

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 68/07
5033643**

BETWEEN CORY MATTHEW DENTON
 Applicant

AND GORRIE FUEL (SI) LIMITED
 t/a DON GORRIE AUTO
 SERVICES
 Respondent

Member of Authority: H Doyle

Representatives: Hamish Evans, Counsel for Applicant
 Ian Thompson, Counsel for Respondent

Investigation Meeting: at Christchurch on 13 April 2007

Determination: 25 June 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Cory Matthew Denton, is currently a university student in his third year of study. Mr Denton commenced employment as a forecourt attendant with the respondent, Gorrie Fuel (SI) Limited (Gorrie Fuel) in or about February or March 2004 while still at high school. Mr Denton continued to work for Gorrie Fuel several nights during the week and on a Sunday after he commenced his university studies. He was employed at the material time on a permanent part-time basis.

[2] Gorrie Fuel operated at material times the service station at which Mr Denton was employed. Donald Gorrie is the director of Gorrie Fuel.

[3] Mr Denton recalls being shown, and given, an opportunity to consider an employment agreement when he commenced his employment. He could not recall if he signed the employment

agreement but said that he handed it to Mr Gorrie. He was not given a copy. The employment agreement could not be found but Mr Gorrie produced a copy of another employee's employment agreement that he said contained standard terms and conditions for a forecourt attendant.

[4] Mr Denton found out on 8 January 2006 that he had been crossed off the Gorrie Fuel roster after attending Phat 06, a dance party in the Golden Bay area. On 9 January 2006, Mr Denton, accompanied by his father Antony Denton, met with Mr Gorrie to find out why Mr Denton had been crossed off the roster. Mr Gorrie advised Mr Denton that he considered he had abandoned his employment.

[5] Mr Denton says that he was unjustifiably dismissed from his employment with Gorrie Fuel. He further says that he was not paid wages for two weeks work prior to dismissal and has not been paid for alternative holidays for public holidays he worked.

[6] Gorrie Fuel says that Mr Denton's personal grievance was not raised within the 90 day time limit and that it does not consent to the grievance being raised out of time. Gorrie Fuel says that the first it knew of the personal grievance was the lodging and service of the application to the Employment Relations Authority. Gorrie Fuel says there are no exceptional circumstances for the Authority to grant leave to Mr Denton to raise a personal grievance after the expiration of the 90 days.

The issues

[7] The issues for the Authority in this matter are:

- What was the date the alleged personal grievance occurred and/or came to the notice of Mr Denton?
- Was the personal grievance of unjustified dismissal raised within the period of 90 days from that date?
- If the personal grievance was not raised within 90 days, should the Authority grant leave to Mr Denton to raise a personal grievance after the expiration of the 90 day period?
- If the Authority finds that the grievance was raised within 90 days of the dismissal or grants leave to raise a personal grievance after the expiration of the 90 day period, then was Mr Denton unjustifiably dismissed?

- Is Mr Denton owed money for unpaid wages and payment for alternative holidays for public holidays he worked?

The background

[8] In September 2005, Mr Denton spoke to Mr Gorrie about taking leave to attend the Phat 06 concert over the New Year period. Mr Denton accepted that he did not have exact dates to give to Mr Gorrie. He did, though, take the steps set out below that support he believed leave had been approved for over the New Year period.

[9] Mr Denton spoke to another employee at Gorrie Fuel, Richard Washington, and advised him that Mr Gorrie had approved leave over the New Year period. He told his parents that leave had been arranged with Mr Gorrie and on that basis, Mr Denton's parents paid for the concert tickets in September 2005 as an early Christmas present.

[10] Mr Denton worked additional shifts leading up to the taking of his holiday to make up for his leave. He worked the two weeks up to Christmas and then on Christmas Day, Boxing Day and the following three days. The roster for January 2006 had not been put up when Mr Denton left for Takaka.

[11] On the day that Mr Denton was to leave for Takaka with his friends, which was Friday, 30 December 2005, he received a telephone call from Mr Gorrie. Mr Gorrie asked Mr Denton what day he was coming back from holiday. Mr Denton advised Mr Gorrie that he would be returning to work on Monday, 9 January 2006. Mr Gorrie told Mr Denton that he wanted him to return to work on 5 January 2006. Mr Denton explained to Mr Gorrie that he was not travelling in his own vehicle and was with a group of his friends. He said he could not get back from Takaka for work until 9 January 2006. Mr Gorrie advised Mr Denton that he could not guarantee him a job on his return. The evidence supports that Mr Gorrie crossed Mr Denton off the roster when he did not subsequently attend work on 5 January 2006.

[12] Mr Gorrie said that between 5 and 9 January 2006 he thought he had telephoned Mr Denton's cell phone but there had been no reply. There are no records of a call being made.

[13] A bank statement that was attached to Mr Denton's statement of evidence shows that he used an automatic teller machine at Riccarton on 4 January 2006. This was not put to Mr Denton at the time of the investigation meeting but was raised in final submissions by Mr Thompson. Mr Evans, in his submissions in reply, said that 4 January 2006 was the first working day for banks

after the New Year statutory holidays. He submits therefore that any transactions from 10pm 30 December onwards would not have been recorded until 4 January 2006.

[14] I telephoned Mr Denton's bank and made a general inquiry as to whether the date appearing on a bank statement showing when a teller machine transaction took place could be accurately relied on to be the date the transaction was actually made. The response I got was that the accuracy depends on when the transaction was made. The date on the statement is likely to reflect the first working day for a bank after a public holiday rather than when the transaction was actually made. I have concluded therefore that the date on its own does not support that this is the date that the transaction was actually made. I do not find in the circumstances that I can place weight on that transaction to conclude that Mr Denton was in Christchurch and able to return to work on 5 January 2006.

[15] On Sunday, 8 January 2006, Mr Denton received a text message from Mr Washington to the effect that he had been crossed off the roster because he did not turn up for work.

[16] On 9 January 2006, Mr Denton telephoned Mr Gorrie and asked whether he was working. Mr Gorrie confirmed that Mr Denton had been crossed off the roster. A meeting was arranged and Mr Denton, accompanied by his father, went to see Mr Gorrie to talk about why his employment had been terminated.

[17] At that meeting, Mr Gorrie advised that the reason for termination of Mr Denton's employment was that he had abandoned his employment. Mr Denton denied that was the situation and he said that he could not change his plans at short notice and had advised Mr Gorrie on 30 December 2005 why that was so. Mr Gorrie mentioned that Mr Denton's performance had slipped and Mr Denton and/or his father reacted and disagreed with that. Mr Gorrie said that the Dentons were both quite aggressive and that Antony Denton could be described as belligerent. Mr Denton and his father strongly denied that they were abrasive or aggressive. I am not satisfied that the evidence goes to support that the Dentons were aggressive or abrasive. I do accept though that there was tension at the meeting. Mr Gorrie said that if the Dentons had been apologetic then he may well have taken Mr Denton back.

[18] Mr Denton's father said that towards the end of the meeting on 9 January 2006 it became apparent that Mr Denton was not going to be permitted to return to work and that Mr Gorrie considered that Mr Denton had abandoned his employment. Antony Denton said in his evidence at the Authority investigation meeting that he wanted to make it known to Mr Gorrie that they intended to take the matter further and that there would be further action.

[19] He said that he told Mr Gorrie that he would take this up with “*employment people*”. He said that he may have, instead of saying employment people, used the words “*Mediation Service*”. Antony Denton could not guarantee that he used the words “*legal action*”. Mr Denton said that it was clear that action would be taken.

[20] Mr Gorrie denied that there was mention about getting the Mediation Service or employment people involved. He said there was no mention of challenging the decision to terminate Mr Denton’s employment.

[21] I find it more likely that Antony Denton, as a concerned parent who believed that his son had not been treated fairly, made a comment that he would take the matter up elsewhere. This is in circumstances where both parties had agreed that the meeting did not end on a positive note.

[22] There is a dispute as to whether Mr Gorrie asked Mr Denton to return his uniform and shop keys during the meeting on 9 January 2006. Mr Denton says in his evidence that there was no such discussion. Mr Gorrie says that there was, and that he told Mr Denton to return all company property before he was paid his final pay. The importance of that matter will become clear shortly.

[23] Mr Denton says that following the meeting on 9 January 2006 he telephoned the Employment Relations Service and spoke to a mediation support officer, Baden Meyer, about mediation. Mr Denton said that Mr Meyer advised him that he would telephone Mr Gorrie. Mr Denton said that Mr Meyer then telephoned him back and said that Mr Gorrie would attend mediation when Mr Denton returned the company property. Antony Denton gave evidence that supports Mr Denton made a call after the meeting on 9 January to the Mediation Service.

[24] Mr Denton and his mother went to the service station on 9 January 2006 and returned the clothing and key. Mr Denton was given a receipt from Mr Gorrie which shows that the items were returned at 3.25pm on 9 January 2006. Mr Gorrie denied that he received a call from Mr Meyer about mediation at that time and said that the company property was returned because a request was made for it to be returned during the meeting on 9 January 2006.

[25] There is certainly evidence that can safely be relied on that the property was returned on 9 January 2006. The issue of returning the uniform has now assumed some legal importance because of the challenge to the grievance being raised within 90 days. In my view, this would not have been apparent to Mr Denton at the time he lodged his statement of problem which was prior to getting any legal assistance. In the first statement of problem lodged with the Employment Relations Authority, Mr Denton recorded that he had returned the uniform and keys immediately to Mr Gorrie on the understanding from the mediation support officer that Mr Gorrie would attend

mediation. Mr Denton said in his statement of problem that he had obtained a receipt for the items he returned.

[26] I found Mr Denton to be a reliable witness. I think it most unlikely that Mr Denton simply made up that he had contacted Mr Meyer on 9 January 2006 about mediation. Further, I find it most unlikely that he would simply make up that he returned his uniform and keys on Mr Meyer's advice, following Mr Meyer's telephone call to Mr Gorrie that Mr Gorrie would then attend mediation. On that basis I find it more likely than not that there was some discussion between Mr Gorrie and Mr Meyer.

[27] There was an objection raised by Mr Thompson with respect to Mr Meyer's statement of evidence. The objection was on the basis that Mr Meyer's evidence breached the confidentiality requirement in s.148 of the Employment Relations Act 2000 which applied to a person employed and engaged by the Department of Labour and required them to keep confidential any statement, admission or document created or made for the purpose of mediation. Mr Meyer was a mediation support officer at the material time but has since left the Service.

[28] It was agreed with the parties that Mr Meyer's evidence would be put to one side until after the investigation meeting. I have decided that it is not necessary for me to hear from Mr Meyer.

[29] I advised Mr Thompson and Mr Evans that I intended to make a formal inquiry if there was any record of calls made or received in relation to the employment relationship problem from the Mediation Service. Accordingly I wrote to Margaret Radford, the Service Manager of Workplace Group, in Christchurch.

[30] Ms Radford promptly responded and advised that there were two files opened in respect of the matter. The first was opened on 14 March 2006 and closed as not proceeding on 5 April 2006. The record reflects that attempts to contact both parties were unsuccessful. The employment relationship problem was recorded as money recovery. The second file was opened on 22 August 2006 in relation to a referral to mediation from the Authority, presumably after the statement of problem was lodged with the Authority. There was no record of a call in January 2006. Clearly though, some telephone calls were not recorded. Mr Gorrie said he first received a telephone call from Mr Meyer in June 2006 to the effect that Mr Meyer was leaving in a week or so and wanted to clear his desk. That call is not recorded.

[31] There are at least two recorded attempts to contact Mr Gorrie which were unsuccessful before the file was closed as not proceeding on 5 April 2006 and then reopened in August 2006.

[32] I place little weight on the description by the Mediation Service of the problem as money recovery. Mr Denton became aware that he had not been paid for two weeks work but that was not until some days after the 9 January 2006 meeting. A description of the problem in my view could place no limitation on matters to be discussed during mediation.

[33] The statement of problem was received by the Authority on 17 July 2006 and posted to Mr Gorrie on 18 July 2006 by a support officer. Mr Gorrie would have received the statement of problem within a day or so after it was posted.

What was the date the alleged personal grievance occurred or came to the notice of Mr Denton?

[34] I find that Mr Denton's employment was terminated on 5 January 2006 when he did not attend to work and Mr Gorrie crossed him off the roster. It was not until 8 January 2006 that this came to Mr Denton's attention. 8 January 2006 is the later of the two dates and that therefore is the date that I find the 90 day period begins to run from. The relevant expiry date, therefore, for 90 days was in early April 2006.

Was the personal grievance of unjustified dismissal raised within 90 days from 8 January 2006?

[35] Section 114(2) of the Employment Relations Act 2000 provides:

“(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.”

A personal grievance does not have to be raised in writing. Mr Denton took the step of meeting with Mr Gorrie to find out why his employment had been terminated. Mr Denton did not agree with and challenged the reasons for his dismissal. Mr Gorrie knew that there was a challenge to the termination of Mr Denton's employment and I find this conclusion is strengthened by the fact that he said at the investigation meeting he may have allowed Mr Denton to stay on if he had been apologetic. At the end of the meeting, Mr Denton's father advised that the matter would be taken further. The matter which would be taken further was clear to both parties because it had been the subject of discussion at the meeting. It was the termination of Mr Denton's employment.

[36] I conclude, after considering all the communications, that the grievance was raised during that meeting on 9 January 2006. Consistent with that, Mr Denton telephoned a mediation support officer and following his advice returned the company property on the understanding Mr Gorrie

would attend mediation. Mr Gorrie was made aware that Mr Denton alleged a personal grievance which he wanted his employer to address which was within the 90 days from 8 January 2006. I do not need, therefore, to go on to look at the matter of whether the delay in raising the personal grievance was occasioned by exceptional circumstances.

Was Mr Denton unjustifiably dismissed from his employment?

[37] Whether a dismissal was justifiable must be determined on an objective basis under s.103A of the Employment Relations Act 2000. The Authority must consider 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 occurred.

[38] There is no dispute Mr Denton was dismissed from his employment. There was some initial confusion about whether Mr Denton was dismissed for failure to obey a lawful instruction or for abandoning his employment. Mr Gorrie confirmed at the Authority investigation meeting that the reason for the dismissal was abandonment of employment. Mr Gorrie said he had no idea where Mr Denton was between 5 and 9 January 2006 and that it was during this period that Mr Denton abandoned his employment.

[39] The evidence supports that there was some discussion between Mr Gorrie and Mr Denton about leave for the New Year period. I find that exact dates were not given when the discussion first took place and it is unclear whether there was an exact date given for the end of the leave subsequently. Mr Gorrie said there may have been some general discussion but nothing specific was put forward. When Mr Denton took his leave, though, no roster had been put up for 2006.

[40] It was quite clear that Mr Denton was intending to return to work and had no intention of ending his employment. He told Mr Gorrie on 30 December 2005 that he would be on leave in Golden Bay until 9 January 2006. Mr Denton advised Mr Gorrie that he thought his leave had been approved during the telephone conversation on 30 December 2005. There was no further discussion or investigation with Mr Denton before his employment was terminated when he failed to return to work on 5 January 2006.

[41] I do not find that a fair and reasonable employer would have concluded in these circumstances that Mr Denton had abandoned his employment. There was no justification for such a conclusion.

[42] I then turn to whether Mr Denton should have been dismissed. At worst there was a miscommunication by Mr Denton about the exact date he was to be returning from leave over the

New Year period. Mr Gorrie was aware that Mr Denton was taking some leave and there was no evidence to support that Mr Denton was deliberately misleading about the dates of his leave. Any concerns about the lack of clarity needed to be discussed on Mr Denton's return. Mr Gorrie could have talked to Mr Denton then about his concerns and he would then have to investigate why Mr Denton believed he had approval to take leave and whether the basis for that was reasonable. If the basis was not reasonable then Mr Denton could have received a warning. Mr Denton had been a satisfactory and trusted employee and he had not had any previous warnings about his behaviour.

[43] I do not find, though, that the decision to dismiss Mr Denton was what a fair and reasonable employer would have done in the circumstances at the time of the dismissal.

Determination

[44] Mr Denton has a personal grievance that he was unjustifiably dismissed. He is entitled to remedies.

Remedies

Contribution

[45] I need to consider the extent to which Mr Denton's actions contributed to the situation that gave rise to the grievance and, if those actions so require, reduce the remedies accordingly.

[46] Mr Thompson submits that Mr Denton's contributing conduct "*will be extreme*". I have not found that I can safely rely on the bank statement to support that Mr Denton was in fact in Christchurch on 4 January 2006, which is one of the grounds put forward by Mr Thompson to support this submission. I have not found any evidence that Mr Denton's conduct was misleading as submitted by Mr Thompson.

[47] I do find, having listened to Mr Denton's evidence, that he was probably less than clear about the date he was returning from leave. This is in circumstances where he was travelling in another person's car and could not make independent arrangements about travel. Mr Denton should have made it perfectly clear with Mr Gorrie what date he was returning from leave. The service station did not, though, have a particularly formal or clear procedure around recording leave.

[48] In all the circumstances, I find that contribution should be assessed at 10%.

Lost wages

[49] Mr Denton was able to obtain other employment on 16 January 2006. He was without employment from 9 January until 16 January 2006. That is a period of one week. Mr Denton has claimed two weeks' wages in lieu of notice.

[50] I find, given Mr Denton was able to mitigate his loss, his entitlement is to his actual lost wages which is one week.

[51] Mr Denton did not work consistent hours. He was not paid for his last two weeks work on the basis that he failed to give notice. I shall come to that matter shortly. I am able to average Mr Denton's gross fortnightly income for the weeks ending 4 December and 18 December 2005. For the fortnight ending 4 December 2005, Mr Denton received \$715 gross and for the fortnight ending 18 December 2005 he received \$850 gross. That is an average for those two weeks of \$782.50 gross. Divided by two for a week's lost wages, the amount arrived at is \$391.25 gross. I have reduced this amount by 10%.

[52] I order Gorrie Fuel (SI) Limited to pay to Cory Denton the sum of \$352.13 gross being lost wages under s.123(1)(b) of the Employment Relations Act 2000.

Compensation

[53] In relation to the compensation claim, I heard from Antony Denton that his son was quite disturbed, shocked and surprised after the meeting on 9 January 2006. Mr Denton said that he was concerned about his financial situation following termination and about not being able to save for his university fees for that year. I do take into account that Mr Denton was able to promptly obtain other employment.

[54] In the first statement of problem that was prepared without legal advice, Mr Denton claimed \$2,000 for compensation. After legal advice, an amended statement of problem was lodged with the Authority. In the amended statement of problem, \$10,000 for compensation was claimed.

[55] Mr Thompson submitted that Mr Denton, in terms of the higher claim for compensation, was an opportunist. I do not find that is so. Mr Denton was given legal advice and the earlier claim for compensation was made in the absence of legal advice.

[56] In all the circumstances of this case, I find an appropriate award for compensation is \$5,000. Taking contribution into account, the award is \$4,500.

[57] I order Gorrie Fuel (SI) Limited to pay to Cory Denton the sum of \$4,500 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Unpaid wages and payment for alternative holidays for public holidays worked

Unpaid wages

[58] Mr Denton was not paid for several days that he worked before his employment was terminated. The money was incorrectly withheld on the basis that Mr Denton failed to give notice. Mr Denton is entitled to be paid his wages.

[59] Mr Gorrie prepared a schedule which was produced to the Authority setting out the dates and hours worked by Mr Denton for which he was not paid. Although this material was available to the parties and their representatives, it does not appear a calculation of the actual amount owing has been done. I have therefore assessed the amount of unpaid wages as below for the parties at the rate of \$10 per hour and at time and a half for statutory days.

19 December 2005	8.25 hours @ \$10 per hour	\$82.50
20 December 2005	8.25 hours @ \$10 per hour	82.50
21 December 2005	7.5 hours @ \$10 per hour	75.00
23 December 2005	5.5 hours @ \$10 per hour	55.00
25 December 2005	5.5 hours @ \$15 per hour	82.50
25 December 2005	8.0 hours @ \$15 per hour	120.00
27 December 2005	6.5 hours @ \$10 per hour	65.00
28 December 2005	8.25 hours @ \$10 per hour	82.50
29 December 2005	9.0 hours @ \$10 per hour	90.00

[60] The total amount of unpaid wages is \$735.00 gross owing to Mr Denton.

[61] These wages should have been paid to Mr Denton by mid-January 2006 at the latest. Mr Denton has been without the benefit of that money since that time and it is appropriate that he receive an award of interest on that sum in accordance with clause 11 of the Second Schedule of the Employment Relations Act 2000. Mr Denton is also entitled to have holiday pay calculated on that sum. That is 6% of \$735.00 which is \$44.10.

[62] I order that Gorrie Fuel (SI) Limited pay to Cory Denton the sum of \$735.00 gross being unpaid wages and interest on that sum at the rate of 7.5% from 23 January 2006 until the date of payment.

[63] I order that Gorrie Fuel (SI) Limited pay to Cory Denton holiday pay on the sum of \$735.00 in the sum of \$44.10.

Payment for alternative holidays for public holidays worked

[64] Mr Denton worked 11 public holidays including Christmas and Boxing Day 2005 for which he is entitled to an alternative holiday under s.56 of the Holidays Act 2003 if the public holiday falls on a day that would otherwise be a working day. It was not put forward that the public holidays worked were not Mr Denton's otherwise working days and that he was not entitled to an alternative holiday. Mr Gorrie's evidence was that either alternative holidays were taken or Mr Denton was paid out. The evidence of that is not clear. Mr Denton did recall receiving two or possibly three alternative holidays.

[65] On that basis, and given the absence of any clear evidence that alternative holidays were either paid in accordance with the Holidays Act 2003 or alternative days actually provided, I find that Mr Denton is entitled to eight days' payment for alternative holidays. Payment should be calculated in accordance with s.60(2)(b)(i) of the Holidays Act 2003 in circumstances where Mr Denton has not taken the alternative holiday before the date on which his employment ended. That is eight days at the rate of Mr Denton's daily pay for his last day of employment. The parties should attempt to reach agreement on what the relevant daily pay is for Mr Denton's last day of employment and calculate the eight days at that rate. If agreement is not possible, then leave is reserved to the parties to return to the Authority.

Costs

[66] I reserve the issue of costs.

Summary of findings and orders made

- I have found that Mr Denton's grievance was raised within 90 days from the date he became aware that his employment had been terminated.
- I have found Mr Denton has a personal grievance that he was unjustifiably dismissed.
- I have found that Mr Denton contributed to the situation that gave rise to the grievance and have assessed his contribution at 10%.
- I have ordered Gorrie Fuel (SI) Limited to pay to Cory Denton the sum of \$391 gross being lost wages less contribution being the sum of \$352.13.

- I have ordered Gorrie Fuel (SI) Limited to pay to Cory Denton the sum of \$4,500.00 without deduction being compensation.
- I have found Cory Denton is entitled to be paid unpaid wages in the sum of \$735.00 together with interest on that sum at the rate of 7.5% from 23 January 2006 and holiday pay of \$44.10.
- I have found Cory Denton is entitled to eight days' payment for alternative holidays for public holidays worked. I have asked the parties to attempt to reach agreement on what the relevant daily rate is for Mr Denton's last day of payment so that the eight days can be calculated on this basis. If agreement cannot be reached, I have reserved leave for the parties to return to the Authority.
- Costs are reserved.

H Doyle
Member of the Employment Relations Authority