

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mike MacDonald (Applicant)
AND Summerbilt Products Ltd (Respondent)
REPRESENTATIVES Mike MacDonald - In person
Steve Summers – For the Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 3 December 2004
DATE OF DETERMINATION 11 April 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] Mr MacDonald initially claimed that he was unjustifiably dismissed from his employment as a Sales Representative on or about 19 February 2004. But, Mr MacDonald also said that he is owed wages from 16 March to 30 April 2004, while still in the employment of Summerbilt Products Ltd. When this contradiction was pointed out to Mr MacDonald by the Authority, he was uncertain as to the date of his dismissal, if indeed he was dismissed. Mr Summers, the owner/operator of Summerbilt Products Limited, says that Mr MacDonald simply resigned from his employment and that no monies are owed to him.

Therefore, the primary issue for the Authority to determine is: Was Mr MacDonald actually dismissed?

Background

- [2] Mr Summers owns and operates a small business selling automotive tools and equipment as well as manufacturing some equipment for four wheel motorcycles.
- [3] In mid-November 2003, Mr Summers broke a leg and following his release from hospital, he was immobilised for some time and required assistance with the operation of his business. Mr MacDonald started his employment as Sales Representative on or about 19 January 2004. While it seems that Mr Summers had some reservations about Mr MacDonald's lack of product knowledge, he accepted his assurance that he would familiarise himself with the product range and price lists.
- [4] Mr Summers says that he provided a job description and employment agreement but Mr MacDonald refused to sign the agreement as he was unhappy about some aspects of it, but was not specific. Mr Summers also says that it was verbally agreed that there would be a trial

period of three months, with a review after one month and after three months, whereby either party could terminate the agreement if they did not wish to continue the relationship.

- [5] Mr MacDonald denies the existence of a trial period. Apart from making the observation, that section 67 of the Employment Relations Act 2000, requires that trial or probationary periods must be recorded in writing, and there is no written record, the overall evidence regarding the fraught nature of the employment relationship, is such, that I do not need to determine whether a trial period was agreed to.
- [6] Because of his injury, and the associated need to obtain some income, Mr Summers returned to his previous occupation as a School Teacher hence Mr MacDonald was expected to work largely on his own. The evidence of Mr MacDonald is that he was told by Mr Summers that he would be shown around the sales area by Mr Summers for three weeks, but only received half a day of induction.
- [7] Mr Summers says that he gave Mr MacDonald the catalogues and price lists pertaining to the products for sale and he accepted Mr MacDonald's assurance that he would soon make himself familiar with what was required.

Performance Concerns

- [8] The evidence of Mr Summers is that after two weeks, he had serious concerns about Mr MacDonald's work practices and product knowledge. Mr Summers told of his concerns, including:
- Late starting the work day
 - Failure to keep a daily call log
 - Failure to balance monetary transactions with sales
 - Dress and footwear (the business bought clothing to upgrade Mr MacDonald's appearance)
 - Mr MacDonald's manners.
- [9] Mr Summers also says that after two weeks' of being in employment, Mr MacDonald gave him a list of matters that he alleged were problems pertaining to his employment. Mr Summers alluded in particular to Mr MacDonald wishing to take the work van home each day rather than picking it up from the residence of Mr Summers, or alternatively, Mr MacDonald wished to be paid to travel from his home to the home of Mr Summers. Mr MacDonald also wished to have his salary increased by \$5,000 and an increase in the percentage of commission being paid.

Accident Compensation

- [10] The evidence presented to the Authority is that Mr MacDonald slipped from the back of the vehicle that he used in carrying out his role, and injured his left elbow. This occurred, oddly enough, on Friday 13 February 2004. Mr MacDonald did not visit a Doctor at the A&E Department of Waikato Hospital until Monday 15 February 2004. It appears that Mr MacDonald then returned to work. He visited the A&E Department again on the afternoon of 19 February 2004. The Doctor's certificate of that date, shows that Mr MacDonald was to remain off work for a period of 10 days, being fit to return to normal work on 29 February 2004.
- [11] Then, for reasons unknown, Mr MacDonald visited the A&E Department again on 23 February and the period that he was to remain off work was extended to 5 March 2004. Mr

MacDonald visited the A&E Department again on 2 March, 4 March and 5 March 2004. The medical notes of the latter date record that Mr MacDonald required a new medical certificate but the Doctor refused to give him one, because at the visit the previous day (4 March), Mr MacDonald had been deemed fit to return to work by another Doctor.

- [12] Mr MacDonald was apparently unhappy about this diagnosis and he visited another medical practice on 8 March. He there received a medical certificate that stated that he was unable to resume work and that his condition would be reviewed on 5 April 2004. It seems that Mr MacDonald must have made a better recovery than was initially anticipated, as he visited the Doctor again on 18 March and was cleared to begin work again on 22 March 2004.
- [13] Mr MacDonald says that he provided all of the medical certificates to his employer but Mr Summers denies receiving them.

The Breakdown in the Relationship

- [14] Early on the morning of 19 February 2004, Mr Summers telephoned Mr MacDonald and requested his IRD number from him. While the overall evidence is a little unclear, it appears that the conversation became quite acrimonious, possibly because Mr MacDonald made it clear that he had some issues regarding his conditions of employment that he wanted to see resolved to his satisfaction. It seems that Mr Summers became frustrated. He says that he simply rang to obtain Mr MacDonald's IRD number, in order to comply with his tax obligations due that day. Instead, it appears that he was confronted by Mr MacDonald and as a result, he suggested to Mr MacDonald that he should find a job that was more suited to his talents. The conversation terminated at about that point.
- [15] The evidence of Mr Summers is that upon returning to his home after school, he found the van that Mr MacDonald used parked up when he thought that Mr MacDonald would be working. A phone call was made to Mr MacDonald and he informed Mr Summers that he believed that he had been told that morning that he had been "sacked". Mr MacDonald also informed Mr Summers that he had sought legal advice and that he also was now off work on accident compensation for six weeks.
- [16] The evidence of Mr MacDonald is that Mr Summers told him on the morning of 19 February that he no longer had a job. Mr MacDonald says that he went to the house of Mr Summers to talk to him but found that he had left for his work as a school teacher.
- [17] Mr MacDonald did not start work that day but he did three other things. Firstly, he consulted a lawyer. Secondly, he went to a Doctor and then remained off work due to the injury to his elbow. The third thing Mr MacDonald did was write a letter to Mr Summers.

The letter conveyed to Mr Summers that:

"My main concern is that I was told that I no longer had a position with Summerbuilt [sic] Products. This letter is to advise you that I believe your actions were unjustified and therefore I have taken a personal grievance for unjustified dismissal."

- [18] The letter further listed 20 matters pertaining to his employment that Mr MacDonald was unhappy about and concluded that: "These concerns are still outstanding" and it was suggested that he would meet with Mr Summers the next Friday (27 February) in mediation.
- [19] The two men attended mediation but this only lasted a short period of time with no tangible outcome. On the same day Mr Summers wrote to Mr MacDonald and informed him that:

- He was still employed by Summerbilt Products Ltd on a three month trial basis
- He was still on accident compensation at present
- That Mr Summers had applied to ACC to have a medical review
- That Mr MacDonald should only return to work when he was fully recovered from his injury and he would have to sign the employment contract

- [20] Mr Summers concluded his letter by conveying that if Mr MacDonald did not return to work within three days of receiving a medical clearance, he would be deemed to have terminated his employment.
- [21] In the meantime, because Mr Summers understood from Mr MacDonald that he would be off work for six weeks, he engaged another person (Mr Armstrong) for that period of time. Mr MacDonald is of the view that this was evidence of his dismissal. I heard from and observed Mr Armstrong, a most credible witness, who told me that he was fully aware that he was only engaged to work while Mr MacDonald was injured. I conclude, without hesitation, that Mr Summers had good reason to believe that Mr MacDonald was going to be off work for six weeks and hence he had no choice but to employ a replacement for that period of time in order to maintain his business.
- [22] I also conclude that Mr MacDonald's position remained available to him and he was mistaken in his belief that he was dismissed. Indeed, it would appear that Mr MacDonald also came to the conclusion that his employment remained intact, as on 19 March 2004, he wrote to Mr Summers and informed him that:
 "I will be at work at 8.00am as per normal on Monday 22nd March."
- [23] Mr MacDonald also raised a number of other issues regarding his employment contract and payment for the first week that he was off work with his injury. Mr MacDonald conveyed that he was prepared to participate in mediation "to resolve this ongoing conflict."

Incompatibility

- [24] Just exactly what occurred between Mr MacDonald and Mr Summers after the 19th March letter is somewhat unclear from the overall evidence but Mr MacDonald did not start work on 22 March. I am able to conclude that Mr MacDonald visited the residence of Mr Summers on 19 March to deliver his letter of that date. The result was that there was considerable hostility between the two men with Mr MacDonald eventually being told by Mr Summers he was trespassing, and Mr MacDonald called the Police but they did not attend.
- [25] Mr MacDonald returned to the Summers' residence again at 8:00am on 21 March, demanding his personal possessions from the van. A Police Officer was present at the request of Mr MacDonald. Further aggression between the two men was present. The outcome was that the Police Officer obtained Mr MacDonald's personal possessions for him and he departed.
- [26] A telephone conversation between Mr MacDonald and Mr Summers appears to have taken place on 6 April 2004. Mr MacDonald wrote to Mr Summers on 7 April. He recorded that:
 "As discussed in our conversation last night, both parties agreed that the communication and the working relationship are non-existent and therefore agree to part company with the understanding no notice will be required by either party to end the working contract, but both parties must sign and agree to this."

- [27] Mr MacDonald also drew attention to his view that he was owed payment for the first week that he was absent from work with his accident and that he was owed two weeks wages from 22 March to 5 April 2004 as he was available for work.
- [28] However, no agreement (in writing or otherwise) was entered into, albeit I have no doubts that the parties had indeed mutually concluded that there would have to be a parting of the ways.

Determination

Was Mr MacDonald Dismissed?

- [29] I find that Mr MacDonald was not dismissed from his employment. It is demonstrably obvious that the employment relationship terminated because Mr MacDonald and Mr Summers were simply not compatible. That is as kindly as I can state the position. Indeed, I am bound to say that at the investigation meeting, I was unfortunate enough to observe the unconcealed hostility that still remained between these two men some 7 months after they had parted ways. It is clear to me that the employment relationship was destined to failure almost from its beginning.
- [30] Mr MacDonald does not have a personal grievance. Therefore, the remedies that he seeks are not available to him

The Matter of Payments Due

(a) The First Week after the Accident

- [31] Mr MacDonald claims that he was not paid wages for the first week that he was off work as a result of his accident. It seems that Mr Summers had some reservations about whether Mr MacDonald incurred the injury at work and there was some suggestion of a review taking place with ACC, but there is no evidence that this occurred. Given that there is no tangible evidence to show otherwise, and that medical certificates support Mr MacDonald's claim, I find that he is entitled to be paid for the first week that he was absent from work due to his injury.

Mr Summers is ordered to pay to Mr MacDonald one weeks' wages being the gross sum of **\$480.77** (\$25,000 per annum divided by 52 weeks).

(b) Holiday Pay

- [32] Mr MacDonald says that he was not paid holiday pay due to him when he ceased his employment. Mr Summers did not contest this claim. The Holidays Act provides that an employee that works for a term of less than 12 months must be paid holiday pay at the rate of 6% of the gross earnings for the period of time worked. Mr MacDonald is entitled be paid holiday pay. The Inland Revenue record shows that Mr MacDonald earned the gross sum of \$1,031.00. The order of one weeks' wages (\$480.77) must be added to that sum, making a total of \$1,511.77 x 6% = \$90.70.

Mr Summers is ordered to pay to Mr MacDonald holiday pay of the gross sum of **\$90.70**.

(c) *Commissions*

[33] Mr MacDonald claims that he is owed commission payments at the rate of 5% of gross sales made. While it was agreed that he would be paid commissions, unfortunately, he did not keep any records of the sales made and as there is no tangible evidence to support his claim, I must decline it.

(d) *Payment of Wages from 22 March to 2 April 2004*

[34] Mr MacDonald says that he had a medical clearance to begin work again on 22 March 2004 and was ready and willing to do so.

However, it is my conclusion that probably as at 19 March, and certainly by 21 March 2004, the breakdown in the employment relationship was complete and irreparable and Mr MacDonald contributed substantially to the breakdown. I find that it is fanciful for Mr MacDonald to now claim that he was reasonably contemplating returning to work and should be paid. The claim for payment of wages is declined.

Costs

[35] Mr MacDonald claims \$70.00 for the application fee paid to the Authority. While he has been unsuccessful with his personal grievance claim he has obtained payment of monies due to him. It should not have been necessary to litigate for these payments as they were lawfully due.

Mr Summers is ordered to pay to Mr MacDonald the sum of **\$70.00**.

Ken Anderson
Member
Employment Relations Authority