

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 4/10  
5157065

BETWEEN COLIN RAMSAY  
Applicant  
AND NEW ZEALAND CARDS  
LIMITED  
Respondent

Member of Authority: Helen Doyle  
Representatives: Johnny Saunders, Advocate for Applicant  
Robert Beresford, Advocate for Respondent  
Investigation Meeting: 10 September 2009 at Christchurch  
Submissions Received: 17 September 2009 for Applicant  
14 October, 15 October, 23 October and 5 November 2009  
for Respondent  
Determination: 15 January 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Colin Ramsay worked for about ten years for New Zealand Cards Limited (New Zealand Cards). During that period of time there was no written employment agreement between Mr Ramsay and New Zealand Cards. Mr Ramsay has initially worked part-time for New Zealand Cards supplementing his income with gardening for other people but at the material time he had moved to a full-time role for the company which included sales representative work around New Zealand selling cards with New Zealand scenes. He was paid \$18.00 per hour.

[2] Mr Ramsay says that he was unjustifiably dismissed from his employment on 24 November 2008 following a discussion with the Director of New Zealand Cards Robert Beresford. He says that during this discussion he considered that he had been

sent away from his employment and thereby dismissed or in the alternative, raised somewhat unsatisfactorily at the investigation meeting and in final submissions, that he was unjustifiably constructively dismissed.

[3] Mr Ramsay seeks compensation in the sum of \$25,000, reimbursement of three months lost wages and a contribution towards costs.

[4] There is or was also an outstanding issue relating to a small amount of holiday pay retained by New Zealand Cards whilst Mr Ramsay provided receipts for an expense claim. Most of the holiday pay owing had been paid with assistance from the Labour Inspector. That matter may well have been resolved or, I would imagine is at least capable of being resolved, by the parties but I shall reserve leave for either party to return to the Authority about that if necessary.

[5] New Zealand Cards says in response to Mr Ramsay's claim that he was never dismissed during the meeting on 24 November 2008 and that following a discussion about his role, he abruptly left the work site saying he would call back the following day, but never did. That it says is how the relationship ended. New Zealand Cards does not accept that Mr Ramsay is entitled to the remedies that he seeks.

### **The issues**

[6] The Employment Relations Authority is required to determine the following issues:

- What happened on 24 November 2008 and how did the employment relationship between Colin Ramsay and New Zealand Cards end?
- Was Mr Ramsay dismissed or did Mr Ramsay resign?
- If Mr Ramsay was dismissed then was the dismissal unjustifiable? The Authority is required to apply the test in s.103A of the Employment Relations Act 2000 and consider in terms of justification the actions of the employer against the objective standard of a fair and reasonable employer.
- If Mr Ramsay was unjustifiably dismissed, then what remedies is he entitled to and are there issues of contribution or mitigation?

**What happened on 24 November 2008 and how did the employment relationship between Colin Ramsay and New Zealand Cards end?**

[7] Mr Ramsay and his sister Elaine provide support and care for their mother who is elderly and suffers from dementia. In late 2008 Mr Ramsay's mother's condition deteriorated and this caused Mr Ramsay to reflect on his work situation and talk to Mr Beresford about whether he could keep working the hours he was working for New Zealand Cards and making the out of town trips. Mr Ramsay recalls a discussion with Mr Beresford about these matters in or about October 2008. There is a dispute about whether Mr Ramsay at this time and at an earlier time advised Mr Beresford that he intended to leave his job at New Zealand Cards. Mr Beresford says that Mr Ramsay did make such offers to resign but this is not accepted by Mr Ramsay.

[8] Mr Ramsay's evidence was that in October 2008 he was not clear about his mother's health and any impact that would have in terms of his role with New Zealand Cards. I prefer Mr Ramsay's evidence as more likely, that he did not in these circumstances advise Mr Beresford in any clear way about his future with the company.

[9] There is a dispute as to whether 24 November 2008 was Mr Ramsay's last day at work. I find, having heard the evidence, that it is likely that was the day the conversation took place between Mr Ramsay and Mr Beresford after which Mr Ramsay did not return to work. In concluding that I have had regard to the discharge summary that I was provided with from Christchurch hospital that gives dates consistent with Mr Ramsay's evidence that his mother was in hospital on that date which, in turn is consistent with Mr Ramsay during the discussion on 24 November 2008 advising that he was going after work to visit his mother in hospital.

[10] Mr Beresford recorded the discussion that took place between him and Mr Ramsay on 24 November 2008. He did this without Mr Ramsay's knowledge and provided the tape recording of the discussion to the Authority shortly before the investigation meeting. Mr Saunders made arrangements to come and listen to it with Mr Ramsay shortly before the Authority's investigation meeting. The tape was played during the investigation meeting and I have again listened to it before writing my determination.

[11] During the discussion on 24 November 2008 Mr Beresford said to Mr Ramsay that Mr Ramsay had suggested *sort of leaving a couple of times*. Mr Beresford said words to the effect that that should be implemented with any further work for the company being on a casual basis and probably not until January 2009. During the discussion there was reference to the financial situation of the company which prevented payment of holiday pay in full and there was also reference to the work that Mr Ramsay was currently performing, making stands for the cards, being work that could wait until a later date.

[12] It is clear from the recording of the discussion that Mr Beresford wanted Mr Ramsay's agreement to his employment ending preferably that day and to being paid out holiday pay on the basis of reducing the outstanding amount in instalments of a proposed \$500 per week. Mr Beresford accepted quite properly in his evidence that Mr Ramsay did not resign as such during the meeting on 24 November 2008. For completeness I should add that prior to the discussion on 24 November 2008 Mr Ramsay had agreed to a schedule of 2½ days work and having his holidays reduced by 2½ days per week.

[13] Mr Beresford referred during the discussion to his preference for Mr Ramsay to leave his position on that day. The conversation ended with Mr Ramsay saying he needed to go and visit his mother and he would call Mr Beresford in the morning because he would know what was happening by then.

[14] Mr Ramsay did not telephone Mr Beresford in the morning. The evidence supports a call made a week or so later by Mr Ramsay to another employee at New Zealand Cards about payment for 24 November 2008. Mr Ramsay said that he focused on the words Mr Beresford said *make today your last day here* and they stuck in his mind. Mr Ramsay said that he concluded that Mr Beresford dismissed him and he advised his sister Elaine of his belief that this was the situation.

[15] Shortly after 24 November 2008, and in all likelihood before 26 November 2008, Mr Beresford came to hear from two people that Mr Ramsay considered he had been dismissed. He telephoned one of those individuals, Mr Ramsay's sister Elaine, to ask her about this. One of the conversations that Mr Beresford had with Elaine was also taped. Elaine confirmed to Mr Beresford that Mr Ramsay had told her that he had been dismissed by Mr Beresford and Elaine suggested that Mr Beresford leave a message on Mr Ramsay's answerphone because he checked that phone from time to

time. Mr Beresford did not have Mr Ramsay's mother's home phone number at whose place Mr Ramsay was largely based. Mr Ramsay said that this was because he was concerned that his mother may not be able to properly relay messages or become anxious.

[16] On 26 November 2008 Mr Beresford wrote or at least started a letter to Mr Ramsay. The evidence supports that whilst the letter may have been written on that date it was not in fact posted until some 10 to 12 days later. The contents of that letter are relevant. Mr Beresford said that Mr Saunders has focused unduly on a paragraph in the first page of that six page letter. I have considered the letter in its entirety. I shall cite, however, the passage that Mr Saunders referred me to:

*Since you've recently offered twice to quit the job, I took you up on that on Monday afternoon (then you quickly shot off). Considering all circumstances, it's the best thing, and also means you can concentrate on finding more gardening work –the sooner you do that the better for you.*

[17] Mr Beresford referred me to paragraphs on page 5 of his letter that specifically refer to his having heard from others that Mr Ramsay believed he had been dismissed. In the final two paragraphs on page 5 Mr Beresford states:

*Anja had heard from Phyllis you'd been sacked, but when I asked Phyllis she clammed up about it all and basically only knew what ever Elaine had told her, and I should remember all that ... apparently. So I rang Elaine, she was reluctant to talk, and she said that I'd told you to (approx) "leave and don't come back" ... so you did.*

*Which sounds a bit like a sacking ... but it's a lie. Why would I say that anyway, when you've still got keys, roller door remote (costing \$100), the big stand fixing kit, and the instruction manual for the cell phone!? (so far taking ages to get last 2 back). At the least I'd be getting all that off you before perhaps telling you to disappear?!<sup>1</sup>*

[18] On page 6 of his letter Mr Beresford states:

*Meanwhile, it's clear that we'll have to sort out the situation by you coming into work and returning the necessaries and starting from there. (You could also explain, for interest, why you told Anja 8 hours when you start at 8 and left before 3.30?). ...*

[19] The letter concludes by Mr Beresford saying:

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<sup>1</sup> The excerpts from the transcript are as provided by Mr Beresford to the Authority and have not been edited.

*The job only exists (or should) anywhere near being a fulltime thing because of the repping. After over a months procrastinating on it, which cost us a lot, you've ruled yourself out of the repping.*

*You've disqualified yourself from what the job namely is, so your offer to quit is very appropriate.*

*Doing stands is something that can be looked at separately, when the need arises, and that's not now. Even then, it would only, in theory, be a fill in job around gardening, as it was originally for you.*

[20] When the letter is read carefully it is clear that whilst Mr Beresford does not accept in his words he *sacked* Mr Ramsay during the discussion on 24 November 2008, there is no invitation for Mr Ramsay to return to his role. The only suggestion in terms of any return to work is to return the *necessaries*. On the third page of the letter there is reference to Mr Beresford having to decide, in January, February or March whether to re-employ Mr Beresford on a fresh start. The final paragraphs support that Mr Beresford relies on Mr Ramsay's offer to quit and that he has disqualified himself from the role of sales representative.

[21] After Mr Ramsay received that letter he asked for some assistance in obtaining his holiday pay from the Labour Inspector when he ceased to be paid his holiday pay at the rate of \$500 or so a week. He then raised a personal grievance.

**Was Mr Ramsay dismissed or did Mr Ramsay resign or simply abandon his employment?**

[22] I am not satisfied that Mr Ramsay resigned from his employment with New Zealand Cards. Mr Beresford said in his evidence that he did not tell Mr Ramsay that he was dismissed on 24 November 2008 and further because Mr Ramsay advised that he would telephone back he could not genuinely believe that he had been dismissed.

[23] From the transcript of the tape recording of 24 November 2008, I have set out the relevant parts toward the end of the conversation:

*Bob: Well, I mean, for me, the best way to do it, the clean thing is to say, okay, okay – you're quitting full time, whatever, there's still the options of starting in January by the time- in fact your holidays- – we'd get more money to pay your holidays in January probably, as well at the moment? \$500 worth of holidays- even at 2½ days a week- its outrageous (laughs)*

*Colin: [pause] Yeah, oh well, let me sort it all out – I've just got a lot of going on at the moment but I've got to go because I want to go and see Mum – otherwise I'm going to miss visiting her [long pause] So there's nothing else you want?*

*Bob: No, but I wanted to do it – like – if we do it I wanted to do it from today, really, to get it over and done with, to be perfectly honest because it worries me – so ummm.*

*Colin: Well, I'll ring tomorrow, in the morning cause by then I might know what's happening when we find out – cause the doctor's been around. and let us know what's going on*

*Bob: Oh alright.....*

[24] I am satisfied Mr Ramsay formed the view that he had been dismissed in the sense of sent away following the discussion and that 24 November 2008 was his last day. It is clear from the recording of the conversation that Mr Beresford intended to attempt to secure Mr Ramsay's resignation and that was the purpose of the conversation.

[25] As to why it was recorded, Mr Beresford said at the investigation meeting that it was difficult to sack an employee and it was easier if Mr Ramsay agreed to leave. Mr Beresford said he was not entirely happy with Mr Ramsay's performance and that he preferred it if it could have been sorted out that day. Mr Beresford said the recording was a protection in case the matter went further.

[26] Mr Ramsay said he would telephone back the following day and he did not. Notwithstanding, Mr Beresford quickly came to know of Mr Ramsay's view that he believed he had been dismissed within a day or so. There was therefore an opportunity for Mr Beresford, if he considered there was a genuine misunderstanding on Mr Ramsay's part about what was intended from the discussion on 24 November 2008, to clarify that Mr Ramsay had not been dismissed and he could return to his role at New Zealand Cards.

[27] Even if I accept that the part of the letter from Mr Beresford of 26 November 2008 setting out that he had accepted Mr Ramsay's offer to quit on 24 November 2008 was simply poorly expressed, the balance of the letter does not state, in any place, that Mr Ramsay was able to return to his role or indeed had a role at New Zealand Cards. For completeness I do not find that it was open to Mr Beresford to accept an offer to resign because as previously set out there was no clear offer from Mr Ramsay to resign. The letter of 26 November 2008 also raises several other issues about Mr Ramsay's performance, ability to perform the role and an issue about possible conflicts in terms of his sales role.

[28] I find in conclusion that the relationship between Mr Ramsay and New Zealand Cards ended when Mr Ramsay was dismissed during the discussion on 24 November 2008. That dismissal was then confirmed by the letter dated 26 November 2008 from Mr Beresford, written in the knowledge that Mr Ramsay was of the view he had been dismissed, which letter was received by Mr Ramsay some days later. In arriving at my conclusion as to how the relationship ended I have taken both these events into account.

**If Mr Ramsay was dismissed then was the dismissal unjustifiable?**

[29] The position of New Zealand Cards is that there was no dismissal. I have found that there was a dismissal. I have then considered the matters put forward during the discussion of 24 November and in the letter of 26 November to see if the issues would justify the dismissal.

[30] I accept that there were issues that Mr Beresford was entitled to raise with Mr Ramsay. He was concerned about Mr Ramsay's ability to travel and carry out his sales representative component of his job in light of what was happening with Mr Ramsay's mother and her long term care needs.

[31] The discussion that Mr Beresford intended to have with Mr Ramsay on 24 November 2008 concerned Mr Ramsay's future with the company. Mr Beresford attended the discussion with a concealed tape recorder and a pre-determined view of what he wanted as an outcome, being Mr Ramsay to leave his employment that day and any holiday pay owing being paid by instalments. Mr Ramsay on the other hand had no advance warning in order to prepare himself for the discussion and as is clear from the recording was waiting for some further information as to his mother's condition in terms of his undertaking his role. There was some dispute as to exactly what time the discussion was held but I am satisfied that the discussion was close to the end of his working day shortly before Mr Ramsay was to go to visit his mother in hospital.

[32] It is clear from the tape recording that although the discussion was fairly amicable Mr Ramsay was confused as to exactly what Mr Beresford was saying to him. For example, Mr Ramsay makes statements such as *what do you mean* on several occasions. I find that Mr Beresford was not clear, open and transparent about what he wanted and that was not good faith behaviour.

[33] A fair and reasonable approach in the circumstances would have been for Mr Beresford to ask Mr Ramsay to make arrangements for a suitable date for a meeting so that there could be a discussion about whether he could continue to perform the sales representative role and if not whether there was any other productive work that he could undertake in the meantime. There could also have been a discussion at that time about the financial performance of the company. Had Mr Beresford adopted that approach then it is unlikely matters would have proceeded as far as they have.

[34] I do not find, however, without a proper opportunity for discussion with Mr Ramsay after he had had an opportunity to obtain some information about his ability to carry out his role would justify a dismissal. For the reasons set out above the actions of Mr Beresford were not those that a fair and reasonable employer would have done in all the circumstances.

[35] I am not satisfied that a fair and reasonable employer would conclude that a build up of holidays justified a dismissal. One of the issues in the letter of 26 November 2008 was whether Mr Ramsay was selling 3D cards whilst undertaking work for New Zealand Cards and another issue was whether he was claiming 40 hours per week and not working those hours.

[36] Mr Ramsay denied both those allegations in his evidence. A disciplinary meeting would have been required to have been held about those matters and Mr Ramsay given an opportunity to comment on those matters before a dismissal for either of those issues would have been justified. A fair and reasonable employer would not have concluded, without hearing from Mr Ramsay, that those matters justified his dismissal.

[37] I am not satisfied that the dismissal was justified at that time because objectively assessed it was not what a fair and reasonable employer would have done in all the circumstances.

## **Remedies**

### ***Lost wages***

[38] Mr Ramsay seeks 13 weeks lost wages. He said in his evidence to the Authority that he did not really look for another job because of his mother's illness

and he concentrated on looking after her. Mr Ramsay did undertake a limited gardening role, although Mr Saunders said the total amount earned was around \$70.

[39] I have considered it unlikely that if Mr Ramsay's employment had continued that it would have continued for a further three months. Mr Ramsay also took on a full time carer role and did not mitigate his loss to any great extent. I intend to limit reimbursement of lost wages to a period of eight weeks from 24 November 2008 until 19 January 2009 less any money earned during the period by Mr Ramsay. Mr Saunders suggested leaving the actual calculation of lost wages to the parties and I accept in the first instance that should occur. Leave is reserved for either party to return to the Authority if agreement is unable to be reached about that matter. I have already reserved leave if there are any outstanding issues as to holiday pay for either party to return to the Authority and have that matter determined.

### ***Compensation***

[40] Mr Ramsay initially sought the sum of \$25,000 for compensation although in final submissions Mr Saunders submitted \$12,000 as an appropriate award.

[41] Mr Ramsay gave evidence that he felt stressed because he had no job and was concerned for his financial future. He gave evidence that he suffered from headaches and dizzy spells and that he was a worrier by nature.

[42] I accept that Mr Ramsay was distressed and that compensation has to be real and adequate and compensate the actual hurt established. I have to take into account also the uncertainty that existed for Mr Ramsay in terms of his future role with New Zealand Cards because his mother was unwell and there was a very real likelihood that he may not have retained employment or there would have had to be changes to his position.

[43] In all the circumstances of the case and taking all matters into account, I am of the view that an appropriate award is the sum of \$6,000.

### **Contribution**

[44] I am required under s.124 of the Employment Relations Act 2000 to consider whether Mr Ramsay contributed to the situation that gave rise to his personal grievance. I have considered whether he did so by failing to telephone Mr Beresford or whether other matters should result in a reduction in terms of remedies.

[45] In terms of the failure to telephone Mr Ramsay said that he could not recall having advised Mr Beresford at the end of the conversation on 24 November 2008 that he would and he simply concluded he had been dismissed. Mr Beresford did not take up the initiative and leave a message on Mr Ramsay's telephone when Mr Ramsay failed to telephone him although he did write a letter. In all the circumstances, I am not satisfied there was contribution on Mr Ramsay's part in term of that matter. Although there were some allegations put forward about selling 3D cards and misrepresenting hours worked, I am not satisfied, on the balance of probabilities from the evidence that remedies should be reduced in terms of those matters.

[46] I make the following orders:

(i) I order New Zealand Cards Limited to pay to Colin Ramsay eight weeks wages lost as a result of the personal grievance under s. 123 (1) (b) of the Employment Relations Act 2000 less any money earned by Mr Ramsay during that period.

(ii) I order New Zealand Cards Limited to pay to Colin Ramsay under s.123(1) (c) (i) of the Employment Relations Act 2000 the sum of \$6,000 being compensation without deduction.

### **Costs**

[47] Mr Saunders has made submissions as to costs and seeks the sum of \$3,000. I want to give Mr Beresford an opportunity to respond to that submission and he has until 5 February 2010 to lodge and serve submissions as to costs after which date I will determine the issue of costs.

Helen Doyle  
Member of the Employment Relations Authority