

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ross Gelissen (Applicant)
AND Oasis Properties Limited (Respondent)
REPRESENTATIVES Lyn Preston, Advocate for the Applicant
Michael McGurk, Advocate for the Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 25 May 2005
WITNESS INTERVIEWS 22 June 2005
DATE OF DETERMINATION 8 September 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] Mr Gelissen claims that he was unjustifiably dismissed from his employment – effective from 9 June 2004. He seeks that the Authority finds that he has a personal grievance and award him various remedies.
Mr Gelissen also says that he is owed one weeks' wages and holiday pay for the period that he was employed. Finally, Mr Gelissen says that he provided a variety of personal equipment and tools, including a car trailer, in order to carry out maintenance that was required in order for the business operation to continue, and that the property in question has not been returned to him.
- [2] The employer, Mr Michael McGurk, says that Mr Gelissen was not dismissed and that he "walked out" on his employment on 9 June 2004 and never returned. Mr McGurk does not appear to deny that Mr Gelissen may be owed wages and holiday pay, but in regard to the personal property claimed by Mr Gelissen, Mr McGurk says that he has no knowledge of Mr Gelissen providing the equipment in question.

Background

- [3] Mr Gelissen commenced his employment as the Manager of Leisure World Fun Park – Rotorua, on or about 25 February 2004. It appears that Leisure World Fun Park has had a problematic history for some time, as evidenced by the various Health & Safety Reports compiled by Department of Labour Inspectors. The reports were obtained for Mr Gelissen under the Official Information Act 1982 and have been provided by him to the Authority as evidence of the some of the issues that confronted him during his employment. It is not necessary to analyse this evidence in any detail. It is enough to say that it is accepted that

when Mr Gelissen commenced his employment at Leisure World Fun Park, he inherited a less than ideal environment in regard to the condition of the plant and premises.

- [4] Leisure World Fun Park (“Leisure World”) is owned by Oasis Properties Limited. The Managing Director (and the sole director and shareholder) of the Company, is Mr Michael McGurk. Mr Gelissen was directly responsible to Mr McGurk for the management of the Fun Park. In regard to administrative matters, Mr Gelissen was required to have contact with Ms Jourdan Piacun, at the Auckland office of the Company.
- [5] Mr Gelissen had the responsibility for the day to day operation of Leisure World. This included the supervision of staff (4 or 5 full-time employees), plant maintenance and accountability for income obtained from customers and any expenditure incurred.
- [6] The evidence pertaining to Mr Gelissen’s tenure at Leisure World, while conflicting, nonetheless reveals that while Mr Gelissen probably had good intentions in regard to its management, he really did not have the necessary skills or experience for the position and it was probably beyond him. Mr McGurk says that he was supportive of Mr Gelissen, but it appears that Mr Gelissen was largely left to apply his own skills and experience and these were clearly shown to be inadequate.
- [7] There is conflicting evidence pertaining to money management, record keeping, staff management and the overall general management practices pertaining to Leisure World, and the manner in which Mr Gelissen carried out his role. It is difficult make any conclusive findings as to exactly what was going on during Mr Gelissen’s time at Leisure World, but it is clear that the longer that he was there, the more dysfunctional things became. Mr Gelissen can certainly be held to be largely responsible for much of that dysfunction. On the other hand, while Mr McGurk, set out his requirements from Mr Gelissen in a letter dated 12 March 2004, there is no evidence that he followed through or made any tangible moves to accurately assess what was occurring, or take appropriate and timely action to address matters regarding the performance of Mr Gelissen.
- However, it is clear that matters came to a head on the morning of 9 June 2004.

Events of 9 June 2004

- [8] There is further conflict in the evidence as to what actually happened on the morning of 9 June 2004. A summary of the evidence available follows:

The Evidence of Mr Gelissen

- [9] The evidence of Mr Gelissen is somewhat inconsistent. In his written statement he says that the first indication that there was an “employment problem” was when he arrived at work on 9 June and was confronted by 5 dissatisfied staff. They advised him that that their wages had not been paid because he had not been banking the daily takings for the business. Mr Gelissen further says that Ms Jenny Hawker, the Office/Administration person, was the appointed spokesperson for the group and she was also representing Mr McGurk. Mr Gelissen says that Ms Hawker told him that Mr McGurk was accusing him of taking funds from the business and that she had Mr McGurk’s authority to take his work keys from him.
- [10] Mr Gelissen’s written evidence is that at that point he handed over his keys to the premises and was then told by Ms Hawker that his employment had been terminated. He says that he was shocked at being dismissed by “a junior staff member” and left the premises.

- [11] At the investigation meeting, Mr Gelissen said that he arrived at Leisure World at about 10:00am. The staff had gathered around a table in the lunch room. Mr Gelissen said that upon his entry, one of the staff began abusing him and wanted to know where the wages were for the staff as none of them had been paid. The evidence of Mr Gelissen is that he was told by the staff that they thought their wages had not been paid because he had not been banking the “takings” for the business. He says that he was given the phone by one of the staff and told to ring Ms Piacun about the payment of the wages.
- [12] Mr Gelissen says that he then left the premises for about quarter of an hour and then returned. He says that upon his return, he was met by Jenny Hawker and she told him that Mr McGurk had instructed her to take the keys to the premises off him. Mr Gelissen said that he then gathered some of his personal belongings from the office and left the premises. When questioned by the Authority as to what he did after leaving, he said that he drove to Wellington and stayed there for a week living out of his car.

The Evidence of Ms Hawker

- [13] Ms Hawker did not attend the investigation meeting on 25 May 2005 but was interviewed by the Authority on 22 June 2005. Ms Hawker says that she was employed as an office person at Leisure World in April 2004. She says that she had a feeling that things were not right in regard to the management of the money obtained from customers and she told Mr Gelissen that she would not take any responsibility for managing the money side of the office. Ms Hawker further says that Mr Gelissen used to pay staff and other people doing work at Leisure World with cash and he asked her if she wanted to be paid in cash or have her wages banked. She chose the second option. Ms Hawker also says that Mr Gelissen had shown staff how to ring up a “no sale” on the till and she implied that this was to avoid any till record of what the takings were. The further evidence of Ms Hawker is that Mr Gelissen was the only person who had access to the office safe as he was the only person with a key.
- [14] Ms Hawker says that when she arrived at Leisure World on the morning of 9 June, Mr Gelissen was there. She says that Mr Gelissen told the staff that had gathered in the lunch room that they would not be getting paid as “Auckland” would not pay the wages. Ms Hawker says that Mr Gelissen was asked to ring the Auckland office and find out what was happening about the payment of the wages but he refused to do so and then left the premises. Ms Hawker said that she rang the Auckland office but did not get a particularly welcoming reception from Ms Piacun and Ms Hawker says that she informed Ms Piacun that she should ring back with a better attitude.
- [15] The further evidence of Ms Hawker is that Mr Gelissen subsequently returned to Leisure World but then “took off” again. Ms Hawker says that she was upset about what was happening that morning and was contemplating resigning. In the meantime, another staff member, Rachel Trumper, telephoned Mr McGurk and apparently conveyed to him what was happening regarding Mr Gelissen and the effect on the staff. Mr Gelissen then returned to the premises.
- [16] Ms Hawker says that Mr McGurk telephoned and spoke to her. He requested Ms Hawker to ask Mr Gelissen to leave his keys to the premises and this duly happened. Ms Hawker says that Mr Gelissen then went to the office and started putting things into a carry bag, including the walkie talkies owned by the business. Ms Hawker says that she told Mr Gelissen that he could only take his own possessions and that he took some tools with him in a tool box. He then left and never returned.

[17] After Mr Gelissen left Ms Hawker opened the safe. She says that there should have been \$500 in petty cash and a till float of \$300 because she had cashed a cheque the previous day to ensure those sums of cash were available. Ms Hawker says that there was only \$147 in the safe. Ms Hawker recalls that there was a car trailer at Leisure World that she understood belonged to Mr Gelissen. She also related to a dispute about the purchase of a Mazda car by Mr Gelissen and she recalled that he told other staff that he had taken \$500 out of the till to purchase the car for Leisure World and that he intended to use the car to bring Ms Trumper to work as she only had a partial licence to drive. Ms Hawker also made mention that there had been some indication that Mr Gelissen had been using the drug commonly known as “P”.¹

The Evidence of Ms Piacun

[18] Ms Piacun says that she received a call from Ms Hawker who conveyed that Mr Gelissen had left Leisure World with the keys to the safe in his possession and it was not possible to open for business as the cash for the till could not be accessed. Ms Piacun believed that the safe should have held the sum of \$600, being the float for two tills, plus \$500 in petty cash. Ms Piacun also says that as there had been a long weekend (Queen’s Birthday) and no banking had been done, therefore, there should also have been a reasonable sum of money in takings in the safe. Ms Piacun says that Ms Hawker told her that Mr Gelissen had come back in and “dumped” the keys on the office desk.

The Evidence of Mr McGurk

[19] Mr McGurk recalled a conversation with Ms Hawker who told him that Mr Gelissen had been at Leisure World and then “took off.” Ms Hawker had told him that there was no money available to open for business and she did not know where Mr Gelissen was but he “was as high as a kite running around the place.” Mr McGurk says that he instructed Ms Hawker that if Mr Gelissen returned she should get the keys off him and not let him near any machinery. Mr McGurk says he also tried to contact Mr Gelissen on his cell phone numerous times and that Mr Gelissen would answer then turn the phone off.

[20] Mr McGurk also says that Ms Hawker and Ms Trumper told him that Mr Gelissen had taken money from the till. Mr McGurk also says that he believes that Mr Gelissen took \$500 from the till and bought a Mazda car for Leisure World and that Mr Gelissen has retained possession of the car that rightfully belongs to Leisure World.² Mr McGurk also related his discussions with Mr Gelissen’s father pertaining to Mr Gelissen’s disappearance and unknown location.

The Evidence of Mr Robert Gleissen³

[21] Mr Gleissen says that he had two or three discussions with Mr McGurk. Mr Gelissen says that he and his wife were concerned that they did not know the whereabouts of their son. Mr Gelissen says that he received a text message from his son after a few days to say that he was “still alive.”

¹ Methamphetamine

² Mr Gelissen has presented evidence that he says points to his lawful purchase and registration of the Mazda car. The Authority is unable to reach a conclusion about this matter as the evidence is inconsistent. As with the sums of money involved, Mr McGurk may wish to involve the Police if he believes he has good reason to believe that a crime, or crimes, have been committed.

³ Ross Gelissen’s father.

[22] Mr Gelissen also says that during one of the discussions he had with Mr McGurk, he was told that Mr McGurk believed that tools, including a generator, had gone missing from Leisure World and that a private investigator had found property belonging to Leisure World at Ross Gelissen's flat. Mr Gelissen says that Ms McGurk accused his son of being a "P" addict. Mr McGurk also wanted the Mazda car back and intended to go to the Police. Mr Gelissen was adamant that his son would not have carried out the actions that he was being accused of.

Determination

- [23] The primary question that has to be answered is: Was Mr Gelissen dismissed? Having weighed all of the evidence, as confusing as it is in places, I find that Mr Gelissen was not dismissed. Rather, I find that he abandoned his employment on the morning of 9 June 2004. I simply do not accept Mr Gelissen's version of events where he says that he was dismissed by Ms Hawker.
- [24] I do not find the evidence of Mr Gelissen to be at all credible and it is clear to me by his actions in taking flight to Wellington on 9 June, and thereby causing concern to his parents, and to a lesser degree, to his employer, Mr Gelissen simply lost touch with reality. While some have alluded to drug use on the part of Mr Gelissen, I do not know if that is so or not. It has not been proven one way or the other. But, gauging the behaviour of Mr Gelissen on any normal scale, his actions were not those of a person acting rationally.
- [25] I make no findings in regard to the honesty or otherwise of Mr Gelissen as the evidence is inconclusive. In any event, I am not required to come to any conclusions about Mr Gelissen's honesty or if he has been involved in illegal actions. That is not the role of the Authority in this case and may be a matter for the Rotorua Police, should Mr McGurk wish to pursue matters further.
- [26] That also brings me to the matter of Mr Gelissen's claims for the return of certain property that he has listed, including the car trailer. My understanding is that all of the property claimed by Mr Ross Gelissen actually belonged to his father. I largely accept Mr Robert Gelissen's evidence as to the absence of that property from his workshop but it is not proven that it ever found its way to Leisure World and if it ever did, there is no evidence that it remains there. In regard to the matter of the trailer, the overall evidence points to it being most probable that Mr Robert Gelissen's trailer is or was at Leisure World and it may have been wrongly retained. However, once again, that is a matter that can be referred to the Rotorua Police if Mr Robert Gelissen is of a mind to do so.
- [27] In regard to the wages and total holiday pay owing to Mr Gelissen, while it remains uncertain as to what exactly may be owed, I do not understand Mr McGurk to be denying Mr Gelissen's claims. Furthermore, despite requests from the Authority to do so, the employer has not produced any wage or time records for Mr Gelissen.
- [28] Section 130 of the Employment Relations Act 2000 ("the Act") requires that every employer must at all times keep a record showing the wages paid to the employee each pay period and the method of calculation. Section 131 of the Act provides that wages or other money owed to an employee may be recovered by an action in the Authority. Then, at section 132 of the Act, an employee may call evidence to show that the defendant employer failed to keep a wages and time record and that such failure prejudiced the employee's ability to bring an accurate claim under s.131. Upon such evidence being given, the Authority may, unless the defendant proves that those claims are incorrect, accept as

proved all claims made by the employee in respect of the wages actually paid to the employee and the hours, days, and time worked by the employee.

- [29] Given that the employer has failed to produce a wages record, or any other evidence to show that Mr Gelissen's claims are incorrect, I am bound to accept his evidence that wages and holiday pay as claimed are due to him. I understand that Mr Gelissen claims that he has not been paid wages for the days of 7 and 8 June 2004 and holiday pay at 6% of his gross earnings for the period of his employment.
- [30] Oasis Properties are ordered to pay to Mr Gleissen his usual wages for 7 and 8 June 2004 and holiday pay calculated as 6% of his gross earnings for the period of his employment at Leisure World.

Ken Anderson
Member
Employment Relations Authority