

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Christopher Barton (Applicant)  
**AND** Programmed Maintenance Services (NZ) Limited (Respondent)  
**REPRESENTATIVES** Paul Pa'u, for Applicant  
Peter Fuscic, for Respondent  
**MEMBER OF AUTHORITY** Vicki Campbell  
**INVESTIGATION MEETING** 20 June 2005  
28 June 2005  
**SUBMISSIONS RECEIVED** 14 July 2005 from Respondent  
**DATE OF DETERMINATION** 27 July 2005

DETERMINATION OF THE AUTHORITY

**Employment relationship problem**

[1] Mr Christopher Barton was employed by Programmed Maintenance Services (NZ) Ltd (“PMS”) as an account manager on 18 September 2003. PMS contracts to provide long-term painting and paint maintenance programs to its customers. A large number of PMS customers are schools. Account managers source new contracts by providing accurate estimations to enable PMS to quote for the contracts.

[2] Carrying out an estimate involves the account manager measuring each individual part of a building, ascertaining any difficulties in painting the building and identifying the types of paints to be used.

[3] During the period August to October 2004 PMS implemented a marketing campaign entitled “*Back to School*”. This campaign was very structured, focused on identified potential clients and entailed a considerable degree of supervision and involvement by the business manager (Mr Biec), northern regional manager (Mr Barclay McGhie), and general manager (Mr Nigel Caigou).

[4] In mid October 2004 Mr Barton was asked to a meeting with the Mr Caigou. Present also at the meeting were Mr Biec and Mr McGhie. Mr Barton says that at this meeting he was told he did not fit into the team and he should look for alternative employment. Mr Barton says he was threatened with dismissal if he did not seek alternative employment.

[5] Mr Barton says as a result of this and repeated pressure to resign he became ill and has been on sick leave for an extended period.

[6] Mr Barton says that while he has been on sick leave PMS failed to act in good faith towards him including unreasonable demands to return the company motor vehicle and mobile phone.

[7] Mr Barton says this treatment amounts to a disadvantage and seeks compensation for loss of wages, compensation for hurt and humiliation, and reinstatement of lost benefits including sick leave.

[8] In response PMS denies Mr Barton has been disadvantaged in his employment.

[9] The issues for determination are:

- Was Mr Barton disadvantaged in his employment?
- If yes, was the disadvantage justified?

### **Was Mr Barton disadvantaged in his employment?**

[10] Mr Barton is required to show on the balance of probabilities that one or more of his conditions of employment are affected to his disadvantage by an unjustifiable action by PMS (s.103(1)(b) Employment Relations Act 2000).

[11] The Employment Court has found that disadvantage grievances arise out of the employment activity, the on the job situation. The words “are affected” are related to physical conditions of employment, the environment in which the work is carried out, the amenities and facilities available, the payment to the employee and matters of that kind (*Wellington Area Health Board v Wellington Hotel IUOW* [1992] 2 ERNZ 466).

[12] In determining whether Mr Barton's employment was affected to his disadvantage, it is necessary to focus on the employment, considering the changes that occurred and assessing their impact on the employee (*Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994).

[13] At the investigation meeting I heard evidence from PMS and Mr Barton on Mr Barton's ability or otherwise to measure buildings in preparation for quoting on jobs. The company took steps to assist him with that, including having Mr Nigel Richmond, a colleague, measure some of Mr Barton's jobs with him. Mr Biec told the Authority that he and Mr Richmond also did a lot of measuring for Mr Barton as Mr Barton was falling behind in getting estimates together. He says that he raised the problems with Mr Barton but Mr Barton did not accept there was a problem. Mr Biec says that he and Mr Richmond worked up to six days a week to assist Mr Barton and even worked in the dark on one job to help reduce the workload. These steps assisted Mr Barton in the achievement of his agreed budgets.

[14] Mr Barton's performance review for the period 2003/2004 shows that by March 2004 measuring was a cause for concern and resulted in an agreed rating for Mr Barton's "Operation Activity" of two out of a possible six. A score of two indicates there is "...fair scope for improvement in the consistency, quality and/or timeliness of the employee's contribution to the team".

[15] I have concluded that Mr Barton struggled with the measuring and estimating aspect of his job. Having reviewed the evidence gathered during the investigation, it seems to me Mr Barton actually did not like having to measure the buildings and therefore put it off. At the investigation meeting Mr Biec was asked if he had implemented a formal performance management process. Mr Biec says that despite Mr Barton labouring in the measuring area he wanted to try and turn Mr Barton's performance around and did not see his performance as being at the stage where formal disciplinary processes were warranted. Mr Barton himself told me at the investigation meeting that he was falling behind in his work, that he had a lot of clients expecting proposals and had to get them out and this put pressure on him.

[16] Mr Barton took leave for the first week of the *Back to School* campaign. Mr Biec says he reluctantly agreed for Mr Barton to take the leave, and reminded him that as he would be returning during the second week of the campaign he would have to "hit the ground running". Mr Barton says taking the leave during that first week of the campaign had no impact on him achieving the requirements of the campaign. Mr Biec on the other hand says that Mr Barton did not hit the ground running when he got back, in fact he undertook unrelated activities on his first day back.

[17] The second week of the campaign was the calling phase. Everyone involved in the campaign was expected to make calls for a specific purpose. Mr Biec told the Authority that Mr Barton did make some calls but they were unrelated to the campaign. Mr Barton got behind in the requirements set for the campaign.

[18] During the next month, at his usual weekly sales meetings (held individually with each account manager), Mr Biec raised with Mr Barton issues relating to Mr Barton's credibility with his colleagues. Mr Biec refers to credibility in the sense that the interpersonal relationships between Mr Barton and his colleagues was floundering. For example Mr Richmond told Mr Biec that he would refuse to assist Mr Barton in the future, with his backlog in the campaign.

[19] On Monday 11 October 2004 as Mr Barton was passing Mr McGhie's office, Mr McGhie enquired as to how the campaign was going. Mr Barton told Mr McGhie it was frustrating for him. Mr McGhie invited Mr Barton into his office and discussed Mr Barton's frustrations with him. At the end of the conversation Mr Barton told Mr McGhie that he was only marking time with PMS and was only there until something better came along. Mr McGhie passed this information on to Mr Barton's manager, Mr Biec.

[20] On Tuesday 12 October 2004 while Mr Biec and Mr McGhie were discussing operational matters, Mr Biec raised a concern about Mr Barton's relationship with the other account managers. Mr McGhie, keen to hear Mr Barton's side of the problem asked Mr Biec to bring Mr Barton into the meeting.

[21] On his arrival, Mr Barton says Mr Biec attacked him in front of Mr McGhie. On reflection of the evidence I have concluded that it is more likely than not, that Mr Biec did not attack Mr Barton. However, it is common ground that Mr Biec did outline concerns raised by Mr Richmond about not wanting to help out with any more of Mr Barton's work. Mr Barton was annoyed that this matter had been raised with him in front of Mr McGhie when it had not been raised with him before.

[22] A manager is entitled to raise matters regarding how an employee engages with other staff in front of another, more senior, manager. I am satisfied that there was nothing untoward in Mr Biec raising the matter. It seems to me Mr Biec raised the issue to put it on the table and to have Mr

Barton become aware of the difficulties arising from Mr Barton's relationships with other account managers.

[23] On Wednesday, 13 October 2004, Mr Biec and Mr Barton met. Mr Biec says this meeting was one of his standard weekly meetings which he holds with all his staff. Mr Barton has indicated that the meeting was out of the ordinary and that he received no notice of the meeting. I am satisfied that the meeting was part of the standard weekly meetings held with all staff reporting to Mr Biec and was held on an individual basis.

[24] During the meeting there was some discussion about whether Mr Barton was happy in his job. At the same time Mr Biec raised with Mr Barton the interpersonal relationship problems between himself [Mr Barton] and Mr Richmond. Mr Barton apologised if he had offended Mr Richmond in any way and offered to apologise directly to Mr Richmond if he was upset.

[25] Following that meeting Mr Barton approached Mr Richmond and invited him to go and have a cup of coffee with him. The pair drove up to One Tree Hill and parked in a parking bay. Once parked, Mr Barton proceeded to explain what had been told to him by Mr Biec. Mr Barton enquired why Mr Richmond had refused to assist Mr Barton in his work. Mr Richmond explained to Mr Barton in very frank terms that he would not waste his time helping someone who did not want to help himself. Mr Barton told Mr Richmond that he was jealous of him, and also told him he was having difficulty with another account manager, a Mr Hamlyn. Mr Richmond says Mr Barton told him that he had experienced problems in previous jobs where no-one like him and also that he had similar problems outside work. Mr Barton denies telling Mr Richmond this.

[26] I conclude that on the balance of probabilities the discussion Mr Richmond relayed through his evidence did occur. Mr Biec told the Authority that during the last month of his employment, and during a normal weekly sales meeting, when Mr Biec raised issues with Mr Barton about his interpersonal relationships with other account managers, Mr Barton told Mr Biec that he always self-destructed and wrecked relationships when he got too close to people.

[27] Mr Richmond says that he found the experience with Mr Barton rather bizarre and felt very uncomfortable. Mr Barton had invited him for coffee, only to end up sitting in the car in a car park on One Tree Hill.

[28] As part of the campaign, “two-up” meetings were held with potential clients to make a presentation about services provided by PMS. Each account manager was accompanied by one of the three senior executives, either, Mr Biec, Mr McGhie or Mr Caigou.

[29] On Thursday, 14 October 2004, Mr Barton attended a presentation with Mr Caigou. Mr Barton recalls that at the last minute the people representing the client, with whom he had already established a relationship, failed to turn up and of those that attended the presentation, one did not have a good perception of PMS. However, Mr Caigou managed to turn the meeting from a negative meeting into a positive one. Following the client presentation Mr Caigou and Mr Barton had a coffee together and debriefed from the client meeting. The discussion between the two also touched on other matters including how Mr Barton could improve in his presentations. It was common ground that the discussion was amicable and in the nature of a counselling session.

[30] Mr Barton says that the next thing that occurred was a surprise meeting with Mr Caigou, Mr McGhie and Mr Biec on Friday 15 October 2004. However, I am satisfied that the meeting occurred on the afternoon of Thursday 14 October 2004. My conclusion is based on the notation from Mr Caigou’s diary, a contemporaneous document, which records a meeting on 14 October 2004 between the parties at 4.30pm and is annotated as being “off the record chat”.

[31] Mr Caigou says he invited Mr Barton into his office to discuss the comment that he was just marking time until another job came along. He wanted the matter raised off the record to enable an open and frank discussion. All three company representatives present at the meeting gave unequivocal evidence that Mr Barton agreed to the meeting being “off the record”. In answer to questions at the investigation meeting Mr Barton told me he understands “off the record” to mean the discussion can not be used in court proceedings. He is right.

[32] Having an “off the record” discussion is a longstanding and frequent feature between parties when trying to resolve employment relationship problems. The Employment Court has held that such practices provide a safety net for parties to have open and frank exchanges in the knowledge that that fact of them and what is discussed will not be disclosed to the Authority or to the Court (*Jackson v Enterprise Motor Group (North Shore) Ltd*, unreported, Colgan J, AC67/04, 30 November 2004).

[33] While I accept that this is what the parties intended for their discussions on that day, during my investigation of this matter the company provided chapter and verse of their discussion with Mr Barton and have, therefore put the matter on the record.

[34] Mr Barton says that at this meeting he was told Mr Biec and Mr McGhie wanted him to leave the company. Mr Barton says he broke down and told his managers that if they wanted him to leave then he could not fight them. Mr Barton says he agreed to look for another job but that there would be no time restrictions. The company says that at the meeting Mr Caigou outlined the comment Mr Barton had made about marking time. He says that Mr Barton indicated that he wanted to stay with PMS. Mr Caigou says he told Mr Barton that if he wanted to explore some options the company would support him by allowing him a period on full pay, and use of the company vehicle, while not requiring him to work. In response to a question from Mr Barton about timeframes Mr Caigou says he told Mr Barton that some time frames would need to be agreed but that he should give the matter some further consideration.

[35] It is common ground that following this discussion Mr Biec and Mr McGhie left the meeting and Mr Barton and Mr Caigou remained and continued their discussion. Both parties say the discussion was amicable. It is common ground that Mr Barton was emotional during this time, but he composed himself and left Mr Caigou's office.

[36] I have concluded that during the meeting a possible solution of assisting Mr Barton into an alternative employment situation was offered and discussed with Mr Barton. I have concluded that at no time during the meeting was Mr Barton told that if he didn't resign, he would be dismissed.

[37] On Friday, 15 October Mr Biec met with Mr Barton informally. At the investigation meeting Mr Barton agreed that the discussion included Mr Biec advising Mr Barton that he needed to retrieve his credibility with his colleagues. It was common ground that Mr Biec also advised Mr Barton to consider joining in the social activities as a way to improve his relationships with his colleagues.

[38] On Monday 18 October Mr Barton says he had to spend the day with Mr Biec and that during the day he became "...increasingly agitated...". Mr Biec says of that day that he attended a couple of "two-up" presentations as part of the campaign with Mr Barton. He denies getting agitated. In answer to questions at the investigation meeting Mr Barton told me Mr Biec was uncommunicative. I have concluded that there was nothing untoward in Mr Biec's behaviour toward Mr Barton on 18 October.

[39] Mr Barton says that on 19 October Mr Biec made it clear he was not wanted at the communication training day and he spent the day addressing his CV to various employment agencies. Mr Biec says he gave Mr Barton the option of attending the training day or updating his CV if that is what he wanted to do. Mr Barton produced copies of the emails he sent out that day to the agencies. All these emails have been sent after 3.00pm on 19 October.

[40] The next morning Mr Barton briefly advised Mr McGhie that he sent his CV to various agencies in pursuit of alternative job opportunities. Mr Barton says that later that morning he was called into a meeting with Mr McGhie and Mr Biec and was attacked in a threatening manner. Mr McGhie disagrees with this description of the meeting and says that he told Mr Barton at the outset that if he was intending to take up Mr Caigou's offer then Mr Biec needed to know timeframes to assist in planning. No agreement was reached at that meeting around timeframes.

[41] The following morning, Mr Barton attended a "two-up" presentation with Mr McGhie. Following the presentation and over coffee Mr Barton told Mr McGhie that he had decided to stay at PMS. Mr Barton says that upon delivering this news Mr McGhie told him it was too late for that and offered him two months pay for him to leave immediately. Mr McGhie says that he did venture his opinion that it was in Mr Barton's best interests to take the offer and find alternative employment and that he should be doing a job he wanted to do. Mr McGhie says that when Mr Barton told him he wanted to stay at PMS that was the end of the discussion.

[42] Mr McGhie advised Mr Biec of Mr Barton's desire to remain in his job at PMS. It is common ground that Mr Biec was surprised at this decision and told Mr Barton, he couldn't believe he had made that decision. Mr Barton says Mr Biec told him the staff "...hated..." him, Mr Biec says he told Mr Barton the staff "...disrespected him...".

[43] Mr Barton says that Mr Biec then threatened him with performance management if he stayed. Mr Biec says that at that point he had come to the realisation that a process of performance management would be necessary. While Mr Biec denies using the words "performance management" he accepts he indicated to Mr Barton that he would be closely supervised.

[44] It seems to me that at this point in time, Mr Barton had two options, take up the option of his employer to seek alternative work from the position of being employed or be faced with the prospect of performance management.

[45] The following Monday was Labour Day holiday. On Tuesday 26 October Mr Barton attended work only very briefly. After leaving work Mr Barton attended a doctor and sought legal advice.

[46] Mr Barton has not returned to work. The medical certificates provided to PMS indicated that Mr Barton was unfit for work until 15 January 2005.

[47] As at 26 October 2004 Mr Barton had an entitlement to two days annual leave, but no entitlement to paid sick leave. Despite his lack of entitlement PMS continued to pay Mr Barton his normal salary up to and including 15 January 2005. This was over and above any contractual entitlement Mr Barton had for any payment. I find that the payment of salary over any agreed entitlement does not constitute a disadvantage.

[48] Mr Biec, Mr McGhie and Mr Caigou had all taken the view that Mr Barton should find another job because he was having interpersonal relationship problems with his colleagues and had indicated that he was only marking time until he could find an alternative position. Mr Barton has never resigned from his job. This is consistent with his indication to Mr Biec and Mr McGhie that he wished to say with PMS. Neither did PMS take any steps to find a replacement. On 26 January 2005 Mr Barton advised PMS through his representative that he "...no longer trusts his employers to act fairly and reasonably." I find this to be an overreaction. Up until 26 January 2005 PMS had not conducted itself in a way which could possibly lead to such a conclusion.

[49] The question is whether the behaviour of Mr Biec and Mr McGhie affected Mr Barton's employment to his disadvantage. This is not a matter where the employer has used a heavy handed manner in dealing with Mr Barton. It seems to me that it is Mr Barton's perception that Mr Biec brought pressure to bear on him to leave the company and that the discussion about performance management was a threat of dismissal. Once Mr Barton received legal advice on 26 October it was open for him to test his perceptions with his employer and consider a return to work. This was something PMS made clear in their written communications to Mr Barton's representative that they wished to see happen.

[50] I find that Mr Barton was not disadvantaged in his employment by unjustifiable actions by his employer.

### ***Company Car and Mobile Phone***

[51] During his absence Mr Barton continued to make full personal use of the company car. On 10 November PMS requested that Mr Barton return his company car as the vehicle was due for a service and arrangements needed to be made to allow the contracted serviceman to attend the company premises to service the car. PMS received no response to this request.

[52] During his absence Mr Barton also continued to use the company cellphone. Mr Barton incurred expenses of \$760.00 between 26 October 2004 and February 2005. This was considered excessive and PMS terminated the account.

[53] On 11 February 2005 PMS again requested the return of the company vehicle pursuant to the PMS Motor Vehicle Policy which states:

...vehicles may be required when those staff allocated the vehicles are away on leave. At the request of the manager operative vehicles are to be returned to the nearest branch office.

[54] Eventually the car was seized by PMS in May 2005.

[55] Mr Barton says the request to return the company car and the cancellation of the mobile telephone account contributed towards his disadvantage. He says also that in taking this action PMS did not act in good faith.

[56] I find that the actions of PMS did not cause a disadvantage to Mr Barton. The agreement signed by Mr Barton allowed PMS to have the vehicle returned to the company. While it is accepted that Mr Barton's agreement entitled him to reasonable personal use of the company cellphone, the cellphone is predominantly a tool for business use. Given Mr Barton's prolonged absence and extent of personal use, it was open for PMS to terminate the cellphone account.

[57] I find the actions of PMS in recovering the car and cancelling the cellphone account were not in breach of its obligations to act in good faith.

**I am unable to assist Mr Barton any further.**

#### **Costs**

[58] Costs are reserved.

Vicki Campbell  
Member of Employment Relations Authority