IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 127
5329840

	BETWEEN	MILLIN JAMES PARRATT Applicant
	A N D	MARK GROCOTT t/a FLUFFY'S ROOF COATINGS Respondent

Member of Authority:	M B Loftus
Representatives:	Philippa Tucker, Counsel for Applicant Mark Grocott on his own behalf
Investigation Meeting:	21 June 2012 at Christchurch
Submissions Received:	At the Investigation Meeting
Date of Determination:	27 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Parratt, has two claims. His first is that he was unjustifiably dismissed on 23 December 2010. His second allegation is that Mr Grocott owes a significant sum in respect of unpaid wages, unpaid holiday pay and monies inappropriately deducted for his wages.

[2] Mr Grocott denies the claims. He states he never dismissed Mr Parratt and contends Mr Parratt could still be employed if he so chose. Mr Grocott is also of the view there is nothing owing in respect to wages or holiday pay, though he does concede some liability regarding the deductions.

Adjournment application

[3] The application was filed on 20 January 2012. The investigation meeting was scheduled for 21 June during a telephone conference which occurred on 15 March. Mr Grocott participated in the telephone conference.

[4] On 19 June 2012 Mr Grocott sought an adjournment of the investigation meeting. The reason pertained to the sourcing of representation. It was inconsistent with advice Mr Grocott had given over the telephone on 15 March and the application was opposed on that ground. Mr Grocott was advised by e-mail that his adjournment application would be discussed at the commencement of the investigation meeting but he should not assume it would be granted and come prepared to proceed.

[5] At the commencement of the investigation meeting I questioned Mr Grocott about inconsistencies regarding his instructing of counsel. Unfortunately the answers he gave compounded the inconsistencies. His answers were initially contradicted by the statements made by Ms Barbara McGinty during a telephone conversation she had with one of the Authority's support officers that morning and then undermined by his own statements. Ms McGinty is Mr Grocott's mother-in-law and assists him by performing various administrative tasks, including the preparation of staff payroll. She had telephoned about the adjournment request.

[6] I concluded that the situation in which Mr Grocott found himself and which led to the adjournment application was the result of a failure to act on his part. I reach this conclusion as a result of:

a. the contradictions when trying to explain the reason for the application;

b. the fact that other than the late provision of a statement in reply, Mr Grocott has failed to honour any undertakings or requirements relating to the provision of information to either the Authority or Mr Parratt; and

c. his failure to respond to a prompt he received from the Authority about his representation on 8 June.

[7] Procrastination does not justify an adjournment. Mr Parratt is entitled to have his case progressed and Mr Grocott had two months notice of the investigation meeting.

Background

[8] Mr Parratt commenced working for Mr Grocott in January 2006. There is no written employment agreement but the parties agree the arrangement was for permanent and ongoing employment. The hours of work would, however, vary and work would only be offered when it was both available and the weather permitted its performance. Mr Parratt was allegedly paid $16 per hour, but various calculations produced by his counsel in respect to the arrears claim suggest the actual paid rate may have been $15.90. Neither party can clarify the possible discrepancy.

[9] Mr Grocott and Mr Parratt agree the weekly hours were, albeit rarely, as high as 65 but during winter they could be in the mid to low teens. Mr Parratt says the average was somewhere between 20 and 30. Sadly there are serious issues with Mr Parratt's tax records as PAYE was never forwarded to the IRD for a full tax year. The closest is the eleven months between 1 April 2009 and 28 February 2010. Those figures suggest an average of 31 hours per week, which is above the top of Mr Parratt's estimated range.

[10] Whilst the relationship had its ups and downs and notwithstanding various irrelevant allegations levelled during the investigation meeting, it would appear nothing overly untoward occurred until the final week of Mr Parratt's employment. In saying nothing overly untoward, I put aside the pay issues. Mr Parratt claims that payments were often short, drip fed and alternated between cash (sometimes under the table) and deposits into a bank account. There were also issues with the payment of Mr Parratt's fines. Mr Parratt claims Mr Grocott failed to forward to the Court monies taken from his pay as a contribution toward outstanding fines in accordance with multiple attachment orders (sections 87(1)(b), 88(3)(a) and 103 of the Summary Proceedings Act 1957). I shall return to these issues when discussing the arrears claim but suffice to say the allegations are not denied by Mr Grocott – indeed he concedes various failures in this respect.

[11] Mr Parratt claims that on or around 15 December 2010 Mr Grocott approached him and another employee, Mr Shaune Jacobsen, and advised the business would shut

for Christmas on Wednesday 22 December. He says he expected the normal closure of around four weeks but adds Mr Grocott did not mention a return date. He goes on to say:

> *Mark told me that there may not be enough work in the week leading up to 22 December 2010 and that if I was offered other casual work that week I should take it.*

[12] Mr Grocott accepts he approached the two on 15 December. He accepts he said the Christmas close down would commence on 22 December but adds he advised them of a proviso - that date would only apply if all their work was completed by then. He agrees he did not advise a recommencement date in the New Year. He does not, however, agree with Mr Parratt's claims in respect to the comments about casual work. Mr Grocott is of the view he advised that things were quiet as a result of the earthquakes and if either Mr Parratt or Mr Jacobsen could source casual work during the close down, they should avail themselves of the opportunity.

[13] Mr Jacobsen's recollection of the conversation is similar to that of Mr Parratt. Indeed, it is so similar that he (Jacobsen) immediately went and sourced work for both himself and Mr Parratt. The job was a short one to be completed between 21 and 30 December.

[14] In the interim Mr Parratt did another couple of days work for Mr Grocott and was then away sick on Monday 20 December.

[15] On the morning of the 21st he sent a text to Mr Grocott advising he would not be in that day. Mr Grocott accepts that but adds he replied by asking why not and received no reply. Mr Parratt does not recollect the response but accepts it could have happened. Exactly the same occurred the following morning, 22 December, with Mr Parratt working on the casual job arranged by Mr Jacobsen those two days.

[16] Mr Parratt attributes his performing the other work to two things. There was his understanding he was acting in accordance with Mr Grocott's advice they avail themselves of casual work and he was also of the view Mr Grocott's failure to pay wages owing left little choice given a need for income to both pay his bills and feed his family.

[17] On the afternoon of 23 December Mr Parratt and Mr Jacobsen went to Mr Grocott's home. They say they did so to collect various pay documents, raise

concerns about deficient pay and question Mr Grocott's failure to comply with attachment orders for both. They say they had previously gone to Mr Grocott's home over the preceding day or two but Mr Grocott had not been there.

[18] Mr Parratt goes on to say:

> *… Shaune and I requested copies of our time sheets and wage records. We had always filled out time sheets but had never been given pay slips. Mark refused to give the time sheets to us. He just gave Shaune and I an envelope each with a handwritten note inside. The note detailed the list of hours we had worked and how much we had been paid for the year. I do not believe the calculation on that list was correct. I believe I had worked a lot more hours than were recorded and was owed more than I was paid.*

[19] Mr Parratt goes on to say Mr Grocott's attitude, along with a comment (the details of which he can no longer recollect), angered him. He says he bit his tongue and said nothing. Mr Parratt states Mr Grocott then said *I've terminated your employment*. Mr Parratt says he immediately returned to the car, got in and slammed the door.

[20] The position taken in the statement in reply was that when Messrs Parratt and Jacobsen arrived on the 23rd they were in painting clothing and had paint on their hands. It said Mr Grocott was annoyed they had been working somewhere else and not completing jobs for him. It was accepted he could, as a result, have been rude. The statement goes on to advise that after an initial discussion:

> *Shaune walked inside the house & Mark spoke to Millin re finishing the job that he was doing for Mark, Millin respond was just shrugged his shoulders, never spoke & Mark said to Millin with that attitude I don't know whether I want you back next year …*

[21] Mr Grocott's oral evidence remained relatively consistent with that, though he initially said his comment about *not wanting Mr Parratt back with that attitude* was made to his (Mr Grocott's) partner, Angela. Mr Jacobsen immediately challenged that statement on the grounds she was not there but at the back of the house with him. Mr Grocott immediately accepted that and said he made the comment to Angela and Mr Jacobsen after Mr Parratt had left. Mr Jacobsen says no – the comment was *[I've] terminated Millin's employment because he didn't turn up on time*.

[22] Mr Parratt goes on to say that when Mr Jacobsen returned to the car, he (Parratt) told Mr Jacobsen he had just been sacked. He claims Mr Jacobsen responded

by advising *I know, Mark's already told me*. Mr Jacobsen has a similar recollection and remains adamant that Mr Grocott had told him that he had terminated Mr Parratt.

[23] Mr Grocott remains of the view his comment was along the lines of *with that attitude I'm thinking about terminating,* though he adds he is adamant *terminating* is not a word he would use - it's not his style, he would have said something like *fired*.

[24] Whichever is correct, it is clear that Mr Parratt was of the view he had been dismissed. He returned home in a rage, advised his wife of his dismissal and threw a few things around the house. He also tore up a resignation letter he had previously prepared. The failure to pay wages was behind the letter but Mr Parratt was still undecided as to whether or not he would actually use it. However the issue had become irrelevant as, to use Mrs Parratt's words, he would no longer need it.

[25] Mr Parratt did not return to Mr Grocott's employ nor despite his view a return was possible, did Mr Grocott follow up and seek clarification of Mr Parratt's intentions.

Issues for determination

[26] There are, possibly, three issues for determination. They are:

a. Was Mr Parratt dismissed; and

b. If so, can the dismissal be justified; and

c. Does the arrears claim have validity. The arrears claim has two parts – unpaid wages and holiday pay, then the deductions.

Determination – *the dismissal*

[27] The first question is whether or not Mr Parratt was dismissed by Mr Grocott?

[28] I conclude the answer is yes – he was.

[29] While Mr Grocott says he would not use the word *terminate*, which Mr Parratt is adamant he did, I note he used it freely in the investigation meeting. In any event a dismissal is a sending away and I have no doubt that Mr Grocott sent Mr Parratt away. I reach that conclusion for the following reasons:

a. Mr Grocott's contradictory explanations and comments regarding the adjournment application leaves doubts about the accuracy of his evidence;

b. Mr Grocott admits he was displeased with Messrs Parratt and Jacobsen when they arrived on 23 December. He accepts his displeasure with Mr Parratt was enhanced by his view of the latter's attitude. It is not, in such circumstances, inconceivable Mr Grocott's displeasure was expressed via a termination;

c. Mr Grocott contends his words were *with that attitude I'm thinking about terminating* or something to that effect yet his answers as to where and when he actually uttered them are, again, inconsistent and contradictory; and

d. Most importantly there was the evidence of Mr Jacobsen. He is a third party who has had a friendship with both, yet beholden to neither. His evidence is clear. Both Mr Grocott and Mr Parratt told him within a short time of the alleged event, that there had been a dismissal. I accept that evidence and its accuracy.

[30] Turning to justification. Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is justifiable

> *… must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal … occurred.*

[31] That test is used as Mr Parratt was dismissed before the now current test came into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[32] Traditionally the objective review has been performed by considering the employers actions from both a substantive and a procedural perspective. Whilst it is

clear that issues of substance and process overlap and there is no firm delineation, separation still provides a useful means of analysis.

[33] Here there must be doubts about a substantive justification given Mr Grocott's position that Mr Parratt would still be employed if he so chose. In other words there was not, according to Mr Grocott's evidence, an event capable of justifying a dismissal.

[34] Turning to procedure. Having said the test of justification applicable as of 1 April 2011 is not applicable here, I believe it appropriate it be referred to. I do so given a view its content, or at least subsections (b) to (d), succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The new provision requires that:

> *(3) In applying the test in subsection (2), the Authority or the court must consider—*
> *…*
> *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
> *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
> *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

[35] There was no evidence of compliance with those requirements – no raising of concerns, no real discussion, no attempt to ascertain exactly what happened and why Mr Parratt was working for another employer. Such failures would also have rendered a dismissal unjustified prior to implementation of the present test given a failure to adhere to the rules of natural justice.

[36] There is simply no justification for the dismissal.

Remedies

[37] Mr Parratt seeks wages lost as a result of his dismissal and compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[38] In respect to wages, section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Here, the period of loss was less than 3 months.

[39] Whilst there is some debate as to whether or not the amount paid was appropriate, the evidence is that Mr Parratt did receive holiday pay for a period that extended until at least 14 January 2011. He commenced a new job on 7 February. The intervening period is three weeks. Applying the only solid evidence I have in respect to his average weekly earnings (see 9 above and 47 below), I conclude an appropriate weekly rate is $496 gross ($16 per hour by 31 hours per week). Three weeks loss is $1,488 and I consider that an appropriate award.

[40] Mr Parratt's evidence is the new job was intended to be permanent full time but he raised the fact he lost it as a result of the February earthquake. Given those circumstances its loss, and the consequences thereof, can not be visited upon Mr Grocott.

[41] Turning to the claim for compensation. Whilst not extensive Mr Parratt's evidence in support of the claim referred to the financial strain he found himself under. He found that both stressful and embarrassing as it forced him to borrow so he could pay his bills. Also embarrassing was a resulting requirement to move in with his mother in law so that he could reallocate money from rent to the repayment of debt. His evidence was supported by that of his wife and went unchallenged.

[42] Having considered the evidence, I conclude an award of $6,000.00 to be appropriate.

[43] The conclusion that remedies accrue means I must, as required by s.124 of the Act, address whether not Mr Parratt contributed to his demise in a significant way. The conclusion the dismissal has neither substantive nor procedural justification means the answer must be no.

The arrears

[44] Turning to the arrears. The claim has two parts. The first is in regard to unpaid wages and holiday pay. The second is that Mr Grocott improperly deducted monies from Mr Parratt's pay.

[45] The wage claim poses significant problems as there are no wage records. Again Mr Grocott proffered some contradictory explanations as to why. The first is the records were lost in the February earthquake, though this is contradicted by an uncontested allegation he promised their production after that event. Mr Grocott has also claimed the records are in the possession of a Department of Labour inspector who was investigating Mr Parratt's wage claims. The Department's response is no, the records were never requested as the file was closed at an early stage when Mr Parratt chose to use counsel to pursue the matter. Mr Grocott also failed to pursue the issue with the Department as he was to do after the phone conference of 15 March.

[46] The situation is not assisted by the fact that the tax records are also incomplete. While Mr Grocott says he continued to deduct PAYE from payments made to Mr Parratt, he accepts he ceased forwarding those monies to Inland Revenue in February 2010. There was also evidence of a similar failure at the beginning of the employment. Mr Grocott states he had major cash flow problems and his first priority was to pay Messrs Parratt and Jacobsen. He says both the PAYE deductions and monies allegedly removed for forwarding to the Court under the attachment notices effectively became paper transactions. He never had the money in the first place. Whilst he (or more correctly Ms McGinty) recorded a deduction, that never occurred and the monies were not forwarded to either IRD or the Court.

[47] Mr Grocott's admissions lead me to a conclusion these claims have validity. The question is to what extent. Section 132 of the Employment Relations Act 2000 provides that where there is a failure to keep or produce wage records I can accept the claim as correct unless there is absolute evidence to the contrary. The problem is that the quantification of Mr Parratt's wage claim is unsustainable, as the documents proffered in support assume he worked 40 hours per week. That is clearly not the case. His evidence was that he averaged somewhere between 20 and 30 hours per week and the best available documentary evidence suggests a figure just above that - 31 hours per week. In the circumstances I shall accept that last figure as accurate and apply it to the entire period of employment.

[48] That conclusion would suggest Mr Parratt should, for the period of employment, have been paid $69,936. The documents presented at the investigation indicate he received $49,939.84. The shortfall is 19,996.16. That amount is payable.

[49] Thankfully questions about quantification do not apply to the attachment amounts. The evidence is that over the period of his employment $6590 should have been deducted. According to Mr Grocott it was - at least on paper. The evidence is $3,665 was forwarded to the Court. The shortfall is $2,925.

[50] That was money originally payable to Mr Parratt. Its redirection to the Court results from issues between Mr Parratt and the Court. Mr Grocott was simply an intermediary required to facilitate the payment – he never had any entitlement to the money. Mr Parratt has now resolved the matter with the Court by other means which means the money is no longer required for the purpose it was originally deducted. It should therefore be returned to Mr Parratt.

[51] The total owing is $22921.16. Mr Parratt seeks interest on that amount. Interest is to reimburse someone for use, by others, of money that is theirs. Here there can be no doubt Mr Grocott has either retained and had the use of monies he was not entitled to or conversely had the benefit of not sourcing monies he owed but did not originally have. The effect is the same and gives rise to a situation in which interest is payable.

[52] The Authority's power is set out in clause 11 of the 2nd Schedule to the Act. That permits the Authority to order interest at the rate prescribed under the Judicature Act 1908, currently 5% per annum. Mr Grocott is therefore to pay interest at 5% per annum on $22,921.16 starting on 23 December 2009 and continuing until the monies owing are paid in full.

Costs

[53] Mr Parratt seeks a contribution toward costs he incurred pursuing his claim. Mr Grocott made no response. As the successful party, and in the absence of a contrary argument, Mr Parratt is entitled to an award in this respect.

[54] Normally the Authority will assess costs on a daily tariff basis: refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. In assessing that tariff $3,500 per day is now considered a common starting point. From there adjustment may occur depending on the circumstances but neither party argued for a departure from the scale.

[55] This matter took approximately half a day. Applying the scale that means an award of $1750, which I consider appropriate in the circumstances.

Orders

[56] For the forgoing reasons I conclude Mr Parratt has a personal grievance. He is also entitled to recover monies either unpaid or improperly deducted from his wages. The following orders are therefore made:

i. The respondent, Mr Mark Grocott, is to pay the applicant, Mr Millin Parratt, $1,488.00 (one thousand, four hundred and eighty eight dollars) as recompense for wages lost as a result of the dismissal;
ii. Mr Grocott is to pay Mr Parratt a further $6,000.00 (six thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act;
iii. Mr Grocott, is to pay Mr Parratt a further $22,921.16 (twenty two thousand, nine hundred and twenty one dollars and sixteen cents) in respect of monies owing;
iv. Mr Grocott is to pay interest at 5% per annum on the amount in (iii) above starting as of 23 December 2009. He is to continue to do so until both the arrears and interest are paid in full; and
v. Mr Grocott is to pay Mr Parratt a further $1,750.00 (one thousand, seven hundred and fifty dollars) as a contribution toward costs.

M B Loftus
Member of the Employment Relations Authority