

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Glenn Collis (Applicant)
AND Reihana Ratima t/a Havelock Bakery (Respondent)
APPEARANCES Mike Andrews, for the Applicant
Reihana Ratima and Lisa Wade and Tanya Gulbransen for the
Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Palmerston North, 7 July 2005¹
DATE OF DETERMINATION 23 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Background

1. Glenn Collis was employed as a baker in Reihana Ratima's business the Havelock Bakery in Palmerston North.
2. He started work at the bakery on 5 January 2004. He was paid \$11 per hour and required to work 40 hours per week.
3. Mr Collis claims he was not given a written employment agreement but Mr Ratima produced one for the Authority's investigation.
4. Not long after starting Mr. Collis suggested to Mr. Ratima that a government Job Plus scheme was available for an employment subsidy. Mr. Ratima subsequently used the scheme for Mr. Collis and other existing employees.

¹ Submissions were made at the investigation meeting. However, Mr Andrews considered he needed to make a further submission in writing on 11 July 2005. A submission was received from the respondent on 5 August 2005. Mr Andrews advised on 18 August 2005 he did not intend to reply.

Mr Collis' absence from work

5. Mr Ratima knew that Mr Collis' partner, Cheryl Taylor, was pregnant. From 10 June 2004 Mr Collis says that he told Mr Ratima that Ms Taylor was having trouble with her pregnancy and he took some time off work. He says he returned to work on 13 June. However, on 17 June he had to take more time off to assist his wife. When Mr Collis did not return to work Mr Ratima and Ms Gulbransen say they requested him to get a medical certificate. Mr Collis and Ms Taylor saw her specialist at Palmerston North Hospital. Mr Collis obtained a medical certificate dated 23 June 2004 from MidCentral Health that says Cheryl Taylor would be discharged on 30 June (produced).
6. During the Authority's investigation, Mr Collis and Cheryl Taylor told the Authority that an original certificate existed that was dated 17 June 2004 but went missing. This was the first time that this explanation had been provided in these proceedings and that the medical certificate produced was a replacement.

25 June text message

7. It is common ground that initially Mr Ratima had no difficulty with Mr Collis spending time with Ms Taylor in the delivery of their child. However, he did become concerned about the amount of time Mr Collis was taking off work. On or about 25 June Mr Collis received a text message from Mr Ratima to return his keys to the bakery and says he was told he no longer had a job. Mr Collis says Mr Ratima had another baker starting for whom he needed the keys. Mr. Ratima denies that he had employed another baker. However he says that he had been approached by another baker interested in work. Mr Collis did not keep or save the text message to support his allegation.

26 June 2004 meeting between Mr Collis and Ms Gulbransen

8. Mr Collis says that on 26 June 2004 Ms Gulbransen visited him at his home to pick up the keys. Mr Ratima sat in the vehicle while she obtained the keys. At the same time, Mr Collis gave her the 23 June 2004 medical certificate from MidCentral Health, which indicated his wife was in hospital, and that he needed to be with his wife for the period 17 June to 30 June 2004.
9. Mr. Ratima says he left it to his partner to talk to Mr Collis because he was on his cell phone at the time. Ms Gulbransen could not say why she went in alone and Mr Ratima stayed in the car.

10. Mr Collis says that Tanya Gulbransen went into the house and then the two of them went out to the motor vehicle where the keys were on his key ring. He says that Ms Gulbransen told him that another baker had been hired and that he was no longer employed in the bakery. Mr Collis' partner, Cheryl Taylor, says that she overheard these comments.
11. Ms Gulbransen agrees that they had a discussion, but that during the discussion she expressed her disappointment about the situation, and that she requested the keys because Mr Ratima had another baker who was looking for work and he was interested to speak to him. Also during the Authority's investigation Ms Gulbransen said that their decision to visit Mr Collis was because of the time he had taken off without contacting them and they thought he could have abandoned his employment. However upon receiving the medical certificate they decided to wait until July 1 to see what Mr Collis would do.

1 July 2004 telephone call and Mr Collis' return to work in July 2004

12. On 1 July 2004 Ms Gulbransen says she telephoned Mr Collis, after expecting him to call, and requested him, to provide another medical certificate. Mr Ratima and Ms Gulbransen say that by this time Mr Collis did not want to work full time. At some stage after 1 July, Mr Collis went into the bakery. A second medical certificate dated 4 July 2004 materialised for Mr Collis being unable to attend work because of the admission of his partner to hospital and her discharge scheduled for 4 July 2004. The certificate indicated that Mr Collis was not required to resume work until 21 July.
13. Mr Collis disputed that Ms Gulbransen telephoned him. Both parties, for whatever reason, are unclear about what dates Mr Collis went into work. There is no proper record. Mr Collis did work at least two days (he says he worked four days) over a two week period, in a part-time role, making pastry for Mr Ratima. Mr Ratima says that he offered Mr Collis the opportunity to make pastry but only because he believed that Mr Collis did not want to work full-time hours.
14. Mr Collis says that he went into work and provided the second medical certificate to reiterate that there was good reason for him not attending work because of the situation involving his partner and her pregnancy. Mr Ratima says the medical certificate materialising supports his evidence that Mr Collis was not dismissed on 26 June 2004. Mr Collis also agreed to work part time during July.
15. Mr Collis did not return to the bakery following the hours he worked in July.

The issues in this problem

16. There are two underlying issues: was there an employment agreement and who was the employer?
17. The primary issue is whether or not Mr Collis was told on 26 June, by Ms Gulbransen, that he was no longer employed with the bakery.
18. Did Mr Collis convey to Mr Ratima that he had decided that he did not want to work full-time?
19. If there was a dismissal, or if Mr Collis reasonably came to an understanding that he no longer had employment at the bakery, then I am required to scrutinise the reasons as to why this occurred. Finally, if the above situation gives rise to a personal grievance, I am required to consider the remedies available to resolve these problems.

Employment agreement

20. A copy of an employment agreement has been produced for the purposes of the Authority's investigation. It referred to Reihana Ratima, and his partner, Tanya Gulbransen, as a party. Mr. Ratima produced it at the request of the applicant's representative prior to the Authority's investigation.
21. Reihana Ratima says that he discussed the individual employment agreement with Mr Collis a little time after he had started work. Mr Collis denies this. The employment agreement was not given to Mr Collis to take away for consideration and signing. Mr Ratima says he kept the agreement. It is inconclusive that such an agreement was discussed. Mr Collis never otherwise referred to it or requested an agreement. I conclude that it did not seem important to either party and they both agreed with this conclusion. In any event I accept that at the time Mr Ratima and Ms Gulbransen were struggling with the concept and requirements of a new business. I will comment further on this later.

Who is the employer?

22. I am satisfied that Glenn Collis' employer was Reihana Ratima trading as Havelock Bakery (Palmerston North). This is despite the existence of Havelock Bakery Limited that was discovered during the investigation meeting. Mr Ratima was assisted by Tanya Gulbransen who kept the books. Mr Collis says that he understood that Reihana Ratima and Tanya Gulbransen were the owners but did not understand the structure of their ownership of the

business. The documents produced support him on this. Also, the existence of the company was only discovered during the Authority's investigation meeting.

23. The reference to the company was never referred to in any of the papers produced before the Authority, including the statement in reply (that referred to Reihana Ratima t/a Havelock Bakery), the wage and time record produced and the employment agreement. Mr Collis never referred to the company as his employer since it was not disclosed.

What happened at the meeting between Tanya Gulbransen and Mr Collis on 26 June 2004?

24. On 26 June there was a discussion between Ms Gulbransen and Mr Collis at his home. Mr Ratima remained in the car. Ms Gulbransen went in and spoke with Mr Collis. She requested the keys. Ms Taylor says that she overheard Ms Gulbransen tell Mr Collis that he was *fired* and no longer employed. She conceded in her evidence that the word "*fired*" was not actually used. Neither of them produced sufficient evidence of what was actually said by Ms Gulbransen, given what she says she said, to satisfy me there was a dismissal. Further, they each had a different recollection of what Ms Gulbransen said. There was no clarity given by Mr Collis and Ms Taylor about where the comments were made; inside or outside the house. Mr Collis could reasonably have taken the matter up with Mr Ratima sitting in his car if he had been dismissed.
25. Ms Taylor also says that Ms Gulbransen said that she needed the keys for the new baker. I am satisfied from the evidence that no new baker was actually employed. Mr Ratima says that he did have another person interested in employment as a baker and he wanted to talk to him. There was no evidence that this person was actually employed. The wage and time records produced make it probable that no new employee was engaged until November 2004.
26. It is likely Mr Collis' absence had upset Mr Ratima and Ms Gulbransen. Mr Ratima was required to do all the work and says that he even had to sleep over at the bakery. The production of the medical certificate is enough to give the benefit to Ms Gulbransen that, although she was concerned about Mr Collis' absence without any medical certificate, she decided to wait until July 1. Also this is likely since no other baker was employed until November.
27. Mr Collis says that "*I thought Ray had hired another baker*". This makes the situation inconclusive and I accept it more likely that Ms Gulbransen's and Mr Ratima's version of the events is more reliable.

28. Furthermore, Mr Ratima said that because he had no security in regard to his premises and because of the length of time that Mr Collis had been away, for his own peace of mind he needed to take possession of his premise's keys. That is entirely probable and quite reasonable, given Mr Collis' absence. I accept that explanation. Secondly, it would have been entirely reasonable for Mr Ratima to give consideration to take on another baker having regard to Mr Collis' absence from work.
29. There is insufficient evidence to make any inference that the reason for the visit was to dismiss Mr Collis.

Mr Collis returned to work in July

30. Mr Collis did return to work for at least four hours sometime in July to make pastry but neither party has been able to confirm the dates he actually worked. The wage and time record did not include the hours or the dates that Mr Collis worked. Initially, the statement in reply indicated from Mr Ratima that the dates Mr Collis worked were 6 and 7 July.
31. The payment of the wages for these hours has not been made I discovered. A cheque was written on 15 August 2004 for \$44 for the payment of Mr Collis' hours. He did not pick it up and it has never been paid. It was not included in the final payment made for Mr Collis' wages and holiday pay in August 2004 when Mr Ratima and Ms Gulbransen accepted advice to pay him and that they could not withhold any payments. The explanation for the payment of Mr Collis' four hours was that the cheque was written out in the personal cheque book and they were waiting on Mr Collis to pick it up. This is confirmed with the personal cheque book being produced and that the cheque before it was dated 14 August 2004 and the next one after it was dated 6 March 2005. They say that the personal cheque book was very rarely used and Mr Collis did not request the payment. This could explain the payment being overlooked and not included in the final pay. The cheque book seems to support that explanation but does not adequately explain why a personal cheque was written for wages and not properly recorded in the wage and time record. Mr Collis says that he did not demand his wages as he had closed it off as a loss and that it was too insignificant to worry about.

The reasons why Mr Collis did not return to his employment

32. Mr Ratima and Ms Gulbransen accepted that Mr Collis' partner was having difficulties and problems with her pregnancy. They accepted that he would have needed time off. However, the amount of time that he took off created a problem for them in that Mr Ratima was having to undertake all the work, including having to sleep over at the bakery. They required him to

produce medical certificates about the time that he was taking off, and by the time Mr Collis returned to work in July, he did not want to work full-time, they say. They say that he also wanted to sell herbal supplements and pipes and spend more time with his son. Mr Collis denied this.

33. I conclude that it is probable that, for whatever reason, Mr Collis decided not to return to full-time employment by deciding to spend time looking after his partner when he had no leave due and did not reasonably make contact with Mr Ratima and Ms Gulbransen. I have already found that it was unlikely that Ms Gulbransen told him that there was no longer employment for him on 26 June given no one else was employed to help, at least one medical certificate was requested and another one materialised and Mr Collis returned to work in July and was involved in pursuing his own business enterprise and there had been the delivery of a child.
34. Mr Collis has denied that he was telephoned by Ms Gulbransen on 1 July to find out what he was doing and request another medical certificate. If she did not telephone him, given the time that he was absent without contacting them, they would have been entitled to believe that he might not return to work. Mr Ratima accepted that he understood that because of Mr Collis's absence Mr Collis could have been dismissed. Believing or thinking that is not proof that it actually happened and in this case Ms Gulbransen and Mr Ratima were prepared to wait until 1 July. The balance of probabilities that Mr Collis did not want to work full time falls in Mr Ratima's and Ms Gulbransen's favour.
35. Mr Collis requested Mr Ratima and Ms Gulbransen to provide a letter that he was redundant to obtain a benefit from WINZ. They refused to do that because they believed that that was not truthful. They have been consistent throughout that he did not want to return to work full-time for whatever reason. I tend to support that conclusion on balance. This is supported by Mr Collis' failure to do all he could to mitigate his loss and contact his employer during his absence.

Mr Collis had no entitlement to any prolonged period off work

36. Mr Collis produced a medical certificate when he was requested on 26 June and the second medical certificate materialised in July in circumstances that were unclear about Mr Collis' employment.
37. Mr Collis provided the second medical certificate but the reason for it being provided is ambiguous: ie Mr Collis produced it to support his absence for a genuine reason and Ms Gulbransen says she requested it. Mr Collis relies upon the medical certificate to reiterate his

absence in the face of losing his job. He had made no contact with the bakery before this. I simply cannot accept that he would have found it difficult to contact Mr Ratima. It may have been difficult contacting Mr Ratima on the telephone, but not to go into work, since Mr Ratima was the sole baker and could be located at the bakery. It is not unreasonable to have expected that Mr Collis could have made some attempt to contact Mr Ratima in person at the bakery.

38. It is entirely reasonable for an employer to give consideration to abandonment to explain an employee's absence from work. Mr Ratima and Ms Gulbransen requested a medical certificate from Mr Collis and they were entitled to do so because of his absence. Mr Collis accepts that he could have done more to keep in contact with them. It is therefore likely that after July 1 when they had not heard from him that they considered he was not returning to work and believed that they could withhold his wages. This balances any argument that Mr Ratima and Ms Gulbransen dismissed him. Since they had not employed anybody else there is no explanation for them to deny him work. Indeed they provided him with part time hours in July. There is no evidence that they had an ulterior motive to cease his employment because of the cessation of the Job Plus subsidy. No evidence of the details of the subsidy and its timing was put before me. The wage and time record involving other employees and their length of service does not assist the applicant to develop this argument.

Credibility

39. If this matter was to solely turn on credibility, then I have to accept that Mr Ratima and Ms Gulbransen have been more credible in the consistency of their evidence. Both parties appeared inconsistent on various aspects of their evidence. Mr Collis was often confused and vague about the events, including dates and the medical certificates. For the first time during the Authority's investigation, he raised a discrepancy involving the medical certificate dated 23 June and said that this was perhaps a replacement for a certificate that had in fact been dated 17 June initially. Mr Collis could not prove his claim that Mr Ratima had an ulterior motive to end his employment under the Job Plus Scheme.
40. An attempt was also made to suggest that documents may have been tampered with. Mr. Ratima highlighted a date on the second medical certificate. This proved to simply highlight a poor photocopy and was consistent with him highlighting dates on the photocopied wage and time record to assist. Nothing devious or deliberate could be proved by his action, I hold.

41. Other factors include the ambiguity of the second medical certificate being provided, Mr Collis's evidence that he "*thought Ray had hired another baker*" without knowing for sure and the evidence supporting no one else being employed.

Conclusions

42. For all the above reasons, I determine that the claim must be dismissed. I dismiss it accordingly.
43. However, I discovered that Mr Collis has not been paid for at least 4 hours work that not even his own representative seemed to identify. This amounts to \$44. Holiday pay must be added. He is also owed \$2.64 additional. In total he is owed \$46.64 and I order Reihana Ratima trading as Havelock Bakery to pay Glen Hollis the sum of \$46.64.
44. Finally I need to comment on the penalty sought for the failure of the employer to give an employment agreement to Mr Collis. Ignorance of the law and struggling in a business enterprise is no defence. It is not conclusive that Mr. Ratima did not have an agreement available at the time he employed Mr Collis and whether it was discussed. Mr Ratima seems to have taken over the business in late 2003 and was very inexperienced. Probably it was not an important issue for either party at the time. I have also noted that Mr Ratima is now familiar with the Department of Labour web site and the employment agreement builder available on the internet (<http://e-lab.dol.govt.nz/services/ers/default.asp>). In the circumstances I hold this is not a matter for a penalty. And, if it was, it would not have been payable to Mr Collis, as a matter of public policy.

Costs

45. Mr Collis has been unsuccessful in his substantive claim. The matter of his extra wages and holiday pay only became apparent during the Authority's investigation meeting. That problem should have been fixed earlier and would probably not have arisen if it had not been for the investigation. Indeed Mr Collis had given it away as a lost cause anyway and had not requested the payment. Mr Collis' substantive claim had substantial risks although I do accept it was arguable. Mr Andrews' preparation and presentation of written submissions was an entirely voluntary action after the investigation meeting to represent his client. Submissions were requested to be presented orally and that should have reasonably been the end of the matter in the investigation meeting. Any extra cost should not therefore be visited on the respondent for written submissions. The parties should incur their own disbursements, including the applicant's filing fee.

46. The respondent was not represented so has no claim for costs. Costs are to lie where they fall.

P R Stapp
Member of Employment Relations Authority