

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Bantwal Srinivas Pradeep (Applicant)
AND Star Service Stations Limited (Respondent)
REPRESENTATIVES Bantwal Srinivas Pradeep In person
Andrew Cook, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 9 May 2005
DATE OF DETERMINATION 27 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem concerns a number of complaints which Bantwal Pradeep has about his former employer, Star Service Stations Limited trading as Caltex ("Caltex"). The complaints are wide-ranging, but the clearest of them centre on the termination of his employment, and the parties' attempts to resolve the associated personal grievance.

[2] Caltex acknowledges there were shortcomings in its dealings with Mr Pradeep during his employment, and in association with its termination, but says the parties addressed these by an agreement which included Mr Pradeep's reinstatement. It says further that the employment relationship problem was resolved to the parties' satisfaction at the time.

The termination of Mr Pradeep's employment

[3] Mr Pradeep was employed to work as a forecourt attendant at a Caltex service station in Balmoral, commencing 1 April 2004. There were some shortcomings in the completion of recruitment procedures at the time, as a result of which Mr Pradeep was not paid for the first few weeks of his employment.

[4] Some of the shortcomings were picked up later in April when Gavin Cheal, the manager at Caltex' Clark St New Lynn service station, saw Mr Pradeep while Mr Pradeep was helping out at a third station and offered him a position at New Lynn. The necessary pre-employment forms were completed and forwarded in respect of the New Lynn position. I understand the failure to pay Mr Pradeep for work done in April was also remedied.

[5] One of the forms Mr Pradeep completed in respect of the New Lynn position authorised the Department for Courts to release certain information held on the Wanganui computer. In turn the form authorised provision of the information to a third party, Pinnacle Security Consultants

("Pinnacle Security"), which Caltex used to carry out pre-employment checks into aspects of the background of potential employees. Employment was intended to be conditional on a satisfactory report from Pinnacle Security.

[6] Mr Cheal said further that he explained to Mr Pradeep that confirmation of his employment depended on a satisfactory report from Pinnacle Security. Mr Pradeep vehemently denied this. However he completed the authorisation form described above, and I consider it unlikely that he would have done so without an explanation of its purpose. In addition, in the light of the way Mr Pradeep has expressed himself in general, I cannot be sure whether the denial is a simple denial that the information was given or whether it incorporates a wider view about the appropriateness of the form and Caltex' human resources procedures. The denial is unreliable.

[7] Mr Pradeep began working at New Lynn in or about the end of April 2004, before the Pinnacle Security report was obtained.

[8] On the information available to me, the report came in the form of an email message to the relevant area manager, Alec Ng, the human resources manager Bronwyn Hall, and three others. The message was dated 20 May 2004 and read:

"It has been brought to my attention that this person has been working on a casual basis for several sites around Auckland,

I received a vetting form ... and have NOT recommended him based on his credit check. This is the first time he has ever been checked by a vetting agency, ...

Please ensure that site managers are aware that staff are required to be vetted prior to taking them on, (reference checks and credit – the criminal history will follow within 3 weeks)"

[9] The same day Mr Ng forwarded the message to the service station managers in his area, including Mr Cheal, saying:

"Please ensure this person is not hired or rostered for work."

[10] In turn - still on 20 May 2004 - Mr Cheal advised Mr Pradeep that he would not be rostered for work. In effect this was a termination of Mr Pradeep's employment on the ground that a condition of its commencement had not been met. Mr Pradeep subsequently described it as an unlawful suspension, but it was more than that. Employment had commenced and, whatever the substantive merits of the company's position may have been, neither Mr Ng nor Mr Cheal followed a fair procedure in moving to terminate it. The termination was unjustified.

[11] By way of an aside I suggest that Caltex reinforce to its managers the importance of ensuring email messages of the kind set out above are received and read only by those entitled to see and read them. At New Lynn, anyone could walk into Mr Cheal's office and read or access messages on the computer as long as Mr Cheal was logged on.

[12] In response to the advice he received on 20 May, Mr Pradeep wrote a letter to Mr Cheal dated 21 May 2004 asking why he was not to report for work and seeking written confirmation that he would not appear on a subsequent roster. He wrote again on 2 June 2004 referring to 'serious concerns' he had raised with Mr Cheal, saying he had a grievance, asking for unpaid wages and asking for a written explanation of the sudden 'relationship jolt' after the receipt of the credit check. By letter to Mr Cheal dated 9 June 2004 he repeated requests for money he said was owed in respect of the three weeks to that date, and asked Mr Cheal to "let head office know about my status and my need to go on the job urgently."

[13] Mr Cheal did not respond to any of this in writing, and did not refer the matter to Mr Ng or Ms Hall. I regard the failure to respond in writing as a breach of the obligation in s 120 of the Employment Relations Act 2000 to provide written reasons for a dismissal when asked. Mr Cheal did, however, see Mr Pradeep from time to time and discussed with him why he would not remain on the roster. For its part Caltex accepted that Mr Cheal should have referred the matter very much more promptly than he did.

[14] Mr Pradeep also made a written approach to Mr Ng and Ms Hall in a letter dated 4 June 2004, but the address is incomplete and I accept there was some delay before it was received. Indeed much of Mr Pradeep's correspondence was misdirected, had an incomplete address, or was merely left at a service station for forwarding.

[15] Mr Ng became aware of Mr Pradeep's approaches when he visited the New Lynn service station on or about 15 June 2004, and Mr Cheal gave him Mr Pradeep's letters. Mr Pradeep has said repeatedly and heatedly that Mr Ng lied about his state of awareness, but I do not agree. Mr Pradeep is confusing Mr Ng's knowledge of the email messages of 20 May with Mr Ng's knowledge of Mr Pradeep's approaches to Mr Cheal in June. Nor has Mr Pradeep taken into account the delays inherent in the way he directed his correspondence.

[16] Mr Ng contacted Ms Hall, who arranged to meet with Mr Pradeep on 16 June 2004.

Discussions aimed at resolving the dismissal

[17] Mr Ng, Ms Hall and Mr Pradeep duly met on 16 June. First they discussed Mr Pradeep's employment by Caltex with particular reference to arrangements at Balmoral, and stations other than New Lynn, with Caltex expressing the view that Mr Pradeep was employed on a casual basis at the time. No issues arose out of that discussion at the time, and its purpose seemed to be to ascertain the circumstances of Mr Pradeep's employment during April.

[18] Mr Ng then asked whether Mr Cheal had explained about the need for security checks, and Mr Pradeep said that was not done. After further exchanges on the point Mr Ng asked Mr Pradeep what he wanted. Mr Pradeep replied that he wanted to keep working. There followed a discussion about Mr Pradeep's preferred shift, hours of work per week, and rate of pay. Agreement was reached on those matters, although Mr Ng said he would find suitable work over all of his sites rather than saying Mr Pradeep would return to New Lynn. Finally Mr Ng confirmed, and Mr Pradeep agreed, that Mr Pradeep sought reimbursement of the pay he had lost since 21 May and payment of outstanding annual leave.

[19] The meeting ended with Mr Ng saying Caltex would recap the discussion in a letter.

[20] It did so by letter also dated 16 June 2004. The letter said: "We are pleased to have reached resolution on all matters and wish to confirm what we agreed at today's meeting ..." It went on to record that Mr Pradeep would:

- (a) be reinstated as a full time employee, with a minimum of 40 hours per week;
- (b) be offered work on Caltex Auckland sites, in accordance with Mr Pradeep's preference as to shifts and subject to his completing all outstanding employment forms;
- (c) retain his rate of pay;
- (d) receive two days' pay in lieu of the Easter statutory holidays;
- (e) receive payment in respect of accrued annual leave;
- (f) receive payment of three weeks and two days' wages in respect of the period from 21 May, payable in the following week's pay cycle.

[21] The letter ended by asking Mr Pradeep to confirm his agreement by signing it. It asked Mr Pradeep to contact Mr Ng if he was confused.

[22] I accept from the evidence about the 16 June meeting that the letter is a reasonable summary of the matters the parties agreed. Further, the letter reflected matters raised at the meeting and in respect of which a remedy was sought. I find the tone of the letter was conciliatory.

The aftermath of the discussions

[23] Mr Pradeep said at the investigation meeting that when he received the letter he felt like a hot knife went through him, and he made numerous heated assertions to the effect that the letter was unprofessional, unnecessary and bad practice. He also said that what he wanted was for everything to be normal – that he could keep working and receive the money he was owed. He said there was no need for such a letter. In short, in his evidence he did not materially dispute that the letter recorded matters that had been discussed and agreed, rather he disputed the need for such a letter at all. He believed it made him look as if he had done something wrong when he had not, and saw it as an attempt at trickery.

[24] While it is understandable that Mr Pradeep might have preferred to return to work as normal and receive payments owed to him without any more being said, I do not accept the 16 June letter was unnecessary or bad practice. On the contrary, a problem had arisen and the parties had discussed and agreed on how it would be dealt with. It is good and expected practice to confirm that in writing. I do not accept the letter contains a suggestion Mr Pradeep had done anything wrong or that its purpose was to trick him.

[25] Because Mr Pradeep had not countersigned and returned the letter, after several days Ms Hall telephoned him to ensure everything was all right. Mr Pradeep told her he had been unwell. Indeed in correspondence at the time and since, Mr Pradeep has mentioned he is diabetic as well as referring more than once to his suffering a mental illness and his receipt of psychiatric treatment. His response to Ms Hall was that he would return the letter, but he did not do so.

[26] Instead he embarked on further correspondence which, with reason, Ms Hall described as confusing. I construe it as amounting, among other things, to an attempt to raise concerns about the 20 May emails, as well as Mr Ng's saying subsequently that he was unaware of Mr Pradeep's concerns until mid-June. Thus one of the letters said Mr Ng was vindictive and had lied. The correspondence also contained complaints about Mr Pradeep's being classified as a casual. As far as I can make out, the as they appear in that letter the complaints are associated with the reference to Mr Pradeep's casual status in the Pinnacle Security email of 20 May.

[27] The correspondence also said variously that there were 'legal traps' in the 'letter for reinstatement' of 16 June, noted 'shocking HR practice' and made several other similar criticisms, and one of the letters returned the 16 June letter unsigned. That letter also asked that Mr Pradeep be reinstated and paid what he was owed "until the issue is addressed completely and full cost of the damages are recovered due to bad HR policies and the practice of the same." When I asked Mr Pradeep what other damages were contemplated he simply said he wanted to make the company aware of the matters in his letters.

[28] Ms Hall responded with letters of her own. In one she said Mr Pradeep's latest correspondence indicated he would not be returning to work or accepting the 16 June offer. If that was the case, she asked that Mr Pradeep confirm his resignation in writing. She said further that, if there was no resignation and Mr Pradeep did not return to work, Caltex would assume he had abandoned his employment. In a second letter she expressed the view that the parties had reached a

resolution on 16 June and the company remained committed to that position. In addition she said she had difficulty understanding what more Mr Pradeep now required.

[29] Mr Pradeep responded in a letter dated 1 July 2004, saying he would be referring the matter to the labour court, and ending with a request that the matter not be pursued with him until he so requested. He did not return to work.

[30] In further document dated 1 July 2004 Mr Pradeep commented directly on the points of the 16 June letter with which he was dissatisfied. It is not clear when Caltex first saw this document. From the document I take it that - aside from his disputing the need for it - one of the reasons why Mr Pradeep is distrustful of the 16 June letter is that it does not set out all of his employment concerns and does not amount to a 'resolution on all matters'. I turn shortly to the matters Mr Pradeep considered unresolved.

[31] Further correspondence ensued and the parties attempted mediation without success. Mr Pradeep did not return to work.

Mr Pradeep's other complaints

[32] In the exchanges of correspondence after 16 June Mr Pradeep raised other complaints that had not been raised or addressed on 16 June, or no remedy had been sought in respect of them. They were, however, the matters he considered unresolved.

[33] One matter not raised as a problem on 16 June – although Mr Pradeep was asked about his rate of pay - was Mr Pradeep's belief that he should be paid at the rate of \$12 per hour, not the \$10.50 per hour set out in the parties' written employment agreement. However the rate of \$12 per hour was payable to employees who had completed certain management training modules, and Mr Pradeep had not done this. He had no entitlement to payment at the rate of \$12 per hour.

[34] As I have already recorded, another matter which received comment on 16 June was whether Mr Pradeep was a casual employee prior to his employment at New Lynn. Mr Pradeep did not agree that was the case, although nothing turned on that classification in the context of the problem the parties were addressing. However Mr Pradeep was very suspicious of it.

[35] On a number of occasions Mr Pradeep referred to a wish to provide money for medical treatment for his son in the USA. That concern was evident in discussions in May to July 2004, and was referred to on 16 June in the context of Mr Pradeep's request for 'emergency money'. The position Mr Pradeep expressed was not clear, but Caltex' obligation in that respect extended only to paying Mr Pradeep wages owed to him. It failed to do so for part of that time, but was ready to remedy the matter by mid-June. Mr Pradeep now seeks \$10,000 for reasons that seem to relate to costs of care for his son. There is no legal basis for such a claim.

[36] Overall I assume Mr Pradeep's references to 'legal traps' in respect of the 16 June letter concern some or all of these matters, so he thought that agreeing to the terms in the letter meant he agreed he had been a casual employee, for example. I have made this assumption after a very careful consideration of Mr Pradeep's correspondence. It may not even be correct, but if it is then Mr Pradeep's correspondence is far from clear and it is understandable that Ms Hall was confused.

The status of the 16 June agreement

[37] On the evidence, there was oral agreement as to the basis on which Mr Pradeep would return to work following what I find was an unjustified dismissal, but there was no agreement that the

letter of 16 June was a 'resolution on all matters'. That phrase can be reasonably read down to cover matters before Caltex as at 16 June.

[38] The problem clearly before Caltex on 16 June was Mr Pradeep's dismissal. Additional concerns of the kind discussed above were not raised as problems at the time, and even when they were raised it seemed they were raised for the purpose of expressing disagreement rather than because any remedy was sought in respect of them.

[39] The one aspect of the dismissal not covered on 16 June was the injury to Mr Pradeep's feelings. Even then I acknowledge he was asked about whether he wanted 'emergency money'. However in his letter dated 2 June in particular he had expressed injury to his feelings arising from his being out of work. A full settlement of his personal grievance would have made provision for that.

Resolution of the employment relationship problem

[40] Despite the anger he expressed at the use of the word 'reinstatement' in the 16 June letter, Mr Pradeep says in the present application that he seeks reinstatement albeit 'without any conditions new' and with 'no signing of the deceitful and lopsided letter offered on 16 July (sic) 2004.' He also seeks payment from May 2004 to the present date, reimbursement of his 'overseas lawyer's' costs, compensation for loss of reputation of \$150,000, as well as raising other general claims for damages.

1. Reinstatement

[41] In ordinary circumstances the most practical way of addressing a problem of this kind would be to explore with the parties the prospect of returning to the heads of agreement discussed on 16 June 2004, and implementing the associated arrangements with such explanations and amendments as may be necessary. However I consider it likely that some of the problems preventing implementation then remain operative now. For example Mr Pradeep still talks about the 'deceitful and lopsided' letter of 16 June and has indicated he would not accept any conditions in respect of his reinstatement. In addition he has called Mr Ng and Ms Hall liars, unprofessional, unethical and various other epithets, has made numerous comments about matters such as Caltex' failure to apply the norms of a civilised society, and continues to express views of that kind. Mr Ng and Ms Hall do not deserve those epithets, and the statements do not bode well for a successful return to work.

[42] Moreover Mr Pradeep said at the investigation meeting that he is unable to work at present and has been unable to do so for some time. He has acknowledged he has a mental illness, and not only that it was manifesting itself in May 2004 and subsequently, but that he has experienced similar illness before. If he were to be reinstated it would probably be to the 'graveyard' shift - being the shift he had worked, preferred to work, and had agreed to continue working - and there would be serious concerns not just about the effect of his health on his ability to work but also about his safety on such a shift. Even if some other shift was acceptable, for all of the above reasons I do not consider it practicable for Mr Pradeep to be reinstated.

2. Reimbursement

[43] Mr Pradeep had a personal grievance arising out of his dismissal on 21 May 2004 and Caltex' handling of the matter up to but not including 16 June 2004. Part of the arrangements for resolving the grievance included reimbursing Mr Pradeep for remuneration lost between 21 May 2004 and 16 June 2004, and payments in respect of statutory holidays and annual leave. Because of the confusion that followed, these payments were not made at the time.

[44] During the investigation meeting Caltex accepted liability in respect of the statutory holidays and annual leave, as well as for the payment of interest on that amount. I am told the money has been paid to Mr Pradeep's bank account. Assuming that is so, I take that matter no further.

[45] The remuneration lost between 21 May 2004 and 16 June 2004 has not been paid. It should be paid, and I order accordingly.

[46] However Mr Pradeep's loss of remuneration after 16 June was caused by his reaction to Caltex' attempts to confirm the parties' arrangements for the return to work, coupled with his acknowledged illness and subsequent inability to work. I therefore decline to award any further reimbursement of lost remuneration.

3. Compensation

[47] Difficult though it was to identify the exact nature of Mr Pradeep's concerns, and what he wants done about them, I do not consider it appropriate to overlook the fact that Mr Pradeep raised a personal grievance prior to 16 June. A return to work was agreed, but Mr Pradeep had already expressed unhappiness about the way he had been treated and that should have been taken into account. Moreover, albeit on a substantially misconceived basis, he did not agree that all matters between the parties were resolved. Accordingly I do not believe the 16 June letter can be read as a full and final settlement of Mr Pradeep's personal grievance.

[48] At the same time I do not believe that omission has contributed to any significant degree to the injury to his feelings which Mr Pradeep now expresses. A very substantial part of that injury has other causes, including Mr Pradeep's focus on concerns which have either no legal basis or for which no remedy is available.

[49] I therefore order Caltex to pay Mr Pradeep the sum of \$2,500 as compensation for the injury to his feelings arising from his personal grievance.

4. Other claims for damages

[50] I have already dismissed the claim in respect of treatment for Mr Pradeep's son. To the extent that the claim for compensation for loss of reputation can be substantiated with reference to Mr Pradeep's concerns about his son, I have addressed that matter with reference to compensation for injury to feelings arising out of his personal grievance. The claim for reimbursement of the 'overseas lawyer's costs' is appropriately dealt with as a claim for costs following this determination.

[51] To the extent there is any substance in the remaining claims, I have addressed it in the context of the unjustified dismissal. I do not propose to penalise Caltex again in that respect. Otherwise the claims are either not made out, or there has been no quantifiable loss. Accordingly I dismiss them.

Summary of orders

[52] Reinstatement is declined.

[53] Caltex is ordered to reimburse Mr Pradeep for remuneration lost between 21 May and 16 June 2004.

[54] Caltex is ordered to pay Mr Pradeep the sum of \$2,500 as compensation for injury to his feelings.

Costs

[55] Costs are reserved. The parties may make written application to the Authority to determine the matter if they wish.

R A Monaghan
Member, Employment Relations Authority