

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Rodney Graeme Leech (Applicant)  
**AND** Absolute Airconditioning & Refrigeration Limited (Respondent)  
**REPRESENTATIVES** Rodney Graeme Leech In person  
Mark Kamphorst, Advocate for Respondent  
**MEMBER OF AUTHORITY** Leon Robinson  
**INVESTIGATION MEETING** 6 June 2006  
**DATE OF DETERMINATION** 9 June 2006

DETERMINATION OF THE AUTHORITY

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The Authority determines that this employment relationship problem shall be resolved as follows:-

- A. Absolute Airconditioning & Refrigeration Limited is ordered to forthwith pay to Rodney Graeme Leech the gross sum of \$4,847.79 as arrears of wages.
  - B. Absolute Airconditioning & Refrigeration Limited is ordered to pay to Rodney Graeme Leech the gross sum of \$2,500.00 as reimbursement.
  - C. Absolute Airconditioning & Refrigeration Limited is ordered to pay to Rodney Graeme Leech the sum of \$1,000.00 as compensation.
  - D. The Authority recommends that Absolute Airconditioning & Refrigeration Limited account separately in its holiday and leave record for annual leave and days-in-lieu. It also recommends that Absolute Airconditioning & Refrigeration Limited make provision for days-in-lieu in its employment agreements and in particular, the question of whether any accumulated days-in-lieu are payable at termination.
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## The problem

[1] Mr Rodney Graeme Leech ("Mr Leech") applies to the Authority for an investigation of his claims that he is owed holiday pay and lieu days by his former employer Absolute Airconditioning & Refrigeration Limited ("AAR"). He also claims that he was unjustifiably constructively dismissed by AAR, but there is an issue as to whether that problem was properly brought to AAR's attention for resolution within 90 days of it arising. If it was not, there is a further issue as to whether Mr Leech should have the Authority's permission to raise that problem out of time because of any exceptional circumstances which might have caused delay in allowing him to do so within time.

[2] Mr Leech also asks the Authority to order that AAR apologise to him and provide him with a "true" reference. The Authority is not empowered to make such orders.

[3] AAR says it does not owe Mr Leech any money and further, that his alleged constructive dismissal claim is out of time.

[4] Regrettably the parties were not able to resolve the problems between them by the use of mediation.

## The claims for recovery

[5] Mr Leech commenced his employment with AAR on 29 January 2002 as a sales representative. I am satisfied that the individual employment agreement endorsed with Mr Leech's signature records the terms of his employment with AAR.

[6] Mr Leech was entitled to three weeks annual leave per year. He further claims that he was entitled to days-in-lieu for each day that he worked at various home shows out of hours, at which AAR's products were demonstrated. AAR's managing director Mr Malcolm Miller ("Mr Miller") says Mr Leech was extended days-in-lieu only after the home show in September 2003.

[7] The individual employment agreement makes no provision for days-in-lieu. I accept that this practice was extended to Mr Leech at Mr Miller's discretion. I also accept that there was no agreement that accumulated days-in-lieu would be paid out at the end of the employment.

[8] Be that as it may, it seems to me that AAR accounting for both days-in-lieu and annual leave indiscriminately in its records will inevitably lead to an outstanding entitlement that includes both types of leave. I take from that AAR's acceptance that it will pay out any outstanding balance for days-in-lieu at the termination of employment. It raised no objection with me when I articulated that view at the investigation meeting. On the contrary, it agreed.

[9] Having heard from the parties and examined AAR's annual leave records, I am satisfied that those records correctly record Mr Leech's entitlements in respect of both annual holidays and days-in-lieu. I did not understand Mr Leech to mount any serious challenge to AAR's documentary records. AAR's records detailing Mr Leech's outstanding entitlement at nine days, I find that at the termination of his employment Mr Leech was entitled to be paid for nine days as holiday pay and/or days-in-lieu. The gross sum entitlement is \$5,012.79. I shall refer to this sum hereafter as "the entitlement".

[10] Mr Leech was not been paid the entitlement when he left the employment. That is because AAR has made deductions from it for various items and has subsequently maintained Mr Leech is indebted to it in respect of which it has tendered to him no less than three separate invoices demanding payment.

[11] Deductions from wages may only be made where the employee consents to the same in writing. AAR relies on the individual employment agreement signed by Mr Leech as constituting that written consent. I conclude that the relevant clause does constitute that consent. Accordingly, I now proceed to examine each of the deductions AAR has made.

**Fuel**

[12] AAR has deducted \$314.96 from the entitlement for fuel it says Mr Leech used personally while he was on sick leave. Mr Leech says he was entitled to fuel for personal use as part of his remuneration. He conceded however that he would pay for his own fuel for periods when he took leave. I did not understand AAR to disagree with Mr Leech when he tells the Authority that although he was deemed unfit for work, he actually did work on most of the days that he purchased the fuel in question. I am satisfied that he did and I do not accept that AAR was entitled to make deductions from the entitlement in respect of this sum.

**Mobile telephone calls**

[13] AAR has deducted the sum of \$1,507.16 from the entitlement for personal calls it says Mr Leech made on his mobile telephone. The individual employment agreement makes no provision for personal mobile telephone calls. It provides only for the supply of a mobile telephone.

[14] Mr Leech was invoiced for what AAR determined were his personal calls. Mrs Tania Miller has studiously identified and itemised each personal call Mr Leech is said to have made from invoices dated between March 2004 and November 2005. She says little effort was required. I commented that the exercise seemed trivial because it appeared to me to be more vengeful than *bona fide*.

[15] Mr Leech tells the Authority he was permitted personal use of the mobile telephone provided to him as part of his remuneration package. He says he has never been asked to account for his personal calls at any time during his employment. Mr Miller says he spoke to Mr Leech about his personal use. I find he did not except on Mr Leech's final day of work.

[16] It is clear to me that AAR received and paid each of the mobile telephone invoices over the period from March 2004 and November 2005. It raised no issue each time with Mr Leech. If it had any difficulty with his use, it was within its own power to detect any such issue and take the corrective action required. It did not do so. I consider it contrary to equity and good conscience for it to seek to do so now.

[17] Nor do I consider the cost of the documented personal use excessive or unreasonable such that Mr Leech ought now be required to account to AAR for it.

[18] For these reasons, I conclude this deduction should not have been made from the entitlement.

**Airconditioning unit**

[19] AAR deducted the sum of \$2,266.32 from the entitlement in respect of a Hi-Sense airconditioning unit installed at Mr Leech's home in September 2002. This unit was a demonstration unit installed to allow AAR's customers to view it.

[20] Mr Leech says he agreed with Mr Miller that as long as he remained employed with AAR for one year he could keep the unit thereafter. He says Mr Miller omitted to provide him with a written agreement recording the arrangement. Mr Miller denies any such arrangement but I prefer Mr Leech's evidence.

[21] I am not persuaded that Mr Leech agreed to pay for this unit and the costs of its installation.

[22] I am satisfied that no debt arose in respect of it and accordingly AAR was not permitted to make any deduction from the entitlement for it.

### **Forensic computer testing**

[23] AAR had a forensic computer analysis conducted on Mr Leech's work computer. That analysis suggested Mr Leech had both deleted and copied computer files. The decision to conduct this analysis was AAR's prerogative and entirely its own decision. Mr Leech did not become indebted to AAR because of it. Accordingly, AAR was not permitted to deduct this cost from the entitlement.

### **1/2 day salary**

[24] AAR deducted two half days salary from the entitlement in respect of 27 October and 28 October 2005. I am not persuaded that Mr Leech did not work on the morning of 27 October 2005, but clearly when he left his employment at 1.00 pm on 28 October 2005, he was not working. A deduction for the afternoon of 28 October 2005 is appropriate.

### **Parking fine**

[25] Finally, AAR invoiced Mr Leech for a parking infringement of \$40.00. Mr Leech does not deny he is indebted to AAR for this sum. It may be properly deducted from the entitlement.

[26] In conclusion, I find that Mr Leech is entitled to the gross sum of \$4,847.79. That sum I calculate as follows:-

<i>Gross entitlement</i>	5,012.79
<i>Less one half day gross salary (28 October 2005)</i>	125.00
<i>Less parking infringement</i>	40.00
<b><i>Balance owing</i></b>	<b>\$4,847.79</b>

### **Determination**

[27] **I order Absolute Airconditioning & Refrigeration Limited to forthwith pay to Rodney Graeme Leech the gross sum of \$4,847.79 as arrears of wages.**

### **The claims for constructive dismissal**

[28] Mr Leech claims he was unjustifiably constructively dismissed from his employment. He explained to the Authority that there are two aspects to this claim. Firstly he says he is aggrieved by "things that happened during employment" which he explained relates to Mr Miller's manner and secondly, he is aggrieved by "what happened on his last day" of work.

[29] Mr Leech's final day at work was Friday 28 October 2005. He says he raised a personal grievance by a letter he wrote to Mr Miller dated 3 November 2005 which stated:-

*Dear Malcolm Miller*

*Re Personal Grievance*

*Due to your inactivity to get back to me Malcolm I'm taking a personal grievance case against you for a number of reasons, most for humiliation, embarrassment & Stress you have caused me since my employment.*

*I have sent four emails in the past week to you to try and get paid what is legally mine, I have herd(sic) nothing from you to date.*

*So now I am going for humiliation, embarrassment & Stress.*

*What I want is*

1. *My holiday Pay*
2. *My days in lieu for the home show*
3. *An apology in writing*
4. *\$10,000.00*
5. *A true reference*

*After meeting with the Labour Department to-day, they have out line the process to me and my options. I feel I have to do this not just for me but for you to take a look in the mirror & other staff that will follow from me.*

*My options are we attend Mediation (which you are well informed about due to your history).*

*If it is not settled there I file with the Employment Relations Authority, where I will raise the \$10,000.00 to 20,000.00 for more stress.*

*If I have not herd(sic) from you by Tuesday 8th November 2005 I will just file direct to the Employment Relations Authority.*

*Yours truly,  
Rodney Leech*

[30] Mr Leech clearly was aware that he had to bring to his employer's attention the personal grievance he claimed. That is the purpose of his advice of 3 November 2005. Mr Leech wishes to have investigated "things that happened during his employment" on the basis of this advice. I find however, the advice is not sufficient to found the claim of constructive dismissal that he now wishes to have investigated.

[31] The point of raising a personal grievance is to bring it to the employer's attention so that the problem can be resolved. But the problem must be first sufficiently made clear to enable the employer to know what it is it is being asked to resolve. An employer should not have to guess what the personal grievance or problem is. Mr Leech's advice does not make clear a personal grievance for constructive dismissal for the employer to resolve.

[32] It is clear that the advice makes plain Mr Leech's claim of a personal grievance. But what exactly that grievance is, is not clear. Certainly, there is no reference to an alleged constructive dismissal. But his advice lacks specificity in relation to "things that happened during his employment".

[33] I tend to the view that Mr Leech meant a different "grievance" in his advice from that which he now contends.

[34] As it stands, I conclude that Mr Leech's advice is actually a demand for wages and the "personal grievance" that is actually communicated is rather his feeling aggrieved because his demand for payment of his wage arrears had not been met. As I explained to Mr Leech, a claim for arrears of wages is not a personal grievance.

[35] For these reasons, I find that Mr Leech's advice of 3 November 2005 does not raise a personal grievance for constructive dismissal.

[36] Appreciating now the personal grievance Mr Leech now contends, I give consideration to whether Mr Leech should be permitted to proceed with his claim of constructive dismissal out of time. Mr Leech does not give evidence of any exceptional circumstances which occasioned his delay or failure to raise that personal grievance. He explains only that he has no experience in legal matters. That is not an exceptional circumstance.

[37] Nor am I persuaded that it would be just to grant leave in all the circumstances and accordingly, I decline to grant leave for Mr Leech to proceed out of time.

[38] But Mr Leech is on stronger ground re the second aspect of his contended grievance for constructive dismissal. His initial statement of problem dated 9 November 2005 says this in the facts of the problem section:-

*Since I handed in my notice and constructively forcing me to leave the premise and Employment before I could work out my notice*

[39] As bare as that statement is, in my view it is sufficient to put the employer on notice that Mr Leech has a problem with his notice period and he felt that he was forced to leave. That is a problem which was raised within 90 days of it occurring. Accordingly I find that Mr Leech has raised a grievance within 90 days which is properly the subject of an investigation.

[40] At the investigation meeting I heard from both Mr Leech and Mr Miller as to the events on Mr Leech's final day of work on 28 October 2005. I indicated to the parties my views stated in the immediately preceding paragraph and no objection was raised, indeed consent was forthcoming, in relation to investigating the grievance now in question.

[41] Mr Leech had given one month's written notice of his resignation on 26 October 2005. He intended his last day of work to be 25 November 2005. He was contractually only bound to give two weeks notice. Mr Miller was not pleased that Mr Leech was to take up new employment with a competitor. Understandably, he sought to negotiate with Mr Leech a lesser period of notice.

[42] At about 12.55 pm on 28 October 2005, Mr Miller approached Mr Leech. I accept Mr Leech's evidence of the discussion. Mr Miller asked Mr Leech why he had enquired about his holiday pay. Mr Leech said he was owed 34 days. Mr Miller then declared the Hi-Sense airconditioning unit was to be returned. Mr Leech said "No". Mr Miller then declared he was deducting fuel costs from Mr Leech's salary. Mr Leech protested. Mr Miller then commented on Mr Leech commencing work at 8.30 am instead of 7.00 am. Again Mr Leech protested. Mr Miller then complained that Mr Leech had personal information in his computer.

[43] The conversation then markedly deteriorated and Mr Leech says that Mr Miller became visibly enraged. Mr Miller then proceeded to make Mr Leech aware of various provisions in the individual employment agreement that Mr Miller considered Mr Leech had breached. Mr Miller then announced he would deduct \$4,500.00 for an airconditioning unit that had been installed at another company Mr Leech's brother-in-law had worked for.

[44] Mr Miller then declared he was taking Mr Leech's mobile phone, PDA and would answer and screen all Mr Leech's telephone calls. He said he would tell Mr Leech what to do and where to go. Mr Leech announced he could not work under such conditions. Mr Miller then said he owned the company and would make the decisions. At that point Mr Leech then said he was leaving and was not coming back. He said he would not be called a thief and be bullied. As Mr Leech began to leave and had back his company car key to Mr Miller, Mr Miller offered Mr Leech the company vehicle until the following Friday. Mr Leech declined the offer. Mr Miller insisted Mr Leech record his position in writing. Mr Leech duly did so recording that he was leaving and would not be bullied. He left as Mr Miller was engaged on the telephone leaving an earlier prepared letter for Mr Miller together with the handwritten note that he had been bullied.

[45] I conclude that Mr Leech could not reasonably have been expected to continue to work out his notice as a result of Mr Miller's conduct towards him on that final day. I find that Mr Miller's conduct was a breach of the duties of good faith and of fair and reasonable treatment that Mr Leech was entitled to. The breaches were serious and it was reasonably foreseeable that Mr Leech would resign because of them. I find therefore that Mr Leech was constructively dismissed during his notice period. He is entitled to remedies to resolve the problem.

[46] I award Mr Leech two weeks salary as reimbursement being the two weeks notice period under the terms of the individual employment agreement. **I order Absolute Airconditioning & Refrigeration Limited to pay to Rodney Graeme Leech the gross sum of \$2,500.00 as reimbursement.**

[47] As for compensation, having heard Mr Leech's evidence of the effects on him following his interaction with Mr Miller on 28 October 2005, a modest award of compensation is appropriate. **I order Absolute Airconditioning & Refrigeration Limited to pay to Rodney Graeme Leech the sum of \$1,000.00 as compensation.** This is not compensation for the loss of his employment but rather, for the notice period he was not permitted to work out.

## **Recommendations**

[48] I consider it appropriate to make recommendations with a view to avoiding similar employment relationship problems occurring in the future. I recommend that AAR account separately in its holiday and leave record for annual leave and days-in-lieu. I recommend also that AAR make provision for days-in-lieu in its employment agreements and in particular, the question of whether any accumulated days-in-lieu are payable at termination.

[49] To assist AAR, annexed to this Determination is section 81 of the Holidays Act 2003.

## **Costs**

[50] As Mr Leech was not represented by professional advocate, there will be no orders in relation to costs.

Leon Robinson

**Member of Employment Relations Authority**

**Holidays Act 2003****81. Holiday and leave record**

- (1) An employer must keep a holiday and leave record that complies with this section.
- (2) The holiday and leave record must contain the following information for each employee:
  - (a) the name of the employee:
  - (b) the date on which the employee's employment commenced:
  - (c) the days on which the employee actually works, if the information is relevant to the calculation of entitlements or payment for entitlements under this Act:
  - (d) the employee's current entitlement to annual holidays:
  - (e) the date on which the employee last became entitled to annual holidays:
  - (f) the employee's current entitlement to sick leave:
  - (g) the dates on which any annual holiday, sick leave, or bereavement leave has been taken:
  - (h) the amount of payment for any annual holiday, sick leave, or bereavement leave that has been taken:
  - (i) the dates of, and payments for, any public holiday on which the employee worked:
  - (j) the number of hours that the employee worked on any public holiday:
  - (k) the date on which the employee became entitled to any alternative holiday:
  - (l) the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay:
  - (m) the cash value of any board or lodgings, as agreed or determined under section 10:
  - (n) the details of any payment to which the employee is entitled under section 61(3) (which relates to payment in exchange for an alternative holiday):
  - (o) the date of the termination of the employee's employment (if applicable):
  - (p) the amount paid to the employee as holiday pay upon the termination of the employee's employment (if applicable):
  - (q) any other particulars that may be prescribed.
- (3) The holiday and leave record must be kept—
  - (a) in written form; or
  - (b) in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.
- (4) Information entered in the holiday and leave record must be kept for not less than 6 years after the date on which the information is entered.
- (5) The holiday and leave record may be kept so as to form part of the wages and time record required to be kept under section 130 of the Employment Relations Act 2000.