

<b>IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON OFFICE</b>		
<i>Under the Employment Relations Act 2000</i>		
		Determination Number: WA 46/07
		File Number: 5053037 & 5075288

<b>BETWEEN</b>	Steve Farmer & Advance International Cleaning Systems (NZ) Limited (Applicants)
<b>AND</b>	Advance International Cleaning Systems (NZ) Limited & Steve Farmer (Respondents)

<b>Member of Authority:</b>	P R Stapp	
<b>Representatives:</b>	Graeme Ogilvie for Mr Farmer	
	Jiwa Nadan for Advance International Cleaning Systems (NZ) Limited	
<b>Investigation Meeting:</b>	28 February 2007, Wellington	
<b>Determination:</b>	28 March 2007	
<b>DETERMINATION OF THE AUTHORITY</b>		

### **Employment Relationship Problem**

[1] Both parties' proceedings have been consolidated. Steve Farmer says he was unjustifiably dismissed and is seeking remedies for a personal grievance. Further, he says that Advance International Cleaning Systems (NZ) Limited (Advance) has breached the Employment Relations Act by failing to provide an employment agreement and the time and wages and holiday record as requested. Mr Farmer is seeking a penalty under the Act. Advance denied Mr Farmer's claims.

[2] Advance is claiming that Mr Farmer's failure to abide by his commitments meant a loss of sales, profit and damages incurred by the company. Mr Farmer denied the claims.

## The Issues

[3] The following issues have been investigated:

- Was Mr Farmer's terms and conditions of employment unilaterally changed on 8 September 2006?
- Was Mr Farmer's employment terminated on 15 September 2006?
- Was there an unjustified dismissal?
- Did the employer fail to provide any reasons for any dismissal?
- Did the employer fail to provide a copy of the wages and time and holiday record?
- Did the employer provide a copy of an employment agreement as requested by Mr Farmer's representative?
- What was the reason for Advance failing to attend an initial mediation?
- Was Mr Farmer cleared to return to work?
- What work was available to Mr Farmer from 11-15 September 2006 and in the period until 11 October 2006?
- Was Mr Farmer readmitted to hospital on 11 September 2006?
- Was there a precondition that Mr Farmer had to get a medical clearance before resuming full duties? Did Mr Farmer agree to get a doctor's certificate?
- Did Mr Farmer say he had "*a ton of bricks on his chest and was not 100% well*"?
- Have there been any damages incurred by Advance through any actions of Mr Farmer failing to honour any commitments to return to work and or give notice?

## The facts

[4] Steve Farmer commenced employment with Advance on 11 July 2000 as a service technician. He signed an individual employment agreement. Initially his pay was \$15 per hour but this increased to \$18 per hour. He worked a 40 hour week.

[5] In June 2006 Mr Farmer had a heart problem and needed an operation. He went on sick leave without pay. Advance kept his position open until he could return to work. There was some contact between the parties during the period of Mr Farmer's sick leave. In September Mr Farmer advised he could return to work.

[6] Mr Jiwa Nadan, company manager, and Mr Scott Black, service manager, say that Mr Farmer told them he had the doctor's clearance that they understood was in writing. Mr Farmer says his clearance was given verbally and he denied saying he had a written clearance. However, he says it came as a shock to him when he received an email dated 8 September 2006 from Mr Nadan that said that Advance would pay him "*on the basis of hours billed out and work performed*". He says he understood the agreed arrangements were made for him to return to work on 11 September 2006 on his normal terms under the existing agreement. Mr Farmer says he returned to work but there was only work available for 2 hours that confirmed to him that his terms and conditions had been changed consistent with Mr Nadan's email of 8 September 2006.

[7] Advance says that on 11 September Peter Geer, the regional sales manager discovered upon arriving at work that Mr Farmer was at work and that he did not have a written clearance from his doctor, whereupon Mr Farmer left work to get a medical clearance from his doctor. Advance says that Mr Farmer was readmitted to hospital based on what Peter Geers, the regional sales manager, told Messrs Nadan and Black. Mr Farmer denied that he had been readmitted to hospital but instead says he went to get a check up before going to the medical centre to get a clearance from his GP.

[8] Messrs Nadan and Black were adamant that Mr Farmer told them, and Mr Geers, that he had a medical clearance to return to work. They say they relied upon Mr Farmer having the clearance and requested it for the file on 8 September 2006. When he turned up to work on 11 September he did not have a certificate. He says he did not have enough work and went off to get a medical clearance from his GP at the medical centre but also went to the hospital for a check up first. It is unclear when he organised getting the certificate and it is unexplained how the first one produced in the proceedings did not have a date and the original produced at the Authority's investigation meeting was dated "11 October 2006".

[9] There was no proof that Mr Farmer was readmitted to hospital for an irregular heart beat as claimed by Advance. Messrs Nadan and Black are repeating what they say they were told

by Mr Geer, who was not available to give evidence, yet Mr Farmer denied being readmitted to hospital for an irregular heart beat. They accepted that the information might possibly be wrong, although they doubted it, because they say there was no reason for them not to believe Mr Geers.

[10] Messrs Nadan and Black did not believe Mr Farmer. Mr Farmer produced no proof that he went to the hospital and has not been able to explain why he left it so late to produce the written medical clearance (even although it was dated “11 October 2006”).

[11] Mr Farmer says he was not paid for 2 hours work on 11 September 2006. He agreed he never entered his time on a time sheet and Mr Nadan says there was no claim for such pay until his written statement for the Authority’s investigation meeting was received and that Mr Farmer did not finish the work anyway.

[12] It is probable that there has been some misunderstanding on the terms for Mr Farmer to return to work and whether or not he had a written doctor’s clearance to return to work.

[13] On 15 September 2006 Mr Farmer received a letter from Mr Nadan dismissing him. Mr Nadan says the reason for his decision was that Mr Farmer told him he had “*a ton of bricks on his chest and was not 100% well*” and did not know when he would be fit to resume work. Mr Farmer denied this and said that his comments were taken out of context when he could work. Mr Farmer relied on the words in the letter that he was dismissed: “*Based on the above we wish to advice (sic) that we are not able to keep the role open any further and as such we will now make provisions to seek alternative solutions for our business*”. On its face this amounts to a dismissal.

[14] Mr Farmer sought advice and assistance from an employment relations advocate who intervened on his behalf. Mr Farmer’s representative wrote to Advance on 2 October 2006 setting out his complaint. Advance replied the next day (2 October) putting the Applicant on notice that its options were limited and it had to look to alternatives to run its business. Mr Farmer’s representative wrote again suggesting mediation. There was no reply from Advance. Two issues emerged that were whether Mr Farmer could return to work and what the terms were, and if he was required to provide a medical clearance.

[15] Mr Nadan decided that the arrangements for mediation services at the Department of Labour was not needed because Mr Farmer could return to work if he obtained a medical clearance, which the company was waiting for. The company's genuineness has been challenged.

[16] On 11 October 2006 Mr Farmer went into the workplace to have some discussion with the company on him returning to work. Mr Farmer says he could not get the company to agree to let him work full time on his terms and conditions that applied before he became ill (ie pay and hours). The company says that there had been no change and that work would be made available if he provided a medical clearance. He never returned to work.

[17] Advance also says that Mr Farmer told Peter Geers that Mr Farmer had said he had another offer that was "*too good to refuse and that he would not return to work*". Mr Farmer accepted that he did say this.

### **Determination**

[18] Mr Black explained that jobs had to be arranged around whatever Mr Farmer's availability was likely to be and that the invoicing arrangement to pay him had to be considered in terms of his work performed. On 11 September he left the workplace without any detailed discussion on what he was doing. The 8 September email referred to "*work performed*" and I am satisfied that this comment related to Mr Farmer's capability to work. Even with any misunderstanding I have given the benefit of doubt to the employer because Mr Farmer had been on lengthy sick leave and did not produce a clearance when it would have been more than reasonable for him to do so. Mr Farmer may have genuinely thought that his terms and conditions had been varied, and all he had to do was provide the medical note for his file, or that he misunderstood the situation, but in reality I accept he was being offered work that would have amounted to full time employment on his previous hourly rate that had not changed if he could perform it. Therefore, I reject Mr Farmer's claim that his terms and conditions were unilaterally varied. At worst Mr Nadan's letter was poorly written.

[19] Was Mr Farmer's employment terminated on 15 September 2006? Mr Farmer did not report back to work after 11 September 2006. At least from 11 September Mr Farmer knew that he was required to produce a written medical clearance to return to work. There was some discussion around whether or not Mr Farmer had "*a ton of bricks on his chest and was not 100% well*" and did not know when he would be fit. Whatever the context was Mr Farmer left work and did not return maybe because he genuinely believed his terms and conditions had been varied. He says he went to

the hospital and the medical centre. He did not contact his employer. On 15 September 2006 he received a letter that he took to mean he had been dismissed. The letter said that the company was “*not able to keep the role open any further...*”. I agree that it was reasonably open to Mr Farmer to interpret that comment, and the tone of the letter, to conclude that he was dismissed. The letter dismissed him without any notice. There was no prior notice and no attempt to talk through the possible retention of his job. It was wholly unjustified in the shortness of time that occurred from the point that Mr Farmer was saying he could return to work and his being dismissed, when the employer had kept his role open since June 2006. Advance had requested Mr Farmer to get a medical certificate for work clearance and as such it could have given him more time and notice to avoid any misunderstanding before deciding to dismiss him. On the other hand Mr Farmer has not adequately explained his absence for 11-15 September 2006.

[20] The company has not sought to justify its action of 15 September. Instead it says there has been a misunderstanding and that work would be made available to Mr Farmer if he could produce a doctor’s note for clearance to work. It was not provided and it “*was not able to keep the role open any further...*”. This was the employer’s initiative. A fair and reasonable employer would have waited more time given it expected Mr Farmer to give four weeks notice, Mr Farmer had been on lengthily sick leave and the employer had requested Mr Farmer to produce a written clearance.

[21] Later Advance did not consider that mediation was necessary because it was considered that Mr Farmer’s attendance at the workplace on 11 October had ironed out any misunderstanding. I am not satisfied that this is an adequate explanation because arrangements relating to mediation assistance occurred before 11 October considering Mr Farmer’s representative’s earlier correspondence of 2 October. Advance’s decision was wholly unsatisfactory given that Mr Farmer was represented and his representative should have been contacted. The company had not replied to Mr Farmer’s representative’s correspondence dated 3 October, thus the matter had not been closed-off. Early mediation services could very much have assisted this and Advance should have participated. The company says that Mr Farmer abandoned his employment and failed to give any notice. This has simply added to the confusion. I reject both claims. First the company understood that Mr Farmer was saying he could return to work and required him by this time to produce a medical clearance that had yet to be provided. Secondly I do not find that the parties entered into any new terms for an employment relationship and as such no notice was required because Mr Farmer had been dismissed earlier.

[22] Although the company says it suffered losses and profit and incurred damages the claim was not quantified in any detail. I accept the situation caused the company some inconvenience and possibly frustration. It has not established any losses and damages because of any failure by Mr Farmer to decide not to return to work and not to give any notice. He believed he had been dismissed. He had an argument, whether because of any misunderstanding or not, that his terms and conditions of employment on pay had been changed. Mr Farmer had been on unpaid sick leave for 3 months and the company covered that. Advance had requested Mr Farmer to get a medical clearance. I accept that some work had been arranged for him but what happened to it and what the cost was has not been explained and detailed respectively. Advance made a savings from Mr Farmer not being paid. The claim for damages must be dismissed because of the lack of any details.

[23] I now turn to remedies for the personal grievance. I am satisfied that Mr Farmer says he was cleared to return to work. His employer believed him that he was cleared for work but wanted a medical note for the file. Mr Farmer would have been entitled to 4 weeks notice to get a medical clearance before losing his job. However this would not have entitled him to wages since he had been on unpaid sick leave and not provided a medical clearance as requested.

[24] Mr Farmer mitigated his loss by obtaining some contracts to work. His earnings in the three months (thirteen weeks) from the date of his dismissal were approximately \$1,030 from invoices produced. However there was no guarantee that he would have been able to work full time given the sporadic work he obtained, his sickness benefit and that the medical certificate produced refers to only doing "*mild-medium type of physical work without problems*". He also had an opportunity to get some work from Advance if he provided a medical clearance. He chose not do that and decided to move on to a better offer. I am satisfied Mr Farmer was available to work and his clearance would have enabled him to carry out some work, albeit not necessarily full time work. In equity and good conscience I have decided to restrict the lost wages to 4 weeks (\$2,880) less a proportion of the earnings received over 13 weeks above. The amount of lost wages is \$2,563.08. There was no contribution having regard to s 124 of the Act. If Mr Farmer's conduct of leaving work without making any further contact between 11-15 September amounts to contribution it was too small on the scale to merit any further deduction on the wages.

[25] Mr Farmer is entitled to some compensation. His claim for \$10,000 has not been established. His evidence would only entitle him to \$1,000 under s 123 (1) (c) (i) of the Act based on his assertions of being upset and his difficulty in producing sufficient details and since he admitted

saying that he had another offer that was *“too good to refuse and that he would not return to work”*

[26] Mr Farmer has sought penalties against Advance for not providing the employment agreement, wages and time and holiday records. I dismiss the claim in regard to the employment agreement because the documents were produced in the fullness of time and its not as if the employer had not provided the employee with an intended employment agreement as required under the Act. There was also an underlying dispute about the events in the period that would have affected whether or not another agreement should have been produced after 15 September 2006.

[27] Advance did not produce the correct wages and time record for Mr Farmer until handing it up at the Authority’s investigation meeting despite being requested to produce it earlier. However, it had provided a pay slip of details before the investigation meeting. There was no prejudice to Mr Farmer. I am satisfied that Advance has mitigated its position. The claim is also dismissed.

### **Orders**

[28] Advance International Cleaning Systems (NZ) Limited is to pay to Steve Farmer:

- \$2,563.08 loss of wages
- \$1,000 compensation.

[29] Advance International Cleaning Systems (NZ) Limited’s claim for damages, losses and profit are dismissed.

[30] Mr Farmer’s claim for a penalty is dismissed.

### **Costs**

[31] Costs are reserved.

P R Stapp  
Member of the Authority