

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2012] NZEmpC 51  
CRC 6/10**

IN THE MATTER OF      a challenge to a determination of the  
Employment Relations Authority

BETWEEN                NEW ZEALAND CARDS LIMITED  
Plaintiff

AND                      COLIN RAMSAY  
Defendant

Hearing:                12, 13, 23 and 24 August 2010  
(Heard at Christchurch)

Appearances: Robert Beresford, agent for the plaintiff  
Jonny Sanders, advocate for the defendant

Judgment:             27 March 2012

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**JUDGMENT OF JUDGE A A COUCH**

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[1] New Zealand Cards Limited (the Company) makes and sells scenic postcards and similar products. The sole shareholder and director of the Company is Bob Beresford. Colin Ramsay was employed by the Company for ten years or more until late November 2008. The principal issue in this case is how the parties' employment relationship came to an end. Mr Ramsay says he was dismissed. The Company, through Mr Beresford, says that Mr Ramsay either resigned or abandoned his employment.

[2] Mr Ramsay pursued a personal grievance alleging that he had been unjustifiably dismissed. The Employment Relations Authority sustained his claim and ordered the Company to pay Mr Ramsay about \$12,000 in remedies<sup>1</sup>.

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<sup>1</sup> CA 4/10, 15 January 2010.

Subsequently, the Authority ordered the Company to pay a further \$3,000 for costs<sup>2</sup>. The Company challenged both determinations and the matter came before the Court by way of a hearing de novo.

[3] In the course of the hearing, which occupied four days, a great deal of evidence was given. This included several lengthy documents and three audio recordings. Much of this evidence was irrelevant or, at best, peripheral to the essential issues and need not be referred to. I confirm, however, that I have reviewed the whole of the evidence in the course of preparing this decision.

### **Background and sequence of events**

[4] The Company operates a small business. Mr Beresford is a talented photographer, particularly of landscapes. He takes photographs which are used to make postcards, sold principally to tourists. The Company also makes some other products but scenic postcards provide most of its business. These postcards are sold to retailers throughout New Zealand.

[5] Mr Ramsay was originally employed by the Company on a part time basis to make and repair stands used to display the postcards. He was introduced to Mr Beresford by his sister, Elaine Ramsay, who worked for the Company as an accounts clerk and bookkeeper. It was unclear from the evidence when the employment relationship was established but it appears to have been between 1996 and 1998. As well as working for the Company, Mr Ramsay earned money doing gardening.

[6] In about 2000, Mr Ramsay became a full time employee of the Company. In addition to carrying on with the work he had done before, he became a sales representative for the Company. His territory included the whole of the South Island and the lower part of the North Island. This part of the work required Mr Ramsay to undertake lengthy trips, during which he frequently worked long hours. Working full time for the Company meant that Mr Ramsay did less gardening than before but he continued to do some.

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<sup>2</sup> CA 4A/10, 30 March 2010.

[7] In 2002, Mr Beresford was dissatisfied with some aspects of Mr Ramsay's performance. In particular, he felt that Mr Ramsay worked too slowly. Mr Beresford recorded these matters in a letter in which he suggested that Mr Ramsay give up the sales work and return to working only part time. That never happened and Mr Ramsay continued working full time as before.

[8] In about 2005, Elaine Ramsay began cultivating and selling four leaf clovers as a novelty item. Mr Ramsay assisted her to place a few of these in retail stores. When he learned that Mr Ramsay was doing this, Mr Beresford became concerned. There was some discussion between the two men about it but this was never a disciplinary issue and Elaine Ramsay stopped producing the items after only a year or so.

[9] Also around 2005, one of the retailers of his cards commented to Mr Beresford that Mr Ramsay had been promoting what were known as 3D cards for another supplier. This prompted another discussion between the two men but, again, there were no disciplinary connotations.

[10] In mid-2008, another issue arose. During his sales trips, Mr Ramsay worked many more than 40 hours each week. While he was in Christchurch, his other work sometimes did not occupy him all of each day. To even out his income, and possibly to reduce the amount of tax he had to pay, Mr Ramsay recorded some of the hours he had worked while away on sales trips as hours he had worked in Christchurch. It appears he started this practice some time in 2006 but it only came to Mr Beresford's notice in July 2008. He then had a lengthy discussion about this with Mr Ramsay. It concluded with Mr Ramsay saying he would stop the practice and Mr Beresford saying he could continue if he wished. Subsequently, Mr Ramsay did not transfer any more hours.

[11] After resolving this issue with Mr Ramsay, Mr Beresford took up the same issue with his sister. As a result of accusations of dishonesty made by Mr Beresford which Elaine Ramsay found unacceptable, she resigned. She finished work for the Company around the end of October 2008.

[12] An important consideration for Mr Ramsay was the care and well being of his elderly mother. During the second half of 2008, her health was deteriorating. She lived alone in her own home and, while she was able to care for herself during the day, she increasingly needed assistance at night. While he was in Christchurch, Mr Ramsay was able to provide that assistance but he was obviously unable to do so while away on sales trips.

[13] The market for postcards of the type produced by the Company was seasonal. During the winter, the demand was less and few, if any, sales trips needed to be made. There was, however, a real need for such trips to be made from September onwards. Mr Ramsay made a trip to coastal Otago in late August 2008, a trip to Central Otago in mid-September and a further trip to Picton in late September but more trips were required.

[14] Mr Ramsay was conscious of the competing demands of his job and his mother. He spoke regularly with her doctors and made enquiries about getting paid care for her. In early October 2008, he approached Mr Beresford. They discussed the situation. Mr Ramsay expressed his concern about being able to make lengthy sales trips unless arrangements were made to care for his mother. Mr Beresford did not suggest any changes to Mr Ramsay's job at that stage.

[15] Another issue which became apparent about this time was that Mr Ramsay had accrued eight weeks of annual holidays. Mr Beresford was concerned about the contingent liability this represented and encouraged Mr Ramsay to take some of those holidays. Mr Ramsay responded by taking most of the first three weeks of October 2008 as holidays. When he returned to work, Mr Ramsay was able to arrange for someone else to be with his mother for a week and he used that time to make a sales trip to the west coast of the South Island. After Mr Ramsay had been away for four days, however, his mother unexpectedly deteriorated and he had to return to Christchurch

[16] On 11 November 2008, Mr Ramsay approached Mr Beresford again. Mr Ramsay said that he felt unable to take extended trips out of town until arrangements

had been made to care for his mother. Mr Ramsay told Mr Beresford of the efforts he was making to do that. No conclusions were reached in that discussion.

[17] On Friday 21 November 2008, Mr Ramsay's mother had a sudden turn and was admitted to hospital. The nature of her condition was unknown and a major source of worry for Mr Ramsay over the weekend. He made an appointment to see the hospital doctor who was attending her on the afternoon of Monday 24 November 2008. In order to keep that appointment, he had to leave work at 3.30pm.

[18] Mr Ramsay went to work as usual on Monday 24 November 2008. During the morning, Mr Beresford telephoned him and Mr Ramsay told Mr Beresford about the appointment. Some time after 3pm, Mr Beresford went to Mr Ramsay's work area and engaged him in conversation.

[19] This conversation was the last effective communication between Mr Beresford and Mr Ramsay and is central to the issues in this case. Unbeknown to Mr Ramsay, Mr Beresford recorded the conversation and he did not reveal the fact that he had done so until shortly before the Authority's investigation meeting. The tape recording and various transcripts of it were produced during the hearing before the Court.

[20] Although it is clear from the tape recording what was said in this conversation and how it was said, there were critical differences in the parties' views about the inferences to be drawn from it. I deal with those in later in this decision. Some aspects of the matter are, however, undisputed. Mr Beresford initiated the conversation with a view to resolving the uncertainty about Mr Ramsay's availability to do sales trips in the immediate future. Mr Beresford wanted Mr Ramsay to cease being a full time employee and, instead, to become a casual employee available on call. During the conversation, Mr Beresford repeatedly urged Mr Ramsay to resign and proposed several times that Mr Ramsay make that day his last day. Mr Beresford did not, however, explicitly say that Mr Ramsay was dismissed or utter other words to that effect. Mr Ramsay ended the conversation about 3.30pm in order to keep his appointment with his mother's doctor. Before going, Mr Ramsay said

that he would telephone Mr Beresford the following day to let him know the result of that discussion.

[21] Mr Ramsay saw the doctor as arranged. It emerged that his mother's condition was far less serious than had been feared but it was also clear that she would require regular care after she was discharged from hospital if she was to continue living in her own home. Mr Ramsay and his sister were told by social workers that it was likely that such care could be provided.

[22] Mr Ramsay's evidence is that, during that evening, he thought about what Mr Beresford has said to him in the conversation that afternoon. His mind became fixed on Mr Beresford repeatedly saying that he should make that day his last day. He took it from this that Mr Beresford no longer wanted him to work for the Company. He telephoned his sister and told her that he had been dismissed.

[23] Elaine Ramsay confirmed receiving this call from Mr Ramsay on the evening of 24 November 2008. She said that she was concerned to know why this had happened and telephoned Phyllis Parker, another employee of the Company with whom Elaine Ramsay was friendly. Ms Parker knew nothing then about Mr Ramsay being dismissed but subsequently spoke to the other employee of the Company, Anja Carr about the matter. Ms Carr spoke to Mr Beresford, telling him that Mr Ramsay believed he had been dismissed.

[24] In the week following 24 November 2008, Mr Beresford telephoned Elaine Ramsay three times. The first was on Tuesday 25 or Wednesday 26 November. The second call was later that week, either on the Thursday or the Friday. The third was the following Tuesday 2 December 2008. Elaine Ramsay says that she told Mr Beresford in each of these conversations that Mr Ramsay believed he had been dismissed. Mr Beresford agrees that she said this in the second and third calls but disputes what she said in the first.

[25] After Monday 24 November 2008, Mr Beresford and Mr Ramsay did not speak to each other again. Mr Ramsay did not call Mr Beresford on 25 November 2008 as he had said he would. Mr Beresford called Mr Ramsay's home number on

at least one occasion but, when he had the opportunity to leave a voice message, did not do so. On Monday 1 December 2008, Mr Ramsay telephoned Ms Carr to enquire about his final pay. It was a brief call confined to that purpose and he did not speak to Mr Beresford. Mr Beresford was, however, made aware of it.

[26] On 25 or 26 November 2008, Mr Beresford began writing a letter to Mr Ramsay. He added progressively to this letter over the next 10 days or so before sending it and it was not received by Mr Ramsay until 5 or 6 December 2008. I discuss some of the content of this letter and its significance later.

[27] Mr Ramsay's mother was discharged from hospital on Wednesday 26 November 2008. From that time on, Mr Ramsay cared for his mother and did not seek any other employment. Since April 2009, he has received payment for this work.

## **Issues**

[28] There can be no doubt that the employment relationship between the parties ended following the conversation on 24 November 2008 and the events of the following week. The principal issue is where the responsibility for that termination properly lies.

[29] In order to decide that issue, it is necessary to examine one issue of fact in more detail. I do that next.

[30] Mr Beresford conceded in the course of the hearing that, if Mr Ramsay was dismissed, that dismissal was unjustifiable. It follows that, should I find that Mr Ramsay was dismissed, the only other issues will be the nature and extent of remedies to be granted and the extent to which Mr Ramsay may have contributed to the situation giving rise to his grievance.

## **Finding of fact**

[31] There were numerous conflicts in the evidence given on one hand by Mr Ramsay and Elaine Ramsay and, on the other hand, by Mr Beresford but only one issue needs to be resolved. That is when Mr Beresford became aware that Mr Ramsay believed he had been dismissed.

[32] Elaine Ramsay's evidence was that, after 24 November 2008, Mr Beresford made three telephone calls to her and that, on each occasion, she told him directly that Mr Ramsay believed he had been dismissed. She said that the first of these telephone calls was on Tuesday 25 November 2008 or possibly the following day. She described this as the longest of the three conversations and that Mr Beresford rang to ask her about Mr Ramsay. In response to determined and repeated cross examination, Elaine Ramsay's evidence on this issue remained consistent and unchanged.

[33] Mr Beresford's evidence was that he first became aware that Mr Ramsay was saying that he had been dismissed when told of this by Ms Carr on Thursday 27 November or Friday 28 November 2008. It became apparent, however, that Mr Beresford's recollection of his first telephone conversation with Elaine Ramsay was vague at best. In his written brief of evidence, Mr Beresford denied that this first conversation occurred, saying he had only two conversations with Elaine Ramsay, not three. In his sworn evidence, however, he said that he had called Elaine Ramsay within a day or two after Monday 24 November 2008. Mr Beresford said that he made the call in order to find out what Mr Ramsay's situation was but that he could not recall what was said during the conversation. Mr Beresford went on to say that he thought he had not been told Mr Ramsay believed he had been dismissed because he would have remembered that. Mr Beresford also gave evidence, however, that when Ms Parker spoke to him on Thursday 27 November 2008, she told him that Elaine Ramsay had mentioned telling him in their conversation earlier that week that Mr Ramsay believed he had been dismissed.



[34] On this issue, I find the evidence of Elaine Ramsay very much more reliable than that of Mr Beresford. I also find it highly likely that, given the evidence of both Mr Beresford and Elaine Ramsay that he rang to enquire about Mr Ramsay's situation, she would have told him. I find as a fact that Elaine Ramsay told Mr Beresford in their first conversation that Mr Ramsay believed he had been dismissed. That was most likely on Tuesday 25 November 2008 or, at the latest, the following day.

### **Discussion and decision**

[35] What occurred in the final conversation between Mr Beresford and Mr Ramsay on the afternoon of Monday 24 November 2008 cannot be disputed. The tape recording of it accurately captures what was said and how it was said. It is clear from the recording that Mr Ramsay was not directly dismissed in the course of the conversation. From an objective point of view, therefore, the employment relationship remained intact when he left.

[36] Notwithstanding that, Mr Ramsay's evidence is that he formed the view that evening that he had been dismissed. Mr Beresford submitted that this evidence should be rejected as incredible. He based that submission on two propositions. Firstly, he suggested that because Mr Ramsay had not actually been dismissed, any belief to that effect was unreasonable and could not have been genuine. Secondly, he suggested that Mr Ramsay and his sister conspired to construct a false personal grievance claim in order to get money from the Company. According to Mr Beresford, Mr Ramsay's claim that he had been dismissed was the first step in that deception. In support of that proposition, Mr Beresford relied on what he said was the dishonest conduct of both Mr Ramsay and Elaine Ramsay in relation to the three issues which had arisen in previous years.

[37] I do not accept that submission for several reasons. As Mr Beresford conceded, he initiated the conversation with Mr Ramsay on 24 November 2008 with the aim of ending the existing employment relationship. During the conversation, he pursued that aim repeatedly and relentlessly. On at least six occasions, he suggested to Mr Ramsay that he leave immediately. He reinforced this by telling Mr Ramsay

that the work he was doing was not required until the following year. He also said that, if Mr Ramsay wanted to take his holidays, he had to stop working full time. Towards the end of the conversation, Mr Beresford suggested twice that it should be Mr Ramsay's last day and concluded by saying that he wanted to get things "over and done with" that day.

[38] That conversation took place while Mr Ramsay was preoccupied with concerns about his mother's health. Mr Ramsay was closely involved in caring for his mother. She was unexpectedly in hospital with the possibility that she was seriously ill. Mr Ramsay had an appointment to see her doctor to find out how ill she was and was anxious to get away to that meeting. It is apparent from his responses to Mr Beresford during the conversation that Mr Ramsay's thoughts were focussed on his mother for much of the time rather than on the detail of what Mr Beresford was saying. In these circumstances, it is not at all surprising that Mr Ramsay went away from the conversation with general impressions and snippets of the conversation in his mind rather than an accurate recollection of what Mr Beresford had said. Given what Mr Beresford had said, I find it entirely credible that Mr Ramsay formed the belief, albeit mistaken, that he had been dismissed.

[39] Mr Beresford's theory that Mr Ramsay and his sister fabricated evidence to make a false claim is entirely unsupported by evidence and I reject it. I also reject the proposition that Mr Ramsay and Elaine Ramsay were dishonest in relation to the issues which had arisen in previous years. A great deal of Mr Beresford's cross examination of them both was devoted to those issues but nothing of substance emerged.

[40] Just as I accept Mr Ramsay's evidence that he believed he had been dismissed, I also accept Mr Beresford's evidence that, following the conversation on 24 November 2008, he believed the employment relationship remained intact and expected to hear from Mr Ramsay the following day.

[41] It is a fundamental component of every employment relationship that the parties must deal with each other in good faith. What this means in practice is

explained in some detail in s 4 of the Employment Relations Act 2000, the relevant part of which is:

**4 Parties to employment relationship to deal with each other in good faith**

- (1) The parties to an employment relationship specified in subsection (2)—
- (a) must deal with each other in good faith; and
  - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
    - (i) to mislead or deceive each other; or
    - (ii) that is likely to mislead or deceive each other.
- (1A) The duty of good faith in subsection (1)—
- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
  - (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative

...

[42] In this case, the obligations in paragraph (1A)(b) above are particularly significant.

[43] When Mr Ramsay did not call him on Tuesday 25 November 2008 as he expected, Mr Beresford ought properly to have been concerned. It appears he was. Rather than try to contact Mr Ramsay directly, however, Mr Beresford telephoned Elaine Ramsay. In the circumstances then prevailing, that was not unreasonable. Mr Beresford knew that Mr Ramsay was staying at his mother's house. He did not have her telephone number. The issue at that stage was how ill Mrs Ramsay was and, as far as Mr Beresford was concerned, how that might affect Mr Ramsay's attendance at work. Mr Beresford knew that Elaine Ramsay was likely to know about her mother's health and this would give him some idea about Mr Ramsay's availability.

[44] What Elaine Ramsay told Mr Beresford in that telephone conversation fundamentally changed the situation. He learned that Mr Ramsay believed he had been dismissed on the Monday afternoon. He therefore knew that he and Mr Ramsay had different understandings of the state of the employment relationship. He believed it was intact. Mr Ramsay believed it was over.

[45] In these circumstances, the duty to be active and constructive in maintaining the employment relationship and the duty to be communicative required Mr Beresford to get in touch with Mr Ramsay as soon as possible. That duty fell particularly on Mr Beresford because only he knew that he and Mr Ramsay had different understandings. Mr Beresford's failure to discharge that duty was a serious breach of good faith.

[46] In reaching that conclusion, I have had regard to Mr Beresford's evidence about why he did not try to contact Mr Ramsay directly. The reason he gave was that he believed Mr Ramsay was in the process of creating a false personal grievance and that he did not want to say anything to him which might later be used to further that claim. That was a totally unreasonable and irrational point of view. It can be given no weight. As a sort of fall back position, Mr Beresford said that he did make an effort to contact Mr Ramsay by calling his sister. That also can be given no weight. It was common ground that Elaine Ramsay strongly resented Mr Beresford calling her about her brother and made it abundantly clear that she would not be a go between. The reality is that Mr Beresford had the means to contact Mr Ramsay directly by leaving a message for him on the answering machine at his home. Mr Beresford had done this previously and knew that Mr Ramsay responded to such messages. Equally, Mr Beresford could have written Mr Ramsay a letter and posted it or delivered it to his home. He clearly had no difficulty in writing to Mr Ramsay about employment matters as he did so in the letter which Mr Ramsay finally received on 5 or 6 December 2008.

[47] Having regard to all the evidence, I find it more than likely that Mr Ramsay would have returned to work had Mr Beresford promptly clarified that he had not been dismissed. Mr Ramsay made it clear during the conversation with Mr Beresford on 24 November 2008 that he did not want to resign. Contrary to the opinion expressed by Mr Beresford in his evidence and submissions, I find that there were options available for professional care of Mr Ramsay's mother, enabling him to resume all of his employment duties.

[48] I find that Mr Beresford's failure to promptly communicate with Mr Ramsay after finding out he believed he had been dismissed on Monday 24 November 2008 amounted to a dismissal.

[49] The long established definition of a dismissal is that it is a termination of the employment relationship at the initiative of the employer. It covers both actual and constructive dismissals.<sup>3</sup> Although there was not an actual dismissal and the circumstances of this case do not neatly fit into any of the conventional categories of constructive dismissal<sup>4</sup>, it seems to me nonetheless that the employment relationship ended as a result of the employer's conduct. Specifically, Mr Beresford knew that Mr Ramsay believed he had been dismissed, that he was acting on that belief and, in breach of the employer's statutory duty of good faith, failed to correct the situation.

[50] There is a close analogy between this case and one of the scenarios presented by Chief Judge Goddard in *Boobyer v Good Health Wanganui Limited*.<sup>5</sup> When describing cases in which an employee is, against his or her will, treated by an employer as having resigned, he said:

Then there is the case, exemplified by *Sadd v Iwi Transition Agency* [1991] 1 ERNZ 438, where the communication is equivocal, the employee learns that the employer has misunderstood it as a resignation contrary to the employee's intention but does nothing within a reasonable time to correct the employer's false impression. In such a case the employee must suffer the adverse consequences of passively standing by and letting the employer think that a resignation has taken place.

[51] If the mistake is about dismissal rather than resignation, the analogous scenario is this. Where the communication is equivocal, the employer learns that the employee has misunderstood it as a dismissal contrary to the employer's intention but does nothing within a reasonable time to correct the employee's false impression. In such a case the employer must suffer the adverse consequences of passively standing by and letting the employee think that a dismissal has taken place.

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<sup>3</sup> See *Wellington, Taranaki and Marlborough Clerical and Administrative and Related Workers Union v V.V. Greenwich and C.F. Greenwich* [1983] ACJ 965.

<sup>4</sup> See *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA).

<sup>5</sup> WEC 3/94, 24 February 1994.

[52] A fair and reasonable employer in Mr Beresford's position would have communicated directly with Mr Ramsay without delay and, in any case, within a day or so. As I have already found, Mr Beresford could easily have done that. He chose not to and the Company must now accept responsibility for the consequences of his inaction.

[53] Although I have concluded that Mr Ramsay was dismissed for the reasons given above, it is appropriate that I record and respond to Mr Beresford's case. He submitted that the employment relationship remained intact up to the time Mr Ramsay received his letter dated 26 November 2008 on 5 or 6 December 2008. Mr Beresford submitted that this letter clarified to Mr Ramsay that he had not been dismissed on 24 November 2008 and invited him to discuss the matter. In Mr Beresford's analysis, it was Mr Ramsay's failure to respond to that invitation which ended the employment relationship.

[54] As previously noted, Mr Beresford's letter dated 26 November 2008 was lengthy and written successively over a period of eight or nine days. The passage relied on by Mr Beresford is towards the end of the letter. After complaining that Mr Ramsay had not returned keys and other property of the company, Mr Beresford said:

Meanwhile, it's clear that we'll have to sort out the situation by you coming into work and returning the necessaries and starting from there.

...

So ring work to arrange an appointment time to meet with me – this week ought to be the best idea.

[55] In reliance on this passage, Mr Beresford submitted that he had not dismissed Mr Ramsay and that the door had remained open for him to return. In that same letter, however, Mr Beresford made allegations that Mr Ramsay had been dishonest, lazy and deceptive. Mr Beresford also made it clear in the letter that, as far as he was concerned, Mr Ramsay was no longer suitable for the position he held and that there would be no work he wanted Mr Ramsay to do for several months. In the final two paragraphs, Mr Beresford said:

Remember, when you just made and packed stands you were an occasional part timer. And you worked far quicker then, too. I got you into the repping

..... against Elaine's advice (several times). You've often been given Christmas bonuses, despite being slow.

The job only exists (or should) anywhere near being a fulltime thing because of the repping. After over a month's procrastinating on it, which cost us a lot, you've ruled yourself out of the repping.

You've disqualified yourself from what the job mainly is, so your offer to quit is very appropriate.

Doing stands is something that can be looked at separately, when the need arises, and that's not now. Even then, it would only, in theory, be a fill in job around gardening, as it was originally for you.

[56] If it had been possible to restore the employment relationship nearly two weeks after the conversation on 24 November 2008, this letter fell well short of what was required to do so. The letter made it clear that Mr Beresford regarded Mr Ramsay's former position as no longer open to him and offered him no more than the possibility of casual work at some indeterminate time in the future. Had the employment relationship still been intact, this letter would have constituted a dismissal.

## **Justification**

[57] Although Mr Beresford did not attempt to argue that Mr Ramsay's dismissal was justifiable, it is appropriate that I record some aspects of why it was unjustifiable. The test of justifiability to be applied is in s 103A of the Employment Relations Act 2000:<sup>6</sup>

### **103A Test of justification**

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred

[58] In this case, I highlight the following three aspects of Mr Beresford's actions on behalf of his company were not what a fair and reasonable employer would have done in all the circumstances:

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<sup>6</sup> This is the version of s 103A which was in effect at the time of the events in question in this case.

- (a) Initiating and conducting the conversation he had with Mr Ramsay on the afternoon of 24 November 2008. Mr Beresford knew that Mr Ramsay was vitally concerned about his mother's health and preoccupied with that concern. Mr Beresford also knew that Mr Ramsay was about to go an appointment with her doctor. That was not the time to discuss the future of his employment and to press Mr Ramsay repeatedly and relentlessly to resign.
- (b) Failing to communicate promptly and effectively with Mr Ramsay when he knew that Mr Ramsay believed he had been dismissed.
- (c) Concluding that Mr Ramsay could no longer carry out his former role without consulting him fully about the matter.

## **Remedies**

[59] The statement of defence contained no specific claim for remedies. That being so, the Court can only proceed on the basis that he continued to seek the same remedies he sought in the Authority. They were reimbursement of lost wages equivalent to three months' ordinary time pay and compensation of \$12,000.

[60] There is an obvious difficulty with the claim for reimbursement of lost wages. The statutory remedy provided for in s 128 of the Employment Relations Act 2000 is for money lost "as a result of the grievance". After he was dismissed, Mr Ramsay elected to become a full time care giver for his mother. While that was admirable, the result was that he took no steps to earn income which might have mitigated the loss of wages from his job at the Company. In such circumstances, it cannot be said with confidence that Mr Ramsay's loss of wages was the result of his dismissal.

[61] All that Mr Ramsay can justly be awarded is wages in lieu of notice. In the absence of an agreed period of notice, it must be what would have been reasonable in all the circumstances. Having regard to the nature and length of the employment, I



find that period was four weeks. Based on a 40 hour week and Mr Ramsay's wage rate of \$18 per hour, that equates to \$2,880.

[62] Turning to the claim for compensation, Mr Ramsay gave evidence that he was shocked by his dismissal and that it had a major emotional impact on him. He said that he was naturally "a worrier" and that the termination of his employment caused him much anxiety and sleeplessness. He also reported suffering from headaches and dizzy spells. Mr Ramsay said that the job had been a major part of his life for more than ten years, that he really enjoyed the work and that he felt very poorly treated. This evidence was corroborated to an extent by the evidence of Elaine Ramsay.

[63] I accept this evidence and, based on it, I find that a just award of compensation is \$8,000.

### **Contribution**

[64] Section 124 of the Employment Relations Act 2000 provides:

#### **124 Remedy reduced if contributing behaviour by employee**

Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[65] The obligation of good faith imposed by s4 of the Employment Relations Act 2000 is a mutual one. It applies to employers and employees equally. Thus, just as Mr Beresford, on behalf of the Company, had an obligation to be active and constructive in maintaining a productive employment relationship, so did Mr Ramsay. He too was required to be responsive and communicative.

[66] Mr Beresford submitted that these obligations required Mr Ramsay to communicate with him just as much as they required him to communicate with Mr

Ramsay. Indeed, he went so far as to suggest that the responsibility to clarify matters lay entirely with Mr Ramsay. It was implicit in these submissions that Mr Beresford was inviting me to regard Mr Ramsay's failure to seek clarification as contributory conduct.

[67] I do not accept this proposition. I have found as a fact that Mr Ramsay genuinely believed that he had been dismissed on Monday 24 November 2008. That being so, he was unaware of the need for any clarification. As he saw it, the employment relationship was over. It was only Mr Beresford who was aware that Mr Ramsay's belief that he had been dismissed was in error. The obligation to communicate with Mr Ramsay to correct the error was therefore on Mr Beresford.

[68] A great deal of evidence was given about the events of previous years relating to the 3D cards, the four leaf clovers and the recording of hours worked. Although Mr Beresford did not explicitly submit that Mr Ramsay's part in those matters should be taken into account as contributory conduct, it appeared to be one of the reasons the evidence was given. I make it clear that I not do so. They were purely historic matters at the time Mr Ramsay's employment came to an end.

[69] Overall, I do find that Mr Ramsay's actions did not contribute towards the situation giving rise to his personal grievance.

### **Costs in the Authority**

[70] Although the challenge extended to both determinations of the Authority, no evidence was given or submissions made about the costs determination. On its face, it is perfectly conventional and I find no reason to disturb the conclusion reached.

### **Comments**

[71] This judgment is being delivered long after the hearing. That delay, and the resulting inconvenience to the parties, is regrettable. There are several reasons for it.

[72] The manner in which Mr Beresford conducted the case for the Company added greatly to the length of the hearing. Both in his own evidence and in his cross examination of the plaintiff's witnesses, Mr Beresford was repetitious, discursive and frequently drifted into irrelevance. Had the evidence been limited to what was relevant to the essential issues, the case could have been heard in one day. As it was, it occupied four full days and the transcript of evidence ran to well over 400 pages. A very great deal of time was required to review and analyse all of this evidence.

[73] The unusual facts of this case required considerable thought about the applicable principles of law. Mr Sanders' submissions were in writing, well organised and clearly expressed but did not address what turned out to be the critical issue. Mr Beresford's submissions were made orally and were difficult to discern. Considerable time was required to review what he had said and identify the case for the Company.

[74] The Christchurch earthquakes have impacted heavily on the Court's resources and my availability to devote the necessary time to completing this judgment.

## **Conclusions**

In summary, my judgment is:

- (a) Mr Ramsay was unjustifiably dismissed.
- (b) NZ Cards Limited is to pay Mr Ramsay \$2,880 as reimbursement of lost wages.
- (c) NZ Cards Limited is to pay Mr Ramsay \$8,000 as compensation for humiliation, loss of dignity and injury to his feelings.
- (d) I confirm the costs determination of the Authority. NZ Cards Limited is to pay Mr Ramsay \$3,000.

- (e) By operation of s 183(2) of the Employment Relations Act 2000, the determinations of the Authority are set aside and this decision stands in their place.

### **Costs**

[75] Although the remedies I have awarded to Mr Ramsay are slightly less than those awarded by the Authority, the challenge has been almost entirely unsuccessful. Mr Ramsay is entitled to a contribution to the costs he has incurred in resisting it. I encourage the parties to agree costs if possible. If they are unable to do so, Mr Ramsay's representative should file and serve a memorandum within 25 working days after the date of this decision. Mr Beresford is then to have 15 working days in which to provide a memorandum in response. Once the issue of costs has been resolved, I will give directions for disbursement of the money paid into Court by the Company.

AA Couch  
Judge

Signed at 4.00pm on 27 March 2012