

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Conway Butchart Carrick (Applicant)

**AND** European Stone Surfaces Limited trading as Granite Transformations  
(Respondent)

**REPRESENTATIVES** Peter Hodge, Advocate for Applicant  
Ray Parmenter, Counsel for Respondent

**MEMBER OF AUTHORITY** R A Monaghan

**INVESTIGATION MEETING** 6 December 2004

**SUBMISSIONS RECEIVED** 9 December 2004

**DATE OF DETERMINATION** 17 January 2005

**DETERMINATION OF THE AUTHORITY**

[1] Conway Carrick says he was unjustifiably dismissed by his former employer, European Stone Surfaces Limited trading as Granite Transformations (“ESSL”).

[2] ESSL denies there was a dismissal, and says Mr Carrick resigned.

**Background**

[3] Mr Carrick commenced his employment as a specialist fabricator with ESSL in July 2003. He was paid at a rate of \$25 per hour. It was also a term of the parties’ employment agreement that Mr Carrick would supply his own specialist tools, which included a Festool brand saw, sander, vacuum unit and guide rail. There was no written agreement, and no doubt counsel has explained to the company its obligations in that respect.

[4] In return for Mr Carrick’s agreement to use his own specialist tools, there was an understanding that ESSL would pay a tool allowance at a later date never finalised and in an amount not discussed. At the same time Mr Carrick had just returned from living and working in Australia, so the managing director Peter Blundell permitted private use of a van owned by ESSL to assist Mr Carrick’s relocation. There was a mutual intention that the arrangement be for a short term only, but Mr Carrick continued to use the vehicle for private as well as business purposes for the rest of his employment. Mr Blundell did not attempt to stop him, and Mr Carrick came to assume that he was entitled to personal use of the vehicle. Without any further negotiation with Mr Carrick, or making any mention of the matter, Mr Blundell decided to offset Mr Carrick’s personal use of the van by not finalising and paying a tool allowance.

[5] There was also an understanding that ESSL would insure Mr Carrick's personal tools, and Mr Blundell subsequently told Mr Carrick that under the company's insurance policy all tools were covered regardless of ownership. Mr Blundell said at the investigation meeting that he had instructed his insurance broker when arranging the insurance to ensure all tools were covered.

[6] On or about 23 March 2004 the ESSL van Mr Carrick used was broken into while parked outside Mr Carrick's home. His basic carpentry and other tools were stolen, but not the specialist fabricator's tools. He reported the theft to the Police, and to Mr Blundell.

[7] Mr Blundell approached his insurance broker regarding a claim in respect of the stolen tools. The broker said he would look into the matter, but shortly afterwards advised that only company tools were covered.

[8] On or about Wednesday 14 April 2004 Mr Blundell informed Mr Carrick in passing that the stolen tools were not covered by ESSL's insurance. Understandably, this was bad news to Mr Carrick. He was particularly sensitive about the loss because tools had been stolen from him before. Mr Blundell should have anticipated a negative response and approached the matter with considerably more care than he did. Instead there was no further discussion between Messrs Carrick and Blundell about the matter that day.

[9] On Thursday 15 April Mr Carrick reported for work without any of his specialist fabricator's tools, which meant he was not equipped to carry out his normal duties. Steve Pridmore, ESSL's operations manager, took this up with Mr Carrick. Mr Carrick told Mr Pridmore he would no longer bring his specialist tools to work, although by then he was using a company saw while his own was under repair. Mr Pridmore instructed him to go home and get them. Mr Carrick would not agree even to retrieve the company saw. In effect he had decided to treat it as his own pending the return of his saw. He was not entitled to do that. Mr Pridmore said he would take matters up with Mr Blundell.

[10] Mr Pridmore did so and as a result Messrs Carrick, Blundell and Pridmore met shortly afterwards in the ESSL lunch room. It was common ground that Mr Carrick raised his concern about the loss of his uninsured tools, but none of the witnesses had an accurate recollection of what happened next and a file note which Messrs Pridmore and Blundell subsequently caused to be prepared was far from being a full account of the meeting. I consider it likely, however, that Mr Carrick was already aggrieved when the meeting started and his sense of grievance increased as he talked about his stolen tools, their uninsured state and the failure to pay a tool allowance. Accordingly he continued to refuse to go home and get any of the tools. I accept the evidence that Mr Carrick's attitude was confrontational. The immediate concern of Messrs Blundell and Pridmore was that Mr Carrick get his tools and go to work, but as Mr Pridmore put it the conversation 'went nowhere'.

[11] Mr Carrick's evidence was that Mr Blundell eventually said to him that, if he did not bring in his tools, he could leave. Mr Carrick told Mr Blundell he could not give an ultimatum like that, but began moving towards the door. Messrs Blundell and Pridmore said the conversation deteriorated to the point where Mr Carrick refused again to retrieve the tools, saying "no, I'm fucking off". Mr Pridmore's evidence, which I accept, was that by then Mr Carrick was in a temper. I also consider it likely that Messrs Blundell and Carrick both made the statements attributed to them.

[12] Messrs Blundell and Pridmore took the view that Mr Carrick had resigned. There was a discussion about final pay and Mr Blundell required Mr Carrick to leave the ESSL van on the premises. He also told Mr Carrick that Mr Carrick could take the rest of his gear when he had

returned what belonged to the company. Mr Carrick cleared his belongings from the van and went to wait on the footpath for his flatmate to collect him.

[13] Meanwhile Messrs Blundell and Pridmore reassessed the situation, as they did not want Mr Carrick to leave. Mr Blundell went out to the footpath to speak to Mr Carrick and it was common ground he said something like “it doesn’t have to end this way.” He told Mr Carrick there were some problems with Mr Carrick’s attitude, but ESSL was happy to re-employ him. He also said the parties could work on what was to be done about the stolen tools. Mr Blundell believed the chat was friendly.

[14] After a further conversation conducted on the company premises Mr Blundell offered to pay for one half of the value of the stolen tools then, with the rest payable over the next twelve months. A written employment agreement would also be prepared.

[15] Mr Blundell also raised a need for Messrs Pridmore and Carrick to sort out their differences. There was a separate conversation between Messrs Pridmore and Carrick in which Mr Pridmore identified some of his concerns about Mr Carrick’s attitude, but repeated that the company wished to re-employ him. The specific matters Mr Pridmore raised were relatively minor and concerned disagreements about incurring and reimbursing company-related expenditure, although according to Mr Carrick Mr Pridmore also characterised that day’s more serious incident as being related to Mr Carrick’s attitude. Mr Pridmore acknowledged he probably said Mr Carrick and another employee were troublemakers, and had already been planning to raise his concerns about their attitude.

[16] Mr Carrick returned to work. At the same time he took the view that he had been reprimanded about his attitude. I understood that evidence to be the basis of his assertion that he had been disciplined, which I quote in the next paragraph.

[17] Mr Carrick said he agreed to everything Mr Blundell said, including the offer of reimbursement for the stolen tools. He said he did so because he wanted to ensure he would be in a position to get his own saw and another item back from ESSL, and because he felt it was best to do so once his attitude had been raised. However he did not raise those matters with Messrs Blundell and Pridmore as a reason for his return to work, or even as concerns. He also said in his statement of evidence:

“I started work again in the afternoon [of 15 April] on the assumption I would consider Mr Blundell’s written employment offer. However having just been dismissed and then disciplined, I had lost all faith and trust in the company, specifically Mr Blundell and Steve. ...”

[18] The promised written employment agreement took the form of a letter to Mr Carrick dated 15 April 2004, which he received on 16 April. It included the following provisions:

“1. We agree to re-employ you for an initial one month period.  
2. Following your first month’s employment your position will be mutually reviewed with a view to your employment on a longer term basis.”

[19] The version of the letter Mr Carrick received made no mention of a tool allowance, contrary to Mr Blundell’s indication that it would. Nor did it mention the agreement regarding the stolen tools, or tool insurance. Mr Carrick did not sign it or make any attempt to discuss the contents. Meanwhile Mr Blundell had identified the error in not mentioning the tool allowance and prepared another letter which included it. Mr Carrick said he did not receive the second letter.

[20] On Friday 16 or Monday 19 April Mr Carrick retrieved those of his tools in ESSL’s control or possession, with the exception of the saw under repair.

[21] Mr Carrick was off work sick on Tuesday 20 April, although he spoke in evidence of taking advice about the employment agreement that day so I suspect that explains his absence.

[22] By letter dated Wednesday 21 April Mr Carrick advised ESSL he had decided not to take 'the position offered.' He delivered it to the company premises that morning and did not otherwise return to work. When asked at the investigation meeting why he did not attempt to negotiate with the company about the contents of the 15 April letter, he said he had lost faith and felt that he could not rely on the company to keep its promises.

[23] On Thursday 22 April Mr Blundell visited Mr Carrick's house to ask him to reconsider. Mr Carrick said he had thought about the matter and was not coming back. He did not say why.

### **Determination**

[24] The central issue here concerns what caused the decision to terminate Mr Carrick's employment, or put another way, where was the initiative for the termination of the employment.

[25] While Mr Carrick was entitled to be upset at the news his stolen tools were not insured, he could at least have asked Mr Blundell what ESSL proposed to do about that in the light of Mr Blundell's earlier indication that the tools would be insured. He was not entitled to react by deciding to report for work without his remaining tools, contrary to the parties' practice and when that meant he would not be able to carry out his normal work. Nor was he entitled to refuse to retrieve the tools or at least the company's saw when asked to, thus enabling him to carry out his normal work, particularly without having given ESSL the opportunity to address his concern about the tools. Finally he was not entitled to decide for himself what work might be available to him if he did not have his own tools. By those actions Mr Carrick was in breach of his employment agreement.

[26] For its part although as at 15 April ESSL had not paid the tool allowance it had indicated it would pay, it was in breach of the employment agreement to the extent it had failed to negotiate and set an amount. Its reason for that failure, namely that the value of Mr Carrick's full use of the company van probably offset any loss to him in not receiving the allowance, was nevertheless not an acceptable reason. The company should have addressed the limits on his use of the van directly with Mr Carrick, as well as addressing the tool allowance.

[27] The other area in which ESSL was at fault was in the failure to confirm whether Mr Carrick's tools were covered by its insurance before it had occasion to seek to claim on that insurance. It had misrepresented to Mr Carrick the availability of coverage, although there was nothing to suggest the misrepresentation was other than innocent. However Mr Carrick's reaction on 15 April pre-empted any action it might have taken to address the matter.

[28] The effect was that on 15 April ESSL was dealing with an aggrieved employee whose behaviour was significantly in breach of his employment agreement. The company's breaches were minor in comparison and did not justify the stance Mr Carrick was taking. In particular I do not regard the company's breaches as repudiatory, or as being sufficiently serious to make it reasonably foreseeable that Mr Carrick would resign as a result of them.

[29] A standoff developed over Mr Carrick's refusal to go home and get his tools. Mr Blundell told Mr Carrick that if he did not bring in his tools he could leave, although he had some grounds for doing so in that Mr Carrick could not carry out his normal work without them. Since Mr Carrick had no intention of bringing in his tools, and was already angry, he interpreted the conversation as a dismissal.

[30] I find the substantial cause of that state of affairs was Mr Carrick's breaches of the employment agreement as I have set them out. While Mr Blundell's view that Mr Carrick had resigned was a risky stance in the circumstances, the initiative for the termination of the employment agreement that occurred when Mr Carrick walked out was Mr Carrick's. I do not construe the incident as a dismissal. Mr Carrick's conduct was repudiatory of the employment agreement, and the repudiation was accepted.

[31] Matters did not end there because Mr Blundell concluded very shortly afterwards that he wanted the employment relationship to resume, and took steps to that effect which included addressing Mr Carrick's concern about his stolen tools. In that Mr Carrick agreed to Mr Blundell's proposals, went back to work on 15 April and reported for work on 16 and 19 April, the relationship had the appearance of resuming.

[32] However the evidence indicated there was not a meeting of the minds over the resumption of Mr Carrick's employment, or at least that the resumption was conditional on the written offer of re-employment being satisfactory. In addition to his other sources of dissatisfaction Mr Carrick now felt aggrieved because he felt he had been dismissed and then disciplined. His evidence that he had lost faith and trust in his employer by then suggests that, for him, the employment relationship was over. Although ESSL had made mistakes, I do not believe it had done enough at that time to warrant such a loss of faith and trust. Moreover Mr Carrick's further evidence that he gave the appearance of acquiescing in any resumption of employment because he wanted to retrieve his tools raises further questions about his level of commitment to resuming the relationship.

[33] At the same time there were serious shortcomings in the company's written offer of 15 April. One of the worst of these was the attempt to vary the terms and conditions of employment existing up to 15 April by purporting offer 're-employment' for an initial period of one month, rather than permanent employment. The purpose of the fixed term appointment was, in reality, to assess Mr Carrick's suitability for permanent employment. While s 66 of the Employment Relations Act 2000 permits fixed term employment, such employment must be for genuine reasons and based on reasonable grounds. Establishing suitability for permanent employment is not a genuine reason, as expressed in s 66(3)(b) of the Act.

[34] The basis of the wish to assess Mr Carrick's suitability for ongoing employment lay in the concerns about Mr Carrick's attitude which Mr Pridmore had raised. Even if those concerns were well founded, they should have been addressed through a proper disciplinary process rather than by purporting to offer to 're-employ' Mr Carrick on a fixed term basis.

[35] The 15 April offer also suffers from not recording all of the matters on which the parties had agreed, and from not meeting the minimum requirements of a written employment agreement under ss 64 and 65 of the Act.

[36] If there had been an effective resumption of employment on 15 April, these shortcomings would support a proposition that Mr Carrick's rejection of the company's written offer was a constructive dismissal. Instead, as I have said, Mr Carrick's evidence carried a strong suggestion that, to him, his employment was over on 15 April. He reported for work afterwards because he wanted to retrieve certain of his tools and at least to see the company's written offer.

[37] When explaining in evidence his reasons for rejecting the offer on 21 April Mr Carrick repeated his protestations of loss of faith in his employer and said he could not work in an environment of bullying and mistrust. The overall flavour of his evidence remained his dissatisfaction about the various issues relating to his tools, and about having been disciplined.

Overall Mr Carrick did not lose the sense of grievance he felt on 15 April. That was why he had lost faith and trust in his employer.

[38] Undoubtedly the 15 April offer did not help. However, on the view he took of it, the offer did no more than reinforce Mr Carrick's existing position on the future of his employment. Accordingly he rejected it. The result is that his employment did not resume.

[39] Therefore I do not accept that Mr Carrick was actually or constructively dismissed. He does not have a personal grievance.

### **Costs**

[40] Costs are reserved. The parties are invited to agree on the matter. If they seek a determination from the Authority they should advise it in writing, providing reasons in support of their position on costs, and provide a copy of this information to the other party.

**R A Monaghan**  
**Member, Employment Relations Authority**