CITATION:	*NORMIST PTY LTD v O'SHEA* [2009] NTMC 063
PARTIES:	NORMIST PTY LTD
	v
	RODNEY MICHAEL O'SHEA
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	SMALL CLAIMS
FILE NO(s):	20908298
DELIVERED ON:	2 DECEMBER 2009
DELIVERED AT:	DARWIN
HEARING DATE(s):	17 NOVEMBER 2009
JUDGMENT OF:	ACTING JUDICIAL REGISTRAR SMYTH

CATCHWORDS:

CONTRACT – certainty of terms

Whitlock v Brew (1968) 118 CLR 445

REPRESENTATION:

Counsel:

Plaintiff:	NA
Defendant:	NA

Solicitors:

Plaintiff:	Self Represented
Defendant:	Self Represented

Judgment category classification:	B
Judgment ID number:	[2009] NTMC 063
Number of paragraphs:	23

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20908298

BETWEEN:

NORMIST PTY LTD
Plaintiff

AND:

RODNEY MICHAEL O'SHEA
Defendant

REASONS FOR JUDGMENT

(Delivered 2 December 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. This is a small claim proceeding brought by the plaintiff against the defendant, a former employee. The plaintiff seeks damages for breach of contract arising from the contract of employment, and from subsequent agreements entered into during the course of employment. Specifically, the plaintiff seeks to recover the costs of excessive mobile phone calls made by the defendant and training costs.

2. The plaintiff, with leave, was represented by Mr Willis, the General Manager of the plaintiff and Ms Goody, the credit officer. The defendant, Mr O'Shea, represented himself. All parties were sworn and gave evidence under oath.

The plaintiff's evidence

3. The defendant was employed by the plaintiff on 20 August 2007 in its lifting and testing services division. The terms of employment were set out

in the letter of offer dated 14 August 2009. The relevant parts of the letter state:

> "3. A mobile phone is provided for work purposes only. If either of the following should eventuate then payment in full will be deducted from your next pay:
>
> a) Any excessive personal phone calls made will be charged back to you.
>
> b) In the event of you losing or it being stolen (depending on circumstances) the company mobile phone you will be issued with a replacement mobile at your expense."

4. During the course of his employment the defendant was required to use the mobile phone to contact customers, the office and the like.

5. During the period of the defendant's employment, the defendant made the following excessive personal use of his company mobile phone in breach of the employment contract:

Oct-07	$118.29			
Nov -07	$77.03			
(04) 24155669	$380.01	614 calls	20.35.15 hrs	to wife
61401967378	$27.00	108 calls		
(04) 3284 7978	$56.36	34 calls	3.02.36 hrs	
439562746	$18.53			
89993000	$21.84	34 calls	1.12.50 hrs	to legal aid
61424155669	$5.74	23 calls		to wife
432847978	$46.13	23 calls	2.46.26 hrs	
(13) 00650410	$49.85	19 calls	2.02.43 hrs	
(04) 0130 9058	$20.30	16 calls	0.53.19 hrs	
137663	$22.77			

6. It was about 6 months into the defendant's employment that an opportunity to undertake specific training arose. The specific training was in the nature of undertaking a rigger's and dogger's course, so that the defendant could obtain a rigging and dogging licence.

7. On 19 May 2008 the defendant and a representative of the plaintiff, Mr Cheadle, entered into two contracts. Relevant parts of the first contract provides:

Normist Pty Ltd agrees to pay the sum of $765 to enable you to complete your Dogging Licence on the following conditions.

1. Should you resign or have your employment terminated within the first twelve months of completion of the course you will repay to Normist Pty Ltd the full amount of the course fee ($765.00 excl GST).
2. Should you leave the company at the end of twelve months and less then two years of completion of the course you will repay to Normist Pty Ltd 50% of the course fee ($382.50 excl GST).
3. At the end of two years should you leave the company the Dogging Licence is debt free.

I Rodney O'Shea have read the above and do agree to conditions set out.

"Executed by Rodney O'Shea and Eddie Cheadle" dated May 19, 2008"

8. Relevant parts of the second contract provide:

Normist Pty Ltd agrees to pay the sum of $720 to enable you to complete your Rigging Licence on the following conditions.

1. Should you resign or have your employment terminated within the first twelve months of completion of the course you will repay to Normist Pty Ltd the full amount of the course fee ($720.00 excl GST).
2. Should you leave the company at the end of twelve months and less then two years of completion of the course you will repay to Normist Pty Ltd 50% of the course fee ($360.00 excl GST).
3. At the end of two years should you leave the company the Rigging Licence is debt free.

I Rodney O'Shea have read the above and do agree to conditions set out.

"Executed by Rodney O'Shea and Eddie Cheadle" dated May 19, 2008"

9. The defendant resigned from the plaintiff's employ on 5 September 2008, which was within 12 months of the completion of the courses.

10. The plaintiff sought to recover, from the defendant's final entitlements, the amount of $843.85 for excessive mobile phone usage and $1485 for training costs due to the defendant's early departure from employment.

11. The costs of excessive mobile phone calls were not sought to be recovered during the course of the defendant's employment, but only on his termination. The plaintiff did not have any specific policy giving guidance to employees in relation what might be considered excessive phone calls, or how employees might be put on notice of such calls, or how such phone costs may be monitored. The plaintiff tendered Telstra phone records for the defendant's mobile phone for the entire employment period, namely August 2007 to September 2008.

The defendant's evidence

12. It was the defendant's evidence that he did not deny a majority of the phone calls were for private use. In evidence he made some reference to calls being made to employees but there was not a concerted effort on his behalf to deny the phone records.

13. However, it was the defendant's evidence that, in relation to his use of the employer's mobile phone, he was never given details of any calls nor were the accounts ever brought to his attention during his employment. It was his evidence that excessive use of the phone was never brought to his attention, nor was he told his usage was too high and to cut down the calls. The defendant recalled a conversation with the office manager, Mr Cheadle, in about May 2008. That conversation mainly related to the over use of SMS messaging on the mobile phones, and which was raised in relation to another employee. However, he did recall Mr Cheadle saying words to the effect "If you can get the personal calls down then try to". However, that was about the extent of the conversation.

14. In relation to the issue of the training agreements, it was the defendant's evidence that he had signed the contracts under "duress". It was his view that he did not need to sign such agreements, that such training should have been provided as part of his employment, and that he signed them because he was forced to. Further, he resigned from the plaintiff's employ because of the actions of the office manager Mr Cheadle. The defendant

made allegations relating to what he described as the "unethical and unlawful" behaviour of Mr Cheadle, which eventually forced the defendant's hand. It was on that basis, that the defendant considered that he should not be held to the training agreements.

Decision

15. In order to enforce a term of a contract the term must be certain, that is, the Court must be able to ascertain clearly and objectively what the parties intended (see *Whitlock v Brew* (1968) 118 CLR 445).

16. Clause 3 of the employment contract contains the phrases "a mobile phone is for work purposes only" and "any excessive personal phone calls made will be charged back to you". The two phrases are inconsistent, that is, it is not clear how the phone could be for "work purposes only" yet also be used for non-excessive personal phone calls. Assuming the clause contemplates the use of the phone for personal phone calls, which are not for work purposes, there is no definition of what is excessive. The word "excessive" is defined by the Macquarie Dictionary to mean "exceeding the usual or proper limit or degree; characterised by excess". The contract does not give any guidance as to what the usual or proper limit for personal phone calls may be. Further, on the evidence, the plaintiff had no corporate policy in relation to personal phone usage, which could have been incorporated into terms of the employment contract. Furthermore, on the evidence, there were no formal processes or procedures to make employees aware of excessive personal phone use. There was no warning system.

17. The phrase "then payment in full will be deducted from your next pay" also implies that monitoring will be conducted on a regular basis and deductions made from an employee's pay when necessary. That did not occur in this case, where the plaintiff sought to recover over 13 months of alleged excessive phone calls. Although there was evidence that at least

one other employee has had his pay reduced for excessive calls during the course of his employment.

18. Further, in this case, the plaintiff has sought to recover the costs of all excessive calls from the defendant regardless as to whether they were excessive or not (ie. above an accepted level). The wording of clause 3 appears to contemplate that a non-excessive amount of personal calls would be tolerated by the employer, and only calls above an excessive amount will be deducted from salary. For example, if five calls per week to one's spouse was considered the limit for excessive calls, and an employee made twenty five calls in a week, the employer should only seek to recover the cost of twenty calls (ie. the number of calls which exceeded the set level).

19. In relation to defining excessive personal calls, one would have thought that it would be a simple matter to incorporate a definition of excessive into either the contract or a workplace policy. Excessive could be defined by percentage cost per month (ie. any personal calls more than 5% of the monthly bill is excessive). Alternatively excessive could be defined by reference to the number of calls or their duration. Further, at the very least, a warning system for employees should be implemented such that they are put on notice of what might be considered excessive. None of that was done in this case.

20. I am therefore not satisfied, given the evidence, that the clause allowing the recovery of excessive personal mobile phone call costs is certain enough to be enforceable as a term of the employment contract. An employee, without reference to a definition of excessive, or reference to a employer's policy, would have little or no idea as to what excessive meant. Further, an employee could continue using a mobile phone oblivious to their excessive use, only to be penalised for their ignorance on their termination. It is not for an employer to determine what is excessive use on the termination of the employment contract, that is something which

should be done on the contract's formation. I therefore dismiss that part of the plaintiff's claim.

21. In relation to the second aspect of the plaintiff's case, I find no compelling reason why the defendant should not be bound by the training agreements. Such agreements are common place in many industries, there is often a degree of *quid pro quo* in entering into such agreements. In this instance the defendant has received the benefit of the training, whilst the plaintiff has been denied his continued employment. I find that the defendant knew what he was doing when he executed the training agreements. I do not believe him when he says he entered into them under duress. At hearing, whilst giving evidence, the defendant did not strike me as the type of character who would be easily forced into signing something he did not agree to. Further, the issue of Mr Cheadle's alleged actions have little bearing on the matter. In any event Mr Cheadle was not called to give evidence and I am not prepared to accept uncorroborated and vague accounts of his behaviour. The plaintiff therefore succeeds on this aspect of its claim.

22. I understand that the plaintiff has already deducted $902.63 from the defendant's entitlements on termination of his employment. I make no finding as to the legality or otherwise of the plaintiff's right to do so, however my final order will take into account the fact that the plaintiff should only be entitled to recover the difference.

23. Therefore my orders are:

    1. The plaintiff's claim in relation to damages arising from a breach of the employment contract, concerning excessive personal phone call usage, is dismissed.

    2. There be judgment in favour of the plaintiff against the defendant in relation to that part of the claim concerning payment of monies under the two training agreements. Damages are awarded in favour of the plaintiff against the defendant in the amount of $523.59, being the

difference between $1426.22 (the amount owing under the training agreements) and $902.63 (monies already recovered from the defendant).

Dated this 2nd day of December 2009

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CRAIG SMYTH
ACTING JUDICIAL REGISTRAR