

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Keith William Brown (Applicant)  
**AND** Autobuy 2000 Limited (Respondent)  
**REPRESENTATIVES** Jamie Moore for Applicant  
Stephen Underwood for Respondent  
**MEMBER OF AUTHORITY** P R Stapp  
**INVESTIGATION MEETING** Wellington, 10 March and 24 May 2005  
**FURTHER DETAILS AND  
INFORMATION** Jamie Moore 9 & 24 March and 23 May 2005  
Stephen Underwood 20 March and 17 May 2005 and Wendy  
Ambury on 24 May 2005<sup>1</sup>  
**AFFIDAVITS** Carol Brown 18 March, Keith Brown 24 March, Kaye  
MacCarthy 16 March and Ian Boag 19 May 2005<sup>2</sup>  
**DATE OF DETERMINATION** 21 June 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

1. Mr. Brown says he was unjustifiably dismissed on 1 March 2004. He is seeking compensation and loss of wages for his grievance. He also claims outstanding holiday pay and expenses and costs.
2. On 29 October 2001 Mr. Brown became an employee of Autobuy 2000 Limited (Autobuy). He was at that time a bankrupt. Prior to bankruptcy he was engaged under a management contract in his wife's company, Beattie Holdings Limited, to provide Autobuy with administration services, including the use of an office at the Browns' home in Levin. These arrangement ceased in acrimonious circumstances when the company moved its services to Palmerston North.

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<sup>1</sup> Wendy Ambury was interviewed on the telephone during the investigation meeting by the Authority on 24 May 2005.

<sup>2</sup> Kaye MacCarthy and Ian Boag did not attend the investigation meeting.

3. There was no written employment agreement but Mr. Brown says that it was agreed for him to start employment on \$60,000 per annum and to have 4 weeks' holiday. However he was paid \$35,000 to start and given 3 weeks' annual leave.
4. Mr. Brown and Stephen Underwood, a director of, and investor in, Autobuy, tried to negotiate an employment package, without success. During the negotiations Mr. Underwood conceded 4 weeks annual leave to Mr. Brown conditional on the negotiation of the package.
5. During his employment Mr. Brown contested three warnings handed to him and a suspension on full pay involving Ian Boag, a director of Autobuy. Mr. Brown and Autobuy reached a settlement recorded and signed on 17 February 2004 by a mediator with the Department of Labour in full and final settlement of only those matters. Mr. Brown believed that the settlement provided for the parties to start their relationship afresh.
6. On 18 February 2004 Autobuy wrote to Mr. Brown informing him that it had discovered an invoice received by it on 28 January 2004. The invoice indicated he had been selling plastic window wallets to Autobuy customers. He was informed of the seriousness which the company considered this matter and that if there was no satisfactory explanation it could result in his dismissal.
7. A disciplinary meeting was held on 27 February 2004. Mr. Brown was represented. Mr. Brown admitted that he had been selling window card wallets and had not obtained prior approval. It also became clear that Mr. Brown had been selling the window wallets on behalf of Beattie Holdings Limited. The respondent was suspicious Mr. Brown had been creating an impression he was selling them for Autobuy. More information about this impression was provided in the dismissal letter on 1 March 2004.
8. Mr. Underwood decided to dismiss Mr. Brown on 1 March 2004. Mr. Brown was informed of the decision by his representative. Mr. Brown subsequently received the reasons in writing.
9. Mr. Brown was summarily dismissed. His holiday pay entitlements were not paid but off set by a deduction in regard to an advance he owed the company.
10. The issues for me to determine are:
  - What holiday pay is Mr. Brown entitled to?
  - Was the dismissal fair?

1. Was it fair that Autobuy settled earlier matters in Mr. Brown's employment and then immediately afterwards invoked further disciplinary proceedings?
2. Was the dismissal premeditated and predetermined?
3. Was Mr. Brown's dismissal justified?

### **What is the holiday pay entitlement?**

11. Mr. Brown is owed outstanding holiday pay that the respondent has tried to offset with an advance given to Mr. Brown for his expenses. Mr. Brown did not repay the advance. The respondent cannot deduct without written authority. Mr. Underwood conceded that there was no written deduction authority from Mr. Brown (a deduction clause was one of the disputed matters in the parties' negotiations). It had not been agreed.
12. There is also a matter of the amount of Mr. Brown's annual leave entitlement. Mr. Brown commenced employment without a written employment agreement. The agreement became subject to negotiations that remained unsettled as a package. There were no interim terms entered into although Mr. Brown expected 4 weeks annual leave. The employer's decision to agree later to 4 weeks was conditional on a package being agreed. Mr. Brown relied upon notes that referred to a salary level and 4 weeks' holiday when he started as an employee. However, the document falls short of an agreement, especially since he started on a different salary level and received an increase later when the management contract with Beattie Holdings ceased and thus his employment status needed to be regulated. Therefore Mr. Brown is only entitled to the statutory minimum of 3 weeks per annum holiday entitlement.
13. There is a dispute about the annual leave entitlement taken. I have scrutinised both parties' schedules of leave taken. I prefer the employer's schedule because Mr. Browns' schedule is not correct and has not been adequately verified where there are disputes over leave taken in July 2002. I have relied on the employer's schedule.
14. Both parties have calculated that 3 days annual leave are owed. As at 29 October 2003 the outstanding leave was 1 day from the employer's schedule.
15. The employer's calculation has been calculated on a daily basis and takes account of Mr. Brown's 3 week entitlement in the residual period from the date of his anniversary and the

date of termination, being less than 12 months. His holiday pay should have been calculated on the basis of 6% for the residual period since the entitlement last arose.

16. I have compared both parties' accounts of the leave. I have carried out my own calculation. He was due 1 day's leave carried over. There were three days leave taken on 29 December 2003, 30 December 2003 and 31 December 2003 and two of these would be leave in advance because they were taken after Mr. Brown's anniversary date for the new leave year. Mr. Brown's gross earnings for the period 29 October 2003 (being his anniversary date when he became an employee on 29 October 2001) until the last pay period, amounts to \$21,923.15. 6% of this is \$1,315.38. After allowing for the advance of two days of \$461.54, Mr. Brown is owed \$853.84.

**Was the dismissal premeditated and predetermined?**

17. Mr. Brown says the respondent acted in a premeditated way to dismiss him because it knew before January 28 about the selling of the car window wallets and because Mr Brown had raised a grievance.
18. The reasons relied upon by the respondent are entirely separate to the matters the parties settled in a record of settlement recorded and signed by a Department of Labour mediator on the other employment problems.
19. Mr. Brown says that to enable the parties to start their relationship afresh Mr. Underwood should have raised the matter of the wallets during that process. Mr. Brown is suspicious of it being raised the very next day after the settlement was recorded. However, I accept that it is likely the letter dated 18 February 2004 happened to be coincidental with the timing of settlement and the record of settlement being signed by the mediator on 17 February.
20. Autobuy became aware of a problem on 28 January 2004 when the debtor's invoice was received. It started an investigation. Autobuy's reason for the investigation was that Mr. Brown had been removed from collecting debtors much earlier. In good faith the employer could have raised the matter. However, the employer was also entitled to carry out a preliminary investigation before putting the matter to Mr. Brown with as much information that could be gathered on the matter. In this context the parties had a difficult relationship with the employment agreement negotiations, the other disciplinary matters and the termination of the Beattie Holdings Ltd management agreement. The relationship between Mr. Brown and Mr. Underwood was fractious and strained.

21. The respondent's position is supported by Ms Wendy Ambury, the company's dealer service manager. She gave the Authority convincing evidence that although she knew before 28 January that there had been queries about invoices in regard to window wallets, and who was selling them, that she did not realise the significance of the situation until 28 January when the email between the Browns was discovered. She also explained her involvement with a client company, Impact Klipbind, in contacting it for information about prices and quantities of display wallets because of an invoice dated 20 January 2004. She was a convincing witness despite not being present. She did not prepare a statement for the record but was very familiar with the points relevant to her evidence and thus was plausible with her explanations.
22. Mr. Brown alleges the decision was made to dismiss him on 28 January by the managers attending that meeting. I hold he has not been able to prove this considering Mr. Underwood's and Ms Ambury's evidence. They denied it.
23. Therefore, Autobuy was entitled to keep the matter separate from the other matters that Mr. Brown had raised.
24. I conclude that the dismissal was not premeditated and predetermined.

**Was the dismissal process fair?**

25. Mr. Brown was put on notice of the allegation. He was told how serious the employer considered the matter and that if there was no explanation he faced the prospect that he could lose his job. Mr. Brown was also represented.
26. There was sufficient information made available to Mr. Brown in the letters dated 18 February and 1 March (produced) to make it clear to him that an investigation was being carried out to find out what Mr. Brown was doing.
27. Mr. Brown has raised a question mark about the information relied upon by Autobuy in regard to businesses that supposedly queried his activity. He produced an invoice book to support him not hiding his activity about selling the wallets for Beattie Holdings. The invoice book also supports him that he had not sold to one of the firms referred to by Mr. Underwood and Ms Ambury. Any mistake by them on this issue is not critical to the point that Autobuy relies upon – ie that Mr. Brown was selling the window wallets for another company in Autobuy's time and using its resources without authorisation. The company relied upon his admission. That is sufficient for it to be able to then turn its mind to the seriousness of the situation.

28. The only other blemish in the process followed by the employer was the way it informed Mr. Brown of its decision to dismiss him. For some unknown reason Mr. Brown did not initially receive the dismissal letter sent by the respondent with a courier and was told the outcome by his representative. It seems to be all a matter of timing. Mr. Brown understood the respondent was to make a decision and he expected it. A failure here would not have in any way changed the outcome.
29. I therefore conclude that the process and investigation was carried out fairly.

**Was Mr. Brown's dismissal justified?**

30. Mr. Underwood says Mr. Brown's employment was terminated because his actions constituted serious misconduct, for using his employer's time and expenses to sell plastic car window wallets for another company. He did not seek prior approval to sell the wallets.
31. The respondent has been able to justify dismissing Mr. Brown. Even if I am wrong about this Mr. Brown's actions would have contributed significantly to his personal grievance. Therefore he would not be entitled to any remedies for a personal grievance because I assess him being entirely responsible for the situation.
32. I have reached this decision for the following reasons:
- Mr. Brown worked for Autobuy 2000 Limited full time.
  - Mr. Brown's and Mr. Underwood's negotiations included a term:  
*“Other employment” - “You will not, without the written consent of the General Manager of Autobuy, undertake any other paid employment that may conflict with the interests of Autobuy or impair your ability to complete your normal work to the full satisfaction of Autobuy and your immediate supervisor.”*
  - Mr. Brown had not challenged the above proposed term during the negotiations. Given the existence of the term, and Mr. Brown not challenging it, unlike some of the other terms, he could reasonably have informed his employer of the sales activity notwithstanding any knowledge that Mr. Underwood might have had about Beattie Holdings activities. Also the employer would be entitled to rely upon the implied term of fidelity anyway in the absence of any agreement being settled.

- Nothing turns on Autobuy's suspicion that Mr. Brown created an impression he was selling the wallets for Autobuy and not Beattie Holdings Limited. It was not crucial to the decision considering Mr. Brown's admissions.
- There is also a dispute by Mr Brown that he was not informed about the reasons for the 27 February meeting and in particular the names of businesses involved. Nothing turns on this since Mr. Brown admitted he had been selling on behalf of Beattie Holdings.
- Mr. Brown admitted at the disciplinary meeting selling car window wallets for another company.
- Mr. Brown accepted he sold the wallets while he was on Autobuy's time and expenses. This is further supported by the hours of work Mr. Brown says he undertook for Autobuy.
- Mr. Brown's motive was considered suspect by Mr. Underwood. An email was put to Mr. Brown that was intercepted on the company's computer that he sent to his son, where he said: "*I am back on the road so any communications should be sent to [kwbrown@xtra.co.nz](mailto:kwbrown@xtra.co.nz) which is secure from the wankers*". Nothing turns on this considering Mr. Brown's admissions.
- Because Mr. Brown decided not to inform his employer it reasonably could come to the conclusion that it had *lost trust and confidence in [him] to continue in the employment of Autobuy* for selling wallets for Beattie Holdings.

33. An admission is enough for an employer to rely upon. It was open to Autobuy to reach an honestly held belief that Mr. Brown's action of selling car window wallets in its time and expense for another company was serious misconduct. Its decision was within the range of options open to a fair and reasonable employer.

34. Mr. Brown does not have a personal grievance.

### **Expenses and Advance**

35. Mr. Brown did not claim expenses in the statement of problem, but raised it during the Authority's investigation and has suggested off setting the \$1,500 advance. Mr. Underwood says the company has not received the claim to complete although Mr. Brown does seem to

accept that he owes the company the advance. The parties should try and sort this out by agreement and leave is granted to return for any determination on the point.

### **Costs**

36. Mr. Brown has claimed \$5,000 for these proceedings, excluding the mediation that took place. He has requested substantially more for the costs without quantifying them for the resumed investigation meeting but left it to the Authority to determine. Costs would normally follow the event. Mr. Brown has only been modestly successful, in respect of one of his issues and missed out on the issues that took most of the time. The holiday pay could not be sorted out without a determination of the Authority. Mr. Brown has been put to some expense on this issue. The respondent has requested that costs lie where they fall. The respondent did not claim any costs for legal fees. It was not represented by a specialist employment lawyer or advocate. However since Mr. Brown was successful on the one issue some costs for this should follow the event because of the costs of getting there. I have decided to restrict that to a contribution of \$250 costs and \$70 filing fee and that the parties meet the rest of their own costs in equity and good conscience.

### **Conclusion**

37. Mr. Brown does not have a personal grievance. Autobuy 2000 Limited is to pay to Mr. Brown the sum of \$853.84 for holiday pay.
38. Autobuy 2000 Limited to pay Mr. Brown a contribution of \$250 costs and \$70 filing fee

P R Stapp  
Member of Employment Relations Authority