



[4] Through its sole director, Mr Graeme Daniel, the employer has maintained that this amount as received by Mr Watson was the agreed payment for 40 hours work each week at \$15 per hour.

[5] Mr Watson became dissatisfied with taking his lunch break at the employer's premises and in early October 2008 arranged for mediation with Mr Daniel about that issue.

[6] The mediation produced a Memorandum of Understanding. It recorded the breaks agreed to be taken by Mr Watson and also his hours of work. The Memorandum was signed on 2 October 2008 during the mediation and Mr Watson and Mr Daniel shook hands on it. There is no dispute that Mr Watson told the mediator he enjoyed his job, apart from the issues that had arisen over his breaks and the lack of a written employment agreement, both of which were addressed by the Memorandum.

[7] In relation to lunch, the Memorandum recorded that Mr Watson was to have a half-hour break paid at \$7.50 gross. In relation to hours of work the memorandum recorded:

**Hours of Work**

*8am – 4pm*

*8.30am - 4.30pm*

*9am – 5pm*

*Graeme will contact Dave the night before to advise the start time for the next day.*

[8] The Memorandum also recorded that Mr Daniel was to provide Mr Watson within seven days a written employment agreement in which the arrangements made about lunch breaks and hours of work would be confirmed.

[9] On the Friday after the mediation Mr Watson went to work as usual. Near the end of the day Mr Daniel told him he was required to work the following week from 9am to 5pm and gave him a draft agreement with the terms and conditions of employment.

[10] The agreement given to Mr Watson was unsigned. I accept that it was given to him to take away and consider, and then sign if satisfied with it.

[11] The conduct of Mr Daniel in requiring Mr Watson to work from 9am to 5pm for the following week and in presenting the draft employment agreement, caused Mr Watson some anxiety. Over the weekend he took the agreement to a friend who spent some time with him going through its provisions.

[12] The agreement was incomplete in some respects and plainly erroneous in others. The names of the employer and employee parties had been transposed, so that Mr Watson was recorded as being the employer rather than the employee. As well as this obvious mistake, the employment was expressed to have commenced on 3 October 2008, the day after the mediation, when in fact Mr Watson had started over two years earlier, in May 2006.

[13] Mr Watson's anxiety and stress increased over the weekend to a point where on the following Monday morning, 6 October, he and his wife attended their doctor, Dr Suzanne Rowden. She wrote and signed a note which was then faxed to Mr Daniel before 9am that day. The note said:

*I have taken David Watson off work for medical reasons and have asked him to make a few appts today so he was unable to call in. He will be off work indefinitely. He will return for assessment to my office in four weeks.*

[14] Until he received the doctor's note Mr Daniel had been expecting Mr Watson to be at work from 9am on Monday to perform his job as usual for the rest of the week. At first when Mr Daniel read the note he wondered whether Mr Watson had suffered some sudden and serious illness, such as a heart attack, that had led to him being "taken...off work indefinitely." Mr Watson had not taken sick leave nor been unwell at any time before during his employment.

[15] Ryjack Holdings was a small business run by only Mr Daniel and two employees, Mr Watson and another person who worked in the office. In the week commencing 6 October that other employee had gone on annual leave, as had been planned for and approved by Mr Daniel. Mr Watson had also known in advance of that intended absence.

[16] Mr Daniel's response to the doctor's note was to seek more information about what had happened to Mr Watson that required him to be taken off work indefinitely, particularly when the business was left with no cover in the office while the person in

that position was away. As Mr Daniel saw it, the three man business had been suddenly reduced to only him, and he usually travelled about for part of the day, away from the office.

[17] There is no dispute that during the course of that day Monday 6 October, Mr Daniel rang Mr Watson's house several times to try and find out more about what had happened to him. A number of his calls were not answered and some were diverted to answer phone. Eventually Mr Daniel succeeded in getting Mr Watson to come to the phone, but the conversation was short. When asked to give more details about his situation Mr Watson simply told Mr Daniel to read the note from his doctor and said he did not wish to discuss the matter, before hanging up on Mr Daniel.

[18] After consulting the Department of Labour Advisory Service about what he could do Mr Daniel handwrote and signed a dismissal letter which he took with him to the Watsons' house. He was not able to see Mr Watson but could hear him inside the house when Mrs Watson came to the door. When no information was forthcoming from this visit as to Mr Watson's medical situation or the likely period that he would be off work, Mr Daniel handed the dismissal letter to Mrs Watson, for her husband. It read:

*Due to the size of Ryjack Holdings Ltd T/A Adhesive & Sealants we cannot have one of our employees off work indefinitely. As I have tried to contact you on 11 occasions on the 6-10-08 and you refused to discuss the matter I now make you redundant as at 6-10-08.*

*You will be paid any money owing to you week ending 13-10-08.*

*Thank you for your work over the last 27 months. Any queries please do not hesitate to phone me during work hours. Thank you.*

[19] The employer does not seek to justify the dismissal of Mr Watson on the grounds of "redundancy," a term Mr Daniel says he used in the dismissal letter after obtaining advice from the Department of Labour. It is clear that redundancy was not the reason for the dismissal.

### **Justification for dismissal**

[20] The test of justification is contained in s 103A of the Employment Relations Act 2000, which requires 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 or action occurred.

### **Determination**

[21] A fair and reasonable employer I find would view it as both unfair and unreasonable to be resisted by an employee in his attempts to communicate over the matter of when, or even whether, the employee would be returning to work. This is especially so in the case of a very small business where it was vital for Mr Daniel to quickly get some meaningful advice and not be left waiting indefinitely for that.

[22] With a small business to run and with only two employees, Mr Daniel had been suddenly confronted with a situation where he had no other staff to work. The office person was not going to be there that week. When Mr Daniel tried to find out what was wrong with Mr Watson preventing him from working, and find out when Mr Watson expected to be able to return to work, he was resisted and received no information. He was abruptly told to read a doctor's note which provided no meaningful information, except that Mr Watson would be off work "*indefinitely.*"

[23] It became obvious to Mr Daniel from his first brief conversation over the telephone on 6 October and from his visit to the house, that whatever may have been wrong with Mr Watson he was not so incapacitated that he could not communicate at all. His wife was aware of his state as was his doctor, and they were capable of speaking on his behalf with his consent. Mr Daniel was given no indication of when Mr Watson (or someone on his behalf) might say how long he was expecting to be off work.

[24] The employer I consider was put in the position of having to make a decision whether to continue the employment of Mr Watson, without knowing when or even whether he would return to work, or whether in the interests of the business he needed to quickly try and find someone else to do the job.

[25] I consider that by his failure to respond and communicate adequately to reasonable inquiries his employer had tried to make, Mr Watson was in breach of his duty under s 4(1A) of the Act requiring him to deal in good faith with his employer. In rejecting Mr Daniel's reasonable attempts to get necessary information he was not active and constructive in maintaining a productive employment relationship.

[26] I therefore find there was a breach of duty by Mr Watson amounting to misconduct which justified dismissal, but not serious misconduct justifying summary dismissal. Mr Watson's action or inaction was not simply bloody-minded or annoying conduct but which had no real consequence to the employment relationship. It was conduct that undermined the relationship, as Mr Daniel needed to know the extent to which performance of the employment would be affected by Mr Watson's absence. Mr Daniel was left completely in the dark about Mr Watson's future availability to perform the employment.

[27] Applying s 103A of the Act, I find that a fair and reasonable employer would have dismissed Mr Watson, but upon notice and not summarily. The period of notice in this case was two weeks. The dismissal was unjustified only because of the failure to give that notice.

### **Holidays Act**

[28] A note signed by a doctor does not trigger the entitlement to take sick leave under the Holidays Act 2003. I do not agree with Mr Single's submission that Dr Rowden's note amounted to "***proof of sickness or injury***" for the purposes of s 68 of the Holidays Act and the entitlement of employees under the Act to 5 days sick leave each year. Although provided by a medical practitioner, the note did not certify or even state that Mr Watson was "*not fit to attend work because of sickness or injury.*" The existence of that situation cannot reasonably be implied from the vague reference to "*medical reasons.*"

[29] It is clear that what is required by s 68 is a "*certificate,*" the purpose of which, as the Act emphasises with bolding, is to provide "***proof of sickness or injury.***" The purpose of the certificate is also to confirm that the employee is "*not fit to attend work*" because of the sickness or injury. Those requirements are not complicated but they were not met by Mr Watson in this case, I find.

[30] Shortly before the Authority's investigation meeting Dr Rowden provided a letter whose purpose was, she said, "*to clarify my Off Work Certificate dated 6 October 2008.*" Dr Rowden explained why she had not wanted to state in her 6 October note what she had considered to be wrong with Mr Watson. Her diagnosis was that he had a form of illness but, she said in her letter, she had not wanted to

inflame the situation or antagonise Mr Watson's employer by stating the cause of that illness, which she attributed to Mr Daniel.

### **Conduct of employer after the dismissal**

[31] Part of the investigation meeting was taken up with discussion and evidence given about the conduct of Mr Daniel after the dismissal. Later in October he was secretly recorded saying over the telephone that Mr Watson had been dismissed for dishonesty.

[32] This conduct I find is of no relevance to the question of justification, which under s 103A is to be determined at the time the dismissal, 6 October 2008. I am satisfied that dishonesty was not a reason in the mind of Mr Daniel when he decided to dismiss Mr Watson on 6 October. The suspicion of dishonesty arose only later in October, when a customer was questioned about whether goods or services had been paid for. The issue caused Mr Daniel to wonder about Mr Watson's handling of cash, and to become concerned that good relations had been affected by the issue in the way it had to be raised with the customer.

[33] During the investigation meeting Mr Watson strongly denied any dishonesty with regard to misappropriating money or goods from Ryjack Holdings. Misconduct discovered after a dismissal may have a bearing on the outcome of a claim such as this one, but it was not investigated in any detail and is not determined, as I am satisfied that the real and substantial reason for dismissal was the absence of Mr Watson from his employment in circumstances where he had deliberately failed to provide any useful information to his employer about his situation and the prospects of his recovery and return to work.

### **Remedies**

[34] I must inevitably find that Mr Watson contributed to the situation that gave rise to his personal grievance. His actions in deliberately rejecting Mr Daniel's reasonable attempts to communicate were a breach of a statutory duty and therefore blameworthy. The unresponsive and uncommunicative stance directly contributed to the situation that led Mr Daniel to dismiss him. For that reason any remedies to be awarded Mr Watson must be reduced, in accordance with s 124 of the Act.

[35] Within about three weeks of the dismissal Mr Watson was able to resume employment with a new job he had found. It appears he made a speedy and full recovery from a condition that earlier had led to his being taken off work indefinitely.

[36] The successful grievance claim is to be remedied by payment from Ryjack Holdings Ltd to Mr Watson of two weeks pay in lieu of notice, as sought when his grievance was first raised. The amount is \$1,200 in total. To take account of his contributory fault no other remedy is awarded.

[37] The claim to recover the alleged underpayment of wages in relation to the hours of work cannot succeed. For the hours he worked Mr Watson accepted the payment of \$600 per week, and did so for over two years without complaint. In that time no grievance was raised by him and no claim was made for greater payment. The Memorandum of Understanding had addressed all the issues Mr Watson had with Mr Daniel as at the beginning of October 2008.

[38] I find that by his conduct Mr Watson affirmed the terms of his employment, or variation of those, under which he had worked and received payment of \$600 per week.

### **Costs**

[39] Given the result, costs will lie where they fall.

### **Non-Publication order**

[40] All notes, letters, certificates or other written communications, and their contents produced to the Authority from Dr Rowden, are not to be published in any way to any person by Mr Daniel or anyone else he may have supplied them to or who may have obtained them. This suppression order is made under clause 10 of Schedule 2 of the Act.