

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**THE PARTIES** Craig Geoffrey Gleeson  
**AND** Real Cakes and Pastries Limited  
**REPRESENTATIVES** Alan Miller, for Mr Gleeson  
Mike Andrews, for Real Cakes and Pastries Limited  
**MEMBER OF AUTHORITY** P R Stapp  
**INVESTIGATION MEETING** Palmerston North 21 March 2006  
**DATE OF DETERMINATION** 11 April 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

1. The parties have filed separate statements of problem. The statements of problem have been consolidated.
2. Mr Gleeson has raised an issue about how he was treated by his employer, Real Cakes and Pastries Limited, when he requested his entitlements having given two weeks' notice to leave his employment. He has claimed compensation, wages and holiday pay.
3. Real Cakes and Pastries is seeking exemplary damages and compensation for losses it says were incurred by Mr Gleeson during his employment and upon leaving it. In particular, the company has issues with Mr Gleeson on:
  - His alleged unauthorised purchase of a cellphone during his employment and his allegedly not disclosing accounts for the payments of the cellphone with Telecom.
  - His performance over sales that may have incurred losses with another company during his employment.
4. The company contends that it met its obligations to pay Mr Gleeson advances on his wages before he left his employment. It seeks to offset these payments for the sums owing on the

telephone account and make a deduction for a speeding ticket and parking fine incurred by Mr Gleeson during his employment.

### **Mr Gleeson's employment**

5. Mr Gleeson started his employment with Real Cakes and Pastries Limited on 1 November 2004 that the company says was unusual where Mr Gleeson imposed himself in his employment and that this should mitigate later events. This will not mitigate the events that will emerge shortly. A wage and time record produced shows that Mr Gleeson was regularly paid a taxable gross weekly payment of \$600. The employer (through its representative) accepts that Mr Gleeson was employed for 45 weeks. During Mr Gleeson's employment most wages payments were made by direct credit automatically made into his bank account. There may have been some cash payments.
6. It is common ground between the parties that Mr Gleeson, and Wayne Schwamm, company director and shareholder, agreed that Mr Gleeson would be paid \$150 per week for delivery duties starting around about June 2005 when another employee left. Mr Schwamm says he paid Mr Gleeson in cash. Mr Gleeson says his pay was irregular and he was not paid his full entitlement from this time. Mr Gleeson says he was paid \$1,000 and is owed \$950 for 13 weeks. Mr Schwamm could not produce evidence to contradict this. The wage and time record does not assist because there is no record of any payment being made at all.
7. Mr Schwamm and Christine Bell, another director and shareholder of the company, say they found out that Mr Gleeson had purchased a cellphone he was using under the company's name. They say it was unauthorised. Mr Schwamm and Mr Gleeson reached an oral agreement that Mr Gleeson's would pay \$50 per week to meet the past personal use of the phone and an arrangement for the continuing use of the phone during his employment. It appears common ground that \$450 was paid back by Mr Gleeson. Both parties left it unclear what would happen to the repayments for the use of the phone if Mr Gleeson left his employment at any time. It is clear there were no arrangements for the post-employment repayments. Mr Gleeson continues to have his phone in his possession and the employer says that the Telecom accounts show the phone's continued usage. The applicant accepts he still has the phone and the calls were incoming phone calls. The Employer raised this to support its contention that Mr Gleeson has responsibility for the telephone.

8. An issue does arise between the parties about how Ms Bell and Mr Schwamm found out about the cell phone. They say Mr Gleeson deliberately put the accounts into a box that they did not get to see until they found out about the non-payment of the telephone account.
9. There was no written employment agreement. There were no written terms in regards to the cell phone and the extra \$150 per week for the delivery work undertaken by Mr Gleeson.
10. The wage and time records confirm Mr Gleeson's gross weekly wage was \$600. The record also shows that he did take six days' annual holidays during the Christmas and New Year shutdown. There is one notation involving another three days but no details as to the dates when such leave was taken. Mr Gleeson disputes taking these three days as annual leave.
11. Mr Schwamm raised three issues with Mr Gleeson during his employment. First there was the matter of \$102 cash going missing. The purchase and payment of the cellphone became an issue. Finally there was a matter about documentation of purchases made by Pohongina Venison. Mr Schwamm raised these issues in writing in June 2005. No other further action appears to have been taken.
12. Mr Gleeson agrees he gave two weeks' notice of his resignation on 29 August 2005 when he informed Mr Schwamm orally of his intention. It was later confirmed in writing on 5 September 2005. Mr Schwamm decided to stop Mr Gleeson's automatic payment of wages. Mr Gleeson was not paid from 27 August 2005 his usual wages by direct credit, and his last day at work was 12 September 2005.
13. Mr Gleeson requested money from Mr Schwamm and Ms Bell. They paid him to tide him over as follows: 25 August 2005 - \$900, 30 August 2005 - \$200 and 6 September 2005 - \$275.
14. The parties are in dispute about another sum that Mr Schwamm says was paid in cash to Mr Gleeson - \$34.70 on 6 September 2005. Mr Gleeson could not recall being paid this sum. The wage and time records again do not assist. Since there was no other proof offered and the wage record is not reliable I cannot conclude the payment was made even although Mr Gleeson did accept that the other three payments were made. I have not taken this any further.
15. Mr Gleeson met with Mr Schwamm on 12 September 2005 and assaulted Mr Schwamm when he says Mr Schwamm did not act in good faith to meet his obligations to pay him and he took exception at how Mr Schwamm looked at him. Mr Gleeson left his employment and was not required to work out his notice.

## **Discussion and findings**

### **The cell phone and Telecom accounts**

16. The existence of the phone, the Telecom account on Real Cakes and Pastries and without any written terms about the use of the telephone satisfies me that the employment relationship did include the use of a cell phone for business purposes. I am supported in this by the agreed deduction arrived at by the parties for the personal use of the phone. I am satisfied agreement was reached on a payment of \$50 per week to be made by Mr Gleeson from his wages for the personal use of the cell phone because he agreed. It is common ground that \$450 was paid that was not challenged. There were no written terms and the parties probably had no terms in place for any post-employment arrangements if Mr Gleeson decided to leave at any time. Therefore, any obligation Mr Gleeson had in respect of his employment and the deduction ended when the employment ended upon the expiry of his notice, i.e. 12 September 2005. The company has relied upon Mr Gleeson somehow being devious in his conduct and behaviour by not disclosing the accounts for payment. However, I am not satisfied that was actually the case. My reasons follow.
17. Given the agreement above, I am not satisfied the employer has a claim against Mr Gleeson for any fraudulent purchase of the cell phone since its use appears to have been condoned, although the terms were vague and at best unclear on its purchase and private usage. The company has not been assisted by its failure to responsibly provide an employment agreement or any variation to that employment agreement. I have no doubt that the cell phone was of some issue to the parties and that the non-payment of the Telecom accounts and whose responsibility it might have been to meet those payments was an issue between them. The fact is that the Telecom accounts are in the name of Real Cakes and Pastries Limited.
18. For the above reasons I am not prepared to make any order for Mr Gleeson to pay any damages for losses on the cell phone account.

### **Speeding ticket and parking ticket**

19. Mr Gleeson accepts responsibility for the repayment of the speeding ticket. It happened during work time, in a work vehicle while Mr Gleeson was carrying out his duties. He accepted that his reply in writing to the Employment Relations Authority meant he accepted the company's position. He agreed to repay \$80 for the speeding ticket.

20. However, there is a dispute about the responsibility for a \$10 parking ticket that Mr Gleeson denies involved him. The employer did not produce any evidence that Mr Gleeson was responsible. No ticket was produced. No details were produced. There is no evidence of any inquiry being conducted to apportion blame and responsibility at the time. It is reasonable to expect such evidence to be produced in support of any claim. As it has not been provided, I dismiss the Real Cakes and Pastries' claim to be reimbursed by Mr Gleeson for the parking ticket.

### **The work in relation to Pohongina Venison**

21. This is clearly a matter of dispute between the parties on Mr Gleeson's sales to Pohongina Venison. I am told the Real Cakes and Pastries is still pursuing some form of investigation that is stalled until invoices are provided.
22. Real Cakes and Pastries has not been able to provide any proof of any losses in respect of Mr Gleeson's sales. The evidence was not sufficient to establish that Mr Gleeson deliberately or wilfully or deceptively set out to mislead his employer and not to act in good faith during his employment. I accept there were difficulties in the employment relationship that might appear related to Mr Gleeson's performance of his duties. Some of the responsibility for this must rest with the employer. It is the author of its own misfortune for the losses it believes it has had to cover through failing to deal with these performance issues in a proper way and failing to set out the terms of the employment as they might have applied for the use of the cellphone and the work required with sales.
23. Real Cakes and Pastries endeavoured to advance similar fact evidence about Mr Gleeson to try and prove that he was a dishonest person and refute that he had a good relationship with a previous employer. Mr Gleeson denied the allegations against him. I decided not to investigate the matters because there a number of the facts were not established and the probative value of the information and evidence was not of any assistance.

### **Personal grievance and damages claims**

24. Mr Gleeson assaulted Mr Schwamm. Mr Gleeson says this happened when Mr Schwamm did not respond to him properly when he made a reasonable request for his wages and holiday pay to be made and how Mr Schwamm looked at him. Mr Gleeson was charged, prosecuted and required to pay reparations for holes in the wall and damaged product.

25. Mr Schwamm says he had to visit his dentist upon being assaulted but did not provide any details and receipts for any expenses. There is no evidence to establish any causal linkage between the dentist visit and the assault. This was raised orally for the first time at the investigation meeting. If it had any substance it could have been raised earlier. I do not intend to order any reimbursement or damages in the circumstances.
26. My conclusion is that any failure by Mr Schwamm to act in best practice does not condone Mr Gleeson's actions of assaulting him. Mr Schwamm's failure to act properly, which seems to relate to how he looked at Mr Gleeson and his refusal to pay Mr Gleeson any more money was less than helpful, when the parties should have amicably discussed a process to reconcile any payments. Mr Schwamm's action raised the prospect of denying Mr Gleeson the use of his full entitlement that I calculate amounts to \$1,612. I will return to the actual calculation shortly.
27. The claims for damages are dismissed because they have not been proved.
28. Mr Schwamm's behaviour when Mr Gleeson says he did not respond to his request for wages is not a matter that crosses the threshold of the employer acting unjustifiably that involves how an employer might look at someone and refuse to pay more money when there was a genuine belief that all money owed had been paid. This is especially so since Mr Gleeson had available to him procedures to recover any lost wages and holiday pay not paid. Mr Gleeson has possibly been disadvantaged by being denied his money, but that disadvantage is covered for by the provisions that enable him to recovery any wages and holiday pay owing (section 131 of the Act).
29. Even if I am wrong and if there was a personal grievance Mr Gleeson's actions amounted to contribution and I would not be inclined to order him any compensation given the seriousness of assaulting his employer in the above circumstances.
30. The position taken by Mr Schwamm was based on a genuine view that Mr Gleeson was not owed any wages because of the cash he was given and the disagreement on the responsibility for paying Telecom. The issue required a proper reconciliation of the payments and this was not properly organised.
31. I have decided in equity and good conscience in line with my earlier comments not to consider granting any compensation or going so far as to determine that Mr Schwamm's behaviour amounted to an unjustifiable action. I have had regard also to the other background factors that were raised before me, including some personal matters involved in Mr Gleeson's

life affecting him at work before the incident. They do not excuse his decision to lash out at Mr Schwamm physically. The claim for personal grievance is dismissed.

### **Calculation of holiday pay and money owing to Mr Gleeson**

32. Real Cakes and Pastries provided a document through its solicitor calculating holiday pay on the basis of 45 weeks work (including 2 weeks notice (not paid) and the cash paid (\$1,375)) at \$600 per week: \$27,000. I have added to this sum \$1,950 for the delivery work that was not included in the holiday pay calculation.
33. I hold that the applicant has had six days' annual leave paid in advance (not nine days), given that he had not worked for the respondent for more than 12 months. The six days were included in the gross sum. The sum will need to be reconciled as an advance in holiday pay.
34. The total gross sum would come to \$ 28,950 and holiday pay calculated @ 6% of this sum is equal to \$ 1,737. Less the advance for holidays of six days (\$720) the amount due is \$1,017.
35. The sum of \$1,000 was paid for the delivery work. Mr Gleeson is owed \$950 in addition. Mr Gleeson accepts that he owes the repayment of the \$80 speeding fine. He has not been paid for his two weeks' wages in lieu of notice of \$1,200. His last day of pay was 25 August and he left on 29 August. He was subsequently paid cash amounts totalling \$1,375. He was overpaid by \$175 on his entitlement of wages in lieu of notice. A further two payments of \$50 each need to be deducted in line with Mr Gleeson's early agreement for the deduction to be made (total \$100). I calculate the total sum owed is \$1,612 including holiday pay and wages.

### **Outcome**

36. Therefore, I order Real Cakes and Pastries Limited to pay to Mr Gleeson the sum of \$1,612 that includes holiday pay and wages owing.

### **Costs**

37. Real Cakes and Pastries Limited has been unsuccessful in its claim for damages. Therefore there will be no costs order on its application.
38. Mr Gleeson has been put to the expense of engaging a representative to bring this claim. Both parties have attempted to use mediation to save costs and both parties had an opportunity to try and settle these matters although I do accept that an obvious settlement may not have been

achieved given the situation that existed on the dispute in relation to the cellphone, the calculation of holiday pay and wages and the offsetting that was required. I am informed that there will be a charge for Mr Gleeson's representative's attendance and fees and preparation.

39. Mr Gleeson is entitled to a contribution towards his costs. He is entitled to the filing fee of \$70. The expense of two hearings on each of the applications filed in the Authority has been saved by the consolidation of the proceedings. The claims had overlapping facts and issues. The company has left itself exposed to some costs in raising the damages matters that it has been wholly unsuccessful on and the applicant was unsuccessful in regard to his personal grievance claims that have to be off set too. My assessment is that a reasonable contribution would be in the order of the range of \$1,500 per day for an investigation meeting, including attendance fees and preparation.
40. Therefore I order Real Cakes and Pastries Limited to pay a contribution towards Mr Gleeson's reasonable costs in the order of \$1,000 and the \$70 filing fee.

P R Stapp  
Member of Employment Relations Authority