

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 432
5340052

BETWEEN	JOHN MASON GARDNER Applicant
A N D	MALLOWBAY HOLDINGS LIMITED First Respondent
A N D	PAUL ISAAC Second Respondent

Member of Authority: James Crichton

Representatives: Ted Hipkiss, Advocate for Applicant
Steve Franklin, Counsel for Respondents

Investigation meeting: 19 September 2012 at Whakatane

Date of Determination: 3 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Gardner) alleges that he was unjustifiably dismissed from his employment and argues in the alternative that he was employed either by the first respondent (Mallowbay) or by the second respondent (Mr Isaac) personally.

[2] Mallowbay contends that it was Mr Gardner's employer and that he was justifiably dismissed for serious misconduct. Mr Isaac denies employing Mr Gardner.

[3] Mr Gardner began the relevant employment initially as a part-time relief milker on 1 October 2009. His service in that capacity was valued and he subsequently entered into an individual employment agreement the effect of which was that he commenced full time employment on and from 30 June 2010.

[4] It seems that once Mr Gardner commenced full time employment, the relationship between the parties deteriorated and both parties refer to frequent disputation in the short number of months that Mr Gardner was employed full time. On 15 July 2010, Mr Gardner fell off a motorbike while working on the farm which accident caused him to sustain head injuries. He spent three days in hospital and when he returned to the farm, he worked only intermittently as a consequence of his injury. Mr Gardner claims that the employer made various intemperate suggestions about his inability to work; those contentions are denied with the second respondent maintaining only that he sought to establish when Mr Gardner would be fit for duty and also sought to discourage him from returning to duty if he was not fit.

[5] On 20 August 2010, a large quantity of cannabis was found on the farm property. Mr Gardner was apprehended and initially assisted the Police with their inquiries. It is alleged for the respondents that Mr Gardner, in the presence of Police, made admissions about the cannabis being his and that the Police asked Ms Sally Isaac if she intended to dismiss Mr Gardner in consequence and she confirmed that was the position.

[6] Mr Gardner denies making the admission in front of Police, denies that the cannabis was his and points out that no charges were ever laid by Police. Mr Gardner also claims that he was not dismissed at that time (as the respondents allege) but had been dismissed a week earlier on 13 August 2010 when he claims Mr Isaac told him that if he had not returned to duty by that date, he would be terminated.

History of the proceedings

[7] It is appropriate for the Authority to set out the history of these proceedings for the sake of completeness. An initial application by Mr Gardner was out of time. The raising of the personal grievance out of time was opposed. The matter was considered by the Authority and in its decision issued as *John Gardner v. Mallowbay Holdings Ltd*, [2011] NZERA Auckland 526, Member King gave Mr Gardner leave to pursue his personal grievance. The parties were directed to mediation but were unable to resolve their employment relationship problem.

[8] When the matter came back before the Authority, Mr Gardner's claim was initially expressed to be only against Mallowbay. Then, apparently because of information that Mallowbay was in financial difficulty and in any event had ceased

trading, Mr Gardner caused a subsequent application to be made against Mr Isaac. Mr Isaac was the sole director and sole shareholder of Mallowbay. In the statement in reply filed on behalf of Mr Isaac, it was contended that first Mr Gardner was employed by Mallowbay and second the dismissal, which was acknowledged, was justified for serious misconduct.

Issues

[9] The Authority needs to resolve two questions:

- (a) Who employed Mr Gardner; and
- (b) Was Mr Gardner unjustifiably dismissed?

Who employed Mr Gardner?

[10] The Authority is satisfied on the evidence it heard that Mr Gardner was employed by Mallowbay. At the investigation meeting, the advocate for Mr Gardner advanced a number of propositions to attempt to demonstrate his conviction that Mr Gardner was in fact employed by Mr Isaac and not by Mallowbay. None of those submissions have any force or effect. The evidence is plain that Mr Gardner entered into a standard form Federated Farmers employment agreement with Mallowbay which at the time owned and operated a dairy farm property between Te Puke and Whakatane.

[11] Mr Isaac was at all material times the governing director of Mallowbay, but the fact that Mr Isaac took executive action on behalf of Mallowbay does not make him the employer. Mallowbay is a legal person and can only act through its directors or officers. For our purposes, that executive action was primarily provided by Mr Isaac but in one particular regard, was provided by his wife, Ms Sally Isaac. On Mallowbay's evidence, it was actually Ms Isaac, who the Authority is satisfied had delegated authority from her husband at the relevant time, who actually dismissed Mr Gardner.

[12] Accountants for Mallowbay have confirmed to the Authority that Mr Gardner was paid wages by Mallowbay and that the accounting records of Mallowbay held by that firm disclose that Mr Gardner was an employee of Mallowbay.

[13] There is nothing in the factual matrix which encourages the Authority to conclude that this is a case where the corporate veil should be lifted. The only contentions that can be made on Mr Gardner's behalf about Mr Isaac being Mr Gardner's employer rely on the mistaken notion that because Mr Isaac took steps on Mallowbay's behalf, he was somehow acting as if he were the employer. In fact all Mr Isaac (or Ms Isaac for that matter) was doing was fulfilling his obligations as the director of the company which by reason of its status as only a legal rather than a natural person, could not take those steps of its own motion.

[14] For the avoidance of doubt then, the Authority is satisfied that Mallowbay employed Mr Gardner. The Authority is also satisfied that Mallowbay's farm operation was not financially successful and the evidence before the Authority is clear that the company has ceased to trade and that its assets have been disposed of on a forced sale basis with significant losses both to the shareholder of Mallowbay (Mr Isaac) and a lender. In the lead up to the Authority's investigation meeting, there was an intimation that Mallowbay was in liquidation. Of course, if that were the position, Mr Gardner would need leave of the liquidator to proceed in his claim. In fact, Mallowbay is not in liquidation but for reasons just described, it is impecunious.

Was Mr Gardner unjustifiably dismissed?

[15] There are two distinct versions of the dismissal. Mr Gardner claims to have been dismissed by Mr Isaac on or about 13 August 2010 because he could not return to work soon enough for Mr Isaac's purposes, having suffered a head injury after a motorcycle accident on 15 July 2010. The Authority observes that Mr Gardner's evidence about the actual dismissal, and indeed other matters on which he gave his evidence, was somewhat vague. He made the point, understandably, that the events complained of were some time ago. But notwithstanding that, the Authority would have expected that Mr Gardner would have the clearest recollection of his dismissal given that it is central to his claim.

[16] In fact, it seemed that he was rather unsure about when the actual dismissal took place although he was certain it was not when Mallowbay said it took place. The effect of that position is, as counsel for Mallowbay asserted during the investigation meeting, that Mr Gardner's evidence was that when he attended the Police at the discovery of the cannabis on the farm on 20 August 2010, he had already been dismissed and was simply working out his notice.

[17] Mr Gardner says that on 20 August 2010, he had been assisting one of the other farm workers with a particular duty and was simply in the vicinity when the cannabis was discovered.

[18] That whole evidence of course is challenged by Mallowbay. First, Mr Isaac gave clear evidence that he had not dismissed Mr Gardner prior to 20 August 2010 although he readily conceded that he had spoken with Mr Gardner about his health status in an effort to find out when he could expect Mr Gardner to return to full time duty. That of course is not unreasonable and given Mr Gardner's own evidence that he only worked intermittently once he returned from hospital, it is hardly surprising that on a working farm, the governing director of the employer would want to know when one of his principal workers would be back to full time employment.

[19] Mr Gardner also alleged that Mr Isaac had sent him a text message in the following terms:

If you are not well enough to do milking don't come back.

[20] This message allegedly was sent to Mr Gardner by Mr Isaac and was awaiting his return from hospital. Mr Isaac does not remember the text message but readily agrees that he may well have sent a message of that sort. He points out, entirely sensibly, that the message, if sent in exactly those terms, has two possible meanings, one of which is negative and the other of which is positive. Mr Isaac, not unnaturally, maintains that if he sent the message, he would have been saying to Mr Gardner that he did not want him returning if that would be injurious to his health. Conversely of course, Mr Gardner maintained that a correct reading of the message was that if he was unable to return because of his ill health, then his job had gone.

[21] In any event, the short point is that Mr Isaac is absolutely unequivocal that Mr Gardner was not dismissed by him prior to 20 August 2010. Mr Isaac acknowledges that the relationship with Mr Gardner was troubled; there were two earlier incidents which resulted in warnings, one of which was a written warning, but he gave clear evidence that there was no dismissal until 20 August 2010.

[22] On that day, Mr Isaac was away from the farm at the New Zealand Dental Conference in Christchurch. Amongst other things, Mr Isaac is a dental surgeon. He had given his wife power to act in his absence although had not expected that she would need to take any particular steps. If he was away from the farm for any

purpose, Ms Isaac would act for him and would have his authority to act on behalf of Mallowbay.

[23] Ms Isaac told the Authority in her evidence that, during the earlier part of the day of 20 August 2010, she had seen Mr Gardner behaving suspiciously in a barn a long way from his farmhouse. Ms Isaac said that the barn in question was fully two kilometres away from Mr Gardner's house and she was perplexed at seeing him there because he had no reason to be there particularly when he was supposed to be on sick leave. She said that when she saw Mr Gardner initially, he had a shovel with him.

[24] After Mr Gardner had left the vicinity, Ms Isaac investigated the barn and she found the cannabis. It was buried in two large drums. When she made this discovery, she called her neighbours and the Police. She had both of the other two farm workers with her by the time the Police arrived.

[25] Because of the remoteness of the particular barn where the cannabis was buried, Police had to be carried in on a four wheel drive vehicle.

[26] The cannabis was in two 20 litre buckets with lids and it was buried under the ground at the back of the barn. The 20 litre buckets belonged to the farm.

[27] When Mr Gardner appeared, according to Ms Isaac, he went up to the senior of the policemen present and said words to the effect "*good on you mate you got me then*". Mr Gardner then, according to Ms Isaac, looked at her and said "*sorry Sally*". One of the Police then said to Ms Isaac words to the effect "*I presume you now dismiss this man*" and she said "*yes*".

[28] Mallowbay says that that was the dismissal, that it was a dismissal for serious misconduct, Mr Gardner having confirmed to both the employer and to Police that the cannabis was his. Mallowbay acknowledges that there was no formal process associated with the dismissal but it says given the seriousness of the situation, the abuse of trust associated with the storing of illegal substances on the farm property, and the use of farm equipment for that purpose, the breach was so significant as to justify summary dismissal without process.

[29] But of course the difficulty with that thesis is that Mr Gardner maintains that he did not make those admissions, that the cannabis was not his and that if the Police had been presented with an admission as Ms Isaac maintains, they would have

presumably charged him with the appropriate offence. While he was arrested and given a Trespass Act notice preventing him from re-entering the farm property, save for the collection of his personal effects, he was not charged with the offence.

[30] In those circumstances, the Authority asked the representatives to provide evidence from the Police who attended the incident on the one hand and the other farm workers who were also present. Clearly, in the absence of some corroboration about what happened at the farm on 20 August 2010, the Authority will simply have to make a credibility finding based on the evidence of Ms Isaac on the one hand or Mr Gardner on the other.

[31] A consequence of that request made by the Authority was the provision by Mr Gardner of the Police report on the incident together with information from Mallowbay about the contact details for one of its other farm workers, who was involved at the incident on the farm on 20 August 2010. The Police report was provided to both parties as was a Minute from the Authority outlining the discussion between the Member and the other farm worker, Mr David De Haan. The parties have had an opportunity to comment in their closing submissions on the Police report on the one hand, and on the Authority's Minute in respect of its conversation with Mr De Haan on the other.

[32] Dealing with the Police report first, it is broadly supportive of the narrative that the Authority has already recorded, save for the evidence of Ms Isaac to the effect that Mr Gardner made an admission to her and apologised for his behaviour and also for the contention that Mr Gardner made an admission to Police. There is nothing in the Police report which would support either the contention that Mr Gardner accepted liability to Policy or accepted liability for wrongdoing in terms of the employment relationship. The Police report also confirms Mr Gardner's evidence that he was not charged with the offending; this appears to have been first because he made no admissions to Police and second because there was no physical evidence linking him to the cannabis. The Police report refers to finger and palm printing of Mr Gardner as being inconclusive in terms of evidence linking him to the two containers holding the cannabis.

[33] In relation to Mr De Haan however, the Authority is satisfied that his evidence goes some way to confirming Ms Isaac's recollection of the relevant events. First, the Authority would want to record, as it has in the earlier Minute circulated to the

parties, that Mr De Haan was pleasant, cooperative, and very willing to assist the Authority in its investigation. The Authority has no reason to conclude that Mr De Haan was not telling the truth as he remembered it.

[34] That said, Mr De Haan was very clear that when Police arrived on 20 August 2010, Mr Gardner did say something to the effect “*you’ve got me*”. He was quite clear about that in his recollection of the events but equally clear that he never said anything more of an incriminating nature. In particular, Mr De Haan was quite explicit that Mr Gardner never said the cannabis was his or made any other statement which would more closely link him to the cannabis stash.

[35] Mr De Haan also told the Authority that Police did ask Ms Isaac what she wanted done with Mr Gardner and she said something to the effect “*I just want him gone*”. Mr De Haan did not recall Police asking Mrs Isaac if she was going to dismiss Mr Gardner or use any word of that kind; his recollection was rather that Police sought information from Ms Isaac about the general disposition of the matter rather than making any particular observations about Mr Gardner’s continued employment.

[36] Mr De Haan also told the Authority that his impression was that Mallowbay was suspicious about Mr Gardner’s activities and had been for some time and felt that Mr Gardner may have been using Mallowbay’s premises for illicit drug purposes. The Authority interposes at this point that there is no evidence before it that Mallowbay ever put those allegations to Mr Gardner and on that footing anyway, it would seem that it may perhaps have prejudged Mr Gardner, if Mr De Haan’s recollection is accurate.

Determination

[37] The Authority is satisfied on the evidence before it that Mr Gardner was employed by Mallowbay and that he was dismissed from his employment on 20 August 2010 and not at any other time. The Authority is satisfied that the evidence before it discloses that the proximate cause of Mr Gardner’s summary dismissal on that date was the finding of a cannabis stash on the farm and Mallowbay’s conviction that Mr Gardner was responsible for that stash.

[38] It is plain that there was a complete absence of any measured and reflective process in effecting the dismissal. This was a summary dismissal in all senses of the word *summary*. The question for the Authority is whether, given the nature of the

circumstances in which the dismissal took place, a fair and reasonable employer would have concluded that dismissal was the appropriate outcome. This was a dismissal effected prior to the change in the law which came into effect on 1 April 2011, and as a consequence, the original test for justification in s.103A of the Act is the one that the Authority must apply.

[39] Mallowbay urge on the Authority the proposition that, all things considered, it was open to it to dismiss. There had been two previous warnings that were proximate in time to the dismissal; while the criminal standard of proof beyond reasonable doubt might not be available, the behaviour complained of fell within the terms of the balance of probabilities test, it being more likely than not that Mr Gardner was responsible for the cannabis particularly given Ms Isaac's evidence and the corroboration of Mr De Haan around the admission.

[40] Mr Gardner had been seen behaving suspiciously around the barn where the stash was found. Although not fit to work, he apparently was fit enough to be at the barn with a shovel some two kilometres from his house.

[41] Ms Isaac was in sole charge of the farm at the time with her husband away. She says she felt very vulnerable, knowing that there had been difficulties with Mr Gardner in the short past each resulting in a warning. The evidence is that she broke down once the Police and Mr Gardner were there at the site of the cannabis find.

[42] The practical reality is that, whatever Ms Isaac might have been inclined to do after the stash discovery, Police were intent on their process which involved taking Mr Gardner away so that he could assist them with their enquiries. Even if Ms Isaac had wanted to stay her hand and seek explanations from Mr Gardner, Police process would result in him being removed from the site in the first instance. She had little time to react to the situation and the decision to dismiss was the obvious one.

[43] Despite the absence of complete corroboration, the Authority prefers Ms Isaac's evidence to Mr Gardner's in relation to the events of 20 August 2010 when she was very clear that Mr Gardner made admissions in her presence as to the cannabis being his. While that is not referred to in the Police report, Mr De Haan was adamant that Mr Gardner said something to the effect "*you've got me*".

[44] On that footing then, Mallowbay says simply that it had an admission of criminal wrongdoing involving the use of its property for what may well have been a

significant criminal operation, and that no investigation or explanation was required. An investigation it says would have been pointless in the face of the admission and an opportunity for Mr Gardner to explain himself was pointless because he had already made the admission.

[45] The Authority accepts those arguments have merit. As the Authority has already noted, the witnesses for Mallowbay were more compelling than Mr Gardner was. He seemed vague about most things and even denied that he was dismissed on 20 August 2010. In all the circumstances, the Authority preferred the evidence advanced on this aspect particularly by Ms Isaac that there was an admission, that she was in sole charge of the farm with her husband away in the South Island at the relevant time, and that in those circumstances, the sending away of Mr Gardner was all she could do.

[46] In all the circumstances, the Authority is satisfied that it was available to a fair and reasonable employer to reach a conclusion to dismiss, in the particular circumstances of this case. The preference for the evidence advanced by the employer about the admission, the absence of any real confidence in the evidence of the employee and the intervention of Police all weigh with the Authority as does the practical reality of Ms Isaac being in sole charge and being required to make an urgent decision on the matter without the prospect of a measured opportunity to reflect or take advice. The effect of the admission, the fact of the Police removal of Mr Gardner, the reasonable assumption that he would be charged, all conspire to create a demand for an immediate decision. That decision, to dismiss, is a decision that an employer in these circumstances would be able to make: s103A Employment Relations Act, 2000 applied.

[47] In any event, even if the Authority had been persuaded that Mr Gardner was entitled to remedies as a consequence of being found to have a personal grievance,, the evidence before the Authority is that Mallowbay is a mere shell, has no ability to meet any award of whatever magnitude, and continues in existence only until the final accounts have been prepared. It is as plain as can be that Mallowbay has disposed of all its assets on a forced sale basis and there is simply no basis on which any award, if made, could be met.

Costs

[48] In all the circumstances, costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority