

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN James William Gilbert
AND EDI Electrical Limited
REPRESENTATIVES Amy Shakespeare, counsel for the applicant
Daryl Evans for respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING Christchurch 24 January 2007
DATE OF DETERMINATION 28 February 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Gilbert) alleges that he was subject to an unjustified action causing disadvantage, was unjustifiably dismissed and was not paid holiday pay to which he was, in law, entitled.

[2] EDI Electrical Limited, the respondent, (EDI) denies each of Mr Gilbert's claims.

[3] EDI is an electrical contractor specialising in the installation of heat pumps. Mr Gilbert is an electrical technician who is very close to full qualification as an electrical tradesman. The parties entered into an employment agreement on 20 March 2006.

[4] Mr Gilbert broke his ribs playing rugby on 6 May 2006. Mr Gilbert says that he told Mr Evans of the injury the following day by a telephone call and that he actually spoke to Mr Evans and that Mr Evans clearly was irritated that he would not be available for work because of the inconvenience that would cause.

[5] Mr Evan's evidence is that he found out about Mr Gilbert's injury from another member of his staff and not by a telephone call from Mr Gilbert.

[6] Mr Gilbert's evidence is that he made numerous attempts to contact Mr Evans to leave messages about the progress of his injury and that he deposited in Mr Evans' private mail box copies of the medical certificates from his doctor detailing the progressing in the healing of the injury. Mr Evans says that, while there may well have been calls to his cell phone from Mr Gilbert he did not actually get the information that he needed on Mr Gilbert's progress and accordingly he was forced to take the step of trying to contact Mr Gilbert himself. Mr Evans also said that the provision of the medical certificates was not timely and his recollection was that he received three separate certificates altogether delivered to his private mail box at the same time and then only after he had asked to receive them.

[7] Because Mr Gilbert had been employed by Mr Evans' company at the suggestion of Mr Gilbert's father, Mr Evans said in his evidence that he had made contact with Mr Gilbert's father and had managed to get an indication from him as to the progress of his son's injuries.

[8] Mr Gilbert put into evidence copies of telephone accounts which clearly disclose that calls were placed to Mr Evans cell phone and on a regular basis but that evidence of course does not confirm that Mr Evans received those calls or listened to any message and thus obtained the information that he says he required in order to plan his business. Mr Evans says that he had always made it clear to Mr Gilbert that he (Mr Gilbert) should call Mr Evans, if he needed to, at home on the landline and the evidence is clear that Mr Gilbert did not do that. But the evidence is also clear that Mr Gilbert did not understand that those were Mr Evans' instructions, at least until very late in the relationship and probably after the communication problems between these two parties had already reached a point of no return.

[9] For his part, Mr Evans gave evidence that he would regularly not listen to the messages on his cell phone. He said that that was particularly the case during the period that Mr Gilbert was recovering from his sports injury. Because Mr Gilbert was not available to Mr Evans' company, Mr Evans was forced to do more hands on tradesman work than he would otherwise have done in order to keep up with customer demand and his evidence was that during the working day he would get reasonable numbers of cell phone messages and frequently not have the opportunity to listen to those messages because of the pressure of work.

[10] During the course of the investigation meeting, the answer to the conundrum of how it was that Mr Evans managed to talk to his clients and continue to nurture his business if he adopted this practice of not listening to cell phone messages became clear; it seemed that Mr Evans recognised the numbers of the parties who were principally responsible for referring work to him and he always responded to those messages. As if to give weight to his evidence on this point, Mr Evans produced his cell phone (which I note rang on more than one occasion during the investigation meeting and was responded to by Mr Evans) and invited me to listen to the disembodied voice on his cell phone which indicated that he had 19 new messages.

[11] In addition to the obvious difficulty that the parties had in communicating information to each other, there was also difficulty about the length of time Mr Gilbert was going to be required to remain away from work. The initial intimation, immediately after the injury, was that Mr Gilbert would be back at work in one week, and on Mr Gilbert's evidence, that is what he said he told Mr Evans when he says he spoke to Mr Evans on 7 May, the day after the injury.

[12] Whether Mr Evans actually received that particular message is, as I mentioned above, disputed, but in any event it was clear that the date on which Mr Gilbert was to return to work kept getting put back because his injuries were not healing as quickly as his doctors had anticipated.

[13] The evidence is that Mr Gilbert diligently attended his doctors on a regular basis and he was cleared for light duties from 22 May just over two weeks after the injury but Mr Evans' company had no light duties available.

[14] The evidence suggests that by the end of May communication between the parties was, with one exception that I will refer to, non-existent. Mr Gilbert says that Mr Evans was impossible to contact and Mr Evans says that Mr Gilbert made no effort to contact him. It seems the only information that was being received by Mr Evans was the regular medical certificates which Mr Gilbert, according to his evidence, was leaving in Mr Evans' letterbox. There can be no doubt that Mr Evans received this information because he seems to have acted upon it.

[15] Mr Gilbert continued to be anxious about his inability to engage with his employer and so, although the regular medical certificates that he obtained from his doctor were indicating continued restrictions on a return to work, Mr Gilbert says that he initiated a visit to his doctor seeking an early return to work. Having obtained that blessing from his doctor, he rang Mr Evans on 22 June 2006, the same day that he visited the doctor, and left a message to the

effect that he would be returning to work on 26 June, the following Monday. Mr Evans confirmed in his oral evidence at the investigation meeting that he had got that message and so knew that Mr Gilbert was planning to return to work the following Monday.

[16] When Mr Gilbert actually appeared at the beginning of the working day on Monday 26 June, he had his father with him. The interview between the parties is pivotal to the claim. Mr Gilbert's evidence is that Mr Evans said at that meeting, which took place on Mr Evans' door step, that Mr Evans' company had no work for Mr Gilbert. Mr Gilbert Snr confirmed this exchange. Mr Gilbert Snr said that Mr Evans had told the pair of them that *he had taken on two other employees, and that he had no work available*. Mr Gilbert Snr said he asked Mr Evans if that meant that his son *hasn't got a job*. Mr Gilbert Snr's evidence is that Mr Evans then confirmed that *he had no job for James* (the applicant Mr Gilbert). Mr Gilbert Snr made a contemporaneous written record of that exchange which he made available to the Authority. The contemporaneous record is consistent with Mr Gilbert Snr's oral evidence.

[17] For his part, Mr Evans does not dispute all of the facts alleged by the Gilberts. He says that the business is primarily a winter business and at the time that Mr Gilbert was injured, the business was *flat out*. It was accordingly exceedingly difficult for EDI to continue to fulfil its obligations to its customers with a man down and Mr Evans said that he was run off his feet trying to meet customer demand during that very busy period. He said that he had received the medical certificates and that as they showed a trend of just extending the period of absence from work, he decided that he had to take some steps to get additional labour. He told me at the investigation meeting that he had made arrangements for his brother in law who is a student in Dunedin to work for EDI during the University vacation and that his brother in law became available at the same time as Mr Gilbert announced his return. Mr Evans says that he had had only a matter of days warning that Mr Gilbert was going to return and by then he had arranged for his brother in law to fill in. He told me that his brother in law could not do all that Mr Gilbert could do but he was *another paid of hands*.

[18] Mr Evans said in his evidence that what he said at that door step encounter was that *right now I don't have any work for James* but he says that he went on to say that the position might be different in the short future because now that he had some relief from having to do all the work himself he could *build up the marketing*. In cross examination by counsel for Mr Gilbert, Mr Evans emphasised again that he was not saying there was no work for Mr Gilbert, only that there was no work **then**.

[19] Mr Gilbert accepted in answer to a question from me that the door step discussion was capable of the interpretation that Mr Evans placed on it, although his father, Mr Gilbert Snr did not. Further, Mr Evans accepted in cross examination that had he responded promptly to Mr Gilbert's lawyer's letter to him which characterised the 26 June door step meeting as a dismissal the matter might have been able to be dealt with more promptly and at a lower level.

[20] Despite Mr Gilbert accepting in answer to my question that the door step meeting was capable of being interpreted in the way that Mr Evans suggested, he made no further attempt to return to the service of EDI. Two things may have influenced Mr Gilbert in this regard. There was a dispute of some sort about the return to Mr Gilbert of his tools by EDI. Mr Gilbert was clearly anxious at the difficulties the ACC had had in dealing with Mr Evans' company.

[21] Despite the relevant ACC documentation being forwarded to Mr Evans on 15 May (to enable Mr Gilbert to be paid his earnings related compensation) ACC did not receive the relevant information back from Mr Evans until 8 June 2006 despite numerous reminders and follow-ups from ACC to Mr Evans. Mr Evans said that his technology let him down and that in the result he actually took the forms physically into ACC once he had completed them.

[22] Mr Gilbert obtained a copy of his personal file from ACC and that included a note of a telephone call from Mr Evans to the ACC Case Officer on 8 June 2006, the same day that it appears Mr Evans returned the earnings related compensation material to ACC. In this telephone discussion, the ACC Case Officer records Mr Evans as making the following observation:

His main concern is lack of contact from James (Mr Gilbert) and stated that because of this James now has no job – he says (a) I have no light duties and (b) James has no job as no attempts at keeping Mr Evans informed have occurred. He has had various mixed messages about lengths of incapacity and he is too busy to mess with people like that.

[23] Interestingly, the same date entry on the ACC files contains the following additional piece of information:

He is too busy (this refers to Mr Evans) to listen to voice mails so do not leave voice mails. The preferred method of contact is text message to (telephone No.) say please call me with number and he will respond.

[24] When I put this file note to Mr Evans at the investigation meeting, he indicated that he was endeavouring to convey to the ACC Case Officer that unless Mr Gilbert made contact with him he would have no job, not that he had already lost his job.

Issues

[25] The first and most important issue is whether Mr Gilbert was entitled to treat the door step meeting of 26 June 2006 as a dismissal or not.

[26] There are subsidiary issues around the quality of the communication between the parties and in particular whether those communication failures need to be included in my consideration of contributory fault (if any) and/or whether they themselves constitute an unjustifiable action by EDI to Mr Gilbert's disadvantage.

[27] Another subsidiary issue relates to the delay in Mr Gilbert obtaining earnings related compensation which he says is a consequence of EDI's failure to deal with the necessary paperwork in a prompt fashion.

[28] Finally, there is an issue about unpaid holiday pay. Mr Gilbert says that he is due holiday pay and has not received it. Mr Evans said that there was an agreement between the parties that, when Mr Gilbert was ill during the early part of his employment, he would be paid those sick days but should he leave the employment within six months, he would forfeit his entitlement to holiday pay in lieu of those earlier sick day payments.

Was there a dismissal?

[29] The focus of the dismissal question must be around the 26 June 2006 meeting which I have referred to throughout this determination as the *door step* meeting. In essence EDI's position is that their message conveyed through Mr Evans was that there was no work at that time, whereas Mr Gilbert claims that he was told there was no job for him leading him to believe that his employment had in fact been terminated.

[30] Mr Gilbert, as I have made clear already, accepts that EDI's explanation of the message it sought to convey at the door stop meeting is consistent with what happened, that there were in fact two possible interpretations of what was said. Mr Gilbert Snr on the other hand is firmly of the view that the message conveyed was one of a dismissal, a sending away.

[31] While the evidence seems to me to support either version of the message conveyed, it seems to me this door stop meeting is yet another example of these parties' apparent inability to communicate adequately with each other. In those circumstances, while it could be said that each party bears a share of the blame for communication failures, the responsibility for ensuring the clarity of the message must in my judgment rest especially with the party who is in the stronger position. In this particular case, it is difficult to escape the conclusion that EDI has the greater responsibility to ensure the message it transmits is in fact the message received. If, as Mr Evans claims on behalf of EDI, the message EDI wished to convey was that

there was no work at present then he had an obligation to ensure that Mr Gilbert was very clear about the position. He seems to have done nothing whatever to ensure that Mr Gilbert understood the message he claims to have been sending.

[32] Mr Evans could have made it clear when Mr Gilbert came to collect his tools that Mr Gilbert still had a job or he could have telephoned or even written to Mr Gilbert setting the position out clearly. He can have been in no doubt at the end of the door stop meeting as to the message that Mr Gilbert and his father had received. That would have been self-evident from the Gilbert's behaviour. Knowing what message they had received, if EDI genuinely wanted to leave the door open (as is contended) they took no steps whatever to convey that intelligence to Mr Gilbert after the door stop meeting.

[33] That view of matters is in my view confirmed by the astute question that counsel for Mr Gilbert asked Mr Evans at the investigation meeting. Counsel got Mr Evans to accept that he could have resolved this matter a great deal earlier by promptly responding to her letter of grievance on behalf of her client Mr Gilbert and contesting Mr Gilbert's claim that he had been dismissed at the door stop meeting.

[34] If Mr Evans had, either of his own motion or through his own adviser, responded to that letter and said that there had been no dismissal and that he had always expected Mr Gilbert to return to duty, that would have placed a different complexion on the issues between the parties.

[35] On the balance of probabilities then, I am not persuaded that EDI's claim that there was no dismissal at the door stop meeting can be made out. Mr Gilbert Snr is very clear in his evidence that his son was told he had no job. Mr Gilbert Snr wrote a contemporaneous account of the meeting and his oral evidence is consistent with that account. His son, Mr Gilbert the younger, while honestly accepting that the exchange at the door stop meeting was capable of both the EDI version and his own version also thought that he had been dismissed. Only Mr Evans took the view that there had been no dismissal and yet it is plain on the evidence I heard that Mr Evans at no stage took any steps whatever to disabuse Mr Gilbert after the event that he had in fact lost his job. On that basis then, I prefer Mr Gilbert's position and I hold that there was a dismissal on the door step on 26 June 2006.

Communication Failures

[36] Each party blames the other for the failure to adequately communicate to EDI the consequence of Mr Gilbert's accident and the prognosis. There is ample evidence that Mr Gilbert rang Mr Evan's cell phone regularly. The telephone records produced at the investigation meeting confirm it. However, Mr Evans made clear at the investigation meeting that, particularly when he was under pressure at work, he did not necessarily always answer his cell phone and that Mr Gilbert should have rung him at night as he had requested.

[37] However, the evidence is that, while it is accepted that Mr Evans did request contact to be made with him at his home number in the evening, that message was not received and acted upon until very late in the relationship by which time things had got rather sour. It follows that Mr Gilbert mostly was ringing Mr Evans on his cell phone which Mr Evans either was not accessing or having accessed did not respond to, so that the information about Mr Gilbert's condition was not necessarily being conveyed from the one party to the other.

[38] As I have previously remarked, it appears that Mr Evans did receive the medical certificates although he says that he received three together which suggests that the furnishing of the medical certificates may have been overlooked, and he also says that he did not receive the medical certificates at all until he asked for them. Both of those claims are disputed by Mr Gilbert.

[39] I am satisfied on the balance of probabilities that Mr Evans did receive some or all of the medical certificates because he must have had some basis for forming a view about when

Mr Gilbert was expected back to work and if, as he claims, he did not get the information that he needed by telephone then that can be the only other possible source of information. This is particularly so given that Mr Evans reached the conclusion somehow that he needed to engage his brother in law to fill in during Mr Gilbert's absence.

[40] I am not satisfied that either party has done all that it could have in relation to communicating with each other. Mr Gilbert, one would have thought, might have tried an alternative means of communicating with his employer if he found the method he was using to be unsatisfactory. There is no evidence that that happened; all the evidence suggests is that Mr Gilbert became increasingly frustrated because Mr Evans did not return his calls. In my opinion, Mr Gilbert does have obligations to alert his employer to his prolonged absence and to explain the basis for it. Given that communication between the two men effectively broke down about the middle of May, Mr Gilbert ought to have found another way of communicating with his employer if, as he claims, his job was important to him.

[41] Equally, Mr Evans ought to have been proactive if he was dissatisfied (as plainly he was) with the information or the lack of it that he was getting from his employee. Mr Evans ought to have summoned Mr Gilbert to a meeting if he was having difficulty in obtaining information via the telephone. Mr Evans clearly knew how to get hold of Mr Gilbert Snr even if he had difficulty communicating with Mr Gilbert Jnr and he could simply have said that he wanted to have a meeting to discuss Mr Gilbert's health prognosis. That would not necessarily have been either time consuming or difficult to arrange but he did not undertake that step and simply chose to blame Mr Gilbert for failing to communicate adequately with him.

[42] I reach the conclusion then that both parties bear some share of the blame for the communication failure. It follows that that conclusion will sound in a reduction in compensation on the question of contribution by Mr Gilbert but equally, the fact that Mr Evans took no steps to address the evident communication deficit himself is also in my opinion a basis for a finding that EDI has taken an unjustifiable action to Mr Gilbert's disadvantage in its failure to deal prudently and sensibly with the absence of information about Mr Gilbert's return to work.

ACC

[43] Mr Gilbert contends that because there was an unreasonable delay by EDI in the furnishing of the appropriate information to the ACC so that Mr Gilbert could receive his earnings related compensation, he suffered a disadvantage in that his earnings related compensation was delayed in payment.

[44] I accept this claim on its face. The accident happened on 6 May 2006 and the relevant documentation from EDI was not furnished to the ACC until 8 June 2006 having been provided to EDI on 15 May 2006. It follows that EDI had the relevant documentation for approximately three weeks before dealing with it. That is an unreasonable delay.

[45] I accept the evidence of Mr Evans that he had technological problems which in the end necessitated his delivering the appropriate paper work to the ACC personally. However, nothing precluded Mr Evans from taking that step three weeks before and responding to the ACC immediately that he had their request for information.

Holiday Pay

[46] Mr Gilbert says that he is owed holiday pay as he did not receive any holiday pay with his final pay. Mr Evans says that the reason that holiday pay was not included in Mr Gilbert's final pay was that the parties had an informal agreement the effect of which was that, because Mr Gilbert had taken some sick days prior to actually being entitled to sick leave pursuant to the Holidays Act, it had been agreed between the parties that EDI would pay Mr Gilbert sick

pay for his sick days but that in the event that he left the job within six months, (and that is exactly what happened) he would forfeit his right to holiday pay.

[47] The law is clear that agreements to avoid the effect of the Holidays Act are without force or effect. This is such an agreement. Even if there were evidence of a concluded agreement and there is not (Mr Gilbert denied having agreed to any such thing although he remembers the conversation) such an agreement would not serve to abrogate a worker's rights to the legal minima set out in the Holidays Act.

[48] No doubt EDI could claim that, in effect, their decision to pay what is effectively ex gratia sick pay is of no less benefit to Mr Gilbert than the receipt of his holiday pay on termination of employment. However that is not the issue. The law on this matter is clear and it is my duty to apply it.

[49] Mr Gilbert is entitled to holiday pay.

Determination

[50] I am satisfied on the balance of probabilities that there has been a dismissal at the door step meeting on 26 June 2006. There is ample evidence of the distress that that whole episode caused to Mr Gilbert and were there no contributing conduct I should have awarded the sum of \$5,000 as compensation under s.123(1)(c)(1) of the Employment Relations Act 2000.

[51] However, I have already indicated that I have reached the conclusion that Mr Gilbert has contributed to his own misfortunes by his failure to pursue another means of contacting his employer when so self-evidently, the means that he was using to try to communicate with his employer was not being successful. I consider that Mr Gilbert's conduct is 10% to blame for the dismissal and it follows that under this head, Mr Gilbert is to receive \$4,500 as compensation under s.123(1)(c)(1) of the Act.

[52] On the allegation that Mr Gilbert has suffered an unjustifiable action of EDI which has caused him disadvantage I am satisfied that there are in fact two heads of grievance made out under this disadvantage banner. The first relates to the failure of EDI to proactively seek communication with Mr Gilbert so as to establish once and for all what the position was in respect of Mr Gilbert's return to work and how the parties were to communicate in the future. I have decided that EDI as employer has a duty and obligation to use all reasonable steps to ensure that the information it requires from a worker is provided even where the worker has contributed to the failure to provide information, as in this case.

[53] Because I have reached that conclusion, I find that EDI has, through its failure to deal proactively with the absence of information about Mr Gilbert's return to work, committed an unjustifiable action to Mr Gilbert's disadvantage. Mr Gilbert's disadvantage is manifest; he suffered anxiety and stress as a consequence of not being able to contact his employer and ultimately lost his job as a consequence of the failure of the parties to communicate adequately with each other. As I have already made clear, I do not think that that failure is exclusively Mr Gilbert's fault; nor do I think it exclusively Mr Evans' fault.

[54] On balance however, the employer in this situation I find was in a stronger position, a position of more power and authority than Mr Gilbert was and accordingly a finding of a personal grievance on the grounds of an unjustified action causing disadvantage is appropriate.

[55] On this head, I award Mr Gilbert the sum of \$3,600 which takes into account his 10% contribution to the matters complained of.

[56] The second head of the disadvantage grievance relates to the delay in complying with the ACC's request for information so that Mr Gilbert could be paid his earnings related

compensation. The delay was unreasonable and put Mr Gilbert to disadvantage; I award Mr Gilbert \$2,000 under this head unabated as no contributory conduct is a factor here.

[57] Having determined that Mr Gilbert has a personal grievance, section 129 of the Employment Relations Act 2000 requires me to consider the award of lost wages. The thrust of the provision is, as counsel for the applicant says, to require an award at a rate no less than three months earnings and no more than the actual loss. Mr Gilbert says his actual losses amount to \$10,404.47 net while three months wages would amount to \$7,411.69 net. I am not disposed to award actual losses; I accept Mr Evans' claim for EDI that Mr Gilbert ought to have been more proactive in completing his qualification which would have materially assisted him to mitigate his loss. There will be an award of wages of the gross figure which equates to \$7,411.69 net.

[58] Finally, I am satisfied that Mr Gilbert is owed holiday pay for his period of service irrespective of any informal understanding that Mr Evans for EDI might have thought the parties had. I direct that holiday pay is to be calculated in the normal way on Mr Gilbert's earnings and that sum is to be paid to Mr Gilbert as well.

[59] I have made the following awards:

- Compensation under section 123 (1)(c)(i) of the Act for the unjustified dismissal in the sum of \$4,500.
- Compensation under section 123 (1)(c)(i) of the Act for the unjustifiable action causing disadvantage in failing to adequately communicate in the sum of \$3,600.
- Compensation under section 123 (1)(c)(i) of the Act for the unjustifiable action causing disadvantage in failing to respond appropriately to the ACC in the sum of \$2,000.
- Lost wages to be calculated at the gross figure which is equivalent to \$7411.69 nett on Mr Gilbert's period of service with EDI.
- Holiday pay to be calculated.

Costs

[60] Costs are reserved.

James Crichton
Member of Employment Relations Authority