

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 47/08
5076108

BETWEEN JONATHAN BARDRICK
 Applicant

AND MOSGIEL ABILITIES
 RESOURCE CENTRE
 INCORPORATED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Jarrod Lovely, Counsel for Applicant
 Sharon Knowles, Counsel for Respondent

Investigation Meeting: 9 October 2007 at Dunedin

Determination: 30 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jonathan Bardrick has worked for the Mosgiel Abilities Resource Centre Incorporated (MARC) for some time providing personal care to one of its clients. He works standard hours each pay period.

[2] His first statement of problem lodged with the Authority described his problem as a failure to agree terms of an employment contract. I infer that he attributes that failure to MARC. Mr Bardrick wanted that problem solved by having his conditions of employment determined by the Authority. The parties participated in mediation but were not able to resolve the problem.

[3] As some point Mr Bardrick instructed counsel and an amended statement of problem was lodged with the Authority. In this document the problem is described as a claim for unpaid wages and constructive dismissal. The unpaid wages claim is

based on the existence of a disagreement between Mr Bardrick and MARC as to the value to be placed on his education and experience as a carer. The constructive dismissal claim is based on MARC changing its requirements about the provision of timesheets by Mr Bardrick, Mr Bardrick refusing to comply with the change and MARC not paying him. Reference is also made to the fact that when Mr Bardrick lost his licence for a period of time, MARC declined to pay his travel expenses to allow him to get to the client's residence. The refusal is contrasted with MARC paying for other employees' transport costs.

[4] I interviewed Mr Bardrick and counsel subsequently provided submissions about both aspects of the problem. In those submissions counsel accepts that there is no constructive dismissal because Mr Bardrick has not resigned. Instead, it is argued that an unjustified disadvantage personal grievance exists.

The source of Mr Bardrick's dissatisfaction

[5] To a significant extent Mr Bardrick's dissatisfaction with his employment by MARC is based on his view that he has not been paid at a level that properly recognises his education and experience. In that sense the original statement of problem more accurately reflects his view about the nature of his employment relationship problem than does the amended statement of problem. Mr Bardrick is entitled to that view but it is not the role of the Authority to set terms and conditions of employment, subject to certain exceptions that do not apply here: see s.161(2) of the Employment Relations Act 2000 for both the restrictions on the Authority's role and the reference to the various exceptions.

[6] Subject to the Minimum Wages Act 1983 it is for Mr Bardrick and MARC to negotiate the applicable rate of pay. There was an originally agreed rate of pay and subsequently MARC increased that rate. The increased rate then became the contractual rate of pay but it cannot be backdated without agreement. Equally the Authority cannot tell MARC to pay Mr Bardrick at a different rate.

Personal grievances

[7] Mr Bardrick considers that he has been unfairly treated, or possibly discriminated against because MARC would not meet his transport costs for the period of his loss of licence. There was no contractual requirement for MARC to pay Mr Bardrick's transport costs. Normally, he transported himself to and from the place

of employment. When he lost his licence he asked MARC to pay his transport costs but that was declined. That does not give rise to an unjustified disadvantage grievance. The reason why Mr Bardrick could not get to his place of employment by the usual means had nothing to do with MARC. There was no action or inaction by MARC affecting Mr Bardrick's employment. What affected his costs in getting to and from work was the consequence of his own actions.

[8] There is no evidence to support the contention that Mr Bardrick was treated differently on this matter by reason of any of the prohibited grounds of discrimination such as his sex, religion, race or age etc. While Mr Bardrick may be dissatisfied about the position taken by MARC over this issue, there is nothing the Authority can do to help him.

[9] I agree that Mr Bardrick has not been constructively dismissed because he has continued to work notwithstanding the dispute about timesheets and pay.

Other wage arrears arising

[10] The point about the timesheets requires more explanation. What used to happen was that Mr Bardrick filled in a timesheet recording his hours of work and returned that to MARC. MARC introduced a new system that required the employee to telephone a designated number using the client's phone during each work period (Panstel). MARC says that this system was introduced as a result of requirements by its external funders for accountability purposes. However, Mr Bardrick refused to cooperate. His position is that he is not contractually bound to use the Panstel system for recording his working hours. However he is willing to comply with the new system if MARC agrees to pay him a higher hourly rate and perhaps agrees to some other changes in his current terms of employment. In the meantime, Mr Bardrick has continued to do the work for MARC's client but has not been paid. MARC says that it requires Mr Bardrick to complete timesheets in order for it to receive funding from the external funder that meets the costs of the services provided to the client.

[11] It was one of the original terms of this employment that Mr Bardrick would complete a timesheet each fortnight, get the client to sign that timesheet and then return the signed timesheet to MARC at its South Dunedin office. Mr Bardrick's evidence was to that effect and that is what happened. After that office closed, MARC maintained a mail box facility which Mr Bardrick used for some time. Next

Mr Bardrick was required to post the timesheets using his own stamp and envelope to MARC's Mosgiel Office but he objected to doing that. Later, MARC introduced the Panstel system in place of the paper timesheets. I do not need to determine whether MARC could request Mr Bardrick to post the timesheets using his own stamp and envelope as events have gone past that point. The question is whether the original contractual obligation about the timesheets can be construed as now obliging Mr Bardrick to use the Panstel system. I find that it can. Assuming MARC has its client's approval for Mr Bardrick to use the client's telephone, the Panstel system simply is a technologically more sophisticated way of Mr Bardrick providing a timesheet.

[12] Mr Bardrick should not refuse to use the Panstel system in an effort to force MARC to negotiate a higher rate of pay or other conditions of employment. He risks not complying with what would be a lawful and reasonable command by MARC and the consequences that might follow.

[13] Mr Bardrick has apparently not been paid for his work since July 2007. This is on the basis that MARC requires his timesheets to be submitted before it will pay him. I tend to think that this is not a sustainable position for MARC.

[14] The obligations on Mr Bardrick to complete a timesheet and MARC to pay him are separate and the latter is not contingent on the former. The contractual obligation to pay Mr Bardrick for time worked arises expressly, or by conduct or by implication in the circumstances of this employment. On any of those approaches it is clear that the arrangement was to pay Mr Bardrick fortnightly for time worked during the preceding period. Section 4 of the Wages Protection Act 1983 says that an employer shall, when wages become payable to a worker, pay the entire amount of those wages without deduction. The wages became payable to Mr Bardrick on the regular payday following the end of each pay period during which he performed any work. There was then a contractual obligation to pay the wages and a statutory obligation to pay them without deduction.

[15] I will stop short of making a finding about arrears of wages for time worked since July 2007 because MARC has not had a full opportunity to argue the point. Rather I will provide the parties with this determination and arrange a telephone conference to discuss what needs to be done further to finalise the investigation and a determination of this matter.

Summary

[16] The Authority has no jurisdiction to assist Mr Bardrick with his dissatisfaction about the level of pay or other negotiable terms of the employment.

[17] Mr Bardrick does not have a personal grievance arising from MARC's refusal to meet his extra transport costs during the period of his loss of licence.

[18] It is a term of Mr Bardrick's employment contract that he complete a timesheet and MARC is entitled to rely on that term to require his compliance with its Panstel system. However, I do not accept that Mr Bardrick's refusal to use the Panstel system absolves MARC of its obligation to pay wages to Mr Bardrick.

[19] The Authority will arrange a phone conference to discuss what needs to be done to bring all issues to an end.

Philip Cheyne
Member of the Employment Relations Authority