

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Peter Jarvis (Applicant)
AND Canterbury Cleaning Service Limited (Respondent)
REPRESENTATIVES Sam Kirk, Advocate for Applicant
Brian Nathan, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 1 December 2005
DATE OF DETERMINATION 20 January 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Peter Jarvis worked for Canterbury Cleaning Services Limited from January 2000 until his employment ended in January 2005.

[2] Canterbury Cleaning Services had a contract to perform cleaning at Middleton Grange School and Mr Jarvis worked on that contract. In late 2004 the respondent lost the contract to another cleaning contract. There was some discussion with affected staff, including Mr Jarvis, about transferring to the new contractor or accepting alternative work with Canterbury Cleaning Services at other worksites. However, Mr Jarvis did not transfer to the new contractor nor did he obtain other work from Canterbury Cleaning Services. He says that he was unjustifiably dismissed and is critical at the way in which Canterbury Cleaning Services handled the situation.

[3] There is apparently some conflicting evidence about what was said and done by Canterbury Cleaning Services managers in December 2004 and January 2005. To resolve the problem, it is necessary to carefully assess the evidence about what happened and measure that against the requirements of the law and the relevant employment agreement.

The people involved

[4] Kevin Bird was Canterbury Cleaning Services' Chief Executive Officer at the time. Linda Skillicorn is still employed by Canterbury Cleaning Services and was a Customer Services Manager at the time. Bruce Barnes was the Team Leader at the school. Tina Giles, Michelle Fotheringham, Suzanne Bayliss and Brian McNabb were all employed by Canterbury Cleaning Services as cleaners at the school. They all gave evidence along with Mr Jarvis.

Relevant events

[5] Mr Bird convened a staff meeting just before Christmas in December 2004. The affected staff were told that Canterbury Cleaning Services had lost the cleaning contract to a competitor (Jani King). At the time, Mr Bird and others believed that the situation was covered by Part 6A of the Employment Relations Act 2000 that had come into force in December 2004. Mr Bird told the affected employees that they had the option to transfer to the new contractor on the same terms and conditions. Mr Bird also encouraged staff to get advice from the union and said that staff would shortly receive a written notice about their options.

[6] Some witnesses claimed that Mr Bird said that the affected staff could remain working for Canterbury Cleaning Services but at another site while other witnesses did not refer to that. I find it more probable than not that Mr Bird referred to that as an option for discussion with Ms Skillicorn as indicated in the undated letter received by some but not all of the affected staff after the December 2004 meeting.

[7] I accept Ms Skillicorn's evidence that she delivered copies of that letter to the work site on or about 10 January 2005. However, it is also clear that Mr Jarvis was not given and did not see the letter. Some others did not see the letter either. It asked for staff to elect to transfer to the new contractor by advising Ms Skillicorn in writing by Monday, 24 January 2005. It also said that there was the option to negotiate with Ms Skillicorn about alternative work with Canterbury Cleaning Services, also by the same date.

[8] Mr Bird's evidence is that he spoke personally to Mr Jarvis on or about 12 January 2005, that Mr Jarvis indicated some uncertainty about what to do and that Mr Bird reminded him of the need to make a decision by 24 January 2005. Mr Jarvis says that he can recall Mr Bird coming into work perhaps in early January 2005 but he cannot recall anything about what they discussed. I see no reason to disbelieve Mr Bird's evidence on the point.

[9] The next relevant event was a further meeting with some of the staff on 21 January 2005. Ms Skillicorn met with Peter Jarvis and several other cleaners in the science laboratory. I accept the evidence of Mr Barnes that Ms Skillicorn arrived with a list of possible alternative positions with Canterbury Cleaning Services and spoke initially to the three women. Ms Skillicorn asked Mr Jarvis what he was intending to do and he said that he did not know as he had not seen the employment contract being offered by the new contractor.

[10] There is a dispute in the evidence about whether Mr Jarvis indicated to Ms Skillicorn that he intended to transfer to the new contractor and whether he was rude and made derogatory comments about Canterbury Cleaning Services. Ms Skillicorn rang Mr Bird after her exchange with Mr Jarvis because it had not resolved his situation and because of his attitude. That supports the evidence of Mr Jarvis that he did not indicate any intention to transfer so I accept his evidence on that point. It also supports the evidence of Ms Skillicorn that Mr Jarvis made some derogatory comments about Canterbury Cleaning Services so I accept that evidence too.

[11] Mr Bird arrived soon after but Ms Skillicorn left before he did. Mr Bird spoke to Mr Jarvis. Mr Bird says that he repeated the message from the earlier letter but that Mr Jarvis ... *stormed out* stating *his intention to see Jani King about their employment contract*. Mr Jarvis says that he left this meeting because he had to get home to his daughter. That is no doubt true, but he also says that he got upset at the end of the meeting with Ms Skillicorn and I accept that he was also upset during the brief exchange with Mr Bird. However, I do not accept that Mr Jarvis said or indicated that he was going to transfer to the new contractor.

[12] The last point from the exchange for Mr Bird to consider was whether Mr Jarvis was told that Mr Bird would bring in a form on Monday, 24 January 2005 to be signed confirming the transfer to the new contractor. I prefer the evidence of Mr Jarvis, supported by Mr Barnes and Ms Giles, that Mr Bird did say he would come in on Monday with a form for them to sign.

[13] Mr Bird returned to the school on Tuesday, 25 January 2005 and met with a number of the affected employees such as Ms Giles and Ms Fotheringham but he did not meet with Mr Jarvis. His evidence is that he thought that Mr Jarvis was going to transfer to the new contractor. However, that does not adequately explain why he did not meet with Mr Jarvis since Canterbury Cleaning Services had been insistent on receiving written advice from employees about their intentions and none had been received from Mr Jarvis. After these meetings, Mr Bird wrote a letter dated 26 January 2005 to Jani King confirming that Mr Jarvis and three other staff intended to transfer their employment to Jani King and continue working at Middleton Grange School.

[14] Mr Jarvis obtained a copy of the Jani King contract on 26 January 2005. Ms Giles was a union member but Mr Jarvis was not. A union representative gave them advice on or about 28 January 2005 not to sign the employment agreement. Mr Jarvis then rang Mr Bird and told him that he was not going to transfer to Jani King but wanted to relocate to another Canterbury Cleaning Services site. Mr Bird told Mr Jarvis that it was too late and that there were no jobs with Canterbury Cleaning Services for Mr Jarvis. Mr Jarvis repeated that message to Ms Giles who then also had a brief conversation with Mr Bird. There was no further communication between Mr Jarvis and Mr Bird.

[15] Mr Jarvis worked as usual until Monday, 31 January 2005, following which his work was undertaken by the new contractor. Canterbury Cleaning Services paid Mr Jarvis his final pay for time worked and holiday pay on the next regular pay day, about 8 February 2005.

[16] Mr Jarvis found another job which he commenced on 14 February 2005. There followed an unsuccessful mediation and in August 2005, an application to the Employment Relations Authority. In his statement of problem, Mr Jarvis says that he felt *walked over as if he was worthless* but despite that, his new job and the passage of time, he claimed reinstatement. However, during the investigation meeting, he formally withdrew the reinstatement claim.

[17] The employment agreement specifies that no redundancy payment is payable if the position is no longer required or genuine commercial reasons necessitate termination of the employment. It also says that *where redundancy occurs the provisions of the termination clause would apply: the employer would either provide two weeks' notice of termination or alternatively discharge their notice obligation by paying Peter two weeks' remuneration in lieu of notice.*

Continuity of employment conditions

[18] As mentioned above, in December 2004 and January 2005, Canterbury Cleaning Services thought that it and Jani King were bound by the provisions of Part 6A of the Employment Relations Act 2000 giving employees such as Mr Jarvis a right to transfer to the new contractor. However, it is now common ground that subpart (1) of Part 6A is not applicable, the present situation being materially identical to that in *Gibbs & Ors v. Crest Commercial Cleaning Ltd*, 18/7/05, Colgan CJ, Travis and Couch JJ, CC10/05.

[19] Subpart (2) of Part 6A does not assist Mr Jarvis. Subpart (2) is expressed to employees to whom subpart (1) does not apply, so on its face it might be relevant. Mr Jarvis had an existing individual employment agreement (not being a union member) so the obligation under s.69N(2) was to include an employee protection provision before any restructuring occurred. However,

restructuring is defined by s.69L to exclude the termination of a contract or arrangement under which the employer (here, Canterbury Cleaning Services) carried out work on behalf of another person. I also note that restructuring is defined to mean entering into a contract or arrangement under which the employer's business is undertaken for the employer by another person. As in *Crest Cleaning*, the employer did not enter into any arrangement for its business to be undertaken by or transferred to another person. Even if it had done so, that would have been excluded from the definition of *restructuring* as outlined above. Hence there was no obligation under the December 2004 statutory amendments to include an *employee protection provision* in the relevant employment agreement.

Justification for dismissal

[20] Canterbury Cleaning Services says that Mr Jarvis effectively resigned by indicating his intention to leave its employment and that it did not dismiss him. I do not accept that as an accurate characterisation of events. Canterbury Cleaning Services told Mr Jarvis in December 2004 that there was a potential redundancy situation since it had lost the contract at Middleton Grange School. Mr Jarvis was asked to indicate in writing whether he would transfer to the new contractor or wanted to work for Canterbury Cleaning Services at another site. Mr Jarvis did not tell Canterbury Cleaning Services that he would transfer nor did he give them that written advice. To the contrary, he specifically advised Mr Bird that he would not transfer and wanted to continue working for Canterbury Cleaning Services at another site. Mr Bird said that they had no other work for him. All that amounts to a sending away or a dismissal by Canterbury Cleaning Services.

[21] Whether that dismissal is justified must be determined objectively by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time of dismissal.

[22] A fair and reasonable employer would comply with contractual and statutory obligations, but Canterbury Cleaning Services did not. Under the employment agreement, Mr Jarvis was entitled to two weeks' notice of dismissal or two weeks' pay in lieu. It is suggested that notice of dismissal was given at the December 2004 meeting but I do not accept that contention. It was made clear that work at Middleton Grange School for Canterbury Cleaning Services would end on a certain date but the employment agreement permitted Canterbury Cleaning Services to deploy Mr Jarvis elsewhere and that possibility was specifically mentioned as an option for future discussion. No certain notice of the termination of the employment was given at that time. If notice had been given, one would expect the subsequent letter to reflect that, but it does not.

[23] I see no merit in the complaint that Mr Jarvis did not receive the letter or anything else in writing about the situation. The employer provided timely information to Mr Jarvis by meetings and discussion with him in December 2004 and January 2005. I acknowledge that there was a failure to ensure that he received the letter but it merely repeated information given in December 2005 and individually conveyed to Mr Jarvis by Mr Bird on about 12 January 2005.

[24] A fair and reasonable employer would not have neglected to confirm with Mr Jarvis what his intentions were, especially after the exchanges with Ms Skillicorn and Mr Bird on 21 January 2005 that were unsatisfactory from Canterbury Cleaning Services' perspective. On 25 January 2005, Mr Bird took the time to check with others but did not do the same for Mr Jarvis. He should have.

[25] Finally, a fair and reasonable employer would have engaged in a dialogue with Mr Jarvis about alternative work opportunities in response to his phone call on 28 January 2005. Mr Bird resorted to the cut-off date rather than engage in that discussion. However, there was no compelling reason to apply the cut-off date in that way. Indeed, Mr Bird ignored the cut-off date when he spoke

with Ms Giles and Ms Fotheringham on 25 January 2005. The size of the respondent's business also made it quite possible that other opportunities would arise even if the options on Ms Skillicorn's list were no longer available.

Remedies

[26] Mr Jarvis lost remuneration from 1 February 2005 until he commenced new employment on 14 February 2005. That coincides with the two week notice payment that he should have received. I order the respondent to pay Mr Jarvis two weeks' pay in lieu of notice.

[27] There is a claim for \$15,000 compensation for humiliation although there is a submission from the applicant that ... *compensation for humiliation ... will not fall at the high end* and that \$7,000 is an appropriate award. This was a genuine redundancy situation and the employment contract specifically excluded redundancy compensation. No compensation is available for the loss of position or associated distress. The simple failure to give or pay proper notice is largely remedied by the foregoing award.

[28] What remains is to assess compensation for the distress arising from the careless failure to check with Mr Jarvis on 25 January 2005 and to reopen the discussion about alternative work options. The proven effects connected to these aspects call for a modest award. I order Canterbury Cleaning Services to pay compensation of \$2,000 to Mr Jarvis.

[29] I do not accept that Mr Jarvis contributed in a blameworthy way to the situation giving rise to the personal grievance. Mr Jarvis was not in a position to determine whether to transfer to the new contractor until he had seen its proposed employment agreement on 26 January 2005. Hence the delay in responding to Ms Skillicorn was not of his making. Mr Jarvis got upset during the meetings with Ms Skillicorn and Mr Bird but his upset was simply a natural reaction to the potential redundancy situation given his years of service.

Conclusion

[30] Mr Jarvis has a personal grievance because Canterbury Cleaning Services Limited unjustifiably dismissed him.

[31] Canterbury Cleaning Services Limited is to pay Mr Jarvis two weeks' wages in lieu of notice.

[32] Canterbury Cleaning Services Limited is to pay Mr Jarvis compensation of \$2,000.

[33] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority