Determination Number: CA 63/06
File Number: CEA 111/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Brian Duncan (Applicant)
AND	North Otago Ag-Centre Limited (Respondent)
REPRESENTATIVES	David Polson, Counsel for Applicant Janie Kilkelly, Counsel for Respondent
MEMBER OF AUTHORITY	Paul Montgomery
INVESTIGATION MEETING	29 November 2005
DATE OF DETERMINATION	9 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Duncan claims he was dismissed from his employment with the respondent when, after a dispute over payment for some time off, the respondent's representative told him to *take a hike*. After the statement was made, the applicant returned to his office, then left to seek legal advice and came to the conclusion that he had been dismissed.

[2] The respondent's managing director, Mr McCabe, does not dispute that he made the statement but says it was in the course of a debate over a deduction from the applicant's wages for an absence of 3½ days without authority. Mr McCabe says that when the applicant insisted he be paid for those days of absence, he told Mr Duncan to *take a hike*.

[3] The statement of problem lodged with the Authority makes it clear that Mr Duncan's claim is that he was actually dismissed and relies on the statement above in making his claim.

[4] Mr Duncan sought remedies from the respondent namely, lost wages, $30,000 for hurt and humiliation, compensation for an alleged threat to prevent the applicant from securing future employment, an apology from Mr McCabe in respect of the incident on 7 October 2004, and an undertaking not to blacklist the applicant. He also sought penalties for breaches of the individual employment agreement.

[5] The respondent denies it dismissed the applicant or denigrated him to other employers in the town and district. The respondent accepts that in making the deductions for 1, 8, 9 and 22 September 2004, it acted unlawfully but in ignorance of the law. It declined to grant the remedies sought by the applicant in respect of the dismissal.

[6] For the sake of the record, there was no finalised written employment agreement between the parties. The respondent says it provided the applicant with a proposed agreement but that that agreement was never signed. The applicant says he never saw any proposed agreement until the time this matter went to mediation.

A brief history

[7] Mr Duncan was employed by the respondent and began working on 23 August 2004 as a salesman. The respondent says that the role was predominantly a field sales position at a salary of $35,000 per annum plus commission on sales. In this role, the applicant had the use of a company vehicle for work purposes, including travel to and from the respondent's premises. The applicant says he was dismissed without notice by Mr McCabe on 7 October 2004.

[8] As this is a case in which virtually no facts are agreed between the parties, I will focus only on those issues which need to be decided in order to determine the matter.

[9] After beginning his employment, the applicant was absent from work on a number of occasions to attend to personal matters. He was absent on such matters for a total of seven days and a further two hours on another day. The appointments on 1, 8, 9 and 22 September 2004 became an issue between the parties when the respondent deducted money from the applicant's salary some time later. The deductions were made by the respondent because it believed the applicant had a pre-arranged medical appointment at Dunedin Hospital and an ACC review meeting in Timaru prior to the time he was employed and the respondent believed it could not be expected to pay wages for those days.

[10] Shortly after Mr Duncan commenced his employment with the respondent the two directors, Mr and Mrs McCabe, went on holiday to Australia. While holidaying, Mr McCabe received a phone call from a former employer of the applicant who had seen him working at the respondent's premises. The phone call was redirected from the McCabe home number to Mr McCabe's cellphone. The former employer warned Mr McCabe that Mr Duncan's honesty was questionable.

[11] Upon their return from Australia, Mr and Mrs McCabe met with Mr Duncan on 20 September 2004. They told Mr Duncan of the phone call but said they would not be judging him on that basis and reassured him that they were happy with his work. At the same meeting, the rules regarding the use of the utility vehicle were clarified and the respondent's directors assured Mr Duncan they wanted him to stay but simply wanted a fair day's work from him. Mr Duncan expressed some concern about the information which had been relayed to his employer saying he would always be looking over his shoulder if he stayed in their employment. The respondent says that the applicant said he was happy and he was very pleased to be able to set up his own office the way he wanted it.

[12] The significance of this statement by the applicant is that when Mr Duncan began his employment, no office was available for him in the showroom area so his initial period of employment was taken up in partitioning and painting an area and setting up an office for himself. After leaving his employment, the applicant alleged that the respondent had unilaterally varied the agreement between them and relegated him, in essence, to a handyman. On that basis, he claims a breach of the terms of the employment agreement. Mr McCabe's evidence is that at no time did the applicant complain to him or to any other fellow staff members about the tasks he was undertaking at that time.

[13] The issue of the vehicle is also important as initially the applicant was using the company's utility vehicle. The respondent was in the process of sourcing a suitable vehicle for the applicant to carry basic stock items for sale while calling on rural customers in the course of his duties. The applicant was certainly aware of the respondent's intention in this matter, because he says that when

in Timaru on 9 September 2004 he spent three hours looking for a suitable vehicle. It is on the basis of this time spent searching for a vehicle that the applicant opposed the deduction made in respect of 9 September 2004.

[14] The applicant took 28 and 29 September 2004 off work in order to shift house. This was clearly an extremely stressful event and on 30 September 2004 the applicant telephoned the respondent saying that he believed he was ill. He attended his general practitioner on 4 October 2004 and was given a medical certificate covering the period from 30 September to 7 October 2004. The applicant returned to work on 7 October 2004.

[15] Once the respondent became aware that Mr Duncan was not returning until 7 October 2004, it requested that the ute be returned to the yard so other staff members could use it if the need arose. The vehicle was returned and was used on occasions by other members of staff according to the respondent. The applicant claims that the respondent removed the vehicle from him on a permanent basis.

[16] Another issue between the parties was the issuing of a verbal warning to the applicant on 24 September 2004 and then later another warning was issued for not working on 30 September when the applicant had indicated to the respondent that he was ill. Mr Duncan agrees that the second warning was issued before he provided the medical certificate, but was not withdrawn on the presentation of that certificate. The respondent says that it was attempting to convey clearly to the applicant that the amount of time he was taking off work was simply unacceptable and required him to improve his attendance record.

[17] On 7 October 2004, the applicant returned to work. Mr McCabe says that he was in the back workshop and saw the applicant standing in the middle of the yard. He said that he presumed Mr Duncan wanted to talk to him and so said to him *good morning, do you want to talk to me?* The applicant indicated that he had some issues to discuss so the pair went to the office. There were two other people in the office, namely Mrs McCabe and Jacqui McCabe, the accounts manager and the McCabes' daughter-in-law.

[18] Mr McCabe's evidence says that Mr Duncan demanded that the three days' pay that had been deducted from his pay should be paid into his bank account that night. He further stated that Mr Duncan says that the three days should not have been deducted but given as holiday pay. Mr McCabe says he told Mr Duncan that he was not entitled to holiday pay as he had not been employed for six months. He says that Mr Duncan again demanded the money, to which Mr McCabe replied *I am the boss and you will not tell me what I can and can't do and no one is going to demand I will do anything.* Mr McCabe went on to say that Mr Duncan told him that he would not start back at work until he was paid for those three days. Mr McCabe says *I replied, as far as paying you those three days' pay is concerned, you can take a hike.* Mr Duncan then gave Mr McCabe a copy of the medical certificate and when Mr McCabe asked for the original, Mr Duncan refused to give it to him. Mr McCabe says *it was then that I noticed he was not wearing his overalls so I asked him what he had been doing since he arrived at work.* He says that the applicant did not reply so he said to him *stop wasting my time and get your overalls on and start doing some work* and with that Mr McCabe left the office to get on with his own work.

[19] Mr Duncan says that Mr McCabe was belligerent and threatening. Mr McCabe denies that but says that Mr Duncan attempted to be belligerent in that he declined an invitation to sit down and stood over Mr McCabe while the discussion took place.

[20] The applicant says that when he attempted to reply to what Mr McCabe had said, that Mr McCabe yelled at him and ranted then stormed out of the office. His evidence was *I stood dumbstruck in Mervyn's office after he stormed out; trying to collect my thoughts and work out*

what my position was. I returned to my office for about five minutes. I was afraid of confronting Mervyn so I went to Mrs McCabe, the other managing director, and told her since I was not going to be paid that stance created a problem. Because Mervyn told me to take a hike that's what I did; I told her I was going now, and would be seeking some advice.

[21] Jacqui McCabe's evidence was that the applicant used *a strong demanding tone* when speaking to Mr McCabe, and that she saw Mr McCabe leave the office. She says of Mr McCabe *He did not look angry, he looked like a man who had said his piece and was going back to work*.

[22] Mr Duncan did not go to work the following day which was a Friday and Mr McCabe says he thought that the applicant must have gone to Dunedin to see a lawyer as he had done before. He says he decided to wait until the Monday. When the Monday produced no Mr Duncan, Mr McCabe rang the applicant to see if he was coming in to work. Mr McCabe says that Mr Duncan told him not to ring him on this phone number again and that he was going to terminate the call. Mr McCabe says he asked *well what are you doing? Are you coming into work or not?* Mr McCabe says that Mr Duncan's reply was simply *I am terminating this phone call, if you want to discuss this any further you can ring my solicitor*. Mr McCabe says the phone was then hung up.

The issues

[23] The Authority is required to determine the following issues:

- Was the applicant dismissed; and
- If so, was the dismissal unjustified; and
- Was there a unilateral change to the applicant's position description; and
- Were the warnings unjustified; and
- Was there a breach of the Wages Protection Act 1983; and
- What, if any, remedies are due to the applicant?

The investigation meeting

[24] At the investigation meeting the Authority heard from the applicant on his own behalf and, somewhat surprisingly, the Authority heard no supporting evidence in respect of the applicant's claim for hurt and humiliation. For the respondent, the Authority heard from Mr and Mrs McCabe, the managing directors of the respondent, and from their daughter-in-law, Jacqui McCabe.

[25] The Authority also had before it a number of sworn affidavits from previous employers of the applicant and this is a matter to which I will return later in this determination.

[26] The role of the Authority is to investigate the issues relevant to the circumstances of personal grievances and disputes properly before it and to determine a fair outcome in the light of the facts. This matter was placed before the Authority by Mr Duncan who sought significant remedies from his former employer. The Authority found his evidence to be internally inconsistent on some issues and his ability to recall aspects of his employment history unconvincing. His refusal to answer the Authority's questions regarding his allegation that he had failed to secure further employment with

potential employers because Mr McCabe had told them not to employ him and his refusal to reply to several questions legitimately put by counsel for the respondent, were nothing short of obstructive.

[27] An applicant approaching the Authority must come with clean hands, that is, be open and honest in his or her responses to questions put by the Authority and by counsel for the respondent party. The behaviour of the applicant at the investigation meeting has led me to the firm view that Mr Duncan's evidence is both unreliable and self-serving. Further, he has failed to display the good faith required of him in front of the Authority.

Discussion and analysis

[28] I turn now to the matter of the documentation placed before the Authority and contested by counsel for the applicant in relation to statements from former employers of the applicant. None of the authors of these statements was required to appear before the Authority but their affidavits referred to payments made in settlement to the applicant in order to avoid litigation threatened by Mr Duncan. Having read those affidavits prior to the investigation meeting, I made it clear to counsel and the parties that the weight the Authority might place on the affidavits might come into the Authority's deliberation only if the Authority was unable to determine the instant matter on the evidence before it at first hand.

[29] I have had no need to rely on these statements to come to a determination in this particular matter. The applicant's staunch refusal to cooperate with the Authority in support of his own claims, coupled with his failure to call supporting evidence from people such as his wife and family or others has essentially done his case serious harm. In short, I found Mr Duncan an unreliable witness in his own cause and one who has exhibited bad faith before the Authority.

[30] I have considered at some length the submissions of Mr Polson on behalf of the applicant, in particular the issue of the allegation of the change in job description, the unlawful deductions and the warning procedures.

[31] In relation to the change of job description, I do not believe the respondent has breached its obligation to the applicant in that it did not have an appropriate space from which Mr Duncan could work. I prefer the evidence of the respondent who said that Mr Duncan told him he could turn his hand to just about anything and that at no time while undertaking the building of the office did Mr Duncan complain to him. The allegation appears to me to be a *post factum* claim.

[32] I accept that the deductions are clearly a breach of the Wages Protection Act 1983. I also accept that they were made unwittingly by the respondent which has since admitted that it did not have the written consent it now knows is required. I will return to this matter when considering remedies.

[33] Addressing the issue of the warnings procedure, I accept that Mr McCabe, who admits he is unskilled in this area, handled this poorly. However, having considered the issue in its context and in the light of subsequent events, I am not persuaded that the applicant was unduly disadvantaged by this.

[34] In relation to another matter, namely the alleged failure to provide a written agreement, I again prefer the evidence of Mr McCabe who indicated that Mr Duncan was provided with a proposed agreement, but when approached on at least two occasions by Mr McCabe, declined to discuss let alone sign such an agreement.

[35] Turning finally to the matter of the phrase *take a hike*, the context in which the statement was made by Mr McCabe is highly relevant. It is very clear from both the applicant and the respondent that the matter at issue was the deductions. Some two weeks earlier in a meeting with both the directors, Mr Duncan was assured that they wanted him to stay and that they were happy with his work to date. Given the applicant's very poor recall on cogent aspects of his evidence, I prefer the evidence of Mr McCabe regarding the events on the morning of 7 October 2004. In support of that view, I consider that Mr McCabe's telling the applicant to get his overalls on and go and do some work clearly establishes that he had no intention of sending Mr Duncan away from his employment.

[36] As an aside, I was particularly interested in the applicant's evidence at para.37 of his statement of evidence where he says *I returned to my office for about five minutes*. In para.32 of his evidence, the applicant says in relation to his return to work on 7 October 2004 *Upon reaching my desk I began reading through the large pile of brochures on it. I completed this task but was unable to perform any other work as I no longer had an office, computer, telephone, work vehicle, cellphone.* Clearly, both statements cannot be correct.

The determination

[37] I return now to the issues outlined above.

[38] I find the applicant was not dismissed by Mr McCabe.

[39] I find there was no unilateral change to the applicant's position description.

[40] I find that the warnings were poorly handled but were not unjustified in that the respondent was attempting to bring to the applicant's attention the considerable amount of time he had been absent from his employment on personal matters.

[41] I find there was a breach of the Wages Protection Act 1983.

[42] I now turn to the remedies that are due to the applicant.

Remedies

[43] As noted above, I have found that the respondent is in breach of the Wages Protection Act 1983 and was not entitled to deduct 26 hours from the applicant's wages. I order the respondent to pay to the applicant the amount due to him for those 26 hours. The respondent is also to pay the applicant interest on the sum in question calculated at 9% per annum from the date of the deduction through until the date of payment.

[44] The applicant is entitled to no other remedies.

[45] As I understand the respondent is now in no doubt as to its obligations under the Wages Protection Act, I decline to levy a penalty against it. However, I put the respondent on notice that should a further breach come before the Authority, it is unlikely to escape a penalty.

Costs

[46] Costs are reserved. The respondent is entitled to costs on this application. If they cannot be agreed between the parties, counsel for the respondent is to file a memorandum within 21 days of the issue of this determination and the applicant has a further 14 days in which to respond.

Paul Montgomery
Member of Employment Relations Authority