

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 78/09  
5144170

BETWEEN                      DAVID GEORGE PAINTER  
Applicant

AND                              CANSTAFF LIMITED  
Respondent

Member of Authority:      Philip Cheyne

Representatives:            Peter McDonald, Advocate for the Applicant  
Robert Thompson, Advocate for the Respondent

Submissions Received:    21 May 2009 on behalf of the Applicant  
3 June 2009 on behalf of the Respondent

Determination:              10 June 2009

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**DETERMINATION OF THE AUTHORITY**

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[1] This determination resolves whether Mr Painter raised with his employer within time a personal grievance; and if not, whether leave should be granted for him to raise a grievance out of time. By agreement this part of Mr Painter's employment relationship problem is determined followed the receipt of submissions from both sides.

[2] Mr Painter worked for Canstaff as a carpenter/builder from 27 December 2007 until 19 September 2008. There is a signed employment agreement. It provides *Your minimum hours of work shall be not less than 40 (forty) hours per week, as required by the demands of the business.* After 25 May 2008 Mr Painter apparently was not paid the 40 hour minimum per week. He says that there are a total of 451 hours not paid up to 21 September 2008.

[3] By letter dated 19 September 2008 Mr Painter resigned *as of immediate effect*. The letter includes the following:

*As you can see from your records there are 450 hours at \$20.00 per hour for which I have not yet been paid according to my contract of employment, plus my holiday pay.*

*I would appreciate receiving this payment within the next 14 days.*

[4] After this letter Mr Painter met with one of the directors of Canstaff (Matthew Jones) but it is not suggested that any grievance was raised as a result of this meeting. Next, Mr Painter wrote to Mr Jones on 10 November 2008 as follows:

*Having had no communication from yourself or Bill after our meeting regarding the 450 hours plus holiday pay on that amount, I am now formally inviting you to mediation at the Department of Labour. If you wish to make good all monies owed, this can be done as you have my bank details. ...*

*If you prefer to go to mediation please advise when you are available.*

*I respectfully request that you respond to this letter within 7 days.*

[5] When nothing more was heard Mr Painter lodged with the Authority a statement of problem on 25 November 2008. He described his problem as *NON PAYMENT OF WAGES AS PER CONTRACT OF EMPLOYMENT AS SIGNED BY MATT JONES (FOR CANSTAFF LTD) AND DAVID PAINTER* and wanted the problem resolved by *PAYMENT OF THE 451 HOURS PLUS HOLIDAY PAY FOR THE HOURS THAT ARE OWED TO ME.*

[6] As usual the Authority served Mr Painter's statement of problem on Canstaff Limited. In the meantime and apparently in response to Mr Painter's 10 November 2008 letter, Canstaff sought some advice and its representative wrote to Mr Painter on 26 November 2008 denying any liability for arrears of wages but agreeing to attend mediation. The Authority also canvassed whether there was agreement to attend mediation, which there was. However mediation did not resolve the problem and on 20 March 2009 Mr Painter, who by then was represented, lodged an amended statement of problem seeking to include *a further claim that, as a direct result of the Respondent's actions, the Applicant was severely and unjustifiably disadvantaged and/or constructively dismissed.* The amended statement of problem also added the remedy of compensation under s.123(1)(c)(i) of the Employment Relations Act 2000. That caused Canstaff to lodge a statement in reply saying that Mr Painter's unjustified disadvantage and constructive dismissal grievances had not been raised within 90 days.

**Were grievances raised in time?**

[7] The position for Mr Painter is that his original statement of problem alleging a breach of his employment agreement was sufficient to raise a personal grievance of unjustified disadvantage and/or constructive dismissal.

[8] The difficulty with Mr Painter's position regarding constructive dismissal is that his exchanges with the employer including the statement of problem did not raise any complaint at all about the termination of his employment. Mr Painter's complaint was solely about Canstaff's failure to pay him the wages he says he was due under the employment agreement. If that is why Mr Painter resigned (as it might very well have been), he did not communicate any dissatisfaction about the termination of his employment to his employer.

[9] The same problem does not arise regarding an unjustified disadvantage grievance. Mr Painter's complaint is the alleged failure to pay him all wages due. At least some of the alleged non-payment fell within the 90 days leading up to when Mr Painter raised his problem with Canstaff. An employer's failure to pay wages might come within the definition of personal grievance set out in s.103(1)(b) of the Employment Relations Act 2000. The Authority, in concentrating on resolving the employment relationship problem, may treat the matter as a type other than as described by Mr Painter: see s.160(3) Employment Relations Act 2000. Having said that, I would need to be persuaded that the elements of an unjustified disadvantage grievance were proven and that the problem was more than the arrears of wages claim initially lodged by Mr Painter.

**Exceptional circumstances?**

[10] Having determined that no constructive dismissal grievance was raised within time I must consider whether the delay in raising a grievance was occasioned by any exceptional circumstance and if so, whether leave should be granted for a constructive dismissal grievance to be raised out of time.

[11] There are several examples of exceptional circumstances set out at s.115 of the Act but none describe the present case. Here the exceptional circumstances are said to be Mr Painter's limited knowledge of New Zealand law and the grief and hardship caused to him by Canstaff's failure to pay him in accordance with the employment agreement. I should explain that Mr Painter was recruited overseas for this job and

then emigrated from the United Kingdom to New Zealand to start work. However, I do not accept that Mr Painter's lack of knowledge about New Zealand law is an exceptional circumstance. There is nothing unusual in a skilled employee being recruited overseas to work in New Zealand, nor is there any reason in principle to distinguish between a local employee and an immigrant employee. Ignorance about their rights is not exceptional in either case. In addition, the employment agreement included a plain language description of procedures for dealing with employment relationship problems and specifically referred to the time limit for personal grievances. Mr Painter could easily have sought information or advice about his rights. While it is said that Mr Painter suffered grief and hardship because of Canstaff's failure to pay him, this is not a case where the potential grievant was so affected or traumatised that they could not properly consider raising a grievance. That is clear because Mr Painter took up his complaint with his employer and commenced proceedings within 90 days. He just did not raise any grievance about the termination of his employment. Accordingly the delay in raising a constructive dismissal grievance was not occasioned by any exceptional circumstances.

### **Summary**

[12] Mr Painter did not raise a grievance about the termination of his employment within time and cannot be granted leave to raise that grievance because the delay was not occasioned by any exceptional circumstances.

[13] Mr Painter's problem may amount to an unjustified disadvantage grievance despite its description by him as *NON PAYMENT OF WAGES*. This problem will be investigated as scheduled on 4 August 2009.

[14] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority