

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 53
5397694

BETWEEN ROBERT GILLETT-JACKSON
Applicant

A N D SINCLAIR PRYOR MOTORS
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Piers Hunt, for the Applicant
Gary Tayler, for the Respondent

Investigation meeting: 20 February 2013 at Napier

Date of Determination: 14 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Gillett-Jackson was employed as an apprentice vehicle technician by Sinclair Pryor Motors Limited (Sinclair Pryor) between 2010 and August 2012 when he resigned shortly after completing his apprenticeship. He claims he was constructively dismissed by his employer. He says Sinclair Pryor breached good faith throughout his employment by failing to pay him wages in accordance with his employment agreement and this led to his resignation.

[2] Mr Gillett-Jackson is claiming payment for lost wages, compensation for hurt and humiliation, arrears of wages, and costs. He also seeks a penalty against his employer for deliberate, serious and sustained breach of good faith throughout his employment.

[3] Sinclair Pryor, which trades as Hawkes Bay Toyota, says Mr Gillett-Jackson resigned of his own accord when it declined to pay the \$5.30 an hour pay increase he sought, offering instead an increase of under \$2.00 an hour. It says he pretended to be sick for his two week notice period and that effectively nullified the notice he had given.

[4] Sinclair Pryor says it complied with the terms of Mr Gillett-Jackson's employment agreement at all times and did not underpay his wages. It counterclaims a penalty against Mr Gillett-Jackson for failure to comply with the notice provisions of his employment agreement.

Issues

[5] The issues I have to determine are:

- i. Whether Sinclair Pryor paid wages to Mr Gillett-Jackson in accordance with his employment agreement;
- ii. Whether Mr Gillett-Jackson was constructively dismissed;
- iii. If he was not constructively dismissed, whether Mr Gillett-Jackson breached his contractual obligation to provide notice and, in the absence of agreement from his employer, work out, that notice; and
- iv. Whether penalties are appropriate against Sinclair Pryor or Mr Gillett-Jackson.

(i) Did Sinclair Pryor pay wages in accordance with Mr Gillett-Jackson's employment agreement?

[6] According to Sinclair Pryor's payroll records Mr Gillett-Jackson commenced employment with it on 20 April 2010. His employment agreement shows his hourly rate as \$10.20, which was the training minimum wage rate at that time. The agreement, which he signed on 5 May 2010, contains no provision for pay increases, although Sinclair Pryor would clearly have an obligation to increase that rate in line with any increases to the training minimum rate.

[7] In June 2010 Mr Gillett-Jackson signed a training agreement with his employer and the New Zealand Motor Industry Training Organisation Incorporated (MITO). The training agreement formalised the industry training he would undertake, with the assistance of his employer and MITO. It set out the qualifications he would

pursue and the NCEA credits required for achieving them. It was expressed to form part of his employment agreement with Sinclair Pryor.

[8] Mr Gillett-Jackson says at an early stage in his employment he received a chart which outlined a scale of credits achieved and the commensurate hourly rate increase. In his written evidence to the Authority Mr Gillett-Jackson referred to a memorandum dated 7 April 2006 which, he said, outlined the agreement with his employer that his pay would increase as he achieved credits throughout his apprenticeship. The one-page memorandum was one of the documents attached to the Mr Gillett-Jackson's Statement of Problem and included the chart reproduced below:

Credits Achieved	Hourly Rate Increase
35	\$0.50
70	\$0.50
105	\$0.50
140	\$0.50
175	\$0.50
210	\$0.50
245	\$0.50
271	\$0.50

[9] The memorandum specified that the employer would review an apprentice's hourly pay rate and give increases at the employer's sole discretion on the achievement of each particular credit level. It also stated that the hourly rate increases would be subject to workplace performance.

[10] Under questioning in the investigation meeting, Mr Gillett-Jackson said he did not receive the memorandum, but only the chart it contained, during his employment. He said he had an expectation of an hourly pay rate increase each time he achieved the next credit level, on the basis of that chart. He says he was never told otherwise by his employer. He did not produce a separate copy of the chart he claimed to have received as an apprentice.

[11] Sinclair Pryor says the credit achievement chart was an initiative the company implemented in 2006 to encourage its apprentices throughout their training. It did not form part of Mr Gillett-Jackson's employment agreement. The document containing the chart made it explicit that hourly rate pay increases linked to the achievement of credits were at the sole discretion of the employer, and subject to workplace performance.

[12] Sinclair Pryor says information containing the chart formed part of the employment pack given to each apprentice at the outset of employment. Charmaine Soanes is the company's General Manager for Parts and Service. Part of her role involves preparing employment agreements for employees in that division and liaising with managers over the implementation of the credit achievement chart.

[13] Ms Soanes says she prepared an employment pack for Mr Gillett-Jackson when he joined Sinclair Pryor in 2010 and gave it to his immediate supervisor to pass onto him. The employment pack included a one-page document headed *Apprentice Credit Achievement* which replicated the information from the 2006 memorandum. The supervisor did not give evidence so there is no confirmation of the employment pack being passed on to Mr Gillett-Jackson.

[14] I find it unlikely Mr Gillett-Jackson did not see the memorandum, either in its 2006 form, or in the form in which it was inserted into new employees' packs when he commenced his employment. He referred to it in his written evidence to the Authority without making any mention of having seen only the chart portion of the document during his employment. If, as he said in the investigation meeting, he had seen the full document for the first time when Sinclair Pryor included a copy in its response to the raising of his personal grievance, I consider it likely he would have mentioned that in his written evidence.

[15] Mr Gillett-Jackson says he asked for pay rises during his employment in accordance with the chart as he achieved his apprenticeship credits. He said his requests were ignored. In his written evidence he claimed to have spoken, in early 2012, to Matthew Downing, then General Manager of Sinclair Pryor's Napier and Greenmeadows divisions, about not receiving pay increases. Mr Gillett-Jackson said nothing was done about paying him the correct amount and this caused him a great deal of distress as he was having trouble coping financially on a low wage.

[16] Mr Downing was unable to attend the investigation meeting and gave his evidence to the Authority by way of affidavit. His evidence, which was confirmed by Sinclair Pryor's payroll records, was that Mr Gillett-Jackson had received a pay increase in February 2012. The records show that was his third pay increase since the commencement of his employment. During the course of the investigation meeting Mr Gillett-Jackson accepted this to be correct but claimed he should have received the February 2012 pay increase several months earlier.

[17] Mr Downing deposed that there was good reason for the delay in Mr Gillett-Jackson obtaining the February 2012 pay rise. Between April and November 2011 Mr Gillett-Jackson had made very little progress in his apprenticeship and the then MITO Apprentice Manager, the late Clyde Cunningham, had emailed Sinclair Pryor to express his concern.

[18] MITO had put Mr Gillett-Jackson in a recovery plan as he had not returned any work for 141 days, and his attendance at night class was inconsistent. Mr Cunningham had notified Sinclair Pryor that Mr Gillett-Jackson's apprenticeship was now under review and he needed to make a far better effort than he had recently.

[19] Mr Downing rejected Mr Gillett-Jackson's claim that he had requested pay increases when he passed credits but had his requests ignored. Mr Downing says the apprentice did not once take issue with him over his pay rate. He said Mr Gillett-Jackson sought a significant increase in his pay on completion of his apprenticeship and resigned when he was offered a lesser hourly pay rate increase.

[20] In replying to Mr Downing's affidavit evidence, Mr Gillett-Jackson claimed he had been underpaid from the outset of his employment as he had completed a pre-apprenticeship polytechnic course for which he had gained 127 credits. He said his employer must have known this and should have taken it into account in setting his initial pay rate. Mr Gillett-Jackson had not previously made this claim and there is no evidence that he ever raised the issue during his employment.

[21] Ms Soanes said she relied on receiving notification from MITO of an apprentice's achievement of credits before she would action a pay rate increase in accordance with the credit achievement chart. Once she received that notification she would contact the Service Manager and Branch Manager to discuss an increase to the employee's pay rate. If the managers were satisfied the apprentice was performing to their expectations the pay increase would normally go through in the next pay run. However, if the managers had reservations about the employee's performance, the pay rate would not be increased.

[22] Ms Soanes could not recall Mr Gillett-Jackson ever querying his pay with her in relation to credits he'd achieved. She said that if he had, she would have asked Mr Cunningham about the notification of any credits Mr Gillett-Jackson had achieved. She was aware pay increases had been withheld during a period of dissatisfaction with

his performance, but had no knowledge of the detail. Mr Gillett-Jackson had not queried her about this.

[23] Mr Gillett-Jackson conceded during the investigation meeting that he raised the matter of his pay rate for the first time in July 2011, by which time he had been working for Sinclair Pryor for approximately 17 months. He also acknowledged there was a period during his employment when he had difficulties keeping up with his apprenticeship training due to family problems. He got behind with his work and was warned he could lose his apprenticeship. He initially said in answer to questioning that he couldn't expect a pay rise during that period, but then said he nonetheless had expected to receive one.

[24] From the payroll evidence provided by Sinclair Pryor, Mr Gillett-Jackson received three pay increases over the 2 years and 8 months of his employment:

August 2010 an increase of \$1.00 per hour (to \$11.20)
April 2011 an increase of \$1.00 per hour (to \$12.20)
February 2012 an increase of \$0.50 per hour (to \$12.70)

[25] The evidence suggests Mr Gillett-Jackson did receive the benefit of the 127 credits he achieved before commencing employment with Sinclair Pryor, as and when they were notified by Mr Cunningham. Those credits were marked in his notifications as "*Unit standard completed prior to MITO training*".

[26] Mr Cunningham's 4 Training Plans relating to Mr Gillett-Jackson's apprenticeship progress were included of the agreed bundle of evidence to the Authority. From these it appears Mr Cunningham recorded, and presumably notified, Mr Gillett-Jackson's pre-employment credits within the Training Plan for which they had relevance. For example, in the Training Plan relating to Automotive Repair, of the 80 credits listed as achieved by Mr Gillett-Jackson, 25 pre-dated his employment with Sinclair Pryor.

[27] I find Sinclair Pryor paid Mr Gillett-Jackson a rate agreed with him at the commencement of his employment. If he had concerns the rate did not adequately reflect his pre-apprenticeship credits, he should have raised that issue when discussing his employment agreement. Sinclair Pryor offered him the minimum training rate and was not obliged to offer him more.

[28] Mr Gillett-Jackson was paid \$12.70 an hour at the time of his departure from Sinclair Pryor in August 2012. After he completed the requirements of his apprenticeship he was offered an increase to \$14 per hour on 15 August 2012, an offer Mr Downing says was increased to \$14.40 per hour the following day.

[29] I find Sinclair Pryor did not breach the terms of Mr Gillett-Jackson's employment agreement in the wages it paid him. He was at all times paid at, or more than, the hourly wage rate specified in his employment agreement.

[30] Mr Gillett-Jackson was not entitled as of right to the hourly rate increases in the Credit Achievement Chart. Those increases were to be applied at the discretion of the employer, and subject to performance. Sinclair Pryor exercised its discretion not to award hourly rate increases for the period during which Mr Gillett-Jackson's attention to his apprenticeship requirements were unsatisfactory and his apprenticeship was under review. He was at all times paid on or more than the minimum training rate.

(ii) Was Mr Gillett-Jackson constructively dismissed?

Constructive dismissal – the law

[31] It is long-settled law that a resignation by an employee may be found to have been caused by the conduct of an employer. If the conduct is sufficiently serious the responsibility for terminating the employment relationship will rest with the employer. A resignation in such circumstances will be treated as a constructive dismissal.

[32] The Court of Appeal has recognised that cases of constructive dismissal could arise from at least three categories of employer conduct. The court acknowledged the list was not exhaustive but those easily identifiable were where:

- (a) An employer gives an employee a choice of resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) A breach of duty by the employer leads the employee to resign.¹

The law applied to the facts

¹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374 & 375

[33] Mr Gillett-Jackson's claim fits within the third category, that is, he says his resignation was caused by a breach of duty by Sinclair Pryor. If it was, I need to consider whether the breach was so serious that Mr Gillett-Jackson's resignation should have been reasonably foreseeable to the employer.²

[34] Mr Gillett-Jackson claims he consistently told his supervisor when he passed credits and requested the appropriate pay increases but his requests were ignored. He says he should have been receiving a minimum of \$14.20 per hour at the completion of his apprenticeship if all the credit increases had been applied. This was his first job and he expected his employer to treat him with good faith and pay him the correct rate.

[35] Mr Gillett-Jackson completed the requirements of his apprenticeship at the end of July 2012. He says he told his employer as soon as he completed his credits but had to wait 2 weeks for a meeting with Mr Downing to discuss a pay increase and he only had that meeting after contacting the owner of Sinclair Pryor.

[36] Mr Downing says he arranged the meeting, which occurred the day after he received notification from the MITO manager that Mr Gillett-Jackson had completed his apprenticeship requirements. A copy of that notification, emailed to Sinclair Pryor on 14 August 2012, was provided to the Authority.

[37] When Mr Gillett-Jackson completed his apprenticeship requirements he was being paid \$12.70 per hour. He says he was aware qualified technicians were paid \$18 - \$20 an hour and he wanted to earn around that rate. At his meeting with Mr Downing on 15 August 2012, he was offered \$14 an hour.

[38] Mr Gillett-Jackson says he found this offer offensive. He was already disillusioned with his employer because of the failure to pay him wage increases to which he thought he was entitled throughout his apprenticeship. He had prepared his resignation before the meeting with the intention of submitting it if he was not offered at least \$14.20 per hour. He gave it to Mr Downing when he made an offer of \$14 per hour.

[39] Mr Downing says he had talked to Ms Soanes about an appropriate pay rate before the 15 August 2012 meeting with Mr Gillett-Jackson, and she had

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168 (CA) at 172.

recommended offering \$14 per hour, rising to \$14.50 after 3 months. When Mr Downing offered \$14 per hour, Mr Gillett-Jackson told him that if he was not paid \$18 to \$20 an hour he would leave his employment. Mr Gillett-Jackson then handed Mr Downing a pre-completed leave application form for 2 weeks' "Termination Leave", that he intended as his resignation.

[40] Mr Downing urged Mr Gillett-Jackson to reconsider his resignation overnight and persuaded him to return for a second meeting the next day. Mr Downing said he would discuss with Ms Soanes the possibility of lifting the \$14 per hour offer. Mr Gillett-Jackson agreed and met again with Mr Downing on 16 August 2012. Mr Downing says he offered Mr Gillett-Jackson \$14.40 per hour, saying the company could not meet the \$18 the employee had requested. Mr Downing says Mr Gillett-Jackson rejected that offer and said he would leave his employment. He then left the meeting, returning later with a medical certificate declaring him unfit to work for the next 2 weeks. He did not return to work out his notice period.

[41] Mr Gillett-Jackson stated, in his written evidence, that Mr Downing had offered him \$14.40 per hour in the meeting of 16 August 2012. He said he rejected the offer, even though it surpassed his bottom line of \$14.20 per hour, because Mr Downing:

"..was in a position of power and I couldn't trust him to honour any agreement with me because he had continuously ignored my requests regarding my apprenticeship pay. It was the persistent breaching of his pay agreements with me that led me to the conclusion that I could not continue to work there because I couldn't trust him and did not believe that he would continue to treat me fairly."

[42] In the course of the investigation meeting Mr Gillett-Jackson changed that evidence and said he had not been offered \$14.40 per hour at the second meeting with Mr Downing. He said Mr Downing had told him on 16 August 2012 he had intended to offer \$14.40 per hour but had changed his mind after hearing Mr Gillett-Jackson had informed colleagues he was leaving Sinclair Pryor.

[43] I prefer Mr Gillett-Jackson's initial evidence that he had been offered \$14.40 per hour by Mr Downing on 16 August 2012. This is because it appeared in his own written statement to the Authority, together with his reasons for rejecting the offer. Also, if Mr Gillett-Jackson had then changed his mind about that offer having been

made, he had the opportunity to correct his earlier statement in his reply to Mr Downing's affidavit evidence before the investigation meeting, but did not do so.

[44] Mr Gillett-Jackson submits he was constructively dismissed by Sinclair Pryor in that his employer breached its duty to him by consistently underpaying him throughout his employment. It started him on the wrong rate, and did not give him pay increases for every 35 credits he achieved in accordance with the Credit Achievement Chart that he claims formed part of his employment agreement.

[45] I have already found that Sinclair Pryor was not obliged to offer Mr Gillett-Jackson a higher starting rate than the minimum training rate. I have also found he should have raised any concerns he had about the starting rate before entering into an employment agreement that confirmed that rate. Sinclair Pryor did not breach its employment agreement with Mr Gillett-Jackson in exercising its discretion not to pay him hourly rate increases in accordance the credit achievement chart. This was at a time Mr Gillett-Jackson acknowledged his achievement and performance were suffering from a family situation, and further acknowledged his employer's helpful attitude to him during that time. His apprenticeship had been placed under review by MITO because of his recent lack of achievement.

[46] Mr Gillett-Jackson went into the meeting of 15 August 2012 with Mr Downing with a pre-prepared document he regarded as his resignation. His evidence was that he wanted a pay rate of \$18 - \$20 an hour and intended to resign if he was not offered at least \$14.20 an hour. It appears he did not tell Mr Downing of his bottom line.

[47] Having been offered less than that and having submitted his resignation, he agreed to Mr Downing's urging that he reconsider overnight and meet again the next day, knowing Mr Downing had told him he would see if he could lift his offer. However, when he met Mr Downing the next day and was offered \$14.40 an hour, which was \$0.20 an hour more than his bottom line, Mr Gillett-Jackson rejected the offer.

[48] I do not find the reasons Mr Gillett-Jackson advanced for his rejection of the offer credible. If, as he says, he could not trust his employer to honour any agreement he made with him, that would have applied regardless of whether Mr Downing had offered \$14.40 or the \$18 an hour he was seeking. If his motivation to resign came

from a lack of trust that Mr Downing would treat him fairly, then the exercise of going through discussions about his pay was a futile one from the outset as Mr Gillett-Jackson had predetermined the outcome.

[49] It was Mr Gillett-Jackson's right to resign because he did not achieve the hourly rate he assessed his employment to be worth. However, I find he cannot blame Sinclair Pryor for his resignation. He took a high risk stance in entering into pay discussions with his employer with what turned out to be an unrealistic expectation. The increase he sought was significantly above the hourly rate he would have received at the end of his apprenticeship if he had received pay increases for all credits he had achieved.

[50] The requirement of good faith in employment relationships imposes obligations on employees as well as employers. Mr Gillett-Jackson had an obligation to be open and communicative with his employer. His premeditated resignation on 15 August 2012 did not fit comfortably with that requirement.

[51] His evidence also shows an inconsistent stance in that, having resigned but agreed to reconsider overnight on the basis that his employer would look at lifting its pay offer, he then confirmed his resignation when offered an increase in excess of the bottom line with which he said he entered pay discussions. Nor does it seem that Mr Gillett-Jackson informed Mr Downing in the meetings on either 15 or 16 August 2012 that he believed he had been underpaid throughout his employment.

[52] The Employment Court has found that where "*there is a genuine dispute between the parties as to their rights, especially if it is based on reasonable grounds, neither party can use the other's stance in the dispute as a ground for either dismissal or resignation intended to be treated as a dismissal*" and that "*The parties owe each other a duty to refer the dispute to mediation...*".³

[53] If Mr Gillett-Jackson genuinely believed he had been paid at less than the rate to which he was entitled throughout his employment, he should have raised that as a dispute with his employer and attempted to resolve it. I am not satisfied from the evidence that he ever made his employer aware of his views. While I could not test Mr Downing's evidence that Mr Gillett-Jackson had not raised issues of his pay with him, I found Ms Soanes' evidence that she could recall no instances where he had

³ *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 (EmpC) at 362

done so with her to be more credible than Mr Gillett-Jackson's claims to have frequently done so.

[54] I find Mr Gillett-Jackson was not constructively dismissed and there was no breach of duty towards him by Sinclair Pryor.

(iii) Did Mr Gillett-Jackson breach the notice provisions of his employment agreement?

[55] Mr Gillett-Jackson's employment agreement provided that he could terminate his employment on the provision of 2 weeks' notice in writing. His method of resigning, by completing a leave application for 2 weeks' "Termination Leave" was unorthodox, but was clearly understood by both Mr Gillett-Jackson and his employer to constitute a resignation.

[56] While his employer could be forgiven for taking a cynical view of Mr Gillett-Jackson's failure to work out his notice period, the fact remains that he did give the contractually required 2 week period of notice. Mr Gillett-Jackson says he was extremely stressed and his medical practitioner clearly agreed he was incapable of performing his duties for a period of 2 weeks. That precluded him from working out his notice period.

[57] I find Mr Gillett-Jackson did not breach the notice provisions of his employment agreement.

What penalties, if any, are merited?

[58] I have found Sinclair Pryor did not breach its duty to Mr Gillett-Jackson and did not constructively dismiss him. It follows that Mr Gillett-Jackson's claim for a penalty against his former employer fails.

[59] The counter-claim by Sinclair Pryor for a penalty against Mr Gillett-Jackson also fails for the reason that he did not breach the notice provisions of his employment agreement.

Determination

[60] Mr Gillett-Jackson's personal grievance fails. His resignation was not a constructive dismissal and there was no breach of good faith by his employer.

Costs

[61] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority