

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 210/09
5117895

BETWEEN PETER DUNNETT
 Applicant

AND GARDENING AIDS LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Clive Bennett, Counsel for Applicant
 Tom Skinner, Advocate for Respondent

Investigation Meeting: 10 February 2009

Submissions Received 9 March 2009 from Applicant
 27 March 2009 from Respondent

Determination: 26 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Peter Dunnett, claims that he has been unjustifiably dismissed and that monies had been illegally deducted without his consent by the respondent, Gardening Aids Limited. He also says he was not provided with an employment agreement and seeks a penalty.

[2] The dismissal claim concerned both a constructive dismissal and a claim that the applicant was dismissed within his notice period.

[3] In closing submissions the applicant conceded that the constructive claim could not succeed. With regard to the dismissal claims, I intend therefore to deal solely with the issue of whether there was an actual dismissal.

[4] Mr Dunnett worked for the respondent on three separate occasions. It is agreed that on each of the two previous occasions he terminated his employment by way of resignation.

[5] On 28 November 2007 Mr Dunnett wrote three different versions of a resignation letter. That there were three versions only emerged during the course of the Investigation. I was supplied by the applicant with a letter that turned out to be a synopsis of the letter handed to the respondent. The applicant held another version and the respondent had been given a third version. It is the version given to the respondent that I will take into account as that is the version upon which the respondent acted.

[6] Mr Dunnett gave Mr Robin Humphreys, the director of the respondent, the letter on 29 November 2007. In part, the letter states:

Since I have been with you for such a long time it is hard writing this as I have got to know you as a boss as well as a friend, but the staff morale and atmosphere at Gardening Aids would be the worst I have ever seen. As you know I do not like confrontation. Therefore with reluctance please accept my resignation and Annie's [Mrs Dunnett's] from Gardening Aids. I will use my days and holidays leading up to Christmas to look for another job.

...

Thank you for your support when I needed it and for employing me over these past years but I also have to think of my future and health at the age I am if I don't act now then it will be harder later on.

[7] Mr Dunnett maintained that he had presented Mr Humphreys with a list of reasons for his resignation on Saturday 1 December and told Mr Humphreys he had some issues he wanted to resolve. Mr Dunnett said Mr Humphreys told him not to worry and they would have a discussion when Mr Dunnett returned to work on 5 December.

[8] Mr Humphreys denies that he was given a list. Mr Humphreys said there was a conversation in the course of which Mr Dunnett launched a racist attack on Mr Collah, the Financial Controller. Mr Collah had asked Mr Dunnett to pay an overdue account related to the purchase of tyres on the company account. Mr Humphreys said

Mr Dunnett told him that if he wanted him to continue working then Mr Humphreys needed to “get rid of that bloody Indian”.

[9] Mr Humphreys met with Mr Ross Cato, a manager at another of the company’s stores, on 5 December. They discussed the resignation and decided to accept it. On 5 December Mr Dunnett was told his resignation was accepted. He was given a financial statement detailing his debts to the company and what the company owed him. He was given references for himself and Mrs Dunnett and a cheque for monies owed. The applicant says that these events amounted to an actual dismissal.

[10] The cheque totalled \$442.38. Mr Dunnett and Mrs Dunnett had received wage advances from the company totalling \$4,000. On 8 November 2007 \$3,000 was advanced to Mr Dunnett. On 25 March 2007 \$1,000 was advanced to Mrs Dunnett. According to the statement Mr Dunnett was owed holiday pay of \$3336.24 gross. Mr Humphreys claimed that Mr Dunnett also owed the company \$1,200 for cash drawings on the company credit card.

[11] The financial statement provided by Mr Humphreys is confusing. It includes personal debts and the total amount paid (\$442.38) is what the respondent says is owed to both Mr and Mrs Dunnett. Mr Humphreys had also transferred a day of Mr Dunnett’s annual leave to Mrs Dunnett.

Notice

[12] Mr Dunnett had not signed an employment agreement. Mr Humphreys said one had been proffered and that other staff had signed employment agreements. The notice period in comparable agreements was one week.

[13] As well as paying Mr Dunnett for the week ending 4 December Mr Humphreys paid an additional week which was said to be a week in lieu of working out his notice.

[14] Mr Dunnett said he had not specified the exact date on which his resignation would be effective and was expecting to work at least until the end of December or longer depending on how long it took him to find another job. It is arguable that the letter provides for a resignation with immediate effect: “I will use my days and holidays leading up to Christmas to look for another job”. However, Mr Dunnett continued to go to work after 28 November.

[15] Mr Dunnett's resignation took effect as from 28 November. While Mr Humphreys said he and Mr Cato considered the resignation and decided to accept it, an employer cannot do other than accept a resignation unless the employee can be persuaded to revoke it.

[16] If there is a contractual period of notice the issue is clear. In the absence of a contractual period the law implies that reasonable notice will be given. What is reasonable depends on the circumstances. Factors to be considered include the length of employment, the responsibilities, the importance of the position to the organisation and income. I have also taken into account that the employment agreement that was proffered to Mr Dunnett and signed by other staff in comparable positions made provision for a week's notice.

[17] In the circumstances of this case a week's notice was reasonable. Given that, 5 December was the last day of the notice period. That was the day on which Mr Dunnett was told his resignation would be effective as from that day and would be paid a week in lieu of working out his notice. He was also told to hand in his keys and leave the premises by 10.00am.

[18] Mr Dunnett was dismissed within the notice period. The dismissal was unjustified. There was no discussion and he was told to leave the premises. The award of compensation is discretionary. This is a rare case where the award of compensation is not called for. Generally speaking, employees who write letters of resignation cannot expect their employer to do other than simply accept it. Writing a letter of resignation, particularly in a situation where there is a history of ending the employment by resigning and no grounds for maintaining that there was a constructive dismissal, and then saying the letter was intended as a cry for help, is not wise.

Failure to provide employment agreement

[19] I am satisfied that an employment was provided and that Mr Dunnett failed to sign it. The employer should have ensured that the agreement was signed prior to the employment commencing.

[20] Having said that, this is not an appropriate case for a penalty and I decline to award one.

Deductions from pay

[21] Claims on behalf of employers to a right to set off claims against the worker from wages owing have been uniformly unsuccessful. In *Inspector of Awards v Perry* [1982] ACJ 51, the Court found that the employee owed money to the employer for the cost of materials and the use of a vehicle. The employer did not dispute that wages and holiday pay were owed, but attempted to establish a set off of the money owed. The Court held that the provisions of s 4(1) and (2) Wages Protection Act 1964 completely precluded the application of any set off. The Court also held that to grant relief to the employer under the Court's equity and good conscience jurisdiction would be completely contrary to the clearly expressed mandatory provisions of the Wages Protection Act

[22] In *Inspector of Awards v Eliassen* [1987] NZILR 126, prior to becoming entitled to sick pay under an award, the employee had taken periods of sick leave for which the employer chose to pay her wages. When the employment was terminated, the employer attempted to recoup these payments by withholding holiday pay. The Arbitration Court held the employer had no right to do so. Similarly, in this case the employer had no right to set off the pay advances and other debts against Mr Dunnett's wages and holiday pay.

[23] Section 4 (1) Wages Protection Act provides that subject to ss 5 (1) and 6 (2) of the Act the employer must pay the entire amount of the wages to the employee when they become due. Neither of the exceptions is applicable in this case.

[24] The applicant says he is owed \$7,289.24. This is based upon the financial settlement statement provided by Mr Humphreys. As I have already indicated, that document is confusing, contains private debt and melds amounts owed to Mr and Mrs Dunnett.

[25] The applicant is to be paid wages owing and that includes the pay in lieu proffered by the employer. The applicant is also to be paid outstanding holiday pay.

[26] If there is any difficulty in making the appropriate calculations leave is reserved for the parties to return to the Authority on that issue.

Costs

[27] Costs were reserved. If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority