

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Tawio Davis (First Applicant)  
AND Jack Harris (Second Applicant)

**AND** First Homes (2002) NZ Limited (Respondent)

**REPRESENTATIVES** Rowland Ingram, for Applicant  
No appearance for Respondent

**MEMBER OF AUTHORITY** Y S Oldfield

**INVESTIGATION MEETING** 7 July 2005

**DATE OF DETERMINATION** 11 July 2005

DETERMINATION OF THE AUTHORITY

**Non-appearance of the Respondent**

- [1] Mr Geddes, director of the respondent, wrote to the Authority in response to the statement of problem. He stated that the respondent stopped trading on April 1 2005 and was going to be put into liquidation. He said that they *“were willing to go into mediation ...but feel that this would be pointless as the financial position of the company would prohibit the company from making any payments ordered or agreed on.”*
- [2] I proceeded to have the matter set down. The notice of investigation meeting was delivered to the respondent’s registered office on 21 June 2005. That office was at a Kerikeri Chartered Accountant’s firm. On 27 June the Authority received a letter from this firm acknowledging receipt and advising that the Director of the respondent had been informed. The letter also stated that a date had been set for a Creditors’ meeting.
- [3] There was no appearance for the respondent at the investigation meeting. Being satisfied that the respondent had been properly served I proceeded to investigate the matter in the respondent’s absence.

**Employment Relationship Problem**

- [4] Mr Davis withdrew his employment relationship problem shortly before the matter proceeded to an investigation meeting. Mr Harris’s case concerns a dismissal for redundancy on 28 February 2005. Mr Harris says that his employment was ended without prior consultation and in breach of good faith. He says therefore that he has a personal grievance of unjustified dismissal. He also claims that he is owed pay in lieu of notice, arrears of wages and holiday pay.

[5] There is some indication in the evidence that Mr Harris might be an independent contractor. I will deal with this issue first. The next issue is whether the dismissal was genuinely for redundancy and whether it was effected in a procedurally fair manner. The final matter for determination is whether any arrears are owed.

### **Was Mr Harris an independent contractor?**

[6] Mr Harris's letter of redundancy read:

*First Homes (2002) NZ Ltd is undergoing financial constraints beyond the control of current management. Janine Copeland (Contractor) was contracted to provide an informed analysis of the business and to determine possible solutions for the retention of the business or closure.*

*After consultation with management and assessment of our current financial status, management were advised that your position as a Building Subcontractor for First Homes (2002) Ltd was no longer financially sustainable under the proposed restructuring model.*

*It is with great regret that we must therefore inform you of the dissolution of your position effective Monday 26 February 2005.*

*Negotiations are underway to provide you with an opportunity to subcontract with an independent contractor."*

[7] Mr Harris does not agree that he was a "Building Subcontractor." He says the respondent did engage independent contractors but he had never understood himself to be one of them.

### **Determination**

[8] I consider the letter of redundancy to be internally inconsistent in that it describes Mr Harris as a subcontractor and then suggests that an opportunity might arise for him to become a subcontractor. I also note that Mr Geddes' letter in reply to the statement of problem makes no reference to Mr Harris being a contractor and appears to signal acceptance of the Authority's jurisdiction.

[9] Without the benefit of evidence from the respondent I conclude on balance that Mr Harris must be treated as an employee.

### **Was the redundancy genuine?**

[10] Although I have no sworn evidence to that effect, I am prepared to accept from what I do have that the company has ceased trading and is in a poor financial state. I am accordingly prepared to accept that Mr Harris's dismissal was genuinely for redundancy.

### **Was the redundancy handled in a procedurally fair manner?**

[11] In early 2004 Mr Harris, who is a builder by trade, had been living and working in Auckland for many years. However he is originally from the North. He told me that at that time he was approached by Simon Geddes, director of the respondent ("First Homes") and offered a job as a supervisor with his company. Mr Harris did not want to ask his wife to leave her job, and move the whole family, without being sure that the proposed position was secure. Mr Geddes reassured him that it was a permanent job and that he had three years' work in the pipeline.

- [12] Mr Harris accepted and went up to supervise a group working on the new prison at Ngawha. "First Homes" contract on this project ended in January 2005 and workers were being laid off from late 2004 onwards. This however had been planned all along and Mr Harris was not concerned about it. He understood that he had a permanent position as supervisor and that he would move on to other projects being handled by First Homes's three offices in Northland.
- [13] For a couple of weeks after the contract on the prison ended this is what happened. Then on Friday 25 February Mr Harris was on a job in Mangonui when he received a text message from another staff member in Kerikeri telling him that several staff had, without warning, received letters advising them that they had been laid off.
- [14] He went back to Kerikeri and spent the weekend trying to get hold of Mr Geddes to find out more about what was going on. Finally on Monday morning he succeeded and later that day he was able to meet with him. Mr Geddes handed him the letter which has been quoted above. Strangely, it was dated February 16. Mr Harris told me that Mr Geddes said nothing to him and offered no explanation, simply referring him to the letter.
- [15] Mr Harris told me that he finished up the same day. Nothing came of the letter's suggestion that he might have an opportunity to subcontract. He had received his usual weekly wage the previous Thursday but was never paid for the Friday or the Monday. He did not receive holiday pay or pay in lieu of notice. Mr Harris is a family man and although he found work within a reasonably short period of time, he had to manage three weeks without income. This placed a great strain on the family.

### **Determination**

- [16] Judging by the date on the letter of termination Mr Geddes had been considering this step for almost a fortnight by the time of the termination. Yet Mr Harris was dismissed without warning and without payment of notice or holiday pay. His termination was a shock to him. The level of consultation and forewarning that can be expected of a company laying off staff depends on its size and resources and on whether the redundancies are due to a planned restructure or a response to a crisis situation. The latter is probably more likely to be the case here. However, even the most critical situation requires a minimum of effort. That minimum was absent here. For Mr Harris the loss of a job would have been bad enough but for it to happen as suddenly as this compounded his distress.
- [17] He is entitled to a remedy for this. I therefore order **First Homes (2002) NZ Limited to pay to Mr Harris the sum of \$3,000.00 compensation for the lack of notice and consultation.**

### **Arrears of wages, notice and holiday pay.**

- [18] Mr Harris was on an hourly rate of \$28.00. He normally worked 9 hours each day Monday-Thursday and 8 on Friday, and 6-7 hours on a Saturday.
- [19] He is entitled to be paid arrears of wages for the final Friday and Monday he worked. This comes to \$476.00. **I therefore order First Homes (2002) NZ Limited to pay to Mr Harris arrears of wages of \$476.00 gross.**
- [20] Mr Harris is also entitled to one week's pay in lieu of notice. Treating his normal week as 50 hours gives me a figure of \$1,400.00 gross. **I therefore order First Homes (2002) NZ Limited to pay to Mr Harris in lieu of notice the sum of \$1,400.00 gross.**

[21] He told me that in the time he worked for the respondent he received his paid statutory holidays however he did not take any annual leave. He has provided me with tax records which show that his total earnings while with the respondent amounted to \$64,584.80. He is entitled to 6% of this as holiday pay, which works out at \$3,875.09. **I therefore order First Homes (2002) NZ Limited to pay to Mr Harris holiday pay of \$3,875.09 gross.**

## **Costs**

[22] I leave it to the parties to attempt to resolve this issue however if the Authority is required to determine the matter submissions should be lodged within 28 days of the date of this determination.

Y S Oldfield  
Member of Employment Relations Authority