New Zealand Employment Relations Authority Decisions

Garrett v Richmond Funeral Home Limited (Wellington) [2017] NZERA 2040; [2017] NZERA Wellington 40 (22 May 2017)

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Last Updated: 27 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 40
5602072

BETWEEN DARRELL GARRETT Applicant

AND RICHMOND FUNERAL HOME LIMITED

Respondent

Member of Authority: Representatives:	M B Loftus Jills Angus Burney, Counsel for Applicant	
	Andrew Scott-Howman, Counsel for Respondent	
Investigation Meeting:	15 June 2016 at Masterton	
Submissions Received:	At the investigation meeting and 16 June Respondent and 24 June from Applicant	from
Determination:	22 May 2017	

DETERMINATION OF

THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant, Darrell Garrett, claims he was unjustifiably dismissed (albeit constructively) on 12 November 2015. He also claims he was unjustifiably disadvantaged and is due outstanding wages by virtue of not having been paid the minimum wage.1

[2] The respondent, Richmond Funeral Home Limited (Richmond) denies

Mr Garrett was constructively dismissed. It also denies he was unjustifiably disadvantaged and states there is no merit to his wage claim.

1 Section 4 of the Minimum Wage Act 1983

Background

[3] Richmond, as its name suggests, operates a funeral home. It is a family owned business whose principals and senior staff are Peter and Jenny Giddens.

[4] Richmond employed Mr Garrett as a funeral director/embalmer in July 2011. His terms and conditions were in an individual employment agreement which contained the following relevant provisions. The applicant's hours were to be *Monday to Friday 8.30am to 5pm (on-call and available to work after hours every second week*. This reflected a provision that said the salary included a requirement Mr Garrett be *on-call* and *rostered on, and to work when required to do so*.

[5] There are additional provisions which read:

Saturday and Sunday On-call and available to work every second weekend. (or three week roster as per Schedule 2) Must be able to respond to calls within a period of 30 minute period A/H.

Additional after hours work: In addition to the rostered "on-call" hours there will/may be times (days/weekends) when you will be required to work additional hours due to workload eg. Saturday funerals, after hours preparation etc and in these cases we would try to give time off in lieu.

The On all Roster of every second week may/will change to a three week roster once the employee is suitably trained to be on first call.

[6] The three week roster saw the employee rotating through a week on first call, a week on second call (which meant he was a back up to the first call) and a week off.

[7] Mr Garrett says the atmosphere in the workplace was always strained and there was continuous tension. Mr Garrett claims Mr Giddens frequently raised his voice and used disrespectful tones. He says staff were on tenterhooks in a *learn by your mistakes environment* enforced by continuous public reprimands. He says while work was critiqued there was little training and this created a dysfunctional environment in which staff reacted by failing to assist or cooperate with others.

[8] Mr Garrett goes on to say that during the first two years of employment the situation was exacerbated by other employees

having a lot of time off due to sickness. He says he became grumpy due to extreme tiredness caused by having to work additional hours and this led to a conclusion he was being inadequately remunerated.

[9] Mr Garrett says he approached Mr Giddens around 6 September 2013 and asked for a meeting to discuss the work situation. The ensuing meeting occurred at the Giddens' home over fish and chips.

[10] Mr Garrett says he wanted to discuss his concerns along with other issues including:

(a) Mr Giddens having allegedly left Mr Garrett in charge while on leave but failing to inform other staff thus putting Mr Garrett in a difficult position;

(b) Mr Giddens having openly berated Mr Garrett for *taking on too much during that absence*. Mr Garrett accepts he did take on a significant amount of work but thought he would cope as other staff would *step up and assist.* He says they failed to do so;

(c) A comment about Mr Garrett being controlling which he saw as *a kick in the guts* given he was only doing what was asked of him;

(d) Additional pressure created by being paired with a colleague whose computer skills were limited and who, according to Mr Garrett, was unwilling to *step up to help.* Mr Garrett also thought Mr Giddens was failing to address this employees deficiencies;

(e) The same employees' sickness affected staff as a whole and his excessive leave meant Messrs Giddens and Garrett were covering his on-call shifts;

(f) Mr Garrett was feeling stressed;

(g) That Mr Garrett's situation was exacerbated by the fact money was

tight and he did not have time to finish work on his house; and

(h) To canvass the possibility of Mrs Garrett performing some work at the funeral home (which, it should be noted, was arranged).

[11] Mr Garrett says the meeting turned into a casual night and he felt neither Mr nor Mrs Giddens took any of his comments on board.

[12] Mr Garrett says that following the meeting his confidence in the Giddens, and particularly Mr Giddens, deteriorated. He says:

... actions were consistently short of what I held to be good management conduct. When I broached the subject of his administrative shortcomings he chose not to do anything about trying to correcting them. When I spoke to him with kindness

and compassion and tried to explain how his behaviour was causing myself and other staff distress it would just inflame the situation.

[13] Mr Garrett also raises other things which he says influenced his negative view of Richmond. For example he complains Mr Giddens assisted two other employees by providing rental accommodation and while he did not expect such treatment he felt this was unfair and unequal. He says he was further disadvantaged in that he once looked at purchasing a property on the edge of Masterton but when he discussed the employee location clause with Mr Giddens he was told he was restricted to a 10 minute radius of his workplace in Carterton. He says his feeling of disadvantage was exacerbated when another of the employees chose to live in Masterton. Richmond disputes this and notes the rental accommodation it provided the other employee was, in fact, in Masterton.

[14] There was also an embalming course Mr Garrett attended. He says he constantly had to request opportunities to embalm in order to get his numbers up in preparation for the course and the final straw was when he was presented a new employment agreement which appeared to have a bonding arrangement tying him to Richmond after the course. Mr Garrett chose not to sign the agreement which he says led to further deterioration in the relationship with the directors.

[15] On 16 September there occurred what Mr Garrett says was a *very unprofessional rant by Mr Giddens.* It appears from the evidence this was a watershed moment with Mr Garrett saying he was accused of being inflexible and not doing extra on-call work. He says this was totally unfair given he had covered the long absence of another employee both couple of years earlier and during 2015. He also covered when the Giddens went on holiday. Mr Garrett says the situation was exacerbated by the fact his earlier attempt to raise his concerns had been ignored and he had just returned to work after a couple of days' sick leave. Finally there was his view Richmond was unwilling to remunerate its employees reasonably with a particular belief his remuneration was inadequate given the hours he was working.

[16] The following day, Mr Garrett approached Mr Giddens and asked he put his concerns about Mr Garrett's performance in writing. He says Mr Giddens responded by saying *I'm not going to put anything in writing. You put your remuneration expectation in writing*. Mr Garrett is said to have replied that's your choice but its putting the cart before the horse as the concerns about performance had to be addressed before remuneration.

[17] Mr Garrett goes on to say the conversations *left no doubt that there was a disagreement and both parties were unhappy*. He says he requested mediation to resolve the differences and *the continual unprofessional conduct the directors were engaging in*. He adds that as a result he felt the workplace was unsafe.

[18] On 5 October 2015, Mr Garrett raised his concerns as a personal grievance. The letter goes on to say:

Within the last two weeks I have sought to discuss with you your concerns about my performance and my concerns to negotiate a remuneration review. I am not comfortable with conduct that can only be called obstructive that "tit for tat" you are not going to do a performance review and therefore I do not have an opportunity to do a remuneration review. I find that conduct unbecoming and I do not find it professional at all.

[19] Mr Garrett asked Richmond attend mediation which occurred on 27 October

2015. Mr Garrett did not return to work after the mediation but there as a further meeting on 11 November. It clearly failed to resolve the issues as the following day,

12 November 2015, Mr Garrett sent Richmond a letter advising he was resigning forthwith and would not be working his notice.

Determination

[20] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a serious thereof, existed to allow a written determination of findings at a later date.

[21] Mr Garrett claims he was unjustifiably disadvantaged and constructively dismissed with the disadvantages and the employers' refusal to address them leading to the constructive dismissal.

[22] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd2* the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

a. An employer gives an employee a choice between resigning or being dismissed;

b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

c. A breach of duty by the employer causes an employee to resign.

[23] In *Wellington etc Clerical Workers etc IUOW v Greenwich3* the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[24] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Mr Garrett to establish, prima facie, there was such a breach.

[25] There must also be a causal link between the employer's conduct and the tendering of the resignation4 and the possibility of resignation in response to that conduct should be foreseeable.5

[26] It is Mr Garrett's evidence the event which led to his finally concluding the environment was such he could no longer remain was Mr Giddens *unprofessional rant*6 on 16 September. Indeed of six reasons Mr Garrett gives for having lost trust and confidences is his employer at paragraphs [54] to [59] of his brief, five relate to what occurred during this discussion. The last relates to what Mr Garrett says was Richmond's inadequate wage and time records.

[27] There is then the letter of resignation. The bulk of is content refers to the discussion of 16 September 2015.

2 (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

3 (1983) ERNZ Sel Cas 95; [1983] ACJ 965

4 *Z v A* [1993] 2 ERNZ 469

5 *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

6 Brief of evidence at [46]

[28] At least the parties agree about what was discussed during the conversation. It opened with Mr Giddens advising he was unhappy with the way the on-call roster was working and what he perceived as a lack of flexibility to cover leave. From there the discussion moved to Mr Garrett's view it was time for a pay review to which Mr Giddens is said to have replied that was on his 'to do' list. He also added he felt Mr Garrett's performance had been sliding since the embalming course which he attributed to stress occasioned by issues Mr Garrett was having with work on his house. The conversation moved to the bond and it was then a customer arrived.

[29] The conversation later continued with Mr Garrett asking Mr Giddens put his concerns in writing. To that Mr Giddens asked Mr Garrett put his salary expectations in writing. As the conversation continued Mr Giddens observed Mr Garett was becoming forgetful and the later agreed. The conversation ended with Mr Giddens being said to have observed *it isn't anything that can't be fixed.*

[30] Mr Giddens essentially agrees though says there was a disagreement about which of the two was to put his concerns in writing.

[31] The difficulty I have with this is the main source of evidence about what was said comes from Mr Garrett in the form of something that looks close to a transcript.7

There is nothing therein that indicates an unprofessional rant and Mr Garrett was incapable of giving any oral evidence to support his contention that is what occurred. When talking to his concerns and the disadvantages he alleged he suffered he inevitably came back to saying the key issue was a lack of appropriate remuneration. Even when discussing unrelated events the issue arose. For example, and when talking about the embalming course he states he discussed wages with others students and one advised his firm did not pay on-call or overtime and as a result staff did not work it which was unlike the approach taken by Richmond where deceased would be attended to immediately.

[32] It is very difficult to say a failure to give a pay rise is repudiatory behaviour of the kind envisaged when considering whether or not an employee has been constructively dismissed. It is also very difficult to see how, on the basis of Mr

Garrett's own evidence about the discussion, Mr Giddens could have foreseen a

7 Brief of evidence at [69]

resignation. Indeed the evidence is Mr Giddens was willing to discuss what was

clearly Mr Garrett's prime concern – his salary.

[33] There is then Mrs Garrett's evidence. She says her husband walked out due to a belief he couldn't resolve the issues as he couldn't talk about them. Again Mr Garrett's evidence about the conversation makes it difficult to conclude that is the case.

[34] For the above reasons I conclude Mr Garrett as fallen well short of the requirement he establish he has been constructively dismissed.

[35] Turning to the other issues which Mr Garrett says constitute disadvantages and which led to his concluding he could no

longer trust his employer. Again there are problems if, for no other reason, there is no evidence of specific discussions about these issues other than in September 2013 or after the grievance was raised in October

2015. I also have to say the supporting evidence was weak. It largely comprised general accusations with little or no supporting detail.

[36] It is very difficult to conclude an allegedly unsatisfactory conclusion to a conversation which occurred some two years earlier can constitute a disadvantage when Mr Garrett continued to work and can evidence no specific examples of attempts to revisit the issues.

[37] Nor does raising them in October assist especially as none are cited in the six reasons he says led him to loose trust and confidence in his employer (refer [26] above).

[38] There are other deficiencies with these claims. For example why raise the embalming course. It took place some time ago and one has to ask what the disadvantage was. Mr Garrett says it was the proffering of a bonding arrangement yet he refused to accept it and the matter was not pursued.

[39] Similarly Mr Garrett says he as on stress leave toward the end of his employment but the medical certificate he proffered does not reflect that. Nor is there any evidence his mental health was negatively affected by his employers actions as claimed and finally I note there were external stressors which admittedly appear to have been amplified by a lack of income – namely Mr Garrett's home.

[40] I also have to say the evidence supporting the disadvantage claims was weak. It largely comprised general accusations with little or no supporting detail. Indeed it was notable that while Mr Garrett said another employee could support his allegation he did not want that employee to give evidence. That is perhaps not a surprise as it is the same employee about whose capabilities and performance he has been quite critical.

[41] Having reviewed the evidence I can do nothing other than conclude the real issue was Mr Garrett's dissatisfaction with his remuneration which he considered inadequate given the hours he was working. The hours he agreed to when he entered into the employment agreement and the remuneration Mr Giddens was willing to discuss.

[42] For the above reasons I conclude Mr Garrett has failed to make out his claims he has been unjustifiably dismissed or unjustifiably disadvantaged.

[43] Turning to the arrears claim. Mr Garrett is claiming that he has not received the minimum wage by virtue of the hours he is rostered on-call.

[44] In essences the claim appears akin to a sleepover claim8 given what he says was the restrictive nature of an onerous on-call regime.

[45] The conclusion Mr Dickson was working was based on an analysis of three factors. They were:

a. the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;

b. the nature and extent of the responsibilities placed on the employee;

and

c. the benefit to the employer of having the employee perform the role. [46] This approach were confirmed and applied in *Victoria Law & Ors v*

Woodford House Trust Board & Ors.[9]

[8] *Idea Services Ltd v Dickson* [2011] NZCA 14; [2011] ERNZ 192 (CA)

9 [2014] NZMC 25

[47] One of the problems Mr Garrett faces with his approach is a significant portion of the time he now says he was working he was on-call. Here I note the Court of Appeal's comments10 when referring to the European case of *Landeshauptstadt Kiel v*

Jaeger. 11 A simple approach is to ask whether the employee is engaged to be

available or available to be engaged? If engaged to be available it is work. If available to be engaged (ie: on-call) it is not.

[48] If on-call was removed from the hours Mr Garrett says he worked the total would reduce to a level which would nullify the claim he received less than the minimum wage.

[49] Applying the principles in *Dickson* I would reach a similar conclusion. While it accepted on Richmond's behalf there is an obvious benefit in having employees perform call-outs, the other two factors do not apply to the extent they did with Mr Dickson.

[50] With regard to restrictions on Mr Garrett's freedom I note:

a. he could remain at home till required to react to a call;

b. he could leave his home and move around the district as he wished so long as he could respond within 30 minutes. Even then it is a requirement Mr Garrett respond in that time and not that there be immediate action;

c. Mr Garrett's was not an exclusive responsibility as at times he had the

backing a second call;

d. Mr Garrett claim he was always at work for Richmond is undermined to some extent by the fact that throughout he maintained his own secondary joinery business though he appears it was not very active.

[51] These restrictions are not nearly as onerous as those applying to Mr Dickson whose freedom was totally fettered by virtue of a requirement he remain on the employers premises. Mr Garrett are also one he agreed to when entering into the

relationship and which are said to be recognised in the salary paid.

10 n 7 above at [19]

11 *Landeshauptstadt Kiel v Jaeger* [2003] IRLR 804, [2004] All ER 604 (ECJ) also referred to and approved in *Law,* n 8 at [193] as capturing the essence of the issue

[52] To that I add Mr Garrett's answers when commenting on the restrictions. It was not so much a case of where he could go but what he could do. For example he cited an inability to ride his bike where he wished or restore a car as the noise from tools might mean he could not hear his telephone. At one point Mr Garrett went so far as to describe the restrictions on his freedom as self-imposed.

[53] With regard to the nature and extent of the responsibilities it should be noted Richmond's employees are not solely responsible for care of the deceased and their bereaved family. A team approach is used and while the on-call employee does certain initial tasks the bulk of the work can be done in normal working hours and by others. As Mr Scott-Howman put it ... *he had immediate responsibility for certain tasks while on-call, but not overall responsibility for all tasks required for a particular funeral.*

[54] When applying these principles and considering their application as a totality I do not consider Mr Garrett's on-call constitutes work. His minimum wage claim therefore fails.

Conclusion and Costs

[55] For the above reasons I conclude Mr Garrett has failed to establish he was constructively dismissed or that he suffered an unjustifiable disadvantage in his employment.

[56] Similarly I conclude he has failed to establish he was working while on-call and his wage claim is also dismissed.

[57] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority