

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Calida Gomas (Applicant)  
**AND** Argonaut Racing & Breeding Limited (Respondent)  
**REPRESENTATIVES** John Peebles - For the Applicant  
Dan Gardner - For the Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 5 April 2004  
**FINAL SUBMISSIONS** 20 July 2004  
18 December 2004  
**DATE OF DETERMINATION** 8 February 2005

**DETERMINATION OF THE AUTHORITY**

**The Employment Relationship Problem**

- [1] Ms Gomas claims that she was unjustifiably dismissed from her employment on 14 January 2003. She says that the dismissal was a constructive dismissal. Ms Gomas seeks that the Authority finds that she has a personal grievance and award her the remedies of five weeks' loss of wages and compensation. Ms Gomas also says that she has not been paid her full entitlement to holiday pay. However, her employer says that Ms Gomas was not dismissed constructively or otherwise and that she simply chose to leave without giving any reason.

**Background Facts and Evidence**

- [2] Argonaut Racing and Breeding Limited is owned and operated by Mr Tony Cole and Mrs Louise Cole ("the Coles"). The business is all about breeding, training and racing horses.
- [3] Ms Gomas has had two separate periods of employment with the Coles. The first period was a full time employment arrangement from 23 September 2000 until 1 February 2002. The second period of employment was from 16 September 2002 until 14 January 2003, and she was employed as a stable hand and track work rider. While Ms Gomas says that this period of employment was also full time employment, the overall evidence is that the employment was on a part-time basis. The wage records show that the hours worked each day by Ms Gomas varied from as little as 2 hours up to 7 hours but with 5 to 6 hours each day being prevalent. The hours of work were by agreement with Mr Cole and were regular.

- [4] The payments that Ms Gomas received initially appear to have been on the basis of a rate of \$6.00 per ride, but from October 2002, payment was at a per ride rate of \$6.00 and an hourly rate of \$10.00. It appears that Mrs Cole had the responsibility for the administration side of the business, including the payment of wages. Her evidence is that the above rates of pay for such workers as Ms Gomas, included holiday pay.
- [5] Consistent with the general practice of training race horses, it seems that Ms Gomas would work from early in the morning then take a break and then return for further work in the afternoon.
- [6] Mrs Cole says that it was agreed that Ms Gomas would be on leave, coinciding with that of her partner, from 26 December 2002 to 4 January 2003 inclusive, albeit that was a busy and lucrative time for the business.  
The further evidence of Mrs Cole is that on 23 December 2002, Ms Gomas conveyed via a message to Mrs Cole's daughter, that she would not be working that afternoon as she would be Christmas shopping. There had been no previous agreement about this.
- [7] Ms Gomas was also absent on 24 December and the morning of 25 December albeit it was expected that she would be at work. However, Mrs Cole says that their confidence in Ms Gomas was restored somewhat when Ms Gomas came to work on 4 January 2003, as the result of becoming aware that Mr Cole had been injured in a fall from a horse.  
Ms Gomas returned to work, after the completion of her leave, on 6 January 2003.

### ***The Evidence of Mrs Cole***

- [8] The evidence of Mrs Cole is that on Saturday 11 January 2003, Ms Gomas left midway through her morning duties without any explanation as to why she was leaving. Ms Gomas did not attend work on Monday 13 January or Tuesday 14 January 2003, albeit it was expected that she would be there.
- [9] Mrs Cole says that Ms Gomas arrived at the stable yard on the afternoon of 14 January and enquired from Mrs Cole whether a letter that she was expecting, care of the Coles, had arrived. Mrs Cole informed Ms Gomas that no letter had arrived and that wages due to her were on the "peg board" as per normal practice. There was no explanation given by Ms Gomas why she had been absent from work, nor do I understand that Mrs Cole asked for one.
- [10] However, Mrs Cole acknowledges that she commented "*as an aside*" that it was doubtful that Ms Gomas would be required further. Mrs Cole said that she was upset about the unscheduled absence of Ms Gomas and the adverse affect on the track riding schedules.

### ***The Evidence of Mr Cole***

- [11] Mr Cole says that on 14 January 2003, upon discovering that Ms Gomas had been to the workplace and left again without any explanation as to the reason for her absence, he attempted to contact her but was only able to leave a message on her cell phone. The further evidence of Mr Cole is that Ms Gomas did not return his call and she never came back to work.

### ***The Evidence of Ms Gomas***

- [12] Ms Gomas says that it was on 13 January 2003, she was told by Mrs Cole that she: "*was not wanted any more and that she was to pick up her final pay and leave. I was also told that my family*

*was no longer welcome at the stables and a racist comment was made about my partner and my work. This was not the first time that racist comments had been made.”*

### ***The Evidence of Mr and Mrs Stevenson***

- [13] At the time that Ms Gomas worked for the Coles, she was boarding with Mr and Mrs Stevenson and her partner was their son. Mrs Stevenson says that she arrived home from work on the afternoon on the last day that Ms Gomas returned from the Coles and found her in a very distressed state. Ms Gomas informed Mrs Stevenson that she had been “sacked” from her job without notice and with no reasonable explanation. Mrs Stevenson says that she advised Ms Gomas to see a lawyer.
- [14] The evidence of Mr Stevenson is that he started work early that day but returned home about 10:00am and found Ms Gomas in a distressed state. Mr Stevenson says that she told him that the Coles had claimed that she was unreliable and that she had been sacked for taking time off over the Christmas break.

### ***The Evidence of Mrs Gomas***

- [15] The evidence of Mrs Gomas is that she spoke to her daughter on the phone on 13 January 2003 and that among other things, Ms Gomas told her that she had gone to the Coles to collect her wages and was then told by Mrs Cole that her services were no longer required and that her final pay was there. Mrs Gomas says that her daughter was upset when conveying what had happened.

### **Analysis and Conclusions**

- [16] The first question that requires a determination is: Was Ms Gomas dismissed or did she just leave her employment of her own free will?
- [17] The overall evidence is somewhat confusing and uncertain in many areas and simply not credible in others. Furthermore, I cannot help but observe that the evidence relating to some of the matters alleged by Ms Gomas to have occurred, was somewhat lacking in substance and has come largely from others rather than Ms Gomas herself. Indeed, I found Ms Gomas to be a most reticent witness, even given her youthfulness. I also have to say that there was a most unsavoury racial thread running through the evidence given by the witnesses for Ms Gomas. On that matter, it is my conclusion, that such evidence was largely a construction and of little substance. Indeed, I will go as far as to say that I cannot help but suspect that such evidence was imported mainly to give misguided, albeit perhaps well-meaning, support, to an applicant who is far from fault free.
- [18] Nonetheless, having given close consideration to the overall evidence, on the balance of probabilities, I conclude the following:
1. Ms Gomas was employed on a part-time rather than a casual basis. The hours of work varied but she was expected to work on a regular and daily basis, including Christmas Day.
  2. While there was an agreement with the Coles that Ms Gomas would take time off during the Christmas/New Year period, because it was a particularly busy time on the horse racing calendar, the Coles were not particularly happy about Ms Gomas being on leave.

3. The unhappiness on the part of the Coles, regarding Ms Gomas being absent over the above period, was exacerbated by her absence on the afternoon of 23 December 2002 and her unexplained failure to arrive at work on 24 December and the morning of 25 December 2002. Then, there was her unexplained departure from the work place on 11 January 2003. The situation was further compounded by Ms Gomas in that, without any explanation, she failed to arrive at work on 13 and 14 January 2003.<sup>1</sup>
4. The discussion that took place between Ms Gomas and Mrs Cole, when Ms Gomas arrived at the work place on the afternoon of 14 January, was most probably a little more to the point than the evidence of Mrs Cole suggests. I conclude that it is more probable than not that if the words used by Mrs Cole were not actually dismissive in nature, they were such that Ms Gomas was under no illusions that she was no longer welcome and it was a reasonable for her to arrive at the conclusion that she had been dismissed.

[19] I therefore find that Ms Gomas was dismissed from her employment on 14 January 2003. If the dismissal was not summary in nature then it was certainly constructive.

### **Was the Dismissal Justified?**

[20] The absence of Ms Gomas, on the days in question, without explanation or good reason, constituted serious misconduct to such degree, that dismissal was an option that was open to the Coles.

[21] However, it is well established that there are certain minimal requirements that must be met when an employer has reason to believe that serious misconduct has occurred and that dismissal is a possibility. The minimal requirements are:

1. The employee is to be given notice of the specific allegation and the possible consequences;
2. The employee is to be given a real opportunity, as opposed to a nominal one, to attempt to refute the allegation or to explain or mitigate his or her conduct; and
3. The employer must give an unbiased consideration to the employee's explanation in the sense that such consideration must be free from predetermination and uninfluenced by irrelevant considerations.

*NZ (with exceptions) Food Processing etc v Unilever New Zealand [1990] 1 NZILR 35.*

[22] Unfortunately, none of the above steps were followed. Perhaps that was because the Coles were of the view that Ms Gomas was employed on a casual basis and therefore she could come and go as she pleased. However, there is other evidence from them that they expected Ms Gomas to be at work every day, at least for the hours of work that were available. It is my conclusion, that Ms Gomas was a permanent part-time worker, but even if that was not so, there were mutual obligations on both parties.

[23] Ms Gomas was obliged to be reliably attend work as required and when she didn't, the Coles were obliged to seek an explanation from her and give her the opportunity to explain herself, then give consideration to that explanation, before telling her that she was no longer required.

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<sup>1</sup> I prefer the evidence of Mrs Cole in regard to the final day that Ms Gomas presented herself at the work place that is, 14 January 2003.

[24] Because the Coles failed to discuss with Ms Gomas the reason/s for her absence from work before informing her that she was no longer required, I find that the dismissal of Ms Gomas is procedurally unjustified and she has a personal grievance.

## **Remedies**

[25] Having found that Ms Gomas has a personal grievance, I now turn to the remedies that may be available to her pursuant to section 123 of the Employment Relations Act 2000 (“the Act”).

[26] (a) Reimbursement of Lost Wages

Ms Gomas seeks the reimbursement of the loss of earnings that she incurred in the five weeks that elapsed between leaving the employment of the Coles and obtaining other employment. An assessment of the wage records shows that average earnings for a week would be approximately \$250.00 gross. Therefore, the loss of wages for five weeks would be \$1,250.00 and in the absence of any contribution on the part of Ms Gomas towards the situation that gave rise to the personal grievance, and I address that below, I would have awarded her that sum.

[27] (b) Compensation

The evidence of Ms Gomas is that she was humiliated and that her self esteem and confidence were shattered. There is also other evidence available that is sufficient to show that Ms Gomas was upset by the loss of her employment. On the other hand, it appears that Ms Gomas had adopted an attitude of something close to disdain regarding her commitments to the Coles and I doubt that it would have come as much of a surprise to her that she was no longer required. On balance, in the absence of any contribution the part of Ms Gomas, I would have awarded her compensation of \$2,000.00.

[28] Contribution

While I have awarded Ms Gomas loss of wages and compensation as above, pursuant to section 124 of the Act, I must consider the extent to which her actions contributed towards the situation that give rise to the personal grievance and if those actions so require, the remedies that are awarded can be reduced accordingly.

I consider that by her continued failure to attend work when she was expected to, without any attempt to contact her employer or proffer an explanation in any form whatsoever, Ms Gomas contributed significantly to the situation that gave rise to the personal grievance. Indeed, had Ms Gomas been of a more mature age, I would have given serious consideration to nullifying totally the remedies award. However, given her immaturity, and the failure on the part of the Coles to take that into consideration, I conclude that the remedies awarded should be reduced by 65% and that is reflected in the determination that follows.

## **The Holiday Pay Issue**

[29] Ms Gomas claims that she did not receive holiday pay for either of the two periods that she was employed by the Coles. The Coles say that for the first period of employment (23 December 2000 to 1 February 2002), Ms Gomas received her full entitlement to holiday pay, and for the second period of employment (16 September 2002 to 14 January 2003), the holiday pay was included to the hourly rate and the rate per ride.

In the absence of any evidence to the contrary, and given that Ms Gomas had no issue in regard to the payments she received at the end of her first period of employment, and given that Ms Gomas is unable to prove her claim for that period, I must decline it.

- [30] However, for the second period of employment, I am bound to take a different view. While in certain circumstances, it is permissible for employers to include a holiday component in the hourly rate, if that is to occur, then it is essential, that the employee is aware of, and accepts, that holiday pay is included in the hourly rate. Furthermore, the holiday pay component must be clearly identified, that is, an additional 6% of the agreed rate of pay.
- [31] Having viewed the wage record for Ms Gomas, there is no indication of a holiday pay component. Furthermore, there is no evidence that she was aware of or accepted, that holiday pay was included in the rate of pay that she received, that is, in the hourly rate or the rate per ride.
- [32] The failure on the part of the Coles to show that an agreement was reached with Ms Cole as to the payment of holiday pay, and/or to show a holiday pay component in the wage record, is, I find, in breach of section 21 of Holidays Act 1981 (the Act that applied at the time). Ms Cole is entitled to be paid holiday pay at the rate of 6% of her gross earnings for the period that she was employed. According to the wage record, Ms Gomas earning a gross sum of \$4,117.00 during her period of employment with the Coles and 6% of that sum is \$247.02. That is the sum that is due to Ms Gomas.

## **Determination**

1. I find that the departure of Ms Gomas from the employment of the Coles on 14 January 2003, if not a summary dismissal, was certainly a constructive dismissal.
2. The dismissal was procedurally unjustified and Ms Gomas has a personal grievance.
3. Pursuant to section 123(b) of the Act, Argonaut Racing and Breeding Limited are ordered to pay reimbursement of wages to Ms Gomas of the gross sum of \$437.50 (\$1,250.00 reduced by 65%).
4. Pursuant to section 123(c)(i) of the Act, Argonaut Racing and Breeding Limited are ordered to pay compensation to Ms Gomas of the sum of \$700.00 (\$2,000.00) reduced by 65%.
5. Pursuant to section 21 of the Holidays Act 1981, Argonaut Racing and Breeding Limited are ordered to pay to Ms Gomas, the gross sum of \$247.02.

**Costs**

[33] Costs are reserved. The parties are invited to attempt to reach a resolution of this matter. In the event that a resolution is not achieved, submissions can be made to the Authority for an order.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**