

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Alex Harris (Applicant)
AND Vision X (Respondent)
REPRESENTATIVES John Shadbolt, Advocate for Applicant
Jenni-Maree Trotman, Counsel for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 25 January 2005
DATE OF DETERMINATION 4 February 2005

DETERMINATION OF THE AUTHORITY

This employment relationship problem concerns a claim that the applicant has been disadvantaged in her employment. The applicant seeks remedies of \$10,000.00 compensation for hurt and humiliation arising out of the alleged disadvantage.

Chronology of events.

1. Ms Harris was employed by the respondent in February 2003 to work in its optometry practice and shop. It was her first permanent full time job since leaving school.
2. Ms Harris suffered a back injury and required time off work in May 2003. It was agreed between her and her employer that she would be paid for this time as an advance on the special leave entitlements to which she would become eligible upon six months' service. Over the next few months an arrangement of the same type was extended to any annual leave taken in advance of the anniversary of her employment.
3. In August 2003 the respondent's managing director, Richard Chinn, met with the applicant to conduct a six monthly review of her employment and noted his satisfaction with her performance. In consideration of this he gave her a pay rise. For the record he reminded her that she had at that stage taken 6.5 days off sick however at this stage he did not have any concerns surrounding this issue.
4. In February 2004, Mr Chinn conducted a further review. According to the wage records, between 9 August 2003 and Ms Harris's anniversary on 10 February 2004, she had already used up the full balance of both special and annual leave due to her on that anniversary. In addition she had taken a further 3.2 days in advance on the second year's leave. Again, Mr Chinn noted this in his conversation with the applicant. This time he made a suggestion that instead of offsetting this leave against her future entitlement, she could repay him for the paid leave she had taken by producing two paintings for the business premises. (Ms Harris is

something of an artist and Mr Chinn had already commissioned other work from her.) Mr Chinn provided Ms Harris with \$500.00 to purchase the necessary art materials.

5. Ms Harris did complete one canvas and emailed photographs of the work to Mr Chinn. He was not sure if the work was suitable and suggested that it might require further work, however he could not see clearly from the emailed photographs. Ms Harris did not complete any more work on the piece and did not bring it in for Mr Chinn to see. That work and another blank canvas paid for by Mr Chinn remain at the home of Ms Harris's parents.
6. In March 2004 Mr Chinn spoke to Ms Harris regarding her use of the business telephone for personal calls to mobile phones. On 12 April Mr Chinn approached her on this subject again, advising that she had made \$43.00 worth of calls to cell phones in the previous month. He requested that she cover that bill. He also reminded her that she had yet to pay for product that she had received from the shop (a pair of glasses to the value of \$250.00.) In notes attached to her witness statement, Ms Harris stated that she had forgotten about the sunglasses and acknowledged that she did owe the money for these along with the personal calls to her boyfriend's cell phone.
7. In addition, Mr Chinn reminded her that she still owed him for the leave taken in advance (the painting not having been supplied.)
8. As the wage records show, after 10 February 2004 Ms Harris was paid for 18.5 hours sick leave and 17.5 hours annual leave. In total, therefore, leave taken in advance now amounted to 7.7 days. In speaking with Ms Harris on 12 April, Mr Chinn converted this to a dollar amount of \$700.00 gross. He told her that between the cell phone calls, the sunglasses and the leave she owed him over \$1,000.00.
9. She was however sceptical that the leave taken had mounted up to quite such a level. She asked Mr Chin to provide her with information showing how he had arrived at the figure. On 19 April 2004 he provided a schedule showing her pay, PAYE and leave taken. This schedule was set out in what I find to be a very confusing manner. In addition to showing what she currently owed (\$1,071.00 altogether) it also showed what she would owe if she shortly took a further three weeks leave. Mr Chinn says he did this as she had indicated to him that she was considering an overseas holiday with her boyfriend in the near future. While done in good faith, this unfortunately had the effect of making Ms Harris feel even more concerned about the total amount shown.
10. Ms Harris sought counsel from her mother and at her recommendation, requested wage and time records from Mr Chinn. On 22 April these were provided along with a revised schedule in which minor mistakes had been corrected. Copies of all these documents were provided to the Authority.
11. The wage and time records do not record details of hours worked. Absences are recorded in the week in which they occurred but the days and hours of absence are not shown. Ms Harris says that as a result she found it difficult to check when or even whether she had taken the time off that had been claimed.
12. Between 22 April and 29 April Mr Chinn and Ms Harris spoke about the matter informally on several occasions. Ms Harris told Mr Chinn that she could not understand the schedule that he had prepared. He then took advice himself and on 29 April he told her that it had been recommended to him that he set out his workings differently so that they were easier to follow. He asked Ms Harris if she understood and accepted his revised schedule and she

agreed that she did although she now says that she still did not really grasp it. Mr Chinn then suggested some alternative proposals for repayment. These included the completion of the proposed art work, or a system of payment in instalments. Ms Harris responded that she would talk to her mother.

13. Ms Harris told me that she thought she may have taken 10-13 days leave in total but was not sure exactly. She also told me that on occasions she worked late and so did not expect every half day taken to be counted as leave. However, the wage book records additional payments made in respect of extra work or late nights.
14. On Friday 30 April at around midday Ms Harris told Mr Chinn that she did not accept that she owed him anything for leave taken in advance. Mr Chinn asserted that she did owe him the money and the two had a brief discussion. Although I accept that this was not a relaxed exchange, it was brief and did not involve raised voices.
15. Mr Chinn left the conversation to attend to a customer and on his return he found that Ms Harris had gone home. She did not appear at work the following day (a rostered day for her) or on the Monday after. On Monday afternoon Mr Chinn sent her a fax requiring her attendance at a meeting the next day. He advised that she was entitled to bring a representative and told her that the meeting would deal with the following issues:
 - Leave entitlements;
 - Performance;
 - Her 'debt to Vision X';
 - Her absence without consent from the practice.
16. The last of these points related to Ms Harris's absence between Friday afternoon and Monday afternoon.
17. By the time Ms Harris received this fax she had already spoken with an employment consultant and now arranged for this person to accompany her to the meeting.
18. The meeting on 4 May did not go well. Mr Chinn opened the meeting by asking Ms Harris "what do you want to do?" and Mr Shadbolt responded with "you called the meeting, you tell us." From this point on very little progress was made. Mr Chinn told me his principal concern was to get Ms Harris back on the job, but he also wanted her to repay what she owed him and was hoping to hear from her as to how she might do so. He did not however put conditions on her return to work except to say that she was required back that afternoon.
19. Ms Harris did not participate directly having arranged instead for her representative to speak on her behalf. He stressed (correctly) that Ms Harris could not be compelled to repay any leave taken in advance, and disputed that leave had been taken in advance in any event. There was also discussion of payment for the sunglasses and mobile calls, and for another item (cigarettes) that Mr Chinn had purchased for the applicant duty free. Now, in contradiction with what she had earlier conceded to Mr Chinn, Ms Harris argued that the glasses and cigarettes had been gifts.
20. I note that I have accepted the respondent's assertion that Ms Harris changed her position on the glasses and other expenses because her own evidence confirms this. As noted above, attached to her witness statement were notes Ms Harris made at the time of the dispute. In them, she records that she had forgotten about the money for the sunglasses, and also that she knew she had made a number of personal calls from work to her boyfriend's mobile. At

the investigation meeting, she asserted (as it appears she did at the meeting of 4 May) that she had believed the sunglasses were gifts from her employer. During the course of my investigation meeting she also sought to change her evidence on other points (such as the amount of time she had been off sick with her back injury).

21. Ms Harris was a very well presented, confident and articulate young woman, however because of the inconsistencies in her evidence she did not impress me as entirely truthful, and where her evidence has differed from that of Mr Chinn, I have preferred his account.
22. Both parties claim that the other was confrontational and aggressive during the meeting of 4 May, and that this prevented any constructive problem solving. The applicant's representative suggested discussing an agreed termination but Mr Chinn was not prepared to do this. He told me that his overriding objective was to get Ms Harris back to work as he was short handed without her and this posed something of a crisis for him. The meeting ended with Ms Harris refusing to commit to returning to work. However her mother (who was also present to support her daughter) gave an undertaking that she and her husband would pay for the glasses, cigarettes and calls to cell-phone.
23. This undertaking was honoured by payment of a cheque on 6 May. Ms Harris also submitted a doctor's certificate at the same time and remained on sick leave until Thursday 20 May, when she resigned. She commenced other employment on Monday 24 May.
24. On Ms Harris's behalf, Mr Shadbolt says that the respondent did not act as a reasonable employer. Specifically he says that Ms Harris was disadvantaged in the following ways:
 - The respondent did not keep sufficiently detailed records as required pursuant to s.130 of the Employment Relations Act 2000;
 - The respondent should have monitored the situation and taken remedial action sooner rather than making a claim in excess of \$1,000.00;
 - Mr Chinn was aggressive and confrontational in the meeting of May 4.
25. Ms Harris told me that she had come to the Authority with her claim because she felt that Mr Chinn made unreasonable requests for payment. She said that he "never got that he was wrong" when she told him so. This made her feel browbeaten, uncomfortable and unsafe. She believed the issues between them could have been sorted out but for the fact that Mr Chinn became aggressive at the meeting of 4 May.

Determination

26. Some of the applicant's assertions are correct:
 - The wage and time records should have shown the specific days taken as leave rather than just the week in which leave was taken;
 - The schedules were set out in a very confusing manner. In particular the reference to a further three weeks leave (for which the request had yet to be confirmed) was unnecessary and confusing;
 - Most importantly, once leave in advance had been given, the respondent could not require that it be repaid other than by the elapse of time, against future entitlements.
27. The respondent's failure to keep fully detailed wage and time records and its error in telling Ms Harris that she was obliged to repay the leave taken in advance were both "unjustified actions" in terms of s.103 of the Employment Relations Act. I accept that Ms Harris suffered

some minor disadvantage as a result. However I do not consider this disadvantage to have been had any material consequences for her, or to be sufficiently significant as to warrant compensation.

28. In addition I note that Ms Harris told me that any distress she experienced arose directly out of the meeting of 4 May. I consider that she contributed by her conduct to the conflict and stress that developed in that situation. By this I mean that she failed to address legitimate concerns put to her by Mr Chinn and failed to honour her own obligations of good faith towards her employer.
29. I have accepted Mr Chinn's account of the amount of leave Ms Harris took, and his evidence about her failure to pay for purchases and personal telephone calls. I refute the suggestion that Mr Chinn should have broached these issues earlier. He did raise them promptly, shortly after the anniversary of employment and soon after the first year's entitlement had been used up. I consider that, in this context, Mr Chinn had several legitimate and reasonable concerns, as follows:
- a young staff member who was discussing plans for overseas travel was taking high levels of leave in advance;
 - he had had to remind Ms Harris twice about her use of the mobile phone;
 - by the time of the meeting of 4 May more than three weeks had elapsed since he had reminded her about that issue and about payment for her purchases, yet she had not paid him what she owed;
 - at the meeting of 4 May, in front of her mother and advocate, she misrepresented the situation regarding the purchases and the leave taken;
 - she purchased expensive art materials at Mr Chinn's expense; to this day he has seen nothing for this. (Ms Harris told me it had not occurred to her to return to him the materials he had paid for.)
30. I accept that the meeting of 4 May became tense but I do not place all the responsibility for this on Mr Chinn's shoulders. By the time of the meeting on 4 May, Mr Chinn was frustrated by the lack of response to the issues of concern to him and by Ms Harris's absence from the workplace. It was not inappropriate for him to confront Ms Harris about these matters. Although Mrs Harris agreed to pay for the purchases there was no progress on his primary objective of getting Ms Harris back to work. I find it reasonable that Mr Chinn was becoming impatient by this stage.
31. In short, it was as much Ms Harris's fault as it was Mr Chinn's that the meeting of 4 May did not resolve the issues between the parties. Both parties have helped to create this employment relationship problem.
- 32. As a result I am not satisfied that a personal grievance has been made out and do not consider that there is any case for an award of remedies.**
33. Because of this finding, I express a preliminary view that this case may be an appropriate one for costs to lie where they fall. However, I have not had submissions on the issue. I leave it to the parties to discuss it but if it cannot be resolved, they have leave to request a determination of it.