. A note made by Mr Shreeve records *OK to change focus of work now that we know that he is leaving*. I accept that was said by or on behalf of Mr Darling.

### ***The doctor's diagnosis of stress***

[11] Mr Darling says that the atmosphere at work remained awful and in the end he could not stand it. He saw his doctor on 18 April 2005. Dr Bennett's evidence which I accept is that –

*At the initial presentation, Mr Darling outlined recent events and circumstances that he found himself in. He was most distressed and suffering from acute anxiety disorder with depressive features. This was caused by his feelings of stress arising from his workplace situation.*

[12] Dr Bennett certified that Mr Darling was unfit for work from 18 April until 25 April 2005. Dr Bennett issued a further certificate after a phone consultation certifying Mr Darling unfit until 2 May 2005. Dr Bennett saw Mr Darling again on 4 May 2005 and he cleared him to return to work that same day. Dr Bennett told me that the treatment required was to remove Mr Darling from the workplace which he considered was the source of the problem. He considered it to be a reasonably severe anxiety disorder but its features were not manifest every day. In his view the workplace pressures felt by Mr Darling would have been enough to upset most people. In evidence as during the employment, Mr Shreeve attempted to call into question Dr Bennett's diagnosis but there is no reason to doubt its accuracy as a description of Mr Darling's symptoms.

[13] On 22 April 2005 Mr Darling's solicitor wrote to Platinum Properties. The letter refers to Dr Bennett's diagnosis of a stress-related illness; Mr Darling's surprise and disappointment at the news about the new manager; his decision to resign; statements by Ms Anngow after receipt of the resignation; the removal of the cellphone, office keys and fuel card; changes to his work tasks upon the arrival of Ms Anngow; the meeting of 4 April at which Mr Shreeve said the cellphone would be returned; and a further meeting between Mr Shreeve and the solicitor on 19 April. The letter raised Mr Darling's personal grievance of unjustified disadvantage and proposed resolution, failing which Platinum Properties could expect these proceedings.

### ***Mr Darling's return to work***

[14] Mr Darling returned to work on 4 May 2005. Mr Shreeve says that he had two phone conversations with Mr Darling that morning. Mr Darling refused to drive Platinum Properties' car

if he was liable for any insurance excess and Mr Shreeve asked him to do some office bound work. They also discussed some issues with the fuel card and cellphone accounts. Mr Shreeve spoke again to Mr Darling on Friday 6 May. By that time, Mr Shreeve had been told by his lawyer that there were grounds for dismissing Mr Darling. Mr Shreeve's evidence is that he and others were working on a response to the 22 April grievance letter but it was ...*particularly difficult with Craig hanging around the office* ... Mr Shreeve got Mr Darling to go home to do some work on the cellphone bill. His evidence is that he knew their lawyer would be serving a reply to the 22 April grievance letter and that he was therefore hoping that Mr Darling would not ever be coming back to the office.

[15] There is a letter dated 6 May 2005 from Platinum Properties' solicitor addressed to Mr Darling's solicitor. In that letter issue is taken with many of the factual allegations contained in the 22 April grievance letter. It also conveys claims by Platinum Properties that Mr Darling had seriously breached his employment obligations and significant detail of those claims. In conclusion the letter says that the working relationship is no longer tenable and that Mr Darling's conduct has brought the company into disrepute and been destructive of the relationship of trust and confidence. The letter invites Mr Darling either to bring forward his resignation from 20 June 2005 to take effect immediately, or be dismissed effective immediately. This is the letter that Mr Shreeve expected would be delivered shortly when he sent Mr Darling home on Friday, 6 May.

[16] Mr Darling knew nothing of this letter so went to work on Monday, 9 May as usual. Mr Shreeve was in Auckland but he received a phone call to tell him about Mr Darling's unexpected arrival at work. In evidence, Mr Shreeve says that he believes it to be possible that Mr Darling's lawyer instructed him to attend work in order to provoke a dismissal. However there is no evidence to support that contention. Returning to the events of Monday morning, Mr Shreeve phoned Mr Darling and told him to go home to complete the job about the cellphone account. Mr Darling did that then returned to the office about 1 pm. Mr Shreeve next instructed Mr Darling to go and walk around the campus area to identify poster sites. Mr Darling refused to do this and (on Mr Shreeve's evidence) was rude and obstructive.

[17] Mr Shreeve's purpose at the time was to get Mr Darling out of the office partly because he had fielded complaints about Mr Darling from both Ms Anngow and Ms Camp. He knew that the situation would be resolved once Mr Darling had received the 6 May letter. In evidence, Mr Shreeve is critical of Mr Darling's conduct on 9 May, but that is irrelevant because Mr Shreeve had already decided what would happen to Mr Darling as conveyed in the 6 May letter.

[18] Still not having any knowledge of this letter, Mr Darling turned up for work again on Tuesday morning. Mr Shreeve told Mr Darling to go and see his solicitor because Platinum Properties had formally responded to the personal grievance notice. Mr Darling followed that direction and became aware for the first time of Platinum Properties' ultimatum that he either bring forward his resignation to take effect immediately, or be summarily dismissed for the allegations set out for the first time in the 6 May 2005 letter. Mr Darling did not return to work.

[19] Three further points should be mentioned. Mr Darling received a final pay into his bank account on Tuesday, 10 May. He was paid for one day and accrued annual leave even though he returned to work on 4 May and attended work on 5 May, 6 May, 9 May and 10 May. Mr Darling's printed payslip which he received on 13 May 2005 records the payment as his *Final Pay*. On either 10 May or 11 May, Platinum Properties' lawyer told Mr Darling's lawyer that *Craig Darling is not to attend at work at present*. There followed some attempts to resolve the problem by correspondence, discussion and mediation, all to no avail.

[20] Platinum Properties could have insisted that Mr Darling comply with the oral agreement between him and Mr Shreeve made on 29 March 2005 that he would work until 29 April 2005 and

then receive an additional two weeks pay without having to work. However, Platinum Properties elected not to enforce that agreement so it is irrelevant for present purposes. I am left to assess the effect of the events of early May in the light of Mr Darling's notice of resignation that expired on 20 June 2005.

### ***Termination of the employment***

[21] In his evidence Mr Shreeve says that *Craig left and did not return to work. Craig was not fired. Craig did not bring forward his resignation date.* In addition I should note that Mr Darling was sent home although he was prepared to work and there was an instruction from Platinum Properties' solicitor conveyed to Mr Darling's solicitor for him not to attend work at present. Accepting Mr Shreeve's evidence at face value, then the outcome must be that Mr Darling's employment remained on foot until it ended by reason of his resignation. He did not attend work after 11 May because he was told not to by Platinum Properties. It follows that Mr Darling is entitled to payment of his salary and holiday pay for the balance of the employment between 4 May 2005 and 20 June 2005 less the one day's pay already received. Platinum Properties is ordered to calculate the amount owing and pay that sum to Mr Darling. Leave is reserved if there is any difficulty with the calculation.

[22] The allegations conveyed in the 6 May 2005 letter and those and other allegations canvassed during the investigation meeting are irrelevant given Ms Shreeve's evidence that he did not dismiss Mr Darling. I note that the inevitability of this finding was pointed out to Mr Shreeve by me during the investigation meeting.

### ***Unjustified disadvantage***

[23] What remains to be decided is the unjustified disadvantage grievance claim. There is no doubt that Mr Darling's employment was affected to his disadvantage by having his office keys, petrol card and mobile phone unceremoniously taken off him as a result of Platinum Properties' suspicions that he might make some improper use of them. Mr Darling felt less trusted and valued as a result. There are no doubt circumstances where an employer would be justified in taking such steps to protect its interests, but not here. The action was taken in an insensitive manner and Platinum Properties acted on its conclusions about Mr Darling's intentions without giving him a chance to explain the situation or dispel the suspicion. The actions were not remedied even after the 4 April meeting when Platinum Properties was apprised of Mr Darling's plans. Accordingly, Mr Darling has a personal grievance.

[24] Assessing distress compensation is difficult. The claim for \$6,000 appears modest given the evidence available from Dr Bennett and Mrs Darling in particular about Mr Darling's state of mind. However, it is also clear that Mr Darling was upset by the appointment of Ms Anngow because he saw himself filling the role as manager of Platinum Properties' operations based in Dunedin. He had expected a bright future with Platinum Properties and hoped for his existing property management role to expand into a bigger, more important and better remunerated position. However, Mr Darling had no contractual right to a promotion and Platinum Properties was entitled to appoint Ms Anngow. Inevitably Mr Darling was going to be upset by that, but that is not sufficient to establish a claim for compensation. I must attempt to exclude the effects caused by that understandable but not actionable disappointment from the effects caused by the established grievance. I consider that the disappointment was the more significant of the two causes of Mr Darling's illness by a factor of about 3. Accordingly I will order Platinum Properties to pay compensation of \$1,500 to Mr Darling to remedy the effects of the proven grievance.

[25] There is a claim for wages for the duration of Mr Darling's sick leave. Mr Darling was not paid sick leave because he had no entitlement. The argument is that the illness and therefore the lost

remuneration was caused by the grievance. However, my finding is that the grievance was the lesser of the two workplace issues that caused the illness. I am not satisfied that Mr Darling would have needed sick leave if only the grievance factor applied at the time so I do not find that the lost remuneration was caused by the grievance.

[26] Mr Darling did not contribute in a blameworthy way to the situation giving rise to the grievance. The grievance is about Platinum Properties' reaction to Mr Darling's resignation. Mr Darling was entitled to resign. He did so because of his disappointment arising from the decision to appoint Ms Anngow and I accept that this decision was influenced by the company's view about Mr Darling's work performance. However, issues about the work performance are far too remote from the grievance to amount to blameworthy conduct giving rise to the grievance.

### ***Penalty***

[27] In the statement of problem lodged on 19 September 2005, there is a claim for a penalty for the failure to provide a written employment agreement. That is a reference to the obligations now contained in section 63A of the Employment Relations Act 2000.

[28] I am satisfied that no collective employment agreement applied to the work to be done by Mr Darling: see section 63A (1) (e). As a result, Platinum Properties was required to give Mr Darling a copy of the intended agreement; advise him that he was entitled to seek independent advice about it; give him a reasonable opportunity to do so; and consider and respond to any issues raised by Mr Darling about the intended agreement: see section 63A (2). These things should have been done before Mr Darling started work in January 2005. No agreement had been provided to Mr Darling even by the time that he finished work in May 2005. It is clear that Platinum Properties Limited breached section 63A and is therefore liable to a penalty of up to \$10,000.00: see section 63A (3), section 135 (1) (b) and section 135 (2) (b).

[29] Some consideration must be given to whether a penalty should be imposed. In *Xu v McIntosh* [2004] 2 ERNZ 448, the Employment Court held that the first question to ask when considering the imposition of a penalty is how much harm has the breach occasioned. The second question focuses on the defaulter's culpability, the need to bring home to them the seriousness of their conduct and the need to deter others.

[30] In the present case, the current problem is unlikely to have arisen if Platinum Properties had complied with its obligations. Employment agreements almost always include a defined notice period and it would almost certainly have been less than the 3 months notice given by Mr Darling. Mr Darling could have given the stipulated notice and been gone. There would have been no need for the discussion about a reduced notice period from which the problem escalated. Platinum Properties considered compliance with its obligations around the formation of the employment relationship unimportant compared with other aspects of establishing its business. The best that can be said is that the company took some steps towards having an employment agreement drafted during the employment but nothing was given to Mr Darling before his employment ended. The obligation cannot be regarded as a mere technicality: see *Varney v Tasman Regional Sports Trust* unreported, Goddard CJ, 23 July 2004, CC15/04. So it must be said that Platinum Properties' attitude towards its obligation falls well short of what is required. Bearing in mind the consequences of the breach I find that it is an appropriate case to impose a penalty.

[31] The situation calls for the imposition of a modest penalty. I order Platinum Properties Limited to pay a penalty of \$500.00 to the Crown. The applicant did not request the Authority to consider exercising its power to order the payment be made to him.

***Other matters***

[32] Near the end of the meeting, claims were made for Mr Darling for the imposition of a penalty on the respondent for a breach of good faith and the reimbursement of cellphone charges, some being business calls made by Mr Darling on his own phone and others being part of the business cellphone account which Mr Darling apparently reimbursed the respondent for when challenged about his personal use of that phone. These claims came too late to give them any attention during a lengthy investigation meeting and I dismiss them.

***Summary***

[33] Pursuant to section 131 of the Employment Relations Act 2000, Platinum Properties Limited is to pay Mr Darling arrears of wages and holiday pay in respect of the period starting on 4 May 2005 and ending on 20 June 2005. Leave is reserved if there is any difficulty with calculations.

[34] Mr Darling has a personal grievance. To remedy that grievance, Platinum Properties is to pay him compensation of \$1,500.00 pursuant to section 123 (1) (c) of the Employment Relations Act 2000.

[35] I impose a penalty of \$500.00 on Platinum Properties Limited and order it be paid to the Crown.

[36] Costs are reserved. If not agreed, Mr Darling must make an application within 28 days and Platinum Properties may lodge and serve any reply within a further 14 days.

Philip Cheyne  
Member of Employment Relations Authority