

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN William David Gittoes (Applicant)
AND Gorrie Fuel (SI) Limited (First Respondent)
AND Don Gorrie (Second Respondent)
REPRESENTATIVES Timothy J Twomey, Counsel for Applicant
Don Gorrie for First and Second Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 6 April 2006
DATE OF DETERMINATION 2 May 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] William Gittoes worked for Gorrie Fuel (SI) Limited from 20 August 2004 until he resigned by giving 2 weeks notice in writing to Don Gorrie in March 2005. Don Gorrie is the sole shareholder and director of Gorrie Fuel (SI) Limited.

[2] In his statement of problem, Mr Gittoes says that he was constructively dismissed and has a personal grievance against the company. To remedy the grievance, Mr Gittoes is claiming compensation for distress and reimbursement of lost wages. Mr Gittoes also says that he has an unjustified disadvantage grievance against the company in connection with a reduction in his wages. To remedy that grievance, he seeks reimbursement of lost wages from 7 January 2005 to the date the employment terminated.

[3] To determine these grievances, it is necessary to refer to the original employment arrangements, make findings about what happened on Saturday 27 November 2004 and Wednesday 1 December 2004, explain what happened to Mr Gittoes' pay after Christmas and make findings about why Mr Gittoes resigned. The law about constructive dismissal must then be applied to assess whether there is any grievance.

[4] There is an alternative claim made by Mr Gittoes against Mr Gorrie personally. He says that Mr Gorrie made statements about the terms or conditions of the employment that were misleading or deceptive or were likely to mislead or deceive him and he seeks damages for distress under section 43 (2) (d) the Fair Trading Act 1986. If a grievance is made out, it may not be necessary to make any findings about this part of the problem.

The employment arrangements

[5] The company placed an advertisement for a mechanic. The relevant sections read *MECHANIC \$23.50 PER HOUR You must have ... Work a 5½ day week Supervisory skills for this position* When interviewed, Mr Gittoes was told by Mr Gorrie that the hours of work were from 8am until 5pm Monday to Friday and from 9am until 1pm on Saturday. Sometime after the interview, Mr Gorrie contacted Mr Gittoes and provided him with a copy of the proposed written employment agreement. That was signed by both men on 20 August 2004, the day the employment commenced.

[6] There are several clauses in the employment agreement that should be mentioned. Clause 9.1 says **Normal hours:** *The Employee will work within the hours specified in Schedule 1, or, if unable to do so, notify the Employer as soon as possible.* Clause 13.1 says **Notice:** *Either party may terminate this agreement by giving the period of notice specified in Schedule 1.* Clause 13.3 says **Abandonment:** *Where the employee is, absent from work for more than 2 working days without notifying the Employer, the Employee will be deemed to have terminated this agreement without notice* Clause 18.6 says **Before entering into a formal disciplinary process the Employee will be given a reasonable opportunity to improve. ...In some other cases, it may be more appropriate to move directly to the formal procedures.** Clause 18.7 says *Before considering any form of disciplinary action an investigation into the alleged misconduct must be carried out promptly.* Clause 18.9 says *If the Employer decides to issue a warning, this will be formally and clearly issued and confirmed in writing...Note: All warnings will remain effective for a period of three months.*

[7] The attached schedule 1 says **Hours of Work.** *The position is that of an on-call employee to perform work as and when requested by the employer. Hours so worked shall be paid at the rate above [\$23.50], for each hour worked ... and Period of notice for termination: 2 weeks but handwritten alongside is Will Gittoes to give 3 months notice of resigning. Can be reduced by negotiation.*

[8] The company operates a petrol station business in Christchurch. Mr Gorrie thought that there was a business opportunity to provide light mechanical work such as WOFs to the service station customers by opening a workshop for regular hours. Although the employment agreement describes Mr Gittoes as a Service Station Attendant, he was actually employed as a mechanic to man the workshop. Upon starting work, Mr Gittoes normally worked 44 hours per week in accordance with the days and hours of work that had been discussed during the interview and he received \$2068.00 gross for a full fortnight's work.

What happened on and after 27 November 2004?

[9] Mr Gittoes was not a key holder because the petrol station opened earlier and closed later than the workshop. However, when he arrived at work on Saturday 27 November 2004, he found the business still locked up. The petrol station attendant told him that the keyholder had not arrived and that Mr Gorrie had been called. A while later, Mr Gorrie arrived and opened up. Mr Gittoes attended to his usual duties while Mr Gorrie and the other employee dealt with the influx of petrol station customers. When there was a lull in trade, Mr Gorrie went in to the workshop to speak to Mr Gittoes. No-one else witnessed the exchange and there is now some dispute about what was said.

[10] Mr Gittoes says that Mr Gorrie accused him of not being much help with the influx of customers and really launched into him about that. Mr Gittoes then took off his overalls and said *If you're so clever, there you go* and left. Mr Gittoes says that no other issue was mentioned by Mr Gorrie at that time. Mr Gorrie's evidence is that he started to talk to Mr Gittoes about a particular

job because the bill seemed to be too low. Mr Gorrie could not tell me the customer name, the vehicle or the job. Mr Gorrie says that he did not get a response but that Mr Gittoes started taking off his overalls and *shot out the door* saying *I'm not going to be spoken to like that*. Mr Gorrie explains that by saying that Mr Gittoes probably expected a *rark up* and left to avoid it. Mr Gorrie denies *tearing a strip* off Mr Gittoes. He says that he thought Mr Gittoes' attitude towards helping out that morning was a bit casual but doubts that he actually mentioned that issue to Mr Gittoes at that stage.

[11] It is more likely than not that Mr Gorrie would have spoken to Mr Gittoes about his view that Mr Gittoes did not help out sufficiently that morning. That would be why he took the opportunity as soon as there was a lull in trade. Accordingly, I reject Mr Gorrie's evidence that he only spoke to Mr Gittoes about a particular job and that Mr Gittoes left to avoid a *rark up*. Mr Gittoes walked out because he objected to the manner in which Mr Gorrie spoke to him.

[12] Mr Gittoes did not report for work on Monday morning or ring. Mr Gorrie did not attempt to contact Mr Gittoes. On Tuesday 30 November Mr Gittoes did go in to work. Mr Gorrie was not present so Mr Gittoes left a note saying he was unsure if Mr Gorrie wanted him to work and for Mr Gorrie to call him and let him know about Wednesday. When Mr Gittoes went in on Wednesday 1 December, Mr Gorrie gave him a letter requesting a meeting to discuss the absence from work. The letter advised that there was a risk that the employment might be terminated and that Mr Gittoes was entitled to have a support person present. Mr Gittoes waived that offer and signed Mr Gorrie's hand written note to that effect on the letter. This letter is in the exhibits and was produced by Mr Gorrie on the day of the investigation meeting. Mr Gittoes says that he received a warning letter but his recollection about a warning letter probably relates to the 1 December 2004 letter requesting a meeting.

[13] Both men accept that there was a discussion about a number of issues during the meeting on 1 December. Both say that the meeting was tape-recorded by Mr Gorrie but Mr Gorrie has not produced the tape despite several directions to do so. He now says that he cannot locate any such tape and that the recorder might not have been activated properly. However, it is not necessary to canvass the issues or the extent to which they disagree about what was discussed. Mr Gorrie says that matters were left *a little open* and also that *you'd have to say that he got a verbal warning*. The employment agreement required any waning to be confirmed in writing and that did not happen. What did happen was that Mr Gittoes resumed his previous pattern of work. His pay for the fortnight ending 5 December 2004 was docked but he got his usual pay for the period ending 19 December 2004.

Mr Gittoes' pay after Christmas

[14] Mr Gorrie told Mr Gittoes to start at 10am rather than 8am over the Christmas period, and Mr Gittoes seems to have continued on these reduced hours in the New Year. However, Mr Gittoes' pay no longer appeared to equate with his actual hours of work. Mr Gittoes says that he asked Mr Gorrie about the reasons for the variation in his pay and Mr Gorrie accepts that Mr Gittoes probably did ask. However, Mr Gorrie did not explain the reason for the variation in pay.

[15] The 2005 pay periods ending before Mr Gittoes resigned show gross pays of \$1750.00, \$1645.00, \$1316.00, \$1410.00, \$1457.00 and \$1128.00.

The Resignation

[16] Mr Gittoes wrote out his resignation on 22 March and Mr Gorrie received it on 23 March. It reads *...It has become impossible for me to carry on working for you, not knowing from week to*

week what I would be paid – irrespective of the hours which I have worked. I have asked you for wage slips on previous occasions but you did not want to provide them. Since Christmas, my pay has dropped dramatically – and on many occasions does not seem to have born any relation to my usual 76 hours per fortnight. Last week it reached an all time low of just under \$900 net for the fortnight during which I worked 69 hours – I can't make the figures add up. I would be grateful if you could check this amount, and let me have an explanation I would also be grateful for an explanation of the last few weeks' pay,.... I have been trying to discuss this matter with you for the last three days, but you haven't been on site long enough to talk to.

[17] Mr Gorrie responded in writing saying that the resignation was received on 23 March, that he did not believe he should accept it, that Mr Gittoes should seek some advice and that there has been a lack of trust and confidence in the relationship. Mr Gittoes responded in turn saying that he would extend his notice period to ensure it covered a full two weeks and *If we could meet before the end of tomorrow, Friday 1st April and sort out the matter of my pay and a statement of that last couple of months' pay, then I would be glad to extend my notice by a further period of time to enable you to replace me. Once again, I have been unable to speak to you during working hours and have had no response to my message left on your mobile phone.*

[18] Lalage Gittoes is Mr Gittoes' wife. Because there had been no explanation about the variation in pay, she rang Mr Gorrie at about 8am on 1 April. Mr Gorrie says that he spoke to Mr Gittoes' wife over the phone to do with the pay and she was pretty close to hysterical. Mrs Gittoes agrees that she was very distressed. At lunchtime on 1 April Mr Gorrie went and spoke to Mr Gittoes while he was sitting in his car eating his lunch. Mr Gorrie told Mr Gittoes that his work was being charged out on completed jobs and that he was assessing Mr Gittoes' wages on the same basis.

[19] Nothing else of relevance happened between the two men and Mr Gittoes finished up soon after.

[20] In his evidence to the Authority Mr Gorrie referred to the terms of the employment agreement to justify his unilateral and unexplained decision to change the basis on which Mr Gittoes was paid.

Constructive dismissal?

[21] In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 the Court of Appeal held that dismissal includes cases where the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing an employee to resign and where a breach of duty by an employer leads an employee to resign. The law in respect of the latter category of cases has been developed in *Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW Inc* [1994] 1 ERNZ 168.

[22] I find that Mr Gittoes resigned because of the unexplained and significant variation in his fortnightly pays after Christmas. That is clear enough from the resignation letter and is supported by his and Mrs Gittoes' evidence to the Authority. Mr Gittoes had no other job to go to and there was no other reason for his resignation.

[23] Mr Gorrie told me that Mr Gittoes was an on call mechanic and that he was not doing a full days work so he started to pay him for the hours charged out rather than his hours of attendance at work. Mr Gorrie says that he was therefore paying Mr Gittoes on an *on-call basis*. Mr Gorrie did not have with him the details of the formula but that it was *a little bit of a rule of thumb – I worked out what time was being charged out and I gave him his hourly rate plus a percentage to cover administration*. He says that this applied *from Christmas*.

[24] To describe Mr Gittoes' employment as *on call* is nonsense in light of the whole written agreement and the work history but that is not really the point. Mr Gittoes was entitled under the terms of the agreement to be paid \$23.50 per hour for each and every hour he was required to attend work and that is expressly said in the schedule under the **Hours of Work** heading. At Christmas time, Mr Gorrie stopped doing this and instead started paying Mr Gittoes based on some unannounced assessment of his productivity. Mr Gorrie did that on his evidence because of some dissatisfaction with Mr Gittoes' productivity. That was a serious and continuing breach of the employment agreement by the employer.

[25] Mr Gittoes sought an explanation on a number of occasions but did not receive one. It is foreseeable that an employee who has their pay significantly reduced without any explanation will leave the employment sooner or later. I also find that Mr Gorrie knew that Mr Gittoes would eventually resign. When he received Mr Gittoes' resignation, Mr Gorrie studiously ignored the request for an explanation about the reduction in pay and attempted to craft a possible defence to any grievance claim by purporting not to accept the resignation while acknowledging a lack of trust and confidence.

[26] Accordingly, I find that Mr Gittoes was constructively dismissed and that he has a personal grievance against the company.

Unjustified Disadvantage?

[27] The company's failure to pay Mr Gittoes in accordance with the terms of the employment agreement could be seen as either an unjustified disadvantage grievance or a claim for arrears of wages payable under the agreement. I prefer the latter view of the problem.

[28] I accept that there was the ability under the terms of the employment agreement for the employer to change Mr Gittoes' hours of work and it is apparent from the resignation letter that Mr Gittoes had no difficulty with some variation in his hours of work. For example, he refers in the letter without complaint to his usual 76 hours of work per fortnight and the 69 hours worked in the previous period. That is a change from the 88 hours generally worked before Christmas. The company has no record of Mr Gittoes' actual hours of work and I accept the evidence based on the resignation letter that after New Year Mr Gittoes usually worked 76 hours per fortnight but worked only 69 hours in the period ending 13 March 2005.

[29] For the periods ending 16 January, 30 January, 13 February, 27 February, 13 March and 27 March Mr Gittoes should have been paid for 76, 76, 76, 76, 69 and 76 hours respectively, a total of 449 hours at \$23.50 equals \$10,551.50. He was actually paid \$8084.00 so he is owed \$2,467.50 plus holiday pay. The company is to pay \$2,615.55 to Mr Gittoes as arrears of wages and holiday pay.

[30] Because the employment agreement stipulated payment for time worked rather than productivity, the reasons Mr Gorrie now relies on for changing the pay are irrelevant.

Remedies for the dismissal grievance

[31] I accept that Mr Gittoes was out of work for about 7 weeks from when the employment ended to the beginning of June when he obtained another job. Mr Gorrie argues that Mr Gittoes jumped the gun by continuing with his resignation even after receipt of Mr Gorrie's letter dated 24 March 2005. There might have been merit in the point if Mr Gorrie had given an explanation at the time about the change to Mr Gittoes pay. That could have led to an acknowledgement by the company

that it could not unilaterally vary the agreement and an offer to repay the arrears. However, Mr Gorrie omitted to explain what had been done and it was too late to retrieve the situation by the time of Mrs Gittoes' phone exchange with Mr Gorrie. As a result, I find that all the income lost by Mr Gittoes is attributable to the grievance. The company is to reimburse Mr Gittoes for the loss based on the 76 hours referred to in the resignation letter for 7 weeks, a total of \$6,251.00.

[32] There is a further claim by Mr Gittoes for the difference between his earnings at the new part-time job and the income he would have received from the company for another 6 weeks, the balance of 3 months after the dismissal. I accept that Mr Gittoes is entitled to reimbursement for that loss. The lost income from the company should be assessed on the basis of the 76 hours per fortnight referred to above. I have not been given details of the actual income from the new job. Counsel for Mr Gittoes should provide wage records from the new job for the relevant period and the parties should endeavour to reach agreement. Leave is reserved if there is any difficulty.

[33] There is a claim for \$15,000.00 compensation for distress. Mr & Mrs Gittoes and their three children emigrated to New Zealand in December 2003 and Mr Gittoes left his original New Zealand employment to take up the position at Gorrie Fuel (SI) Limited. I accept Mrs Gittoes' evidence about their limited assets and the difficult situation visited on the family because of the unexplained variations in Mr Gittoes' pay. I accept Mrs Gittoes' evidence that *The stress was enormous. ...I was pushing him to keep going until he found another job and he was becoming increasingly unhappy and irritable and was losing confidence in himself. It put a huge strain on our marriage, and on the family relationships all round.* Mrs Gittoes goes on to explain that Mr Gittoes' confidence has been shattered and his bewilderment about what happened. She says that Mr Gittoes has even begun to regret moving to New Zealand. Again, there is no reason to doubt her evidence.

[34] To remedy the distress and other emotional effects on Mr Gittoes arising from the grievance, I order the company to pay Mr Gittoes \$8,000.00.

[35] Much of Mr Gorrie's statement of evidence is directed at criticism of Mr Gittoes' work. It is correct that Mr Gorrie became dissatisfied with aspects of Mr Gittoes' work performance. The company had the opportunity to formally warn Mr Gittoes about these matters on 1 December 2004 but elected not to do so. In large measure, Mr Gorrie relies on the same matters to justify his decision to reduce Mr Gittoes' pay, the action which caused Mr Gittoes' resignation. If I assume for present purposes that Mr Gorrie's criticism are accurate, they cannot amount to actions by Mr Gittoes that contributed to the situation giving rise to the grievance. The company could have utilised the disciplinary processes in the employment agreement but Mr Gorrie chose to breach it instead. That is what gave rise to the grievance, not Mr Gittoes' actions.

Misleading conduct

[36] I dismiss the claim against Mr Gorrie personally. It is advanced as an alternative claim should the other complaints fail. Given the findings above upholding the grievance and the arrears claim it is not necessary to take this matter any further.

Summary

[37] Gorrie Fuel (SI) Limited is to pay Mr Gittoes \$2,615.55 as arrears of wages and holiday pay pursuant to section 131 (1) of the Employment Relations Act 2000.

[38] Gorrie Fuel (SI) Limited unjustifiably dismissed Mr Gittoes.

[39] As a remedy for that grievance, Gorrie Fuel (SI) Limited is to pay Mr Gittoes \$6,251.00 plus a further sum to be determined in accordance with paragraph 32 above as reimbursement of lost wages. This order is made pursuant to section 128 (2) of the Employment Relations Act 2000.

[40] As a further remedy for the grievance, Gorrie Fuel (SI) Limited is to pay Mr Gittoes \$8,000.00 compensation pursuant to section 123 (c) (i) of the Employment Relations Act 2000.

[41] Costs are reserved.

Good faith

[42] The respondents were required to provide relevant documents to the Authority and the applicant in a notice of directions dated 21 December 2005. There was a second phone conference on 7 February this time involving Mr Gorrie. A further direction was made for the respondents to provide any tape recording of a meeting between Mr Gorrie and Mr Gittoes. Despite these attempts to ensure the exchange of relevant material, Mr Gorrie attended the investigation meeting with a pile of notes apparently relevant to matters as he referred to them while giving evidence. I required him to hand over relevant documents and he did provide some. Others he said were subject to legal privilege. Because it seemed that there were more relevant documents still undisclosed and Mr Gorrie said he was going to get legal advice, I made a further order on 6 April 2006 requiring the production of relevant documents and a list of any documents said to be subject to legal privilege. The importance of strict adherence to the direction was explained to Mr Gorrie in person and in the written direction. A fax was received from Mr Gorrie on 19 April with further documents, some relevant which should have been disclosed earlier. However, no list of the allegedly privileged material was provided. The explanation mentioned earlier about the tape recording was also given.

[43] I am not confident that Mr Gorrie has disclosed all relevant documents and he has not provided a list of allegedly privileged documents. His actions have obstructed rather than facilitated the investigation.

Philip Cheyne
Member of Employment Relations Authority