

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

5272642
CA 122/09

BETWEEN RALPH de CLIFFORD
 Applicant

AND P L CLARKE LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Jeff Goldstein, Counsel for Applicant
 Jarrod Lovely, Counsel for Respondent

Investigation Meeting: 3 August 2009 at Christchurch

Determination: 5 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ralph de Clifford was employed as the Branch Manager of P L Clarke Limited, Christchurch branch, from in or about September 2006 until 25 June 2009. He was a party to an individual employment agreement.

[2] Mr de Clifford seeks from the Authority an order that he be reinstated on an interim basis to P L Clarke Limited (P L Clarke), pending the hearing of his personal grievance that he was allegedly unjustifiably dismissed on 25 June 2009.

[3] P L Clarke says that Mr de Clifford admitted receiving some fish and chops that were the property of the respondent from a customer and that against the background of other concerns, a decision was made to dismiss Mr de Clifford. Further, P L Clarke say that Mr de Clifford was given the option of resigning his employment or having his employment terminated and that he chose to resign his employment.

[4] The parties have not attended at mediation but Mr Lovely advised that a mediation date has been set for 20 August 2009.

[5] In support of his application for interim reinstatement, Mr de Clifford provided a primary affidavit dated 3 July 2009 and an affidavit in reply dated 29 July 2009. He also lodged an affidavit from the customer who gave him the frozen fish and chops, Peter Watts, and a late document in the form of an affidavit from a Mr Hargreaves dealing with an issue of beef. I place limited weight on that document given that it is of little relevance. Mr de Clifford also provided an undertaking with respect to damages.

[6] P L Clarke lodge four affidavits opposing the application for interim reinstatement from Paul Clarke, owner and Managing Director of P L Clarke, Brian Cuthbertson Service Manager, Judith Ussher Administration Officer, and Tony Newman who is the Transport Manager.

[7] I dealt with the application for interim reinstatement on the basis of the untested affidavit evidence and submissions from Mr Goldstein and Mr Lovely.

[8] I set out below the relevant facts from the untested affidavit evidence which provide the necessary background in this case. I have identified where the facts are in conflict on the face of the affidavit evidence.

The facts

[9] The respondent company has its registered office in Dunedin and trades as a machine hire company in both Dunedin and Christchurch.

[10] The Christchurch branch that trades as Clarke Machine Hire was established in or about 2006 and Mr de Clifford's role as Branch Manager was to expand and grow the existing client base. There was some dispute about the nature of the existing client base in the affidavits.

[11] Mr de Clifford's duties and functions are set out in his individual employment agreement as dealing with customer inquiries and overall promoting of heavy equipment and sales and undertaking supervision of all staff.

[12] Peter Watts had previously hired machinery (a front end loader) from P L Clarke in Christchurch. There is a dispute on the face of the affidavit evidence about when Mr de Clifford spoke to Mr Clarke about what to charge Mr Watts and what was said in the respect. About two weeks before Mr de Clifford employment

ended, Mr Watts hired the loader and when he returned it gave Mr de Clifford some frozen fish and lamb chops.

[13] Mr Watts deposes in his affidavit to the hiring of the front end loader from P L Clarke on the later occasion to bury a dead horse. He says in his affidavit that the owner of the dead horse gave him some frozen fish fillets as a thank you and that he already had some frozen chops in his truck. When he returned the front end loader he decided to give the frozen fish and some frozen chops to either Mr de Clifford or to someone at the firm next door. Mr Watts deposed in his affidavit that as far as he knew he had paid the full hire rate for the front end loader.

[14] Mr de Clifford offered some fish and chops to Ms Ussher. Ms Ussher deposed in her affidavit to declining the offer but that Mr de Clifford still left some fish and meat by her desk.

[15] Mr Clarke was advised by other employees about the frozen fish and chops and he was concerned. He deposes in his affidavit to telephoning Mr de Clifford on Monday 22 June 2009 and asking him where the company property was. Mr de Clifford said that he did not know what Mr Clarke was talking about and Mr Clarke referred at that stage to the fish and chops.

[16] Mr de Clifford accepted that he had received the chops and fish.

[17] Mr Clarke said that Mr de Clifford did not deny the chops and fish were company property and did not claim that they had been gifted to him from Mr Watts or that they had no bearing on the hire charge. Mr de Clifford said that he told Mr Clarke the chops and fish were not company property as they had been gifted to him from Mr Watt and they had no bearing on the hire charges.

[18] There was no company policy in place about gifts, but Mr Clarke in his affidavit said that Mr de Clifford, a person in a managerial role, and as a matter of commonsense, would have been aware that the goods belonged to the company.

[19] Mr de Clifford said in his affidavit that during the telephone conversation of 22 June 2009 Mr Clarke accused him of theft and that he denied that. Mr Clarke said in his affidavit that he told Mr de Clifford that he believed his actions amounted to theft from the company and that Mr de Clifford agreed but said he did not think about it at the time.

[20] Mr de Clifford said in his affidavit that Mr Clarke then became abusive during the telephone call and told him that he would be receiving a written warning. Whilst Mr Clarke does not accept he became abusive, he says that he advised Mr de Clifford that he had lost trust in him and that he would be receiving a written warning in respect of his actions.

[21] On Thursday 25 June 2009 Mr de Clifford met with Mr Clarke in his office. Mr Clarke gave Mr de Clifford an envelope which contained a letter of dismissal. I have set out the relevant parts of the letter below:

I formally write to record your dismissal.

I became aware of circumstances which suggested that you had taken goods which were the property of the company.

I investigated the matter and put to you all information that I became aware of regarding this matter. You had the opportunity to take advice and to reply to the allegation. You admitted that you had taken property that belonged to the company.

The employment agreement provides that you can be dismissed for serious misconduct. Taking goods which are the property of the company is serious misconduct.

The details of Mr de Clifford's final pay were set out in the letter.

[22] There is a dispute as to whether the meeting on 25 June 2009 was five or 10 minutes long. Mr Clarke deposed in his affidavit that he told Mr de Clifford that things had not been good for a while and that in doing so he was referring to a number of different matters ongoing with Mr de Clifford including his inability to cost jobs and a sense from other staff that he was not working hard enough. Mr de Clifford stated in his affidavit in reply that at no time was he ever warned by Mr Clarke about his performance.

[23] As to whether or not Mr de Clifford resigned, there is no dispute on the face of the affidavits that Mr Clarke said words to Mr de Clifford that he could do it the nice or hard way. Mr de Clifford deposed in his affidavit to not having resigned but having been given a note as he was leaving the office on 25 June 2009 that was to be read to staff which said that Mr de Clifford had resigned.

[24] Mr Clarke deposes in his affidavit to this note being given to Mr de Clifford on 26 June 2009 when he returned the company vehicle and after Mr de Clifford said he wanted to resign.

The issues

[25] An injunction requires the exercise of a discretion. The answer to an interim injunction is not in the rigid application of a formula. There are two broad inquiries. The first is whether there is a serious issue to be tried and the second is where the balance of convenience lies. The final question requires the Authority to stand back and ascertain where the overall justice lies – *Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).

Serious issues to be investigated

[26] Mr Lovely accepts that Mr de Clifford has an arguable case on the basis that the threshold to satisfying that test is low.

[27] I find that there are serious issues to be investigated on the face of the untested affidavit evidence. There is an issue as to whether there was a proper investigation undertaken into the allegation that Mr de Clifford took goods that were the property of the company. There is an issue about whether Mr de Clifford charged Mr Watts the full hire charge as discussed with Mr Clarke. There is an issue as to what happened between Mr Clarke's advice on 22 June 2009 that Mr de Clifford was to be given a written warning and 25 June 2009 when Mr de Clifford was given a letter recording his dismissal. There is also an issue as to whether Mr de Clifford resigned or was dismissed. There is an issue as to whether Mr de Clifford had a proper opportunity to give an explanation to the concerns.

[28] Assessing carefully the issues and the law applicable to the issues, I find that there are serious and arguable issues to be investigated between Mr de Clifford and P L Clarke.

Balance of convenience

[29] The Authority is required to look at the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not in considering the balance of convenience.

[30] A substantive date for the investigation meeting will be available in September or during the first part of October. Account, however, would have to be taken of the time to determine the matter and the timeframe is such that it does favour Mr de

Clifford in terms of the balance of convenience because it is a considerable period to be without work and his usual income for that period.

[31] Mr Lovely submitted that there was no real evidence of serious financial difficulties on the basis that Mr de Clifford had some savings, had been paid out his holiday pay and final payment together with commissions owing and that those payments amounted to several thousand dollars.

[32] Mr de Clifford set out in his affidavit that he is 64 years of age and he has a mortgage over his house which costs about \$170 per month to service. Mr de Clifford says that he is in a position where he needs to continue to work to support himself and his wife and that at his age he will probably not get another job. He is only able to get a partial unemployment benefit because his wife works part time. Mr de Clifford says he is very keen to continue to work for the company and is sure that he could repair his relationship with Mr Clarke so that the relationship could again become productive.

[33] Over a month has now expired since Mr de Clifford last worked at P L Clarke although the amount paid to him in terms of his final pay was such that it would alleviate at least in the short term the economic consequences of the loss of his position, although not to the extent it could be said until the substantive matter could be dealt with and determined.

[34] Mr Lovely submits on a further five main grounds, financial reasons aside that the balance of convenience favours P L Clarke. Mr Clarke deposes to a further ground in his affidavit that the position that Mr de Clifford filled no longer exists because P L Clarke has changed its structure and has filled the position with a sales representative.

[35] Mr Lovely submits that there is not a strong case for permanent reinstatement, that there was serious admitted conduct on the part of Mr de Clifford, and, irreparable damage to the trust and confidence of the company in Mr de Clifford, that there is incompatibility with other staff and the relationship with the staff and Mr de Clifford has completely broken down and is irreparable, that Mr de Clifford resigned and that Mr de Clifford is almost at retiring age.

[36] I balance against those matters firstly that Mr Goldstein wrote a letter to Mr Clarke on 29 June 2009 advising that he would be seeking, on behalf of Mr de

Clifford, amongst other matters, immediate reinstatement to his position. On 1 July 2009, there was an advertisement lodged in the *Christchurch Press* by P L Clarke Limited for a representative for machinery hire. Given that there was early advice that Mr de Clifford would be seeking reinstatement on an interim basis, I do not consider that the hiring of a sales representative who, it is said, undertakes a proportion of Mr de Clifford's duties, is a factor that favours P L Clarke in terms of the balance of convenience.

[37] In terms of the working relationships with Mr de Clifford, Mr Cuthbertson, Ms Ussher and Mr Newman say that they have had difficulty working with the applicant and there is a suggestion or flavour throughout all three affidavits that he was doing unlawful things whilst he was working, was not altogether above board in terms of invoicing and that they do not have trust and confidence in him. There are also statements in the affidavits to the effect that things are running better without him. There is also some reference in Mr Cuthbertson's affidavit to receiving a phone call from Mr de Clifford about affidavits lodged in this proceeding and being told by Mr de Clifford words to the effect that he would be reinstated. Mr de Clifford, in his affidavit in reply, does not accept those matters aside from telephoning Mr Cuthbertson and refers to the allegations at various times in his affidavit as malicious gossip, totally untrue, exaggerated and twisted.

[38] I do need to weigh the concerns of the staff and hardship that may be caused to them in the circumstances if Mr de Clifford was reinstated in the interim, particularly given his position as Branch Manager.

[39] Mr de Clifford's employment did not end for reasons of difficulties in staff relationships or for other matters raised in the affidavits. I have to balance such statements on that basis otherwise I accept the submission from Mr Goldstein that any reinstatement could be defeated on the basis that staff and/or managers did not have trust and confidence in an employee for reasons other than those that brought the relationship to an end. Mr de Clifford's employment ended for allegedly taking goods that were the property of the company, being the frozen fish and lamb chops. The allegations made by the staff have to be balanced by the fact that Mr de Clifford deposes that no performance issues were previously raised with him and that he has not received previous warnings. In this case however Mr de Clifford as Branch Manager does have some supervisory role in terms of staff and that matter and how

that can be managed does favour P L Clarke in terms of inconvenience if he was to be returned to the work site.

[40] In terms of the conduct itself, there is a dispute as to whether it was admitted in the untested affidavit evidence. There is no dispute that Mr de Clifford accepted the fish and meat but I do not find that this is a case where it is without dispute that the conduct of taking goods that are the property of the company is admitted. That is not a matter that favours P L Clarke in terms of the balance of convenience at this interim stage.

[41] I do not find that Mr de Clifford's age is a factor that weighs in favour of P L Clarke nor the argument that he resigned although that is a matter that I shall return to when I consider the overall justice of the case and the respective strengths and weaknesses of the parties cases.

[42] I have carefully considered all the matters in terms of where the balance of convenience lies. The timeframe for an investigation into the substantive matter and allowing time for determination of that matter is a factor that does favour some interim relief. Mr de Clifford says his age will count against him in getting other employment. Although Mr de Clifford did receive some money by way of commissions and final pay that will be fairly well exhausted before the matter can be finally determined. In weighing up the respective hardships and considering the matters in the affidavits I do find the balance of convenience favours Mr de Clifford.

Overall justice

[43] I now stand back and consider the overall justice of the case. I have found that there are arguable and serious issues to be investigated and there will need to be a careful assessment of the evidence relating to the process and substance of dismissal. I am aware that this matter is to proceed further and in assessing the relative strengths of the parties' cases I will only state that at this interim stage it cannot be said that Mr de Clifford does not have a strong arguable case for permanent reinstatement.

[44] I have also had regard to the fact that reinstatement is a primary remedy provided for in the Employment Relations Act for a remedy in the event that a dismissal is found to be unjustified.

[45] I have considered the concerns with respect to continued working relationships where staff have deposed that they have no trust and confidence in Mr de Clifford. Notwithstanding those matters, I am satisfied that these concerns can be dealt with in by the way an order for interim relief is framed. I have found that the balance of convenience does favour Mr de Clifford and I am satisfied that when I stand back and consider the overall justice, that it also favours Mr de Clifford.

[46] The parties are to attend mediation as I understand on 20 August 2009. Mr de Clifford has provided an undertaking for damages that P L Clarke may sustain through the granting of an order for interim reinstatement.

[47] I take into account that Mr de Clifford has received reasonably sizable sums by way of holiday pay and commission. Taking those into account, I order Mr de Clifford's interim reinstatement as branch manager to commence from 17 August 2009 which is the Monday of the week during which mediation is scheduled.

[48] Until 20 August 2009 when mediation will be held, Mr de Clifford will not be required to attend and perform his work duties but is to be paid as if he had attended and performed his duties for that time.

[49] From 20 August 2009 until the determination of the substantive matter, it is for P L Clarke to elect whether Mr de Clifford actually attends and performs work for the company or remains on garden leave. In any event he is to be paid.

[50] I reserve the right for either party to apply to the Authority for only further directions in terms of these orders if that should be necessary.

Costs

[51] I reserve the issue of costs to be dealt with following the determination of the substantive matter.

[52] I shall ask the support officer to arrange with Mr Goldstein and Mr Lovely for a telephone conference so that a date for the substantive meeting can be finalised and timetabling orders can be made in terms of that meeting.

Helen Doyle
Member of the Employment Relations Authority