

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Andrew Stevens (Applicant)  
**AND** Unibag Packaging Limited (Respondent)  
**REPRESENTATIVES** Jills Angus-Burney for Applicant  
Deidre Marshall for Respondent  
**MEMBER OF AUTHORITY** G J Wood  
**INVESTIGATION  
MEETING** Wellington 17 January and 1 February 2007  
**FURTHER SUBMISSIONS** Received by 13 February 2007  
**DATE OF  
DETERMINATION** 1 March 2007

**DETERMINATION OF THE AUTHORITY**

**The Employment Relationship Problem**

1. The applicant, Mr Andrew Stevens, claims that he was unjustifiably dismissed by the respondent, Unibag Packaging Limited (Unibag), which claims that he was not dismissed but rather his employment was terminated by the operation of the parties' abandonment clause. Mr Stevens claims that his dismissal was unjustified because there was no investigation of the matters leading to him leaving the workplace, he had no proper opportunity to respond and that a fair and reasonable employer would not have dismissed a young and inexperienced worker in all the circumstances.

**The Facts**

2. Andrew Stevens is a 16 year old schoolboy who had a full time job after school with Unibag, a manufacturer of paper bags, as a packer. Mr Stevens started work for Unibag on 2 October 2006. While eligible to be paid as a junior, Mr Stevens was remunerated by Unibag as an adult packer, meaning that he was paid significantly

more per hour. By the time his employment ended he was earning \$10.56 per hour. He worked the afternoon shift, commencing straight after school at 3.30pm, rather than 3.00pm, as expected of other workers on that shift. The afternoon shift required the labour of significantly less staff than the day shift on which his supervisor, Ms Asomaliu Ohlsen, worked.

3. During the course of his employment Mr Stevens became concerned that because he operated a shrink wrap machine he should have been paid as an operator, who earned more than packers. He also came to believe that his supervisor, Ms Ohlsen, was being paid significantly in excess of him for doing a similar job, namely \$16 per hour.
4. It is clear from the investigation that Mr Stevens was wrong about both of these subjects and had been told so by the production manager, Mr Andrew Ford. For its part, Unibag had some concerns about Mr Stevens' performance and a meeting was held about that in late October 2006.
5. The events of particular relevance here, however, occurred from Wednesday 13 December 2006 onward. Mr Stevens had raised the above concerns, together with concerns about the way he was treated by Ms Ohlsen, with his union earlier in the day. He told who he thought was his delegate, Ms Elizabeth Rankin, that Ms Ohlsen was standing over him telling him he was not doing enough work and telling him that she wanted to take him to Andrew Ford. Ms Rankin's evidence, which I accept, was that she believed Mr Stevens, as she had observed Ms Ohlsen telling staff in the smoko room that her staff were "*useless*" and "*dickheads*".
6. Ms Rankin passed Mr Stevens' concerns on to the new delegate for Unibag, Mr Darryl Thompson. Mr Thompson took Mr Stevens with him and tried to arrange a meeting with Mr Ford. Mr Ford was unavailable, but later approached Mr Stevens at his work station. Mr Stevens raised with Mr Ford his concerns about his pay rate. Mr Ford explained that he was not an operator but a packer and that he was being correctly paid. Mr Stevens also raised his complaints about Ms Ohlsen's remuneration, but was assured that Ms Ohlsen was not earning anything like \$16 per hour, but was paid more than him because she was a supervisor.

7. Mr Ford then approached Mr Thompson to see if there was anything further that needed to be discussed. I accept that Mr Stevens was there but that he did not contribute much, if anything, to the conversation between Mr Ford and Mr Thompson, which went on for around an hour.
8. I find that while Mr Thompson did raise the issue of whether it was safe for Mr Stevens to be operating the shrink wrap machine in the light of insufficient training, the conversation focussed on the wages claim and Mr Stevens' work attitude. Mr Thompson, Mr Stevens and Mr Ford all agreed that Mr Stevens, although largely silent, was quite agitated during this meeting.
9. On Mr Stevens' return I find that Ms Ohlsen told him that he was not good enough for the company and that he was also told, in language that included swear words, that if he didn't want to work he could leave, as there were plenty of others who needed money at that time of year.
10. While Ms Ohlsen denied all the accusations against her, I prefer the evidence of Mr Stevens and the union delegates over Ms Ohlsen, because they all gave consistent, direct and open evidence. In particular, in his oral evidence Mr Stevens was prepared to concede matters even though they were to his disadvantage, whereas Ms Ohlsen, whom I accept has English as a second language, simply responded with blanket denials as to any poor behaviour on her part.
11. Therefore, although there can be no certainty over what occurred, I prefer the evidence of the other witnesses to Ms Ohlsen specifically as to her treatment towards Mr Stevens on 13 December 2006.
12. Mr Stevens was very upset about all the above matters and wanted to leave his shift. He sought counsel from Ms Rankin and another worker, who both advised him against doing so. Despite this, he waited until Ms Ohlsen had completed her overtime at around 7.30pm, and then left.
13. I do not accept that his reasons for doing so were brought about by a concern that he might do or say something stupid, because his concerns were mainly with his pay and Ms Ohlsen and she had just left. Rather I consider that he had simply had enough of

the treatment he had been receiving from Ms Ohlsen and was upset that Mr Ford would not change his pay rate and therefore he could not face attending work at that time.

14. Mr Stevens decided not to go to work the next two days and not to contact Unibag about his whereabouts. He did not take any advice from the union either. He spent the time resting, helping with family activities and playing with his brothers. He only decided to return to work on the Monday when it was clear that the cupboards at home were getting bare and he realised that without a job the family would be struggling to meet its commitments for food and other necessities of life.
15. Obviously Ms Ohlsen knew Mr Stevens had not presented himself for work the previous two days. Mr Ford then became aware of that fact. It was determined that there was no need to find cover for Mr Stevens because there were sufficient packers on duty to meet Unibag's requirements for these two days. No one from Unibag made any effort to contact Mr Stevens to see why he was not at work.
16. The union organiser for the site, Mr Mark James, had become aware of Mr Stevens' concerns, but not his later absence, on 13 December and contacted Unibag the next day about that and other matters. A meeting was held on site between Mr James and Mr Ford on the 14th. It was clear that the meeting did not go well, particularly as the two men clashed over Mr Ford's alleged intimidatory behaviour towards staff. During that meeting Mr James also raised the issue about Ms Ohlsen's treatment of staff, and her bullying of Mr Stevens in particular. Mr Ford commented that he thought Mr Stevens only had an issue with his pay rate. Mr James replied that the union would not tolerate bullying of its members.
17. After that meeting Mr Ford took the matter up with Ms Ohlsen. She denied the accusations by way of making a joke. Mr Ford told her that this was a serious allegation and that she should take it seriously. Ms Ohlsen then again denied treating Mr Stevens unfairly, but said she simply instructed him in how to do his job and that he was to ensure that he did all of the duties required of him. The mistreatment of Mr Stevens, coupled with an inadequate investigation by Mr Ford, indicate to me that Unibag would do well to review its staff supervision policies and training.

18. Mr Stevens returned to work at his usual starting time on Monday 18 December and was approached about ¾ hour later by Mr Ford. Mr Ford took him to one side and asked him why he had not been at work. He told Mr Ford that he had been sick. When asked why he had not made any effort to contact Unibag, Mr Stevens told Mr Ford that his home phone was disconnected and that he did not have any credit on his cell phone. I note that while these statements are correct, they are not good cause for Mr Stevens not contacting Unibag about his absence, which was the same conclusion Mr Ford reached.
19. Mr Ford asked Mr Stevens what his illness in fact was and was told that he was just “*pissed off*” about the events of last Wednesday and did not feel like coming in. Mr Ford did not press him on this, but rather told him that it was unacceptable. While Mr Ford knew that Mr Stevens was concerned about the treatment by his supervisor on that day, he did not follow the matter up with him. In fact, he went further and discounted that as a reason in his own mind, believing that the issue was just pay rates. He drew this conclusion because the claim of unfair treatment by Ms Ohlsen had not been brought up before by Mr Stevens and because he discounted the union’s claims on his behalf, as the union had complained about his own behaviour and he considered that his treatment of staff was in no way unfair.
20. Mr Ford and Mr Stevens then had a discussion over the length of time that Mr Stevens had been away. Mr Ford next left Mr Stevens to check the point. He found out that Mr Stevens had in fact been away for more than the time permitted under the abandonment clause. He then discussed the matter with Unibag’s Acting General Manager and determined that Mr Stevens had breached the abandonment clause in the collective employment agreement. It states:
- “Where employees absent themselves from work for a continuous period exceeding two working days without notification and good cause or consent from the employer, they shall be deemed to have terminated their employment. An employee who is unable to notify the employer of absence due to unforeseen hospitalisation or similar cause shall be given the opportunity of reinstatement.”*
21. Not only did Mr Ford conclude that Mr Stevens was in breach of the abandonment clause, but there was no reason why he should be reinstated because he was able to notify Unibag of his absence but had chosen not to. Furthermore, Mr Ford was

satisfied that no good cause had been shown for Mr Stevens' absence. He therefore terminated Mr Stevens' employment with immediate effect. He wrote a letter that day to Mr Stevens to the same effect entitled "Termination of Employment". It states:

*"I refer to clause 20.3 of the collective agreement, and hereby notify you of the termination of your services.*

*You left the premises early on Wednesday without clocking out and failed to return to work on Thursday and on Friday.*

*No attempt was made to contact either myself or the company to give notice of your failure to attend work, and during our discussions you failed to give good cause for your absenteeism, simply stating that you did not feel like coming in."*

22. Subsequently, interim reinstatement was sought by the union on Mr Stevens' behalf. That issue was settled as a result of undertakings by Unibag to continue to pay Mr Stevens until the conclusion of the Authority's investigation. The matter is of some urgency and it therefore has been granted priority by the Authority in terms of scheduling and the issuing of this determination.
23. Despite attending mediation and efforts made during the course of the investigation meeting to resolve the employment relationship problem, this has not proved possible. Therefore it falls to the Authority to make a determination. Subsequently I had a conference call with the parties representatives so that they could make submissions on whether an alternative grievance, of unjustifiable action, should be found under s. 122, based on the treatment of Mr Stevens by his supervisor, and whether a recommendation under s. 123(1)(ca) should also be made.

## **The Law**

24. In *Pitolua v. Auckland City Council Abattoir* [1992] 1 ERNZ 693 the Court of Appeal held that once a factual situation contemplated by an award clause on abandonment had occurred the employment came to an end in accordance with that clause. In view of the meaning and effect of the clause in *Pitolua* the Court of Appeal held that a telegram sent by the employer terminating the employment was unnecessary and that its despatch could not add to the obligations imposed by the agreement itself. In that case the worker had terminated his own employment and thus his employment had already come to an end before the telegram had been sent.

25. In *EM Ramsbottom Ltd v. Chambers* [2000] 2 ERNZ 97 the Court of Appeal concluded that a company's failure to make inquiry of a worker as to his intentions after apparently abandoning the employment can not constitute that worker's dismissal. The Court of Appeal went on to hold, however, that there was substantial force in the submission that where the issue is whether the employee abandoned the employment, the employer should be cautious in drawing that inference and must face a high threshold in contending that the employment ended on the employee's initiative in that way. The Court of Appeal went on to hold that the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly indicated an intention to finally end his or her employment.
26. In *Lwin v A Honest International Co Ltd* [2003] 1 ERNZ 387 the Employment Court took note of the above comments in *Ramsbottom* and stated at para.34:

*"34. Mr Simon was clearly concerned whether the plaintiff had in fact abandoned her employment and was duly cautious in drawing that inference and took the very proper step of writing to her on 18 June to clarify the position. Had that letter been sent to the correct address then the defendant would have discharged its obligation of trust and fair dealing in the employment relationship. Unfortunately for the parties, the letter did not go to the correct address. This did not allow the plaintiff to clarify the situation but nor did it permit the defendant to assume that she had abandoned her employment and to arrange another teacher in her stead.*

*35. For these reasons I must conclude, contrary to the Authority's determination, that there was no abandonment of employment and that the actions of the defendant constituted dismissal."*

27. All of the cases make it clear that the words in specific clauses in the employment agreement and the facts of the case are vital. Also relevant are the provisions provided for in the Employment Relations Amendment Act 2004. In particular, s.4(1A) provides:

*"The duty of good faith in subsection (1) –*

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and*
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; ..."*

28. Furthermore, if there has been a dismissal or an unjustifiable action in this case s.103A provides that the question of whether a dismissal or an action was justifiable must be

determined, on an objective basis, 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 the dismissal or action occurred.

### **Determination**

29. It was clear that Mr Ford relied on the abandonment clause to notify Mr Stevens of the termination of his employment. I accept that Mr Stevens had absented himself from work for a continuous period exceeding two working days, as was accepted by Mr Stevens himself. It was clear he did so without consent from his employer. I also accept that he did so without notification and good cause. Mr Stevens needed to show both good cause and notification under the agreed clause. Not only is this consistent with the case law, but the fact that the clause provides for an opportunity for workers to be reinstated where they are unable to notify the employer of their absence supports this conclusion.
30. It was clear that Mr Stevens did not provide notification. The issue of whether he had good cause is more problematic, particularly as it is linked to the issue of non-notification.
31. Upon full investigation by the Authority, I find that Mr Stevens did not have good cause to absent himself from work without notification. He was concerned about his pay rate, but had no grounds to insist on re-classification. Even if he did that could have been worked through with his union, pursuant to the collective agreement between the parties. I accept that Mr Stevens was also subjected to unacceptable treatment in the workplace on the day that he walked out. This was a matter, however, that he could have taken up with Mr Ford but did not at any time. The fact that he was prepared to wait several hours until after Ms Ohlsen had left shows that he could have dealt with the legitimate concerns he had about her behaviour while remaining at work, particularly with the union's support. In that sense, Mr Stevens may have been deemed to have abandoned his employment pursuant to the collective agreement.
32. *Lwin* must be distinguished because there was no abandonment clause in Ms Lwin's employment agreement. Here, as in *Pitolua*, the parties had explicitly agreed, as part of a collective agreement, that a worker who absented themselves for more than two

working days has been deemed to have abandoned their employment. The parties had clearly decided that this period was reasonable for both parties, allowing Unibag not to have to place too much administrative resources into chasing up absent workers, while recognising that two working days (plus the other provisions in the clause as to reinstatement) provided sufficient protection for the staff. As a matter of contract, that provision must be given effect to. Thus Unibag was not under any obligation to contact Mr Stevens, however desirable that may appear to be in hindsight.

33. I have considered whether Mr Stevens has a claim for constructive dismissal given his treatment by Ms Ohlsen, although it is difficult to reconcile such a claim when married to reinstatement. I determine that Ms Ohlsen's treatment of Mr Stevens was a factor, but not the main one, in him leaving work and not returning for several days. The main reason was over his pay relative to others, but as there was no breach of contract by Unibag on that matter there can not be a constructive dismissal based on breach of duty.
34. Ms Ohlsen's behaviour certainly unjustifiably disadvantaged Mr Stevens in his employment, however. It made him feel unsafe at work and was part of the reason why he subsequently lost his job. He is entitled to compensation accordingly, as he was afraid of being further abused, and even of being chased down the road if he left while Ms Ohlsen was still at work. Subsequently he felt bad about his whole working experience, a serious matter for a young worker trying to make ends meet for his family while also attending school full-time. Compensation of \$4000 is therefore appropriate and I so order.
35. Furthermore, I recommend, pursuant to s.123(1)(ca), that Unibag review its staff supervision policies and training to prevent similar employment relationships occurring.
36. Were it not for the contractual provision on abandonment I would have reinstated Mr Stevens, because his position, except as to notification, was one worthy of sympathetic treatment. Mr Ford, for instance, gave evidence that had Mr Stevens come to him and explained all the circumstances he may have been more compassionate towards him, but he presented as someone who was not interested in the job. Given that I am

confident that both Mr Stevens and Ms Ohlsen are now better placed to understand their mutual rights and responsibilities there is no practical bar to reinstatement. Furthermore, should Unibag make such an offer of reinstatement voluntarily, it would seem appropriate that no remedy for unjustifiable disadvantage should apply in addition, especially given Unibag's payment of Mr Stevens wages up until the investigation meeting.

### **Costs**

37. Costs are reserved.

**G J Wood**  
**Member of Employment Relations Authority**