

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
OFFICE**

<b>BETWEEN</b>	Tyler Stephens
<b>AND</b>	Rosebuds Solutions Limited
<b>REPRESENTATIVES</b>	Mark Nutsford, advocate for Tyler Stephens Bob Clark, advocate for Rosebuds Solutions Limited
<b>MEMBER OF AUTHORITY</b>	Rosemary Monaghan
<b>INVESTIGATION MEETING</b>	18 October 2006
<b>DATE OF DETERMINATION</b>	26 October 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Tyler Stephens says he was unjustifiably dismissed by his former employer, Rosebuds Solutions Limited ("RSL"). RSL says Mr Stephens was not dismissed, but left his employment of his own accord. Resolution of this issue depends on findings of fact centring on a key conversation whose content is disputed.

**Prelude to the disputed conversation**

[2] RSL is in the business of contract cleaning. As an employee Mr Stephens had the use of a company van, and he was using the van for a day shift he worked on Sunday 15 January 2006. He was asked to return the van to the RSL office in West Auckland for the use of another employee working an evening shift later the same day.

[3] Mr Stephens duly returned the van when he finished his shift. At about 9.30 pm that night he turned on his cellphone to find a message from the employee who was to work the evening shift, advising that she did not need the van as she had injured herself. The implication was she had not worked or would not be working her shift. The text also advised that James Clark, the shareholder and working director of RSL, had been informed.

[4] Mr Stephens decided the security of the van was at risk, and he should retrieve it from the company's office. He did so, taking it to his home without advising Mr Clark of his intention or otherwise attempting to contact him. He had no reasonable grounds for assuming, as he did, that the van would not now be needed, or for acting without attempting to contact Mr Clark.

[5] Mr Clark said in evidence that the other employee did not advise him of her unavailability until 9.00 pm. He and his partner, Vanessa Shaw, were at home some distance away. They left to collect the van and do the employee's work themselves. The van was gone by the time they arrived at the office. They

suspected Mr Stephens had taken it, to the extent that they drove to an address they thought was his in order to retrieve it. However they had the wrong address, so of course the van was not there. At or about 10.15 pm Ms Shaw sent a text message to Mr Stephens asking where the van was. Mr Stephens replied that he had it, and advised Mr Clark and Ms Shaw they could collect it if they wished.

[6] By then it had become impossible to complete the work contracted for that evening. Mr Clark was angry. At or about 11.02 pm he sent a text message to Mr Stephens advising that his (and the other employee's) actions meant a client had not been serviced, and instructing that the van be returned at 9.00 am the next day. Mr Stephens replied saying he could not do so as he had a family commitment, and asking whether Mr Clark could pick it up.

[7] This prompted Mr Clark to respond by text message at or about 11.48 pm, saying the van was to be taken to the office at 9.00 am the next day or Mr Stephens' employment would be terminated.

### **The disputed conversation and its aftermath**

[8] Mr Stephens telephoned Mr Clark to discuss the matter. He repeated that he would not be able to take the van to the office the next day. He also pointed out that he was not rostered to work that day. Neither this, nor his plan to meet his mother and sister, were good reasons for his continued refusal to take any responsibility for the problem he caused when he moved the van. It was common ground the discussion became heated.

[9] Mr Stephens says Mr Clark then told him his employment was terminated. Mr Clark denied saying that.

[10] Mr Clark's written evidence was not only that he made no such statement during the conversation, but he sent a further text message to Mr Stephens asking for a meeting. His evidence was that he wanted to discuss the van and other employment-related issues. Mr Stephens responded by asking if he was fired, and Mr Clark said he was not.

[11] The problem with that evidence was Mr Stephens had retained his cellphone sim card, and it contained no record of that exchange of messages. It is also true, however, that Mr Stephens could simply have chosen not to save the messages to the card as Mr Clark alleged was the case (but Mr Stephens denied). Mr Stephens had retained the card for some time before showing it to Mr Clark, so had the opportunity to be selective about what was saved. Indeed he told me he saved what he thought was relevant. Overall the card does little to assist the resolution of the conflict concerning the later messages. I am left with Mr Clark's word against that of Mr Stephens.

[12] Mr Clark's further oral evidence was that there were 'two or three' phone calls, and that Mr Stephens queried several times whether he was dismissed. Mr Clark told him he was not, but that he wanted to talk to him. Mr Stephens should telephone to arrange a meeting. That evidence, however, was vague and offered no insight into exactly when the alleged conversations occurred. Mr Clark seemed to be suggesting they occurred very late on the Sunday night, but that seems unlikely. Further, it was common ground there were no direct conversations between the two men the next day, Monday 16 January. Finally, Mr Stephens denied having more than one telephone conversation on the Sunday night. For those reasons I am not persuaded the additional phone conversations occurred.

[13] It was common ground that Mr Stephens telephoned more than once on the Monday, leaving recorded messages each time. Mr Clark said that in one Mr Stephens asked for a meeting, in one he pleaded for his job and did not want to leave things 'this way', and in the third he raised the fact that wages were owed to him. Mr Stephens said that in one he asked Mr Clark to reconsider, and in one he said he was following up on the request to reconsider. It must at least be common ground that Mr Stephens indicated he wanted to keep his job.

[14] These conflicts led me to ask to speak to Ms Shaw. Accordingly she was called on during the investigation meeting at my instigation, without notice and without being present during or otherwise hearing the preceding evidence, to give an account of what she heard Mr Clark say during the Sunday night conversation. Her evidence on the point was inevitably limited, but her recall was that the discussion was heated. It concerned the return of the van and the inability to complete that night's work. Ms Shaw did not hear Mr Clark tell Mr Stephens his employment was terminated, and it was not her impression that was the case. She also said there were no more phone conversations or text messages that night.

[15] As for the Monday, Ms Shaw said she had a discussion with Mr Stephens herself. Mr Stephens asked her whether he was still employed, and she said he was. She also told him he still needed to come in and talk to Mr Clark.

[16] Ms Shaw also heard the messages Mr Stephens left on the Monday. Her account of them was that she heard Mr Stephens saying he was sorry and wanted to talk. She did not hear a request to 'reconsider'.

[17] Because of the circumstances in which Ms Shaw's evidence was obtained, I found it credible.

[18] Someone retrieved the van from outside Mr Stephens' home on the afternoon of Monday 16 January.

[19] Mr Stephens attended the RSL offices later in the week. Mr Clark said it was on the Tuesday, Ms Shaw said it was on the Tuesday or the Wednesday, and Mr Stephens said it was on the Thursday or possibly as late as the Friday. The final pay record indicates it was the Tuesday. Nothing turns on who is correct.

[20] Mr Stephens said he had been instructed to drop off his company property, so he attended the office to do so. However there was no evidence about the source of the instruction, there was no assertion that Mr Clark gave the instruction, and I consider it unlikely that he did. It was in effect common ground that Mr Stephens came into the office and dropped some company property onto the desk. Mr Clark asked Mr Stephens if that meant Mr Stephens was leaving. According to the oral evidence Mr Stephens' reply was that he would 'leave it at that'. That was the end of the meeting, and Mr Stephens did not return.

### **Determination**

[21] This matter turns on the credibility of the witnesses. Determining such matters can be difficult when, as here, the issue amounts essentially to one person's word against that of another. Not only that, Mr Stephens' credibility suffered from his emphasis on self justification and attempts to paint Mr Clark as a less than competent manager, while Mr Clark's suffered from his vagueness and unconvincing recall.

[22] I construe the evidence as follows.

[23] Mr Clark was angry enough on the Sunday night to threaten to dismiss Mr Stephens if the van was not returned. However it is for Mr Stephens to persuade me the dismissal was actually carried out. The evidence he relies on principally in that respect is his assertion that Mr Clark told him on the Sunday night his employment was terminated.

[24] I am not persuaded Mr Clark used those words. Rather, I take into account that it was common ground Mr Clark instructed Mr Stephens to return the van the next morning or he would be dismissed, and that Mr Stephens indicated he would not be in a position to do so. I consider it likely Mr Stephens came to take that exchange as amounting to his dismissal, or to conclude his employment was at an end the next day as a function of his failure to return the van.

[25] I am reinforced in this view by the letter from Mr Stephens' advocate raising a personal grievance. The letter was dated 2 February 2006. It acknowledges that dismissal was threatened on the Sunday night, but does not assert that Mr Clark confirmed the dismissal that night. Indeed it goes on to say that Mr Stephens left messages on the Monday 'asking for a resolution' or 'alternatively confirmation of the termination of his employment'. That was not quite the evidence about the content of the messages, but the point is the text is not consistent with the allegation that Mr Stephens was expressly dismissed on the Sunday night. It is consistent at least with uncertainty on Mr Stephens' part about whether his failure to return the van on the Monday meant his employment was terminated.

[26] If Mr Clark confirmed on the Sunday night that Mr Stephens was not dismissed, then he must have done so by text message. I am unable to reach a conclusion about whether such a message was sent, but have accepted that Ms Shaw gave an indication on the Monday that Mr Stephens was still employed. Mr Stephens should at least have taken note of Ms Shaw's indication, and been open to participating in the meeting Mr Clark wanted to arrange.

[27] By the time he attended at the company's office, Mr Stephens had concluded he was dismissed. His conclusion was premature. Unfortunately for him, by his conduct when he returned the company's property Mr Stephens made it apparent that he considered his employment to be at an end. He did not give Mr Clark any indication that he thought this was because Mr Clark had dismissed him. On the other hand the attitude he had exhibited to Mr Clark gave Mr Clark reason to believe the decision to leave was Mr Stephens'.

[28] For these reasons I conclude Mr Stephens was not dismissed.

### **Costs**

[29] Costs are reserved. If the parties seek a determination from the Authority they are to file in the Authority and copy to each other written statements of their position on the matter within 28 days of the date of this determination.