



- iv. failed to pay Mr Plank for the full number of hours he had worked each week.

[2] Mr Crawford does not dispute that he had occasion to take Mr Plank to task about performance issues. He also accepts that (after an unauthorised absence) he warned him that his job was in jeopardy. He says that this was justified. However he disputes purporting to dismiss Mr Plank at any time. Mr Crawford says that on 15 February he decided to relieve Mr Plank of boom spraying duties because of concerns about his competence to perform that work. Mr Crawford told me he was desperate for labour at that time and had plenty of other work for Mr Plank at the same hourly rate. He said he had not even contemplated dismissing Mr Plank. On 23 February he wrote to Mr Plank asking him “*Could you please confirm in writing your intention with regard to your return to employment.*” Mr Plank did not return. Instead, he raised a grievance in March 2006, attended mediation with Mr Crawford in March 2007, and finally lodged his employment problem in the Employment Relations Authority in December 2008.

[3] Mr Plank also claims arrears of wages arising out of the alleged underpayments. In relation to this issue Mr Crawford told me that on 8 May 2006, after obtaining advice, he paid Mr Plank what he understood at the time to be the back pay the respondent owed in relation to payment for statutory and annual holidays. He now suspects that he overcompensated and has paid too much. The respondent, in turn, counterclaims for penalty arising out of the fact that Mr Plank left without giving notice.

### **Issues**

[4] The issue for determination are:

- i. Whether any underpayment of Mr Plank, or any conduct on Mr Crawford’s part gave rise to a constructive dismissal;
- ii. Whether the respondent owes any arrears of wages to Mr Plank, and

- iii. Whether the respondent is entitled to a penalty in relation to Mr Plank's failure to give notice.

### **Constructive dismissal**

[5] Daily job sheets were completed by Mr Plank for the purposes of billing clients but contained enough information to serve as timesheets for Mr Plank, and (with allowance made for travelling and other down time) were used by the respondent in making up his pay each week. I accept that there was no need for additional timesheets to be filled in and nothing arises out of the fact that the job sheets were used for dual purposes.

[6] During the Authority investigation meeting Mr Crawford, Mr Plank and I went through each job sheet for the entire period of employment and compared the hours recorded there with those paid each fortnight. I was satisfied that there was no short payment in the pay periods ending 9 December 2005, 23 December 2005, 20 January 2006, and 3 February 2006, with the exception of errors in the payments for statutory holidays, which were rectified by the payment made in May 2006.

[7] I note that Mr Plank did not initially receive payslips but upon request, the relevant information was supplied to him. I do not consider the lateness of provision of this material, in itself, a serious breach.

[8] I note that the final pay (for the period ending 20 February) was not a factor contributing to the decision to resign since it was not received until afterwards. It is therefore dealt with below.

[9] The next issue raised by Mr Plank relates to Mr Crawford's performance concerns. I heard several examples of Mr Crawford having occasion to speak to Mr Plank about poorly executed work. Some of these were triggered by complaints from customers. Mr Plank told me that equipment failure or inadequate instructions accounted for some of the problems for which he was blamed and therefore sees the criticisms as unfair.

[10] I accept that it was entirely reasonable for Mr Crawford to follow up on customer complaints, and note that there was no evidence that the concerns were expressed in an inappropriate or abusive way. Nor did warnings or other sanctions result. I am not satisfied that anything associated with these matters could give rise to a constructive dismissal.

[11] In relation to the warning I note that Mr Plank sought to explain his leave taking by the fact that he had cleared it with another staff member whom he saw as his immediate manager. I do not find it credible that Mr Plank saw his co-worker as having that level of authority, especially given the small size of the respondent's business. I consider Mr Crawford entitled to reject that explanation. I find no reason why Mr Plank should not have sought Mr Crawford's clearance instead. I accept that a warning was justified.

[12] The alleged dismissal arose when, shortly before Christmas, Mr Crawford left a voicemail message for Mr Plank regarding his alleged unauthorised use of a company vehicle. Mr Plank says Mr Crawford said in that message that he was "terminated." Mr Crawford agrees that he left a message to say that he had seen the truck in the street and to remind Mr Plank that it was not for personal use. However he strenuously denies saying anything at all about termination.

[13] Mr Plank never acted upon the message, continuing to work (as previously scheduled) in the period immediately after Christmas and before speaking again to Mr Crawford. Given this conduct, I find Mr Crawford's denial to be more credible than Mr Plank's account of the message. I do not accept that there was any dismissal.

[14] The final matters which Mr Plank says gave rise to a constructive dismissal occurred in the week leading up to the resignation on 15 February. On 13 February Mr Plank returned from a few days off to be told that there was no work for him that day because he was not expected back yet. He was not happy about this. He says that he should have been expected as he left a message to confirm his return date. Mr Crawford however disputes receiving such a message. Then on 15 February Mr Crawford spoke with Mr Plank about a further complaint about his boom spraying work. Mr Crawford asked him "*where's your common sense*" and told him that he from then on he would not be working on the boom spraying.

[15] Mr Plank told me he was concerned that there might be no work for him after that. He also took offence at Mr Crawford's comment. Later that day, he left a message to say he was resigning. He also told me that he understood that there was no work for him.

[16] Neither the comments by Mr Crawford, nor the change of duties amounts to a breach by the employer. Mr Crawford's comments were within the acceptable range. Mr Plank was employed to do spraying work generally, not just boom spraying and Mr Crawford was entitled to deploy him to other similar tasks if he considered it appropriate. As for the concern that there might be no work for him, I accept that this was never the case, and a simple question from Mr Plank would have confirmed as much. In any event, by the following week, Mr Crawford wrote asking Mr Plank to confirm his intentions. By that point (at least) it should have been clear to Mr Plank that from Mr Crawford's side, there was still a job there for him.

[17] Once again, I am not persuaded that Mr Crawford did anything on 15 February that could give rise to a constructive dismissal.

[18] In summary, Mr Plank was not underpaid and criticisms of his work were genuine and reasonable. He has not satisfied me that he was subjected to any kind of inappropriate conduct. Individually or together, his concerns do not amount to breaches by the respondent which could give rise to a constructive dismissal.

### **Arrears of wages**

[19] During the final pay period (ending 17 February) Mr Plank failed to maintain full job sheets for each day. Only 24 billable hours were recorded for that period. After the two witnesses and I had gone over what records there were, there was no dispute that if both 13 and 15 February were to be counted as days of work, seven days were worked in that fortnight. The hours however were not able to be agreed. When making up Mr Plank's payment for that period, Mr Crawford had estimated the hours worked at 49 and a half for the fortnight, and paid Mr Plank accordingly. He could not tell me, after the elapse of three years, exactly how he came to this figure.

For his part Mr Plank claimed that he had worked a total of 61 hours in that fortnight, although he did not supply these hours to Mr Crawford at the time.

[20] It was Mr Plank's responsibility to complete the daily job sheets, and he failed to do so. In these circumstances, it is not reasonable to assert now that Mr Crawford's estimate was wrong. I am not prepared to revise Mr Crawford's estimate. No award is made for arrears of wages.

### **Penalty**

[21] This claim can be disposed of very quickly. Any claim for penalty must be made within twelve months of the alleged breach to which it relates. It is now much too late for the respondent to claim a penalty from Mr Plank. The penalty claim is dismissed.

Yvonne Oldfield

Member of the Employment Relations Authority