

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Christopher Jarden (Applicant)
AND G C Smith Contracting Limited (Respondent)
REPRESENTATIVES Peter Wetherall, Counsel for Applicant
Neil McPhail, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 23 November 2004
DATE OF DETERMINATION 7 February 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christopher Jarden says he has a personal grievance against his former employer by way of a constructive dismissal on 22 January 2003. G C Smith Contracting Limited says that it did not constructively dismiss Mr Jarden or, alternatively, any dismissal was justified for serious misconduct. Mr Jarden is also claiming arrears of wages. G C Smith Contracting Limited accepts that something might be owed but says it cannot be quantified because Mr Jarden claimed through his timesheets for time he did not work.

[2] Despite mediation, the parties were not able to resolve this problem.

Background

[3] Mr Jarden commenced the employment in 1999. There is no written employment agreement. Mr Jarden's duties involved driving and ancillary duties. He worked Monday to Friday and sometimes on a Saturday.

[4] Mr Jarden was at work as usual on Friday 6 December 2002. During the morning he received a phone call from his fiancée who had just taken a phone call from the hospital to say that Mr Jarden's mother was dying and not expected to live much longer. Mr Jarden's fiancée then collected Mr Jarden from work and they went to the hospital. Mr Jarden's mother died a little while later.

[5] When Mr Jarden got home from the hospital, he phoned Graham Smith. Graham Smith is the principal of the company, G C Smith Contracting Limited. Mr Jarden and Mr Smith have slightly different recollections about that call. Mr Jarden says that he was told that he was entitled to bereavement leave and that he should put in his timesheets as usual. Mr Smith says that he told

Mr Jarden he was entitled to bereavement leave which he understood to be 3 days, that Teresa (the wages clerk) would sort it out and to record the time as bereavement leave on the timesheet.

[6] A funeral service for Mr Jarden's mother was held in the afternoon on Monday 9 December 2002. There is a disagreement about the extent to which Mr Jarden was at work in the days following the funeral. On Saturday 14 December 2002, he received news that his two year old grandson had died suddenly of meningitis. Mr Jarden again rang Mr Smith. There is again a difference between the two men over what was said. Mr Jarden says that he was told to follow the same practice as to bereavement leave and put in his timesheets as usual. Mrs Jarden (as she now is) confirms his account saying that she heard the whole conversation on speaker phone. They both say that Mr Smith already knew of the death. Mr Smith says he had no prior knowledge of the death, that the usual things (sympathies) were said and that he told Mr Jarden he was again entitled to bereavement leave.

[7] On his timesheet for the week ending Sunday 8 December Mr Jarden records starting at 6:30, finishing at 5:00 for 10 hours Monday to Friday inclusive, a weekly total of 50 hours. His bank records show wages of \$516.66 were paid into his account on Wednesday 11 December 2002. There is no dispute between the parties as to time worked up to Friday 6 December 2002 and the wages paid in respect of that work. Mr Jarden's next timesheet (week ending Sunday 15 December) does not record any starting or finishing times but just shows 10 hours Monday to Friday inclusive, a weekly total of 50 hours. It seems that Mr Jarden did do some work in this week because load out records for the Rapahoe Mine record him as taking a load at 9:27 on Tuesday 10 December and at 4:35 on Thursday 12 December. I was not given load out sheets for every day of this and other relevant weeks.

[8] Mr Jarden's bank records show a wages payment of \$2,447.75 on 18 December. The employer's payroll report, provided in the lead up to the investigation meeting, shows that the payment was for 50 hours work and accrued holiday pay. The 50 hours must be for the week ending Sunday 15 December 2002. That would not have been obvious to Mr Jarden at the time because he did not receive any breakdown of the \$2,447.75 net payment.

[9] Mr Jarden's timesheet for the week ending Sunday 22 December records him starting at 7, finishing at 5:30 for 10 hours daily Monday to Friday, a weekly total of 50 hours. The load out sheets show him as working at 2:25 and 3:15 on 19 December 2002 during this period. It was at the beginning of this week that Mr Jarden received the news of the death of his grandson.

[10] Mr Smith's evidence is that on or about 19 December he discovered (via Teresa, the wages clerk) that *...since almost the beginning of December...he [Mr Jarden] had claimed for work not performed*. Teresa apparently saw Mr Jarden stop at her letter box about 10:00am then drive back towards Greymouth (i.e. not towards work). She collected his payslip from the letter box and was apparently concerned at the claim for full-time pay. Mr Smith did not say which timesheet concerned Teresa. In evidence, Mr Smith said *She might have rung me lunchtime - she faxed things [timesheets] to me, so I stopped things right now. It couldn't just get paid. I wanted to see Chris Jarden to talk to him about it. It took a couple of days before I raised it with Chris*.

[11] There is a conflict over what happened next. Mr Smith says that he spoke to Mr Jarden at the yard about the claim for pay for work not performed. No-one else witnessed the conversation. Mr Smith says that he *confronted* Mr Jarden who admitted that he should not have been putting in full timesheets for time not worked and explained the misbehaviour by saying that his *head was spinning*. Mr Jarden agreed to pay back the extra time claimed by working 10 hours but by claiming only 5 hours pay each day. Mr Jarden also said that he would make sure his future timesheets were accurate. For his part, Mr Jarden simply denies that there was any such discussion or agreement. If

Mr Jarden had agreed to the arrangement mentioned above, he did not put it into effect on the timesheet for the week ending 22 December 2002 or the timesheets for the weeks ending 29 December 2002, 5 January 2003, 12 January 2003 and 19 January 2003.

[12] The pay received on 18 December 2002 was the last payment made to Mr Jarden despite his continued rendering of timesheets. Mr Smith's evidence is that he told Teresa to stop Mr Smith's *last week's pay* which she did but she did not recommence payments after then. He says that he was unaware of this until after Mr Jarden had left the employment. Mr Smith did not tell Mr Jarden about his instruction to Teresa, nor did he explain in evidence how he intended to take this into account as part of the alleged arrangement with Mr Jarden.

[13] Mr Jarden's evidence is that after the first week of non-payment, he endeavoured to contact Mr Smith but was told that he was in Christchurch. After the second week, he again tried unsuccessfully to contact Mr Smith and then spoke to Teresa who told him that Mr Smith had held back his pay and he would have to see Mr Smith about it. After the third week of not getting paid, Mr Jarden saw Mr Smith at work. Mr Smith said he would talk to Teresa and have the pay in Mr Jarden's account the next day. After the fourth week of not being paid, Mr Jarden again phoned Mr Smith but was told he was in Christchurch. Mr Jarden then went to Mr Smith's residence and was told he was not there although his vehicles were present. Mr Jarden says he spoke to Mr Smith the next day and Mr Smith continued to blame Teresa. Then on entering the sixth week of not being paid, Mr Jarden went with his fiancée to Mr Smith's house. There Mr Smith again blamed Teresa (calling her a useless bitch) and said the arrears would be paid the next day. All these events happened before 22 January 2003. In their oral evidence both Mr Jarden and Mrs Jarden said that they went to Mr Smith's residence 3 separate times about the wages. The account in evidence by Mr Jarden (supported by Mrs Jarden) refers to more efforts by him to chase up his pay than did his solicitor's letter dated 17 April 2003. That letter refers to one discussion with Teresa, a discussion with Mr Smith and one trip to Mr Smith's house (with his fiancée) where there was a second discussion.

[14] Mr Smith's evidence is that he was aware that wages were not being paid and that Mr Jarden came to him only once to complain about that. He said that Mr Jarden arrived at his house, there was discussion on the doorstep and Mr Jarden's fiancée remained in the car at least 15 metres away throughout.

[15] Matters came to a head on 22 January 2003. Mr Jarden arrived in the yard in his truck. Mr Smith's evidence is that he confronted Mr Jarden and *...put it to him that he was back to his old tricks of putting in false timesheets. I told him it was like fraud which would be a police matter. I gave him a choice, that he could come down to the Police Station and sort the matter out or leave. Mr Jarden chose to leave and immediately walked out. His truck was left running in the yard.* Mr Smith added in evidence that he got Mr Jarden to come into the office; that he was pretty annoyed and disappointed; that he said to Mr Jarden *I've had enough of this – I've had a fair gutsful*; that he said *There are two doors, one – you and me to the police to sort it out, the other – you leave: you make the choice*; and that Mr Jarden said *fuck-you* and left. Mr Smith denied swearing at Mr Jarden.

[16] Mr Jarden's evidence is that he approached Mr Smith on 22 January to ask about his wages. Mr Smith told him that his wages were being held back due to allegations of theft. Mr Smith made it clear that he had stolen from the company by lodging timesheets for the bereavement leave and that there were two choices, *either to be charged with theft down at the Police Station or fuck off...* The account set out in the grievance letter of 17 April 2003 is substantially similar except Mr Smith is alleged to have said that Mr Jarden *...had two choices, either to cease his employment or be*

charged with theft as a servant. At the investigation meeting, Mr Jarden said that ...things got heated, he told me to fuck off...He said to fuck off and don't fucking come back.

[17] Drivers are required to maintain a logbook. Mr Jarden said that he kept his logbooks in the truck and left them there on 22 January 2003 when the employment terminated. Later, another employee retrieved a logbook with entries dated 23 December 2002 up to 22 January 2003. No-one can say where the logbook for the period immediately before 23 December 2002 now is.

[18] In evidence, Mr Smith provided a detailed analysis comparing Mr Jarden's timesheets, the daily load out sheets referred to above and (where available) the logbook. The logbook provides space for a driver to mark on duty time, driving time and rest periods, any supporting notes and the hub odometer reading. Mr Smith pointed to the timesheets, the log books and the load out sheets in order to satisfy me that *short days were being worked and long days being claimed*. He acknowledged owing some wages to Mr Jarden but said his difficulty now is sorting out *...what is fact and what is fantasy as far as his timesheets and logbook are concerned*.

Issues resolved

[19] Mr Jarden alleges and the company denies a constructive dismissal. The relevant law is well settled. In *Auckland Shop Employees IUW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal included cases where an employer gives the employee a choice between resigning and being dismissed, or the employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign.

[20] Assuming without finding that Mr Smith's evidence about the exchange on 22 January 2003 is correct, the termination amounts to a constructive dismissal. The choice given was between a complaint of fraud (or the like) to the police or a resignation. The NZ Police have no role in conducting an employer's disciplinary inquiry and Mr Smith either did or should know this. Before the exchange on 22 January 2003, Mr Smith had already decided that Mr Jarden was falsifying his timesheets so the only matter that needed to be sorted out was Mr Jarden's response to his employer's conclusions. Mr Smith assisted Mr Jarden with choosing his response because he made it clear that a police complaint would be made unless Mr Jarden resigned. Viewed that way, the situation is really little different from that facing the employee in *Northern Hotel etc IUOW v Hyatt Regency Hotels (NZ) Ltd* [1990] 1 NZILR 164. Here, as in the *Hyatt Regency* case, the initiative for the termination of the employment came from the employer. Accordingly, I find there was a constructive dismissal.

[21] It was strongly argued that, if a dismissal, it was justified for serious misconduct being the falsification by Mr Jarden of his timesheets. I was referred to several cases such as *NZ Amalgamated Engineering etc IUOW v Nestle NZ Ltd* [1991] 1 ERNZ 402 where the Labour Court commented:

In any event, it might be reasonable to suppose that a false claim by a worker for unearned wages might be a sufficient cause for summary dismissal whether there were a rule to that effect or not.

[22] There are two parts to the alleged falsification of timesheets. The first is the two claims for bereavement leave following the death of Mr Jarden's mother on Friday 6 December and then the news of the death of his grandson on Saturday 14 December. That is advanced before the Authority as justification on the basis that Mr Jarden admitted claiming more time that he was entitled to. That alleged admission, on Mr Smith's account, included an agreement to repay the time which

resolved the matter. The second part to the misconduct now relied on by the company is Mr Jarden's actions thereafter in continuing to work short hours and claim long hours.

[23] It is important to be clear about what is required of an employer when called upon to justify the dismissal of an employee. In *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 the Court of Appeal held that *The burden on the employer is not that of proving to the court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.* It is acknowledged by Mr Smith that he conducted no investigation before the brief exchange on 22 January 2003. On Mr Smith's account, the earlier misconduct over the bereavement had been resolved. The only thing that happened subsequently was the site manager apparently commenting to Mr Smith about Mr Jarden's lack of attendance. Mr Jarden was at work obviously attending to his duties on 22 January 2003 when Mr Smith, on his account, initiated the exchange. Accordingly, this is not one of those rare cases...*where the person...is captured 'in flagrante delicto' so there can be no doubt as to what the person has done and little, if any, doubt as to the character of that act:* see *FINSEC v Australian Mutual Provident Society* [1992] 1 ERNZ 280.

[24] What is established from my investigation is that Mr Jarden sought, and Mr Smith agreed to, two periods of bereavement leave, both of unspecified duration. The load out sheets show that Mr Jarden returned to work by 9:27am on 10 December and was also at work on 12 December after the first period. They further show that Mr Jarden had returned to work by 2:25pm on 19 December after the second period of leave. He was also at work on the morning of Monday 23 December, by which time Mr Smith would have first spoken to Mr Jarden about his concerns, if he did at all. From all of that, there was at best some room for a discussion about what other duties Mr Jarden attended to between 10 December and 13 December and again on 19 and 20 December. There are also some differences between the time sheets, the log books and the load out sheets after 20 December. The time for sorting out the answer to those questions, if they needed to be asked at all, was in December 2002, not November 2004. Even if disputed facts were resolved in favour of Mr Smith, there should have been an opportunity for Mr Jarden to explain or mitigate any concerns.

[25] I consider it unlikely that Mr Jarden would have admitted misconduct over his bereavement claim if he had been asked about the matter in December 2002. At worst, from his perspective at the time, there may have been some confusion between the two men over how much bereavement leave had been approved by Mr Smith. It is unlikely that Mr Jarden would have agreed to repay the extra leave by claiming less time than he actually worked then immediately ignored the agreement. A reasonably long standing employee who had been caught out but given a reprieve would normally adhere to the conditions of a reprieve. It is also difficult to see the sense of an employer who is concerned about inaccurate time keeping requiring an employee to continue to give inaccurate timesheets for an unlimited period of time in order to recoup an unspecified amount of time or money without administrative monitoring. Finally, it must be remembered that Mr Jarden's last pay received on 18 December 2002 was for the period ended Sunday 14 December. In evidence, Mr Smith attributed the sustained non-payment to Teresa's oversight but that is unconvincing. Mr Smith gave the instruction to stop the pay and it was for him to arrange its recommencement.

[26] Accordingly, I find that Mr Jarden had neither committed nor admitted any misconduct in respect of the bereavement leave claim. That makes the requirement for an adequate and fair investigation into Mr Smith's suspicions even stronger.

[27] For the foregoing reasons, Mr Jarden has a personal grievance against the company.

Grievance Remedies

[28] The third line of argument for the company is that Mr Jarden's actions contributed to the grievance in such a blameworthy way so as to require a 100% reduction in any remedies. I have already found that there was no misconduct by Mr Jarden over the bereavement leave claims. I do not accept that there was anything improper about the way in which Mr Jarden submitted his time sheets. I accept it was common for him to drop them at Teresa's house rather than give them to the site manager. Mr Jarden's explanation for the differences between his time-sheets, the log books and the load out sheets is that he would have been attending to ancillary duties or engaged on driving duties that did not take him to Rapahoe. Taking that into account, it seems that Mr Jarden may not have been working very hard but there is insufficient evidence to establish that the times entered on his timesheets were false. I reject the view that Mr Jarden contributed in a blameworthy way to the situation giving rise to his grievance.

[29] Mr Jarden suffered a measure of distress arising from the dismissal. It is also relevant that these events occurred soon after the bereavements. Those effects are remedied by ordering G C Smith Contracting Limited to pay \$6,000.00 to Mr Jarden.

[30] In his statement of problem, Mr Jarden sought six weeks wages as a reasonable period of notice. However, his evidence was that he commenced other employment after about a month. I find that he is entitled to one month's pay as reimbursement for wages lost as a result of his grievance. Although Mr Jarden said he normally worked 50 hours per week, that is not supported by his timesheets for the several weeks immediately before 22 January 2003. I order G C Smith Contracting Limited to pay Mr Jarden \$2,253.00 being one month's pay calculated at \$13.00 per hour for 40 hours per week.

Arrears Claim

[31] Mr Jarden is entitled to arrears of wages based on his timesheets from Monday 16 December 2002. That is 203 hours at \$13.00, a total of \$2,639.00. He is also entitled to holiday pay of \$158.34 on the arrears. Mr Jarden has already been paid for accrued holiday pay up to 15 December 2002 and the Christmas statutory holidays. I order G C Smith Contracting Limited to pay Mr Jarden \$2,797.34.

[32] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority