



evidence is that Mr Quinn started work on Monday, 19 September 2005. The written employment agreement is dated 13 September 2005 but it includes a handwritten note that the employee is to commence work on Monday, 19 September 2005. There is also some induction material dated 19 September 2005. From this, I find that Mr Quinn started work on 19 September 2005.

[3] The signed employment agreement provides for a probationary period of 12 weeks. Clause 3.2 says that if the probationary period is completed to the employer's satisfaction, the employer shall notify the employee in writing and the employment shall be deemed to be permanent. Clause 3.3 says that if the employee's work does not meet the required standard, the employer may terminate the employment without notice or may offer an extended probationary period of employment. Mr Quinn's probationary period started on 19 September and should have ended on 12 December 2005. However, Mr Quinn suffered an accident and was unfit for work from late November 2005. During the incapacity, Mr Quinn was called to a disciplinary meeting that was held on 14 December 2005 and he was dismissed the next day. Part of Mr Quinn's complaint is that the failure to allow him to return to work to complete his probationary period was a breach of an express term and constitutes an unjustifiable disadvantage.

[4] Clive Peter is Metallic Sweeping's managing director.

### **Disciplinary meeting**

[5] Mr Quinn received a letter from Metallic Sweeping dated 7 December 2005. The letter sets out a complaint about Mr Quinn from a shopkeeper in Little River, and says that it is a serious matter which could result in dismissal, that Mr Quinn is to come to a disciplinary meeting on 14 December 2005 and may bring a support person. The letter also refers to the forthcoming expiry of the probationary period.

[6] Shortly before the disciplinary meeting, Mr Peter discovered that Metallic Sweeping had been invoiced by the Akaroa Supply Store for cigarettes apparently purchased some time in November by Mr Quinn. Mr Peter decided to raise this matter at the disciplinary meeting as well as the issue foreshadowed in the 7 December letter.

[7] The issue that prompted the disciplinary meeting was a complaint conveyed to Metallic Sweeping by the Banks Peninsular District Council Contracts Overseer. He

sent an email to Metallic Sweeping on 7 December 2005 about a complaint from the Little River store. The gist of the complaint is that Mr Quinn was rude to the storeowner in front of a customer in the context of an exchange between the storeowner and Mr Quinn about the collection of rubbish bags from the Council bins near the shops. The email also says that there have been problems with non-collection of rubbish since Mr Quinn started work.

[8] At the 14 December meeting, Mr Peter explained the complaint and showed the email to Mr Quinn. It was alleged that Mr Quinn went into the shop and was rude to the shopkeeper in front of a customer. Mr Peter says that Mr Quinn denied any incident with the shopkeeper and said that he had only spoken with a lady at the store.

[9] From there, the disciplinary meeting canvassed some issues about the standard of Mr Quinn's work during the employment. There was discussion about Mr Quinn using Metallic Sweeping's account without permission to obtain the cigarettes. Mr Peter also told Mr Quinn that he had recently been seen driving past a block of toilets without stopping to clean them. Mr Quinn claimed to have cleaned them the previous day (the Sunday), but Mr Peter said that they were dirty on the Monday, were cleaned by another employee and that the contract required them to be cleaned on Mondays. Mr Quinn made unrelated accusations against this other employee but also said that the other employee did not show him how to do the work and was trying to set him up, because he did not like Mr Quinn.

[10] There was discussion about whether Mr Quinn's second job affected his availability for Metallic Sweeping work which Mr Quinn denied. Mr Peter said that the company believed that Mr Quinn was padding out his work hours and that he had not actually worked all the hours claimed. Mr Peter referred to the increased frequency of complaints since Mr Quinn's employment, indicating that work was not being done or was not being done properly. Mr Peter asked if more training was required but Mr Quinn said that *cleaning toilets is not rocket science* and that he thought he was doing a good job.

[11] Mr Quinn then mentioned not having received the first week's wages following a work accident and threatened not to return company product until his ACC was paid. Mr Peter told Mr Quinn that that could be serious misconduct. The meeting ended with Mr Peter telling Mr Quinn that he would conduct further investigations with the shop owner before deciding what to do about matters.

[12] After the disciplinary meeting, Mr Peter attempted to speak with the shop owner but could not contact him. Instead, he spoke to the Council's contracts overseer who had spoken directly to the shop owner and whose email to Metallic Sweeping conveyed the complaint. Mr Peter also arranged the other employee to speak with the storeowner. Mr Peter's evidence is that the employee confirmed that the storeowner stood by his original complaint.

### **Dismissal**

[13] On 15 December, Mr Peter spoke by phone with Mr Quinn and told him that he was dismissed. Mr Peter then sent a letter dated 16 December which sets out the reasons for the dismissal. First, the letter says that given various complaints about performance issues Metallic Sweeping had decided to terminate Mr Quinn's employment during the probationary period. The letter makes it clear that Mr Peter did not accept Mr Quinn's denial about the incident with the shop owner. Mr Peter rejected Mr Quinn's attempts to blame the other employee. The cigarette purchase is also described as a serious offence. The letter concludes with arrangements about final pay.

### **Justification for dismissal**

[14] Justification for the dismissal is to be determined on an objective basis by considering whether the employer's actions and how the employer acted at the time were what a fair and reasonable employer would have done in all the circumstances.

[15] It is said that Mr Peter predetermined the decision to dismiss Mr Quinn. This is based on Mr Quinn's evidence that he got the impression that whatever he said during the disciplinary meeting was ignored. Mr Quinn also says that Metallic Sweeping engaged his replacement before dismissing him. Further, Mr Quinn says that *curiously* he received the 16 December letter in an envelope postmarked 11 December 2005 (i.e. posted before the disciplinary meeting).

[16] I do not accept Mr Quinn's evidence. He annexed one envelope (postmarked 11 December 2005) to his statement of evidence lodged with the Authority on 30 July 2007. However, Mr Quinn received at least three letters in envelopes from Metallic Sweeping. During the investigation meeting, I noticed some envelopes in counsel's file which were then handed to me at my request. One is postmarked 29 November 2005 and the other is postmarked 19 December 2005. The 16 December letter

probably came in the latter envelope; a 21 November letter probably came in the former envelope; and the 7 December letter probably came in the 11 December envelope.

[17] Mr Quinn's evidence suggesting that the dismissal letter was drafted and sent before the date of the disciplinary meeting and his selective presentation of an envelope in support is misleading or, at best, mistaken. Either way, it causes me to be cautious placing any reliance on his evidence.

[18] I should note that the lodging of the statement of evidence and the envelope occurred before Mr Quinn instructed counsel who appeared at the investigation meeting and I have no reason to doubt counsel's assurance that he was unaware of the selective presentation.

[19] I accept Mr Peter's evidence to the effect that a permanent replacement for Mr Quinn was only engaged after the dismissal. That same person was earlier engaged to relieve for Mr Quinn following his incapacity on or about 27 November 2005. Someone needed to do the work, so the appointment of a temporary replacement does not indicate any predetermination. I also accept that the allegation that resulted in the disciplinary meeting only came to the attention of Metallic Sweeping on or about 7 December by which time the temporary replacement had already been engaged.

[20] There is a complaint about the dismissal when Mr Quinn had not completed the probationary period due to incapacity arising on or about 27 November 2005. He says that he should have been permitted to complete his probationary period to prove his suitability. The criticism is misplaced. Metallic Sweeping had serious misgivings about Mr Quinn's suitability for permanent employment. That is reflected in the letter of 21 November which refers to earlier conversations about unsatisfactory performance and cautions Mr Quinn that disciplinary proceedings would follow any further complaint. However, the dismissal was effected for misconduct, being Mr Quinn's interaction with the storeowner and the cigarette purchase. Mr Quinn's unsatisfactory performance during the probationary period was no more than the background to these reasons for the dismissal. That is why the 16 December 2005 letter said *we would have not been in a position ... to confirm your employment* (emphasis added).

[21] It is submitted that Mr Quinn had either expressed or implied permission to purchase cigarettes on Metallic Sweeping's account. I do not accept Mr Quinn's evidence to that effect. I accept Mr Peter's evidence that he saw the unauthorised charging of cigarettes to Metallic Sweeping's account as a breach of trust, as would any employer. I do not accept Mr Quinn's evidence that he spoke to Mr Peter about the purchase before Mr Peter raised the matter at the 14 December 2005 meeting. All Mr Quinn's evidence on these points is inconsistent with the statement in his solicitor's letter of 10 January 2005 acknowledging the purchase was wrong and attempting to mitigate the conduct by linking it to an alleged underpayment of wages. The evidence is also inconsistent with clause 2.16 and 2.17 of the statement of problem. Mr Quinn's sworn evidence demonstrates the extent to which his recollection has changed over time rather than representing a reliable account of events.

[22] Something is made of the mention in Mr Peter's notes of the disciplinary meeting of Mr Quinn being on ACC for four weeks at the busy time of the year. The note perhaps manifests some frustration on Mr Peter's part, but I do not accept that the ACC situation influenced the dismissal decision. After all, at the date of the disciplinary interview, Metallic Sweeping had temporarily engaged a competent employee to cover Mr Quinn's absence.

[23] The only troubling aspect of this dismissal is Mr Peter's decision to proceed with a dismissal without first speaking directly to the storeowner. That Mr Peter attempted to contact the storeowner shows that he thought it was an important aspect of the investigation. Nothing in the circumstances required a decision to be made quickly so Mr Peter could have waited until he was able to speak in person with the storeowner. The rejection of Mr Quinn's denial necessarily meant an acceptance of the complainant's account. At that time, all that was known was that the *shop owner tried to explain what the story was to Michael, he seemed to have been extremely rude while customers were in the shop. The shop owner doesn't want to see Michael even near the shop any more*". That description of the incident could be conduct justifying dismissal but it could also be less serious misconduct.

[24] Given these circumstances, I conclude that a fair and reasonable employer would have spoken directly to the complainant, to flush out better details of what had

happened and to test Mr Quinn's denial of any incident. It follows that Mr Quinn was unjustifiably dismissed.

### **Remedies**

[25] In evidence Mr Quinn accepts that there was an exchange between him and the storeowner. He says that during the disciplinary meeting he told Mr Peter *the ...guy was very rude to me, that I was abrupt but not rude back*. That evidence does not match Mr Peter's or the notes that he made to the effect that Mr Quinn totally denied any incident. I prefer Mr Peter's evidence about what was said at the disciplinary meeting but Mr Quinn's evidence to the Authority must undermine the truthfulness of his original denial. I am left to conclude that Mr Quinn was very rude to the storeowner in front of a customer. That leads to a finding that Mr Quinn contributed to the circumstances giving rise to his grievance.

[26] I also conclude that Mr Peter probably would have dismissed Mr Quinn in reliance on the breach of trust arising from the unauthorised cigarette purchase even if Mr Quinn's denial about being rude had been accepted. Such a dismissal would have been justified.

[27] For these two reasons Mr Quinn is not entitled to any remedies for his grievance.

### **Summary**

[28] Mr Quinn has a personal grievance but is not entitled to any other remedy.

[29] Counsel for Metallic Sweeping indicated during the investigation meeting that there was no point in seeking costs against Mr Quinn. It would not be just to make any award against Metallic Sweeping in Mr Quinn's favour given the probability of a justified dismissal for breach of trust.

Philip Cheyne  
Member of the Employment Relations Authority