

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Grant Molloy (Applicant)

AND Bruce & Denise Sangster trading as Novus Windscreen Repairs Southland (Respondent)

REPRESENTATIVES Angela Morgan-Roberts, counsel for the applicant
Craig Smith, counsel for the respondent

MEMBER OF AUTHORITY Helen Doyle

INVESTIGATION MEETING Invercargill 2 November 2006

DATE OF DETERMINATION 5 December 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Grant Molloy, says that he was unjustifiably dismissed from his employment as an auto glazier with the respondent on 7 February 2006. Mr Molloy seeks reimbursement of lost wages in the sum of \$2,840 for the 24 days that he was without employment at the rate of \$160 per day, interest, compensation for humiliation and loss of dignity in the sum of \$15,000, costs and a penalty under s.136(2) of the Employment Relations Act 2000 for failure to provide a written employment agreement.

[2] Bruce and Denise Sangster trade as a partnership. The partnership owns and operates Novus Windscreen Repairs Southland, a franchise business which was commenced by the Sangsters in August 1990. Mr and Mrs Sangster say that Mr Molloy simply walked away from his employment on 7 February 2006 indicating by his actions that he had terminated his employment. They also say that Mr Molloy did not seem concerned about an employment agreement because they were friends and it did not really seem necessary.

The employment relationship

[3] Mr Molloy commenced employment in the Sangsters' business on 17 May 2004. One of the main attractions of employment with the Sangsters for Mr Molloy was the prospect, which had been discussed with him before he commenced employment, of a future partnership in the business between him and Mr Sangster.

[4] There were no initial difficulties in the employment relationship. Mr Sangster and Mr Molloy got on well and were friendly both in and out of the workplace. In April 2005, Mr Molloy and Mr Sangster travelled to Christchurch to look at and consider a Novus paint franchise.

[5] In September 2005, Mr Molloy went with Mr Sangster to the Novus conference in Christchurch. Employees are not normally permitted to attend the Novus conference due to the commercially sensitive information which is discussed. Mr Sangster said that because he

anticipated Mr Molloy being part of the business he thought it would be appropriate for him to see how Novus operated.

[6] In November 2005, Mrs Sangster noticed that Mr Molloy's telephone account was double that of Mr Sangster's. She asked Mr Molloy to highlight his personal calls for that month in the hope that it would give him a hint that he may be making too many personal calls.

[7] Towards the end of 2005, Mr Molloy asked Mr Sangster about a price for the partnership. Mr Molloy was duly provided with a price and he then spoke to his accountant, Bruce Kooman. Mr Kooman advised Mr Molloy that he needed a set of accounts and that the balance sheets which were provided by the Sangsters were not helpful. Mr Sangster said that he was asked for more information by Mr Molloy but he was not exactly sure what Mr Molloy required. He suggested that Mr Molloy contact Mrs Sangster as she dealt with the financial side of the business. Mr Sangster said that he expected there to be some negotiation around the price but there was in fact no real negotiation about the price put to Mr Molloy.

[8] Mr Molloy started to become frustrated about securing a partnership in or about December 2005. He accepted that he made a comment to Mr Sangster in or about December 2005 that he may as well take his [Mr Molloy's] clients and go somewhere else and that he might as well set up in opposition next door and take half his clients.

[9] Mr Sangster said that he was a bit shocked by the comment but thought that Mr Molloy was just angling for a financial share in the business.

[10] In December 2005 Mr Sangster had about 1,000 business cards printed with both his and Mr Molloy's name and phone number on them. Mr Molloy also asked Mr Sangster for monthly bonuses in or about December 2005 when there were good months. Mr Sangster advised that the business could not sustain it at that time.

[11] In January 2006, Mr Molloy advised that he wanted to sort the partnership issue out again. Mr Molloy denies that he told Mr Sangster that if something was not sorted out about the partnership by the end of February 2006, then he had another business lined up to go to. The evidence does not support that Mr Molloy did in fact have a business to go to, and in any event if the comment was made it was probably not an unusual comment in a commercial negotiating context. Whether or not that statement was said, I find Mr Sangster was concerned enough that Mr Molloy may leave that he dropped the figure for buying into the partnership significantly.

[12] Mr Molloy took the new figure to Mr Kooman. Mr Kooman said that he would contact Mrs Sangster and advise her what information he needed to get things moving with the partnership.

[13] Mr Kooman did not contact Mrs Sangster before 7 February 2006, after which date Mr Molloy and Mr Sangster did not work together again.

3 February 2006

[14] On Friday, 3 February 2006, Mr Sangster had a discussion with Mr Molloy about his personal calls. Mr Sangster told Mr Molloy that his personal calls were *getting up there*. Mr Molloy I find then placed the cellphone firmly down on the bench and said that he did not want the phone if calls were an issue. Mr Sangster told Mr Molloy that the continuing situation with excessive personal calls on his cellphone was hopeless and that something was going to have to be done about it. Mr Sangster said he meant by that statement that if Mr Molloy was going to have excessive personal calls then he would need to reimburse the business for them.

[15] Mr Sangster and Mr Molloy then went home for the weekend. Mr Molloy felt it was strange that the issue of personal calls on the work phone had only just arisen. I find though that it had been an issue for the Sangsters since at least November 2005 but they had not clearly put their concerns to Mr Molloy before 3 February 2006. I accept that they both hoped

Mr Molloy would pick up a hint after being required to highlight personal calls but the evidence does not support that he did.

[16] On 3 February Mr Sangster telephoned the New Zealand franchise owner, Michael James, and discussed with him his growing concerns about Mr Molloy's attitude and the cellphone incident. There was also a discussion about whether it was an issue that there was no employment agreement. Mr James said that he suggested Mr Sangster talk to Mr Molloy on Monday about his cellphone use. He said that he warned Mr Sangster against doing anything that could give an impression that Mr Molloy was not wanted in the business.

Tuesday, 7 February 2006

[17] Mr Molloy and Mr Sangster returned to work on Tuesday, 7 February 2006 after the weekend. Monday, 6 February was a public holiday. They commenced the morning in the usual way with a coffee and casual conversation about their weekend.

[18] After about 30 minutes when they were about to commence work, there was a conversation which led to the end of the employment relationship. There is agreement about many aspects of the conversation but there are some areas of dispute and there is a dispute as to the order of particular comments.

[19] Mr Sangster asked Mr Molloy if he wanted his cellphone back. Mr Molloy responded with words to the effect, not if it was going to be a problem. I find it likely that Mr Sangster then advised Mr Molloy that the cellphone was not for private use and that it was a work phone. Mr Molloy responded that half the tools in the workshop were his and, I find, said that he may as well take them home. At some stage of the conversation, Mr Molloy said words to the effect *that Denise Sangster does not know about what goes on around here like I am doing all the work and there are jobs I'm doing that you wouldn't have a clue about*. He probably said something about the Sangsters getting the benefit of his work.

[20] Considering the conversation logically I am of the view that it is more probable that it was after this statement that Mr Sangster told Mr Molloy he was not the only person in town who could do the job.

[21] Mr Sangster said that he told Mr Molloy when he said he would take his tools home *suit yourself*. He said that when he told Mr Molloy that he was not the only person in town who could do the job Mr Molloy then said *right I'll take them and go now*. Mr Molloy denies that he said that. Mr Sangster said he took Mr Molloy to mean he was resigning there and then.

[22] Mr Molloy said that he felt he was dismissed when Mr Sangster said *you are not the only person in town who knows how to do these jobs. You might as well go*. Mr Sangster denies that he said Mr Molloy might as well go. Mr Molloy then proceeded to load his tools from the workshop into the van. Mr Sangster stood close by as he said he did not want Mr Molloy to load any of the business tools into the van.

[23] There was agreement that Mr Sangster said to Mr Molloy that he was sorry it had come to this. Mr Molloy said Mr Sangster also said *but we are losing money anyway*. Mr Sangster denied saying this. Mr Molloy said he replied *you'll be losing a whole lot more now*. There was agreement that Mr Molloy raised the issue of an employment contract and that there was some discussion about the record of holidays. Mr Molloy probably said words to the effect *I hope you've done it properly for your sake*. Mr Sangster said that he told Mr Molloy *you're walking out I haven't sacked you*. Mr Molloy denied that was said.

[24] Mr Molloy returned to collect his second load of tools later that same morning. Mr Sangster asked for the cellphone charger to be dropped back but there was no other conversation. Mr Molloy gave Mr Sangster the key to the workshop.

[25] After the first exchange on 7 February, Mr Sangster telephoned Mr James and advised him that Mr Molloy had walked out. Mr Molloy telephoned Dave Egan from Mainland Glass

early on 8 February 2006 and told him that he had been dismissed. Mr Egan works in the same building as Mr James. Mr Egan advised Mr Molloy that Mr James had been told by Mr Sangster that Mr Molloy had walked out.

[26] It is clear that both Mr Molloy and Mr Sangster expected the other to make contact after 7 February. As it happened, neither initiated contact. Mrs Sangster made an inquiry of the Department of Labour about an employer's obligation when an employee leaves without notice on 1 February. Mr Molloy received his final pay including holiday pay by way of cheque on Monday, 13 February 2006.

[27] Mr Molloy then sought legal advice and Ms Morgan-Roberts raised a personal grievance on his behalf by letter dated 14 February 2006 that he had been unjustifiably dismissed. Mr Sangster likewise sought legal advice and a letter responding to the grievance was written by his then legal advisor on 24 February 2006.

The issue

[28] The issue in this case was whether Mr Molloy was dismissed from his employment or whether he abandoned his employment.

Determination

[29] The decision of the Court of Appeal in *EN Ramsbottom Ltd v. Chalmers* [2000] 2 ERNZ 97 is relevant to the circumstances in this case. The Court of Appeal held in *Ramsbottom* that, where an oral contract included the right to resign at any time, the employer was entitled to believe that the employee had abandoned his employment in the particular circumstances and there was no obligation to check on whether the abandonment was genuine.

[30] The Court of Appeal in *Ramsbottom* referred to a 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 if contending that the employment ended on the employee's initiative in that way. The Court of Appeal said that there was substantial force in that submission and clearly 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 evinced an intention to finally end his or her employment.

[31] I am of the view that this statement, although not essential to the decision in *Ramsbottom*, is persuasive authority as to what is expected of an employer in terms of obligations of trust and fair dealing. It is also in line with the good faith obligations in s.4 of the Employment Relations Act 2000, including the requirement to be communicative and responsive.

[32] The Employment Court decision in *Lwin v. A Honest International* [2003] 1 ERNZ 383 referred to the statement of the Court of Appeal in *Ramsbottom*. In that case, it was held that there was insufficient evidence for the employer to conclude that the employee had abandoned her employment. It was found that the employer had not sufficiently discharged its obligations of trust and fair dealing. It was held that there was no abandonment of employment and the actions of the employer therefore constituted a dismissal.

[33] In my view it would be unsafe to rely on the conversation that took place between Mr Molloy and Mr Sangster on 7 February to conclude whether there was a dismissal as in a *sending away* or an abandonment in the sense of *to give up*. Further clarification was necessary.

[34] It would be quite possible for both parties to have formed a different view or understanding from that conversation. Mr Sangster, not unreasonably in my view, raised the issue of Mr Molloy's cell phone use. Mr Molloy reacted badly to that, possibly because he did not feel he was being adequately recognised for his contribution to the business and was annoyed at the lack of progress on the partnership front. Mr Molloy suggested that he may as

well take his tools home. Mr Sangster did not try to stop him. Mr Molloy said that there were things he could do in the business which Mr Sangster could not do. Mr Sangster responded by saying Mr Molloy wasn't the only person who can do the jobs. There are then the disputed words about whether Mr Molloy said he would go or whether Mr Sangster told him to go. Mr Molloy says that Mr Sangster told him the business was losing money anyway which Mr Sangster denied.

[35] There is no evidence to support that the business was losing more money at that point than any other time. In my view if Mr Sangster felt that to be the case then he would not, only shortly prior to the conversation, have significantly reduced the partnership price because he was afraid that Mr Molloy would leave. Likewise if Mr Molloy hadn't been interested in staying then he would not have asked Mr Kooman to discuss the accounts with Mrs Sangster.

[36] An objective consideration of the conversation supports that Mr Sangster should, on reflection, have been cautious in drawing the inference that Mr Molloy had abandoned his employment. Mr Molloy's comment that he hoped Mr Sangster had done it properly for his sake would suggest that Mr Molloy did not consider he was leaving voluntarily. There was also the raising by Mr Molloy about the issue of an employment contract. Even though there was no written employment agreement it would have been very unlikely I find, that both parties would have contemplated resignation at any time without a notice period as one of its terms.

[37] These matters should have suggested to Mr Sangster that there was some doubt as to whether in fact Mr Molloy had abandoned his employment.

[38] I am of the view that Mr and Mrs Sangster were both concerned about Mr Molloy's future intentions and whether or not in fact he would return to the business. They waited until the end of that week before paying Mr Molloy his final pay and holiday pay.

[39] In my view, though, as in *Lwin*, Mr and Mrs Sangster did not sufficiently discharge their obligations of trust and fair dealing in the employment relationship before paying Mr Molloy his final pay in circumstances where he had not evinced a clear intention to leave his employment. I consider as Travis J did in *Lwin*, that a letter asking Mr Molloy to clarify his future intentions would have sufficed in terms of the Sangsters' obligations. Mr and Mrs Sangster knew where Mr Molloy lived and how to get hold of him. They had been together in an employment relationship since May 2004, there was a possibility of the relationship changing to one of partnership and this was the first time there had been anything of this nature.

[40] I conclude therefore that there was no abandonment of employment and that the actions of the Sangsters in finalising Mr Molloy's employment by paying out his final pay and holiday pay without clarifying the position as to Mr Molloy's future intentions constituted a dismissal. There was no justification offered for the dismissal as the Sangsters' always maintained that Mr Molloy simply walked out.

[41] I find that Mr Molloy has a personal grievance that he was unjustifiably dismissed from his employment with Mr and Mrs Sangster. Mr Molloy is entitled to remedies.

Remedies

Contribution

[42] I am required under section 124 of the Employment Relations Act 2000 to consider the extent to which the actions of Mr Molloy contributed towards the situation that gave rise to the grievance and if required reduce the remedies that would otherwise be provided.

[43] I have not considered the events of 7 February 2006 with respect to the issue of contribution. In my view it was not the discussion and actions of that day that gave rise to the grievance but the failure to subsequently make inquiries of Mr Molloy where in my view it is clear that he had not evinced a clear intention to finally end his employment.

[44] Mr Molloy knew on 8 February 2006 as a result of his discussion with Mr Egan that Mr Sangster was of the view he had walked out of his employment. He did not clarify the position with Mr Sangster that he had not abandoned his employment until after he had been paid his final pay and holiday pay. The obligations of trust and fair dealing go both ways in an employment relationship.

[45] I find the failure on Mr Molloy's part to clarify in some way his position amounts to blameworthy conduct on the part of Mr Molloy which I intend to take into account in determining remedies. In doing so and assessing the amount, I take into account that it was the Sangsters' who, only a few days after the exchange on 7 February 2006 and without further inquiry, paid Mr Molloy's final pay which confirmed to him his employment was over. I have also taken into account that there was no written employment agreement. Had there been one this may well have provided a means of clarifying the situation for Mr Molloy and may have overcome his reluctance to be the first in the relationship to make a move. I assess Mr Molloy's contribution at 30%.

Reimbursement

[46] Mr Molloy claims the sum of \$2840.00 for reimbursement of lost wages for the 24 days he was without employment. I am satisfied that during that period he attempted to mitigate his loss and I find that he is entitled to reimbursement of his wages.

[47] Taking contribution into account I order Bruce and Denise Sangster to pay to Grant Molloy the sum of \$1988.00 gross being reimbursement of lost wages under section 123 (1) (b) of the Employment Relations Act 2000. I am not minded to make an award for interest in the circumstances of this case.

Compensation

[48] Mr Molloy has claimed the sum of \$15,000 for compensation. I heard from Mr Molloy's wife Jacqueline about the effect of the dismissal on him. There were significant financial consequences and the incident caused stress and strain in the relationship. Mr Molloy also said that he was humiliated because he has had to tell people that he is no longer entering into a partnership.

[49] In my view Mr Molloy could have reduced much of the humiliation, loss of dignity and injury to his feelings if he clarified with Mr Sangster in some way the events of 7 February 2006 and his future with the business including the prospect of partnership. Instead Mr Molloy made a decision not to make that first move and clarify his situation. I find that there should only be a moderate award made for compensation for that reason. Without taking contribution into account I am of the view that there should be an award of \$5000.00.

[50] Taking contribution into account I order Bruce and Denise Sangster to pay to Grant Molloy the sum of \$3500.00 without deduction under section 123 (1) (c) (i) of the Employment Relations Act 2000.

Penalty

[51] Section 63A of the Employment Relations Act requires the employer amongst other matters to provide an employee with a copy of an intended employment agreement. There was no copy of a written employment agreement provided to Mr Molloy. There was some initial discussion and I accept that Mr Molloy did raise the issue of an employment agreement on at least two occasions. It was not however taken any further. I take into account that the evidence supported the Sangsters' were particularly nice people and there was a degree of trust for most of the relationship between them and Mr Molloy that one may not find in every employment relationship. An employment agreement though may well have made a difference to the events after 7 February 2006.

[52] I find that a penalty should be imposed but that it should be a moderate penalty. I order that a penalty be paid by Bruce and Denise Sangster in the sum of \$300. The penalty is to be paid into the Authority and will then be paid by the Authority into the Crown Bank Account.

Costs

[53] I reserve the issue of costs

Helen Doyle
Member of Employment Relations Authority