

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 123  
5303481

BETWEEN            ANDREW MCCLINTOCK  
                                 Applicant  
  
AND                    ALLIED INVESTMENTS  
                                 LIMITED  
                                 Respondent

Member of Authority:     Philip Cheyne  
  
Representatives:         Dean Kilpatrick & Alice Lysaght, Counsel for applicant  
                                 Damian Black, Representative for respondent  
  
Further submissions:     19 June 2012 for the applicant  
                                 15 June 2012 for the respondent  
  
Investigation Meeting:   15 September 2011  
  
Determination:            21 June 2012

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**DETERMINATION OF THE AUTHORITY**

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**Acknowledgement**

[1]     Regrettably, this investigation has been delayed for several reasons.

[2]     An investigation meeting scheduled for 28 February 2011 had to be adjourned because of the February 2011 earthquake. There followed some delay because the Authority and counsel could not access their respective offices. Eventually we agreed on a fresh date for an investigation meeting. Following the meeting there has been a delay while I worked on other matters deferred or affected by the September 2010 and February 2011 earthquakes or which have been accorded priority. Preparation of the determination has also been affected by the issue referred to by the Chief of the Authority in his memorandum dated 7 May 2012.

[3] Since recently turning my attention to this matter, I have reread the statement of problem, statement in reply, statements of evidence, all the exhibits, my full notes of the evidence and the parties' written submissions provided during the investigation meeting.

[4] I acknowledge the parties' patience and understanding and sincerely regret any difficulties caused by the delay.

### **Employment relationship problem**

[5] Allied Investments Limited operates a business called Allied Security which I will refer to as Allied. Andrew McClintock was employed by Allied in various roles from September 2006. By March 2009 Mr McClintock was Allied's Canterbury area manager working fulltime.

[6] On Tuesday 15 December 2009 Mr McClintock gave four week's notice in writing of his resignation. Mr McClintock worked out the notice period and finished up on 13 January 2010. He was not paid his holiday pay when his employment terminated and when he inquired he was told that was because he had not returned company equipment. Mr McClintock says that in March 2010 he heard that a friend had been appointed to his former position. He decided to get legal advice and by letter dated 7 April 2010 Mr McClintock's lawyer raised a grievance of constructive dismissal and a complaint about arrears of holiday pay with Allied.

[7] The present problem does not include any claim about holiday pay because it was eventually paid sometime before these proceedings commenced. It does however include claims by Allied against Mr McClintock to reimburse it for property not accounted for and recent training courses. I will revert to these issues after dealing with the personal grievance claim.

[8] It is convenient to summarise the grievance as expressed in the lawyer's letter dated 7 April 2010. The letter says that Mr McClintock received an email on or about 11 December 2009 confirming that Allied no longer required an area manager and that Mr McClintock would have to take on the role of a site supervisor on lesser terms. As a result Mr McClintock resigned on or about 12 December. Following

termination of the employment Mr McClintock learnt that someone else had been employed in his position so that there was no redundancy. The letter says that there was no consultation with Mr McClintock about the restructuring, no genuine redundancy and a breach of s.4(1)(b) and s.4(1A) of the Employment Relations Act 2000. As lodged with the Authority there is also a claim for a penalty for breach of the contractual obligation to consult in a redundancy situation.

[9] An apparent resignation can constitute a dismissal if an employer's actions or words oblige or strongly tend to induce the employee to proffer a resignation: see *Wellington Clerical Workers v Barraud and Abraham* (1970) 70 BA 347. That makes it clear that the focus must be on what caused the resignation. Matters unknown to Mr McClintock until after the termination of the employment cannot be relevant to consideration of whether there was a constructive dismissal. I must assess what caused Mr McClintock to resign before turning to whether there was a constructive dismissal. In response to Mr McClintock's grievance Allied provided documents that disclose various exchanges about Mr McClintock between senior managers. Because Mr McClintock did not know about these exchanges at the time of his resignation they are not relevant to the question of what caused the resignation.

### **Background to the resignation**

[10] Shortly after his appointment as Canterbury area manager Mr McClintock was also asked to manage the company's hospitality section. That resulted in Mr McClintock being very busy and having to work long hours. Despite that it seems that Mr McClintock remained committed to a long-term future with Allied. During this time Mr McClintock occasionally would have discussions with a senior Allied manager (Chris McDowall) about his future. For example in early September 2010 Mr McClintock told Mr McDowall that he liked the job and could not see himself leaving the business in the next 3 to 5 years.

[11] Damian Black is Allied's general manager and the company's sole director. On Saturday 19 September 2009 Allied hosted a function in Christchurch for some clients. Afterwards Mr Black, Mr McDowall, other senior managers and Mr McClintock went into town. Towards the end of the night some of them (but not Mr Black) were walking past a client's bar and it was noticed that there was no

doorman on duty when there should have been. Mr Black's evidence, which I accept, is that he was annoyed with Mr McClintock's handling of that problem and let him know that. For current purposes it does not matter whether Mr Black was justified in the view that he formed about the incident.

[12] There is a dispute about whether Mr McDowall was present. Bernadette Laurie was Mr McClintock's girlfriend at the time. Her evidence is that Mr McDowall was present and was *having a go* at Mr McClintock. Ms Laurie took Mr McClintock home. Again, for current purposes, it is not necessary to resolve any disputes about the incident itself. However, I accept Ms Laurie's evidence about Mr McDowall being present and *having a go* at Mr McClintock.

[13] Mr McClintock's evidence is that he noticed a real change in the way Mr Black and Mr McDowall acted towards him after this incident. He says that Mr McDowall started making lists of things for him to do and requiring him to submit rosters for approval. He says that Mr Black hardly ever spoke to him. His evidence is that things continued to go downhill, with no communication and him being kept out of the loop. Mr Black and Mr McDowall do not accept the tenor of this evidence. There are emails after 7 September 2009 that suggest the continuation of a normal employment relationship. However, other emails between Mr Black and Mr McDowall at the time show that their confidence in Mr McClintock was undermined to some extent. Judging by his evidence, Mr McClintock may have sensed that at the time.

[14] There is a letter dated 22 October 2009 also signed by Mr McClintock recording changes to his working arrangements. Mr McClintock's evidence is that he first heard about a change in his hours of work when he received the letter. However, there is an email dated 28 September 2009 to Mr Black where Mr McDowall mentioned a discussion with Mr McClintock about changing his hours if Allied employed a separate hospitality manager. There is another email dated 30 September 2009 between Mr Black and Mr McDowall to similar effect. When questioned, Mr McClintock said that he thinks he can recall one discussion in passing about how his hours might be reduced if a separate hospitality manager was employed. It was apparently Mr McClintock's idea to engage a separate hospitality manager to help alleviate his workload issues. It is unlikely that Mr McDowall would have falsely

reported such a conversation to Mr Black. In light of Mr McClintock's somewhat equivocal evidence, I accept that there was a discussion along the lines indicated in the emails.

[15] Mr McClintock's hours changed in accordance with the 22 October 2009 letter signed by Mr McDowall and Mr McClintock. Mr McClintock's evidence is that he accepted these changes because he needed a job, he could not be bothered putting up a fight and he thought he could work his way back into the fold with Mr Black and Mr McDowall. Nonetheless Mr McClintock signed the letter and it must be regarded as a valid variation to the terms of his employment.

[16] Allied provided security staff at Lincoln University. There was an issue on 18 November 2009 about an Allied staff member's quality of service. Lincoln University apparently phoned Mr McClintock when the issue arose but did not get any response. At the time Mr McClintock was off work on ACC. The University then contacted Mr McDowall and later put its complaint in writing. The complaint was not limited to the immediate issue. Mr McDowall responded several days later. His response attributes the blame to Mr McClintock. However, it is common ground that Mr McClintock saw neither letter until after the termination of his employment.

[17] Mr Black's evidence is that he and Mr McDowall thought the Lincoln University issues were Mr McClintock's fault. Mr McDowall says that he and Mr Black wondered how they were going to resolve the performance issues with Mr McClintock. He says that he told Mr McClintock about the problems in early December 2009 but not what they would do to deal with them. Mr McClintock's evidence is that he and Mr McDowall spoke about the training of the Allied staff member which was part of the University's complaint. I accept Mr McClintock's evidence on this point. Mr McDowall's discussion with Mr McClintock was to get background information for his response to Lincoln University. Mr McClintock was not told of the complaint, Allied's view that it was caused by his poor performance or that Allied told Lincoln University that it was his poor performance.

## Resignation

[18] Mr McClintock's evidence is that Allied employed a new person to manage hospitality (Alex) and the following Monday he received an email from Mr Black telling him that the Canterbury area manager position was going to be redundant and that his only option was a role as a site supervisor on lesser terms. The next day he sent his resignation by email to Mr Black. He says that he received this email on or about 11 December 2009. That was a Friday. It is common ground that Mr McClintock gave notice by email on 15 December 2009.

[19] Mr Black's evidence is that he never sent such an email to Mr McClintock and a search of his computer records has failed to unearth it. That evidence supports Allied's statement in reply which alleges:

*Damian [Black] created a discussion document on 14 December 2009 but this was not given or sent to Andrew [McClintock]. The document clearly envisages input from Andrew as had happened in the past.  
See Document D*

[20] Sometime after Mr McClintock's employment ended Mr Black disclosed the existence of a word processed document headed *Restructure Discussion* that reads as a brief description of a restructuring proposal. It is the exhibit Document D mentioned above. It will help if I set out the text (as printed):

*Restructure Discussion*

*Hospitality to be managed by Alex under the profit share arrangement*

*Office to be managed by Lisa*

*Sites to be managed by site supervisors and report to Chris*

*Site managers may use the office and equipment to create reports etc*

*Andrew*

*Restructure into the old role as CPIT supervisor.*

*Canterbury job becomes redundant and not replaced*

*Reality*

*This has come about due to poor performance and failure and the request of Lincoln who now do not want to deal with Andrew*

*Andrew*

*Rather than just make this change can you put in some thought on alternatives?*

*Obviously the supervisor role is a step down in role and pay rate etc*

*If there is another way to manage this area please let me know*

*Any changes are envisaged to take place in the New Year?*

[21] Exhibited with Document D is a printout of the windows properties dialogue box said to relate to this file which shows 14 December 2009 as its *Date Created*. It also shows a line count of 5, word count of 115 and character count of 656. The text set out above contains 23 lines (or 16 without carriage returns), 136 words and 749 characters (628 without spaces). There is a significant mismatch between the printed document and the printout of the properties dialogue box. I cannot confirm the bona fides of Document D to a standard of probability.

[22] Having identified this issue while working on the determination, I asked the parties for any further comment. Mr Black repeated the explanation that Document D was provided after the resignation and had not been sent to Mr McClintock during the employment. He also said that, on checking, his computer generated a similar properties mismatch on an unrelated document and suggested that an IT expert could be engaged to explain the matter. Mr Kilpatrick sent me the email and attachment sent to him in May 2010 by Mr Black. When I opened that attachment the properties dialogue box showed the document was created on *Monday, 14 December 2009 12:19:00 p.m.* The properties dialogue box provided with Document D as part of the bundle of materials for the investigation meeting shows the date created as *14/12/2009 11:19 a.m.* and Date last saved as *14/12/2009 11:22 a.m.*

[23] To summarise, Mr McClintock says he received an email from Mr Black concerning his redundancy. Initially he thought this was on or about 11 December 2009. He resigned the next day. We know that the resignation was on Tuesday 15 December 2009. If Mr McClintock received anything it must have been on Monday 14 December 2009. Mr Black says he never sent anything to Mr McClintock but coincidentally had drafted a document about a redundancy proposal. The properties dialogue boxes indicate that there were actually two documents called *Restructure Discussion* both created on 14 December 2009. I have only been provided with the text of the second document. Mr McClintock did not think that the second document matched what he was emailed.

[24] I find that Mr McClintock must have received something about redundancy. Otherwise he would have been displaying remarkable prescience. It may not have been Document D. Whatever it was, however, it probably was along the lines of the text of Document D; in other words, the initiation of consultation about restructuring.

It is clear that Mr Black appreciated as at the time of Document D that there was a need to consult about such a proposal and he would have had the same awareness in respect of the drafting of anything that he actually sent to Mr McClintock. In response, Mr McClintock resigned on notice. He possibly had a sense of unease about what was to come. However, on balance, I do not accept that Allied's actions or words (as known by Mr McClintock at the time) obliged or strongly tended to induce him to proffer a resignation.

[25] It follows from this analysis that Mr McClintock's resignation on notice does not amount to a constructive dismissal. Mr McClintock does not have a personal grievance against Allied.

[26] Because Mr McClintock resigned rather than involve himself in consultation over a redundancy proposal there was no breach of contract by Allied. The penalty claim is accordingly dismissed.

[27] There are several other matters that were canvassed in the evidence concerning events in Ashburton and a car but those matters do not strengthen Mr McClintock's position so it is not necessary now to canvass them.

### **Counterclaims**

[28] In the course of preparation for the investigation meeting Allied advised the Authority and Mr McClintock in writing that its counter-claims do not rely on any express written contractual provisions.

[29] The statement in reply asserts that Mr McClintock agreed to repay the cost of courses that had occurred within six months of the termination of his employment. Claims are made for reimbursement of three courses: \$75 for a first aid course, \$27.50 for fire training and \$500.00 for tenderlink.

[30] There is little evidence in support of these claims. I have been given an email dated 28 January 2010 that says that *training seminar on tenders will need to be deducted as well as per the agreement prior to attendance*. Mr Black says that there was an arrangement that course costs within six months of leaving would be repaid. I

have not been provided with anything in writing confirming such an arrangement, nor have I even been given any documentation relating to the dates and costs of these courses. Mr McClintock says that there was no such arrangement, that the first aid course was required by Allied's client and was in 2008 and that Allied made a donation for the fire training course. On balance I accept Mr McClintock's evidence. It follows that this part of the claim is rejected.

[31] The second part of Allied's counter-claim is for various items of equipment. I will deal with each type of item in turn.

[32] An internal email dated 23 January 2010 refers to Mr McDowall charging Mr McClintock for between 16 and 25 lost radios. The email dated 28 January 2012 to Mr McClintock refers to 18 radios valued at about \$1,800.00 missing from six bars. When the statement in reply was lodged it included a document referring to 10 radios sent to Mr McClintock in October valued at \$400.00 and 2 radios collected by Mr McClintock from Capital Bar valued at \$400.00. Mr Black says that the values are estimates based on invoices. He says that Mr McClintock was responsible for equipment and was expected to ensure it was accounted for on a weekly basis. He also says that Allied had ceased operating at some of the venues and Mr McClintock was supposed to have gathered up the equipment. Mr McDowall says that Mr McClintock was told to collect radios from Capitol Bar but later reported that he could not retrieve them. However, Mr McDowall says that the business owner told him that Mr McClintock did collect the radios.

[33] Mr McClintock's evidence is that there was no inventory system in place, he was never given a list of equipment and was not told that he was responsible for accounting for assets on a weekly basis. He says that the radios would go out when needed and come back in after the event. He also says that the radios were mostly kept on site at various client bars and it was up to the head doorman to keep on top of what gear they had on any particular night. There is no reason to disbelieve any of this evidence. I note that Allied has not provided me with any proof of purchase of radios. There is no inventory or stock list. There is an email trail about some radios dispatched from Dunedin to Christchurch at the end of September 2009 for an event and another email dated 6 October 2009 indicating that they would be returned. There is nothing to suggest this did not happen. There is some evidence from

Mr McClintock about the number of radios at various bars. There is no reason to doubt this evidence either. Overall the evidence does not establish that any particular radios were lost at any particular venue. In addition, there is nothing to establish that Mr McClintock was responsible for the loss of any radios; or that there was any obligation on him to account to Allied for radios. This part of the counterclaim is dismissed.

[34] There are three counterclaims relating to items of clothing: \$120.00 for jackets left at the Redwood hotel, \$80.00 for a manager's jacket and \$700.00 for missing polo shirts. In the 28 January 2010 email these items (plus another manager's jacket) were said to have cost \$1,500.00. Again I have not been provided with any invoices or other documentation to prove purchase or value of any of these items.

[35] I will deal with the Redwood jackets first. Mr McDowall's evidence is that he and Mr Black told Mr McClintock *on numerous occasions* to collect jackets from the Redwood hotel but he did not do so and the jackets have never been recovered. Mr Black's evidence is that Mr McClintock admitted to him that he still has items such as the jackets. There is an email dated 16 November 2009 that says that Mr McClintock is *yet to collect the Redwood jackets but this will be done today*. Mr McClintock's evidence is that these jackets were picked up on the last night by one of the doorman who he later tried to get the jackets from but who became difficult to contact when his relationship with Allied started to break down. There is no reason to disbelieve this evidence. Given that, there is nothing to establish that Mr McClintock is liable for any loss, even if there was adequate proof of a loss.

[36] The manager's jacket claim appears to be based on Mr McClintock's failure to return his own jacket. Mr McClintock's evidence is that he never had a manager's jacket. There is nothing to establish that a jacket was ever issued to Mr McClintock and no basis for disbelieving his evidence on this point. It follows that the counterclaim cannot succeed.

[37] The final claim is for missing polo shirts. The 28 January 2010 email refers to *25 white polos that were in the office, issued and then replaced by Blue, now none in the office*. Mr McDowall did not mention polo shirts in his prepared statement. However in response to a question he said it was *poor management by Andrew*. Give

*out a blue one, get a white one back. He didn't.* Mr Black's evidence is that 25 polos *disappeared* after events.

[38] Mr McClintock's evidence is that the 25 white polo shirts were sent back to Dunedin the weekend after Show Weekend 2009. They were replaced by blue polo shirts that were issued to doorstaff. He says that he saw them loaded into a vehicle that was returning to Dunedin. In response to a question Mr Black said that he was not present and could not dispute Mr McClintock's evidence about seeing the polos loaded into the vehicle. In light of that evidence there is no sufficient proof that Mr McClintock was responsible for any loss. It follows that this part of the counterclaim must be dismissed.

[39] For the foregoing reasons Allied's claims against Mr McClintock are all dismissed.

[40] I have not been asked to consider whether Allied's retention of holiday pay against these alleged debts was a breach of the Wages Protection Act 1983 for which a penalty should be imposed.

### **Summary and Orders**

[41] Mr McClintock's claims and Allied's counter-claims are dismissed.

[42] Costs are reserved. Any claim for costs must be made by lodging and serving a memorandum within 28 days. The other party may have 14 days in which to lodge and serve any reply.

Philip Cheyne  
Member of the Employment Relations Authority