

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 171/09
5071689

BETWEEN	RONALD GILLIES Applicant
AND	AMBRO & CHOOD SINGH TRADING AS WAINGARO HOT SPRINGS POOL COMPLEX Respondent

Member of Authority:	Vicki Campbell
Representatives:	Alex Hope for Applicant Boris Samujh for Respondent
Investigation Meeting:	19 February 2009 at Hamilton
Further Information Received	25 February 2009
Submissions Received:	6 March 2009
Determination:	29 May 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Ronald Gillies was employed as a groundsman and pool attendant by Mrs Ambro and Mr Chood Singh trading as Waingaro Hot Springs Pool Complex (“Mr and Mrs Singh”) from July 2006 until October 2006.

[2] Mr Gillies claims he was unjustifiably disadvantaged in his employment as a result of a number of failures by Mr and Mrs Singh. Mr Gillies also claims he was unjustifiably dismissed on 30 October 2006 when he says his employer sent him away. Alternatively, Mr Gillies says if he wasn’t actually dismissed then he was constructively dismissed as a result of his employer unilaterally altering the number of hours of work available to him and evicting him from his accommodation.

[3] Finally Mr Gillies says Mr and Mrs Singh were in breach of the Employment Relations Act in that they did not provide him with a copy of a written employment agreement.

[4] Mr and Mrs Singh denies Mr Gillies was unjustifiably disadvantaged in his employment or that he was dismissed either actually or constructively. Mr Singh also says he provided Mr Gillies with a copy of a written employment agreement when he commenced employment but the agreement remained unsigned by Mr Gillies.

[5] The issues for this determination:

- Did Mr Gillies suffer an unjustified disadvantage in his employment?
- Was Mr Gillies dismissed?
- If so was that dismissal unjustified?
- If Mr Gillies was unjustifiably dismissed, what, if any, remedies are available to him?
- Were Mr and Mrs Singh in breach of the Act with regard to the alleged failure to provide a written employment agreement?

22 October 2006 Incident

[6] An incident which occurred on Sunday 22 October informs what happened in the employment relationship at the time it came to an end. I have therefore set out my findings of fact with regard to this incident.

[7] Sunday 22 October was the day before Labour Day 2006. Mr Gillies brother and cousin came to visit him at the complex. This was a normal day of work for Mr Gillies and he was due to commence his shift at 1.30pm. It is not entirely clear when Mr Gillies guests arrived, however, I have concluded it is more likely than not that they arrived sometime around 12.00noon.

[8] As a result of his guests arriving Mr Gillies made approaches to other employees seeking their assistance in covering his shift for him that day. He was unsuccessful.

[9] At the time Mr Gillies was due to commence working, Mrs Singh was aware he was still at his caravan entertaining his guests. She approached Mr Gillies at his caravan and asked him to attend to his work.

[10] Tenants of the complex who have guests staying with them overnight are expected to pay a fee of \$8.00 per person. There is a dispute as to whether Mr Gillies had paid for his guests to stay with him or not. Mr Gillies says he paid for them at 1.52pm when he purchased other goods at the camp store. Mr Singh says that by 9.30pm that night he was not aware Mr Gillies had paid for his guests to stay and that one of the reasons he approached Mr Gillies caravan at 9.30 that night was to find out if he intended to pay for his guests.

[11] Mr Gillies produced a copy of an EFTPOS receipt which shows he did make a purchase at the store on 22 October. Further, Ms Emmalina Bellas, a witnesses for the respondent, recalled Mr Gillies paying on 22 October, for guests to stay with him for a night, however she thought he was paying for guests who had stayed on the Saturday night. I have concluded, on the balance of probability, that Mr Gillies did pay on the afternoon of 22 October, for his brother and cousin to stay with him.

[12] Mr Gillies guests started consuming alcohol from the time they arrived at the complex. Mr Gillies evidence was that he went up to the local Hotel and purchased beer for his guests and took that back to the caravan where Mr Lewis and Mr Paul drank it. In his oral evidence Mr Lewis told the Authority that he and Mr Paul drank the beer and then went up to the Hotel to wait for Mr Gillies to finish work. Mr Gillies joined his guests at 4.00pm, having only worked 2 ½ hours of his shift. He was not due to complete his shift until 9.30pm.

[13] Mr and Mrs Singh say Mr Gillies guests were causing problems for the other guests at the complex. Being Labour Weekend the complex was particularly busy with a large number of guests staying in the caravan park. Mr and Mrs Singh told me Mr Lewis and Mr Paul were riding Mr Gillies' motorbike and driving their cars through the complex in a way that was disturbing the guests. Mr Gillies denied this happened, however, Mr Lewis told me that he and Mr Paul had taken the motorbike and car in and out of the complex a couple of times.

[14] At or about 8.30pm Mr Gillies and his guests arrived back at the complex and returned to Mr Gillies caravan. Mr and Mrs Singh then began receiving complaints from pool visitors and campers about the noise and bad language coming from Mr

Gillies caravan. At about 9.30pm Mr Singh drove to Mr Gillies caravan to check if payment had been made for Mr Gillies guests and to address the complaints he had received. Mr Singh got out of his car and approached the caravan where he knocked on the door.

[15] Mr Singh says he was abused by Mr Gillies and his guests and he went back to his car. At that time Mr Gillies approached Mr Singh's car while continuing to abuse and swear at him. Mr Gillies then told Mr Singh to stop hitting him. This behaviour by Mr Gillies was witnessed by at least two other employees who provided evidence to the Authority. I am satisfied that once he returned to his car, Mr Singh remained inside his car and that it was therefore not feasible for Mr Singh to have had any physical contact with Mr Gillies.

[16] Mr Singh left the caravan site and returned to the office where he rang the Police. The Police arrived and escorted Mr Gillies' guests off the complex at or about 10.00pm. Mr Gillies followed his guests off the site.

Did Mr Gillies suffer an unjustified disadvantage in his employment?

[17] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Mr and Mrs Singh's actions disadvantaged Mr Gillies in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act (see *Mason v Health Waikato* [1998] 1 ERNZ 84).

[18] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Mr and Mrs Singh establishes justification for its disadvantageous actions, there is no grievance (see *McCosh v National Bank*, unreported, AC49/04, 13 September 2004).

[19] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances. (see *NZ Storeworkers IUW*

v South Pacific Tyres (NZ) Ltd [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000)

[20] Mr Gillies says he was unjustifiably disadvantaged in his employment as a result the following failures by Mr and Mrs Singh:

- Failure to provide Mr Gillies a written employment agreement;
- Failure to provide Mr Gillies with 40 hours work each week;
- Failure to provide Mr Gillies with work from 25 October to 30 October 2006;
- Eviction from Mr Gillies accommodation;
- Failure to provide Mr Gillies with reasonable notice of termination of his employment; and
- Summary termination of employment without due process.

Failure to provide Mr Gillies a written employment agreement

[21] At the commencement of the relationship between Mr Gillies and Mr and Mrs Singh, Mr Gillies preferred to be treated as an independent contractor. Consistent with that approach Mr Gillies tendered GST invoices for his services at the complex.

[22] Mr Singh says that on 24 July it was agreed Mr Gillies would become an employee. He says that on that date he gave Mr Gillies a copy of the IRD Tax Code Declaration form to complete, together with two copies of a written employment agreement which he had signed. Mr Singh says he received the signed Tax Code Declaration back, but not the employment agreement. The Tax Code Declaration was signed by Mr Gillies on 24 July but that date was struck out and the date of 2 July 2006 was entered in its place. This change was initialled by Mr Gillies. Mr Gillies denies receiving a copy of the written employment agreement.

[23] I am satisfied there was no concluded employment agreement between the parties. I have been unable to conclude with any certainty whether Mr Gillies received the copies of the employment agreement or not. However, I am satisfied that Mr Gillies was fully aware of the relevant terms and conditions of his employment. Mr Gillies undisputed evidence was that his terms of employment included an obligation on him to work at the pools on a Saturday and Sunday, take Monday and

Tuesday off, and then to undertake additional work as a Groundsperson on Wednesday, Thursday and Friday of each week. He was provided with accommodation at the complex under a Service Tenancy and was paid \$10.50 per hour for each hour worked.

[24] Mr Gillies also says that he was entitled to be paid for a minimum of 40 hours each week and that he could have visitors, free of charge, as long as they didn't use the pool facilities. These two terms are disputed by Mr and Mrs Singh.

[25] I am satisfied on the balance of probabilities that Mr Gillies was aware that he would only be paid for the actual number of hours he worked and that there was no minimum entitlement to 40 hours pay each week. I am supported in this conclusion by Mr Gillies own evidence which indicates that the only regular work he was required to do was on a Saturday and Sunday at the pool. The work he undertook as a Groundsperson was, to use his word, "additional" work.

[26] While not having a written employment agreement between the parties may disadvantage an employee, in the circumstances of this case, I am satisfied that there were no disadvantageous consequences of Mr Gillies not having a written employment agreement.

Failure to provide Mr Gillies with 40 hours work each week

[27] As already set out in paragraph [26] I am satisfied there was no agreement that Mr Gillies would receive a minimum of 40 hours pay per week.

[28] A review of the wages book indicates that Mr Gillies worked various hours each week ranging from 15 hours to 61.25 hours. His average hours worked throughout his employment were approximately 32 hours per week.

[29] Mrs Singh told me this was because Mr Gillies would often turn up for work and then disappear. She says there was plenty of work for Mr Gillies to do and he could have been regularly working 40 hours per week, however, he would leave in the middle of his work, or leave early or arrive at work late. It was common ground that Mrs Singh advised Mr Gillies at least twice during his employment that he needed to put in his hours or he would not make any money.

[30] I find on the balance of probability that Mr Gillies chose whether he worked more or less than 40 hours per week. I am satisfied that had he wished to work more hours than he did, those hours were available to him.

[31] Mr Gillies was disadvantaged to the extent that he did not work 40 hours every week during his employment. However, I find that disadvantage was as a result of Mr Gillies actions and not as a result of the actions of Mr and Mrs Singh.

Failure to provide Mr Gillies with work from 25 October to 30 October 2006;

[32] Following the incident on 22 October 2006 which Mr Gillies says lead to his dismissal, he took his usual two days off, returning to work on 25 October 2006. Mr Gillies says he arrived at about 9.00am and enquired of Mrs Singh whether he was still working there or had he been fired. Mr Gillies says he was told there was no work for him.

[33] Mrs Singh recalls the questions by Mr Gillies, but says he turned up late in the afternoon at about 4.00pm. Mrs Singh says she reminded Mr Gillies that his working day did not start at 4.00pm. Mr Gillies says he was provided with work later on 25 October when he was asked to remove some window frames for Mr and Mrs Singh. Mrs Singh denies this and says the window job was completed in September.

[34] Mr Gillies also enquired as to whether his caravan accommodation was still available to him. Mrs Singh acknowledged that it was. Mr and Mrs Singh say other than late in the day on 25 October Mr Gillies did not report for work on any day up to and including 30 October 2006, but rather kept to himself. They say he drifted in and out of the complex.

[35] There is no explanation as to why Mr and Mrs Singh did not approach Mr Gillies to ascertain why he was not at work, especially given that Mr Gillies lived and worked at the complex.

[36] I have concluded that it had become common practice in the employment relationship for Mr Gillies to decide for himself whether he would work on any given day or not and Mr and Mrs Singh respected that. My conclusion on this point is

supported by Mrs Singh's belief which she expressed to me at the investigation meeting that they could not force Mr Gillies to work if he did not want to.

[37] I find it is more likely than not that Mr Gillies chose not to be available for work on the days between 25 and 30 October 2006. It follows that he has not been disadvantaged in his employment by an action of Mr and Mrs Singh.

[38] In coming to my conclusions in this matter, and while this matter has not been raised by either counsel I have given consideration to the obligations on both parties to an employment relationship to act in good faith. In particular the requirements set out in s.4(1A)(b) of the Act that the parties be active and constructive in maintaining a productive employment relationship in which the parties are responsive and communicative, and whether a breach may give rise to a disadvantage grievance.

[39] Mr and Mrs Singh had a responsibility to be active and communicative with Mr Gillies with regard to providing work for him from 25 to 30 October. I find that they were not. However, the responsibility under s.4(1A)(b) is a two way street. Mr Gillies, likewise was not active and communicative with his employer with regard to making himself available for work during that period. For these reasons I have concluded that both parties to this employment relationship have breached their obligations of good faith, however, no remedies will flow from these breaches.

Eviction from Mr Gillies accommodation;

[40] Mr Gillies says that on 30 October Mrs Singh told him to leave as he was not working there, not paying rent and his caravan had been sold. Mrs Singh denies the content of the conversation as put forward by Mr Gillies. Mrs Singh says she advised Mr Gillies when she saw him on 30 October that the caravan he was occupying on the site had been sold but that he would be offered another on-site caravan as a replacement.

[41] Mr Gillies says he still had belongings in the caravan but he was told to leave, he was dismissed. I find that evidence does not accord with the fact that Mr Gillies then stayed at the complex, in his caravan, for a further three days. Mr Gillies remained in his accommodation until 2 November 2006 when he left of his own accord.

I find Mr Gillies has not been disadvantaged in his employment by an action of Mr and Mrs Singh.

Failure to provide Mr Gillies with reasonable notice of termination of his employment and Summary termination of employment without due process

[42] As can be seen below, I have determined that Mr Gillies was not dismissed from his employment. This aspect of Mr Gillies claim for disadvantage therefore fails.

Was Mr Gillies dismissed?

Actual dismissal

[43] Mr Gillies says he was dismissed on 30 October when Mrs Singh told him to leave the complex and his caravan had been sold. Mr Gillies says he returned to work on 25 October and was not offered any work.

[44] Mrs Singh denies she told Mr Gillies to leave the complex on 30 October. Mrs Singh says she simply advised Mr Gillies that the caravan had been sold and told him they would find him alternative accommodation.

[45] In reaching my conclusions on this point, I have taken into account Mr Gillies previous conduct and general attitude towards his work. I have also taken into account the normal response of Mr and Mrs Singh when Mr Gillies decides not to work.

[46] It was common ground that on each working day all employees would attend the office and receive their working instructions for the rest of that day. I find it is more likely than not that on 25 October Mr Gillies failed to arrive at work before 4.00pm and then failed to attend work on the following days to receive his working instructions.

[47] In response to Mr Gillies not attending work Mr and Mrs Singh did what they routinely did, accepted that Mr Gillies would not be working in the hope that he might feel like working the following day. Mrs Singh was of the opinion that she could not make Mr Gillies work.

[48] I find on the balance of probabilities that it is more likely than not, Mrs Singh did not tell Mr Gillies to leave the complex on 30 October. It follows therefore, that there was no actual dismissal.

Constructive dismissal

[49] Mr Gillies has claimed that if he wasn't actually dismissed then he was constructively dismissed as a result of Mr and Mrs Singh unilaterally altering the number of hours of work available to him and evicting him from his accommodation.

[50] The basis for Mr Gillies claim for constructive dismissal is that he left as a result of a breach of duty on the part of the employer, which is the third of the three non-exhaustive categories of constructive dismissal referred to by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 1 NZLR 372.

[51] The conduct amounting to a breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. (*Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 2 All ER 1 (CA)).

[52] In coming to my conclusions under this heading I must determine the following issues:

- Did Mr Gillies leave his employment as a result of a breach of duty on the part of the Mr and Mrs Singh? and
- If there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Gillies would leave his employment?

(Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc [1994] 1 ERNZ 168)

Was the resignation caused by a breach of duty on the part of the respondent?

[53] Mr Gillies claims Mr and Mrs Singh breached their employment agreement with him in that they unilaterally reduced his hours of work. I have already found that the hours Mr Gillies worked were entirely under his control, it follows therefore that an action founded on a unilateral change to his hours of work will not succeed.

[54] Mr Gillies also claims that Mr and Mrs Singh breached his employment agreement when they evicted him from his accommodation on 30 October without notice. The evidence shows that Mr Gillies was not evicted on 30 October and that he remained in his accommodation until 3 November 2006.

[55] As already set out earlier in my determination, it is more likely than not, Mr Gillies was not evicted on 30 October, although he was told that the caravan he was staying in had been sold, and that another caravan would be made available for him.

I find that Mr Gillies was neither actually, nor constructively dismissed.

Penalty

[56] Mr Gillies claims for a penalty for the failure of Mr and Mrs Singh to provide him with a copy of the written employment agreement. Mr and Mrs Singh say they did provide Mr Gillies with a copy of the intended employment agreement which they had signed.

[57] Applications for penalties must be made within 12 months after the cause of action first became known or should reasonably have become known to the person bringing the action. Mr Gillies has been legally represented in this matter since November 2006. The parties met in mediation in February 2007. It would have become known, or ought to have become known to Mr Gillies at the latest, when he attended mediation, that he did not have a written employment agreement and that the employer was therefore in breach of the Act. The action for penalty was lodged in the Authority on 25 September 2008. This was clearly outside the limitation period of 12 months.

Counter-claim

[58] In his submissions Mr Sumujh seeks determination of a counter-claim on behalf of the Respondent. There was no counter-claim against Mr Gillies that was properly before the Authority and final submissions is not the appropriate place to raise new issues. I have therefore declined to address this matter.

Costs

[59] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr and Mrs Singh may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority