

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 69  
5468886

BETWEEN                      MATTHEW MAYSON  
Applicant

A N D                              GOLDEN GUN (2007)  
LIMITED  
Respondent

Member of Authority:      James Crichton

Representatives:            Greg Bennett, Advocate for the Applicant  
John Gandy, Counsel for the Respondent

Investigation Meeting:     27 January 2015 at Auckland

Date of Determination:    11 March 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Mayson) alleges that he was either unjustifiably dismissed from his employment or in the alternative was constructively dismissed and that he was disadvantaged by unjustifiable actions of the employer and subject to breaches of good faith as well.

[2]     All those contentions are resisted by the employer (Golden Gun).

[3]     Mr Mayson commenced his employment with Golden Gun on 18 April 2011. The employment was as a general hand.

[4]     About six months into the employment, Mr Mayson was offered the opportunity to complete an apprenticeship through the Motor Industry Training Association (MITO).

[5]     To progress that, there was a meeting between the parties and MITO's Arend Schoemaker to discuss the proposed apprenticeship. Mr Mayson could not fund it

himself but Golden Gun agreed to fund the apprenticeship on the basis that Mr Mayson fulfilled all the conditions of the apprenticeship in lieu of which a refund of Golden Gun's costs would be sought. That same day, a training agreement was entered into on a tripartite basis between employer, employee and MITO.

[6] The apprenticeship did not go well. By way of three letters variously dated 3 September 2013, 4 October 2013 and 7 February 2014, Golden Gun remonstrated with Mr Mayson about his lack of progress in the apprenticeship. The letters evidence an escalating concern by Golden Gun about Mr Mayson's progress. In the first letter, a level of general concern is expressed and there are allegations of a lack of application by Mr Mayson. The letter concludes with the suggestion that "*taking time off in the future ... will be put on hold until your assignments are completed and I am comfortable that you are putting in the effort expected*".

[7] In the second letter, the same theme is taken up again when Mr Shadbolt refers to his earlier letter as having "*stated that I was putting all leave on hold until you have completed your outstanding assignments*" and then referred to an oral discussion between Mr Shadbolt and Mr Mayson wherein Mr Shadbolt represented that he had repeated this statement when Mr Mayson had proposed to take some leave.

[8] Mr Mayson was instructed to hand his assignments in the first instance duly completed to Mr Shadbolt and Mr Shadbolt would pass them on to MITO. The second letter is expressed to be "*a final written notice regarding the abovementioned issues*".

[9] The final letter dated 7 February 2014, repeats the warnings from the earlier correspondence and then goes on to make the following assertion:

*I now have no option but to give you four weeks to bring your MITO apprenticeship courses up to date, if you choose to not take up this offer your employment will be terminated at the end of the four weeks.*

[10] The letter concluded with confirmation that if the employment did come to an end, the MITO fees paid by Golden Gun would be reimbursed from Mr Mayson's final pay and that no leave application would be approved within the four week period referred to in the letter. Mr Mayson was asked to sign agreement to those terms and did so.

[11] According to Mr Shadbolt, there were further difficulties with Mr Mayson's completion of his apprenticeship obligations after the 7 February 2014 letter of agreement and then on 5 May 2014, it is common cause that Mr Mayson applied for annual leave for the period 4 July 2014 to 18 July 2014. Mr Mayson did this formally by filling in the appropriate leave application form and leaving it in the correct place for consideration.

[12] The leave form, a copy of which is before the Authority, provides amongst other things that requests for annual leave "*must be approved 10 working days prior to leave requirement*". On the basis of Mr Mayson's application, his request for leave would comply with that provision on its face.

[13] There was also a relevant provision in the operative individual employment agreement. Clause 7.2.2(b) provides, inter alia:

*To avoid any confusion, the employee should not assume that leave has been granted until he/she has received a signed copy of the leave application form confirming approval.*

[14] I observe at this juncture that the leave form has a box for a signature by Golden Gun against the legend "*Approved*". The copy of the form before the Authority is not signed by Golden Gun but under that box is written the words "*not approved*". Mr Mayson's evidence is that the first time he saw this form was once these proceedings were on foot.

[15] Mr Shadbolt says that on the day after the application was made (that is, 6 May 2014), he spoke to Mr Mayson at the workplace and told him that his leave application had been declined. The basis of this decision, according to Mr Shadbolt, was that Mr Mayson had failed absolutely to meet his various obligations in respect of his apprenticeship and pursuant to the 7 February 2014 agreement, Mr Mayson had allegedly accepted that he would not make leave applications until his apprenticeship was up to date.

[16] Mr Mayson denies that he received any such verbal notification from Mr Shadbolt that his leave application had been denied and as well as pointing out that he did not receive a copy of the declined leave application form until his personal grievance was before the Authority, he also says that he remembers a discussion which involved Mr Shadbolt a week before he left on his holiday, the discussion concerning a clash of leave dates between Mr Mayson and another employee.

[17] Mr Mayson made the point to me in his evidence that if his leave was not approved it was difficult to see why there would have been any discussion about the apparent inconvenience of having two staff away at the same time. Mr Mayson was adamant that the discussion he had was with Mr Shadbolt and the other affected staff member. Mr Shadbolt did not remember that discussion.

[18] Mr Shadbolt says that the day before Mr Mayson left for his holiday (a holiday which according to Mr Shadbolt was not approved and which Mr Shadbolt had no understanding Mr Mayson was determined to take), he (Mr Shadbolt) spoke to Mr Mayson about a particular repair job for an important client. The point of this conversation was that the work on this important repair was to be done on the following day, 4 July 2014, when the business would be short staffed because a number of staff would be attending the funeral of the owner of Golden Gun. Mr Shadbolt's evidence is that Mr Mayson gave him no indication that he would not be at work the following day and indeed, according to Mr Shadbolt, Mr Mayson said he would attend to the work required.

[19] The following day was, of course, the first day of Mr Mayson's applied for leave. Mr Mayson was not at work. He received a text message from Mr Shadbolt at 12.49pm and that text message is in the following terms:

*I request that you return to work immediately as your leave was not approved. You are well aware of this as ... discussions regarding this and many warning letters advising you your leave was on hold.*

*Failure to return to work will result in termination of your employment.*

[20] Although not apparent from this text message, it became clear later that the ground on which the employer chose to rely in the termination of the employment was abandonment, that is Golden Gun said that, by taking unauthorised leave, Mr Mayson was abandoning his employment.

[21] Mr Mayson was still in the jurisdiction when he received that text message and was not due to leave for his family holiday overseas until the following day. Accordingly, he immediately contacted his advocate (Mr Bennett) and had Mr Bennett deal with it. Mr Bennett wrote promptly to Mr Shadbolt by email and it is common cause that Mr Bennett's letter was received by Mr Shadbolt the same afternoon that Mr Shadbolt sent his text message. Mr Shadbolt can have been left in

no doubt from Mr Bennett's letter as to the position in respect of Mr Mayson's whereabouts as Mr Bennett's letter makes the position abundantly clear.

[22] A personal grievance was raised on 4 July 2014.

### **Issues**

[23] I agree with the identification of the key issues submitted by Mr Bennett and intend to address the following questions:

- (a) Did Mr Mayson abandon his employment; and
- (b) If Mr Mayson was dismissed, was the dismissal justified; and
- (c) If the dismissal was unjustified, what remedies should be applied?

### **Did Mr Mayson abandon his employment?**

[24] I have no hesitation in concluding that Mr Mayson did not abandon his employment as Golden Gun maintain. The essence of the argument for Golden Gun is most elegantly expressed in a letter from Mr Don Thomas, solicitor for Golden Gun, whose 7 July 2014 response to the raising of Mr Mayson's personal grievance proceeds on this footing:

*... (Mr Mayson) has been on written notice since September 2013 that holidays would not be approved. ... Your client ... agreed to this arrangement in February 2014.*

*As at the date of your client's request for leave he had not complied with this agreement. He was specifically told that his request was declined.*

*To then take unauthorised leave is clearly an abandonment of his employment entitling our client to terminate the employment.*

[25] The difficulty with that formulation, however elegantly expressed, is that it overlooks the fundamental reality that it is completely improper for an employer to seek to bind an employee to not take a statutory entitlement until certain preconditions have been met.

[26] Whether or not Mr Mayson agreed to the arrangement is beside the point. No employee can be heard to contract out of their statutory rights. Every employee is entitled to take annual leave and to suggest otherwise is simply not in accordance with the requirements of the Holidays Act 2003 (the 2003 Act).

[27] As Mr Bennett correctly observes in his submissions on the point, s.16 of the 2003 Act, provides that an employee is entitled to four weeks' paid annual holidays at the end of each completed 12 months of continuous employment and that that entitlement remains in force until either the employee has taken all of the entitlement or has been paid out for it.

[28] Moreover, s.18 of the 2003 Act establishes a mandatory requirement that an employer allow an employee to take holidays and prohibits an employer from unreasonably withholding consent.

[29] Again I agree with Mr Bennett's analysis that my obligation is to assess the employer's conduct at the point at which the decision was taken to act to the prejudice of the employee, that is the point at which Mr Shadbolt appears to have formed the view that there has been an abandonment and that a failure to return to work will result in the termination of the employment. That event is timed to the receipt by Mr Mayson of Mr Shadbolt's text message at 12.49pm on 4 July 2014.

[30] At that time and date, I am satisfied I am required to assess the conduct of the employer in terms of whether what the employer did was what a fair and reasonable employer could have done in the particular circumstances of that case. It follows from decided cases that the question whether a fair and reasonable employer could reach the conclusion that Golden Gun reached need not be the only conclusion that a fair and reasonable employer could arrive at; it is enough that it is one of the conclusions that a fair and reasonable employer could arrive at: *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 160 applied.

[31] I conclude, applying that test, that a fair and reasonable employer could not have concluded that it was appropriate to deny Mr Mayson his annual leave entitlement even although Golden Gun purported to extract Mr Mayson's consent to that arrangement. If consent is perceived to be an issue, I am satisfied on the facts I heard that Mr Mayson had no proper opportunity to obtain advice about whether he should consent to such an arrangement and I prefer his evidence to the evidence of Mr Shadbolt to the effect that he was simply told to sign the relevant letter without being given any proper opportunity of even considering it himself before signing it.

[32] In any event, as I say, even if the consent had not been obtained improperly, as I am certain was the case here, it would still be inoperative consent because no employee can waive their statutory entitlement.

[33] Having said that, I should make clear that I have great sympathy for Golden Gun. It was endeavouring to find a mechanism to incentivise Mr Mayson to conclude his apprenticeship and, as Mr Shadbolt pointed out, I thought rather sadly in his evidence at my investigation meeting, if Mr Mayson had been diligent in the prosecution of apprenticeship, he would have been a tradesman three months after he finished his holiday.

[34] Notwithstanding my sympathy for the employer, and my acceptance that its motives were honourable in trying to get Mr Mayson to properly engage with the opportunity that it had provided (and funded), the device of seeking to rely on a putative agreement not to ask for annual leave is simply inconsistent with statute law and cannot stand.

[35] Moreover, there is another reason why I consider that Mr Mayson cannot have abandoned his employment. Mr Shadbolt's text message of 4 July 2014 identifies that Mr Shadbolt knew that Mr Mayson was on leave because he refers to it. Mr Mayson's advocate, Mr Bennett, reacted extremely promptly to Mr Mayson's request for help and Mr Bennett's letter arrived with Mr Shadbolt that same afternoon. In that letter, Mr Bennett makes abundantly clear that Mr Mayson has an issue with the circumstances in which he was refused permission to take leave and raises a number of relevant objections to the position that Golden Gun was taking.

[36] I am satisfied it was available to Golden Gun to rethink its position on receipt of that letter because that letter put it on notice that it was standing in danger. Golden Gun chose not to rethink its position and to maintain its view that the clear words of the statutory entitlement could somehow be abrogated by a putative agreement with a young employee and by the wording of the employment agreement together with the wording of the leave application form itself.

[37] In his letter of 4 July 2014, Mr Bennett quite properly acknowledges that Mr Mayson was unwise to proceed with his holiday in the absence of formal consent. Mr Mayson acknowledged to me in his evidence that he knew that he ought to have obtained that formal consent before making his arrangements.

[38] It follows from the foregoing analysis that I am satisfied Mr Mayson was dismissed from his employment and did not abandon it.

**If Mr Mayson was dismissed, was the dismissal justified?**

[39] I am satisfied on the evidence before me that Mr Mayson was unjustifiably dismissed. This conclusion follows inexorably from the previous analysis that there was no basis for Golden Gun to rely on the abandonment provision at clause 8.5 of the operative employment agreement. As I have already noted, there was no proper basis on which the employer could conclude that Mr Mayson had abandoned his employment.

[40] While no doubt Mr Mayson was ill advised to proceed with his holiday when he knew that he ought to have obtained the written consent of the employer to the annual leave before taking the holiday, the short point was that on Mr Mayson's analysis, based on what he told me in the investigation meeting, there was no ability for him to engage with Mr Shadbolt on the point because he felt locked into the earlier arrangements around a trade-off between his failure to complete the apprenticeship assignments and denial of leave and so, having 30 odd days of annual leave owing to him, he felt an entitlement to proceed despite the risk.

[41] Golden Gun says that Mr Mayson left on 4 July 2014 and had no intention of coming back because it says that while he was away he sought alternative employment. It is a fact that Mr Mayson was only unemployed for a total of three weeks (including the two weeks of annual leave that he took in Australia). But what else was the young man to do? Mr Shadbolt had told him on 4 July 2014 that if he did not return to work "*immediately*", he would be dismissed. Given that he received that text message the day before he left the country for a family holiday in Australia lasting another two weeks or so, it is difficult to see what other steps Mr Mayson could take, other than to seek alternative employment.

[42] I am satisfied that the only proper construction that an employee could take of Mr Shadbolt's text message was that he had been dismissed from the employment.

[43] I am not attracted by Golden Gun's alternative argument that if I find there was no abandonment, then Mr Mayson's behaviour would be sufficient to ground a finding of serious misconduct and thus justify a summary dismissal.

[44] The reason I do not think that argument can be accepted is that there is no proper process evident in Golden Gun's consideration of the matter even assuming that Mr Mayson's actions, which even he acknowledges were ill advised, is sufficient to ground a finding of serious misconduct.

[45] If the employer were intent upon a finding of serious misconduct, it would have been incumbent on it to notify Mr Mayson of that and give him some opportunity to be heard. Whatever else is true, this is a dismissal completely devoid of any process. The dismissal happened by text message and despite Mr Mayson's attempt (through Mr Bennett's timely letter) to respond, the employer maintained its position. At no stage was it ever suggested that there was any basis on which serious misconduct had been committed and it is inappropriate to try to recalibrate the factual matrix now.

**If the dismissal was unjustified, what remedies ought to apply?**

[46] For reasons I have already made plain, I am satisfied that Mr Mayson was unjustifiably dismissed from his employment when Golden Gun, in the mistaken belief it was incentivising Mr Mayson, sought to insist that Mr Mayson abort annual leave that he had already booked and paid for, and return to work, in lieu of which he would be dismissed.

[47] As I have already made plain, I do not accept Golden Gun's premise that because Mr Mayson may have found alternative employment during the holiday break or immediately thereafter that evidences his intention to leave Golden Gun; the difficulty with that argument is simply that Mr Shadbolt's text message makes it abundantly plain that unless Mr Mayson were to return to the employment "*immediately*", he would be dismissed and that is a dismissal pure and simple. Put like that, Mr Mayson had to find alternative employment because his job at Golden Gun had already gone.

[48] The question I have to address now having identified that Mr Mayson has a personal grievance by reason of having been unjustifiably dismissed is whether he has contributed to the circumstances giving rise to that dismissal by his willingness to proceed with his holiday notwithstanding he knew perfectly well that he was in breach of his employment agreement by so doing.

[49] In this regard, I agree with submissions for Golden Gun that Mr Mayson did contribute to the circumstances giving rise to his personal grievance for unjustified dismissal. Mr Mayson acknowledged himself that he was ill advised to proceed with the taking of his annual leave when he knew the employer's rules around obtaining consent.

[50] But he was frustrated by his inability to take some of his steadily accumulating leave and the very fact that he had over 30 days of leave available to him at the time that he made the application simply made the position worse.

[51] Looked at in the round, despite the good intentions of Golden Gun, its attempt to preclude this young man from taking any annual leave at all, over a period of years, until he got up to date with his apprenticeship requirements, was an egregious breach of the conduct of a good and fair employer. In this regard, I agree with submissions for Mr Mayson that as well as constituting a personal grievance, the behaviour of the employer is a breach of good faith because it does not evidence the sort of collaborative engagement which the law seeks to try to promote.

[52] If Mr Mayson had not contributed to the circumstances giving rise to his personal grievance for unjustified dismissal, I should have awarded him the sum of \$5,000 for that grievance. But applying s.124 of the Employment Relations Act 2000 (the 2000 Act), I think that award must be reduced and I consider that the appropriate reduction is one of 20%.

[53] Mr Mayson also claims he has suffered a disadvantage by the unjustified actions of the employer in trying to lock him out of his statutory entitlement to annual holiday leave. But as Golden Gun's submissions correctly identify, any disadvantage grievance is out of time, and must be set aside. The specific complaint is about the alleged agreement reached between the parties on 7 February 2014, but no personal grievance was raised until 9 July 2014, well outside the justiciable period.

[54] I do not accept Golden Gun's submission that there is no evidence of the hurt that Mr Mayson suffered because of the personal grievance for unjustified dismissal.. Mr Mayson gave evidence about the financial embarrassment suffered as a consequence of the way that Golden Gun behaved, the fact that Mr Mayson had to borrow from family while he was out of work and the fact that his expectation was

that having over 30 days of annual leave, he could at least expect his holiday pay to be paid in the normal way, as he considered he had been dismissed by Mr Shadbolt.

### **Determination**

[55] I am satisfied that Mr Mayson has a personal grievance and I direct that Golden Gun is to pay him the sum of \$4,000 as compensation under s.123(1)(c)(i) of the 2000 Act.

[56] Mr Mayson was off pay for three weeks and that loss was directly attributable to the unjustified dismissal. He was in receipt of \$760 a week gross and I direct that he is to be paid \$2,280 gross in lost wages.

[57] Mr Mayson is also to be reimbursed the filing fee of \$71.56.

[58] Although Mr Mayson protests the deduction of the costs incurred by Golden Gun in supporting his apprenticeship, it is plain in terms of the employment agreement that the employer is entitled to make that deduction and in any event, he makes no claim for the return of that money so I am satisfied that no claim lies there, presumably because he believes he agreed to it.

[59] There is dispute about whether final and holiday pays have been made and the representatives are directed to engage with each other to discuss the position. If no agreement is able to be reached, leave is reserved for either party to revert to the Authority for orders.

### **Costs**

[60] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority