

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Darcy Albon (applicant)
<b>AND</b>	Professional Garden Services Limited (respondent)
<b>REPRESENTATIVES</b>	The applicant represented himself Mark Skinner for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 10 November 2005
<b>DATE OF DETERMINATION</b>	29 November 2005

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. Mr Darcy Albon says he was unjustifiably dismissed by the Company – statement of problem received on 30 August 2005. During the Authority’s investigation on 10 November Mr Albon confirmed that the remedies he sought were compensation of \$3,000 for humiliation, etc and eleven weeks’ lost wages (approximately \$6,270 gross) and costs totalling \$1,813.75.

2. The Company says Mr Albon was justifiably dismissed – statement in reply received on 15 September.
3. The parties did not settle their employment relationship problem in mediation. Agreement was subsequently reached on a one-day investigation in Wellington on 11 November. As it happened only half of the day was required. Witness statements were usefully provided in advance of the investigation.
4. Agreement was reached in the investigation that the Company would provide evidence of its trading situation in the following week. At the end of that period the Company, through Mr Mark Skinner, its Operations Manager, sought and was granted an extra week to provide the information. On Monday, 28 February Mr Skinner advised that in fact the Company would not be providing such information. I am satisfied it is appropriate in all the circumstances to now proceed to determine Mr Albon's application.

## **Background**

5. The key facts are largely agreed.
6. Mr Albon commenced employment with the Company on 14 April 2004 as a garden assistant.
7. During his employment with the Company issues arose about various matters including Mr Albon's timekeeping, his conduct and his (non)use of certain safety equipment. Meetings were held with the applicant on a number of occasions as a result of the respondent's concerns.
8. Mr Albon denied seeing a warning letter addressed to him and dated 10 November 2004 prior to its presentation for the Authority's investigation: however, he accepted that the matters raised in it were put to him at a meeting and that they were by way of a warning. Mr Skinner could not be sure that the letter was ever given to the applicant.

9. It is agreed that warnings were issued to Mr Albon by letters dated 22 April and 8 June 2005. Mr Albon refused to accept the first warning. By letters dated 23 June & 7 July 2005 he took issue with their content. Mr Skinner says he subsequently spoke to the applicant about the latter's letters, that he rejected the claims made in them and that the original warnings remained in place unchanged. Mr Albon agrees he did not pursue personal grievances in respect of the warnings issued him by the Company.
10. Because of their various employment relationship problems the Company attended, by its calculation, three mediations provided by the Department of Labour with Mr Albon in an attempt to address and resolve their problems. Mr Skinner calculates that he also spent approximately in total 50 hours in discussions with Mr Albon in an attempt to achieve the same. I am satisfied from the evidence disclosed by the Authority's investigation that Mr Skinner's efforts to address Mr Albon's concerns were genuine, as was his participation in mediation efforts at least up to the point of Mr Albon's dismissal, and were not a cynical masking of an indifferent or even hostile attitude to the applicant.
11. Matters came to a head between the parties on 17 August 2005 when the Company instructed Mr Albon to participate in a toilet cleaning roster: he refused that direction and left the workplace. A meeting was scheduled for the following day: the Company say Mr Albon was late to work and left after the meeting. Mr Albon did not attend on the following two rostered work days. Mr Albon relies on his advice to the Company at the time that all of the absences complained about arose as a consequence of him being stressed by the instruction to participate in the cleaning roster.
12. In the meanwhile a further mediation was arranged, urgently, for Monday 22 August. Mr Skinner gave evidence about some of the content of that mediation. Because of the provisions of s. 148 of the Act and the fact that the parties were not represented by professional advocates, I have put that evidence to one side for the purpose of this determination.
13. Immediately following the mediation, Mr Skinner gave Mr Albon oral advice he was dismissed. A letter of termination dated 23 August was subsequently forwarded to the applicant.

14. Mr Albon reported for work on 25 August 2005: the Company say he was invited to leave because he had been dismissed. When Mr Albon failed to go the Police were called. Notice of his personal grievance was then filed five days later.

## **Discussion and Findings**

15. I am satisfied that Mr Albon was unjustifiably dismissed for the following reasons.
16. Mr Albon says he refused the instruction to undertake cleaning duties because, at the time of signing off his individual employment agreement, he received assurances from Mr Skinner and another Company employee that his gardening assistant duties did not extend to cleaning. Mr Skinner accepted that part of the applicant's evidence. I therefore accept Mr Albon's claim that it was a condition of his employment agreement that he was not required to undertake cleaning duties or to participate in a cleaning roster. Mr Skinner's 22 August 2005 notice of termination of Mr Albon clearly links the final written warning of 8 June to the applicant's refusal to,

*"... comply with a management direction that all staff would be assigned to a cleaning roster.*

*On 17 August you were requested by ... management ... to attend to your rostered cleaning duties. You duly refused .... It was at this point that, without permission, you walked out of work and did not return. There was no acceptable reason for you to leave work at that time ... The next morning, you failed to show up to work ... and did not arrive until 8 am at which stage you attended the Disciplinary Meeting. At the Disciplinary Meeting you indicated that you would not be working that day as you were too stressed. ... The next day you then called ... management ... informing the Company that you would be in on Friday or Saturday and that you would see Mark at a Mediation hearing you had arranged on Monday. No reason was given for your non-attendance at work ...*

*The (respondent) take(s) very seriously the fact that you personally decided not to turn up to work on 4 given rostered days. Such behaviour is not acceptable ...*

*Accordingly your Contract of Employment is terminated immediately...*

(attachment to statement of problem)

17. The above makes clear that Mr Albon was dismissed for both failing to undertake cleaning duties and his absence from work. Because it was a term and condition of Mr Albon's employment agreement that he not undertake cleaning duties, it was neither fair nor reasonable of the employer to dismiss him for refusing to undertake the same: the applicant was lawfully entitled to rely on the (orally) amended employment agreement.
18. In the event of disagreement as to the existence of that term then it was incumbent on the respondent to work the matter through by a dispute resolution process: *Sky Network Television v Duncan* [1998] 3 ERNZ 917 (CA).
19. Mr Albon's absence from the workplace, he says because of "stress", was inextricably linked to his employer's effort to have him act in breach of his employment agreement. Cool-heads were called for. Unfortunately Mr Skinner behaved intemperately and precipitately. Mr Albon's response did not assist. The evidence makes clear that Mr Skinner's actions, objectively viewed, did not amount to "... *what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred*": s. 103A of the Act applied.
20. I reach this conclusion because I accept Mr Albon's evidence that he had explained to Mr Skinner and other Company representatives, in advance of his dismissal on 22 August, that he relied on the terms and conditions of his employment agreement to legitimately decline to undertake cleaning duties. The proper course of action for the Company was, of course to participate in a dispute resolution process, in which it could have pointed out to Mr Albon the ramifications – in the context of the Company's trading and financial realities – of the applicant relying on those terms, and in particular that redundancy could result.

### **Contributory Fault**

21. While Mr Albon's dismissal was unjustified, I find that he significantly contributed to the situation that gave rise to his grievance. This is, firstly, because of Mr Albon's troubled employment history with the Company from shortly after the commencement of his employment: for much of the duration of his employment he was the subject of various disciplinary issues and warnings. Secondly, his timekeeping was also

questionable if not poor. Thirdly, he showed little sympathy for the problems confronting his employer. His behaviour was not always helpful. For example, during the investigation Mr Albon said – in respect of one day's absence – that while he had a doctor's certificate he did not produce it because, "*they didn't ask*".

22. I find, furthermore, that his absence from work prior to the mediation on 22 August was a major factor contributing to his unjustified dismissal on the same day, as Mr Skinner's letter makes clear (see above). Mr Albon has not provided good reason for his absence. I do not accept Mr Albon's claims that his stress levels were such that he had no choice but to absent himself from his workplace effectively from 17 August until his dismissal 5 days later. Mr Skinner properly sought a medical certificate at the time: it was not provided by the applicant. No retrospective certificate has been provided.
23. Having considered the parties' evidence on the matter, I also do not accept Mr Albon's claim that he was effectively authorised to leave the workplace by the Company on 17 August and thereafter it was fair and reasonable for him to be absent because of stress.
24. The good faith obligations set out in the Act apply equally to employee and employer alike: Mr Albon was entitled to expect the protection of his employment rights by the Company. At the same time he had a duty of fidelity to protect and enhance his employer's interests and to do all he could to meet the respondent's fair and reasonable requirements.
25. Having regard to the above I am satisfied that the level of contributory fault by Mr Albon is properly set at 50%: s. 124 of the Act applied.

## **Remedies**

26. Mr Albon seeks lost wages totalling approximately \$6,270 gross, compensation of \$3,000 for humiliation, etc and costs totalling \$1,813.75.

27. The applicant gave evidence of his efforts to find paid and self-employment, including a list of employers he approached and details of monies earned by him. That evidence was not contested by the Company.
28. I am satisfied the applicant has made out his entitlement for compensation for lost remuneration of a sum equal to 11 weeks' ordinary time remuneration. That sum is to be reduced by the \$560.00 earned by Mr Albon during that period (the latter to be deducted from the gross calculation): s. 128 (2) applied. The resulting amount is then to be reduced by Mr Albon's 50% contributory fault.
29. I am also satisfied from Mr Albon's evidence that he has made out his claim for \$3,000 for compensation for humiliation, etc. The sum is to be reduced by Mr Albon's 50% contributory fault.
30. The applicant provided copies of legal invoices incurred by him: they total \$1,813.75. These costs were clearly incurred in respect of preparing for this investigation. At the conclusion of the investigation the parties were advised that costs were reserved. The parties are now encouraged to attempt to reach agreement on costs failing which the matter can be returned to the Authority for determination.
31. It is appropriate for me to indicate to the Company at this point that Mr Albon's costs claim has all the appearance of being fair and reasonable.

### **Employer's Ability to Pay**

32. Mr Skinner gave oral evidence during the investigation of the Company's financial situation. He agreed to the Authority's request that he obtain and forward a financial statement in support of his claims from the Company's accountant, so that Mr Albon might respond and the Authority have regard to the parties' positions.
33. As is made clear above, Mr Skinner subsequently advised that the Company would not be presenting such evidence: I am therefore disregarding Mr Skinner's oral evidence and do not intend to take those claims into account by way of application of ss. 137 (4A) of the Act.

**Determination**

34. For the reasons set out above, I find in favour of Mr Darcy Albon's, claim that he was unjustifiably dismissed by Professional Garden Services Limited. The respondent is directed to pay to the applicant the following:
- a. Lost wages – a sum equal to 11 weeks' ordinary time remuneration. That sum is to be reduced by the \$560.00 (five hundred and sixty dollars) earned by Mr Albon during that period (the latter to be deducted from the gross calculation) and also by Mr Albon's 50% contributory fault. Determination of this figure can be returned to the Authority if the parties cannot reach agreement.
  - b. Compensation for humiliation, etc – \$3,000 (three thousand dollars), to be reduced by Mr Albon's 50% contributory fault.
28. Costs are reserved: refer to the comments in par. 29 above.

**Denis Asher**

**Member of Employment Relations Authority**

