

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Gary J Lond (Applicant)
AND Gibraltar Shelf No 56 Limited (Respondent)
REPRESENTATIVES Gary J Lond In person
Graeme Riach, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 27 October 2005
DATE OF DETERMINATION 2 December 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Mr Lond says that he was unjustifiably dismissed from his employment with the respondent in or about March 2005 whilst on leave as the result of an accident. He seeks \$4000.00 compensation for humiliation and distress.

[2] Mr Lond also seeks the following:

- Recovery of two hours wages deducted from his time sheet without his authority and not paid to him.
- Eight hours payment with respect to an alternative day for working on Waitangi Day.
- Two weeks pay in lieu of notice.
- Adjustment to holiday pay.
- The return of his tools and equipment.
- The correct status to be filed with ACC with respect to the nature of his employment.

[3] The respondent, Gibraltar Shelf Company No 56 Limited ("Gibraltar") does not accept that Mr Lond was unjustifiably dismissed and does not accept it owes further money to Mr Lond. Mr Lond's tools and equipment were available on the day of the investigation meeting in the boot of the car of the director of Gibraltar, Terry Birchfield. Mr Lond was not able to take them home on the day of the investigation meeting as he was travelling on the bus. They are now on site for Mr Lond to collect.

The Background

[4] The facts in this case are not complicated although there are some factual disputes.

[5] Mr Lond was employed by Gibraltar in early January 2005 at an agreed rate of \$22.00 per hour following his advertising for a position in the Buy, Sell and Exchange newspaper. Gibraltar is involved in the business of renovation and construction.

[6] Mr Birchfield offered Mr Lond a position at Gibraltar. I accept Mr Birchfield's evidence that he wanted an experienced tradesman who could work without supervision. He was satisfied after talking to Mr Lond that he was an experienced tradesman, a carpenter. On that basis Mr Birchfield offered Mr Lond the higher hourly rate of \$22.00 rather than the \$15-\$18.00 per hour that a labourer would receive.

[7] Mr Lond said that he never held himself out as a carpenter but rather described himself as experienced in building, painting and cabling but made it clear he was not a qualified tradesman. I accept that the advertisement did not describe Mr Lond as a carpenter. Mr Birchfield though not only had a clear view that Mr Lond was a carpenter but told his other employees that he was employed as such. I find it more likely than not that Mr Birchfield was led to believe during the initial conversation leading to employment that Mr Lond was a qualified carpenter and on that basis Mr Birchfield offered him a higher rate of pay than a hammer hand or a labourer.

[8] There was no written employment agreement entered into between Mr Lond and Gibraltar. Mr Birchfield said that he told Mr Lond he was employed on a one month trial period. Mr Lond denies that he was told this. I found Mr Lond to be less than reliable as a witness in accurately recalling what took place and he was frequently inconsistent in his answers. I find that Mr Birchfield more likely than not did tell Mr Lond that he would be on a one month trial period. Another employee employed at the same time confirmed that he was subject to a one month trial.

[9] The matter of a trial period is problematic for Gibraltar because there is a requirement under section 67 (1) (a) of the Employment Relations Act 2000 that a period of trial or probation must be specified in writing. Two further subsections (2) and (3) were inserted in section 67 as from 1 December 2004, by section 28 of the Employment Relations Amendment Act 2004 to the effect that failure to comply with subsection (1) (a) does not affect the validity of the employment agreement but if the term of a trial period is not in writing and the employee treats the term with respect to a trial as ineffective then the employer will not be able to rely on it.

[10] In any event I am not satisfied for reasons that I will set out shortly that Mr Lond was spoken to by Mr Birchfield and given one month's notice before the expiration of the one month period. In relation to the trial period therefore I conclude that it was ineffective because it was not in writing as required under section 67 of the Employment Relations Act 2000 and Mr Lond was given notice within the one month period that his employment would end.

[11] Mr Birchfield did not find that Mr Lond met the standard that he required from him in his work. He said that it became obvious to him shortly after Mr Lond started that he had misrepresented his qualifications and skills. Mr Birchfield described him as an *impostor*. Mr Lond did not accept that he had misrepresented his skills or that the criticisms of his work were well founded.

[12] Perhaps not surprisingly Mr Lond's performance quickly fell short of Mr Birchfield's expectations. Mr Birchfield did not feel that Mr Lond could work unsupervised which was what he had hoped when he employed Mr Lond. It was incumbent on Mr Birchfield to move to bring those performance concerns to Mr Lond's attention.

[13] Mr Birchfield more likely than not spoke to Mr Lond from time to time about issues with his work but it was not until late February 2005 that Mr Lond understood the level of dissatisfaction

Mr Birchfield had with his work. My view is that Mr Birchfield was a kindly person who would usually fix mistakes made by Mr Lond himself or have others fix them rather than making a big issue about them.

[14] The way the meeting in late February 2005 came about strengthens my view that Mr Lond was unaware Mr Birchfield was unhappy or dissatisfied with his work. Mr Lond had approached Mr Birchfield in late February 2005 about whether he could rent a house which was on the building site. Such a request would have been unlikely in my view if Mr Lond thought that Mr Birchfield was very dissatisfied with his work. Mr Birchfield advised Mr Lond that he had rented the house out to someone else and then took the opportunity to tell Mr Lond he was unhappy with his work. He suggested that it was better that Mr Lond look for another job and gave him until the end of March 2005 to do so.

[15] Mr Lond said that whilst Mr Birchfield did initially give him another month to find a job, he could not understand why. He then said that *they both moved on and it was agreed Mr Lond would remain*.

[16] I prefer Mr Birchfield's evidence that he did give Mr Lond a month's notice. That was consistent with how Mr Lond recounted what had happened at the meeting to another employee I heard from, Ron Goslin. I understood during the investigation meeting that Mr Lond did not disagree with Mr Goslin's evidence on that point.

[17] Mr Lond was off work shortly after the conversation took place, initially for a migraine. Clare Harrington is responsible for doing the accounts and wages for the respondent company. She is also Mr Birchfield's partner. After talking to Ms Harrington about the fact he had a migraine on or about 7 March 2005 Mr Lond then delivered a doctors certificate to Ms Harrington's home which said that he was able to resume work on 12 March 2005. Either during that telephone conversation or a later one Ms Harrington said to Mr Lond that he was finishing at the end of the month in any event. Mr Lond told Ms Harrington that that was not the situation.

[18] Mr Lond telephoned Ms Harrington after the delivery of the doctor's certificate and advised Ms Harrington that he had fallen down a hole at the building site on 13 February 2005 and hurt his back. Ms Harrington asked Mr Lond why he had not mentioned the incident to Mr Birchfield and Mr Lond responded that Mr Birchfield was *not around*.

[19] I prefer Ms Harrington's evidence that she received no further medical certificates from Mr Lond to Mr Lond's evidence.

[20] Mr Lond then raised a personal grievance in April 2005. In due course ACC wrote to Gibraltar about the accident. One of the major issues for Mr Lond was that the description of his employment by Gibraltar in correspondence to ACC was that of a temporary employee.

[21] The issues for determination in this case are:

Was Mr Lond dismissed from his employment?

If Mr Lond was dismissed from his employment was the dismissal unjustified? (Section 103A inserted by section 38 of the Employment Relations Amendment Act (No 2) 2004 is applicable in this case).

Should Mr Lond be paid two weeks wages in lieu of notice?

Should two hours have been deducted from Mr Lond's timesheets?

Is Mr Lond entitled to additional payment with respect to an alternative day for working on Waitangi Day?

Is an adjustment required to Mr Lond's holiday pay?

There are also issues about the return of tools and equipment and what the nature of the employment relationship was between the parties.

Was Mr Lond dismissed?

[23] I have found that in late February 2005 during a meeting to discuss another matter Mr Lond was given a months notice by Mr Birchfield because Mr Birchfield was very dissatisfied about Mr Lond's performance. Mr Lond was encouraged during that month to look for another job. I do not conclude that there was a mutual agreement at the meeting to terminate the relationship. The termination of the relationship came about at the initiative of Mr Birchfield because of his dissatisfaction with Mr Lond's performance.

[24] I find that Mr Lond was dismissed at that meeting and given one month's notice.

Was Mr Lond unjustifiably dismissed?

[25] I accept that Mr Birchfield had concerns with Mr Lond's performance and probably thought that Mr Lond was aware of these concerns. The leading employment cases about performance place an emphasis on an employee being told very clearly about the performance concerns, the consequences of not lifting their performance and being given an opportunity to improve or disagree with the criticisms. A fair process is important.

[26] I am not satisfied from the evidence I heard that Mr Birchfield told Mr Lond clearly before that late February meeting about the extent of his dissatisfaction or warned Mr Lond prior to that meeting that unless there was improvement he could be dismissed. There wasn't a real opportunity for Mr Lond to give any explanation to the concerns as Mr Birchfield had made up his mind that Mr Lond should go. Mr Birchfield did accept in evidence that Mr Lond did not agree with his criticism in the meeting.

[27] The failure by Mr Birchfield to clearly warn Mr Lond about his performance deficiencies and advise him that unless he improved his employment could be terminated were not the actions, I find, of a fair and reasonable employer.

Determination of Personal Grievance

[28] I accept that Mr Lond did not meet Mr Birchfield's expectations during the short time he worked there but there was no fair process adopted by Gibraltar prior to Mr Lond's employment being terminated. I find that Mr Lond was unjustifiably dismissed with notice from his employment with Gibraltar.

[29] Mr Lond has a personal grievance. I now turn to consider remedies.

Remedies

[30] Mr Lond does not seek lost wages.

[31] Mr Lond seeks \$4000.00 compensation under section 123 (c) (i) of the Employment Relations Act 2000. The evidence about his distress was mainly about the description of his employment as temporary and the impact that had on the compensation level paid by ACC. It was also about the failure of his employer to communicate with him about the accident. Mr Lond however had not told his employer prior to that time about falling down a hole on 13 February 2005.

[32] Mr Lond spoke of his distress in early March 2005 rather than as a result of the late February 2005 meeting where I have found the personal grievance occurred. Mr Lond did not say that he was distressed after that meeting. Mr Lond was unfit to work on the building site after 7 March 2005 and that remained the position at least until the investigation meeting. Mr Lond did not suffer distress therefore with respect to an inability to return to work with Gibraltar at that time and his actions in only supplying one medical certificate did not indicate an intention in this respect.

[33] In those circumstances given the absence of any evidence as to distress, humiliation and injury to feelings with respect to the personal grievance I make no award in Mr Lond's favour.

[34] In terms of Mr Lond's employment status, for reasons I have set out earlier with respect to the trial period, I am not satisfied that he was engaged as a temporary employee but rather as a permanent employee employed for an indefinite period with Gibraltar.

[35] I now turn to consider the monetary claims.

Two weeks wages in lieu of notice

[36] Mr Lond has now been paid for the first week of his injury by Gibraltar. He was not fit to work for his notice period and I do not find that he is entitled to payment of two weeks wages in lieu of notice.

Recovery of two hours wages for hours deducted from his timesheets

[37] The timesheets that I was provided with did show some alteration of hours worked. The alterations were not discussed with Mr Lond. I am of the view that they should have been if the employer's version of hours worked did not accord with Mr Lond's. Mr Lond has claimed two hours wages which is \$44.00 and I accept this claim.

[38] Gibraltar Shelf No. 56 Limited is ordered to pay to Gary Lond the sum of \$44.00 gross.

Payment for an alternative day for working on Waitangi Day

[39] Whether or not Waitangi Day was otherwise a working day for Mr Lond requires consideration of the factors set out in section 12 of the Holidays Act 2003. Mr Lond did work some Sundays although there was dispute as to whether he did because he had to or because he wanted to. Mr Birchfield said that Mr Lond asked for financial reasons to work extended hours which included Sundays and on Waitangi Day asked if he could work because with the school holidays coming up he wanted time off to have his child to stay. Mr Birchfield agreed to the request saying he was a softie. Mr Lond denied making a request.

[40] I intend to approach the matter in this way. It appeared to me from the evidence that Mr Birchfield was agreeing to Mr Lond having time off if he worked on Waitangi Day. Logically it seemed to me that such time off would be paid. I do take that into account with the other factors in

section 12 of the Holidays Act 2003. On that basis I conclude that Mr Lond is entitled to an alternative holiday.

[41] Payment for an alternative day is to be made in accordance with section 60(2)(b) of the Holidays Act 2003 if the employee has not taken the alternative holiday before the date on which employment ends. Payment should be made at the rate of the employee's relevant daily pay for his or her last day of employment. Mr Lond ordinarily worked an eight hour day.

[42] I have calculated an alternative days pay on the basis of eight hours at \$22.00 per hour or \$176.00 gross. Gibraltar Shelf No 56 Limited is ordered to pay to Gary Lond the sum of \$176.00 gross.

Adjustment to holiday pay

[43] There is an adjustment required to the holiday pay paid to Mr Lond. This is because one week's pay for the week ending 22 February 2005 was not taken into account. Payment for that week was \$1188.00 gross. Holiday pay was calculated by Gibraltar on the basis of 6% of \$7149.00 gross rather than 6% of \$8337.00.

[44] Mr Lond was not paid for the first week of ACC and the full amount owing for working on Waitangi Day until August 2005. A recalculation was then done of his gross payment by Gibraltar taking those payments into account and Mr Lond was paid holiday pay on an increased gross figure of \$8073.00 at that time (see wages and time records). That recalculation however still did not take account of the week's pay of \$1188.00. I have now also found Mr Lond is entitled to an additional payment of \$44.00. I do not include the payment for the alternative day of \$176.00 because that is payment that is required to be made because the employment has ended.

[45] Mr Lond's total gross earnings are therefore \$9305.00. 6% of \$9305.00 is \$558.30. Mr Lond has already been paid \$484.38 for holiday pay. That leaves a balance due and owing for holiday pay of \$73.92 gross.

[46] Gibraltar Shelf No 56 Limited is ordered to pay to Gary Lond the sum of \$73.92 gross.

Tools

[47] Mr Lond's tools and other equipment are available to be picked up from Gibraltar and I make no specific order in that respect.

Costs

[48] Mr Lond was not represented but is entitled to reimbursement of his \$70.00 filing fee and I so order.

Summary of findings and orders

- I have found that Mr Lond was not engaged by Gibraltar on a temporary basis but as a permanent employee for an indefinite period.
- I have found that Mr Lond was unjustifiably dismissed.
- I have made no order for compensation as there was no evidence of distress or humiliation when the personal grievance occurred.

- I have ordered Gibraltar to pay to Mr Lond the sum of \$44.00 gross being an underpayment of hours worked.
- I have found that Mr Lond is entitled to an alternative day payment for working on Waitangi Day. I have calculated that to be \$176.00 gross and ordered Gibraltar to pay that amount.
- I have ordered Gibraltar to pay to Mr Lond the sum of \$73.92 for adjusted holiday pay.
- The tools and equipment are available for Mr Lond to pick up from Gibraltar and he should make arrangements accordingly.
- I have ordered Gibraltar to pay to Mr Lond the sum of \$70.00 being the filing fee reimbursement.

Helen Doyle
Member of Employment Relations Authority